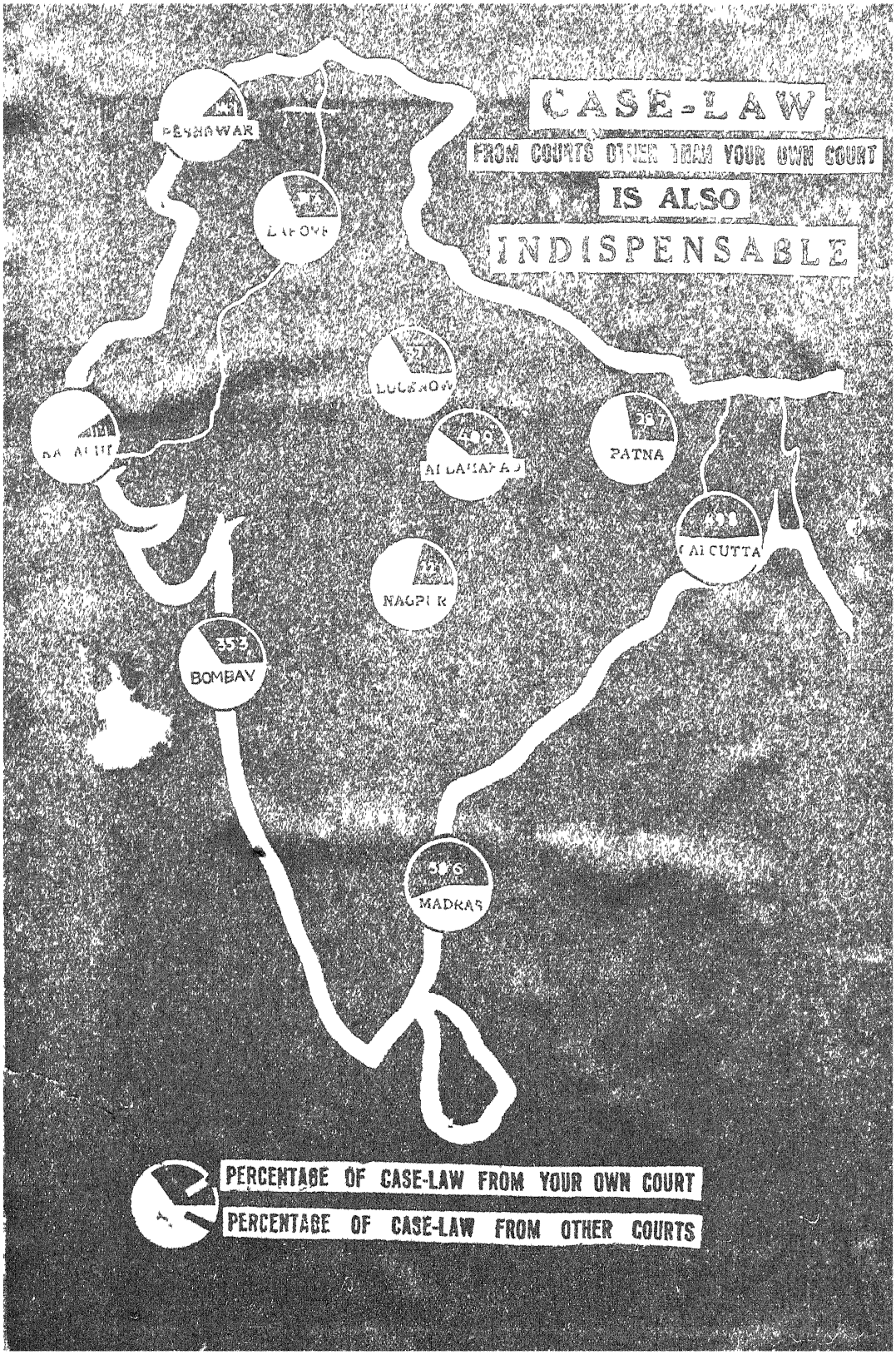

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(CIVIL AND CRIMINAL)

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VOLUME VIII

SUCCESSION ACT TO WORKS OF DEFENCE ACT
INTERPRETATION OF STATUTES
APPENDIX AND TOPICAL INDEX

PUBLISHERS

THE ALL INDIA REPORTER LTD.

NAGPUR

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Statute Law stated in this Volume is as on 31st December 1948

Printed by D. V. Chitaley, B.A., LL.B., Advocate
at the All India Reporter Press
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PREFACE TO THE EIGHTH VOLUME

We are glad to have reached now the final stage of our labours in this vast undertaking. This volume contains, besides the remaining unrepealed Acts of the Central Legislature and the Topical Index, a Note on the Interpretation of Statutes and a number of useful Appendices.

The object, plan and special features of this publication have been fully explained in the Preface to the first volume. As we think that it will be useful to reproduce here portions of the Preface dealing with these matters we make no apology for giving such portions again below :

"The aim of the present publication is to make available to the Bench and the Bar in a set of convenient volumes practically the entire statute law passed by the Central Legislature which is of general application to the whole of India. The Acts are given in the alphabetical order of their titles. This has the advantage of enabling an Act to be referred to without having to remember the year and number of the Act — which is the difficulty one feels when referring to the volumes of the Government publication, 'Unrepealed Central Acts' in which the arrangement is according to the year and number of the Act. We also have not made any division into civil and criminal Acts as is sometimes done, as we felt that such a division is on the whole an inconvenience rather than an advantage to the profession. In numerous instances, sections of a penal nature are found in enactments which are mainly of a civil nature, e. g., the Stamp Act, Income-tax Act, Cantonments Act, etc. In such cases it will be highly inconvenient to omit, in the portion that may be allotted to the civil section, the sections of a penal nature and print them in the criminal section. If such a course is adopted, it will detract from the utility of both the portions of the publication. Again, there are Acts like the Evidence Act which will have to appear in both sections. It was, therefore, considered, on the whole, to be the better course to just give all the Acts in their alphabetical order without labelling them as civil or criminal Acts.

"Care has been taken to incorporate all the amendments in the various Acts up to date. Even provincial amendments have been given as completely as possible. In the case of the Civil Procedure Code, local amendments by the various High Courts are given. Letters Patent of the different High Courts are also given and also the rules of the Federal Court and the Judicial Committee of the Privy Council.

"Besides the above, we have also given the more important of the Acts of the British Parliament applicable to India, such as the Government of India Act, 1935.

"We need hardly say that all the Acts have been carefully edited and annotated. Not only have all the amendments been incorporated but also notes have been added giving particulars as to the date and other matters relating to the amendments. Full and copious extracts from Select Committee Reports, Statements of Objects and Reasons and Notes on Clauses have been given in appropriate places under each Act. Besides the above, each Act is preceded by a statement as to how the Act has been affected by subsequent legislation. Further, cognate Acts and provisions have been indicated under the respective enactments.

"In addition to the above features, the case-law bearing on the different enactments has been given in the foot-notes under each section. We have taken care to see that the notes are full and it is hoped that the bulk of the relevant Indian case-law would be found summarised in the foot-notes. The notes have been divided into convenient headings of which a synopsis is given for each section. The matter under each heading is presented in a manner which is well adapted for easy and quick reference. It may also be mentioned that what may be treated as a special feature of A. I. R. publications, viz., the giving of the particular page of the report where the point occurs, is also present in this publication."

We wish to thank the legal profession in India for the liberal support it has accorded to the publication. We regret that owing to certain unforeseen difficulties we have not been able to bring out the volumes according to schedule. The indulgence of the profession is requested for this.

V. V. C.
S. A. R.

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ABBREVIATIONS

A. O. ... Government of India (Adaptation of Indian Laws) Order, 1937, as modified by the Government of India (Adaptation of Indian Laws) Supplementary Order, 1937.

A. O. (P) ... The Government of India (Adaptation of Acts of Parliament) Order, 1937.

A.I.R. 1914 All, Bom, etc. ... All India Reporter, Allahabad, Bombay, etc., sections of the respective years.

All. or I. L. R. All. ... Indian Law Reports, Allahabad Series.

Agra. ... Agra High Court Reports.

All. L. Jour. ... Allahabad Law Journal.

All. W. N. ... Allahabad Weekly Notes.

All. W. R. ... Allahabad Weekly Reporter.

App. Cas. ... Law Reports, Appeal Cases (England).

Beng. L. R. ... Bengal Law Reports.

B. R. ... Bihar Reports.

Bom. or I. L. R. Bom. ... Indian Law Reports, Bombay Series.

Bom. H. C. R. ... Bombay High Court Reports.

Bom. L. R. ... Bombay Law Reporter.

Bom. P. J. ... Bombay Printed Judgments.

Cal. or I. L. R. Cal. ... Indian Law Reports, Calcutta Series.

Cal. L. Jour. ... Calcutta Law Journal.

Cal. L. Rep. ... Calcutta Law Reports.

Cal. W. N. ... Calcutta Weekly Notes.

C. P. L. R. ... Central Provinces Law Reports.

Cri. L. Jour. ... Criminal Law Journal.

E. R. ... English Reports (England).

I. O. ... India (Adaptation of Existing Indian Laws) Order, 1947.

Ind. App. ... Law Reports, Indian Appeals.

Ind. Cas. ... Indian Cases.

Ind. Rul. ... Indian Rulings.

Kar. (I. L. R.) ... Indian Law Reports, Karachi Series.

K. B. ... Law Reports, King's Bench (England).

Knapp ... Knapp's Reports.

Lah. or I. L. R. Lah. ... Indian Law Reports, Lahore Series.

L. J. ... Law Journal (England).

L. R. ... Law Reports (England).

L. R. A. ... Law Reporter, Allahabad.

Low. Bur. Rul. ... Lower Burma Rulings.

Luck. or I. L. R. Luck. ... Indian Law Reports, Lucknow Series.

Luck. Cas. ... Lucknow Cases.

Mad. or I. L. R. Mad. ... Indian Law Reports, Madras Series.

Mad. H. C. R. ... Madras High Court Reports.

Mad. Jur. ... Madras Jurist.

Mad. L. Jour. ... Madras Law Journal.

Mad. L. Tim. ... Madras Law Times.

Mad. L. W. ... Madras Law Weekly.

Mad. W. N. ... Madras Weekly Notes.

Moo. Ind. App. ... Moore's Indian Appeals.

Nag. (I. L. R.) ... Indian Law Reports, Nagpur Series.

Nag. L. Jour. ... Nagpur Law Journal.

Nag. L. R. ... Nagpur Law Reports.

N.-W. P. H. C. R. ... North-West Provinces High Court Reports.

Oudh Cas. ... Oudh Cases.

Oudh L. Jour. ... Oudh Law Journal.

Oudh L. R. ... Oudh Law Reports.

Oudh S. C. ... Oudh Select Cases.

Oudh W. N. ... Oudh Weekly Notes.

P. O. ... Pakistan (Adaptation of Existing Pakistan Laws) Order, 1947.

Pat. or I. L. R. Pat. ... Indian Law Reports, Patna Series.

Pat. H. C. C. ... Patna High Court Cases.

Pat. L. Jour. ... Patna Law Journal.

Pat. L. Tim. ... Patna Law Times.

Pat. L. R. ... Patna Law Reporter.

Pat. L. W. ... Patna Law Weekly.

Pat. W. N. ... Patna Weekly Notes.

Pun. L. R. ... Punjab Law Reporter.

Pun. Re. ... Punjab Records.

Pun. W. R. ... Punjab Weekly Reporter.

Q. B. ... Law Reports, Queen's Bench (England).

Rang. ... Indian Law Reports, Rangoon Series.

Rang. L. R. ... Rangoon Law Reports.

R. R. ... Revised Reports (England).

Sind L. R. ... Sind Law Reporter.

Suth. W. R. ... Sutherland's Weekly Reporter.

Times L. R. ... Times Law Reports (England).

U. P. L. R. ... United Provinces Law Reports.

Upp. Bur. Rul. ... Upper Burma Rulings.

Weir. ... Weir's Criminal Rulings.

W. R. (Eng.) ... Weekly Reporter (England).

Other Abbreviations.

Art. ... Article.

B. R. ... Board of Revenue.

Civ. ... Civil.

C. A. ... Court of Appeal.

Cl. ... Clause.

Cr. ... Criminal.

D. B. ... Division Bench.

F. B. ... Full Bench.

F. C. ... Federal Court.

F. N. ... Foot-Note.

G. I. ... Government of India Act, 1915.

Jour. ... Journal.

L. P. ... Letters Patent.

N. ... Note.

O. .. Order.

P. ... Page.

P. C. ... Privy Council

Pre. ... Preamble.

Rev. ... Revenue.

R. ... Rule.

R. S. C. ... Rules of Supreme Court.

S. ... Section.

S. B. ... Special Bench.

S. C. R. ... Select Committee Report.

S. O. R. ... Statement of Objects and Reasons.

U.P.B.R. ... United Provinces Board of Revenue.

Note :— The mark ✻ indicates that citation of a different case begins.

THE A. I. R. MANUAL

Unrepealed Central Acts

(CIVIL AND CRIMINAL)

Volume VIII

[THE INDIAN] SUCCESSION ACT, 1925

(ACT XXXIX OF 1925)

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[THE INDIAN] SUCCESSION ACT, 1925.
(ACT XXXIX OF 1925.)[a]

[30th September, 1925.]

An Act to consolidate the law applicable to intestate and testamentary succession in [b][the Provinces of India].

WHEREAS it is expedient to consolidate the law applicable to intestate and testamentary succession in [b][the Provinces of India] ; it is hearby enacted as follows :—

[a] For Statement of Objects and Reasons, see Gazette of India, 1923, Pt. V, p. 401 ; and for Report of Joint Committee, see Gazette of India, 1925, Pt. V, p. 103.

The Act has been *extended* under the Scheduled Districts Act, 1874 (14 of 1874), to British Baluchistan, see Gazette of India, 1925, Pt. II-A, p 358. [b] *Substituted* for 'British India' by the Indian Independence (Adaptation of Central Acts and Ordinances Order, 1948 [25-3-1948].

PART I.

PRELIMINARY.

Short title. **1.** This Act may be called the INDIAN SUCCESSION ACT, 1925.
[1865—S. 1.]

Definitions. **2.** In this Act, unless there is anything repugnant in the subject or context,—

(a) "administrator" means a person appointed by competent authority to administer the estate of a deceased person when there is no executor ;

(b) "codicil" means an instrument made in relation to a will, and explaining, altering or adding to its dispositions, and shall be deemed to form part of the will ;

[a][*(bb)* "District Judge" means the Judge of a principal Civil Court of original jurisdiction;]

[a] *Inserted* by the Indian Succession (Amendment) Act, 1929 (18 [XVIII] of 1929), S. 2.

SECTION 1—SYNOPSIS.

1. Scope and applicability of the Act.
2. Retrospective effect.
3. Construction of the Act.

1. Scope and applicability of the Act. — [1] Preamble to this Act makes it clear that the Act was only intended to apply to matters of succession. It was never the intention of Legislature to legislate for any matters other than those connected with intestate and testamentary succession. (Vol 30) 1943 Lah 260 (264) : I L R (1943) Lah 765 (S B).

[2] The combined effect of Ss. 2 and 3, Hindu Wills Act, 1870, is that a disposition permitted by the Succession Act may be invalidated but a disposition invalid under the Succession Act cannot be validated by any rule of Hindu law. (Vol 21) 1934 Mad 705 (706): 58 Mad 15 (D B).

[3] The provisions of the Indian Succession Act show that the act is of universal application in this country unless a person claiming to be excepted can show that he is specifically excepted from the operation of its provisions. (1910) 12 Cal L Jour 459 (461) (D B)✠(Vol 22) 1935 Lah 646 (647). (Applies also to subjects of foreign State).

[4] Person who ceases to be Hindu in religion and becomes Christian cannot elect to be bound by Hindu law in matter of succession. After passing of Indian Succession Act Hindu convert to Christianity is now governed solely by Succession Act. (Vol 9) 1922 P C 14 (17): 48 Ind App 381: 43 All 525 (P C) ✠ (Vol 19) 1932 Oudh 85 (87) (D B) ✠ (1912) 11 Mad L Tim 232 (239) (D B). (After passing of the Act intention on the part of convert to be governed by Hindu law is of no use).

[*See also* ('09) Pun Re No. 36 (p. 109) (D B) (Where converts to Christianity had abandoned all connection with Hindu society and manners and there is no proof of local custom overriding Act, only Succession Act applies.)]

[5] This Act does not apply to Cutchi Memons. (Vol 10) 1923 Bom 148 (153): 47 Bom 369 (D B) ✠(Vol 7) 1920 Bom 140 (140).

[6] The Act is not applicable to the Crown when it takes the property upon escheat. (Vol 19) 1932 All 220 (221): 54 All 226.

2. Retrospective effect.—[1] Act of 1925 has no restrospective effect and does not apply to wills executed prior to the passing of the Act ('35) 18 Nag L Jour 1 (9) (DB)✠('09) 31 All 239 (243) (DB).

3. Construction of the Act. — [1] Where there is a positive enactment of the Indian Legislature the proper course is to examine the language of that statute and to ascertain its proper meaning, uninfluenced by any consideration derived from the previous state of the law or of the English law upon which it may be founded. These observations apply with peculiar force to testamentary cases which are governed by the Indian Succession Act. (Vol 15) 1928 P C 2 (4) : 55 Ind App 18 : 7 Pat 221 (P C) ✠ ('74) 12 Beng L R 423 (427 to 429).

[2] Courts should not read into sections of the Act construction which is at variance with ordinary meaning of words used merely because there is distinction in English law between citation to propound and prove will and citation to take probate. (Vol 28) 1941 Oudh 293 (296) : 16 Luck 454 (FB).

[3] Succession Act is partially fiscal enactment, and it is to be administered, as far as possible leniently and must be construed in favour of subject. (Vol 21) 1934 All 296 (297).

SECTION 2 — SYNOPSIS.

1. "Codicil."
2. "District Judge."
3. "Executor "
4. "Indian Christian."
5. "Minor" and "minority."
6. "Probate."
7. "Will."

1. "Codicil."—[1] After the granting of letters of administration in respect of a will, a private memorandum book of the deceased giving some directions for disposing certain articles was found. In an application for admitting these entries to probate, it was

(c) "executor" means a person to whom the execution of the last will of a deceased person is, by the testator's appointment, confided ;

(d) "Indian Christian" means a native of India[a] who is, or in good faith claims to be, of unmixed Asiatic descent and who professes any form of the Christian religion ;

[a] For the definition of 'India', *see* the General Clauses Act, 1897 (X of 1897), S. 3 (27).

(e) "minor" means any person subject to the Indian Majority Act, 1875, who has not attained his majority within the meaning of that Act, and any other person who has not completed the age of eighteen years ; and "minority" means the status of any such person ;

(f) "probate" means the copy of a will certified under the seal of a Court of competent jurisdiction with a grant of administration to the estate of the testator ;

(g) "province" includes any division of [a][the provinces] having a Court of the last resort : and

[a] *Substituted* for "British India" by the Indian Independence (Adaptation of Central Acts and Ordinances) Order, 1948 [23-3-1948].

(h) "will" means the legal declaration of the intention of a testator with respect to his property which he desires to be carried into effect after his death.

[1865—S. 3 ; Native Christians Act, 1901—S. 2; Probate and Administration Act, 1881 — S. 2.]

Section 2 — Note 1 *(contd)*

held that the memorandum was not a testamentary document and could not be treated as a codicil. ('79) 4 Cal 721 (722).

[2] Where there is a distinct disposition made by a will, that disposition cannot be revoked by a codicil except through the medium and use of words equally clear and distinct. (1898) 1 Ch 95 (98), *In re Wilcock*; *Kay* v. *Dewhirst*.

[3] An obviously erroneous recital of the will in the codicil will not alter the construction of the will but if the recital in the codicil is not obviously erroneous it may be referred to clear up the ambiguity in the will. (1904) 2 Ch 52 (55), *In re Venn*; *Lindon* v *Ingram*.

2. "District Judge".—[1] Under S. 2 of Succession Act as amended in 1929, High Court on the Original Side has power to issue succession certificates. (Vol 18) 1931 Rang 281 (281) : 9 Rang 205 (DB)✠(Vol 18) 1931 Cal 580 (580, 581) : 58 Cal 801.

[*See also* (Vol 17) 1930 Mad 779 (781, 782) : 53 Mad 237 (DB).]

[See however (Vol 21) 1934 All 958 (958) : 57 All 302 (DB). (The definition of a "District Judge" (as inserted by the Act of 1929) does not include a High Court which has no original jurisdiction.)]

[2] Powers of Additional District Judge with regard to cases transferred to him by District Judge are same as those of District Judge. (Vol 11) 1924 Pat 593 (593, 594) : 3 Pat 609 (DB).

3. "Executor".—[1] Heirs are not included in definition of 'executors' and 'administrators' in S. 2. (Vol 23) 1936 Rang 17 (24) : 13 Rang 385 (DB).

[2] The testator executed a will leaving the bulk of his property to his minor daughter and appointing his mother as her guardian. The will stated that she should have full right to spend the income although it would not be proper to spend the principal. No other specific duties were laid upon the testator's mother but there were directions that he did not wish certain ceremonies after death to be performed but merely that his mother should feast the poor on death anniversaries: *Held*, that these facts were quite insufficient to make the mother executor by implication. (Vol 14) 1927 Lah 770 (770).

[3] A legatee who undertakes to carry out the wishes of a testator will be treated as a trustee and compelled to carry out the instructions of the testator. (Vol 2) 1915 Bom 10 (10) : 40 Bom 1.

[4] To be a constructive executor, a person must be charged with payment of debts—A charge of payment of legacy by itself is not sufficient to constitute constructive executor (Vol 33) 1946 All 357 (359) : I L R (1946) All 398 (DB).

[5] The effect of the Hindu Wills Act, 1870, is to place the executor in India on the same footing as an English executor. (Vol 11) 1924 Pat 721 (730) : 3 Pat 880 (DB)

[6] Will of the deceased son not appointing any executrix but leaving some property to his mother with the direction that she should also pay certain debts—*Held* that the direction that she should pay certain debts out of certain property was not enough to constitute her an executrix for the general purposes of administration. ('99) 22 Mad 345 (346).

[7] It will be very difficult to determine when an executor ceases to have duties *qua* executor or *virtute officii* even when the facts are fully ascertained where the same persons have been appointed both executors and trustees. (1902) 1 Ch 176 (182), *In re Tummis* ; *Nixon* v. *Smith*.

4. "Indian Christian".—[1] In order to determine whether a person died a Christian for the purposes of the Succession Act, the Court must have regard to the formal protestations of his belief rather than to any private or secret religious practice in which he may indulge. (Vol 21) 1934 Rang 72 (73) : 12 Rang 184 (DB).

5. "Minor" and "minority."—[1] The definitions of "minor" and "minority" contained in the Indian Succession Act do not apply when a person enters into a contract on his own behalf, and not in any representative character under that Act, so that he might be of age for the purposes of that Act but in other respects a minor. (1881) 8 Cal L R 419 (424)✠(1874) 12 Beng L R 358 (360) (D B).

[2] When a minor is brought under the operation of the Minors Act (40 of 1858) the age of majority is altered from 18 to 21 years. ('90) 17 Cal 347 (359) : 16 Ind App 195 (P C).

[3] Certificate of administration granted under Act XL of 1858 takes effect when it is actually issued and where a minor attains the age of 18 before such certificate is issued and enters into a contract, he is bound by such contract. ('83) 9 Cal 901 (904) (D B). (Affirming on appeal ('82) 8 Cal 714.)

6 "Probate".—[1] Issue of certified copy of will by Court with grant of administration held "probate" within meaning of S. 3, Succession Act, 1865 — Subsequent limitation of grant by Appellate Court does not affect grant — Production before decree is sufficient

3. *(1)* The [a][Provincial Government] may, by notification in the [b][Official Gazette], either retrospectively from the sixteenth day of March, 1865, or prospectively, exempt from the operation of any of the following provisions of this Act, namely, sections 5 to 49, 58 to 191, 212, 213 and 215 to 369, the members of any race, sect or tribe in the Province, or of any part of such race, sect or tribe, to whom the [a][Provincial Government] considers it impossible or inexpedient to apply such provisions or any of them mentioned in the order.

Power of Provincial Government to exempt any race, sect or tribe in the Province from operation of Act.

Section 2 — Note 6 *(contd.)*

compliance of section. ('11) 38 Cal 327 (334) : 38 Ind App 7 (P C).

7. "Will"—[1] The fundamental idea of a will is that the testator should thereby dispose of his property, or such part thereof as his personal law permits him to bequeath by will, in such manner as seems to him best; and there is no reason why the provisions of a will should not follow the rules applicable on intestacy. (Vol 20) 1933 Rang 393 (396) (D B).

[2] The definition of will does not require any written instrument. (1900) 24 Bom 8 (11, 12). (Succession Act extends to nuncupative wills and such wills can be admitted to probate.)

[3] In order to decide whether a document is a "will" or not it should be ascertained whether it is revocable or not. ('06) 3 Cal L Jour 370 (372) (D B).

[4] To ascertain whether a document is a "will" or not, the principal test to be applied is whether the disposition made in that document takes effect during the lifetime of the executant or whether it takes effect after his death. ('09) 10 Cal L Jour 644 (645) (D B).

[5] Document intended to operate from date of execution is not will. (1913) 35 All 337 (346): 40 Ind App 161 (P C) ✠ ('20) 1 Pat L T 457 (458) (D B). (Dedication by which grantor appointed himself as manager and provided that upon his death his disciple was to become manager is not "will.")

[6] Merely calling a deed a will does not make it a will. (Vol 8) 1921 P C 89 (90) (P C)✠(Vol 12) 1925 P C 196 (198) : 52 Ind App 305 : 48 Mad 614 (P C). (Will containing power to adopt though invalid as will, may be valid authority to adopt.)

[7] Where one part of the instrument is testamentary in its character, it can be presumed that the rest of it, if the language is capable of that construction, is intended to be testamentary also; and if there is nothing in the testamentary part of the document which is inconsistent with the supposition that the arrangements there made were to take effect at the death of the testator, the instrument may be taken to be a will. ('79) 4 Cal L Rep 401 (403) (D B).

[8] Whether man leaves one testamentary writing or several testamentary writings, it is the aggregate or the net result that constitutes his will and the intention of the testator must be gathered by reading all writings together. (Vol 18) 1931 Bom 533 (536) (D B).

[9] Validity of bequest is to be determined from testator's lawful disposing power at his death. (Vol 16) 1929 P C 121 (122, 123) : 4 Luck 122: 56 Ind App 156 (P C).

[10] One of the clauses of a will was in the following terms: "Upon my demise, my wife and my daughter-in-law will, in equal shares, get the properties, left by me but in all these properties, they will have life interest only. They will not be entitled to transfer the said properties by way of any gift or sale. On the demise of my wife, my younger (son) will get half-share of the properties left by me in absolute right. God forbid, if during the lifetime of my wife, my younger son dies, then the person or persons who will be the legal heirs of the said younger son of mine at the time of the death of my wife will get the said eight annas share in absolute right. On the demise of my daughter-in-law, the sons of my eldest son will get in equal shares the remaining eight annas share of my properties in absolute right": *Held*, that these provisions clearly satisfied the requirements of the definition of a will as contained in S. 2, cl. (h). (Vol 25) 1938 Cal 290 (292, 293) (D B).

[11] A deed purporting to authorise the widow to adopt contained the following clause: "In the event of my having no son, my wife shall be the owner of the estate. If, however, my brother has a son, that son shall be the owner, but if it be found that the brother also begets no son, I hereby authorise my wife to adopt a boy from within the family and he shall then become owner in my wife's stead": *Held* this clause amounted to testamentary disposition within S. 2 (h). (Vol 24) 1937 All 377 (388, 389): I L R (1937) All 292 (D B).

[12] Where the relevant portions of the document were as follows : "You shall yourself after my lifetime use and enjoy the two rooms built on the ground of the house Municipal No. 11. . . . . I shall myself enjoy the rent in respect of those two rooms as long as I may be alive. You shall yourself use and enjoy after my lifetime that rent and that ground and the two rooms from son to grandson and so on in succession with power to gift, mortgage, exchange and sale. No one has any right to or interest in those rooms. To this effect is the gift deed document executed and given in the respect of the aforesaid two rooms and their grounds": *Held* that though in form it was a gift really it was a will. (Vol 11) 1924 Mad 605 (606) (D B).

[13] *A*, a Hindu, adopted a son and executed a document purporting to be a settlement providing *inter alia* that in case of the son and *A's* wife did not agree to live together after *A's* death, the wife should enjoy same land during her lifetime in lieu of maintenance. On disagreement between the son and the wife after *A's* death, wife separated and sued the son for the land, contending that as per settlement she was entitled to the land: *Held* on construction of the document, it was a will as the disposition in it was to take effect after *A's* death. ('89) 12 Mad 490 (492) (D B).

[14] Entry in *wajib-ul-arz* — Whether it can be treated as will depends upon its construction with reference to surrounding circumstances. ('06) 28 All 488 (495, 496): 33 Ind App 97 (P C).

[15] The fact that in document provision is made for appointment of future trustee after the death of the present trustee, does not make the document a will. (Vol 14) 1927 Cal 756 (757) (D B).

[16] A Hindu executed an unregistered document calling it a will in favour of his wife to the effect: "I have consented to your adopting a son at your pleasure and conducting the management of the estate in the best manner": *Held* the document was not a will, but only a power to adopt. (Vol 9) 1922 P C 162 (163): 48 Ind App 482: 44 Mad 733 (P C).

[17] "Will" — Document inoperative as will may be valid authority to adopt. (Vol 12) 1925 P C 196 (198) : 52 Ind App 305: 48 Mad 614 (P C).

Section 3 — Note 1

[1] A notification under S. 332 of Act 10 of 1865 (S. 3 of Act 39 of 1925) declared Oraons, (an aboriginal tribe in Chota Nagpur) exempted from the provisions of the Act, "provided that this notification shall not affect any person in regard to whose rights a decision

(2) The [a][Provincial Government] may, by a like notification, revoke any such order, but not so that the revocation shall have retrospective effect.

(3) Persons exempted under this section or exempted from the operation of any of the provisions of the Indian Succession Act, 1865[c], under section 332 of that Act are in this Act referred to as "exempted persons".

[1865—S 332; Devolution Act, 1920—S. 2 and Sch. I.]

[a] *Substituted* by A. O. for "Local Government". [b] *Substituted* by A. O. for "local official Gazette".

[c] *Repealed* by this Act.

PART II.

OF DOMICILE.

4. This Part shall not apply if the deceased was a Hindu, Muhammadan, Buddhist, Sikh or Jaina.

Application of Part.

[1865—S. 331.]

Section 3 — Note 1 *(contd.)*

contrary to its effect has already been given by a competent civil Court" : *Held* that the decision here meant is not some final decision such as would operate as *res judicata* but includes a decision under appeal. (Vol 3) 1916 Pat 374 (374) : 1 Pat L Jour 225.

SECTION 4 — SYNOPSIS.

1. Hindu.
2. Brahmo.
3. Buddhist.
4. Sikh.
5. Indian Christian.
6. Persons married under the Special Marriage Act, 1872.

1. Hindu.—[1] The words Hindu, Muhammadan or Buddhist must be held to be religious distinctions and not national distinctions, for the two words "Muhammadan and Buddhist" are of only one meaning, and by analogy therefore "Hindus" must mean those of Hindu religion. ('74) 7 Mad H C R (App) 121 (122) (S B). (The fact that the majority of Native Christians still live in the Hindu manner does not affect the question.)

[*See also* (1895) 19 Bom 783 (788) (DB). (There is no race of Hindus and the term is used in a theological sense.)

[2] A European does not become a Hindu merely because he professes a theoretical allegiance to the Hindu faith or is an ardent admirer and advocate of Hinduism and its practices. But if he resides long in India, abdicates his religion by a clear act of renunciation and adopts Hinduism by undergoing formal conversion, gives up along with Christianity his Christian name and deliberately assumes a Hindu name and marries a person who is a Hindu by race and religion and cuts himself off from his old environments and takes to a Hindu mode of life, in such a case it should be concluded that he has become a Hindu. (Vol 15) 1928 Mad 1279 (1283) : 52 Mad 160.

[3] If a twice-born Hindu migrates to Burma and marries a Burmese woman, that in itself may not be sufficient to deprive him of his Hindu status under law. But if he has descendants who have been born and always lived in Burma and who have inter-married with its people then even though they may form a community of their own which has many traces of Hindu usages, if the usages and religion of the community are of a character so divergent from Hinduism the community cannot be regarded as Hindu. (Vol 9) 1922 P C 197 (201) : 48 Ind App 553 : 49 Cal 310 : 11 Low Bur Rul 155 (PC) (Kalais of Burma held had acquired a non-Hindu status of their own of this kind.)

[4] The Act exempts the property of Hindus from the operation of the Act but there is no prohibition to a Hindu succeeding under the Act to the property of a Christian. ('86) 9 Mad 466 (471).

[5] The Act does not apply to a person professing to be Hindu though of mixed parentage. (Vol 1) 1914 Low Bur 201 (202) : 7 Low Bur Rul 362 (DB).

2. Brahmo.—[1] A Sikh or Hindu by becoming a Brahmo did not necessarily cease to belong to the Hindu community in which he was born. So also lapses from the standard of orthodoxy in the matter of diet and observation of ceremonials could not have the effect of excluding a person from the category of a "Hindu" in the Act who was born in it and who never became otherwise separated from the religious communion in which he was born. ('04) 31 Cal 11 (32) : 30 Ind App 249 : 1903 Pun Re No. 84 (P C) ✠ (Vol 10) 1923 Cal 265 (267) : 49 Cal 1069.

3. Buddhist.—[1] Indian Succession Act, does not apply to Chinese Buddhist. Under S. 13 of Burma Laws Act, Buddhist law should be applied to the inheritance of Chinaman. (Vol 1) 1914 Low Bur 144 (144-145) : 8 Low Bur Rul 222 (DB).

4. Sikh.—[1] Under the old Succession Act Sikhs were included in the term "Hindu" and were excluded from the operation of the Act. ('04) 31 Cal 11 (32) : 30 Ind App 249 : 1903 Pun Re No. 84 (PC).

5. Indian Christian. — [1] A person who ceases to be a Hindu in religion and becomes a Christian cannot elect to be bound by the Hindu law in matter of succession, after the passing of the Indian Succession Act (X [10] of 1865). A Hindu convert to Christianity is now governed solely by the Succession Act. (Vol 9) (1922) P C 14 (17) : 48 Ind App 381 : 43 All 525 (PC) ✠ (Vol 27) 1940 All 134 (138) : I L R (1940) All 100 (DB).

[2] Before the passing of the Indian Succession Act 1865, Native Christian converts from Hindu religion were at liberty to renounce the Hindu law of succession or to adhere to it. Now the Indian Succession Act governs the succession in Native Christian families. ('80) 2 Mad 209 (211, 212) (D B) ✠ ('86) 9 Mad 466 (471) ✠ (1887) 10 Mad 69 (72) (DB).

[*See also* (1861-1863) 9 Moo Ind App 199 (239) : 19 E R 716 (PC).]

[3] A Christian woman while she was Buddhist adopted a girl as a daughter in Kettima form with a view to inherit but she subsequently became a Christian and died as a Christian intestate It was held that the adopted girl could not inherit. (Vol 21) 1934 Rang 72 (74) : 12 Rang 184 (DB).

[4] The Succession Act (X [10] of 1865) is of universal application unless the person claiming to be excepted can show that by this or some other Act he is specifically excepted from the operation of its provisions and any convert setting up customs of inheri-

Law regulating succession to deceased person's immoveable and moveable property, respectively.

5. *(1)* Succession to the immoveable property in British India[a] of a person deceased shall be regulated by the law of British India, wherever such person may have had his domicile at the time of his death.

(2) Succession to the moveable property of a person deceased is regulated by the law of the country in which such person had his domicile at the time of his death.

Illustrations.

(*i*) *A*, having his domicile in British India, dies in France, leaving moveable property in France, moveable property in England, and property, both moveable and immoveable, in British India. The succession to the whole is regulated by the law of British India.

(*ii*) *A*, an Englishman, having his domicile in France, dies in British India, and leaves property, both moveable and immoveable, in British India. The succession to the moveable property is regulated by the rules which govern, in France, the succession to the moveable property of an Englishman dying domiciled in France, and the succession to the immoveable property is regulated by the law of British India.

[1865—S. 5.]

[a] As to interpretation of the term "British India," *now see* the India (Adaptation of Existing Indian Laws) Order, 1947, Art. 4; and the Pakistan (Adaptation of Existing Laws) Order, 1947, Art. 4. *See also* the General Clauses Act, 1897, S. 3 (7).

One domicile only affects succession to moveables.

6. A person can have only one domicile for the purpose of the succession to his moveable property.

[1865—S. 6.]

Domicile of origin of person of legitimate birth.

7. The domicile of origin of every person of legitimate birth is in the country in which at the time of his birth his father was domiciled; or, if he is a posthumous child, in the country in which his father was domiciled at the time of the father's death.

Section 4 — Note 5 *(contd.)*

tance must prove them to be different from the law of the new religion when there is no legislative enactment declaring the latter. ('95) 19 Bom 783 (788) (DB).

6. Persons married under the Special Marriage Act, 1872.—[1] Where a marriage has been solemnized between a Hindu man and a woman in 1918 under the Special Marriage Act, 1872, the rights of the parties cannot be governed by the Amending Act, 1923, but by the original Act as the Amending Act has no retrospective effect. The declaration required by the Act does not amount to an abjuration for all purposes of the personal law of the declarant but merely as a statement for the purposes of the Act itself and so questions as to succession and rights to property must be determined by or under no law other than the personal law of the parties as the mere declaration under the Act does not amount to a renunciation of the personal law of the parties. (Vol 15) 1928 Bom 74 (75).

[2] After the amendment of the Special Marriage Act, 1872, by Act XXX of 1923 persons professing, Hindu, Buddhist, Sikh, or Jain religion can marry under the provisions of that Act and the succession to the property of the married persons or that of the issues of such marriage is governed by the Indian Succession Act, 1925 : *See* S. 24 of Special Marriage Act, 1872.

Section 5 — Note 1

[1] The validity of a will which purports to dispose of immovable property in British India must be tested by the rules applicable to the execution of wills in British India. (*96*) 20 Bom 607 (611) (D B) ✠ ('69 70) 13 Moo Ind App 277 (310) : 20 E R 555, *Barlo* v. *Orde*. (When *lex loci* is not known the law applicable is personal law.)

[*See also* (1862) 23 E R 328 (328) : 1 Vern 85, *Bovey* v. *Smith*.]

[2] In English Courts, phrases which refer to national law of propositus are *prima facie* to be construed, not as referring to law which Courts of that country would apply in case of its own national domiciled in its own country in regard (where situation of property is relevant) to property in its own country, but to law which Courts of that country would apply to particular case of the propositus, having regard to what, in their view, is his domicile (if they consider that to be relevant) and having regard to the situation of property in question (if they consider that to be relevant). (Vol 28) 1941 P C 139 (143) (PC).

[3] Land in British India is governed by *lex loci* and not by law of domicile of owner. (Vol 16) 1929 Bom 478 (479) (DB).

[4] Parsi resident in Baroda State dying leaving immovable property in British India—Succession to such property is governed by law prevailing in British India and not custom prevailing in Baroda State. (Vol 25) 1938 Bom 238 (240, 241).

[5] Property belonging to foreign State in British India — Right and title to such property following the possession of and succession to the throne of such State: *Held*, that although the property by reason of its being situated in British India, is subject to British Indian Territorial Law affecting it, the Courts in British India cannot go into the question of the right to succession to the foreign State. ('08) 35 Cal 777 (788) (SB).

[*See also* ('85) 11 Cal 17 (25) (DB).]

Section 6 — Note 1

[1] Though a man may have two domicils for some purposes, he can have only one for the purpose of succession to the personal estate. The necessity of such a maxim is obvious, for it would be monstrously absurd "if it were possible, that there should be a competition between two domicils as to the distribution of the personal estate. It could never possibly be determined by the casual death of the party at either. That would be most whimsical and capricious. It might depend upon the accident, whether he died in winter or summer, and many circumstances not in his choice, that never could regulate so important a subject as the succession to his personal estate." (1801) 5 Ves 750 (786, 787): 31 E R 839, *Somerville* v. *Somerville*. (Per *Arden M. R.*)

Section 7 — Note 1

[1] The domicile of origin is that which a person acquires at his birth from his parents and follows the domicile of the parents. It is not necessarily in itself local, that is to say, merely the place of birth, but its

Illustration.

At the time of the birth of *A*, his father was domiciled in England. *A*'s domicile of origin is in England, whatever may be the country in which he was born.

[1865—S. 7.]

Domicile of origin of illegitimate child.

8. The domicile of origin of an illegitimate child is in the country in which, at the time of his birth, his mother was domiciled.

[1865—S. 8.]

Continuance of domicile of origin.

9. The domicile of origin prevails until a new domicile has been acquired.

[1865—S. 9.]

Acquisition of new domicile.

10. A man acquires a new domicile by taking up his fixed habitation in a country which is not that of his domicile of origin.

Explanation.—A man is not to be deemed to have taken up his fixed habitation in British India[a] merely by reason of his residing there in His Majesty's civil, [b][military, naval or air-force] service, or in the exercise of any profession or calling.

Illustrations.

(*i*) *A*, whose domicile of origin is in England, proceeds to British India, where he settles as a barrister or a merchant, intending to reside there during the remainder of his life. His domicile is now in British India.

(*ii*) *A*, whose domicile is in England, goes to Austria, and enters the Austrian service, intending to remain in that service. A has acquired a domicile in Austria.

(*iii*) *A*, whose domicile of origin is in France, comes to reside in British India under an engagement with the [c][Central Government] for a certain number of years. It is his intention to return to France at the end of that period. He does not acquire a domicile in British India.

(*iv*) *A*, whose domicile is in England, goes to reside in British India for the purpose of winding up the affairs of a partnership which has been dissolved, and with the intention of returning to England as soon as that purpose is accomplished. He does not by such residence acquire a domicile in British India, however long the residence may last.

(*v*) *A*, having gone to reside in British India in the circumstances mentioned in the last preceding illustration, afterwards alters his intention, and takes up his fixed habitation in British India. *A* has acquired a domicile in British India.

(*vi*) *A*, whose domicile is in the French Settlement of Chandernagore, is compelled by political events to take refuge in Calcutta, and resides in Calcutta for many years in the hope of such political changes as may enable him to return with safety to Chandernagore. He does not by such residence acquire a domicile in British India.

(*vii*) *A*, having come to Calcutta in the circumstances stated in the last preceding illustration, continues to reside there after such political changes have occurred as would enable him to return with safety to Chandernagore, and he intends that his residence in Calcutta shall be permanent. *A* has acquired a domicile in British India.

[1865—S. 10.]

[a] *See* S. 5, Legislative note (a). [b] The words "military or air-force" were *substituted* by the Repealing and Amending Act, 1927 (10 [X] of 1927), S. 2 and Sch. I, for the words "or military"; and the word "naval" was *inserted* by the Amending Act, 1934 (35 [XXXV] of 1934), S. 2 and Schedule. [c] *Substituted* by A. O. for "Government of India."

Section 7 — Note 1 *(contd.)*

determination seldom gives rise to practical difficulty. It clings to the person till he acquires a new one by choice. (Vol 3) 1916 Bom 167 (169) : 41 Bom 687 (DB).

[2] The domicile of origin prevails until the party has not only acquired another but has manifested and carried into execution an intention of abandoning his former domicile and taking another as his sole domicile. (1801) 5 Ves 750 (787) : 31 E R 839. *Somerville* v. *Somerville.* (The domicile of origin is that arising from man's birth and connexions).

[3] A Halai Memon of Porebunder residing and carrying on business in Bombay who has not severed his connexion with Porebunder, would be governed by the law applicable to the Halai Memons in Porebunder (namely, the Hindu law) and not by that governing Bombay Memons. (Vol 5) 1918 Bom 39 (49) : 43 Bom 647 (DB).

Section 9 — Note 1

[1] The domicile of origin is to prevail until the party has not only acquired another, but has manifested and carried into execution an intention of abandoning his former domicile and taking another as his sole domicile. (1801) 5 Ves 750 (787) : 31 E R 839, *Somerville* v. *Somerville.*

[2] Law is very strongly inclined to retain domicile of origin. If person alleges that man had acquired domicile of choice, he must prove that that man had that intention. (Vol 3) 1916 Bom 167 (169) : 41 Bom 687 (DB).

Section 10 — Note 1

[1] Whether man has abandoned his domicile of origin and acquired new domicile would depend on his residence and intention. ('35) 62 Cal 869 (876).

[2] It is of the essence of the acquisition of a new domicile that the residence should be intended to be permanent, that is to say, a man making the choice should mean it to be final and definitely intend to end his life in the residence which he has thus chosen, in a new place or country. (Vol 3) 1916 Bom 167 (169) : 41 Bom 689 (DB).

[3] Domicile can always be ascertained either by means of a legal presumption or from the known facts of the case. If a person who has no fixed place of residence, expresses his intention to settle at the place of his wife's parents and stops with those parents at times, that place can be said to be his domicile of choice. (Vol 15) 1928 Pat 375 (385) (DB).

[4] The party who alleges the change of domicile must prove that he had abandoned his domicile of

Special mode of acquiring domicile in British India.

11. Any person may acquire a domicile in British India[a] by making and depositing in some office in British India, appointed in this behalf by the [b][Provincial Government], a declaration in writing under his hand of his desire to acquire such domicile; provided that he has been resident in British India for one year immediately preceding the time of his making such declaration.

[1865 — S. 11.]

[a] *See* S. 5, legislative-note (a). [b] *Substituted* by A. O. for "Local Government".

Domicile not acquired by residence as representative of foreign Government or as part of his family.

12. A person who is appointed by the Government of one country to be its ambassador, consul or other representative in another country does not acquire a domicile in the latter country by reason only of residing there in pursuance of his appointment; nor does any other person acquire such domicile by reason only of residing with such first-mentioned person as part of his family, or as a servant.

[1865 — S. 12.]

Continuance of new domicile.

13. A new domicile continues until the former domicile has been resumed or another has been acquired.

[1865 — S. 13.]

Minor's domicile.

14. The domicile of a minor follows the domicile of the parent from whom he derived his domicile of origin.

Exception.—The domicile of a minor does not change with that of his parent, if the minor is married, or holds any office or employment in the service of His Majesty, or has set up, with the consent of the parent, in any distinct business.

[1865 — S. 14.]

Domicile acquired by woman on marriage.

15. By marriage a woman acquires the domicile of her husband, if she had not the same domicile before.

[1865 — S. 15]

Wife's domicile during marriage.

16. A wife's domicile during her marriage follows the domicile of her husband.

Exception.—The wife's domicile no longer follows that of her husband if they are separated by the sentence of a competent Court, or if the husband is undergoing a sentence of transportation.

[1865 — S. 16.]

Minor's acquisition of new domicile.

17. Save as hereinbefore otherwise provided in this Part, a person cannot, during minority, acquire a new domicile.

[1865 — S. 17.]

Section 10 — Note 1 *(contd.)*

origin and acquired a new domicile. ('35) 62 Cal 869 (876).

[5] Permanent residence in Bombay does not necessarily import the Mahomedan law of succession for one whose ancestors were converted from Hinduism. Severance from domicile of origin and permanent residence in Bombay would, in cases of persons falling within the purview of this Act, effect change of domicile and with it, change of law but it would not change the law of succession for Hindus or Mahomedans. (Vol 5) 1918 Bom 39 (49) : 43 Bom 647 (D B). (Per *Scott C. J.*)

[6] *A*, a Scotchman, entered into East India Company's service and died in 1878 after the Company's Government was taken over by Crown — Will by *A* good under Scotch law but invalid under Succession Act — Application for probate : *Held*, *A* acquired an Anglo-Indian domicile and as the will was not attested, probate could not be granted. ('79) 4 Cal 106 (115) ✠ ('78) 2 Cal L R 497*n* (501*n*). (*W*, a Scotchman entered in service of East India Company in 1841 and continued in service till his death in 1875, in Europe when on leave : *Held*, he had acquired Anglo-Indian Domicile which was not affected by taking over of the Government by Crown in 1858 or by passing of Indian Succession Act, 1865.)

Section 11 — Note 1

[1] Section 11 merely provides a means of acquiring Indian domicile for the purposes of succession under the Succession Act and the making of a declaration under S. 11 would not affect the declarant's domicile for the purposes other than succession, e. g., divorce. The mode of acquiring domicile under S. 11 for the purposes of succession cannot be applied to domicile for the purposes of divorce. (Vol 30) 1943 Lah 260 (264, 265) : I L R (1943) Lah 765 (SB).

[2] The domicile to be acquired under S. 11, Succession Act, is to be acquired only for the purpose of the Act, in which the section itself occurs and by the provisions of this Act, it is only domicile for succession to movable property for which S. 11, provides. (Vol 32) 1945 Sind 171 (177) : I L R (1946) Kar 1 (SB) ✠ (Vol 32) 1945 Sind 152 (161). (Declaration under S. 11 not conclusive for purposes of Divorce Act, 1869.)

Section 15 — Note 1

[1] The domicile of a widow is the same as her husband's unless she is shown to have changed it since the death of her husband. (1895) 19 Bom 697 (699) (D B)

[2] Hindu widow of French Indian subject becoming absolute owner of her husband's property on his death, in accordance with French law prevailing in French territory — Migration of widow to British territory and acquisition of British Indian domicile : *Held* that character of her estate did not change unless she adopted system of law prevalent in that part of British India. ('01) 24 Mad 650 (651, 652) (DB).

Lunatic's acquisition of new domicile.

18. An insane person cannot acquire a new domicile in any other way than by his domicile following the domicile of another person.

[1865 — S 18.]

Succession to moveable property in British India in absence of proof of domicile elsewhere

19. If a person dies leaving moveable property in British India,[a] in the absence of proof of any domicile elsewhere succession to the property is regulated by the law of British India.

[1865 — S. 19.]

[a] *See* S. 5, legislative-note [a].

PART III.

MARRIAGE.

Interests and powers not acquired nor lost by marriage.

20. *(1)* No person shall, by marriage, acquire any interest in the property of the person whom he or she marries or become incapable of doing any act in respect of his or her own property which he or she could have done if unmarried.

(2) This section —

(a) shall not apply to any marriage contracted before the first day of January 1866 ;

(b) shall not apply, and shall be deemed never to have applied, to any marriage one or both of the parties to which professed at the time of the marriage the Hindu, Muhammadan, Buddhist, Sikh or Jaina religion.

[1865—Ss. 4, 331 ; The Married Women's Property Act, 1874—S. 2.]

Effect of marriage between person domiciled and one not domiciled in British India.

21. If a person whose domicile is not in British India[a] marries in British India[a] a person whose domicile is in British India[a] neither party acquires by the marriage any rights in respect of any property of the other party not comprised in a settlement made previous to the marriage, which he or she would not acquire thereby if both were domiciled in British India[a] at the time of the marriage.

[1865 — S. 44.]

[a] *See* S. 5, legislative-note [a].

Section 19 — Note 1

[1] Plaintiff's husband, a Goanese born in Goa settled in Bombay and carried on business for over fifty years till his death. During this period he visited Goa a very few times though he intended to retire and spend his closing years there. He made a will in Bombay whereby he bequeathed, Rs. 7, a month to plaintiff for her life. In a suit by plaintiff for a moiety of the estate under Portuguese Law—*Held* that plaintiff's husband had, despite his intention to return to Goa, acquired a domicile of choice in Bombay and that therefore the devolution of his estate was governed by the provisions of Succession Act. (Vol 3) 1916 Bom 167 (177) : 41 Bom 687 (DB).

[2] The onus is on the persons, who attack a settlement, to show conclusively that nationality of the settlor was foreign and if they succeed in doing so the onus is then on the persons supporting the settlement to show that the settlor had acquired a domicile in British India and that his estate should be administered according to law prevailing in British India. (1905) 32 Cal 631 (638).

Section 20 — Note 1

[1] Sections 4 and 44 (now Ss. 20 and 21 respectively) read together should be understood as laying down a general rule as to the immediate effect of marriage in respect of movable property belonging to each or either of the married persons not comprised in an ante-nuptial settlement, and not as laying down a rule intended to affect the law of succession. (1896) 23 Cal 506 (512).

[2] Section 4 contains the *lex loci* of India. It does not operate upon the movable property of parties not having an Indian domicile. (1876) 1 Cal 412 (420).

[3] Section 4, Succession Act of 1865 (now S. 20) has nothing to do with power of married women to contract. (Vol 25) 1938 Cal 486 (489) ; I L R (1938) 2 Cal 233.

[4] Under marriage settlement some property was vested in the wife without power of alienating the same. Wife and husband executing pro-note jointly — Plaintiff seeking to recover his debt from the property vested in the wife under marriage settlement — *Held* operation of the clause in the settlement prohibiting alienation of property vested in the wife was not prevented by S. 4 of Act X [10] of 1865 (now S. 20) (1874) 13 Beng L R 383 (389) (DB).

[5] Where parties having the same domicile marry during a temporary sojourn in a foreign country, and do not evince any intention to change their domicile, the interest which they acquire in the movable property of each other is that interest given them by law of the country wherein they are domiciled at the time of the marriage. (1876) 1 Cal 412 (418).

[6] The foundation of the practice to order husband to deposit a sum of money to meet the wife's estimated cost in a suit for judicial separation which prevailed in the Ecclesiastical Courts in England, was the absolute right given to the husband upon marriage, to the whole of wife's personal estate and income of her real estate. But that state of law is completely altered in India by the Indian Succession Act—Hence in a proceeding for judicial separation between parties governed by the Act, wife is not entitled to security for costs from husband except under special circumstances. (1880) 5 Cal 357 (362) (DB).

[*See also* (1886) 9 Mad 12 (14).]

Section 21 — Note 1.

[1] Sections 4 and 44 of Act 10 of 1865 (now Ss. 20 and 21) deal with different subjects. The former declares the general *lex loci* of India; the second lays down a special rule to govern a particular case. It is

Settlement of minor's property in contemplation of marriage.

22. *(1)* The property of a minor may be settled in contemplation of marriage, provided the settlement is made by the minor with the approbation of the minor's father, or, if the father is dead or absent from British India[a], with the approbation of the High Court.

(2) Nothing in this section or in section 21 shall apply to any will made or intestacy occurring before the first day of January 1866, or to intestate or testamentary succession to the property of any Hindu, Muhammadan, Buddhist Sikh or Jaina.

[1865—Ss 45, 331.]

[a] *See* S. 5, Legislative note [a].

PART IV.

OF CONSANGUINITY.

Application of Part.

23. Nothing in this part shall apply to any will made or intestacy occurring before the first day of January 1866 or to intestate or testamentary succession to the property of any Hindu, Muhammadan, Buddhist, Sikh, Jaina or Parsi.

[1865—S. 331; Parsi Intestate Succession Act, 1865—S. 8.]

Kindred or consanguinity.

24. Kindred or consanguinity is the connection or relation of persons descended from the same stock or common ancestor.

[1865—S. 20.]

Lineal consanguinity.

25. *(1)* Lineal consanguinity is that which subsists between two persons, one of whom is descended in a direct line from the other, as between a man and his father, grandfather and great grandfather, and so upwards in the direct ascending line, or between a man and his son, grandson, great-grandson and so downwards in the direct descending line.

(2) Every generation constitutes a degree, either ascending or descending.

(3) A person's father is related to him in the first degree, and so likewise is his son; his grandfather and grandson in the second degree; his great-grandfather and great grandson in the third degree, and so on.

[1865—S. 21.]

Collateral consanguinity.

26. *(1)* Collateral consanguinity is that which subsists between two persons who are descended from the same stock or ancestor, but neither of whom is descended in a direct line from the other.

(2) For the purpose of ascertaining in what degree of kindred any collateral relative stands to a person deceased, it is necessary to reckon upwards from the person deceased to the common stock and then downward to the collateral relative, a degree being allowed for each person, both ascending and descending.

[1865—S. 22.]

Persons held for purpose of succession to be similarly related to deceased.

27. For the purpose of succession, there is no distinction:—

(a) between those who are related to a person deceased through his father, and those who are related to him through his mother; or

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Section 21 — Note 1 *(contd.)*

not a modification of the *lex loci* but a declaration of the law in a particular case. (1876) 1 Cal 412 (421). (*Held*, domicile of the parties being in England, they were governed by English law).

[2] This section lays down a general rule as to the immediate effect of marriage in respect of movable property belonging to each of either of the married persons not comprised in an ante-nuptial settlement and does not lay down a rule intended to affect the law of succession. (1896) 23 Cal 506 (512). (Person having English domicile marrying woman with Indian Domicile is entitled, on his wife's death to whole of her movable property.)

Section 24 — Note 1

[1] The definition of 'kindred' in this section is based upon the principles of English statute of distributions (22 and 23, Charles II, Ch. 10) and a gift to a next-of-kin under the English law does not include a husband or a wife. But this definition is not applicable to Hindus and a bequest made by a father to the would-be wife of his son may be deemed to be a bequest to a person described as standing in a particular degree of kindred to his son. (1912) 39 Cal. 87 (97, 98, 100) (DB).

[2] The Indian Succession Act speaks of certain relations and these relations are those which the law recognizes namely those flowing from lawful wedlock. Where therefore, a person governed by the Act claimed as a nephew under a will left by this mother's sister born of illegitimate wedlock, it was held that he was not her relation within the meaning of the Act. (1906) 30 Bom 500 (504) ✠ (Vol 6) 1919 Upp Bur 3 (5): 3 Upp Bur Rul 128. ("Lineal descendants" means descendants born in lawful wedlock.)

[*See also* (1873) 11 Beng L R (App) 6 (8). (The Succession Act does not say anything about illegitimate children.)]

(*b*) between those who are related to a person deceased by the full blood, and those who are related to him by the half blood; or

(*c*) between those who were actually born in the lifetime of a person deceased and those who at the date of his death were only conceived in the womb, but who have been subsequently born alive.

[1865—S. 23.]

Mode of computing of degrees of kindred.

28. Degrees of kindred are computed in the manner set forth in the table of kindred set out in Schedule I.

Illustrations.

(*i*) The person whose relatives are to be reckoned, and his cousin-german, or first cousin, are, as shown in the table, related in the fourth degree; there being one degree of ascent to the father, and another to the common ancestor, the grandfather; and from him one of descent to the uncle, and another to the cousin-german, making in all four degrees.

(*ii*) A grandson of the brother and a son of the uncle, *i. e.*, a great-nephew and a cousin-german, are in equal degree being each four degrees removed.

(*iii*) A grandson of a cousin german is in the same degree as the grandson of a great-uncle, for they are both in the sixth degree of kindred.

[1865—S. 24.]

PART V.

INTESTATE SUCCESSION.

CHAPTER I.

PRELIMINARY.

Application of Part.

29. (*1*) This Part shall not apply to any intestacy occurring before the first day of January 1865, or to the property of any Hindu, Muhammadan, Buddhist, Sikh or Jaina.

(*2*) Save as provided in sub-section (*1*) or by any other law for the time being in force, the provisions of this Part shall constitute the law of British India[a] in all cases of intestacy.

[1865 — Ss 2, 331 ; The Parsi Intestate Succession Act, 1865 — S. 8.]

[a] *See* S. 5, Legislative-note (a).

As to what property deceased considered to have died intestate.

30. A person is deemed to die intestate in respect of all property of which he has not made a testamentary disposition which is capable of taking effect.

Illustrations.

(*i*) A has left no will. He has died intestate in respect of the whole of his property.

(*ii*) A has left a will, whereby he has appointed B his executor ; but the will contains no other provisions. A, has died intestate in respect of the distribution of his property.

SECTION 29 — SYNOPSIS

1. Buddhist.
2. Indian Christians.
3. Jews
4. Hindus.

1 Buddhist.—[1] Chinese Buddhist is a Buddhist within the meaning of Succession Act and as regards succession and inheritance to the estate of a Chinese Buddhist dying intestate in Burma the Chinese customary law is applicable. (Vol 26) 1939 Rang 291 (293) (DB) ✠ (Vol 19) 1932 Rang 59 (60): 10 Rang 97 (DB). (Case law discussed; (Vol 14) 1927 Rang 265 : 5 Rang 406 (FB) and (Vol 17) 1930 Rang 81 : 8 Rang 57 (FB) *Dissented from.*) ✠ (Vol 1) 1914 Low Bur 144 (144) : 8 Low Bur Rul 222 (DB). (Indian Succession Act does not apply to Chinese Buddhist.)

[But see (Vol 17) 1930 Rang 81 (105) : 8 Rang 57 (FB). (Chinese Buddhists are not Buddhists within the meaning of this section and succession to his estate is governed by the Act unless he was domiciled and died in Burma as Burmese Buddhist when Burmese Buddhist law will apply. Chinese Customary Law also cannot apply—(Per *Full Bench — Maung Ba and Otter JJ.* contra.)]

[2] Where a Buddhist woman adopted a girl as daughter in the kelttima form with a view that the girl may succeed her but the woman subsequently became Christian and died as a Christian intestate it was held that the adopted girl could not inherit. (Vol 21) 1934 Rang 72 (74): 12 Rang 184 (DB)

2 Indian Christians — [1] Hindu convert to Christianity is governed solely by Succession Act and cannot elect to be under Hindu law. (Vol 9) 1922 P C 14 (17) : 48 Ind App 381 : 43 All 525 (PC) ✠ (Vol 27) 1940 All 134 (138) : I L R (1940) All 100 (DB).

[2] A party can prove that there is custom of adoption among Christians in Punjab so as to change rule of succession laid down in this Act. Section 2 of the Act makes exception in case of local laws. Section 5 of the Punjab Laws Act provides an exception. (Vol 16) 1929 Lah 230 (232).

3. Jews —[1] Part V of Succession Act applies to Jewish community in Calcutta. (Vol 18) 1931 Cal 560 (562) : 58 Cal 761.

4. Hindus.—[1] The Act does not apply to an intestate succession in the case of a deceased who though of mixed parentage professed Hinduism. (Vol 1) 1914 Low Bur 201 (202) : 7 Low Bur Rul 362 (DB).

Section 30—Note 1.

[1] A private individual, who attempts by gift or will to make property inheritable otherwise than the law directs is assuming to legislate and the gift must fail and the inheritance take place as the law directs. A man cannot create a new form of estate and alter

(iii) A has bequeathed his whole property for an illegal purpose. A has died intestate in respect of the distribution of his property.

(iv) A has bequeathed 1,000 rupees to B and 1,000 rupees to the eldest son of C, and has made no other bequest; and has died leaving the sum of 2,000 rupees and no other property. C died before A without having ever had a son. A has died intestate in respect of the distribution of 1,000 rupees.

[1865 S. 25.]

CHAPTER II.

RULES IN CASES OF INTESTATES OTHER THAN PARSIS.

Chapter not to apply to Parsis.

31. Nothing in the Chapter shall apply to Parsis.

[Parsi Intestate Succession Act, 1865 - S. 8]

Devolution of such property.

32. The property of an intestate devolves upon the wife or husband, or upon those who are of the kindred of the deceased, in the order and according to the rules hereinafter contained in this Chapter.

Explanation. — A widow is not entitled to the provision hereby made for her if, by a valid contract made before her marriage, she has been excluded from her distributive share of her husband's estate.

[1865 — S. 26]

Where intestate has left widow and lineal descendants, or widow and kindred only, or widow and no kindred.

33. Where the intestate has left a widow —

(a) if he has also left any lineal descendants, one-third of his property shall belong to his widow, and the remaining two-thirds shall go to his lineal descendants, according to the rules hereinafter contained;

(b)[a] [save as provided by section 33A,] if he has left no lineal descendant, but has left persons who are of kindred to him, one-half of his property shall belong to his widow, and the other half shall go to those who are of kindred to him, in the order and according to the rules hereinafter contained;

(c) if he has left none who are of kindred to him, the whole of his property shall belong to his widow.

[1865 — S. 27.]

[a] *Inserted* by the Indian Succession (Amendment) Act, 1926 (40 [XL] of 1926), S. 2.

Section 30 — Note 1 *(contd.)*

the line of succession allowed by law for the purpose of carrying out his own wishes or views of policy. (1872) 9 Beng L R 377 (394, 395) : Ind App (Sup Vol) 47 (P C).

[2] This section provides that a man is considered to be intestate in respect of all property of which he has not made a testamentary disposition which is capable of taking effect but this does not destroy the rule of survivorship any more than it extends right on intestacy to property in which intestate had a life estate. (1907) 31 Bom 25 (33) (DB).

[3] *A* made will devising the estate to R. R died before *A*. On *A's* death he not having made any bequest or devise to any other person was held to have died "intestate". (1880) 4 Bom 537 (544) (DB).

[4] Where testator makes a will with respect to a part of his property, he dies intestate with regard to his other property, and, therefore person appointed his executor cannot be his representative with regard to his other property. (Vol 16) 1929 Lah 546 (546) (DB).

[5] Where some dispositions in a will were found to be invalid and could not be given effect to with regard to the residuary property there was intestacy. (1908) 31 Mad 517 (522) (DB).

[6] Surplus income of a trust estate directed to be accumulated for a period longer than twenty-one (the maximum period for which accumulation can be directed by will) years after paying an annuity to testator's neice for her life—*Held* that the surplus income from the expiration of twenty-one years to the death of the niece devolved as on an intestacy. (1900) 2 Ch 541 (547, 548), *Frost* v. *Greatorex*. (*See also* S. 117, Succession Act.)

Section 32—Note 1

[1] Explanation—Where a testator had given to his wife that provision which he meant to be a satisfaction for any claim she might have against the other objects of his bounty, if by any accident those objects should be unable to claim the benefit of that exclusion, no other person could set it up against the widow (1816) 30 E R 1038 (1041) : 5 Ves 332, *Pickering* v. *Lord Stamford*.

Section 33—Note 1

[1] Where a wife had an inchoate right to dower at the time when the Succession Act (X of 1865) was passed she is not deprived of her right by virtue of this Act. Section 27 (now S. 33) which provides what property a wife is entitled to in the event of her husband dying intestate does not, either expressly or impliedly deprive her of any other provision to which she was entitled at the time of the passing of that Act. (1881) 6 Cal 794 (806) (DB).

[2] *A* 'lineal descendant' as the term is used in S. 27 (now S. 33) in the Succession Act is the offspring of a lawful marriage and not the offspring of a union which is not that of husband and wife. (Vol 6) 1919 Upp Bur 3 (5) : 3 Upp Bur Rul 128 ✠ (Vol 18) 1931 Cal 560 (562) : 58 Cal 761.

[3] Clause (c)—Under English Law where a person dies intestate having a widow and there are no persons who answer the character of next of-kin to him, the widow takes one moiety of his personal estate and the Crown is entitled to the other half. (1836) 59 E R 86 (36) : 8 Sim 214, *Cave* v. *Robert*.

Special provision where intestate has left widow and no lineal descendants.

[a][**33A.** *(1)* Where the intestate has left a widow but no lineal descendants and the nett value of his property does not exceed five thousand rupees, the whole of his property shall belong to the widow.

(2) Where the nett value of the property exceeds the sum of five thousand rupees, the widow shall be entitled to five thousand rupees thereof and shall have a charge upon the whole of such property for such sum of five thousand rupees, with interest thereon from the date of the death of the intestate at 4 per cent. per annum until payment.

(3) The provision for the widow made by this section shall be in addition and without prejudice to her interest and share in the residue of the estate of such intestate remaining after payment of the said sum of five thousand rupees, with interest as aforesaid, and such residue shall be distributed in accordance with the provisions of section 38 as if it were the whole of such intestate's property.

(4) The nett value of the property shall be ascertained by deducting from the gross value thereof all debts, and all funeral and administration expenses of the intestate and all other lawful liabilities and charges to which the property shall be subject.

(5) This section shall not apply —

(a) to the property of —

(i) any Indian Christian,

(ii) any child or grandchild of any male person who is or was at the time of his death an Indian Christian, or

(iii) any person professing the Hindu, Buddhist, Sikh or Jaina religion the succession to whose property is, under Section 24 of the Special Marriage Act, 1872, regulated by the provisions of this Act ;

(b) unless the deceased dies intestate in respect of all his property.]

[a] *Inserted* by the Indian Succession (Amendment) Act, 1926 (40 [XL] of 1926), S. 3.

Where intestate has left no widow, and where he has left no kindred.

34. Where the intestate has left no widow, his property shall go to his lineal descendants or to those who are of kindred to him, not being lineal descendants, according to the rules hereinafter contained ; and, if he has left none who are of kindred to him, it shall go to the Crown.

[1865—S. 28.]

Rights of widower.

35. A husband surviving his wife has the same rights in respect of her property, if she dies intestate, as a widow has in respect of her husband's property, if he dies intestate.

[1865—S. 43.]

Distribution where there are lineal descendants.

Rules of distribution.

36. The rules for the distribution of the intestate's property (after deducting the widow's share, if he has left a widow) amongst his lineal descendants shall be those contained in sections 37 to 40.

[1865—S. 29.]

Where intestate has left child or children only.

37. Where the intestate has left surviving him a child or children, but no more remote lineal descendant through a deceased child, the property shall belong to his surviving child, if there is only one, or shall be equally divided among all his surviving children.

[1865—S. 30.]

Section 33A—Note 1

[1] Section 33A (5) (b) is an independent clause and is not part of S. 33A (5) (a) and does not govern the three clauses mentioned in S. 33A (5) (a). Section 33A therefore does not apply to an Indian Christian and the persons specified in S. 33A (5) (a) (ii) and (iii) even if they died intestate in respect of all their property. (Vol 32) 1945 Mad 47 (48)

Section 35—Note 1.

[1] Under the Act the husband can only succeed to half of the wife's property in case his wife dies intestate leaving no lineal descendant. But in the absence of the next-of-kin, the husband would be entitled to the whole of the property as her heir. (Vol 12) 1925 Mad 1110 (1111).

[2] Divorced wife — Marriage between husband and wife dissolved by decree—At date of decree wife was entitled to some reversionary share in certain estate from her father of which no settlement was made prior to her marriage but which was subject to post-nuptial settlement. Subsequent to their judicial separation, share fell into possession but divorced wife died before she could recover possession : *Held* that the husband's rights in respect of that share ceased on the dissolution of the marriage and he was not entitled to recover the same. (1867) 4 Eq 162 (170), *Wilkinson v. Gibson.*

Section 37—Note 1.

[1] The word "child" in this Act does not include an illegitimate child. (Vol 18) 1931 Cal 560 (562) : 58 Cal 761 ✠ (Vol 28) 1941 Rang 33 (34) ; 1940 Rang L R 654 (DB).

Where intestate has left no child, but grandchild or grandchildren.

38. Where the intestate has not left surviving him any child, but has left a grandchild or grandchildren and no more remote descendant through a deceased grandchild, the property shall belong to his surviving grandchild if there is only one, or shall be equally divided among all his surviving grandchildren.

Illustrations.

(i) *A* has three children and no more, John, Mary, and Henry. They all die before the father, John leaving two children, Mary three, and Henry four. Afterwards *A* dies intestate, leaving those nine grandchildren and no descendant of any deceased grandchild. Each of his grandchildren will have one-ninth.

(ii) But if Henry has died, leaving no child, then the whole is equally divided between the intestate's five grandchildren, the children of John and Mary.

[1865—S. 31.]

Where intestate has left only great-grandchildren or remoter lineal descendants.

39 In like manner the property shall go to the surviving lineal descendants who are nearest in degree to the intestate, where they are all in the degree of great-grandchildren to him, or are all in a more remote degree.

[1865—S. 32.]

Where intestate leaves lineal descendants not all in same degree of kindred to him, and those through whom the more remote are descended are dead.

40. *(1)* If the intestate has left lineal descendants who do not all stand in the same degree of kindred to him, and the persons through whom the more remote are descended from him are dead, the property shall be divided into such a number of equal shares as may correspond with the number of the lineal descendants of the intestate who either stood in the nearest degree of kindred to him at his decease, or, having been of the like degree of kindred to him, died before him, leaving lineal descendants who survived him.

(2) One of such shares shall be allotted to each of the lineal descendants who stood in the nearest degree of kindred to the intestate at his decease; and one of such shares shall be allotted in respect of each of such deceased lineal descendants; and the share allotted in respect of each of such deceased lineal descendants shall belong to his surviving child or children or more remote lineal descendants, as the case may be; such surviving child or children or more remote lineal descendants always taking the share which his or their parent or parents would have been entitled to respectively if such parent or parents had survived the intestate.

Illustrations.

(i) *A* had three children, John, Mary and Henry; John died, leaving four children, and Mary died, leaving one, and Henry alone survived the father. On the death of *A*, intestate, one-third is allotted to Henry, one-third to John's four children, and the remaining third to Mary's one child.

(ii) *A* left no child, but left eight grandchildren, and two children of a deceased grandchild. The property is divided into nine parts, one of which is allotted to each grandchild, and the remaining one-ninth is equally divided between the two great grandchildren.

(iii) *A* has three children, John, Mary and Henry; John dies leaving four children; and one of John's children dies leaving two children. Mary dies leaving one child. *A* afterwards dies intestate. One-third of his property is allotted to Henry, one third to Mary's child, and one-third is divided into four parts, one of which is allotted to each of John's three surviving children, and the remaining part is equally divided between John's two grandchildren.

(iv) *A* has two children, and no more; John and Mary. John dies before his father, leaving his wife pregnant. Then *A* dies leaving Mary surviving him, and in due time a child of John is born. *A's* property is to be equally divided between Mary and the posthumous child.

[1865—S. 33.]

Distribution where there are no lineal descendants.

Rules of distribution where intestate has left no lineal descendants.

41. Where an intestate has left no lineal descendants, the rules for the distribution of his property (after deducting the widow's share, if he has left a widow) shall be those contained in sections 42 to 48.

[1865—S. 34.]

Where intestate's father living.

42. If the intestate's father is living, he shall succeed to the property.

[1865—S. 35.]

Section 37 — Note 1 *(contd.)*

[2] According to the rules of succession laid down under the Succession Act an adopted child is not an heir entitled upon an intestacy to inherit the estate of his deceased adoptive parent (Vol 21) 1934 Rang 72 (74): 12 Rang 184 (DB). (A Buddhist woman adopting a girl as daughter in keittima form and subsequently becoming Christian and dying as a Christian intestate — *Held* that the adopted girl could not inherit.)

Section 42 — Note 1

[1] *A*, a Brahmin married *B*, a Brahmin girl, in 1850—In 1851 *A* was converted to Christianity *B* refused to live with him and in 1857 relinquished all her claims on him and his estate — In 1881 *A* died and possession of his estate was taken by Administrator General. In a suit to administer the estate, it was held that *A's* father was entitled to the whole estate. (1886) 9 Mad 466 (471).

43. If the intestate's father is dead, but the intestate's mother is living and there are also brothers or sisters of the intestate living, and there is no child living of any deceased brother or sister, the mother and each living brother or sister shall succeed to the property in equal shares.

Where intestate's father dead but his mother, brothers and sisters living.

Illustration.

A dies intestate, survived by his mother and two brothers of the full blood, John and Henry, and a sister Mary, who is the daughter of his mother but not of his father. The mother takes one-fourth, each brother takes one-fourth and Mary, the sister of half blood, takes one-fourth.

[1865—S. 36.]

44. If the intestate's father is dead, but the intestate's mother is living, and if any brother or sister and the child or children of any brother or sister who may have died in the intestate's lifetime are also living, then the mother and each living brother or sister, and the living child or children of each deceased brother or sister, shall be entitled to the property in equal shares, such children (if more than one) taking in equal shares only the shares which their respective parents would have taken if living at the intestate's death.

Where intestate's father dead and his mother, a brother or sister, and children of any deceased brother or sister, living.

Illustration.

A, the intestate, leaves his mother, his brothers John and Henry, and also one child of a deceased sister, Mary, and two children of George, a deceased brother of the half blood who was the son of his father but not of his mother. The mother takes one fifth, John and Henry each takes one fifth, the child of Mary takes one-fifth, and the two children of George divide the remaining one-fifth equally between them.

[1865—S. 37.]

45. If the intestate's father is dead, but the intestate's mother is living, and the brothers and sisters are all dead, but all or any of them have left children who survived the intestate, the mother and the child or children of each deceased brother or sister shall be entitled to the property in equal shares, such children (if more than one) taking in equal shares only the shares which their respective parents would have taken if living at the intestate's death.

Where intestate's father dead and his mother and children of any deceased brother or sister living.

Illustration.

A, the intestate, leaves no brother or sister, but leaves his mother and one child of a deceased sister, Mary, and two children of a deceased brother, George. The mother takes one third, the child of Mary takes one-third, and the children of George divide the remaining one-third equally between them.

[1865—S. 38.]

46. If the intestate's father is dead, but the intestate's mother is living, and there is neither brother, nor sister, nor child of any brother or sister of the intestate, the property shall belong to the mother.

Where intestate's father dead, but his mother living and no brother, sister, nephew or niece.

[1865—S. 39.]

47. Where the intestate has left neither lineal descendant, nor father, nor mother, the property shall be divided equally between his brothers and sisters and the child or children of such of them as may have died before him, such children (if more than one) taking in equal shares only the shares which their respective parents would have taken if living at the intestate's death.

Where intestate has left neither lineal descendant, nor father, nor mother.

[1865—S. 40.]

48. Where the intestate has left neither lineal descendant, nor parent, nor brother, nor sister, his property shall be divided equally among those of his relatives who are in the nearest degree of kindred to him.

Where intestate has left neither lineal descendant, nor parent, nor brother, nor sister.

Illustrations.

(*i*) A, the intestate, has left a grandfather, and a grandmother and no other relative standing in the same or a nearer degree of kindred to him. They, being in the second degree, will be entitled to the property in equal shares, exclusive of any uncle or aunt of the intestate, uncles and aunts being only in the third degree.

Section 42—Note 1 *(contd.)*

[2] The English view that a man is not the father of the illegitimate children applies also under the Succession Act. (Vol 1) 1914 Cal 222 (223) (DB).

Section 47 — Note 1

[1] On intestacy the brother of deceased succeeds in preference to the grand father. (1754) 3 Atk 762 (766), *Evlyn* v. *Evlyn*.

[2] Where there is brother of the whole blood to the intestate and a sister of the half blood, the sister should have half a share. 1 Vern 403 (404): 23 E R 545, *Earl of Winchelsea* v. *Norcliff*.

(*ii*) A, the intestate, has left a great-grandfather, or a great grandmother, and uncles and aunts, and no other relative standing in the same or a nearer degree of kindred to him. All of these being in the third degree will take equal shares.

(*iii*) A, the intestate, left a great-grandfather, an uncle and a nephew, but no relative standing in a nearer degree of kindred to him. All of these being in the third degree will take equal shares.

(*iv*) Ten children of one brother or sister of the intestate, and one child of another brother or sister of the intestate, constitute the class of relatives of the nearest degree of kindred to him. They will each take one-eleventh of the property.

[1865—S. 41.]

Children's advancements not brought into hotchpot.

49. Where a distributive share in the property of a person who has died intestate is claimed by a child, or any descendant of a child, or such person, no money or other property which the intestate may, during his life, have paid, given or settled to, or for the advancement of, the child by whom or by whose descendant the claim is made shall be taken into account in estimating such distributive share.

[1865—S. 42.]

CHAPTER III.

SPECIAL RULES FOR PARSI INTESTATES.

General principles relating to intestate succession.

[a][**50.** For the purpose of intestate succession among Parsis—

(*a*) there is no distinction between those who were actually born in the lifetime of a person deceased and those who at the date of his death were only conceived in the womb, but who have been subsequently born alive;

(*b*) a lineal descendant of an intestate who has died in the lifetime of the intestate without leaving a widow or widower or any lineal descendant or a widow of any lineal descendant shall not be taken into account in determining the manner in which the property of which the intestate has died intestate shall be divided; and

(*c*) where a widow of any relative of an intestate has married again in the lifetime of the intestate, she shall not be entitled to receive any share of the property of which the intestate has died intestate, and she shall be deemed not to be existing at the intestate's death.]

[a] Ss. 50 to 56 were *substituted*, by the Indian Succession (Amendment) Act, 1939 (17 [XVII] of 1939), S. 2. [12-6-1939].

Division of a male intestate's property among his widow, children and parents.

[a][**51.** (*1*) Subject to the provisions of sub-section (2), the property of which a male Parsi dies intestate shall be divided—

(*a*) where he dies leaving a widow and children, among the widow and children, so that the share of each son and of the widow shall be double the share of each daughter, or

(*b*) where he dies leaving children but no widow, among the children, so that the share of each son shall be double the share of each daughter.

(*2*) Where a male Parsi dies leaving one or both parents in addition to children or a widow and children, the property of which he dies intestate shall be divided so that the father shall receive a share equal to half the share of a son and the mother shall receive a share equal to half the share of a daughter.]

[a] *See* S. 50, Legislative-note [a].

Section 49 — Note 1

[1] An advancement by way of portion is something given by the parent to establish the child in life or to make what is called a provision for him. It is not a mere casual payment. Thus an admission fee at the Middle Temple for a child intended for the Bar, price of the commission and outfit of the child entering Army and advances made for purchase of plant and materials for mining operations were held to be advancements. (1875) 20 Eq 155 (157, 158), *Taylor* v. *Taylor*.

[2] The exception in English law by way of advancement in favour of wife or child does not apply in India. (Vol 2) 1915 P C 96 (97) : 37 All 557 : 42 Ind App 202 (P C). (Purchase by Hindu husband in wife's name is presumed to be benami).

[3] Parsi—Applicability of English Rule of advancement as contained in Statute of Distribution — By excluding S. 42 (now S. 49) by S. 8 of Parsi Succession cAt from applying to Parsis, Legislature did not intend to make the English rule applicable to Parsis. (1878) 2 Bom 75 (82).

Section 50 Note 1

[1] Prior to the passing of Parsi Succession Act, 1865, the Parsis in the town and island of Bombay were as to succession governed by the English law as modified by Act IX of 1837 and in the mofussil the Courts took evidence and enforced what were proved to be the usages of Parsis in that locality. ('87) 11 Bom 1 (4)☒(1906) 30 Bom. 359 (362). (Law in mofussil was ascertained usage of community—In some cases practice of English Equity Courts was followed for purposes of elucidating principles of equity and good conscience and giving uniform effect to such principles.)☒(Vol 14) 1927 Bom 22 (30) : 51 Bom 167 (DB).

[2] In determining the succession to immovable property in British India of a deceased Parsi temporarily residing in a State, the law applicable will be that prevailing in British India and the custom prevailing in the State will not be recognized. (Vol 25) 1938 Bom

Division of a female intestate's property among her widower and children.

[a][52. The property of which a female Parsi dies intestate shall be divided —

(a) where she dies leaving a widower and children, among the widower and children so that the widower and each child receive equal shares, or

(b) where she dies leaving children but no widower, among the children in equal shares.]

[a] *See* S. 50, Legislative-note (a).

Division of share of predeceased child of intestate leaving lineal descendants.

[a][53. In all cases where a Parsi dies leaving any lineal descendant, if any child of such intestate has died in the lifetime of the intestate, the division of the share of the property of which the intestate has died intestate which such child would have taken if living at the intestate's death shall be in accordance with the following rules, namely:—

(a) If such deceased child was a son, his widow and children shall take shares in accordance with the provisions of this Chapter as if he had died immediately after the intestate's death:

Provided that where such deceased son has left a widow or a widow of a lineal descendant but no lineal descendant, the residue of his share after such distribution has been made shall be divided in accordance with the provisions of this Chapter as property of which the intestate has died intestate, and in making the division of such residue the said deceased son of the intestate shall not be taken into account.

(b) If such deceased child was a daughter, her share shall be divided equally among her children.

(c) If any child of such deceased child has also died during the lifetime of the intestate, the share which he or she would have taken if living at the intestate's death shall be divided in like manner in accordance with clause *(a)* or clause *(b)* as the case may be.

(d) Where a remoter lineal descendant of the intestate has died during the lifetime of the intestate, the provisions of clause *(c)* shall apply *mutatis mutandis* to the division of any share to which he or she would have been entitled if living at the intestate's death by reason of the predecease of all the intestate's lineal descendants directly between him or her and the intestate.]

[a] *See* S. 50, Legislative-note [a].

Division of property where intestate leaves no lineal descendant but leaves a widow or widower or a widow of any lineal descendant.

[a][54. Where a Parsi dies without leaving any lineal descendant but leaving a widow or widower or a widow of a lineal descendant, the property of which the intestate dies intestate shall be divided in accordance with the following rules, namely:

(a) If the intestate leaves a widow or widower but no widow of a lineal descendant, the widow or widower shall take half the said property.

(b) If the intestate leaves a widow or widower and also a widow of any lineal descendant, his widow or her widower shall receive one-third of the said property, and the widow of any lineal descendant shall receive another one-third, or if there is more than one such widow, the last mentioned one-third shall be divided equally among them.

Section 50—Note 1 *(contd.)*

238 (241). (Custom of divorce by mutual farkats in Baroda State.) (Vol 16) 1929 Bom 478 (479) (DB). (Custom of adoption in Baroda State.)

[3] Under Parsi Succession Act (XXI of 1865) widows and children rank before brothers and sisters. ('80) 4 Bom 537 (544) (DB).

Section 52 — Note 1

[1] By "widower" is meant a widower relatively to the deceased wife only and without the fact or possibility of the widower remarrying. ('87) 1 Bom 1 (5).

[2] Where a Parsi female dies intestate in respect of certain property which she is possessed of, that property devolves upon her husband and children. ('03) 5 Bom L R 252 (254, 255). (Case under Act XXI of 1865.)

Section 53 — Note 1

[1] It is not necessary, so far as the natural and grammatical sense of the words of the section are concerned, that in order for the widow or widower to take and for the issue to take there should be in existence at the time of the death of the intestate, both widow or widower *and* issue. ('77) 1 Bom 506 (511). (Case under S. 5 of Act XXI of 1865.)

Section 54 — Note 1

[1] The word "next-of-kin" is merely a collective name for all the persons and classes enumerated in the schedule referred to in the section. ('98) 22 Bom. 909 (914).

[2] Will by Parsi providing that in case his son dies issueless, son's widow should be excluded from getting any share in his property—Son dying issueless—Widow claiming property as heir of her husband though not of testator — *Held* she was entirely excluded from any share whether as heir of her husband or otherwise. (Vol 6) 1919 Sind 4 (6) : 14 Sind L R 203.

(c) If the intestate leaves no widow or widower but one widow of a lineal descendant, she shall receive one-third of the said property or, if the intestate leaves no widow or widower but more than one widow of a lineal descendant, two thirds of the said property shall be divided among such widows in equal shares.

(d) The residue after the division specified in clause *(a)*, *(b)* or *(c)* has been made shall be distributed among the relatives of the intestate in the order specified in Part I of Schedule II. The next-of kin standing first in Part I of that Schedule shall be preferred to those standing second, the second to the third, and so on in succession, provided that the property shall be so distributed that each male shall take double the share of each female standing in the same degree of propinquity.

(e) If there are no relatives entitled to the residue under clause *(d)*, the whole of the residue shall be distributed in proportion to the shares specified among the pesrons entitled to receive shares under this section.]

[a] *See* S. 50, Legislative-Note [a].

Division of property where intestate leaves neither lineal descendants nor a widow or widower nor a widow of any lineal descendant.

[a][55. When a Parsi dies leaving neither lineal descendants nor a widow or widower nor a widow of any lineal descendant, his or her next of kin, in the order set forth in Part II of Schedule II, shall be entitled to succeed to the whole of the property of which he or she dies intestate. The next of-kin standing first in Part II of that Schedule shall be preferred to those standing second, the second to the third, and so on in succession, provided that the property shall be so distributed that each male shall take double the share of each female standing in the same degree of propinquity.]

[a] *See* S 50, Legislative-note [a].

Division of property where there is no relative entitled to succeed under the other provisions of this Chapter.

[a][56. Where there is no relative entitled to succeed under the other provisions of this Chapter to the property of which a Parsi has died intestate, the said property shall be divided equally among those of the intestate's relatives who are in the nearest degree of kindred to him.]

[a] *See* S. 50, Legislative-note [a].

PART VI.

TESTAMENTARY SUCCESSION.

CHAPTER I.

INTRODUCTORY.

Application of certain provisions of Part to a class of wills made by Hindus, etc.

[a][57. The provisions of this Part which are set out in Schedule III shall, subject to the restrictions and modifications specified therein, apply—

(a) to all wills and codicils made by any Hindu, Buddhist, Sikh or Jaina, on or after the first day of September, 1870, within the territories which at the said date were subject to the Lieutenant-Governor of Bengal or within the local limits of the ordinary original civil jurisdiction of the High Courts of Judicature at Madras and Bombay; and

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Section 55 — Note 1

[1] In construing the schedule mentioned in the section, the section shows that (1) where it was intended that any class of relatives should, if living, absolutely exclude any other, they were placed within a separate article; (2) within the particular articles differences in propinquity of blood are so far recognized that each degree constitutes a class not for the purpose of excluding or being preferred to any other, but for the purpose of giving each male double the share of each female with it; (3) all males within a particular article, or even within a particular degree of propinquity do not necessarily take equal shares. ('98) 22 Bom 909 (914, 916).

SECTION 57 — SYNOPSIS

1. Scope and applicability.
2. "Hindu"
3. Bequest by Hindu to unborn person.
4. "Buddhist."

1. Scope and applicability. — [1] An unattested will by a Hindu lady executed in Adyon beyond the local limits of the original civil jurisdiction of Madras High Court is valid (Vol 15) 1928 Mad. 1279 (1281) : 52 Mad 160 ✠ (Vol 14) 1927 All 497 (498) : 50 All 314 (DB). (Hindu will executed in 1923 not signed by testator or attested — *Held* valid and as it was the last will it was sufficient to revoke prior registered will.)

[2] When a will by a Hindu does not fall within cls (a) and (b) of S. 57, probate of will need not be taken out before executor or legatee files suit by reason of the provisions of S 213. (Vol 24) 1937 Sind 318 (320) (DB)✠ (Vol 17) 1930 Mad 956 (959, 961) (DB). (Probate need not be taken where disposition does not relate to immovable property in Madras—Will giving some property to *S* and residue to *V* — Subsequent letter from testator to *V* from outside Madras giving Rs. 15,000 to his wife—(Per *Ramesam J.*; *Cornish J.* contra.) Letter

(b) to all such wills and codicils made outside those territories and limits so far as relates to immoveable property situate within those territories or limits; [b][and

(c) to all wills and codicils made by any Hindu, Buddhist, Sikh or Jaina on or after the 1st day of January, 1927, to which those provisions are not applied by clauses *(a)* and *(b)* :]

Provided that marriage shall not revoke any such will or codicil.

[a] The original S. 57 was *re-numbered* as sub-section *(1)* of that section, and a new sub-section *(2) added*, by the Indian Succession (Amendment) Act, 1926 (37 [XXXVII] of 1926), S 2; but that sub section was *omitted*, and sub-section *(1)* was *re-numbered* as S. 57, by the Indian Succession (Amendment) Act, 1929 (XVIII [18] of 1929), S. 3. [b] *Inserted* by Act 18 of 1929, S. 3

[Hindu Wills Act, 1870—Ss. 2, 3]

General application of Part.

58. *(1)* The provisions of this Part shall not apply to testamentary succession to the property of any Muhammadan nor, save as provided by section 57, to testamentary succession to the property of any Hindu, Buddhist, Sikh or Jaina; nor shall they apply to any will made before the first day of January, 1866.

(2) Save as provided in sub-section *(1)* or by any other law for the time being in force, the provisions of this Part shall constitute the law of British India applicable to all cases of testamentary succession.

[1865—Ss. 2, 331.]

CHAPTER II.

OF WILLS AND CODICILS.

Person capable of making wills.

59. Every person of sound mind not being a minor may dispose of his property by will.

Explanation 1. — A married woman may dispose by will of any property which she could alienate by her own act during her life.

Explanation 2. — Persons who are deaf or dumb or blind are not thereby incapacitated for making a will if they are able to know what they do by it.

Explanation 3. — A person who is ordinarily insane may make a will during an interval in which he is of sound mind.

Section 57 — Note 1 *(contd.)*

held to be independent will and hence no probate was required.)

[*See also* (Vol 13) 1926 Mad 434 (447) : 49 Mad 261 (FB). (Hindu Wills Act is not applicable to the Hindu will executed in the moffusil — The estate vests in the executor accepting office from the date of testator's death —No probate is necessary)]

[3] Will alleged to be executed by Hindu after 1st January 1927 comes under S. 57 (c). (Vol 25) 1938 All 640 (641).

[4] No oral will can legally be made by a Hindu after 1st January 1927 in view of Ss. 57 (c) and 63. ('40) 42 Pun L R 326 (328) (DB).

2. "Hindu." — [1] A person does not become a Hindu merely because he professes theoretical allegiance to Hindu faith. Long residence in India, abdication of one's own religion, undergoing conversion, assuming a Hindu name, marriage according to Hindu rites and adoption of Hindu mode of life will show that a non-Hindu has become a Hindu. (Vol 15) 1928 Mad 1279 (1283) : 52 Mad 160.

[2] Brahmo does not cease to be Hindu and therefore grant to widow of Brahmo, must be under Probate and Administration Act. (Vol 10) 1923 Cal 265 (267) : 49 Cal 1069.

3 Bequest by Hindu to unborn person. — [1] Schedule 3 does not provide that a Hindu cannot create an interest in property which could not be created before September 1870, but that the enumerated sections in the schedules do not authorise such creation. Neither Sch. 3 nor any other part of the Succession Act repeals the provision of the Hindu Disposition of Property Act and hence the power to create int rest in property in favour of an unborn person given by that Act is not taken away by the Succession Act. (Vol 33) 1946 Cal 396 (400) (DB).

[*See also* (Vol 21) 1934 Mad 705 (708, 709) : 58 Mad 15 (DB). (The combined effect of Ss. 2 and 3, Hindu Wills Act is that a disposition permitted by the Succession Act may be invalidated but a disposition invalid under the Succession Act cannot be validated by any rule of Hindu law.)]

[2] *See also* Note under S. 113.

4. 'Buddhist"—[1] There is no definition of the term Buddhist in the Act and the word is wide enough to cover Chinese Buddhists as well as Burmese Buddhists. But before it can be claimed that any person is excluded from the provisions of part 6 as being a Buddhist it must clearly be proved that he was professing Buddhism during his life-time. (Vol 17) 1930 Rang. 42 (47) : 7 Rang 720 (DB).

SECTION 59 — SYNOPSIS

1. "Of sound mind."
2. 'Not being a minor."
3. "His property."
4. Explanation 3.
5. Explanation 4.
6. Will by sick person.

1. 'Of sound mind."—[1] "Sound and disposing mind" is a mind of natural capacity not unduly impaired by old age, enfeabled by illness or tainted by morbid influence. (1865) L R 1 P and D 398 (400), *Smith* v. *Tebbitt*.

[2] Mere ability to sign does not imply full mental powers for a valid disposition It is not sufficient that the man is able to answer easy questions but he must have a disposing mind so as to dispose of his property with understanding and reason This does not mean that he should make what other people may think as sensi-

Explanation 4. – No person can make a will while he is in such a state of mind, whether arising from intoxication or from illness or from any other cause, that he does not know what he is doing.

Illustrations.

(i) *A* can perceive what is going on in his immediate neighbourhood, and can answer familiar questions, but has not a competent understanding as to the nature of his property, or the persons who are of kindred to him, or in whose favour it would be proper that he should make his will. *A* cannot make a valid will.

(ii) *A* executes an instrument purporting to be his will, but he does not understand the nature of the instrument, nor the effect of its provisions. This instrument is not a valid will.

(iii) *A*, being very feeble and debilitated, but capable of exercising a judgment as to the proper mode of disposing of his property, makes a will. This is a valid will.

[1865 S. 46.]

Section 59 Note 1 *(contd.)*

ble, reasonable or kind will. He must be able to understand his position and appreciate his property to form a judgment with respect to parties whom he chose to benefit by it after death, nor does this mean that the testator must possess these qualities in the highest degree possible or possess them in such a large measure as he may formerly have done though the mind may have been in some degree debilitated and memory may have become enfeebled. It is sufficient that there is enough left to enable the testator clearly to discern and discreetly to judge all those things and all those circumstances which enter into a rational just and fair treatment. (Vol 8) 1921 Cal 677 (681, 682) : 47 Cal 1043 (DB).

[See however (1873) L R 3 P and D 64 (72, 74), *Boughton* v. *Knight*. (The highest degree of mental soundness is required in order to constitute the capacity to make a testamentary disposition. A testator should understand the nature of the act, its effects and the extent of the property of which he is disposing. The testator should be able to comprehend and appreciate the claims to which he ought to give effect and in order to be able to do this no insane delusion should influence his will in disposing of his property.)]

[3] A man of weak intellect and incapable of managing his own affairs is not necessarily a person of unsound mind. ('06) 4 Cal L Jour 115 (117) (DB).

[4] Test of person being of unsound mind in legal sense is existence of delusion or belief in facts which ordinary person would not credit or belief which one cannot understand how any person in his senses could hold. Mere eccentricity or caprice, however, is not enough to constitute mental unsoundness unless it is associated with some sort of delusion. (Vol 26) 1939 Cal 379 (383) (DB).

[5] It is not at all correct to say that because an operation of the character of injection and transfusion of blood had to be done, there must have been something wrong with the mental capacity of the testator. (Vol 25) 1938 Cal 290 (294) (DB).

2. "Not being a minor."—[1] A will executed by a person who is not a major at the time of the execution thereof is ineffective. (Vol 28) 1941 Mad. 179 (180) (DB).

[2] No Hindu can make a will who is less than eighteen years of age. ('12) 36 Bom. 622 (624) (DB).

[3] Married woman governed by Indian Succession Act of whose person and property guardian has been appointed by the Court cannot dispose of her property by will before she attains age of 21 years. (Vol 11) 1924 Cal 644 (645).

[4] Where the ground of defence is the minority of the testator the onus is on the party propounding the will to prove that the alleged testator was of full age. (Vol 2) 1915 Mad 815 (816): 38 Mad 166 (DB). *(Obiter.)*

3. "His property."—[1] Assent by legatee would not clothe testator with authority to deal with property over which he had no disposing power. (Vol 16) 1929 Sind 19 (22) (DB).

[2] A testator cannot alter the course of law by the use of mere negative words excluding certain relations, unaccompanied by any effective disposition of his property. ('80) 4 Bom 537 (543) (DB).

4. Explanation 3. – The question of insanity is properly a mixed one – partly within the range of common observation and in so far fit to be considered by a jury; and partly within the range of special experience and so far the proper subject for medical inquiry. It is the office of the Court to inform itself, as far as opportunity permits of the general results of the medical observation and to approach the subject on two opposite sides thus indicated—searching for a fit conclusion by alternately presenting the parallel of sanity and insanity to the sayings and doings of the testator. (1865) L R 1 P and D 398 (405), *Smith* v. *Tebbitt*.

[2] A testamentary disposition cannot receive effect if it be shown that its provisions were prompted by an insane delusion or delusions existing in the mind of the testator. (1899) 1899 App Cas 1 (7), *Hope* v. *Campbell*.

[See however (1880) 14 Ch D 674 (680), *Jenkins* v. *Morris*. (The mere existence of a delusion in the mind of a person is not sufficient to deprive him of testamentary capacity even where the delusion is connected with the disposition.)]

[3] Partial unsoundness, not affecting the general faculties, and not operating on the mind of a testator in regard to a testamentary disposition, is not sufficient to deprive a person of the power of disposing of his property. (1870) 5 Q B 549 (556, 571), *Banks* v. *Good Fellow*.

[4] Will—Mental weakness to constitute testamentary incapacity must be *qua* will in question. (Vol 20) 1933 Cal 574 (575) (DB).

[5] Generally speaking, the law presumes sanity in the testator and where a will is not challenged, it is enough for the purpose of establishing the will that it was duly executed by the testator, that he was not a minor, and was otherwise capable of making a will under the law by which he was governed. If the testator's sanity is disputed, the burden of proof lies upon the person propounding the will to prove affirmatively that the testator was of sound mind at the date of its execution and that he knew, understood and approved of its contents. If in sanity of the testator before the date of will is once established burden of proof lies on person propounding the will to show that it was made after testator's recovery or during lucid interval. If it is not established, or habitual insanity does not exist; burden of proving actual insanity at the date of execution of the will shifts to person impeaching the will. (Vol 19) 1932 Bom 588 (590).

[*See also* (1865) L R 1 P and D 398 (434), *Smith* v *Tabbitt*. (Case of monomania.)]

[6] Where the general condition of a testator's mind is deranged, his capacity fluctuating and the intervals

Testamentary guardian.

60. A father, whatever his age may be, may by will appoint a guardian or guardians for his child during minority.

[1865—S. 47.]

Will obtained by fraud, coercion, or importunity.

61. A will or any part of a will, the making of which has been caused by fraud or coercion, or by such importunity as takes away the free agency of the testator, is void.

Section 59 —Note 4 *(contd.)*

of reason very short, it is incumbent upon the party propounding the instrument to show by more than ordinary proof, that the precise time when the act was done, the testator was in the possession and exercise of his mental faculties. (1840) 13 E R 59 (62) : 3 Moo P C 136, *Frederick Dufaur* v. *William Croft*.

5. Explanation 4 —[1] It is the duty of the propounder of a will to show that the testator had the testamentary capacity. To discharge that burden it must be shown the testator had full understanding and reason and judgment in respect of his property and the parties whom he decided to benefit. Mere ability to sign does not necessarily imply the possession of full mental power requisite for a valid disposition of property, nor is it sufficient to show that the testator was conscious when he executed the instrument. (Vol 2) 1915 Cal 225 (228, 230) (DB).

[2] Law presumes sanity in testator and where a will is not challenged it is enough to establish that the will was duly executed by testator, that he was not a minor that he was capable of making a will under the law by which he was governed. (Vol 19) 1932 Bom 588 (590).

[3] In order that a will may be found good, it is sufficient if, when will was read out to him and explained to him or also when he read it himself he was capable of understanding that his instructions in main had been carried out. (Vol 19) 1932 Bom 588 (590).

[4] In case of will, if Court considers that 'due execution' has been proved, that in itself will amount to finding that testator executed the will with full knowledge of claims of his relations upon his bounty, the state of his properties and of every material circumstance. (Vol 20) 1933 Cal 769 (770) (DB).

[5] Where mental capacity of testator is challenged by evidence, Court must be satisfied before granting probate that testator was of sound disposing mind and did know and approve of contents of the will. (Vol 20) 1933 Cal 449 (452) (DB) ✠ (Vol 2) 1915 Cal 393 (396) (DB) ✠ ('99) 22 Mad 345 (346) (DB).

[*See also* (1865) L R 1 P & D 398 (438), *Smith* v. *Tebbitt*. (The Court of jury must be able, affirmatively, on review of the whole evidence, to declare itself satisfied that the testator was of sound mind, memory and understanding at the time of its execution.)]

[6] A Court will not reject a will merely because its terms appear extraordinary, against clear evidence of due execution by a competent testator. But where the terms are unusual and the evidence of testamentary capacity doubtful, the vigilance of the Court will be aroused and, before pronouncing for the will the Court will require to be satisfied beyond all reasonable doubt that the testator was fully cognizant of its contents and in a condition to exercise and did exercise thought, judgment and reflection respecting the act he was doing. (Vol 2) 1915 Cal 225 (230) (DB).

6. Will by sick person. — [1] Wills by sick and dying—Degree of understanding which law requires is such as may reasonably be expected from persons in that condition. He must be able to exercise competent understanding as to general nature of the property, as to state of his family, and as to general condition and claims of objects of his bounty, as to nature of instrument which he executes, and as to general nature and general objects and provisions which it contains; if he can do that though he may be very feeble and debilitated in understanding and be at point of death, it is enough. (Vol 25) 1938 Rang 322 (323) (DB).

[2] Proof of testamentary incapacity — There must be clear evidence that the illness of the testator so affected his mental faculty as to make them unequal to the task of disposing of his property. ('11) 38 Cal 355 (367) : 38 Ind App 13 (P C).

[3] The fact that the testatrix was unwell when she executed the will does not prove that she had no testamentary capacity. (Vol 32) 1945 P C 174 (175) : I L R (1945) Kar P C 351 (PC).

[4] Where a will was executed by a man about two hours before his death, when his condition was critical and when he was restless with pain and there was no information whatsoever either as to instructions, if any, given by him or the time when and the person to whom the directions were given and there was no evidence to show that the will as prepared was before execution read over to and approved by him : *Held* that the propounders had failed to establish that the testator had sound and disposing mind when he affixed his signature to the will. (Vol 2) 1915 Cal 225 (230) (DB).

[5] The testator was in a state of high fever, and of extreme and increasing weakness, and after dictating one clause fell back exhausted and did not speak again till after the signature — His wife dictated the rest and the fair copy was brought to him to sign after an hour or so when he held out his hand for pen but was not able to write. He was made to sit up and his hand was guided. His holding out his hand for pen was the only act which made witness to think that he understood what he was doing and had not spoken for the whole day except dictating the clause — It was held that these circumstances clearly indicated that the testator was not capable of testamentary act and the alleged codicil was not proved. (1898) 22 Bom. 17 (36, 37) ; 24 Ind App 148 (PC).

[6] Where the testator was being looked after by his sister and her husband and he had a desire to benefit them and in executing the will he was not ignoring the legitimate claim of any one else and there was evidence to show that although he was suffering from tuberculosis, he went to a petition writer and to the Sub-Registrar's office and executed the will : *Held* under circumstances, he was having disposing mind required for will and that it was not brought about by any undue influence and was duly executed and hence valid. (Vol 21) 1934 Lah 628 (629) (DB).

Section 60 — Note 1

[1] This section is not made applicable to Hindus— It therefore Hindu father has power to appoint a testamentary guardian it is not by virtue of any statute but under Hindu law. ('07) 31 Bom 413 (417) (DB).

[*See also* ('98) 21 Mad 401 (402) (DB). (A Hindu mother has no authority to appoint by will, a guardian for her son.)]

[2] A testator cannot appoint a testamentary guardian of his illegitimate children. (1871) 13 Eq 36 (41), *Sleeman* v. *Wilson*.

SECTION 61 — SYNOPSIS

1. "Any part of the will."
2. Fraud—Averment of.

Illustrations.

(i) *A* falsely and knowingly represents to the testator that the testator's only child is dead, or that he has done some undutiful act and thereby induces the testator to make a will in his, *A's*, favour; such will has been obtained by fraud, and is invalid.

(ii) *A*, by fraud and deception, prevails upon the testator to bequeath a legacy to him. The bequest is void.

(iii) *A*, being a prisoner by lawful authority, makes his will. The will is not invalid by reason of the imprisonment.

(iv) *A* threatens to shoot *B*, or to burn his house or to cause him to be arrested on a criminal charge, unless he makes a bequest in favour of *C*. *B*, in consequence, makes a bequest in favour of *C*. The bequest is void, the making of it having been caused by coercion.

(v) *A*, being of sufficient intellect, if undisturbed by the influence of others, to make a will yet being so much under the control of *B* that he is not a free agent, makes a will, dictated by *B*. It appears that he would not have executed the will but for fear of *B*. The will is invalid.

(vi) *A*, being in so feeble a state of health as to be unable to resist importunity, is pressed by *B* to make a will of a certain purport and does so merely to purchase peace and in submission to *B*. The will is invalid.

(vii) A being in such a state of health as to be capable of exercising his own judgment and volition, *B* uses urgent intercession and persuasion with him to induce him to make a will of a certain purport. *A*, in consequence of the intercession and persuasion, but in the free exercise of his judgment and volition, makes his will in the manner recommended by *B*. The will is not rendered invalid by the intercession and persuasion of *B*.

(viii) *A*, with a view to obtaining a legacy from *B*, pays him attention and flatters him and thereby produces in him a capricious partiality to *A*. *B*, in consequence of such attention and flattery, makes his will, by which he leaves a legacy to *A*. The bequest is not rendered invalid by the attention and flattery of *A*.

[1865—S. 48.]

SECTION 61 *(contd.)*

3. Coercion.

4. Undue influence.

5. Persons in fiduciary position.

6. Husband and wife.

7. Pardanashin ladies.

8. Burden of proof.

9. Propounder taking benefit under the will.

1. 'Any part of the will." — [1] Where a provision is found in a will under which the writer gets a substantial advantage and the evidence is not sufficient to remove the suspicion attaching to the provision, and to satisfy the Court that the testator knew and approved of the said provision, probate should not be granted of that part but should not be refused in respect of the remainder of the will (Vol 16) 1929 P C 45 (50) : 8 Pat 382 : 56 Ind App 62 (P C).

2. Fraud — Averment of. — [1] In pleadings general allegations, however strong may be the words in which they are stated, are insufficient even to amount to an averment of fraud of which any Court ought to take notice. (Vol 2) 1915 P C 7 (13) : 42 Ind App 135 : 39 Bom 441 (PC).

3 Coercion.—[1] It is not correct to contend that nothing can be "coercion" under Indian law unless it satisfies the definition of coercion in S. 15 of the Indian Contract Act. Outside S. 15, Contract Act, "coercion" must be taken in its general and ordinary sense as an English word and definition of the word in S. 15 does not control the interpretation of "coercion" when used in other surroundings. ('13) 40 Cal 598 (611-613) : 40 Ind App 56 (PC).

[2] Threat to commit suicide to obtain the execution of a document amounts to "coercion" within the meaning of S. 15, Contract Act. (Vol 5) 1918 Mad 414 (416): 41 Mad 33 (SB). (Case under S. 15, Contract Act.)

4. Undue influence. — [1] Undue influence, in order to render a will void, must be an influence which can justly be described by a person looking at the matter judicially to have caused the execution of a paper pretending to express a testator's mind, but which really does not express his mind but something else which he did not really mean. (1920) 1920 App Cas 349 (357), *Craig* v. *Lamoureux*.

[2] Undue influence cannot be presumed from foolish and heartless nature of testator's dispositions. (Vol 11) 1924 P C 28 (33) (PC).

[3] Mere disinheriting one heir and preference of other, who was actively concerned with the management of the estate of the deceased testator is not enough to establish a case of undue influence as regards the execution of a will (Vol 17) 1930 Rang 42 (44): 7 Rang 720 (DB).

[4] Where the evidence showed that there was motive and opportunity for the exercise of undue influence by persons relying upon a will and that some of them in fact benefited by the will to the exclusion of other relatives of equal or nearer degree it was held that circumstances of that character would certainly lead the Court to scrutinize with special care the evidence of those who propounded the will. but in order to set it aside there must be clear evidence that the undue influence was in fact exercised. ('11) 38 Cal 355 (367): 38 Ind App 13 (PC).

[5] Will in favour of person in attendance on testator —He must show that will originated in testator's own desire in order to remove suspicion that he himself had suggested and prepared it. ('10) 5 Low Bur Rul 141 (144) (DB).

[6] Per *Thomas J.* — Person appearing before Judge as accused—Such person executing will in his presence —Will cannot be attacked on ground of undue influence. (Vol 22) 1935 All 425 (427) (SB).

5 Persons in fiduciary position.—[1] *A* and her sister *B* who had been brought up in the house of their uncle *C* and were under his influence executed a sale-deed in his favour for an inadequate consideration. After the death of *B*, *A* sued to recover the property conveyed by the sale deed — *Held* that *C* stood in a fiduciary position towards *A* and *B* and therefore the sale-deed was null and void as regards the share of both *A* and *B*. (Vol 5) 1918 Bom 93 (94) : 43 Bom 173 (DB). (Case under S. 88, Trusts Act.)

6. Husband and wife. — [1] General evidence brought to show wife's dominion over husband, loose and vague — Husband nearly blind and in failing health — Wife possessing great force of character and will and apt to show temper when thwarted — *Held*, that if there is not evidence to show coercion in the special matter of codicils, general assertions of the wife's commanding character and the husband's weak-

Section 61—Note 6 *(contd.)*

ness and of wrangling about expenses went for little. ('98) 22 Bom 17 (28) : 24 Ind App 148 (PC).

[2] Where a person who has been enfeebled by a painful illness and had been suffering great pain for some months before the will was executed is led into the belief that his wife was neglecting him and that she and her father are only after his property and where the testator's father and brother in order to mislead the testator into the belief that his wife is neglecting him did not write to her about his health and send her any moneys to come down to him, though the testator asked them to do so, and the testator thereby conceived an unreasonable dislike of his wife brought about by the machinations of those who were near him — *Held*, that a will leaving a meagre maintenance to his wife, whom he loved very affectionately all through his life, is not valid. (Vol 14) 1927 Mad 295 (297, 298).

[3] In transaction between a Mahomedan husband and his purdanashin wife the burden of proving the reality and the *bona fide* of the transactions is upon the husband. ('67) 11 Moo Ind App 551 (584, 585) (PC).

[4] Where a wife was pressed by her husband to sign and did sign a document which was very different from what she supposed it to be and a document of the true nature of which she had no conception the document is open to the objection of having been obtained by pressure and concealment of material circumstances and is not binding on the wife. ('02) 6 Cal W N 809 (815). (Deed giving security.)

7. Pardanashin ladies. — [1] There is no absolute rule of law that a gift by a pardanashin lady cannot stand unless it is proved that the lady had independent advice. The possession or absence of independent advice is a fact to be taken into consideration and weighed on a review of the circumstances relevant to the issue whether the grantor thoroughly comprehended and deliberately and of her own free will carried out, the transaction. If the conclusion is reached that the obtaining of independent advice would not really have made any difference in the result, then the deed ought to stand. ('14) 36 All 81 (91, 92) : 41 Ind App 23 (PC).

[2] In the case of deeds, and powers executed by pardanashin ladies, it is requisite that those who rely upon them should satisfy the Court that they have been explained to and understood by those who executed them. ('12) 34 All 455 (462) : 39 Ind App 156 (P C). (Deed executed by a pardanashin illeterate woman who was separated from her husband — *Held*, that it was not proved that she understood the deed intelligently.)

8. Burden of proof. — [1] There is no inflexible rule that when a testator of a competent mind has had his will read over to him and has thereupon executed it all further inquiry is shut out. No doubt these circumstances afford very grave and strong presumption that the will has been duly and properly executed by the testator; still circumstances may exist which may require that something further shall be done in the matter. In cases where the ingriedient of fraud enters, it is impossible to lay down any clear and unyielding rule like this. (1875) L R 7 H L 448 (469), *Fulton* v. *Andrew*.

[2] Where a will is challenged it is for the propounder to show not only that it was executed but that it was executed by the testator intelligently and that he had a sound disposing mind and after they have put forward their evidence it is for the objectors to break that evidence down or to meet it with other evidence. (Vol 16) 1929 Oudh 178 (185) (DB).

[3] The burden of proof that a will is genuine lies upon the person who sets up the will and not upon the person who is prepared to impeach it. ('01) 23 All 405 (413) : 28 Ind App 186 (PC).

[4] The standard of proof to establish a will is that of a prudent man and not an absolute or conclusive one. The presumption against misconduct is not without its due weight as a circumstance of improbability, though the standard of proof to the exclusion of all reasonable doubt required in a criminal case may not be applicable Though it is desirable that all the attesting witnesses capable of being called should be examined to remove all suspicion of fraud, it is not absolutely necessary that where there are many attesting witnesses, the absence of every one not called should be specifically explained. (Vol 9) 1922 Cal 260 (266) : 49 Cal 132 (DB).

9. Propounder taking benefit under the will.— [1] Where the propounder of a will is the principal beneficiary under it and has taken a leading part in giving instructions for the execution of the will and procuring its registration and execution, the circumstances are such as would excite the suspicion of any Probate Court and require it to examine the evidence in support of the will with great vigilance and scrutiny. The propounder is not entitled to probate unless the evidence removes such suspicion and clearly proves that the testator approved of the will. (Vol 17) 1930 P C 24 (25) : 8 Rang 179 : 57 Ind App 96 (PC) ✠ (Vol 17) 1930 Bom 539 (541) (DB) ✠ ('05) 29 Bom 530 (559, 560) : 32 Ind App 142 (PC) ✠ (Vol 19) 1932 Cal 574 (576) (DB).

[2] On proof of the signature of the deceased or his acknowledgment that he has signed the will he will be presumed to have known the provisions of the instrument he has signed. This presumption, however, is liable to be rebutted by proof of suspicious circumstances, such as, if the testator from want of education or physical infirmity was unable to read or unable to understand the provisions of the document or his capacity for executing the instrument is doubtful. Then the propounder of the will is bound to remove those suspicious circumstances. (Vol 16) 1929 Cal 484 (489) : 56 Cal 390 (DB).

[3] For the objector it is not enough to show that there was motive and opportunity for the exercise of undue influence. It must be shown that the evidence discloses circumstances which cause the Court to suspect that this was not the last true will of the testator and that, that evidence has not been displaced by the person upon whom rests the burden of displacing it. (Vol 17) 1930 Bom 539 (541) (DB).

[4] When the writer of a will has taken a very active part in the preparation of the will under which he gets a substantial advantage, the propounders of the will must prove that the testator was aware of the contents of the will. It is not correct to say that benefit must be a pecuniary benefit, a legacy, for instance, more or less of a substantial nature. (Vol 16) 1929 P C 45 (46, 47) : 56 Ind App 62 : 8 Pat 382 (PC) ✠ (Vol 5) 1918 P C 306 (307) (PC) ✠ (1903) 1 Ch 27 (50, 51, 52), *Wright* v. *Carter*. (Case of gift by a client to a solicitor —Presumption of undue influence — *Onus probandi* is on solicitor.)

Will may be revoked or altered.
[1865 S. 49.]

62. A will is liable to be revoked or altered by the maker of it at any time when he is competent to dispose of his property by will.

CHAPTER III.

OF THE EXECUTION OF UNPRIVILEGED WILLS.

Execution of unprivileged wills.

63. Every testator, not being a soldier employed in an expedition or engaged in actual warfare, [a][or an airman so employed or engaged,] or a mariner at sea, shall execute his will according to the following rules:—

(a) The testator shall sign or shall affix his mark to the will, or it shall be signed by some other person in his presence and by his direction.

(b) The signature or mark of the testator, or the signature of the person signing for him, shall be so placed that it shall appear that it was intended thereby to give effect to the writing as a will.

(c) The will shall be attested by two or more witnesses, each of whom has seen the testator sign or affix his mark to the will or has seen some other person sign the will, in the presence and by the direction of the testator, or has received from the testator a personal acknowledgment of his signature or mark, or of the signature of such other person; and each of the witnesses shall sign the will in the presence of the testator, but it shall not be necessary that more than one witness be present at the same time, and no particular form of attestation shall be necessary

[a] *Inserted* by the Repealing and Amending Act, 1927 (X [10] of 1927), S. 2 and Sch. 1.
[1865—S. 50.]

SECTION 62 — SYNOPSIS

1. Revocation of will.
2. Destruction or loss of will—Effect.
3. Suit for cancellation of will.

1. Revocation of will. — [1] The will of a living man does not come into operation when it has been executed but only upon his death. So long as a testator is living he may at any moment cancel his will and make a totally different disposition of his property. This power he possesses upto the hour of his death provided he be competent then to execute a valid will. (1905) 27 All 14 (15) (DB).

[*See also* ('10) 33 Mad 304 (307) (DB). (One of the invariable tests in coming to a conclusion as to the testamentary character of a paper is whether the paper is revocable.)]

[2] If an instrument is on the face of it of a testamentary character, the mere circumstance that the testator calls it irrevocable does not alter its quantity. A testator who makes his testament and last will irrevocable may yet revoke it. ('09) 10 Cal L Jour 644 (645) (DB).

[3] Mere expression of intention to revoke a will at at some future date cannot amount to revocation of will under any system of law. (Vol 25) 1938 Mad 616 (617).

[4] Hindu will though not signed by testator or attested will, if proved to be the last will, operate to revoke the previous registered will. (Vol 14) 1927 All 497 (498) : 50 All 314 (DB).

2. Destruction or loss of will — Effect. — [1] There is a presumption that if a will traced to the possession of the deceased and last seen there is not forthcoming on his death, it is presumed to have been destroyed by himself, *animo revocandi*. In such a case, the paper is revoked. This presumption will have an effect unless there is sufficient evidence to rebut it. The presumption will be more or less strong according to the character of the custody. (Vol 33) 1946 Pat 24 (26): 24 Pat. 395 (DB). (Nature of evidence and inferences to be drawn in the case where both the parties fail to prove their respective story regarding destruction of will indicated.) ✠ (Vol 27) 1940 All 175 (177) (DB).

[2] Loss of will does not operate as a revocation. (Vol 33) 1946 Pat 24 (27) : 24 Pat 395 (DB).

3. Suit for cancellation of will.—[1] No suit for the cancellation of a will can lie so long as the testator is alive as he can, at any moment during his lifetime, cancel his will and make a totally different disposition of his property. ('05) 27 All 14 (15) (DB).

[See however ('91) 15 Bom 697 (701) (DB). (Will of a widow operating to defeat an award was declared invalid in so far as it operated to defeat the award.)]

SECTION 63 — SYNOPSIS

1. Scope and applicability.
2. "Sign or affix his mark".
3. Will comprised of several sheets — Signature on.
4. "Shall affix his mark"
5. "Signed by some other person."
6. Proper attestation—What is.
7. Scribe as attesting witness.
8. Endorsement by Registrar.
9. "Has seen the testator sign."
10. Personal acknowledgment of his signature.
11. Proof of execution and attestation.

1. Scope and applicability.—[1] This section merely lays down formalities required to be observed in execution and attestation of a will and does not concern itself with question of proof. (Vol 5) 1918 Cal 78 (79) (DB).

[2] Unprivileged will can only be made in accordance with the provisions of S. 63. (Vol 27) 1940 Bom 400 (402).

[3] Execution under S. 50 includes the testator's signature and the attestation by witnesses and so long as there is no attestation the will is not executed. (Vol 12) 1925 Oudh 337 (344) : 28 Oudh Cas 8 (DB). (Testator admitting execution and signing in witnesses' presence and witnesses signing is sufficient compliance with the section.) ✠ (Vol 2) 1915 Oudh 187 (188) (DB.)

[4] Will prepared under direction of testator — Attestors attest it and testator affixes his thumb mark in presence of attestators—Execution is complete. (Vol 8) 1921 Bom 156 (157) : 45 Bom 989 (DB).

Section 63—Note 1 *(contd.)*

[5] Will executed without attesting witnesses and deposited in Registrar's office but taken out at Registrar's office ten years afterwards in presence of witnesses who signed same in proper places, sufficiently satisfies provisions of S. 50 and must be taken as having been executed and registered on same day. (Vol 1) 1914 Oudh 52 (60) (DB).

[6] This section applies to Hindu wills, hence no oral will could legally be made by a Hindu after January 1927. (1940) 42 Pun L R 326 (328) (DB) ✠ (Vol 12) 1925 Mad 861 (868).

[See however (Vol 15) 1928 Mad 1279 (1281) : 52 Mad 160. (Unattested will executed by Hindu outside Madras in 1922 held valid.)]

[7] Act applies even to wills made by Talukdars whose names are found in lists made for approval but not yet approved. (Vol 18) 1931 P C 24 (26) (PC).

2. 'Sign or affix his mark' — [1] The Act enables a testator to execute a will either by signing it or by making his mark and the fact that a person who can sign his name makes a mark would not affect the validity of the will. But in such a case the evidence as regards the execution should be scrutinised with great care. (Vol 13) 1926 Bom 355 (355, 356) (DB).

[2] Where a person who was unable to read and write was in the habit of using a name stamp and the stamp used to be kept by a servant and under his directions, the servant used to attach it to any document, the execution of will by the name stamp under the master's orders was proper and came strictly within the meaning of the words used in S. 50 (1898) 25 Cal 911 (917) (DB).

3. Will comprised of several sheets—Signature on.—[1] Where will is wholly in handwriting of deceased and bears his signature on various pages thereof and alongside his signature on top of left-hand corner of first page are signatures of four witnesses and on each of other three pages, signatures of two out of those four persons, signature of testator on first page is operative signature by which he intends to make document effective. Witnesses put their signatures *animo attestandi* and will was properly executed by deceased. (Vol 3) 1916 Cal 630 (632) (DB).

[2] Where each of the several sheets of a will is not signed or initialled but there is one signature at the end made with the intention of authenticating the whole instrument, such a signature is sufficient, though as a precaution against possible substitution each sheet may be initialled by the testator or the witnesses. But this is not essential and it will be presumed that all sheets were put together in the same order at the time of execution as at the testator's death. (1909) 10 Cal L Jour 644 (646) (DB).

4. 'Shall affix his mark'.—[1] Unprivileged will is not duly executed under S. 50 where testator who cannot sign his name simply touches pen and hands it to some one to affix his mark. He should affix mark himself though he is allowed under S. 50 to get will signed for him by substitute. (Vol 4) 1917 Mad 900 (901) : 40 Mad 550 (DB).

[See however (1896) 6 Mad L Jour 209 (210). (There is nothing in law to prevent one person asking another person to make a mark with the pen touched and handed over by the former in token of his having consented to enter into the contract. Execution of muchilika held valid.)]

[2] To constitute a direction it is not necessary that anything should be said. If a testator in making his mark is assisted by some other person and acquiesces and adopts it, it is just the same as if he had made it himself. (Vol 2) 1915 Cal 756 (757) (DB)

5. 'Signed by some other person'. — [1] The words "some other person" mean some person other than any of the attesting witnesses. (1874) 11 Bom H C R 87 (88) ✠ (Vol 4) 1917 Mad 900 (901) : 40 Mad 550 (DB) ✠ (1883) 9 Cal 226 (229) (DB).

[2] When an execution of a will by a person other than the testator in his presence and by his direction takes place, it is sufficient for that other to affix the signature of the testator himself. Section does not require that the other person executing the will under the direction of the testator must sign in his own name with sufficient indication to show that he has executed it under the testator's direction. (Vol 21) 1934 Mad 436 (446, 447) : 57 Mad 979 (DB). (*Per* Krishnan Pandalai and Sundaram Chetty JJ., Pakenham Walsh J. Contra.)

[3] Provided the person who signs in the presence and by the direction of the testator at such a place that it will appear that it was intended thereby to give effect to the writing as a will, the provisions of the section are complied with, and it does not matter whether there are other words written by that person so long as those words do not destroy the effect of the signature. (Vol 8) 1921 Bom 156 (157, 158) : 45 Bom 989 (DB).

6. Proper attestation—What is. — [1] When a comparison of the English Statute with the Indian Statute shows that there is no essential difference regarding what constitutes attestation there is no reason why English decisions should not be relied upon for coming to a conclusion as to what is meant by attestation under the Indian law. (Vol 33) 1946 Cal 168 (175) : I L R (1944) 2 Cal 388.

[2] Attesting is more than merely signing on the will. It means signing a document for a particular purpose, the purpose being to testify to the signature of the executant. If it is shown that a person put his signature on a document not with the intention of attesting or witnessing the signature of the executant but *also intuitu* then such person cannot be deemed to be an attesting witness although he may have seen the executant sign the deed and although he may have signed in the presence of the executant. Therefore, even if a person sees the testator sign and signs the will after seeing the testator sign and in the presence of the testator he would not be an attesting witness unless he puts his signature on the will *animo attestandi*. (Vol 33) 1946 Cal 168 (171, 173) : I L R (1944) 2 Cal 388 ✠ (Vol 23) 1936 Lah 367 (367). (Persons signing will in token of consent can be held to be attesting witnesses if other conditions are satisfied.)

[3] Will must be attested by two or more witnesses each of whom has either seen testa or sign or affix his mark to will or has received personal acknowledgment of his signature or mark from testator. Besides this, it is necessary that each of witnesses should sign will in presence of testator. It is not essential that more than one witness should be present at one and same time. (Vol 32) 1945 Lah. 3 (8, 9) : I L R (1944) Lah 495 (DB) ✠ (1881) 6 Cal 17 (19) (DB). (The two witnesses shall sign their names after the testator shall have signed his name on the paper.) ✠ (Vol 12) 1925 Mad 861 (868). (Witnesses need not attest in each other's presence.) ✠ (Vol 2) 1915 Cal. 756 (757, 758) (DB) (Witnesses to a will need not be present at the same time.)

[4] Where the attesting witnesses affixed their initials at the time of witnessing the execution of the will, it was held, to be a sufficient attestation. (1892) 15 Mad 261 (264) (DB).

[5] Will is validly attested even either of two necessary attesting witnesses has merely affixed his mark to the will. (Vol 23) 1936 All. 576 (578): 58 All 1064 (FB) ✠ (Vol 24) 1937 Bom 389 (391, 392) (DB).

[But see (1885) 11 Cal 429 (432) (DB). (Case before the passing of General Clauses Act, 1897.)]

[6] A will after having been executed but without having been signed by any attesting witnesses was

Incorporation of papers by reference.

64. If a testator, in a will or codicil duly attested, refers to any other document then actually written as expressing any part of his intentions, such document shall be deemed to form a part of the will or codicil in which it is referred to.

[1865—S. 51.]

Section 63 — Note 6 *(contd.)*

deposited in a sealed cover at the office of the Sub-Registrar—About ten years later, the executant went to the Sub Registrar's office, took out the will from the sealed cover and formally presented it for registration as a will and admitted its execution in the presence of attesting witnesses and these witnesses as well as the executant himself signed the document in proper places. *Held* that the above proceedings amounted to an attestation of the will sufficient to satisfy the requirements of S. 50. (Vol 1) 1914 Oudh 52 (60) (DB).

[7] A pleader signed the endorsement of presentation made on the cover as an identifier as required by S. 43, Registration Act. On the cover was a superscription in Oriya, signed by the testator where the testator said 'I do execute this last will.' *Held*, (Per *Kulwant Sahay J.*) that the pleader could be considered as an attesting witness. (Contra Per *Macpherson J.*) — That the pleader was purely a witness to the deposit of the will, was not asked by the testator to attest his will and had no animus attestandi. (Vol 16) 1929 Pat 401 (403): 8 Pat 419 (DB).

[8] A will was executed by two executants who affixed their thumb impressions and against their thumb impressions one *P* signed on behalf of the executants. One K signed the will as a scribe and he stated that he read over the contents to the executants. He did not state under his signature that he attested the signature of the executants. The signature of one L also appeared on the will, but his signature was from the pen of K. and there was a mark below it. There was no evidence that this mark was by L. He was dead before proceedings were started in Court. *Held*, that the will was not properly attested. (Vol 28) 1941 Pat 368 (369) (DB).

7. Scribe as attesting witness. — [1] Scribe may be attesting witness to will but it must be shown that signature of scribe was put down for purpose of attesting document. (Vol 26) 1939 Cal 595 (596) (DB).

8. Endorsement by Registrar. — [1] Where a will bore an endorsement by the Sub-Registrar that the testatrix had admitted execution of the will to him, the endorsement was also signed by the testatrix, marking her mark "by the pen of the scribe" : *Held* that the signature of Sub-Registrar must be taken as an attestation and when so taken, the will must be held to be properly attested. (Vol 9) 1922 Pat 402 (404) : 1 Pat 300 (DB).

[*See also* (1885) 11 Cal 429 (433) (DB).]

[2] The Registrar who endorses on the cover containing the will but does not sign it, and copies the superscription and endorsement and signs the same in his Register No. 5 as required by S. 43, Registration Act, is not an attesting witness. (Vol 16) 1929 Pat 401 (403) : 8 Pat 419 (DB).

9. 'Has seen the testator sign.'—[1] Under the section, it is sufficient if attesting witnesses had clear view of testator at time of signing. They may not see that his fingers moved at the time. (Vol 7) 1920 Oudh 87 (92) (DB) ✠ (Vol 7) 1920 Oudh 96 (102) (DB).

[2] Where at the time of signing will, testator and witness were in different rooms and there was no evidence on the record to show one could have seen other when he was signing declaration : *Held* that presumption cannot be made that testator and witness were in visual presence of each other while signing declarations. (Vol 15) 1928 Oudh 258 (259) : 3 Luck 482 (DB).

10. Personal acknowledgment of his signature. — [1] It is sufficient if testator makes attesting witnesses understand that paper which they attest is his will though they do not see him sign it (1913) 15 Bom L R 209 (216) (DB)✠(1846) 4 Moo P C 419 (442), *Cooper* v. *Bockett* ✠ (1900) 27 Cal 169 (171) (DB).

[2] A "personal acknowledgment" of execution need not necessarily be restricted to an express statement to that effect, but may include words or conduct, or both, on the part of the testator which may be construed unequivocally as such an acknowledgment. (Vol 14) 1927 Mad 1054 (1056) : 50 Mad 927 (FB).

11. Proof of execution and attestation. — [1] What the person propounding the will has got to prove is that the will was duly and validly executed and that must be done by not simply proving that the signature on the will was that of the testator but that the attestations were also properly made as required by cl. (c). It is not necessary to examine both or all the attesting witnesses but it does not follow therefrom that if one attesting witness only proves that the testator had acknowledged his signature to him, it is not necessary that the acknowledgment by the testator before the other attesting witness need be proved. All that it means is that if two witnesses had signed in each other's presence, it is not necessary to examine both of them to prove that they had received the acknowledgment from the testator. But if, the attestations to the testator's signature were not made at the same time, it is necessary to prove that both the persons who put down their attesting signatures on different occasions had done so on the acknowledgment of the testator. In such a case the will cannot be admitted to proof on the evidence of only one of the attesting witnesses. (Vol 33) 1946 Bom 12 (16, 17) (DB).

[2] Where out of three only one attesting witness is available, the other two being dead, the fact that he may turn hostile does not excuse party producing document from duty of calling him. (Vol 19) 1932 Mad 148 (150).

[3] Every presumption will be made in favour of due execution and attestation in the case of a will regular on the face of it and apparently duly executed. (Vol 26) 1939 Oudh 213 (222) (DB).

[4] If a will does not show attestation memo but there is signature of the testator at the foot and the subscription of two witnesses, then in the absence or death of the witnesses the first and the main presumption is that the testator signed in the joint presence of the witnesses and that they subscribed in his presence. If in the presence of witnesses who were all present in the assembly the testator signed the will and the circumstances show that the witnesses must have put their signatures in that assembly, the presumption arises that the will was duly executed. (1909) 10 Cal L Jour 499 (501) (DB).

Section 64 — Note 1

[1] A will was executed but not registered within one month as required by S. 13, Oudh Estates Act. Subsequently an addendum was made to it which referred to the will and explained it. The latter was duly executed, attested and registered. It was held that the former will, by virtue of S. 51, (now S. 64) formed the part of the later deed and was legally enforceable. (1902) 25 All 121 (126) : 30 Ind App 54 (PC).

CHAPTER IV.

OF PRIVILEGED WILLS.

Privileged wills.

65. Any soldier being employed in an expedition or engaged in actual warfare, [a][or an airman so employed or engaged,] or any mariner being at sea, may, if he has completed the age of eighteen years, dispose of his property by a will made in the manner provided in section 66. Such wills are called privileged wills.

Illustrations.

(i) A, a medical officer attached to a regiment, is actually employed in an expedition. He is a soldier actually employed in an expedition, and can make a privileged will.

(ii) A is at sea in a merchant-ship, of which he is the purser. He is a mariner, and, being at sea, can make a privileged will.

(iii) A, a soldier serving in the field against insurgents, is a soldier engaged in actual warfare, and as such can make a privileged will.

(iv) A, a mariner of a ship, in the course of a voyage, is temporarily on shore while she is lying in harbour. He is, for the purposes of this section, a mariner at sea, and can make a privileged will.

(v) A, an admiral who commands a naval force, but who lives on shore, and only occasionally goes on board his ship, is not considered as at sea, and cannot make a privileged will.

(vi) A, a mariner serving on a military expedition, but not being at sea, is considered as a soldier, and can make a privileged will.

[1865—S. 52.]

[a] *Inserted* by the Repealing and Amending Act, 1927 (X [10] of 1927), S. 2 and Sch. I.

Mode of making, and rules for executing, privileged wills.

66. *(1)* Privileged wills may be in writing, or may be made by word of mouth.

(2) The execution of privileged wills shall be governed by the following rules:—

(a) The will may be written wholly by the testator, with his own hand. In such case it need not be signed or attested.

(b) It may be written wholly or in part by another person, and signed by the testator. In such case it need not be attested.

(c) If the instrument purporting to be a will is written wholly or in part by another person and is not signed by the testator, it shall be deemed to be his will, if it is shown that it was written by the testator's directions or that he recognised it as his will.

(d) If it appears on the face of the instrument that the execution of it in the manner intended by the testator was not completed, the instrument shall not, by reason of that circumstance, be invalid, provided that his non-execution of it can be reasonably ascribed to some cause other than the abandonment of the testamentary intentions expressed in the instrument.

(e) If the soldier, [a][airman] or mariner has written instructions for the preparation of his will, but has died before it could be prepared and executed, such instructions shall be considered to constitute his will.

(f) If the soldier, [a][airman] or mariner has, in the presence of two witnesses, given verbal instructions for the preparation of his will, and they have been reduced into writing in his lifetime, but he has died before the instrument could be prepared and executed, such instructions shall be considered to constitute his will, although they may not have been reduced into writing in his presence, nor read over to him.

Section 64 — Note 1 *(contd.)*

[2] Where a deed poll of the same date is referred to in the will but not for the purpose of making or so as to make its contents a part of the will it does not come within this section. (1905) 29 Bom. 530 (564) : 32 Ind App 142 (PC).

[3] The testator of a will made three specific bequests and gave the residue of his estate to his son and appointed executors in the will. This will was written on three sides of a sheet of paper and the signature and attestation were at the bottom of the third side and the fourth side contained a schedule of the testator's landed property and particulars of some personal property, it was signed by him but the signature was unattested. The question before the Court was whether in construing the will and finding the meaning of the testator this schedule could be looked at : *Held* the document could be looked at if two conditions were satisfied, the first being that it must be clearly identified by the description given of it in the will, and secondly it must be shown to have been in existence at the time when the will was executed; as witnesses who were present at and attested the will had no recollection of seeing the schedule and could not give any explanation in regard to it, the document could not be looked into in this case. (1878) 3 App Cas 404 (414), *Singlaton* v. *Tomlinson*.

Section 65 — Note 1

[1] A soldier under training cannot be said to be, in the absence of any other evidence, employed in an expedition, or engaged in actual warfare. A will made by him cannot be said to be a privileged will, within the meaning of S. 65. (Vol 33) 1946 Oudh 73 (74).

(*g*) The soldier [a][airman] or mariner may make a will by word of mouth by declaring his intentions before two witnesses present at the same time.

(*h*) A will made by word of mouth shall be null at the expiration of one month after the testator, being still alive, has ceased to be entitled to make a privileged will.

[1865—S. 53.]

[a] *Inserted* by the Repealing and Amending Act, 1927 (10 [X] of 1927), S. 2 and Sch. I.

CHAPTER V.

OF THE ATTESTATION, REVOCATION, ALTERATION AND REVIVAL OF WILLS.

Effect of gift to attesting witness.

67. A will shall not be deemed to be insufficiently attested by reason of any benefit thereby given either by way of bequest or by way of appointment to any person attesting it, or to his or her wife or husband; but the bequest or appointment shall be void so far as concerns the person so attesting, or the wife or husband of such person, or any person claiming under either of them.

Explanation. — A legatee under a will does not lose his legacy by attesting a codicil which confirms the will.

[1865—S. 54.]

Witness not disqualified by interest or by being executor.

68. No person, by reason of interest in, or of his being an executor of, a will, shall be disqualified as a witness to prove the execution of the will or to prove the validity or invalidity thereof.

[1865—S. 55]

Revocation of will by testator's marriage.

69. Every will shall be revoked by the marriage of the maker, except a will made in exercise of a power of appointment, when the property over which the power of appointment is exercised would not, in default of such appointment, pass to his or her executor or administrator, or to the person entitled in case of intestacy.

Explanation.—Where a man is invested with power to determine the disposition of property of which he is not the owner, he is said to have power to appoint such property.

[1865—S. 56.]

Section 67 — Note 1

[1] The reason for the prohibition contained in this section is not the incompetency to give evidence on the ground of interest which has ceased both in England and India to be a disqualification but it is the suspicion or rather the chance of possible collusion which is favoured by the prospect of benefit. The extension of the prohibition to the wife seems to rest on the unity of interest or temptation between the husband and wife. (1879) 4 Mad 244 (246).

[2] By S. 19, Oudh Estates Act, 1869, this section has been made applicable to all wills and codicils made by any Taluqdar in Oudh. (Vol 12) 1925 Oudh 465 (465, 466) (DB).

[3] Section 15, Wills Act (1 Vic. C. 26) strikes at beneficial legacies but does not affect those where the legatee is a trustee for the purpose of directing their disposition. (1868) 6 Eq 69 (74), *Cresswell* v. *Cresswell*.

[4] A bequest to an attesting witness is void whether or not the attestation of the witness is indispensable to the validity of the will. (1882) 4 Mad 244 (245, 246).

[5] Father making will and calling sons to sign it as token of consent to avoid quarrels among themselves — Sons, so signing, do not sign as attesting witnesses. (Vol 14) 1927 P. C. 248 (249) : 52 Ind. App. 1 : 2 Luck 640 (PC). ((Vol 12) 1925 Oudh 465 Affirmed.)&(Vol 15) 1928 Oudh 67 (76). (The mere fact that the word "gaw ashud" appears above their signature does not make them attesting witnesses.)

[*See also* (Vol 16) 1929 Oudh 494 (507) : 5 Luck 305 (DB). (Acceptance of the will shown by the signature on it does not involve voidness of bequest in favour of the signing legatee.)]

[6] A presumption that the witnesses signed as attesting witnesses created by the position of the signature can be rebutted by parole evidence as to what actually occurred at the time of putting the signatures. (Vol 14) 1927 P C 248 (250) : 52 Ind App 1 : 2 Luck 640 (PC).

[7] Attesting witness taking no benefit under a devise at the time of attesting it but subsequently marrying a devisee under it — Marriage held, did not destroy the validity of the devise. (1881) 6 Q B D 311 (312), *Thorpe* v. *Bestwick*.

[8] Bequest to son of an attesting witness independently and not as person claiming under the attesting witness is not void. Section 67, has no application. (Vol 24) 1937 Lah. 292 (294).

Section 69 — Note 1

[1] The rule of the English law which makes a woman's will null and void on her marriage is part of the matrimonial law and not of the testamentary law. (1900) L R 1900 P D 211 (240), *Loustalan* v. *Loustalan*.

[2] An ante-nuptial will executed by a woman having a foreign domicil where marriage does not revoke a will is not revoked by the acquisition of an English domicil by the woman and her husband subsequent to their marriage. (1904) L R 1904 P D 269 (272, 273), *Jeanne Thedora Groos*.

[3] A will is revoked by a second marriage even in cases where a second marriage is lawful e.g., in the case of Jews. (1876) 1 Cal 148 (149).

[4] Decree absolute for divorce was obtained by *A* and *B* in India on 27-11-1879. *B* went to England and there married with *C* on 3-2-1880—*C* executed a will on 6-2-1880—*C* and *B* again went through a second form of marriage on 2-4-1881 — *Held* that as the marriage

70. No unprivileged will or codicil, nor any part thereof, shall be revoked otherwise than by marriage, or by another will or codicil, or by some writing declaring an intention to revoke the same and executed in the manner in which an unprivileged will is hereinbefore required to be executed, or by the burning, tearing or otherwise destroying the same by the testator or by some person in his presence and by his direction with the intention of revoking the same.

Revocation of unprivileged will or codicil.

Illustrations.

(*i*) A has made an unprivileged will. Afterwards, A makes another unprivileged will which purports to revoke the first. This is a revocation.

(*ii*) A has made an unprivileged will. Afterwards, A, being entitled to make a privileged will, makes a privileged will, which purports to revoke his unprivileged will. This is a revocation.

[1865—S. 57.]

Section 69 — Note 1 (*contd.*)
celebrated on 3-2-1880 was within 6 months of the date of divorce decree and was invalid as it offended the Indian Divorce Act IV [4] of 1869 and the will was revoked by the subsequent marriage celebrated on 2-4-1881. (1890) 15 P D 152 (156), *Warter* v. *Warter*.

[5] Where in a will made by a father there was, first of all a settlement on each daughter of the income of her share during her life, with remainder to her children or the other grandchildren of the testator as the lady should appoint and that for the moment as each share was so settled, the trusts in default of appointment were not declared but there was a clause that 'I have all my residuary estate that may not hereby or hereunder be effectually disposed of'. One of the daughters made a will in respect of her share whereby she created a trust in favour of her son. Subsequently she married again : *Held* that as the property, in default of appointment, could not have passed to the daughter's heirs etc., the will made by the daughter was not revoked by her second marriage. (1921) 2 Ch 1 (5), *Trustee* v. *Pearce*.

[6] Frenchwoman residing in England and making a will—Subsequent to the making of the will she marrying a French who came to England from France to escape from punishment in his country—Both husband and wife carrying a laundry business in England and investing sums in it—The husband returning to France after nearly twenty years: *Held* that the Frenchman acquired an English domicil and the ante-nuptial will was revoked by the French woman's marriage as the English law governed the matrimonial property. (1900) L R (1900) P D 211 (240), *Loustalan* v. *Loustalan*.

SECTION 70 — SYNOPSIS

1. Another will or codicil—Revocation by.
2. "Some writing."
3. Tearing of will—Effect.
4. "Otherwise destroying."
5. Destruction of will by third party.
6. Intention to revoke — Evidence of.
7. Loss of will — Presumption arising from.
8. Burden of proving revocation.

1. Another will or codicil—Revocation by. — [1] Execution of wills on different dates—Subsequent instrument not professing to be a codicil but is adequate to the disposition of entire property. Subsequent instrument can be held to supplant prior instrument. (Vol 5) 1918 Mad 759 (762, 763) (F B).

[2] Will and codicil made — Subsequent revocation of will—Codicil cannot be deemed an integral component of the will and the mere fact of the revocation of the will cannot operate to revoke the codicil. (Vol 9) 1922 Cal 182 (184) (D B) ✠ (1873) 16 Eq 19 (23), *Farrer* v. *St. Catharine's College Cambridge* ✠ (1870) 2 P and D 78 (80), *In the Goods of Savage*.

[3] Where a testator authorised by his will his wife to adopt a son after his death and he made a second will which was silent as to the power : *Held*, that the power to adopt contained in the earlier will was unaffected. (Vol 2) 1915 P C 37 (39) : 43 Ind App 20 : 39 Mad 107 (P C).

[4] An alternative inconsistent subsequent disposition which is not valid or effectual in itself, does not revoke an earlier disposition of the same property. (Vol 2) 1915 P C 37 (39) : 43 Ind App 20 : 39 Mad 107 (P C).

[5] A Hindu testator executed three testamentary documents. By the first he divided his whole property equally among his six sons. By the second document he established a common cutcherry, the managers of which were to look after their estates even after the sons have attained majority and to distribute profits among the sons according to their shares. By a third document the sons were deprived from getting personal possession and restrictions as to alienation were imposed upon them : *Held* that the restrictions contained in the second and third document were invalid and inoperative as they barred the sons' right to claim possession and therefore, the first will remained unaffected by the subsequent wills. (1888) 15 Cal 409 (421) : 15 Ind App 37 (PC).

2. "Some writing"—[1] There can be no clearer evidence of revocation of will than a statement made by the testator himself in a registered document that he has cancelled the will, whether the document itself operates as cancellation or not — Section 70 does not apply to this revocation and the formalities required thereby also have no application. (Vol 33) 1946 Oudh 223 (224) (DB).

3. Tearing of will—Effect.—[1] Writing of word "cancelled" on will with date and signature by testator accompanied with tearing of will partially revokes will completely. (Vol 3) 1916 Cal 400 (403) (SB).

[2] Where a will professed to be executed under seal and was published and attested as a sealed instrument, when the seal was torn off it ceased to be the instrument which the testator professed to execute and to publish to the attesting witnesses and through them to the world. (1858) 3 H & N 341 (506), *Price* v. *Powell*.

4. "Otherwise destroying."—[1] A very strict interpretation has been put upon the words "otherwise destroying." There must be an act of destruction and mere symbolical destruction is not sufficient. The destruction must be destruction with an intention to revoke and by some method *ejusdem generis* with those described in that proviso in the section. Both under the English and Indian Statute Law, cancellation appears to have ceased to be one of the ordinary modes of revocation. (Vol 15) 1928 Bom 194 (197) : 52 Bom 653. (Where the testatrix had drawn two cross-lines on the first page of the will and wrote words. "This will is cancelled," but otherwise the will was intact *Held*, that the will could not be held to have been revoked)

71. No obliteration, interlineation or other alteration made in any unprivileged will after the execution thereof shall have any effect, except so far as the words or meaning of the will have been thereby rendered illegible or undiscernible, unless such alteration has been executed in like manner as hereinbefore is required for the execution of the will :

Effect of obliteration, interlineation or alteration in unprivileged will.

Provided that the will, as so altered, shall be deemed to be duly executed if the signature of the testator and the subscription of the witnesses is made in the margin or on some other part of the will opposite or near to such alteration, or at the foot or end of or opposite to a memorandum referring to such alteration, and written at the end or some other part of the will.

[1865—S. 58.]

Section 70 — Note 4 *(contd.)*

[2] The two elements which constitute revocation under this section are, (1) intention and (2) some outward act or symbol of intention. A defacement, obliteration or destruction without the *animo revocandi* is not sufficient. Neither is the intention, the *animo revocandi*, sufficient unless some act of obliteration or destruction is done. (Vol 3) 1916 Cal 400 (403) (SB).

[3] Codicil written at foot of will—Testator revoking will by striking off his signature to the will but keeping the codicil intact—Proof of testator's wish to die intestate—Testator's intention, held was to revoke both will and codicil. (1883) 8 P. D. 169 (170), *In the goods of Bleckley.*

5. Destruction of will by third party.— [1] Verbal authority to third party to destroy will is sufficient to constitute revocation. (1878) 3 Cal 626 (643) : 4 Ind App 228 (PC).

6. Intention to revoke—Evidence of.— [1] If under S. 70, an expression of an intention by the testator to revoke the will is sufficient the statement by the testator in a subsequent registered document that he has actually cancelled the will is in itself sufficient to express such intention. (Vol 33) 1946 Oudh 223 (225) (DB).

[2] It is true that no particular formality is necessary under the law in the mofussil for showing an intention to revoke a will, but when an inference in favour of revocation is asked to be drawn from the conduct of the testator, the conduct must be such as to show that his mind was directed to the question whether the will was to remain in force or not and his conduct proceeded on the footing that the will was no longer to be in force. (Vol 24) 1937 Mad 26 (26) (DB).

[3] Making various gifts during life time of part of the property included in the will does not amount to revocation of the will. (Vol 15) 1928 Lah 934 (935).

7. Loss of will—Presumption arising from. — [1] That if a will, traced to the possession of the deceased, and last seen there, is not forthcoming on his death, it is presumed to have been destroyed by himself and that presumption must have effect unless there is sufficient evidence to repel it. (1836) 1 Moo P C 299 (302), *Anna Maria Welch & Lucy Allenwelch* v. *Nathaniel Phillips* ✠ (Vol 1) 1914 Cal 365 (367) (DB).

[2] Revocation—Presumption of destruction of will from non-tracing after possession of testator must be applied cautiously. (Vol 2) 1915 P C 111 (112) : 1915 Pun Re No. 93 (PC).

[3] The onus of rebutting the presumption of revocation lies on party propounding the will. (1836) 1 Moo P C 299 (302), *Anna Maria Welch and Lucy Allen Welch* v. *Nathaniel Phillips.*

8. Burden of proving revocation. — [1] When the due execution of will is proved in the manner required by law, it lies upon the objector to plead and prove revocation. If revocation is not pleaded, then the Court will not presume revocation from the fact that the will is not forthcoming. (Vol 1) 1914 Cal 365 (368) (DB) ✠ (1870) 2 P & D 172 (176), *Benson and Sankey* v. *Benson.*

Section 71 — Note 1

[1] Section 71 applies to wills and codicils. ('34) 1934 Mad W N 357 (360) (DB).

[2] The rule of the English law that a will with false attestations is void for all purposes when applied to Hindus does not go beyond this that the alteration in a will renders it invalid as the foundation of a suit by the party who has altered it or in whose custody it was when altered but that it does not render the instrument void for all purposes and the altered instrument may be used as proof of some right or title created by, or resulting from, its having been executed. (1884) 7 Mad 302 (303) (DB).

[3] This section applies only to alterations made after the execution of the will. Where the alterations made are unattested and the intention of the will is clear even without them and is not affected by them will as it originally stood without the unattested alterations will be admitted to probate. (1913) 19 Ind Cas 692 (693) (DB) (Lah)✠(1844-46) 4 Moo PC 419 (453):13 E R 365, *Cooper* v. *Bockett*✠(Vol 8) 1921 Cal 677(686): 47 Cal 1043 (DB). (Unattested alterations in will are presumed to be made subsequent to execution of will—Unless presumption is rebutted probate will be granted of original will.)✠(1892) 16 Bom 652 (655, 656) (DB). (Do.)

[4] *T* executing a will in 1894—In 1901 *T* handing over a copy of that will with various pencil alterations to *W* for custody—*T* by codicil confirming the copy-will as altered by him in pencil—Section 71 held did not apply as the alterations were made before the execution of the will and probate was granted of the copy-will with pencil alterations. (1902) 29 Cal 311 (313).

[5] Blank spaces in the body of a will do not themselves make the will invalid. (1892) 16 Bom 652 (655) (DB).

[6] Where the will appears to have been drawn up with great care and attention, and the Court has every reason to feel certain what the intention of the testator was on the day of execution, and the Court has no satisfactory information that the subsequent pencil alterations which the testator, in the wanderings of illness may have projected, were anything more than transient and deliberative, the Court should pronounce for the will without the pencil alterations. (1828) 1 Hagg 490 (498) : 162 E R 655, *Edwards* v. *Astley.*

[7] If there be any blemish in the deed by erasure or interlineation, the deed ought to be proved though it were above thirty years old, by the witnesses, if living, and if they be dead, by proving the hand of the witnesses, or at least one of them, and also the hand of the party, to encounter the presumption arising from the blemish of the deed and this ought more especially to be done, if the deed impute a fraud. (1844-46) 4 Moo P C 419 (451) : 13 E R 365, *Cooper* v. *Bockett.*

Revocation of privileged will or codicil.

72. A privileged will or codicil may be revoked by the testator by an unprivileged will or codicil, or by any act expressing an intention to revoke it and accompanied by such formalities as would be sufficient to give validity to a privileged will, or by the burning, tearing or otherwise destroying the same by the testator, or by some person in his presence and by his direction, with the intention of revoking the same.

Explanation. — In order to the revocation of a privileged will or codicil by an act accompanied by such formalities as would be sufficient to give validity to a privileged will, it is not necessary that the testator should at the time of doing that act be in a situation which entitles him to make a privileged will.

[1865—S. 59.]

Revival of unprivileged will.

73. *(1)* No unprivileged will or codicil, nor any part thereof, which has been revoked in any manner, shall be revived otherwise than by the re-execution thereof, or by a codicil executed in manner hereinbefore required, and showing an intention to revive the same.

(2) When any will or codicil, which has been partly revoked and afterwards wholly revoked, is revived, such revival shall not extend to so much thereof as has been revoked before the revocation of the whole thereof, unless an intention to the contrary is shown by the will or codicil.

[1865—S. 60]

CHAPTER VI.

OF THE CONSTRUCTION OF WILLS.

Wording of will.

74. It is not necessary that any technical words or terms of art be used in a will, but only that the wording be such that the intentions of the testator can be known therefrom.

[1865—S. 61]

Section 72—Note 1

[1] Where will is not a privileged will, S. 72 cannot apply to it. (Vol 26) 1939 Oudh 213 (221) (DB).

Section 73—Note 1

[1] The effect of confirming a will by codicil is to bring the will down to the date of the codicil and to effect the same disposition of testator's property as would have been effected if the testator had at the date of the codicil made a new will containing the same dispositions as in the original will but with the alterations introduced by the codicil. (Vol 18) 1931 P C 307 (308) (PC) ✠ (1904) 1 Ch. 726 (734), *Lowther* v. *Frasher*.

[2] A codicil duly made to pass a testator's real estates amounts to a republication of the will so as to make the will bear date with the codicil and to affect all the lands the testator had at the time of the making of the codicil. (1893) 1 Ch. 101 (110, 115), *Dudley* v. *Champion*.

SECTION 74 — SYNOPSIS.

1. Construction of will—General principles.
2. Technical words— Interpretation of.
3. Construction of wills by Hindu.

1. Construction of will— General principles.

[1] Although the cardinal rule in the construction of wills is to give effect to the intention of the testator, the duty of the Court is to discover not what the testator meant but what is the meaning of his words. (1910) 11 Cal L Jour 461 (474) (DB) ✠ (1881) 18 Ch D 531 (542), *Smith* v. *Lucas*. (One must consider the meaning of the words used and not what one may guess to be the intention of the parties.)

[2] Clear and unambiguous dispositive words are not to be controlled or qualified by any general expression of intention. Technical words or words of known legal import must have their legal effect even though the testator uses inconsistent words, unless those inconsistent words, are of such a nature as to make it perfectly clear that the testator did not mean to use the technical terms in their proper sense. (1897) 24 Cal 834 (846) : 24 Ind App 76 (PC).

[3] The sound principle of construction is that where the language of a will is clear and consistent, it shall receive its literal construction unless there is something in the will itself to suggest departure from it. (1895) 18 Mad 347 (358) : 22 Ind App 119 (PC).

[4] Where there has been a devise or bequest of all a man's property, the generality of the disposition has not been held to be cut down unless the intention that it should be so cut down is clear. (1908) 31 Mad 283 (305) (DB).

[5] In the case of transfer by gift, a benignant construction is to be used and that if the real meaning of the document can be reasonably ascertained from the language used, though that language be ungrammatical or untechnical or mistaken as to name or description or in any other manner incorrect provided it sufficiently indicates what was meant, the meaning shall be enforced to the extent and in the form which the law allows. (1872) 18 Suth W R 359 (364) : Ind App (Sup) 47 (PC).

[6] A testator cannot, by the use of mere negative words unaccompanied by any effective disposition of property, alter the course of the law. (1880) 4 Bom 537 (543) (DB).

[7] Where a testator, in one part of his will, has recited that he had given a legacy to a certain person but it does not appear that any such legacy was given, the Court takes the recital as conclusive evidence of an intention to give by the will and fastening upon it, gives to the erroneous recital the effect of an actual gift. (Vol 22) 1935 Cal 788 (791) (DB).

[8] Testator, after giving his wife a life-estate in his property by will authorised her to draw upon "current deposit accounts" for her maintenance and for working and maintenance of the property as "she may require" the words "as she may require" were held to mean as may be necessary and not as she may think fit. (1908) 31 Mad 283 (307) (DB).

2. Technical words — Interpretation of.—[1] A testator who writes his own will and is not a lawyer is not, in all cases, to be held to have rightly apprehended

75. For the purpose of determining questions as to what person or what property is denoted by any words used in a will, a Court shall inquire into every material fact relating to the persons who claim to be interested under such will the property which is claimed as the subject of disposition, the circumstances of the testator and of his family, and into every fact a knowledge of which may conduce to the right application of the words which the testator has used.

Inquiries to determine questions as to object or subject of will.

Illustrations.

(*i*) *A*, by his will, bequeaths 1,000 rupees to his eldest son or to his youngest grandchild, or to his cousin, Mary. A Court may make inquiry in order to ascertain to what person the description in the will applies.

(*ii*) *A*, by his will, leaves to *B* "my estate called Black Acre." It may be necessary to take evidence in order to ascertain what is the subject-matter of the bequest; that is to say, what estate of the testator's is called Black Acre.

(*iii*) *A*, by his will, leaves to *B* "the estate which I purchased of *C*." It may be necessary to take evidence in order to ascertain what estate the testator purchased of C.

[1865—S. 62.]

Section 74—Note 2 *(contd.)*

the meaning of technical words which he may have used on the occasion of making his will; but a testator who uses words which have an intelligible conventional meaning is not to be held as having used the words with any other meaning unless the context of the instrument shows that he intended to do so. (1894) 1894 App Cas 310 (313), *Hamilton* v. *Ritchie*.

[2] Technical words shall have their legal effect, unless, from subsequent inconsistent words, it is very clear that the testator meant otherwise. Technical terms or words of known legal import should have their proper legal effect attributed to them, although the testator uses inconsistent terms or gives repugnant and impossible directions. To deprive the technical words of their appropriate sense, there must be sufficient to satisfy a judicial mind that they were meant by the testator to be used in some other sense, and to show what that sense is. (1913) 1 Ch. 552 (557), *Evans* v. *Noton*.

[3] The words "enjoy with son, grandson and so on in succession" are frequently used in Hindu wills and they have acquired the force of technical words conveying a heritable and alienable estate. (1897) 24 Cal 834 (849) : 24 Ind App 76 (PC).

[4] Testator bequeaths property to his wife by a will which provides "in trust and for her maintenance and support during her life" and appoints her his sole administratrix —*Held*, on construction that in using the words "in trust" the testator intended that she should enjoy the income of the property for life but that she should not be entitled to deal with the corpus. (1908) 31 Mad 283 (304) (DB).

[5] Indenture deed settling income of property on some person for life and giving him power of appointment. On default of appointment, upon trust and for the use of said trustees absolutely to be expended and used by them for such charitable purposes as they may think fit. *Held* on construction that having regard to the phrase following the word "absolutely" it cannot be said that the deed conferred an unfettered and unlimited interest on the persons designated as trustees. (1905) 29 Bom 375 (385) (DB).

3. Construction of wills by Hindu. — [1] The nature and extent of the testamentary disposition by Hindus is not governed by any analogy to the law of England. (1866) 10 Moo Ind App 279 (308) (PC).

[2] In construing the will of a Hindu it is not improper to take into consideration what are known to be the ordinary notions and wishes of Hindus with respect to the devolution of property. It may be assumed that a Hindu generally desires that an estate, especially an ancestral estate, shall be retained in his family and it may be assumed that a Hindu knows that, as a general rule, at all events, women do not take absolute estates of inheritance which they are enabled to alienate. (1841) 2 Ind App 7 (14, 15) (PC).

[3] Where the will of a Hindu testator among other things provided "If both the daughters have issue they shall divide the properties equally. Those who have no issue shall enjoy the income for their lives and those who have issue shall enjoy the whole property." *Held*, on construction, that the words "have issue" showed that the testator contemplates the existence of those having issue and the words did not mean those who "leave issue." Therefore one of the daughters who had a son born to her but who predeceased her, took his share absolutely and the share did not go over to her sister on her death. (1895) 18 Mad 347 (358) : 22 Ind App 119 (PC).

[4] Will of a Hindu father—Gift to daughter's and their respective sons and in the event of one of the daughters dying without leaving any male issue surviving, then the share of the deceased daughter is to go to the surviving daughter and her sons to the exclusion of female issues in both cases—The intention of the testator is to exclude daughters' daughters and the daughters take only a woman's estate. (1908) 35 Cal 896 (902) : 35 Ind App 118 (PC). (Principle in (1874-75) 2 Ind App 7 followed.)

[5] Where a Hindu, in a document of a testamentary character, after stating that the property was ancestral recites the death of his son, his own wife and further states : "Only D. K. widow .... of my deceased son .... who too, excepting her two daughters ... has no other heirs, is my heir". And further he goes on to say "except D. K. none other is nor shall be my heir and malik", "Further more to the said D. K. too, her two daughters .... together with their children, are and shall be heir and Malik". *Held*, that the will should be construed as meaning that D. K. should take not an absolute estate but an estate subject to her daughters succeeding her in that estate. (1874-75) 2 Ind App 7 (15) (PC).

[6] Deed purporting to be a deed of permission to adopt—Deed registered in life-time of its maker – Deed not containing any words of devise—Maker of deed not having any intention to dispose of his estate by it — Deed held did not amount to will. (1866) 10 Moo Ind App 279 (309) (PC).

Section 75 — Note 1

[1] Even if the principle of S. 75 is to be applied to Hindu wills, it cannot be applied to a will executed in the mofussil to which the Hindu Wills Act does not apply. (Vol 13) 1926 Mad 492 (493). (Will before 1927.)

[2] In all cases it is the primary duty of a Court to ascertain from the language of the testator what were his intentions and in so doing they are entitled and bound to bear in mind other matters than merely the

76. *(1)* Where the words used in a will to designate or describe a legatee or a class of legatees sufficiently show what is meant, an error in the name or description shall not prevent the legacy from taking effect.

Misnomer or misdescription of object.

(2) A mistake in the name of a legatee may be corrected by a description of him, and a mistake in the description of a legatee may be corrected by the name.

Illustrations.

(*i*) *A* bequeaths a legacy to "Thomas, the second son of my brother John." The testator has an only brother named John, who has no son named Thomas, but has a second son whose name is William. William will have the legacy.

(*ii*) *A* bequeaths a legacy "to Thomas, the second son of my brother John." The testator has an only brother, named John, whose first son is named Thomas, and whose second son is named William. Thomas will have the legacy.

(*iii*) The testator bequeaths his property "to *A* and *B*, the legitimate children of *C*." *C* has no legitimate child, but has two illegitimate children, *A* and *B*. The bequest to *B* and *A* takes effect, although they are illegitimate.

(*iv*) The testator gives his residuary estate to be divided among "my seven children" and, proceeding to enumerate them, mentions six names only. This omission will not prevent the seventh child from taking a share with the others.

(*v*) The testator, having six grandchildren, makes a bequest to "my six grandchildren" and, proceeding to mention them by their Christian names, mentions one twice over omitting another altogether. The one whose name is not mentioned will take a share with the others.

(*vi*) The testator bequeaths "1,000 rupees to each of the three children of *A*." At the date of the will *A* has four children. Each of these four children will, if he survives the testator, receive a legacy of 1,000 rupees.

[1865—S. 63.]

Section 75—Note 1 *(contd.)*

words used. They must consider the surrounding circumstances, the testator's position, his family relationships, the probability that he would use words in a particular sense and many other things including influences and aims arising from the race and religious opinions of the testator. But all this is solely as an aid to arriving at a right construction of the will and as soon as it is settled, the duty of the Court is to carry out the intentions as expressed and none other. ('14) 37 Mad 199 (221, 222) : 41 Ind App 51 (P C) ✠ ('13) 24 Mad L Jour 418 (422) (DB).

[3] That the native testators should be ignorant of the legal phrases proper to express their intentions or of the legal steps necessary to carry them into effect is one of the most important "surrounding circumstances" which the Court must bear in mind and it is justified in refusing to allow defects in expression to prevent the carrying out of the testator's true intentions. ('14) 37 Mad 199 (222, 223) : 41 Ind App 51 (P C).

[4] Courts should not enter into an enquiry regarding external circumstances to gather the intention of the testator when the language of the document is clear. (Vol 5) 1918 Mad 759 (763) (FB) ✠ ('10) 12 Bom L R 863 (865) ✠ (1867) 3 Ch App 420 (424), *Hensman* v. *Fryer*.

[*See also* (1902) 1902 App Cas 1 (10, 11), *Higgins* v. *Dawson*. (Extrinsic evidence cannot be admitted to enable the Courts to construe a difficult will where the words themselves require no interpretation, but the difficulty is only in the construction of the sentence in which the words occur.)]

[5] It is not proper to admit extrinsic evidence of testator's intention in a case in which the difficulty created by the use of a particular expression can be solved by adopting a construction bespeaking a reasonable and probable intention and rejecting that which indicates an intention unreasonable, capricious and inconsistent with the testator's views as evidenced by his conduct and by the dispositions of will which are not open to controversy : ('88) 15 Cal 725 (749) : 15 Ind App 127 (P C). (Testator, a taluqdar leaving two childless widows bequeathing to "Maharani Sahiba" his entire estate and giving power to the same to adopt a son to him : *Held* no extrinsic evidence was admissible to show whether the testator referred to elder widow or both—*Abbott* v. *Middelton*, (1858) 7 H L C 389, *Foll*.)

[6] Hindu testator had a son *J* by Mahomedan wife, *J* was brought up as a Hindu and married a Hindu lady from whom he had a son *B*. *J* also had four sons by his Mahomedan mistress. The testator's will provided "*J*, though illegitimate, he being my son it is incumbent on me to provide for him and his (aulad) issue and that certain amount should be paid to him and his (aulad) issue for generation after generation so long as the family of *J* and his (aulad) issue remain in existence": *Held* the construction and evidence that the word "aulad" meant only legitimate children and that intention of testator was to treat *J*'s marriage with Hindu lady as valid and the issue of that marriage as legitimate issue. ('14) 36 All 101 (122, 123) : 41 Ind App 1 (P C).

[7] Testator adopting *B*—Testator executing a document which provided "I place all my property in the possession of my wife to be enjoyed by her during her life time and to appropriate the profits therefrom but she is not to sell the property and after her death the estate is to devolve on *B*—*B* giving consent to the deed": *Held*, on considering the instrument together with the surrounding circumstances which are proper to be regarded, that it was in the nature of a family settlement which gave to the testator's wife an estate for life and not a widow's estate and to *B* a vested remainder on her death. ('76) 1 Cal 104 (104) : 2 Ind App 256 (PC).

[8] Where a testator directed that a certain pecuniary legacy be entrusted to one *H* to be disposed of by him in accordance with instructions given by testator to one of his trustees and that his share in a certain company be transferred to the person whose name will be disclosed by *H* and the intended beneficiary filed a suit praying that *H* might be ordered to disclose the trust : *Held* that a parol evidence was admissible to prove the trust. (Vol 2) 1915 Bom 10 (14) : 40 Bom 1.

Section 76 — Note 1

[1] The distinction between what is description only and what is the reason or motive of a gift or bequest may often be very fine, but it is a distinction which must be drawn from a consideration of the language and the surrounding circumstances. ('85) 11 Cal 463 (484) : 12 Ind App 72 (P C).

When words may be supplied.

77. Where any word material to the full expression of the meaning has been omitted, it may be supplied by the context.

Illustration.

The testator gives a legacy of "five hundred" to his daughter *A* and a legacy of "five hundred rupees" to his daughter *B*. *A* will take a legacy of five hundred rupees.

[1865—S. 64.]

Section 76—Note 1 *(contd.)*

[2] There is a maxim that names shall prevail against an error of demonstration. But it must first be shown that there was an error of demonstration and the rule does not apply till it was shown. But there is no presumption in favour of the name more than of the demonstration. (1860) 8 H L C 172 (179), *Drake* v. *Drake*.

[3] Extrinsic evidence as to testator's intention is admissible when the description in the will is equally applicable to two or more persons but imperfectly descriptive of each of them. (1916) 1 Ch 461 (465), *Cant* v. *Johnstone*.

[*See also* (1908) 2 Ch 111 (116), *King* v. *Winn*. (Testator possessing 25 shares in *S* and *W* Bank— Testator having shares in no other bank — Testator bequeathing 25 shares in *W* and *S* bank — *S* and *W* bank's absorption into Barley and Co., bank — No new acquisition of shares in larger Company by testator — Evidence, held was admissible to explain the slip in the description of the banking company.)]

[4] Bequest to *B* whom the testator referred to as "his wife" Though marital tie between *B* and the testator was motive of bequest yet if it was not proved bequest can be treated as made to *B* as *persona designata*. (Vol 17) 1930 Lah 830 (832) (DB).

[5] *T*, by first will settling his property on his aurasa son *K* — Second and third will confirming his intention to give his property to his aurasa son *K* — *K* not a natural son of *T* — *Held* that there is a gift by will to *K* and the gift is not vitiated by false description. ('99) 22 Mad 383 (391) : 26 Ind App 83 (PC).

[6] Bequest to wife for her life and then to *L* testator's "adopted son" — Wife predeceasing testator — Adoption not proved : *Held* as there was nothing in the will to show that adoption was motive or reason for the gift the bequest was valid and *L* took as *persona designata*. ('09) 31 All 5 (6) (DB) ✠ ('01) 24 Mad 214 (218) : 27 Ind App 162 (PC).

[7] Testatrix adopting *H*, a daughter of *N*— Subsequently testatrix giving her property to *H* by will—*H*, a near relation of testatrix—In will sometimes the phrase 'adopted daughter' occurs and sometimes it does not occur in relation to the name *H* —Adoption invalid— On construction held that *H* was not to take the property under the will as being the adopted daughter but *H* was the adopted daughter and was to take the property because she was the special object of testatrix's bounty, (i. e. *persona designata*). ('13) 37 Bom 116 (121) (DB).

[8] If there be a conveyance of real estate described in general terms followed by a definite and specific enumeration of particulars, as by schedule with or without plan, which enumeration omits something which might otherwise have been covered by the general description, then the designation by schedule and plan would not be read as an imperfect enumeration to be disregarded as "false demonstration" but as restrictive of the prior general description. So in a will if there be not a schedule and plan but an equivalent specific enumeration of particulars by name and locality, that specific enumeration must be held to limit and restrict what has gone before. (1908) 1 Ch 185 (196), *Dawes* v. *Miller*.

Section 77 — Note 1

[1] A will ought to be read, if possible, so as to lead to a testacy and not an intestacy. (1885) 30 Ch D 390 (394), *In re Harrison*; *Turner* v. *Hellard*. (Will prepared by filling up blanks in a common printed form — Executrix leaving certain blanks unfilled and not cancelled — Will capable of being read so as to give a gift to a particular individual : *Held* that the will was to be read in that sense.)

[2] Where it is clear on the face of a will that the testator has not accurately or completely expressed his meaning by the words he has used, and it is also clear what are the words which he has omitted, those words may be supplied in order to effectuate the intention, as collected from the context. (Vol 16) 1929 Mad 64 (66). (*Abbott* v. *Middleton* (1858) 7 H L C 68, *Rel. on.*)

[3] Where there is an uncertainty as to the meaning of any part of a will, the Court of construction has a right even to introduce words in case of necessity but the power of this kind must necessarily be very cautiously exercised, not merely on a conjectural hypothesis of a testator's intention however reasonable in opposition to the plain and obvious sense of the language of the instrument. (1858) 7 H L C 68 (81), *Abbott* v. *Middleton*. (Words 'in the event of my son dying before his mother' interpreted as in case he dies "issueless" before his mother.)

[4] Where the main purpose and intention of the testator are ascertained to the satisfaction of the Court, if particular expressions are found in the will which are inconsistent with such intentions, such expressions must be discarded or modified, and, on the other hand, if the will shows that the testator must necessarily have intended an interest to be given which there are no words in the will expressly to devise, the Court is to supply the defect by implication, and thus to mould the language of the testator, so as to carry into effect, as far as possible, the intention which it is of opinion, that the testator has on the whole will sufficiently declared. (1886) 33 Ch D 198 (206), *Mellore* v. *Daintree*.

[5] The Court is not to introduce and interpolate unnecessarily words in a will, nor even to give a construction to any clause of a will contrary to what the plain words import, without an absolute necessity by intention declared or carried in some other part of the will. (1858) 7 HLC 68 (88), *Abbott* v. *Middleton*. (Per *Lord Cranworth.)*

[6] The will of a Hindu testator ran: "After twenty years from my death my sons will be at liberty to divide the family business but before that my sons will be incompetent to divide the business. I have appointed my eldest son to carry on the business but before the lapse of twenty years from my death, neither he nor any of my other sons shall acquire any rights therein." *Held* that the words "rights therein" meant the rights of immediate enjoyment and that the testator gave the property to his sons in equal shares but postpones their separate enjoyment for twenty years. Such a restriction being repugnant to gifts was invalid. ('75) 1 Cal 104 (107, 108) : 2 Ind App 256 (P C).

[7] Will, after appointing testators' brother as executor and directing him to pay debt and the maintenance of his wife and to make over the estate to his son when he comes of age, proceeded "but if my minor sons should

Rejection of erroneous particulars in description of subject.

78. If the thing which the testator intended to bequeath can be sufficiently identified from the description of it given in the will but some parts of the description do not apply, such parts of the description shall be rejected as erroneous, and the bequest shall take effect.

Illustrations.

(*i*) *A* bequeaths to *B* "my marsh-lands lying in L and in the occupation of *X*." The testator had marsh-lands lying in L but had no marsh-lands in the occupation of *X*. The words "in the occupation of *X*" shall be rejected as erroneous, and the marsh-lands of the testator lying in L will pass by the bequest.

(*ii*) The testator bequeaths to *A* "my zamindari of Rampur." He had an estate at Rampur but it was a taluq and not a zamindari. The taluq passes by this bequest.

[1865—S. 65.]

When part of description may not be rejected as erroneous.

79. If a will mentions several circumstances as descriptive of the thing which the testator intends to bequeath, and there is any property of his in respect of which all those circumstances exist, the bequest shall be considered as limited to such property, and it shall not be lawful to reject any part of the description as erroneous, because the testator had other property to which such part of the description does not apply.

Explanation.—In judging whether a case falls within the meaning of this section, any words which would be liable to rejection under section 78 shall be deemed to have been struck out of the will.

Illustrations.

(*i*) *A* bequeaths to *B* "my marsh-lands lying in L and in the occupation of *X*." The testator had marsh-lands lying in L, some of which were in the occupation of *X*, and some not in the occupation of *X*. The bequest will be considered as limited to such of the testator's marsh-lands lying in L as were in the occupation of *X*

(*ii*) *A* bequeaths to *B* "my marsh-lands lying in L and in the occupation of *X*, comprising 1,000 bighas of lands." The testator had marsh-lands lying in L some of which were in the occupation of *X* and some not in the occupation of *X*. The measurement is wholly inapplicable to the marsh-lands of either class, or to the whole taken together. The measurement will be considered as struck out of the will, and such of the testator's marsh-lands lying in L as were in the occupation of *X* shall alone pass by the bequest.

[1865—S. 66.]

Extrinsic evidence admissible in cases of patent ambiguity.

80. Where the words of a will are unambiguous, but it is found by extrinsic evidence that they admit of applications, one only of which can have been intended by the testator, extrinsic evidence may be taken to show which of these applications was intended.

Section 77 — Note 1 (*contd.*)

die and my daughter should get married and a grandson be born, then on the said grandson's attaining majority you will give him half of my share and give half to your son etc." *Held* that the direction to make over the estate to the son when he comes of age has the effect of a gift to him to take effect at that time and the words "if my minor son dies" in order to be consistent with that must mean dies during minority. ('90) 17 Cal 122 (127) : 16 Ind App 166 (P C).

Section 78 — Note 1

[1] Where some subject-matter is devised as a whole under a denomination which is applicable to the entire land and then that description is followed by words which are added on the principle of enumeration but which do not exhaust all the particulars, then the entirety, which has been expressly and definitely given, shall not be prejudiced by an imperfect and inaccurate enumeration of the particulars. ('94) 18 Bom 283 (288) (DB).

[2] A testator willed away his farm "in Little Bentley and Little Bromley in occupation of Mr. *G* and purchased by me from one *T*." Actually only a part of the farm was purchased from *T*. The remaining parts being purchased from one *N* : *Held* the words "purchased from *T*" ought to be treated as being in the nature not of a definition or restriction but of explanatory comment and as they do not fit the farm which was in *G*'s occupation they should be disregarded. (1919) 1 Ch 297 (305, 306), *Norman* v. *Norman*.

[3] Bequest of all that part of *R* estate purchased by testator consisting of six closes (named therein) to trustees in trust for his son *J* for life with remainder to the use of *J*'s children as he would by his will appoint. —*J* by his will appointing all property devised by his father's will and described as that part of *R* estate purchased by his father but mentioning only four closes to his two sons —The omitted closes lay between the other closes : *Held* the estate was sufficiently described in *J*'s will and mention of four closes being *fasla demonstratio* could be rejected — That *J*'s sons were entitled to all the closes. (1876) 6 Ch D 436 (444, 445), *Travers* v. *Blundell*.

Section 79 — Note 1

[1] Where a given subject is devised and these are found two species of property, the one precisely corresponding to the description in the devise and the other not completely answering thereto, the latter will be excluded. ('11) 33 All 66 (67) (D B).

Section 80 — Note 1

[1] The question was whether evidence was admissible to show that, having regard to the intention of the testator as expressed in the will, the name "K. N. Godbole" applied to "K. G. Godbole" : *Held* that the case was not covered by S. 80, but applying principles of English law as principles of equity, justice and good conscience evidence could be taken to show circumstances, habits and state of testator's family including names of his friends. (Vol 24) 1937 Bom 496 (496).

Illustrations.

(i) A man, having two cousins of the name of Mary, bequeaths a sum of money to "my cousin Mary". It appears that there are two persons, each answering the description in the will. That description, therefore, admits of two applications, only one of which can have been intended by the testator. Evidence is admissible to show which of the two applications was intended.

(ii) *A*, by his will, leaves to *B* "my estate called Sultanpur Khurd". It turns out that he had two estates called Sultanpur Khurd. Evidence is admissible to show which estate was intended.

[1865—S. 67.]

Extrinsic evidence inadmissible in case of patent ambiguity or deficiency.

81. Where there is an ambiguity or deficiency on the face of a will, no extrinsic evidence as to the intentions of the testator shall be admitted.

Illustrations.

(i) A man has an aunt, Caroline, and a cousin, Mary, and has no aunt of the name of Mary. By his will he bequeaths 1,000 rupees to "my aunt, Caroline" and 1,000 rupees to "my cousin, Mary" and afterwards bequeaths 2,000 rupees to "my before-mentioned aunt, Mary". There is no person to whom the description given in the will can apply, and evidence is not admissible to show who was meant by "my before-mentioned aunt, Mary". The bequest is, therefore, void for uncertainty under section 89.

(ii) *A* bequeaths 1,000 rupees to leaving a blank for the name of the legatee. Evidence is not admissible to show what name the testator intended to insert.

(iii) *A* bequeaths to *B* rupees, or "my estate of ". Evidence is not admissible to show what sum or what estate the testator intended to insert.

[1865 S. 68.]

Meaning of clause to be collected from entire will.

82. The meaning of any clause in a will is to be collected from the entire instrument, and all its parts are to be construed with reference to each other.

Illustrations.

(i) The testator gives to *B* a specific fund or property at the death of *A*, and by a subsequent clause gives the whole of his property to *A*. The effect of the several clauses taken together is to vest the specific fund or property in *A* for life, and after his decease in *B*; it appearing from the bequest to *B* that the testator meant to use in a restricted sense the words in which he describes what he gives to *A*.

(ii) Where a testator having an estate, one part of which is called Black Acre, bequeaths the whole of his estate to *A*, and in another part of his will bequeaths Black Acre to *B*, the latter bequest is to be read as an exception out of the first as if he had said "I give Black Acre to *B*, and all the rest of my estate to *A*".

[1865 - S. 69.]

Section 81 —Note 1

[1] The words of the will were "I direct that my executor and trustee shall disburse various petty pensions to some poor persons mentioned by me." There is a deficiency, on the face of the will, as to the objects of this bequest and no extrinsic evidence can be admitted as to the intention of the testator. ('92) 15 Mad 448 (474).

[2] *A* made a will of her property on a printed will and left blank spaces naming therein certain specified legacies and the name of the executor. *A* was illegitimate and had no issue or "next of kin". The Crown claimed the residue of the estate by escheat and after admitting part of evidence on behalf of the executor it was held that the executor was entitled to hold the estate for his own benefit as the effect of the blanks left by the testatrix on a printed form was quite conceivable to be the belief that in doing so the executor would be entitled to the residue. (1886) 31 Ch D 460 (465), *Camp* v. *Coe*.

[3] The circumstance that blank spaces were left in the body of it is no valid objection to its being a will. ('92) 16 Bom 652 (655) (D B).

Section 82 — Note 1

[1] In the interpretation of the will, made by taluqdar, Court must be guided by the rules of construction laid down in Ss. 82 and 87, Succession Act 1925, as these rules are applicable to bequest made by talukdars. (Vol 22) 1935 Oudh 198 (202): 10 Luck 606 (DB).

[2] The primary rule of construing a document in the nature of a will is that the meaning of any clause is to be collected from the entire instrument and all its parts are to be construed with reference to each other. The general words may be understood in a restricted sense where it may be collected from the will that the testator meant to use them in a restricted sense and it is only when two clauses in a will are so absolutely irreconcilable that they cannot stand together the latter of the two clauses shall prevail the theory being that the testators may have changed his mind. ('91) 14 Mad 65 (71) (D B) ✠ (Vol 12) 1925 Bom 282 (286) : 49 Bom 478 (D B).

[3] There are two cardinal principles in the construction of wills, deeds and other documents. The first is that clear and unambiguous dispositive words are not to be controlled or qualified by any general expression of intention. The second is that technical words or words of known legal import must have their legal effect even though the testator uses inconsistent words unless those inconsistent words are of such a nature as to make it perfectly clear that the testator did not mean to use the technical terms in their proper sense. ('97) 24 Cal 834 (846) : 24 Ind App 76 (P C) ✠ ('08) 31 Mad 283 (304) (D B).

[4] Where a father appeared to make a gift of an absolute estate in the will to his sons, but some words which occurred subsequently in relation thereto plainly showed that what was given was no more than an estate for life, inspite of the fact that the subsequent provisions in the will for the grand-children on the death of the legatees failed (as none of the grand-children were in existence), the will conferred only a life estate on the sons. ('05) 28 Mad 386 (389) (D B).

[5] If a widow is designated as a malik or permanent malik in a will, that by itself is not sufficient to justify a Court construing the will to conclude that the inten-

83. General words may be understood in a restricted sense where it may be collected from the will that the testator meant to use them in a restricted sense; and words may be understood in a wider sense than that which they usually bear, where it may be collected from the other words of the will that the testator meant to use them in such wider sense.

When words may be understood in restricted sense and when in sense wider than usual.

Illustrations.

(i) A testator gives to *A* "my farm in the occupation of *B*", and to *C* "all my marsh-land in L". Part of the farm in the occupation of *B* consists of marsh-lands in L, and the testator also has other marsh-lands in L. The general words, "all my marsh-lands in L," are restricted by the gift to *A*. *A* takes the whole of the farm in the occupation of *B*, including that portion of the farm which consists of marsh-lands in L.

(ii) The testator (a sailor on ship-board) bequeathed to his mother his gold ring, buttons and chest of clothes, and to his friend, *A* (a shipmate), his red box, clasp-knife and all things not before bequeathed. The testator's share in a house does not pass to *A* under this bequest.

(iii) *A*, by his will, bequeathed to *B* all his house-hold furniture, plate, linen, china, books, pictures and all other goods of whatever kind; and afterwards bequeathed to *B* a specified part of his property. Under the first bequest, *B* is entitled only to such articles of the testator's as are of the same nature with the articles therein enumerated.

[1865—S. 70.]

84. Where a clause is susceptible of two meanings according to one of which it has some effect, and according to the other of which it can have none, the former shall be preferred.

Which of two possible constructions preferred.

[1865 — S. 71.]

85. No part of a will shall be rejected as destitute of meaning if it is possible to put a reasonable construction upon it.

No part rejected, if it can be reasonably construed.

[1865 — S. 72.]

Section 82 — Note 1 *(contd.)*

tion of the testator was to confer an absolute estate on her, and similarly it would be an incorrect mode of construction to accept such a clause as conferring an absolute estate and then to eliminate one by one all subsequent clauses indicating testator's intention to limit the widow's estate as void for repugnancy. This mode of interpretation contravenes S. 82 read with S. 87. (Vol 34) 1947 Lah 199 (205) (D B).

Section 83—Note 1

[1] When used in a will principal money means all the capital that the testator possessed and a 'gift of principal money by will' means a universal disposition of all his monies worth, that is a bequest of all personal property. The words cannot be extended to the real estate. (1870) 11 E Q 232 (235), *Prichard* v. *Prichard*.

[2] A testator's will contained the following provision 'I give and bequeath unto my wife monies in Bank securities, my house-hold furniture and effects of whatever nature and kind I may be possessed at the time of my decease'. It was held that the word "effects" must receive a more limited interpretation and must be confined to articles *ejusdem generis* with those specified in the preceding part of the sentence. (1806) 13 Ves. 39 (46): 33 E R 209, *Rawlings* v. *Jennings*.

[*See also* (1841) 3 Beav 521 (523) : 49 E R 205, *Wrench* v. *Jutting*.]

[3] Fixed abode does not necessarily mean permanent abode. (Vol 10) 1923 Nag 145 (145) : 19 Nag L R 54.

Section 84 — Note 1

[1] *A* by an "anumatipatra" permitted after his death his two wives to adopt "three sons successively" that is one after another, it was held that the authority intended his widows to do what the law allowed and not to do something which if not absolutely illegal was very unusual and not practiced among Hindus and that a fair and reasonable interpretation of the anumatipatra was that it did not contemplate simultaneous adoption by widows but successive adoptions in accordance with rules of law as now established and as established at the time when the document came into existence. ('12) 39 Cal. 582 (586) (DB) ✠ ('12) 16 Cal L Jour 304 (308) (DB).

[2] An earlier clause in a will stated "you must adopt for me a boy you like from the children that may be born in the families of my brother." Later on the testator mentioned "the object of this will is that you should adopt for me any suitable boy." It was held that the choice of the boy was restricted to the boys from brother's family as any other interpretation would be imputing to the testator's expressed intention and thus importing him an intention to contradict himself. ('91) 14 Mad. 65 (69) (DB).

[3] Testator leaving direction in the will that his daughter-in-law should adopt *K* in the following words: "There is my nephew *M*'s son *K*. He is about nine years of age. It is my wish to adopt him as my son. If I should not be able to do so in my lifetime then my son *L*'s widow is to take the said *K* in adoption:" *Held* that it was a direction to adopt a son to her husband and herself and not to the testator which she was not entitled to do according to law. ('88) 12 Bom 185 (199).

Section 85 — Note 1

[1] In construing the will of an exceedingly illiterate man the rules of grammar and the usual meaning of technical language may be disregarded but the Court cannot strike out from his will any word which, standing where it is, has a clear and definite operation in the disposal of his property. (1861) 9 H L 420 (427) : 11 E R 791, *Hall* v. *Warren*.

[2] Under this section no part of a will is to be rejected as destitute of meaning if it is possible to put a reasonable construction upon it. Thus where a will by a Parsi provided that in case his son dies issueless, son's widow should be excluded from getting any share in the property and the son died issueless it was held that his widow was excluded from any share whether as heir of her husband or otherwise. (Vol 6) 1919 Sind 4 (5) : 14 Sind L R 203.

[3] Punctuation marks—In construing English wills it has not been the practice to pay regard to the punctuation or parenthesis because it would make the construction depend upon the grammatical skill of the

Interpretation of words repeated in different parts of will.

86. If the same words occur in different parts of the same will, they shall be taken to have been used everywhere in the same sense, unless a contrary intention appears.

[1865 — S. 73.]

Testator's intention to be effectuated as far as possible.

87. The intention of the testator shall not be set aside because it cannot take effect to the full extent, but effect is to be given to it as far as possible.

Illustration.

The testator by a will made on his death-bed bequeathed all his property to *C D* for life and after his decease to a certain hospital. The intention of the testator cannot take effect to its full extent, because the gift to the hospital is void under section 118, but it will take effect so far as regards the gift to *C D*.

[1865 — S. 74.]

The last of two inconsistent clauses prevails.

88. Where two clauses or gifts in a will are irreconcilable, so that they cannot possibly stand together, the last shall prevail.

Illustrations.

(i) The testator by the first clause of his will leaves his estate of Ramnagar "to *A*," and by the last clause of his will leaves it "to *B* and not to *A*." *B* will have it.

(ii) If a man at the commencement of his will gives his house to *A*, and at the close of it directs that his house shall be sold and the proceeds invested for the benefit of *B*, the latter disposition will prevail.

[1865 — S. 75.]

Section 85 — Note 1 *(contd.)*

writer. But the circumstance however that there is no such thing as punctuation properly so called in native writings but merely a practice by no means general which has grown up of making a dot to denote to end a sentence, gives the existence of a dot a special importance which the Court may take note of without any risk. ('88) 12 Bom. 202 (214).

[4] Testator making various gifts of immovable property to various persons one amongst them being to his widowed daughter-in-law for her maintenance — Will wound up with a general clause that all the gifts were made absolute — Contention that the general clause could not apply to the gift to the widow for the reason that the testator who gifted the property for maintenance could not have intended to give the widow more than a life estate: *Held* that the general clause removed the ambiguity in all cases and that it was not necessary to strike out or alter a material word in any one of the special clauses in order to give effect to the several devices and that therefore the widow also took absolutely the land gifted to her in the will. ('08) 31 Mad. 349 (353).

[5] The material words of a will were: My self-acquired property the aforesaid houses by the three devisees from generation to generation (Vamsa Paramparai) unitedly (or jointly — "Egopithu") the survivors surviving without power of gift etc., or sale shall be enjoyed — Contention by plaintiff that the word "Egopithu" only meant harmoniously or unitedly and was not a word of limitation: *Held* that the word "Egopithu" should be given effect to in reading the will and so reading the will was held to establish a line of descent unknown to law. ('09) 5 Mad L Tim 103 (104, 105).

Section 86—Note 1

[1] If the same words occur in different parts of the will, they must be taken to have been used everywhere in the same sense unless a contrary intention appears. (Vol 22) 1935 Oudh 198 (202) : 10 Luck 606 (DB) ✠ ('10) 11 Cal L Jour 461 (473) (DB). (There must be clear indication of the intention of the testator if the same word is used a second time to use it in a restricted sense.) ✠ ('08) 31 Mad 283 (305) (DB). (Testator bequeathing property to his wife by will and giving her a life estate in it—Will also authorising her to sell it at favourable opportunity — Will directing income from property to be spent on property "as to her may seem best"—The words, held on construction to mean "as she thinks fit".)

Section 87 — Note 1

[1] If it is not possible to carry out testator's whole plan, paramount intention should be given effect to. (Vol 16) 1929 P C 283 (286) : 56 Ind App 372 : 4 Luck 483 (PC).

[2] In interpreting will made by a talukdar, the Court must be guided by the rules of construction laid down in Ss. 82 to 87 of the Succession Act, 1925, as these rules are applicable to bequests made by talukdars. (Vol 22) 1935 Oudh 198 (202) : 10 Luck 606 (DB).

[3] In construing a Hindu will benignant construction is to be used and if the real meaning of the document can be reasonably ascertained from the language used, though the language is ungrammatical or untechnical, or mistaken as to name or description or in any other manner incorrect, provided it sufficiently indicates what was meant, that meaning shall be enforced to the extent and in the form which the law allows. (Vol 22) 1935 Cal 284 (286) (D B) ✠ ('72) 18 Suth W R 359 (364) : Ind App (Sup) 47 (PC).

[4] Where in a will, there is no gift in so many words and an intention to make a gift can be gathered from the provisions in certain and definite shares effect should be given to the general prevailing intention, however imperfectly and obscurely indicated if discovered by a fair and liberal construction of the language of the will and if allowed by law. ('81) 7 Cal 269 (282, 283) (DB).

[5] Court will struggle against a construction that would defeat the obvious intention of the testator. (1807) 13 Ves 476 (484) : 33 E R 373, *Kirkpatrick* v. *Kirkpatrick*.

[6] Misrecital as to law not followed by disposition does not prove intention to supplement what would be got under law. (Vol 22) 1935 Cal 788 (790) (DB).

[7] The gift by a testator if there be any must be found either in express words or by implication. Where a testator declares that a person has right independent of will a mere recital to that effect in the will is no evidence of intention to gift nor is there gift by implication. (Vol 22) 1935 Cal 788 (791) (DB).

Section 88 — Note 1

[1] The general rule is that if there be a repugnancy, the first words in a deed and the last words in a will, shall prevail. But this rule has no application when the supposed inconsistencies are found in one and the same provision. ('05) 29 Bom 375 (381) (DB).

Will or bequest void for uncertainty.

89. A will or bequest not expressive of any definite intention is void for uncertainty.

Illustration.

If a testator says "I bequeath goods to *A*," or "I bequeath to *A*," or "I leave to *A* all the goods mentioned in the Schedule" and no Schedule is found, or "I bequeath 'money,' 'wheat,' 'oil,'" or the like, without saying how much, this is void.

[1865 — S. 76.]

Section 88 — Note 1 *(contd.)*

[2] The rule laid down by this section should only be applied in the last resort. (Vol 12) 1925 Bom 282 (286) : 49 Bom 478 (D B)

[3] Section 75 of Act X of 1865 cannot be applied to will executed in mofussil. (Vol 13) 1926 Mad 492 (493) (DB).

[4] Where a testator made his widow an absolute owner of his entire property after his death but provided by a subsequent clause that she should give a certain house to one of his relations *Held*, that the subsequent clause must be given effect to on the principle embodied in Succession Act. (Vol 18) 1931 Nag 69 (69, 70).

SECTION 89 — SYNOPSIS.

1. Bequests void for uncertainty.
2. Bequests for charitable purposes.
3. Bequests for "Dharma."
4. Devisee's right to choose.

1. Bequests void for uncertainty. — [1] Will — Bequest for 'a building for Hindus exclusively for general purposes is void for uncertainty. (Vol 19) 1932 Bom 451 (452).

[2] The dedication to the 'Thakurjee' in his 'Thakurdwara' without mentioning the particular deity which was subsequently to be installed in a temple was bad on the ground of uncertainty. ('11) 33 All 793 (795) (D B).

[3] 'The executors shall get a Shivas temple erected at reasonable cost in a suitable plan in my baithakkhana' was sufficiently definite to constitute valid bequest, while a bequest that 'the executors shall spend the residue on proper and just acts for the testator's benefit' was held void for uncertainty as the words give the executors authority to dispose of an indefinite surplus in an indefinite manner. ('87) 14 Cal 222 (233) (DB).

Precatory trusts.

[4] A direction or trust in favour of a third party will be regarded as binding and obligatory where such a binding obligation can be clearly ascertained from the will. A mere wish or desire or confidence or hope on the part of the testator that the donee of the fund should or would or ought to or is expected to apply it for the benefit of other persons will not be enforced or treated as obligatory. ('99) 23 Bom 1 (10). (Gift to *D* for life "she thereout maintaining educating and bringing up the children of the testator' : *Held*, that the widow took a life interest but subject to the obligations of maintaining, educating and bringing up the children and that this obligation was absolved from the time that the children were not in need of being maintained by *D.*) ✠ (1895) 2 Ch 370 (374), *In re Hamilton*; *Trench* v. *Hamilton*.

[5] In the case of precatory trusts the words of gift used by the testator must be such that the Court finds them to be imperative on the first taker of the property and the subject of the gift over must be well defined and certain. If there is uncertainty as to the amount or nature of the property that is given over a difficulty in the execution of the trust arises because the Court cannot know on what property to lay its hands. The uncertainty in the subject of the gift will have a reflex action upon the previous words and throw doubts upon the intentions of the testator as his words of appeal to the conscience of the first taker would not show that he intended them to be imperative. ('82) 4 All 500 (510).

[6] A will after appointing three persons as executors said "you should give my brothers, their wives and children according to your wishes' : *Held* that these words merely gave a discretionary power to the executors and that they did not create a power in the nature of a trust. ('83) 9 Mad 325 (330).

[7] A will which commenced with 'I desire *M* to pay every month my dependants and personal servants" and also contained the words: "Be it known that the expenses of imambara etc. will be continued for ever" and "the pay of *G* and *A* will be defrayed for ever and the rest of the servants will be paid only for life" constituted a bequest and not merely the expression of a wish or a direction ('82) 8 Cal 1 (6) : 8 Ind App 117 (PC).

2. Bequests for charitable purposes. — [1] In a will the testator directed his trustees to divide his estate to charitable religious institutions and the testator had not given a class from which he allowed his trustees to select individually but had left directions so vague that it was in effect giving some one else power to make a will for himself. Law will not allow this and the bequest is void. (1905) 1905 App Cas 124 (126), *Grimond* v. *Grimond* ✠ ('02) 26 Bom 632 (636). (Where a testator had made a gift by a clause in his will to "some one or more charitable, educational or other philanthropic institution," it was held the gift in question is not a good gift.)

[See however ('08) 30 All 111 (115) (D B). (An endowment for "charitable purpopes" (पुण्य) punya) alone that is for charity generally will always be carried out notwithstanding that the objects of charity are not specifically defined. The Court can if necessary in such a case settle a scheme for its proper administration.)]

3. Bequests for 'dharma.'—[1] A bequest for "dharma" "khairat", etc., is void for uncertainty. (Vol 16) 1929 Bom 127 (127) ✠ (('99) 23 Bom 725 : 26 Ind App 71 (P C), Followed.) ('99) 23 Bom. 725 (735) : 26 Ind App 71 (P C).

[But see ('07) 30 Mad 340 (344) (DB). *(Per Subramania Iyer J.)*]

[2] The dedication of property by will for "dharma kriya" in connexion with death is for a definite object and not void for uncertainty. (Vol 17) 1930 Bom 191 (193) : 54 Bom 358.

4. Devisee's right to choose. — [1] If a man devises two acres out of four acres that lie together this is a good devise and the devisee shall select his portion of land. ('95) 18 Mad 460 (462) (DB).

[2] A testator who by his will intends to give a particular property to the legatee and owing to the testator having several properties answering the description in the will of the particular property given the Court is unable to say either from the will itself or from extrinsic evidence which of the several properties the testator referred to then on principle the gift must fail for uncertainty and the Court cannot in order to avoid intestacy change the will or construe it as giving to the legatee the option of choosing any one of the properties. (1894) 3 Ch 260 (263), *Asten* v. *Asten*.

Words describing subject refer to property answering description at testator's death.

90. The description contained in a will of property, the subject of gift, shall, unless a contrary intention appears by the will, be deemed to refer to and comprise the property answering that description at the death of the testator.

[1865 — S. 77.]

Power of appointment executed by general bequest.

91. Unless a contrary intention appears by the will, a bequest of the estate of the testator shall be construed to include any property which he may have power to appoint by will to any object he may think proper, and shall operate as an execution of such power; and a bequest of property described in a general manner shall be construed to include any property to which such description may extend, which he may have power to appoint by will to any object he may think proper, and shall operate as an execution of such power.

[1865 — S. 78.]

Implied gift to objects of power in default of appointment.

92. Where property is bequeathed to or for the benefit of certain objects as a specified person may appoint or for the benefit of certain objects in such proportions as a specified person may appoint, and the will does not provide for the event of no appointment being made; if the power given by the will is not exercised, the property belongs to all the objects of the power in equal shares.

Illustration.

A, by his will, bequeaths a fund to his wife, for her life, and directs that at her death it shall be divided among his children in such proportions as she shall appoint. The widow dies without having made any appointment. The fund will be divided equally among the children.

[1865 — S. 79.]

Section 90 — Note 1

[1] Under S. 90 there is a presumption, unless a contrary intention appears by the will, that it comprises all property as at the testator's death, and in the absence of any indication of testator's intention to exclude after acquisitions from the operation of the will, presumption against an intestacy in respect of those properties must prevail. (Vol 14) 1927 Mad 383 (386) (DB) (Vol 19) 1932 Nag 163 (165): 28 Nag L R 255. (Description of property as that which the testator "now" owns or occupies, *prima facie* does not show a contrary intention as to exclude after-acquired property of the specified nature.)

[2] The provisions of this section made one read the will as speaking from the death and therefore a gift of "so many shares" must be a gift of so many shares as they are found by the executor. (1909) 1 Ch 345 (353), *In re Gillins*; *Inglis* v. *Gillins*. (£50 shares converted into £10 shares by the company after will—Bequest of fifty shares held passed only fifty £10 shares and not so many £50 shares.)

[3] Bequest of property known as "Rahemat Manor" —On date of will property consisting of one building and open space—Three more buildings of different names constructed subsequently on open space — Entire property known as "Rahemat Manor" at the time of death: *Held* all the buildings passed under the will. (Vol 34) 1947 Bom 122 (131). (*Etans* v. *Powell* (1909) 1 Ch 784 and *Spencer* v. *Wills* (1911) 2 Ch 563, *Rel. on.*)

Section 91 — Note 1

[1] A testator *X* willed away his property in 1885 by which he bequeathed an estate to trustees for a charitable object: In 1888, he executed a deed of settlement about the same property for the same purpose in which he reserved a power of appointment to himself. He died without revoking the will and without an issue. The question raised was whether the testator could be said to have exercised his power of appointment reserved to himself under the deed of settlement — three years previous to the deed of settlement: *Held* that a will speaks from the date of the death of the testator and the will, though made, before the power of appointment was created, was a good execution of the power. ('07) 31 Bom 473 (478, 479).

[2] *A* had a power of appointment by deed or will £500 amongst all or such one or more exclusively of the others or other of his children. In default of appointment the sum was to be given between the children equally. *A* bequeathed to his son generally all the residue of his estate after payment of debts, legacies etc.: *Held*, that as the power of appointment was not to appoint in any manner he might think proper but a 'restrictive appointment' restricted to *A*'s children this power did not come within S. 27, English Wills Act, and it could not be said that the power was executed by the will. (1850) 12 Beav 604: 50 E R 1191, *Cloves* v. *Awdry*.

Section 92 — Note 1

[1] If the power of appointment is a power which it is the duty of the party to execute put upon him as such by the testator who has given him an interest extensive enough to enable him to discharge it he is a trustee for the exercise of that power and not as having a discretion, whether he will exercise it or not and the Court will not permit his negligence accident or other circumstances to disappoint the interest of those for whose benefit he is called upon to execute it. (1803) 8 Ves 561 (575): 32 E R 473, *Brown* v *Higgs*.

[2] In order to exercise a special power there must be a sufficient expression or indication of intention in the will or other instrument alleged to exercise it and either a reference to the power or a reference to the property subject to the power constitutes in general a sufficient indication for the purpose. (1913) 1913 Ch 510 (515), *In re Ackerley*; *Chapman* v. *Andrew*.

[3] Existence of power of appointment does not prevent the vesting of the property. The exercise of the power will divest the estate but until the power is exercised, property remains vested in those who are to take in default of appointment. (1866) 2 Eq 151 (155), *Lambert* v. *Thwaites*.

[4] Where there is power to appoint among relations so as to give the donee of the power the right of selection the donee of the power can appoint to any relations, but in modelling the trust to be applied in default or arising from the power being coupled with

93. Where a bequest is made to the "heirs" or "right heirs" or "relations" or "nearest relations" or "family" or "kindred" or "nearest of kin" or "next-of-kin" of a particular person without any qualifying terms, and the class so designated forms the direct and independent object of the bequest, the property bequeathed shall be distributed as if it had belonged to such person and he had died intestate in respect of it, leaving assets for the payment of his debts independently of such property.

Bequest to "heirs," etc., of particular person without qualifying terms.

Illustrations.

(i) *A* leaves his property "to my own nearest relations." The property goes to those who would be entitled to it if *A* had died intestate, leaving assets for the payment of his debts independently of such property.

(ii) *A* bequeaths 10 000 rupees ' to *B* for his life, and, after the death of *B*, to my own right heirs." The legacy after *B*'s death belongs to those who would be entitled to it if it had formed part of *A*'s unbequeathed property.

(iii) *A* leaves his property to *B*; but if *B* dies before him, to *B*'s next-of-kin; *B* dies before *A*; the property devolves as if it had belonged to *B*, and he had died intestate, leaving assets for the payment of his debts independently of such property.

(iv) *A* leaves 10,000 rupees "to *B* for his life, and after his decease to the heirs of *C*." The legacy goes as if it had belonged to *C*, and he had died intestate, leaving assets for the payment of his debts independently of the legacy.

[1865 — S. 80.]

94. Where a bequest is made to the "representatives" or "legal representatives" or "personal representatives" or "executors or administrators" of a particular person, and the class so designated forms the direct and independent object of the bequest, the property bequeathed shall be distributed as if it had belonged to such person and he had died intestate in respect of it.

Bequest to "representatives", etc., of particular person.

Illustration.

A bequest is made to the "legal representatives" of *A*. *A* has died intestate and insolvent. *B* is his administrator. *B* is entitled to receive the legacy, and will apply it in the first place to the discharge of such part of *A*'s debts as may remain unpaid : if there be any surplus *B* will pay it to those persons who at *A*'s death would have been entitled to receive any property of *A*'s which might remain after payment of his debts, or to the representatives of such persons.

[1865 — S. 81.]

Section 92 — Note 1 *(contd.)*

duty the class of relations may be confined to a particular set of relations and the relations who take in default of the exercise of power are those next of kin according to statute, they take as tenants-in-common but not in shares defined by statute. (1883) 24 Ch D 244 (251), *Wilson* v. *Dugniel.*

[5] A person devised his whole estate in a house to his executors and trustees upon certain trusts to pay the net balance of the income to his daughters *C* and *J* in equal moieties and after their death to the use of such of their issues as they should appoint—Such direction, limitation or appointment to affect their own respective share or moiety only, not that of the other of them : *Held* that the power of appointment was valid and even if invalid the gift over on failure of the exercise of that power would be upheld. ('94) 18 Bom 1 (6).

[6] By his will *A* directed all his property to be formed into a trust in favour of his daughter whose children were to divide the property, the trust becoming void on their birth. If his daughter had no issue she had the power to appoint any person to get the property after her death by deed or will. It was urged that the bequest was void following ruling in *Tagore's case* : *Held*, that as there was no gift over on failure to exercise the power the testator had expressed the incidents of an absolute gift instead of making an absolute gift in more simple form and omitted to specify them and hence the power of appointment to the daughter was valid. ('95) 19 Bom 647 (652, 653) (DB).

SECTION 93 — SYNOPSIS

1. "Heirs" or "rightful heirs."
2. "Family."
3. "Without any qualifying terms."

1. "Heirs" or "rightful heirs."—[1] Under the English law, in a gift of real and personal estate together, the word "heir" has one meaning as to the real estate and another meaning as to the personal estate. It means the heir-at law in relation to the real estate and the next-of-kin in relation to the personal estate. (1883) 25 Ch D 212 (218, 220), *Keay* v. *Boulton.*

[*See also* (1852) 3 H L C 524 (550, 551) : 10 E R 206, *Sir John Edmond De Beauvoir* v. *Richard Benyon De Beauvoir.*]

2 "Family." — [1] The word 'family' has three meanings In one sense it means the whole household, in another sense it means everybody descended from a common ancestor. In the third sense it means his "wife" and "children." Every word which has more than one meaning has a primary meaning. The primary meaning of the word "family" being children. (1876) 3 Ch D 672 (674), *Pegg* v. *Clarke.* (*Held* that 'my said family' in a will meant children of a testator in a will.)

[*See also* (1870) 9 Eq 622 (624), *Snow* v. *Teed.* (In the ordinary acceptation of the word "family" which would not strictly speaking be confined to statutory next of kin.)]

[2] The word "family" in the English authorities upon English wills is generally construed to mean children. But if the English rule is applied to the construction of the word 'family' in a Hindu will it would defeat the intention of the testator. (1900) 4 Cal W N 671 (673) (DB) (The word was held to mean the relatives of the testator whether connected by marriage or blood who were living at the time of testator's death and then formed part of his household and were maintained by him.)

[3] If the words "members of my family" used by a testator in will, mean the members of the testator's family at the date of his death, there is nothing that can be urged against the validity of the bequest, but the

95. Where property is bequeathed to any person, he is entitled to the whole interest of the testator therein, unless it appears from the will that only a restricted interest was intended for him.

Bequest without words of limitation.

[1865 — S. 82.]

Section 93—Note 2 *(contd.)*

word 'family' is elastic and capable of different interpretations and where a house is provided in a will on trust so as to be available to the male or female members of the testator's family, it was held that there was no reason why the definition should be extended to include people other than those existing when the testator died. (Vol 7) 1920 P C 27 (28) (PC).

3. "Without any qualifying terms."—[1] The words "without any qualifying terms" in the section refer to the heirs and not to the bequest. (Vol 6) 1919 Sind 4 (6) : 14 Sind L R 203. (Dictum in ('05) 7 Bom L R 205 held obiter and dissented from.)

[But see ('05) 7 Bom L R 207 (212). (The words "without any qualifying terms" refer to the bequests and not to relations and they mean that there must be nothing to qualify the bequest—that it must not be conditional.)]

SECTION 95—SYNOPSIS.

1. Scope.
2. Bequests conferring absolute estates.
3. Bequests conferring restricted interest.
4. Bequests to Hindu females.

1. Scope. — [1] This section applies to Hindus. ('13) 24 Mad L Jour 418 (422) (D B).

[2] Where the two clauses in a will provide for different circumstances they need not be read together and construed so as to reconcile their meaning. ('98) 22 Bom 833 (841) : 25 Ind App 126 (P C).

[3] The use of the word 'absolutely" in a will as defining the amount of the estate which is given under it must be subject to any executory limitation or any other valid limitation or exception which may be found engrafted on that estate in fee simple. (1905) 1905 App Cas 84 (90, 91), *Comiskey* v. *Bowring Hanbury*. (Testator bequeathing absolutely with the confidence that she would devise it at her death to such one or more of his nieces as she thought fit. Direction that nieces should share equally on default of any disposition by the wife : *Held* that there was good executory limitation which created an obligatory trust in favour of the neices.)

2. Bequests conferring absolute estates.—[1] *A* died leaving a will bequeathing his property to *P*. The will recited that after *A*'s death entire property will vest in *P* and that *P* shall be "my heir and successor". "The said heir shall after he has inherited me be bound to abide by the following terms," and then the will provided certain conditions : *Held* that the words "the estate shall vest in *P*" and that *P* shall be testator's "heir and successor" created an absolute estate of inheritance in *P* and the various clauses that followed the main provisions were to come into operation after *P* had so inherited; they must, therefore, be regarded as an attempt to impose repugnant conditions upon the estate so created and were, therefore, void. (Vol 16) 1929 P C 283 (286) : 56 Ind App 372 : 4 Luck 483 (P C).

[2] Where according to the will the devisee was to have an interest so long as he resided in the house of the testator, his maternal grandfather : *Held*, that, the restriction was imposed as a condition and not as an indication that the interest created was a life estate. (Vol 3) 1916 Cal 654 (656) (D B).

[3] When a testator had made a gift by will of a certain zamindari to his wife and his son for 'their maintenance' but language of the gift clearly showed that the estate given is one of inheritance with express power to the donees of making alienation by sale or gift : *Held* that it was not limited to the bare right of maintenance and was the transfer of an absolute interest. ('96) 23 Cal 670 (678) : 23 Ind App 37 (P C).

[4] In order to show that an unlimited gift of profits is less than a gift of the corpus some evidence should be found in the contest or in the circumstances affecting property. ('98) 25 Cal 816 (822) : 25 Ind App 77 (P C). (Unlimited gift of profits held heritable.)

[5] Where the will contained the following provision "I will and bequeath to my dear wife Anne in trust and for her maintenance and support during her life all property which I may die possessed" : *Held* that the words "for her maintenance and support" are words of description or motive and in no way cut down the estate 'during her life' which the testator in terms gave to his wife. ('08) 31 Mad 283 (306) (D B).

[6] Will—Testator giving to his widow his real estate for life — At her death to his eldest son *J* for life and thereafter to "become absolute property" of *J*'s eldest son, alternatively "to become property of my son *K* or of his eldest son"—Failing either to appellant—Death of *J* during testator's lifetime without male issue — *K* and his son who had predeceased him surviving widow—*Held* that as gift to *J*'s eldest son was of absolute interest, alternative gift to *K* was also to be absolute. (07) 1907 App Cas 494 (498), *Mc Cormick* v. *Simpson*.

3. Bequests conferring restricted interest.—[1] Testator bequeathed his landed property among his heirs and gave one part to his wife and provided that if her son out-lived mother, her share should descend to him : *Held* interest of wife was only life interest and not absolute one. It is only where testator speaks of death which is certain as if it were mere contingency by using expression "If any of them die" or "in case of his decease" that such death, to render the divesting clause operative, must be deemed to be death within testator's life-time. ('12) 15 Ind Cas 355 (356, 357) (Low Bur).

[2] *A*, a Hindu talukdar of Oudh, by his will declared that his wife should have full powers but that during the life-time of his son the minor on whose behalf she was to be the manager she should have no power to transfer without necessity any portion of his property, but the wife should have the power to mortgage property for payment of the testator's debts or Government revenue. *Held* that the will conferred no greater power on the wife of alienating her minor son's estate that she had under Hindu law as its manager on her minor son's behalf. ('99) 26 Cal 707 (710) : 26 Ind App 97 (P C).

4. Bequests to Hindu females.—[1] The rule of law applicable to a gift of immovable property by a Hindu husband to his wife is that though a mere gift of immovable property does not carry with it the power of alienation yet when such power of alienation is given expressly or by implication, she acquires an absolute power of disposal over the property and when the gift is by a will, this section entitles her to the whole interest, unless it appears from the will that only a restricted interest was intended to be given. ('01) 5 Cal W N 300 (303) (D B).

[*See also* (Vol 7) 1920 Oudh 37 (38). (Under Hindu law a grant to a female does not necessarily confer absolute estate and this section does not apply to such a case.)]

96. Where property is bequeathed to a person with a bequest in the alternative to another person or to a class of persons, then, if a contrary intention does not appear by the will, the legatee first named shall be entitled to the legacy if he is alive at the time when it takes effect; but if he is then dead, the person or class of persons named in the second branch of the alternative shall take the legacy.

Bequest in alternative.

Illustrations.

(i) A bequest is made to *A* or to *B*. *A* survives the testator. *B* takes nothing.

(ii) A bequest is made to *A* or to *B*. *A* dies after the date of the will, and before the testator. The legacy goes to *B*.

(iii) A bequest is made to *A* or to *B*. *A* is dead at the date of the will. The legacy goes to *B*.

(iv) Property is bequeathed to *A* or his heirs. *A* survives the testator. *A* takes the property absolutely.

(v) Property is bequeathed to *A* or his nearest of kin. *A* dies in the lifetime of the testator. Upon the death of the testator, the bequest to *A's* nearest of kin takes effect.

(vi) Property is bequeathed to *A* for life, and after his death to *B* or his heirs. *A* and *B* survive the testator. *B* dies in *A's* lifetime. Upon *A's* death the bequest to the heirs of *B* takes effect.

(vii) Property is bequeathed to *A* for life, and after his death to *B* or his heirs *B* dies in the testator's lifetime. *A* survives the testator. Upon *A's* death the bequest to the heirs of *B* takes effect.

[1865 — S. 83.]

97. Where property is bequeathed to a person, and words are added which describe a class of persons but do not denote them as direct objects of a distinct and independent gift, such person is entitled to the whole interest of the testator therein, unless a contrary intention appears by the will.

Effect of words describing a class added to bequest to person.

Illustrations.

(i) A bequest is made—
to *A* and his children,
to *A* and his children by his present wife,
to *A* and his heirs,
to *A* and the heirs of his body,
to *A* and the heirs male of his body,
to *A* and the heirs female of his body,
to *A* and his issue,
to *A* and his family,
to *A* and his descendants,
to *A* and his representatives,
to *A* and his personal representatives,
to *A*, his executors and administrators.

Section 95—Note 4 *(contd.)*

[2] In case of a bequest to a Hindu widow there must be some words indicating an absolute gift either expressly or by implication. Where the words of the will are "the documents of the house shall be taken by two ladies" and there are no other words of inheritance or words authorising them to alienate, the ladies cannot be held to have an absolute estate. ('13) 24 Mad L Jour 418 (423) (D B).

[3] A Hindu testator gave certain property to his two younger daughters in equal shares and the remainder to his elder daughter and her son. The son was to pay the Government assessment and subject to the direction of his mother was to enjoy the land but not in any way to alienate the right to property. It was held that the intention was to grant life estate to daughter with remainder to her son whose interest was subordinate to his mother. As mother's interest was not absolute the property passed to her son's heirs. ('98) 21 Mad 425 (428) (D B).

Section 96—Note 1

[1] Will providing that estate should go to testator's daughter during her lifetime and after death to her sons or sons' children as would be alive : *Held*, the word "or" could not be read as "and" and after the daughter's death the property would go to her sons or if sons were not living, to her sons' children. (Vol 28) 1941 Mad 245 (246) (D B).

[2] Bequest of life interest in favour of sons—Residue devised in favour of male issue of sons; such issue failing, to female issue and that again failing, in favour of the grand-daughters by his daughters — No grandchildren by son at the time of testator's death — Two daughters of the daughter and not the sons are entitled to the residue. ('05) 28 Mad 386 (389) (D B).

[3] A bequest was made to two ladies for life and after the death of the survivor of them, to male issue of one *J* and in default of such male issue to any person or persons *J* might by his deed appoint. *J* had no male issue and by his will appointed his daughters *A* and *B* to the estate. *B* was born after the death of the testator. It was held that the alternate gift to persons to be appointed by *J* was valid but as *B* was not alive at the death of the testator it was invalid in regard *B*. ('92) 16 Bom. 492 (497, 499) (D B). (Appeal from ('91) 15 Bom 326)

[4] *A* gave certain pecuniary legacies to children of his deceased son *B* and gave the residue to his other children excepting *B* and added that if such child died before *A* leaving his child or children at the time of *A's* death, such child or children would take the share of his parent. Question was whether *B's* children could share the residue. It was held that they could not as the gift in favour of other grand children was a substitutional gift and not an independent gift in favour of all the grandchildren. (1907) 1907 App Cas 225 (228), *Gorringe* v. *Mahlstedt*.

[5] Alternative gift in favour of a class of persons to be selected by person having power to appoint — In default of appointment all such persons take as tenants-in-common in equal shares. (1883) 24 Ch D 244 (252), *Wilson* v. *Dugmid*.

Section 97 — Note 1

[1] This section does not apply directly to wills by Hindus but as a general principle of interpretation of wills the rule laid down by the section can equally be

In each of these cases, *A* takes the whole interest which the testator had in the property.

(ii) A bequest is made to *A* and his brothers. *A* and his brothers are jointly entitled to the legacy.

(iii) A bequest is made to *A* for life and after his death to his issue. At the death of *A* the property belongs in equal shares to all persons who then answer the description of issue of *A*.

[1865 — S. 84.]

Bequest to class of persons under general description only.

98. Where a bequest is made to a class of persons under a general description only, no one to whom the words of the description are not in their ordinary sense applicable shall take the legacy.

[1865—S. 85.]

Construction of terms.

99. In a will—

(a) the word "children" applies only to lineal descendants in the first degree of the person whose "children" are spoken of;

(b) the word "grandchildren" applies only to lineal descendants in the second degree of the person whose "grandchildren" are spoken of;

(c) the words "nephews" and "nieces" apply only to children of brothers or sisters;

(d) the words "cousins", or "first cousins", or "cousins-german", apply only to children of brothers or of sisters of the father or mother of the person whose "cousins", or "first cousins", or "cousins german", are spoken of;

(e) the words "first cousins once removed" apply only to children of cousins-german, or to cousins german of a parent of the person whose "first cousins once removed" are spoken of;

(f) the words "second cousins" apply only to grandchildren of brothers or of sisters of the grandfather or grandmother of the person whose "second cousins" are spoken of;

(g) the words "issue" and "descendants" apply to all lineal descendants whatever of the person whose "issue" or "descendants" are spoken of;

Section 97 — Note 1 *(contd.)*

applied to a will by a Hindu, though if the clear intention of the testator appeared otherwise it is inapplicable. (Vol 31) 1944 Mad 22 (23) ✠ (Vol 23) 1936 Bom 459 (461) : I L R (1937) Bom 679.

[2] The use of the words 'male heirs" in a will do not import any limitation. According to the rule of construction in this section such an expression would be rejected as having no effect in the absence of any indication of contrary intention. There is no reason why a different effect should be given to that expression in a deed of family settlement. (Vol 12) 1925 P C 306 (306) (PC).

[*See also* ('13) 35 All 211 (223): 40 Ind App 105 (PC). (Devise to my eldest son *T* and his lawful male children according to the law of inheritance followed by other life limitations : *Held*, *T* was entitled to only a interest.)]

[3] A house was by a will devised in the first instance to the testator's wife with a limited interest; then it was to devolve after the death of the wife on the testator's daughter and her children: *Held* the devise directly falls within the first illustration of Illus. (i) and the daughter takes an absolute interest. (Vol 12) 1925 Oudh 24 (26) (D B).

Section 98 — Note 1

[1] A gift to a class implies an intention to benefit those who constitute the class and to exclude all others; but a gift to individuals described by their several names and descriptions, though they may together constitute a class, implies an intention to benefit the individuals named. In a gift to a class you look to the description and inquire what individuals answer to it; and those who do answer to it are the legatees described. But if the parties to whom the legacy is given be not described as a class but by their individual names and additions, though together constituting a class, those who may constitute the class at any particular time may not, in any respect, correspond with the description of the individuals named as legatees. (1838) 40 ER 1091 (1095): 3 My and C 688, *Barber* v. *Barber*.

[2] A number of persons are popularly said to form a class when they can be designated by some genera name, as 'children,' grandchildren, "nephews;" but in legal language the question whether a gift is one to a class depends not upon these considerations, but upon the mode of gift itself, namely, that it is a gift of an aggregate sum to a body of persons uncertain in number at the time of the gift, to be ascertained at future time, and who are all to take in equal or in some other definite proportions, the share of each being dependent for its amount upon the ultimate number of persons. ('91) 15 Bom 543 (548) (D B). (Benefit of each member of class not dependent on number in the class—Each member having independent right to the benefit—Bequest not affected by non-existence of some at the death of the testator.)

[3] When the gift is to a number of persons who are united or connected by some common tie and you can see that the testator was looking to the body as a whole rather than to the members constituting the body of individuals and so you can see that he intended that if one or more of that body died in his lifetime the survivors should take the gift between them there is nothing to prevent the Courts giving effect to the wishes of the testator. (1901) 1901 App Cas 187 (190, 191), *Kingsbury* v. *Walter*.

[4] Gift to a class fails when the class cannot be ascertained within the period allowed by the rule against perpetuities. But when it can be ascertained within that period, the incapacity of some of the members does not make gift invalid, as regards the other members. ('11) 38 Cal 188 (200) (D B).

Section 99 — Note 1

[1] Section 99 *(g)* is not applicable to wills of Hindus. (Vol 26) 1939 Cal 637 (638).

(*h*) words expressive of collateral relationship apply alike to relatives of full and of half blood; and

(*i*) all words expressive of relationship apply to a child in the womb who is afterwards born alive.

[1865—S. 86.]

Words expressing relationship denote only legitimate relatives or failing such relatives reputed legitimate.

100. In the absence of any intimation to the contrary in a will, the word "child", the word "son", the word "daughter", or any word which expresses relationship, is to be understood as denoting only a legitimate relative, or where there is no such legitimate relative, a person who has acquired, at the date of the will, the reputation of being such relative.

Illustrations.

(*i*) *A* having three children, *B*, *C* and *D*, of whom *B* and *C* are legitimate and *D* is illegitimate, leaves his property to be equally divided among "my children". The property belongs to *B* and *C* in equal shares, to the exclusion of *D*.

(*ii*) *A*, having a niece of illegitimate birth, who has acquired the reputation of being his niece, and having no legitimate niece, bequeaths a sum of money to his niece. The illegitimate niece is entitled to the legacy.

(*iii*) *A*, having in his will enumerated his children, and named as one of them *B*, who is illegitimate, leaves a legacy to "my said children". *B* will take a share in the legacy along with the legitimate children.

(*iv*) *A* leaves a legacy to "the children of *B*". *B* is dead and has left none but illegitimate children. All those who had at the date of the will acquired the reputation of being the children of *B* are objects of the gift.

(*v*) *A* bequeaths a legacy to "the children of *B*". *B* never had any legitimate child *C* and *D* had, at the date of the will, acquired the reputation of being children of *B*. After the date of the will and before the death of the testator, *E* and *F* were born, and acquired the reputation of being children of *B*. Only *C* and *D* are objects of the bequest.

(*vi*) *A* makes a bequest in favour of his child by a certain woman, not his wife. *B* had acquired at the date of the will the reputation of being the child of *A* by the woman designated. *B* takes the legacy.

(*vii*) *A* makes a bequest in favour of his child to be born of a woman who never becomes his wife. The bequest is void.

(*viii*) *A* makes a bequest in favour of the child of which a certain woman, not married to him, is pregnant. The bequest is valid.

[1865—S. 87.]

Section 100 — Note 1

[1] This Act contemplates only legal relations and an illegiatimate child being in the eye of law 'filiae nullius" its claim to succeed as a relation must be rejected. ('06) 30 Bom 500 (505).

[2] The term "children" in will *prima facie* means legitimate children and if there is nothing more in the will the circumstance that the person whose children are referred to has illegitimate children will not entitle the illegitimate children to take. This *prima facie* interpretation, however, is departed from in a case where there is on the face of the will, an expression of the testator's intention to use the word 'children" as including illegitimate children. (1887) 35 Ch D 728 (732), *In re Hastie's Trusts*. (Bequest to all and every other children and child which may be born of the said *M* previous to and of, which she may be pregnant at the time of my death—Connexion between testator and *M* regarded as subsisting and to continue — Connexion not in fact ended till testator's death — 'Children' held included illegitimate children.)✠(1886) 31 Ch D 511 (517, 520), *In re Haseldine*; *Grange* v. *Sturdy*. (Bequest to "all the living children of one *M*"—Children known to have been born before the marriage of *M*—No legitimate child born to *M* after her marriage—*Held*, (*Per* Bower and Fry JJ; Cotton L. J., *contra*) children included the illegitimate children.) ✠ (Vol 1) 1914 Cal 222 (223) (D B).

[*See also* (1902) 2 Ch 542 (545), *In re Wood*; *Wood* v. *Wood*. (It is lawful for a testator to give legacies to an illegitimate child and the word children must be read as meaning legitimate and illegitimate having regard to the intention of the testator.)]

[3] The above rule is also departed from where it is impossible from the circumstances that any legitimate child could take. (1909) 1 Ch. 796 (800), *In re Eve*; *Edwards* v. *Burns*. (Children held included illegitimate children.)

[4] A man cannot provide for the illegitimate children either of himself or of another man by any reference that involves an enquiry as to their paternity. The law allows no criterion of paternity but marriage. The law does not forbid a gift to illegitimate children if the Court could make out from the will that the testator means that all children of the woman born during his cohabitation with her, should be considered, or reputed to be his (1886) 31 Ch D 542 (553), *In re Bolton*; *Brown* v. *Bolton*. (In the absence of any such indication the bequest to illegitimate children held failed).

[5] There is a great distinction to be drawn between gifts whether by deed or by will, by a man in favour of illegitimate child or children and gifts by the mother of an illegitimate child or children. In the former case there is an immoral consideration but the argument cannot apply in the case of gifts by the mother. The illegitimate child when the mother wants to benefit it by a will, can take the bequest as there is nothing in the policy of law to effect this gift to her own child. (1905) 1905 P D 137 (139), *In the Estate of Sararah Eggar Frogley*.

[6] The rule as to interpretation of the word "children" equally applies to the meaning of the relation, (1894) 3 Ch 565 (572), *In re Deakin*; *Starkey* v. *Eyres*. (Bequest to relations of testator's wife—Testator knowing illegitimacy of his wife and thus having no legitimate relations — No child or issue born to her during thirty years of married life — Future issues of her not intended—Relations held included illegitimate relations.) ✠(1891) 1891 App Cas 304 (305), *Charles Scale*; *Hayne* v. *Sir Alfred Godrell Baronet*.

[7] *Prima facie* a gift to a testator's niece refers to his legitimate niece, and supposing the only person who could take under the gift was a grandniece of the testator's wife, that means a legitimate grandniece of his wife and not an illegitimate grandniece of his wife.

101. Where a will purports to make two bequests to the same person, and a question arises whether the testator intended to make the second bequest instead of or in addition to the first; if there is nothing in the will to show what he intended, the following rules shall have effect in determining the construction to be put upon the will :—

Rules of construction where will purports to make two bequests to same person.

(a) If the same specific thing is bequeathed twice to the same legatee in the same will or in the will and again in the codicil, he is entitled to receive that specific thing only.

(b) Where one and the same will or one and the same codicil purports to make, in two places, a bequest to the same person of the same quantity or amount of anything, he shall be entitled to one such legacy only.

(c) Where two legacies of unequal amount are given to the same person in the same will, or in the same codicil, the legatee is entitled to both.

(d) Where two legacies, whether equal or unequal in amount, are given to the same legatee, one by a will and the other by a codicil, or each by a different codicil, the legatee is entitled to both legacies.

Explanation.—In clauses *(a)* to *(d)* of this section, the word "will" does not include a codicil.

Illustrations.

(i) A, having ten shares, and no more, in the Imperial Bank of India, made his will, which contains near its commencement the words "I bequeath my ten shares in the Imperial Bank of India to *B*". After other bequests, the will concludes with the words "and I bequeath my ten shares in the Imperial Bank of India to *B*". *B* is entitled simply to receive *A's* ten shares in the Imperial Bank of India.

(ii) A, having one diamond ring, which was given him by *B*, bequeaths to *C* the diamond ring which was given by *B*. *A* afterwards made a codicil to his will, and thereby, after giving other legacies, he bequeathed to *C* the diamond ring which was given him by *B*. *C* can claim nothing except the diamond ring which was given to *A* by *B*.

(iii) A, by his will, bequeaths to *B* the sum of 5,000 rupees and afterwards in the same will repeats the bequest in the same words. *B* is entitled to one legacy of 5,000 rupees only.

(iv) A, by his will, bequeaths to *B* the sum of 5,000 rupees and afterwards in the same will bequeaths to *B* the sum of 6.000 rupees. *B* is entitled to receive 11,000 rupees.

(v) A, by his will, bequeaths to *B* 5,000 rupees and by a codicil to the will he bequeaths to him 5,000 rupees. *B* is entitled to receive 10,000 rupees.

(vi) A, by one codicil to his will, bequeaths to *B* 5,000 rupees and by another codicil bequeaths to him 6,000 rupees. *B* is entitled to receive 11,000 rupees.

(vii) A, by his will, bequeaths "500 rupees to *B* because she was my nurse", and in another part of the will bequeaths 500 rupees to *B* "because she went to England with my children". *B* is entitled to receive 1,000 rupees.

(viii) A, by his will, bequeaths to *B* the sum of 5,000 rupees and also, in another part of the will, an annuity of 400 rupees. *B* is entitled to both legacies.

(ix) A, by his will, bequeaths to *B* the sum of 5,000 rupees and also bequeaths to him the sum of 5,000 rupees if he shall attain the age of 18. *B* is entitled absolutely to one sum of 5,000 rupees, and takes a contingent interest in another sum of 5000 rupees.

[1865—S. 88]

102. A residuary legatee may be constituted by any words that show an intention on the part of the testator that the person designated shall take the surplus or residue of his property.

Constitution of residuary legatee.

Illustrations.

(i) A makes her will, consisting of several testamentary papers, in one of which are contained the following words :—"I think there will be something left, after all funeral expenses, etc., to give to *B*, now at school, towards equipping him to any profession he may hereafter be appointed to." *B* is constituted residuary legatee.

Section 100 — Note 1 *(contd.)*

There is thus no latent ambiguity and no evidence can be let in to show that the illegitimate grandniece was intended by the testator. (1894) 2 Ch 83 (87), *Ingham* v. *Rayner*.

[8] Gift to all my nephews and nieces then living—No possibility of lawful nephews and nieces competing with natural nephews and nieces—Expression held included sons and daughters of testator's natural sister. (1906) 2 Ch 316 (320), *In re Corsellis; Freeborn* v. *Napper*.

Section 101 — Note 1

[1] The common case where the legacies have not been held to be accumulative is where the same corpus is given twice to the same person, the second legacy *nil operatur*, because it cannot be given more than once. Where the same quantity has been given, and the same cause, or no additional reason assigned for a repetition of the gift the Court has inferred the testator's intention to be the same, and rejected the accumulation; but where the same quantity is given, with any additional cause assigned for it, or any implication to shew that the testator meant that the same thing, *prima facie*, should accumulate, the Court has decided in favour of the accumulation. (1794) 28 E R 1196 (1196) : 1 Bro C C 390, *Hooley* v. *Holton*. (Additional cause or mark of favour mentioned in codicil—Gift held accumulative.)

Section 102 — Note 1

[1] This Act does not contain any formal definition of the expression "residuary legatee" but its meaning is evident from Ss. 102 and 103 of that Act. A residuary legatee is the person designated by the testator as one who will take the residue, surplus of his property and residuary bequest implies that the legatee is

(ii) *A* makes his will, with the following passage at the end of it :—I believe there will be found sufficient in my banker's hands to defray and discharge my debts, which I hereby desire *B* to do, and keep the residue for her own use and pleasure". *B* is constituted the residuary legatee.

(iii) *A* bequeaths all his property to *B*, except certain stocks and funds, which he bequeaths to *C*. *B* is the residuary legatee.

[1865—S. 89.]

Property to which residuary legatee entitled.

103. Under a residuary bequest, the legatee is entitled to all property belonging to the testator at the time of his death, of which he has not made any other testamentary disposition which is capable of taking effect.

Illustration.

A by his will bequeaths certain legacies, of which one is void under section 118, and another lapses by the death of the legatee. He bequeaths the residue of his property to *B*. After the date of his will *A* purchases a zamindari, which belongs to him at the time of his death. *B* is entitled to the two legacies and the zamindari as part of the residue.

[1865—S. 90.]

Time of vesting legacy in general terms.

104. If a legacy is given in general terms, without specifying the time when it is to be paid, the legatee has a vested interest in it from the day of the death of the testator, and, if he dies without having received it, it shall pass to his representatives.

[1865—S. 91.]

Section 102 — Note 1 *(contd.)*

entitled to all property belonging to the testator at the time of his death so that whatever is not effectively disposed of goes to the residuary legatee. (Vol 22) 1935 Nag 239 (240) : 31 Nag L R (Sup) 30.

[2] The very essence of a residuary clause is that its terms should be such as to carry with the bequest of all the enumerated items, if any, all items of property belonging to the deceased not mentioned in the will. Therefore where in a will there were no words bequeathing to a person any immovable property excepting those mentioned therein he is not a residuary legatee in respect of any immovable property. (Vol 12) 1925 Mad 418 (420) (DB).

[3] *Prima facie*, the words "I give all my personal property and effects" were sufficient to constitute a person a residuary legatee of the personalty of the deceased within S. 102 and hence *prima facie* under S. 103 the person becomes entitled to all the personal property belonging to the testatrix at the time of her death of which she had not made any other testamentary disposition which was capable of taking effect. (Vol 22) 1935 Rang 71 (71) : 12 Rang 705 (DB).

[4] Devise of specific immovable property to *A* for life only — No direction as to what should happen after determination of *A's* interest — General direction to executors to sell all the residue of his moveable and immovable property and to make over the proceeds to a university : *Held*, reversion after determination of *A's* life interest passes to university under the residuary devise. ('04) 31 Cal 166 (169).

[5] A testator bequeathed "all the real and personal estate" to his trustees for sale and conversion and out of the proceeds to pay "my debts" and hold the residue thereof in trust for certain residuary legatees. It was held that notwithstanding the absence of the words "rest and residue" the general devise and bequest of the real and personal estate as a mixed fund in one mass was clearly residuary so that legacies were charged upon and payable out of the real estate. (1909) 1 Ch 791 (795), *Trewby* v. *Balls*.

Section 103 — Note 1

[1] The residuary gift carries every lapsed legacy and any legacy which on any ground fails to take effect—But this is subject to other rule that if the testator has shown any intention with regard to the excepted property inconsistent with its ever falling again into residue effect must be given to that intention. (Vol 22) 1935 Rang 71 (71) : 12 Rang 705 (DB) ✻ ('02) 6 Cal W N 321 (325) ✻ (Vol 22) 1935 Nag 239 (240) : 31 Nag L R (Sup) 30. (No particular mode of expression is necessary to constitute a residuary legatee.)

[*See also* (1861) 8 Moo Ind App 66 (88) (PC).]

[2] Where the testator has manifested a general charitable intention this should not fail to be carried out merely because the executors are all dead and the particular land, on which the testator desired the dispensary to be erected, is not available for the purpose. ('09) 36 Cal 261 (265).

[3] The residuary estate should be construed to include such portions of the enumerated estate as were not specifically given but it does not apply to property unknown to the testator. (Vol 21) 1934 Cal 356 (361) : 60 Cal 1406 (DB) ✻ (Vol 3) 1916 Mad 17 (18) : 38 Mad 1096.

[4] Certain items to remain as tarwad — Properties omitted, to go to certain persons — Attempt to create property on analogy of tarwad, held, invalid and items fell into residue. (Vol 27) 1940 Mad 785 (787) (DB).

Section 104 — Note 1

[1] Probate granted to executor — Simultaneous agreement recorded between beneficiaries to have properties disposed of by the executor not in complete accordance with the terms of will—Executor agreeing to distribute according to the terms of agreement — *Held* executor holds property under the will and not as a trustee and the heir of residuary legatee who has not received his share can invoke the aid of S. 104. (Vol 20) 1933 Cal 841 (843) : 60 Cal 1135 (DB).

[2] A person who is given by will definite share after expiration of life estate takes vested interest in such share and it is transmissible to his heirs. ('28) 109 Ind Cas 654 (654) (Lah).

[3] A bequest unless the testator intended otherwise, as in the case of a contingent bequest, becomes vested in interest in the devisee or legatee from the date of the testator's death although he may not be entitled to receive what has been bequeathed to him except in due course of administration. ('12) 22 Mad L Jour 228 (229) (DB).

[4] The estate vested under this section is not full or absolute and until the assent of the executor is given the legatee has only an inchoate right to the legacy. (Vol 3) 1916 Mad 422 (423, 424) : 38 Mad 474 (DB). (A legacy even if vested could be divested by the disclaimer of the legatee.)

105. *(1)* If the legatee does not survive the testator, the legacy cannot take effect, but shall lapse and form part of the residue of the testator's property, unless it appears by the will that the testator intended that it should go to some other person.

In what case legacy lapses.

(2) In order to entitle the representatives of the legatee to receive the legacy, it must be proved that he survived the testator.

Illustrations.

(*i*) The testator bequeaths to *B* "500 rupees which *B* owes me." *B* dies before the testator; the legacy lapses.

(*ii*) A bequest is made to *A* and his children. *A* dies before the testator, or happens to be dead when the will is made. The legacy to *A* and his children lapses.

(*iii*) A legacy is given to *A*, and, in case of his dying before the testator, to *B*. *A* dies before the testator. The legacy goes to *B*.

(*iv*) A sum of money is bequeathed to *A* for life, and after his death to *B*. *A* dies in the lifetime of the testator; *B* survives the testator. The bequest to *B* takes effect.

(*v*) A sum of money is bequeathed to *A* on his completing his eighteenth year, and in case he should die before he completes his eighteenth year, to *B*. *A* completes his eighteenth year, and dies in the lifetime of the testator. The legacy to *A* lapses, and the bequest to *B* does not take effect.

(*vi*) The testator and the legatee perished in the same ship-wreck. There is no evidence to show which died first. The legacy lapses.

[1865—S. 92.]

Section 104 — Note 1 *(contd.)*

[5] A will directed that in the event of any of his legatees dying during his life time or any time thereafter "prior to the division" of the proceeds from the sale of his estate as directed in earlier part of the will, leaving lawful issue, such issue would be entitled to the share of the deceased parent. One legatee died after the testator's death but before the said division took place and left a lawful issue. It was held that the interest of the deceased legatee did in law vest in him at the death of the testator but he having died prior to the division of the estate it was divested and the gift over took effect in favour of his issue. ('84) 6 All 583 (597) (DB).

Section 105 — Note 1

[1] This section applies to Hindus and where a legacy is given to *A*, a Hindu alone and he predeceases the testator, the legacy will lapse. But from that it does not follow that illustration (ii) will apply if the bequest is contained in a Hindu will. To say so would be inconsistent with the rule laid down by S. 97 which is expressly made inapplicable to Hindus. (Vol 23) 1936 Bom 459 (462) : I L R (1937) Bom 679. (Hindu will giving legacy to *A* and his sons and daughter — *A* and daughter dying before testator — Legacy held was for parent and issue concurrently and sons took the whole legacy as survivors.)

[2] A person capable of taking under a will must be such a person as could take a gift *inter vivos* and therefore either in fact or in the contemplation of law be in existence at the death of the testator. ('72) 18 Suth W R 359 (367).

[3] In order to prevent a legacy from lapsing a testator must in clear words exclude lapse and must clearly indicate who is to take in case the legatee dies before the testator. (Vol 27) 1940 Lah 318 (319): I L R (1940) Lah 583 (DB). (Bequest to wife and three daughters in four equal shares—Wife dying before testator —No indication as to wife's share in such circumstances — Bequest to wife lapses and passes to son.)

[4] A Parsi devised a house to his wife for her life and then to his son *A* and after him to his widow subject to certain restrictions, and issues of *A* if any and then to his another son *B*. *A* died in the lifetime of testator's widow and left neither widow nor any issue. It was held that *B* was entitled to the house subject to life-estate of his mother. (Vol 5) 1918 P C 206 (208) : 45 Ind App 257 : 43 Bom 88 (PC).

[5] Gift to persons made as tenants-in-common — One of them dies before testator—His share lapses, and forms part of residue of testator's property unless it appears from the will that the testator intended that it should go over to some other person. (Vol 23) 1936 Sind 158 (160) : 29 Sind L R 374 (DB).

[6] Where by the terms of a will an annuity is payable to a certain person *putra pautradi krame*, but is not charged on any specific property, and the legatee predeceases the testator, it must be held that the will confers an estate of inheritance, but the legacy lapses because the legatee has predeceased the testator. The words *putra pautradi krame* etc., are merely descriptive of the estate which the testator proposed to confer on the legatee and do not import a gift over to the sons and grandsons of the legatee. (Vol 28) 1941 Pat 458 (458, 459) ✠ (Vol 27) 1940 Pat 257 (257) (DB).

[7] If the Court finds upon the construction of the will, that the testator clearly intended not to give a mere bounty to the legatee, but to discharge what he regarded as a moral obligation, whether it were legally binding or not, and if that obligation still exists at the testator's death, there is no necessary failure of the testator's object merely because the legatee dies in his lifetime; and therefore death in such a case does not cause a lapse (1904) 2 Ch 30 (33), *Stevens* v. *King*. (On construction of the will held that the testatrix intended to discharge an obligation and that there was no lapse.)

[8] It can make no difference that legatee ceased to exist immediately after the death of the testator. The same law must be applicable whether it was a day, or month, or year or ten years after. The legacy becomes the property of the legatee upon the death of the testator though he might not for some reason, obtain the receipt of it till long after. (1891) 2 Ch 236 (243), *In re Slavin*; *Slavin* v. *Habburn*. (Principles relating to lapse of legacies to charitable objects discussed—Charitable bequest to orphanage existing at the time of testator's death but coming to an end before legacy was paid over—Legacy does not lapse into residue.)

[9] Where a legacy is bequeathed to a particular charitable institution existing at the date of the will and the institution has ceased to exist before the testator's death, the legacy fails and lapses in the same way as in the case of an individual. (1895) 1 Ch 19 (24, 34, 35), *Rymer* v. *Stanfield*. (Case law as to lapse of bequests to charitable institutes discussed.)

[10] Refusal to receive legacy — Retracting such refusal — Effect — Lapse of legacy —Legacy held did not lapse. (1913) 1 Ch 272 (276), *Fraser* v. *Young*.

Legacy does not lapse if one of two joint legatees die before testator.

106. If a legacy is given to two persons jointly, and one of them dies before the testator, the other legatee takes the whole.

Illustration.

The legacy is simply to *A* and *B*. *A* dies before the testator. *B* takes the legacy.
[1865—S. 93.]

Effect of words showing testator's intention to give distinct shares.

107. If a legacy is given to legatees in words which show that the testator intended to give them distinct shares of it, then, if any legatee dies before the testator, so much of the legacy as was intended for him shall fall into the residue of the testator's property.

Illustration.

A sum of money is bequeathed to *A*, *B* and *C*, to be equally divided among them. *A* dies before the testator. *B* and *C* will only take so much as they would have had if *A* had survived the testator.
[1865—S. 94.]

Section 106 — Note 1

[1] Where there are no words to indicate an intention to create tenancies in-common the rule of English law is to presume that the donees are joint tenants. This rule has been adopted in this section. The difference in dates as to handing over the management to each donee, does not sufficiently indicate donor's intention to create tenancies-in-common. ('11) 34 Mad. 80 (81) (DB). (The rule was applied to the case of a gift and held that a gift to *A*, *B* and *C*, simply was a gift to them jointly and not as tenants-in-common.)

[2] Where the gift is to two donees jointly and the one is capable of taking and the other not, he who is capable shall take the whole. This principle does not depend on any peculiarity in English law and is applicable to this deed of gift. ('89) 16 Cal. 677 (682) : 16 Ind App 44 (P C).

[3] Sections 106, 97 — Will by Hindu—Legacy to *T*, his sons and daughter — Death of *T* and daughter during testator's lifetime — Sons take whole legacy as the legacy was for parent and issue concurrently. (Vol 23) 1936 Bom. 459 (462) : I L R (1937) Bom. 679.

[4] Where the relevant portion of the will by a Christian ran : "After my death my wife and foster daughter should get these properties and enjoy them" it was held, that there was a joint bequest to wife and foster daughter and that, therefore, the foster daughter was entitled to succeed to the whole of the property bequeathed by survivorship after the wife's death. (Vol 33) 1946 Mad 12 (14).

[5] Testator directing the net income of trust created during the joint lives of his wife and daughter to be applied first for the payment of monthly allowances to daughter and wife and the residue to be used for their purposes and then the children of the daughter : *Held* that there was a gift of the residue to wife and daughter in equal proportions during their joint lives and that on the death of one, the survivor would take the whole for her lifetime. ('91) 15 Bom. 443 (449, 450).

[6] Bequest to 'children' where a testator directed to sell the estate and pay the proceeds to and among his nephew and nieces as tenants-in common and that in the case of death of any of his nephews and nieces, the children of the one dying should be paid the parents' share, it was held that the children took as joint tenants and not as tenants-in-common. (1915) 2 Ch 216 (221), *Public Trustee* v. *Clarkson*. (Interpretation of 'monies to be paid'.)

[7] Maintenance grant — When a grant is made for maintenance in favour of two persons, *prima facie* it may be concluded that upon the death of either the other would be entitled to only a proportionate amount. But where a grantor provided that two ladies were to receive Rs 650 and that after the death of both one-half of the amount was to be continued as maintenance of a son born of the womb of one of them named therein there was sufficient indication to the contrary so as to construe the grant to the two ladies as if they constituted one grantee with a right of survivorship *inter se*. ('13) 17 Cal L Jour 87 (91) (DB).

[*See also* (Vol 8) 1921 Cal 175 (175) (DB). (Case of annuity.)]

Section 107—Note 1

[1] Where any property is bequeathed to two or more persons without any specification of shares, the natural presumption is that they are intended to take in equal shares: and when the estate bequeathed is one of inheritance, it is far more reasonable to suppose that each legatee and his heirs are the objects of the testator's bounty, than that he intends that the legatees should take by survivorship, and the heirs of the last surviving legatee should take the whole. Even in English law the leaning has been in favour of tenancy in common ; and the Court decrees a tenancy in common as much as it can. ('97) 24 Cal 646 (654) (DB) ✠ ('92) 15 Mad 448 (468, 469). (A bequest of a fund to my grandchildren by my daughter *A*, also to my grandson *B* and to his step-brother *C* in 'equal shares' is a bequest to the testator's grand-children as *persona designata* to be enjoyed as tenants-in common.)

[2] The principle of joint tenancy as obtaining in England is quite foreign to the Hindu law and when property is gifted to more than one, in the absence of anything in the grant to the contrary the presumption is that the donees take as tenants-in-common. In case of Hindu wills, where the grant is to persons incapable of forming a Hindu joint family they can of course take only as tenants in common. Where the grant is to persons who constitute such a family, it may even then be the *prima facie* view that they take in severalty and those who argue in favour of joint tenancy have to show some clear foundation for it in the terms of the will. ('05) 28 Mad 363 (373, 374) (DB). ("Shall enjoy the house from son to grandson and so on in succession" indicates grant of absolute estate while "shall take in equal shares" shows that grantees will take as tenants in common)✠('96) 23 Cal 670 (679) : 23 Ind App 37 (P C). (Bequest of 4 anna share of zamindary to testator's daughter and her son "for your maintenance' with power to alienate—Each took absolute estate in 2 anna share — The words "for your maintenance" did not reduce their interest. 11 Mad 258, *Overruled*.)✠('11) 33 All 41 (44) (DB). (Bequest by Hindu father to his two married daughters : *Held*, daughters took as tenants-in-common.)

[*See also* ('04) 27 Mad 498 (503) (DB). (Partition between father and sons of senior wife—Stipulation that father and junior wife should hold and enjoy father's share—Wife held took as tenant-in-common and not as joint tenant with a right of survivorship—After death of father wife held entitled to moiety only.)]

When lapsed share goes as undisposed of.

108. Where a share which lapses is a part of the general residue bequeathed by the will, that share shall go as undisposed of.

Illustration.

The testator bequeaths the residue of his estate to *A*, *B* and *C*, to be equally divided between them. *A* dies before the testator. His one-third of the residue goes as undisposed of.

[1865—S. 95.]

When bequest to testator's child or lineal descendant does not lapse on his death in testator's lifetime.

109. Where a bequest has been made to any child or other lineal descendant of the testator, and the legatee dies in the lifetime of the testator, but any lineal descendant of his survives the testator, the bequest shall not lapse, but shall take effect as if the death of the legatee had happened immediately after the death of the testator, unless a contrary intention appears by the will.

Illustration.

A makes his will, by which he bequeaths a sum of money to his son, *B*, for his own absolute use and benefit. *B* dies before *A*, leaving a son, *C*, who survives *A*, and having made his will whereby he bequeaths all his property to his widow, *D*. The money goes to *D*.

[1865—S. 96.]

Bequest to *A* for benefit of *B* does not lapse by *A*'s death.

110. Where a bequest is made to one person for the benefit of another, the legacy does not lapse by the death, in the testator's lifetime, of the person to whom the bequest is made.

[1865—S. 97.]

Survivorship in case of bequest to described class.

111. Where a bequest is made simply to a described class of persons, the thing bequeathed shall go only to such as are alive at the testator's death.

Exception.—If property is bequeathed to a class of persons described as standing in a particular degree of kindred to a specified individual, but their possession of it is deferred until a

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Section 107 — Note 1 *(contd.)*

[3] When all persons who are to benefit under the will are mentioned by name the bequest to them is not as a class but as tenants-in-common. Where therefore a bequest is made to one sister and four brothers, mentioning their names and specific shares and one of the brothers dies before testator the dead brother's share lapses and forms part of the residue of testator's property and other brothers and sisters cannot claim it. (Vol 23) 1936 Sind 158 (159) : 29 Sind L R 374 (DB).

[*See also* ('98) 22 Bom 833 (840): 25 Ind App 126 (P C). (On construction of the will held that two brothers took life interest as tenants in common and there being no valid disposal of the ulterior interest, it fell into the residue.)]

[4] Bequest of certain property in equal shares to the testators's children *A*, *B* and *C* or the survivors or survivor of them — *A* attesting the will — *A*'s share becoming void falls into the residue and does not go over to *B* and *C*. ('03) 26 Mad 433 (437) (DB).

Section 108 — Note 1

[1] Will by one *K* in which a legacy was bequeathed to Mrs. *J* who was his sister — *J* attesting the will : *Held* that the legacy to Mrs. *J* lapsed under S. 54 of the Act of 1865 (S. 67 of this Act) and therefore should be dealt with under S. 95 of that Act (corresponding to S. 108 of this Act). ('82) 4 Mad 244 (246).

Section 109 — Note 1

[1] This section is an exception to the general rule laid down in S. 105 and its effect is to prolong the life of the original devisee by a fiction of law for the purpose of giving effect to the will in which the gift which would otherwise lapse, occurs and it only points out the mode in which that is to be given. (Vol 34) 1947 Oudh 45 (62) : 21 Luck 463 (DB).

[2] All that S. 109 provides is that the bequest shall take effect as if the death of the legatee had happened immediately after the death of the testator. In other words, in order to prevent a lapse it must be assumed that the legatee survived the testator. The section does not contain any provision that on such assumption being made the bequest is to take effect only in favour of the lineal descendants. The benefit of this section extends to all the heirs. (Vol 22) 1935 Oudh 437 (439) : 11 Luck 376 (DB).

[3] This section applies to taluqdars — *See* S. 19, Oudh Estates Act, 1869. (Vol 34) 1947 Oudh 45 (62): 21 Luck 463 (DB).

[4] This section applies even if the legatee is dead at the date of the will. (1900) 27 Cal 521 (527) : 27 Ind App 10 (P C).

[5] Bequest by a Hindu having no male issue to his eldest daughter and her sons from generation to generation — Legatee dying before testator having only two daughters—Testator leaving widow and other daughters after him—Daughters of legatee claiming property on equitable principles on analogy of this section : *Held*, the words "sons and grandsons" in the will meant only "heirs" and that the section or its principle could not be applied as the will was not governed by the Act. ('01) 24 Mad 299 (304) (DB).

[6] Bequest to testator's daughter of certain amount— Daughter predeceasing testator leaving a daugher born during life time of testator: *Held*, S. 96 of Act of 1865 applied and the legatee's daughter was entitled to the legacy and further that, the rule in Tagore's case was not contravened as the effect of this section was to vest the legacy in the legatee herself treating her as dying immediately after the death of the testator. ('89) 16 Cal 549 (555) (DB).

[7] The expression "any child or other lineal descendant" in this section does not include an illegitimate son. (Vol 28) 1941 Pat 458 (458, 459). (An illegitimate child would be included in the word "child" only when there is a *designatio personæ*.)

Section 111 — Note 1

[1] It is a question of construction in each case whether the class is to be ascertained at the death of the testator or at a later date. It is for those who assert that the class is to be ascertained at a date other than that of the death of the testator to show that that is the fair result of the language of the will. (1920) 1920 App Cas 794

time later than the death of the testator by reason of a prior bequest or otherwise, the property shall at that time go to such of them as are then alive, and to the representatives of any of them who have died since the death of the testator.

Illustrations.

(*i*) *A* bequeaths 1,000 rupees to "the children of *B*" without saying when it is to be distributed among them. *B* had died previous to the date of the will, leaving three children, *C*, *D* and *E*. *E* died after the date of the will, but before the death of *A*. *C* and *D* survive *A*. The legacy will belong to *C* and *D*, to the exclusion of the representatives of *E*.

(*ii*) A lease for years of a house was bequeathed to *A* for his life, and after his decease to the children of *B*. At the death of the testator, *B* had two children living, *C* and *D*, and he never had any other child. Afterwards, during the life-time of *A*, *C* died, leaving *E*, his executor. *D* has survived *A*. *D* and *E* are jointly entitled to so much of the lease-hold term as remains unexpired.

(*iii*) *A* sum of money was bequeathed to *A* for her life, and after her decease, to the children of *B*. At the death of the testator, *B* had two children living, *C* and *D*, and, after that event, two children, *E* and *F*, were born to *B*. *C* and *E* died in the lifetime of *A*, *C* having made a will, *E* having made no will. *A* has died, leaving *D* and *F* surviving her. The legacy is to be divided into four equal parts, one of which is to be paid to the executor of *C*, one to *D*, one to the administrator of *E* and one to *F*.

(*iv*) *A* bequeaths one-third of his lands, to *B* for his life, and after his decease to the sisters of *B*. At the death of the testator, *B* had two sisters living, *C* and *D*, and after that event another sister *E* was born. *C* died during the life of *B* *D* and *E* have survived *B*. One-third of *A*'s lands belong to *D*, *E* and the representatives of *C*, in equal shares.

(*v*) *A* bequeaths 1,000 rupees to *B* for life and after his death equally among the children of *C*. Up to the death of *B*, *C* had not had any child. The bequest after the death of *B* is void.

(*vi*) *A* bequeaths 1,000 rupees to "all the children born or to be born" of *B* to be divided among them at the death of *C*. At the death of the testator, *B* has two children living, *D* and *E*. After the death of the testator, but in the lifetime of *C*, two other children, *F* and *G*, are born to *B*. After the death of *C*, another child is born to *B*. The legacy belongs to *D*, *E*, *F* and *G*, to the exclusion of the after-born child of *B*.

(*vii*) *A* bequeaths a fund to the children of *B*, to be divided among them when the eldest shall attain majority. At the testator's death, *B* had one child living, named *C*. He afterwards had two other children, named *D* and *E*. *E* died, but *C* and *D* were living when *C* attained majority. The fund belongs to *C*, *D* and the representatives of *E*, to the exclusion of any child who may be born to *B* after *C*'s attaining majority.

[1865 — S. 98.]

CHAPTER VII.

OF VOID BEQUESTS.

Bequest to person by particular description, who is not in existence at testator's death.

112. Where a bequest is made to a person by a particular description, and there is no person in existence at the testator's death who answers the description, the bequest is void.

Section 111 — Note 1 *(contd.)*

(802), *Hutchinson* v. *National Refuges for Homeless and Destitute Children.*

[2] Where a will contains an immediate gift to the children of a living person and nothing more and there are children living at the death of the testator those children only take. Where, however, the period of distribution is postponed the gift will apply not only to the children living then at the death of the testator but also to those born before the period of distribution. (1891) 3 Ch. 197 (202), *Mervin* v. *Crossman* ✠ (1879) 5 App Cas 123 (134), *Engeltina Dias* v. *Alfred De Livera.* (Immediate gift—Children alive at the death of testator take.) ✠ ('94) 18 Bom. 7 (13). (Do.) ✠ ('05) 7 Bom. L R 207 (211). (Do.)

[3] Where the gift is by will to a class the rule of lapse of bequest does not apply. The true rule is that those members of the class who are at the testator's death capable of taking take and that those who become incapable of taking whether by dying in the testator's lifetime or by attesting the will or by some other operation of law do not take. (1876) 4 Ch D 165 (172, 173), *In re Coleman and Jarrom.*

[4] In case of a bequest to a class, even by a Hindu under a power of appointment, the appointment should be made during the life of the life tenant so that the appointee may be ascertained when the event arises when he is to take and secondly the persons who take must be alive at the death of the testator. ('92) 16 Bom 492 (499) (DB).

[*See also* (1803) 8 Ves Jun 375 (381) : 32 E R 400, *Paul* v. *Compton.* (Bequest to such of the children of *A* as *B* shall by will direct and in default of such directions, among the children share and share alike—*B* in executing her power of appointment is to take only those as objects of her disposition who were born before her death.)]

[5] On reading this section with S. 119, it is clear that the title to the property bequeathed to a class of persons certainly vests in such of the persons of that class who are actually alive at the testator's death. This section contemplates the cases of deferred possession and not deferred vesting (Vol 20) 1933 Mad 885 (887) (DB). (Bequest of life-estate with gift over to a class of persons—Defendant 1 only living of that class at the death of testator—Defendant's estate is vested and he can mortgage his interest even before the death of the life-tenant.)

[6] Mere interposition of a life estate does not prevent the vesting of the remainder even in case of a legacy to a class, the time of vesting being the time of the death of the testator. and not the termination of the life-estate. (Vol 22) 1935 Mad 865 (866). (Will by a Hindu dated 26-2-1898 — Principle of the section applied.)

SECTION 112 — SYNOPSIS.

1. Scope.
2. Applicability to Hindu wills.
3. "Kindred."
4. Exception.

1. Scope.— [1] A person capable of taking under a will must be such a person as could take a gift *inter vivos* and, therefore, must either in fact or contempla-

Exception.—If property is bequeathed to a person described as standing in a particular degree of kindred to a specified individual, but his possession of it is deferred until a time later than the death of the testator, by reason of a prior bequest or otherwise; and if a person answering the description is alive at the death of the testator, or comes into existence between that event and such later time, the property shall, at such later time go to that person, or, if he is dead, to his representatives.

Illustrations.

(*i*) *A* bequeaths 1,000 rupees to the eldest son of *B*. At the death of the testator, *B* has no son. The bequest is void.

(*ii*) *A* bequeaths 1,000 rupees to *B* for life, and after his death to the eldest son of *C*. At the death of the testator, *C* had no son. Afterwards during the life of *B*, a son is born to *C*. Upon *B*'s death the legacy goes to *C*'s son.

(*iii*) *A* bequeaths 1,000 rupees to *B* for life, and after his death to the eldest son of *C*. At the death of the testator, *C* had no son. Afterwards, during the life of *B*, a son, named *D*, is born to *C*. *D* dies, then *B* dies. The legacy goes to the representative of *D*.

(*iv*) *A* bequeaths his estate of Green Acre to *B* for life, and at his decease, to the eldest son of *C*. Up to the death of *B*, *C* has had no son. The bequest to *C*'s eldest son is void.

(*v*) *A* bequeaths 1,000 rupees to the eldest son of *C*, to be paid to him after the death of *B*. At the death of the testator *C* has no son, but a son is afterwards born to him during the life of *B* and is alive at *B*'s death. *C*'s son is entitled to the 1,000 rupees.

[1865—S. 99.]

113. Where a bequest is made to a person not in existence at the time of the testator's death subject to a prior bequest contained in the will the later bequest shall be void, unless it comprises the whole of the remaining interest of the testator in the thing bequeathed.

Bequest to person not in existence at testator's death subject to prior bequest.

Illustrations.

(*i*) Property is bequeathed to *A* for his life, and after his death to his eldest son for life, and after the death of the latter to his eldest son. At the time of the testator's death, *A* has no son. Here the bequest to *A*'s eldest son is a bequest to a person not in existence at the testator's death. It is not a bequest of the whole interest that remains to the testator. The bequest to *A*'s eldest son for his life is void.

Section 112 — Note 1 *(contd.)*

tion of law be in existence at the death of the testator. ('97) 21 Bom 709 (721) : 24 Ind App 93 (P C).

[2] Will providing three legacies in succession—Last legatee or descendants of three to nominate successor—In event of disagreement between them Government to appoint successor. Will held invalid as offending rule of perpetuities and as creating interest in unborn persons. (Vol 16) 1929 Oudh 494 (506) : 5 Luck 305 (DB).

[3] A gift to a woman during widowhood and after death or remarriage to persons or class of persons living at her death, has been held to enure on her marriage for the immediate benefit of the persons or class of persons then living. (1918) 1 Ch 368 (370, 371), *Watts* v. *Silvey*.

2. Applicability to Hindu wills.—[1] Section 112 is not included in the limitation upon the power of a Hindu to make a bequest by will to an unborn person contained in S. 3 of the Hindu Disposition of Property Act—S. 112 therefore does not make a bequest by a Hindu in favour of an unborn person void) (Vol 33) 1946 Cal 396 (400) (DB). (('82) 8 Cal 637 (DB) held no longer good law.)

[But see (Vol 20) 1933 Pat 647 (649) : 12 Pat 708 (DB). (Hindu law—Bequest to *L*'s first male child—Male child born to *L* only after death of testator — Gift is void—S. 112 is subject to restriction No. 1 of Sch. III.) ✠('82) 8 Cal 637 (638) (DB). (Reversing ('82) 8 Cal 157.)]

[2] The rules of Hindu law regarding wills are not affected by the Hindu Wills Act. S. 112 which has been made applicable by S. 3 of Wills Act to Hindus does not apply to wills under Hindu Law. ('12) 39 Cal 87 (93) (DB) ✠ (Vol 8) 1921 Mad 258 (264) : 44 Mad 446 (DB).

[3] The principle of Hindu law which invalidates a gift other than to a sentient being capable of accepting it does not apply to a bequest to trustees for the establishment of an image and the worship of a Hindu deity after the testator's death (and does not make such a bequest void). ('10) 37 Cal 128 (134) (F B).

3. "Kindred".— [1] The word "kindred" should not be limited to blood relations when that word is imported into a Hindu will. Therefore a bequest made by a Hindu father to the would-be wife of his son may be deemed a bequest to a person described as standing in a particular degree of kindred to his son. ('12) 39 Cal 87 (101, 103) (DB).

[2] Bequest to relative's would-be-wife in existence at the testator's death is valid, notwithstanding the provisions of S. 99. (Vol 10) 1923 Nag 105 (106) : 18 Nag L R 143.

4. Exception. — [1] A will executed by a Hindu provided, *inter alia* : "*A*, first male child by the present wife to be heir in default of any male child being born to him or dying in childhood, either a son of *B* or *C* to be heir. The boy should live with the daughter-in-law as her adopted son". It was held that no son of *A* was in existence at the time of the testator's death and it could not have been within the contemplation of the testator that the operation of the bequest should be suspended indefinitely, the exception to S. 112 also could not apply. (Vol 20) 1933 Pat 647 (649) : 12 Pat 708 (DB).

[2] The general principle that a donee must be in existence for the validity of a gift is subject to an exception in the case of conditional gifts on marriages, so that a bequest in favour of a girl who was to be married by the testator's son and who was in existence at the time of his death, is valid. ('12) 39 Cal 87 (92) (D B).

Section 113 — Note 1

[1] Sections 100, 101, 102 constitute law of British India applicable to succession to property of every one except Hindus, Mahomedans or Buddhists. They are, therefore, applicable to those subject to a variety of systems of jurisprudence, and must therefore be cons-

(*ii*) A fund is bequeathed to *A* for his life, and after his death to his daughters. *A* survives the testator. *A* has daughters some of whom were not in existence at the testator's death. The bequest to *A*'s daughters comprises the whole interest that remains to the testator in the thing bequeathed. The bequest to *A*'s daughters is valid.

(*iii*) A fund is bequeathed to *A* for his life, and after his death to his daughters, with a direction that, if any of them marries under the age of eighteen, her portion shall be settled so that it may belong to herself for life and may be divisible among her children after her death. *A* has no daughters living at the time of the testator's death, but has daughters born afterwards who survive him. Here the direction for a settlement has the effect in the case of each daughter who marries under eighteen of substituting for the absolute bequest to her a bequest to her merely for her life; that is to say, a bequest to a person not in existence at the time of the testator's death of something which is less than the whole interest that remains to the testator in the thing bequeathed. The direction to settle the fund is void.

(*iv*) *A* bequeaths a sum of money to *B* for life, and directs that upon the death of *B* the fund shall be settled upon his daughters, so that the portion of each daughter may belong to herself for life, and may be divided among her children after her death. *B* has no daughter living at the time of the testator's death. In this case the only bequest to the daughters of *B* is contained in the direction to settle the fund, and this direction amounts to a bequest to persons not yet born, of a life-interest in the fund, that is to say, of something which is less than the whole interest that remains to the testator in the thing bequeathed. The direction to settle the fund upon the daughters of *B* is void.

[1865—S. 100.]

Rule against perpetuity.

114. No bequest is valid whereby the vesting of the thing bequeathed may be delayed beyond the lifetime of one or more persons living at the testator's death and the minority of some person who shall be in existence at the expiration of that period, and to whom, if he attains full age, the thing bequeathed is to belong.

Illustrations.

(*i*) A fund is bequeathed to *A* for his life and after his death to *B* for his life; and after *B*'s death to such of the sons of *B* as shall first attain the age of 25. *A* and *B* survive the testator. Here the son of *B* who shall first attain the age of 25 may be a son born after the death of the testator; such son may not attain 25 until more than 18 years have elapsed from the death of the longer liver of *A* and *B*; and the vesting of the fund may thus be delayed beyond the lifetime of *A* and *B* and the minority of the sons of *B*. The bequest after *B*'s death is void.

Section 113 — Note 1 *(contd.)*

trued according to the generally current meaning of the words used and apart from such technical considerations as are only appropriate in the law of England. (Vol 10) 1923 P C 122 (125) (PC). (Interpretation of Parsi will)

[2] Omission of S. 100 in Act 8 of 1921 does not make S. 113 inapplicable to Hindu wills in Madras. (Vol 21) 1934 Mad 705 (708) : 58 Mad 15 (D B). (Hindu will in city of Madras conferring life estate on son and after his death a life interest by way of remainder to son's wife with a further gift after her death to certain other person. Wife not in existence at the death of testator—Gift to wife is void.)

[3] Rules in Ss. 113 and 114 have to be applied as at the testator's death. They include the possibilities existing at that time and are not confined to actual events (Vol 33) 1946 Cal 396 (401, 405, 406) (D B). (Testator's will after creating some maintenance allowances providing in cl. (9) that legitimate sons, natural or adopted, of his son *A* would be entitled to residuary estate, actual vesting taking place after only son or youngest son completes 21 years — No son born to or adopted by *A* till testator's death — *A* adoptiug son after testator's death — In suit by *A* claiming residuary estate to exclusion of his son, held that bequest in cl. (9) did not offend against provisions of Ss. 113 and 114 — *A*'s son held became entitled to residuary estate on his adoption.)

[4] Reference to a prior bequest in the section does not exclude the idea of more than one prior bequest. The illustrations given in the text beneath these sections do not indicate that when there are two or more prior life interests the bequest would be void even if it comprised the whole of the interest of the testator. (Vol 31) 1944 Mad. 22 (23). (Hindu will — After testator's and his wife's death his only daughter *K* and children that might be born to her to enjoy his property—Will held conferred absolute estate on *K* — Bequest to *K*'s children held valid under S. 113.)

[5] If there is a possibility of the interest given to a beneficiary being defeated either by contingency or by a defeasance clause, the beneficiary under the later bequest does not receive the interest bequeathed in the same unfettered form as that in which the testator held it and the bequest to him does not, therefore, comprise the whole of the remaining interest of the testator in the thing bequeathed within S. 113. (Vol 31) 1944 P C 67 (69, 70) : 71 Ind App 93 : I L R (1944) Kar (P C) 238 (P C).

[6] *H* executed a will in favour of her deceased sister's son *P*. The executors were to hand over the funds to *P*'s trustees, who were to create a trust so that the funds may go to the children of *P*. *P* was not married till the death of *H*. Subsequently *P* married *D* and had from her a daughter *V*, who died shortly after her birth. *P* then died without any issue but left a will leaving the funds to *D* absolutely. It was held that *P* took only a life interest in the funds and further that *V*, immediately she was born and came into existence became entitled to the bequest. After *V*'s death *P* took as *V*'s representative and hence bequest by *P* in favour of *D* was valid. (Vol 33) 1946 Bom. 134 (136-138).

[7] See also notes under S 13 of the A. I. R. Commentaries on the Transfer of Property Act, 1882.

SECTION 114 — SYNOPSIS

1. Scope.
2. Applicability to Hindu wills.
3. Bequests to charitable objects.
4. "In existence."
5. "Thing bequeathed."
6. Bequest to a class.

1. Scope.—[1] When by a disposition a previous life estate is created, and the ulterior estate is bequeathed to a person on his attaining age, such disposition is valid. (Vol 7) 1920 Mad 812 (813) (D B).

[2] Vested Interest—Testator's intention to vest the interest in his son's sons before they attain the age of twenty-five and to divest them of it if they die before

(*ii*) A fund is bequeathed to *A* for his life, and after his death to *B* for his life, and after *B's* death to such of *B's* sons as shall first attain the age of 25. *B* dies in the lifetime of the testator, leaving one or more sons. In this case the sons of *B* are persons living at the time of the testator's decease and the time when either of them will attain 25 necessarily falls within his own lifetime. The bequest is valid.

(*iii*) A fund is bequeathed to *A* for his life, and after his death to *B* for his life, with a direction that after *B's* death it shall be divided amongst such of *B's* children as shall attain the age of 18, but that, if no child of *B* shall attain that age, the fund shall go to *C*. Here the time for the division of the fund must arrive at the latest at the expiration of 18 years from the death of *B*, a person living at the testator's decease. All the bequests are valid.

(*iv*) A fund is bequeathed to trustees for the benefit of the testator's daughters, with a direction that, if any of them marry under age, her share of the fund shall be settled so as to devolve after her death upon such of her children as shall attain the age of 18. Any daughter of the testator to whom the direction applies must be in existence at his decease, and any portion of the fund which may eventually be settled as directed must vest not later than 18 years from the death of the daughters whose share it was. All these provisions are valid.

[1865—S. 101.]

Section 114 — Note 1 *(contd.)*

attaining that age — Payment of interest and not vesting dependant upon attaining that age — Question of remoteness does not arise. (1899) 2 Ch. 739 (746) *In re Turney; Turney* v. *Turney.*

[3] The rule contained in this section has to be applied as at the testator's death and include possibilities existing at that time and are not confined to actual events. (Vol 33) 1946 Cal. 396 (400) (DB) ✠ (Vol 6) 1919 Cal. 809 (812, 813): 46 Cal. 485 (DB) ✠ ('02) 29 Cal. 260 (276, 277) ✠ (1888) 39 Ch D 155 (158), *In re Dawson; Johnston* v. *Hill.*

[4] The mere fact of some of the restrictions and qualifications in the will being void, cannot affect the validity of the arrangement. ('04) 31 Cal 111 (127) (DB).

[5] A person created a will in which he said that his estate shall remain intact and that his heirs, sons, son's sons and great grandsons and so on in succession shall be entitled to enjoy the profits thereof. Alienation was strictly prohibited by the will as also division of the estate. *Held*, that what the testator intended to give was the enjoyment of the profits to the persons mentioned in the will and that as his object was to create a perpetuity as regards the estate and to limit, for an indefinite period the enjoyment of the profit thereof the bequest was invalid. ('85) 11 Cal. 684 (692, 693) : 12 Ind App 103 (P C).

2. Applicability to Hindu wills. — [1] This section lays down a special rule which differs from the English law on the subject and there is no reason why it should be invoked for the construction of Hindu wills made before the section had come into operation. (Vol 6) 1919 Cal 461 (463) (DB).

[2] The rule in S. 114 must be applied in the light of the Hindu Disposition of Property Act, the provisions of which are subject to the section. Therefore, a bequest to an unborn person or a class is valid provided the bequest vests in that person or in the whole or some members of that class within the period prescribed by the section. (Vol 33) 1946 Cal 396 (404) (DB).

[See however (Vol 8) 1921 Mad 258 (267) : 44 Mad 446 (DB). (The fact that a bequest is void under Hindu law is not a ground for refusing to apply S. 101, and to hold that it is void also under this section so as to attract the provisions of S. 102.)]

[3] The will of a Hindu provided: "If no son is born but one or more daughters are born, then those daughters shall with sons, grandsons and so on in succession receive ownership of my estate. If no children are born to me my nephew shall become my *sthulabhishikto* and keep the estate intact and enjoy proceeds of my estate with sons and grandsons and so on in succession:" *Held* that there is not any express prohibition against alienation of the estates which were heritable and the gift is valid. ('97) 24 Cal 834 (849) : 24 Ind App 76 (PC).

[4] *See also* Note 13 under S. 13 of the A. I. R. Commentary on Transfer of Property Act 1882.

3. Bequests to charitable objects. — [1] The positive language of the provision in this section is sufficient to preclude the application of the English Law to determine the validity of bequests in favour of charitable objects. (Vol 6) 1919 Cal 809 (812) : 46 Cal 485 (DB).

[2] The language of this section is clear and unequivocal and applies to all bequests whether they are of charitable nature or not, In this respect it differs from the rule of English law in which an exception is made in favour of charities. (Vol 6) 1919 Cal 809 (813): 46 Cal 485 (DB). (Bequest of property to church subject to certain conditions — On breach of conditions property to be made over to another church — Gift over held invalid for remoteness.) ✠ (Vol 28) 1941 Rang 305 (310) : 1941 Rang L R 410 (DB).

[See however ('05) 1 Cal L Jour 605 (614). (Hindu will — Where the purposes are clearly religious and charitable in their nature, the trust is not invalid merely because it transgresses against the rule which forbids the creation of perpetuity.)]

[3] Charitable trusts though made in perpetuity are not within the mischief of S. 114 of the Succession Act provided the vesting is not delayed beyond the statutory period and there is no remainder over. (Vol 28) 1941 Rang 305 (308, 311) : 1941 Rang L R 410 (DB). (*Per* Roberts C. J.) (Vol 6) 1919 Cal 809: 46 Cal 485 (DB), *Dissting*)

[4] Testator's will containing gift of residue of his estate to a family idol—Testator appointing his brothers as shebaits and directing maintenance of their families out of offerings to deity: *Held*, that will contains a gift of entire property to the idol, that the members take only maintenance from the offerings made to idol and the gift is valid. ('89) 16 Cal 103 (114) : 15 Ind App 159 (PC).

[5] A bequest for the performance of masses according to the forms of the Roman Catholic religion whether the masses be for the testator's own soul or for souls generally is void as it offends the rule against perpetuities. ('92) 15 Mad 424 (442) (DB).

[6] Direction in will that the trustee should look after and keep in repair the graves of himself, his wife and his child is not a charity but a perpetuity and therefore void. ('13) 40 Cal 192 (207).

4. "In existence". — [1] The section makes distinction between living person and person in existence. The words 'in existence' must mean 'existence in law and be either in fact or in contemplation of law. (Vol 33) 1946 Cal 396 (412) (DB). (*Held*, after-adopted person is person in existence at father's death.)

5. 'Thing bequeathed'.—[1] All property, whatever be its nature, is subject to the rule of perpetuity enunciated in S. 114. ('96) 20 Bom 511 (516) (DB) ✠ ('92) 15 Mad 424 (446) (DB) ✠ (1916) 1 Ch 91 (96), *In re Atkinson; Atkinson* v. *Atkinson.*

Bequest to a class some of whom may come under rules in sections 113 and 114.

115. If a bequest is made to a class of persons with regard to some of whom it is inoperative by reason of the provisions of section 113 or section 114, such bequest shall be [a][void in regard to those persons only and not in regard to the whole class].

Illustrations.

(i) A fund is bequeathed to *A* for life, and after his death to all his children who shall attain the age of 25. *A* survives the testator, and has some children living at the testator's death. Each child of *A*'s living at the testator's death must attain the age of 25 (if at all) within the limits allowed for a bequest. But *A* may have children after the testator's decease, some of whom may not attain the age of 25 until more than 18 years have elapsed after the decease of *A*. The bequest to *A*'s children, therefore, is inoperative as to any child born after the testator's death, [b][and in regard to those who do not attain the age of 25 within 18 years after *A*'s death, but is operative in regard to the other children of *A*].

(ii) A fund is bequeathed to *A* for his life, and after his death to *B*, *C*, *D* and all other children of *A* who shall attain the age of 25. *B*, *C*, *D* are children of *A* living at the testator's decease. In all other respects the case is the same as that supposed in *illustration* (i). [b][Although the mention of *B*, *C* and *D* does not prevent the bequest from being regarded as a bequest to a class, it is not wholly void. It is operative as regards any of the children *B*, *C* or *D*, who attains the age of 25 within 18 years after *A*'s death.]

[1865—S. 102]

[a] *Substituted* by the Transfer of Property (Amendment) Supplementary Act, 1929 (XXI [21] of 1929), S. 14, for "wholly void". [b] *Substituted, ibid.*

Bequest to take effect on failure of prior bequest.

[a][**116.** Where by reason of any of the rules contained in sections 113 and 114, any bequest in favour of a person or of a class of persons is void in regard to such person or the whole of such class, any bequest contained in the same will and intended to take effect after or upon failure of such prior bequest is also void.]

Illustrations.

(i) A fund is bequeathed to *A* for his life, and after his death to such of his sons as shall first attain the age of 25, for his life, and after the decease of such son to *B*. *A* and *B* survive the testator. The bequest to *B* is intended to take effect after the bequest to such of the sons of *A* as shall first attain the age of 25, which bequest is void under section 114. The bequest to *B* is void.

(ii) A fund is bequeathed to *A* for his life, and after his death to such of his sons as shall first attain the age of 25, and, if no son of *A* shall attain that age, to *B*. *A* and *B* survive the testator. The bequest to *B* is intended to take effect upon failure of the bequest to such of *A*'s sons as shall first attain the age of 25, which bequest is void under section 114. The bequest to *B* is void.

[1865—S. 103.]

[a] *Substituted* by the Transfer of Property (Amendment) Supplementary Act, 1929 (XXI [21] of 1929), S. 14.

Section 114 *(contd.)*

6. Bequest to a class.—[1] The rule with regard to perpetuities is that the limitation must be such that every member of the class, where it is the question of a class gift, must of necessity take within the time allowed. (1888) 39 Ch D 155 (164), *Johnston* v. *Hill*; *In re Dawson*.

[2] Limitations to a woman for life and then to any husband she may intermarry and who may survive her for life and then to her children is not within the rule against perpetuities where the ultimate takers are to be the children of a person living at the date of a will. (1915) 1 Ch 493 (502), *In re Bullock's Will Trusts*; *Bullock* v. *Bullock*.

[3] Where the vesting of the legacy is postponed for the lifetime of persons living at the testator's death and a period of twenty-one years, the legacy in favour of all the legatees fails if it fails as regards any, due to non-fulfilment of the condition laid down in the Majority Act for extending the period of minority up to 21 years. (Vol 8) 1921 Mad 258 (261) : 44 Mad 446 (DB). (Case before the amendment of S. 115 in 1929.) ✠ ('13) 17 Cal W N 488 (489, 490) (PC). (Do.) ✠ (Vol 12) 1925 P C 244 (247): 52 Ind App 310: 48 Mad 906 (PC). (Do.)

[4] *See also* Notes under S. 115, Succession Act, and S. 14 of the A I R Commentary on the Transfer of Property Act, 1882.

Section 115 — Note 1

[1] This section as it stood before the amendment in 1929 was based upon the English Rule as laid down in *Leake* v. *Robinson* (1817) 2 Mer 363 (390, 391) : 35 E R 979.

[2] In England it is well settled, that where a gift is made to a class of persons, some of whom are incapable of taking, the disposition fails as to all. This rule rests upon the ground that the intention of the testator was to benefit all the members of his class equally, and that it is impossible to know what shape his wishes would have taken if he had known that they could not be carried out as intended. The rule was applied in this country to the wills of Hindus as in consonance with the Hindu law and a convenient rule to follow. ('02) 29 Cal 260 (276) ✠ (Vol 12) 1925 P C 244 (247) : 52 Ind App 310 : 48 Mad 906 (P C) ✠ ('84) 6 All 560 (572, 573, 574) : 11 Ind App 164 (P C). (Gift of ancestral property by Hindu father to his grandson with consent of son— Deed expressing gift to children of testator's son — Gift deed, a sort of family arrangement — Immediate transfer of possession in grandson's name : *Held* that the deed confers a present interest upon a present person and is not affected by Ss. 100, 101 and 102 of Act of 1865.)

[See however ('89) 12 Mad 393 (399, 400) (DB). (The provisions of the Act do not affect any rule of Hindu law. Held also that the case does not come under the section.) ✠ ('11) 38 Cal 188 (197, 200, 201) (D B). (Hindu will—Class can be ascertained within time allowed—Certain members only incapable of taking —Gift as a whole is not void—Section does not apply.)]

[3] This section itself does not confine its application to members of a class who are in existence at the date of a testator's death. The section is of general application and effect and applies to all members of a class in whose favour a bequest is made. (Vol 33) 1946 Cal 396 (403) (D B).

[4] See Notes under S. 15 of the A.I.R. Commentary on the Transfer of Property Act, 1882.

[a][117. *(1)* Where the terms of a will direct that the income arising from any property shall be accumulated either wholly or in part during any period longer than a period of eighteen years from the death of the testator, such direction shall, save as hereinafter provided, be void to the extent to which the period during which the accumulation is directed exceeds the aforesaid period, and at the end of such period of eighteen years the property and the income thereof shall be disposed of as if the period during which the accumulation has been directed to be made had elapsed.

Effect of direction for accumulation.

(2) This section shall not affect any direction for accumulation for the purpose of—

(i) the payment of the debts of the testator or any other person taking any interest under the will, or

(ii) the provision of portions for children or remoter issue of the testator or of any other person taking any interest under the will, or

(iii) the preservation or maintenance of any property bequeathed;

and such direction may be made accordingly.]

[1865—S. 104]

[a] *Substituted* by Act XXI [21] of 1929, S. 14.

118. No man having a nephew or niece or any nearer relative shall have power to bequeath any property to religious or charitable uses, except by a will executed not less than twelve months before his death, and deposited within six months from its execution in some place provided by law for the safe custody of the wills of living persons.

Bequest to religious or charitable uses.

Illustrations.

A having a nephew makes a bequest by a will not executed and deposited as required—

for the relief of poor people;
for the maintenance of sick soldiers;
for the erection or support of a hospital;
for the education and preferment of orphans;
for the support of scholars;
for the erection or support of a school;
for the building and repairs of a bridge;
for the making of roads;
for the erection or support of a church;
for the repairs of a church;
for the benefit of ministers of religion;
for the formation or support of a public garden.

All these bequests are void.

[1865 — S. 105.]

Section 117 — Note 1

[1] See Notes under S. 17 of the A.I.R Commentary on the Transfer of Property Act 1882.

[2] This section before its substitution in 1892 did not apply to the Hindus For the law before the substitution see the following cases. (Vol 7) 1920 Cal 969 (972). 47 Cal 76. (A direction in a Hindu will to accumulate the surplus income of the devised property with the gift of the accumulation is not fundamentally bad it only fails if it offends some independent rule of Hindu law)—(Vol 7) 1920 Cal 951: 47 Cal 88*n* (DB) *Foll*) ✠ ('09) 34 Cal 5 (11). (Hindu law —Will— Direction to accumulate is not per se illegal.) ✠ ('97) 24 Cal 589 (609 610) ✠ ('79) 6 Moo Ind App 526 (536) (P C). (Judgment of the Supreme Court of Calcutta.) ✠ ('85) 12 Moo Ind App 41 (61) (P C).

[3] Accumulation in case of charities— This section applies to charities in the matter of accumulation of income (1894) 2 Ch 184 (191), *Harbin* v. *Masterman*.

[4] Clause in a codicil to the effect that the will is not to have any effect beyond the same being proved for at least two years from the arrival of the news of the testator's death except for payments to some named persons: *Held* that the words that the will shall not have any effect was not a direction to accumulate the income from the estate but only meant that no payments were to be made except to the persons specified until at least for two years from the date of the arrival of the news of the testator's death. ('13) 40 Cal 192 (206).

SECTION 118 — SYNOPSIS

1. Object and scope.
2. "Nearer relative."
3. Religious or charitable uses.
4. Doctrine of cypres— Applicability.
5. Twelve months.
6. Withdrawal from custody—Effect.

1. Object and scope.—[1] The intention of the Legislature in enacting S. 118 was to prevent death-bed bequests to charitable trusts by persons having near relatives, and the section must be construed in a sense which is in harmony with that intention, and so as to give a real meaning to each part of the section, if that can be done without doing violence to the plain language thereof, and not so as to reduce one of the provisions of the section to an absurdity. (Vol 28) 1941 Rang 305 (313): 1941 Rang L R 410 (D B).

[2] The bequest may be a direct bequest or a contingent bequest. So long as it is a bequest to charity the section is wide enough to make it applicable to bequests of any kind. (Vol 30) 1943 Bom 317 (318) (D B).

[3] But before a bequest to charity can be held to be good under S. 118, the following conditions must be fulfilled. First the will must be executed not less than twelve months before the death of the testator, secondly, it must be deposited within six months from the execution in some place provided by law and thirdly, the testator has a nephew or niece or any nearer

Section 118 — Note 1 *(contd.)*
relative and he is alive at the time of the death of the testator. (Vol 30) 1943 Bom 317 (318) (DB) ✠ (Vol 23) 1936 Bom 30 (38) (D B). (Son and daughter living— Bequest to charity within 12 months of death. Will not deposited— Bequest to charity held void.)

2. 'Nearer relative'.— [1] An adopted son may be included in the expression "nearer relative" but wife is not such a relative. (Vol 10) 1923 Mad 131 (132) (DB).

3. Religious or charitable uses.—[1] "Charitable uses" do not mean those clauses of the will which define the investment and deal with the funds but means the same thing as "charitable purposes". (1901) 2 Ch 640 (644, 646), *Lewis* v *Sutton*. (Continuing trust to provide dwelling for the poor at reduced rent held charitable.)

[2] The following cases are the instances of good and valid charitable bequests : (Vol 29) 1942 Rang 64 (65); 1941 Rang L R 712 (720) (DB). (Bequest to Bhishop Strachan's Home for Girls, Rangoon)✠(1851) 14 Beav 509 (524) : 51 E R 381, *Whicker* v. *Hume*. (Bequest for the benefit, advancement and propogation of education and learning in every part of the world.) ✠ (1918) 1 Ch 228 (231), *Brandwood* v. *Haden*. (Bequest of income of fund to provide an annual treat or field day for the school children of certain parish) ✠ (1879) 4 Cal 443 (454) (DB). (Bequests for Annual Shradhs or anniversaries of testator, his father, mother and grand-father; performance of ceremonies, feeding Brahmins and the poor, annual contributions and gifts to Brahmins ; contribution towards the marriage of daughters of the poor of the testator's class and of poor Brahmins and for the education of the sons of the poor and of other respectable class—Quaere — Whether bequests to Pundits holding *tols* and for reading the Mahabharat and Poranas and for prayer of God are valid.)

[3] The following cases illustrate what are not valid charitable bequests : (1913) 40 Cal 192 (209). (Trust for keeping the graves of the testator, his wife and family in repairs—Expenses to be paid out of trust estate — Trust held a perpetuity and not a charity.) (1902) 1902 App Cas 37 (42), *Blair* v. *Duncan*. (Residue of testator's estate to be applied for "such charitable or public purposes as my trustee thinks proper" — Direction held void for uncertainty.) ✠ (1902) 26 Bom 632 (636). (A bequest for "some one or more charitable, educational and other philanthropic institution or institutions.) ✠ (1863) 1 Bom H C R 71 (74). (Bequest to "Dharma" in Hindu bequest.)

[4] Where a testator completely sets apart specific properties for specific purposes and describes the manner in which the income of these properties is to be employed, the bequest is not invalid merely because there is no express gift to any specific idol or because certain idol sare non-existent. (1905) 1 Cal L Jour 605 (613, 614).

[5] An immediate gift to a charity for charitable purposes with a gift over, an event which may occur beyond the limit of perpetuities, to another charity is not illegal. (1913) 40 Cal 192 (212).

4. Doctrine of cypres—Applicability.—[1] Held doctrine could not be applied as the gift to charity failed owing to failure of condition precedent upon which it depended. (Vol 8) 1921 Cal 389 (391, 392) : 48 Cal 124 (DB). (Doctrine of cypres is that when a general intention of charity is manifest but the particular object of the bounty of the founder cannot be carried out literally, it must be carried into effect as nearly as possible. To attract its application an absolute declaration of intention to give to charity must be established.) ✠ (1912) 1 Ch. 106 (110), *Pearson* v. *Webster*. (Bequest to "the Ormond Home for Nurses, a nursing home run by testatrix midwife for the poor. Directions for carrying on the home for next few months given in the will—No person or institution of the above name. General intention to provide for nursing of working women —Disposition held valid.)

[2] Where the testator has manifested a general charitable intention, it should not fail to be carried out merely because the executors are all dead and the particular land in which a charitable institution is to be erected is not available for the purpose. (1909) 36 Cal 261 (265) ✠ (1912) 36 Bom 29 (33) (DB). (Trust for public religious purpose—Trustees named by testator for making and completing trust deed—Object of trust specific and definite —Case falls within the rule of cypres "where execution is to be by a trustee with general or some objects pointed out, there the Court will take the administration of the trust." (*Maggridge* v. *Thakwell* (1803) 7 Ves Jun 36 quoted.)

[3] Where on the true construction of the will no paramount general intention can be inferred and the gift is particular in form i e , a gift for a particular purpose, the whole gift fails if it is found impossible to carry out the purpose. (1913) 1 Ch 314 (321) *Twentyman* v. *Simpson*.

[4] Conditional bequest to charity—Failure of condition — Bequest to "Institute of Medical Services Fund, University of London"—Scheme of founding such institution found impracticable and given up — Contribution to the fund by living subscribers returned—Question whether bequest to be administered cypres — No general charitable intention apparent : *Held*, condition on which gift was to take effect failed (Legacy paid back to executors.) (1909) 2 Ch. 1 (7, 8), *Fowler* v. *Attorney-General*.

5 Twelve months —[1] Under S. 118 and S. 42 *et seq* of the Registration Act three conditions have to be satisfied : first, the will must be executed ; secondly the will must be deposited within 6 months of execution with the Registrar of deeds; thirdly the testator must survive for a period of 12 months after the execution of the will. (Vol 28) 1941 Rang 305 (314) : 1941 Rang L R 410 (DB).

[2] A charitable gift is not invalidated merely by the fact that the will containing the gift is confirmed and republished by a codicil made less than 12 months before the testator's death. (1913) 40 Cal 192 (204). (Will and the first and second codicil duty deposited— Third codicil registered but not deposited — Fourth neither executed nor deposited within the time prescribed by the section — As the fourth codicil did not expressly revoke the will or earlier codicils, it did not prevent their operation.)

[3] Two successive wills—First will containing gifts to charities duly complying with requirements of S. 118. Subsequent will not revoking but only decreasing the gifts—Later will not executed before 12 months of testator's death, *Held*, gifts are not hit by the section. (Vol 18) 1931 Cal 138 (140) (DB).

6. Withdrawal from custody— Effect.— [1] If there is withdrawal from the safe custody the testator can redeposit the will but the requirement of this section as to duration of deposit and time of execution should be once again complied with. (Vol 28) 1941 Rang 305 (313) : 1941 Rang L R 410 (DB).

CHAPTER VIII.

OF THE VESTING OF LEGACIES.

Date of vesting of legacy when payment or possession postponed.

119. Where by the terms of a bequest the legatee is not entitled to immediate possession of the thing bequeathed, a right to receive it at the proper time shall, unless a contrary intention appears by the will, become vested in the legatee on the testator's death, and shall pass to the legatee's representatives if he dies before that time and without having received the legacy, and in such cases the legacy is from the testator's death said to be vested in interest.

Explanation.—An intention that a legacy to any person shall not become vested in interest in him is not to be inferred merely from a provision whereby the payment or possession of the thing bequeathed is postponed, or whereby a prior interest therein is bequeathed to some other person, or whereby the income arising from the fund bequeathed is directed to be accumulated until the time of payment arrives, or from a provision that, if a particular event shall happen, the legacy shall go over to another person.

Illustrations.

(i) *A* bequeaths to *B* 100 rupees, to be paid to him at the death of *C*. On *A's* death the legacy becomes vested in interest in *B*, and if he dies before *C*, his representatives are entitled to the legacy.

(ii) *A* bequeaths to *B* 100 rupees, to be paid to him upon his attaining the age of 18. On *A's* death the legacy becomes vested in interest in *B*.

(iii) A fund is bequeathed to *A* for life, and after his death to *B*. On the testator's death the legacy to *B* becomes vested in interest in *B*.

(iv) A fund is bequeathed to *A* until *B* attains the age of 18 and then to *B*. The legacy to *B* is vested in interest from the testator's death.

(v) *A* bequeaths the whole of his property to *B* upon trust to pay certain debts out of the income, and then to make over the fund to *C*. At *A's* death the gift to *C* becomes vested in interest in him.

(vi) A fund is bequeathed to *A*, *B* and *C* in equal shares to be paid to them on their attaining the age of 18, respectively, with a proviso that, if all of them die under the age of 18, the legacy shall devolve upon *D*. On the death of the testator, the shares vested in interest in *A*, *B* and *C*, subject to be divested in case *A*, *B* and *C* shall all die under 18, and, upon the death of any of them (except the last survivor) under the age of 18, his vested interest passes, so subject, to his representatives.

[1865 — S. 106.]

SECTION 119—SYNOPSIS.

1. "Vested in interest."
2. Postponement of payment or possession—Effect.
3. Bequest of prior interest—Effect.
4. Condition divesting interest.

1. "Vested in interest."— [1] The ordinary distinction between vested and contingent interest consists in the nature of the event or condition upon which the donee should take the property. If the event is one which must happen, it is a vested interest but if if the event is uncertain which may or may not happen the interest is contingent. (Vol 20) 1933 Mad 885 (886) (DB). (Interest taking effect on termination of two life estates is vested one.)

[2] A devise or bequest in favour of a person *in esse* simply i.e., without any intimation of a desire to suspend or postpone its operations confers an immediately vested interest. (Vol 25) 1938 Cal 466 (467) (DB).

[3] Where it is doubtful whether a condition is precedent or subsequent, the Court *prima facie* treats it as being subsequent ; for there is a presumption in favour of early vesting. (Vol 25) 1938 P C 270 (275, 276) (PC).

[4] The existence of power of appointment does not prevent vesting of the remainder because where estate is subjected to a general power of appointment in the first taker with remainder over in default of such appointment, the power does not suspend the remainder from vesting. (Vol 24) 1937 Pat 163 (164) (DB).

[5] Residuary legatee's interest, though finally it may turn out to be nothing, is vested interest and can be attached in execution. (Vol 18) 1931 Pat 76 (76). (He becomes proprietor only after the administration is completed, residue ascertained and made over to him.)

[6] Comparison of S. 98 with S. 106 (now Ss. 111 and 119 respectively) makes it clear that the title to the property bequeathed to a class of persons certainly vests in such of the persons of that class who are actually alive at the testator's death. It is because of such legal vesting of title that even the representatives of any of those dying since the death of the testator get a share in property, when time arrives for distribution. (Vol 20) 1933 Mad 885 (887) (DB) (Mortgage of his interest by remainderman during lifetime of life tenant is valid.)

[7] In substance there is not much difference in a trust to pay until the happening of the certain event and trust to pay that is abrogated on the happening of that event. But legal effects in the two cases is widely different. In the first case, trust will fail altogether. In the second case. trust will remain and clause of abrogation will fail. (Vol 25) 1938 P C 270 (276) (PC).

[*See also* (1905) 2 Ch 295 (300), *In re Francis*; *Francis* v. *Francis*. (A devise to *A* when he shall attain a given age is contingent.)]

2. Postponement of payment or possession—Effect.—[1] The mere fact that a legatee is not entitled to its immediate possession of the thing bequeathed does not make it a contingent bequest. (Vol 20) 1933 Mad 885 (886) (DB).

[2] As a general rule, where a testator creates a particular estate and then goes on to dispose of the ulterior interest expressly in an event which will determine the prior estate, the words and description of such event occurring in the latter devise will be construed as referring merely to the period of the determination of the possession or enjoyment under the prior gift and not as designed to postpone the vesting. (Vol 25) 1938 Cal 466 (467) (DB). (Will granting life interest in property to widow of testator and after her death, absolute ownership to his son—Entire interest of testator parcelled out between widow and son—Estate of testator held vested in his son after testator's death.)

Date of vesting when legacy contingent upon specified uncertain event.

120. *(1)* A legacy bequeathed in case a specified uncertain event shall happen does not vest until that event happens.

(2) A legacy bequeathed in case a specified uncertain event shall not happen does not vest until the happening of that event becomes impossible.

(3) In either case, until the condition has been fulfilled, the interest of the legatee is called contingent.

Exception.—Where a fund is bequeathed to any person upon his attaining a particular age, and the will also gives to him absolutely the income to arise from the fund before he reaches that age, or directs the income, or so much of it as may be necessary, to be applied for his benefit, the bequest of the fund is not contingent.

Section 119 — Note 2 *(contd.)*

[3] A testator gave all his property after the death of himself and his wife to his daughter *A* and his nephew *B*. *B* died after testator but before the death of his wife—*Held B* had vested interest on death of the testator which was transmissible to his heirs though possession and enjoyment was postponed. (1911) 33 All 558 (559) (SB).

[4] Hindu will — Bequest to testator's mother and wife for their lives without any power of alienation and after their death, to the sons of his sister who are now in existence as also those who may be born hereafter to be held in equal shares in possession and enjoyment by right of inheritance—*Held*, testator did not intend merely to declare right of inheritance but to give the sister's sons a vested interest in their share at his death, postponing their possession and enjoyment till the death of his mother and wife. (1911) 38 Cal 468 (473) : 38 Ind App 54 (PC).

[5] *A* dying leaving behind sons *B* and *C*, and a will under which *B* and *C* to get life-interest contingent upon satisfaction of certain conditions— After death of *B* and *C* their issue to enjoy property 'at proper time'— *B* dying leaving infant son *D* and *C* dying without issue — *C*'s widow adopting *E* before *D* attains majority — Suit for declaration of his right under will by *D*—*Held*, though estate vested in *D* at *B*'s death, the period of distribution arose 'at proper time' which meant date of *D*'s majority—*E* being adopted before that date was entitled to half share. (Vol 24) 1937 Mad 835 (836, 837) (DB).

[6] Testator bequeathing all his real and personal estate to his wife absolutely— In the event of wife predeceasing testator trustees and executors empowered to create a fund in cash by selling and converting into money real or personal property other than money and to hold that in trust and to divide the money amongst the several persons named in the will according to the shares given—Payment to be made when the legatees attained the age of twenty-one in the case of males and in the case of females when they attained that age or married —Wife predeceasing testator — *Held* that the legatees got a vested interest in their several shares upon the death of the testator. (1884) 6 All 583 (593, 597) (DB). (*Held* that a divesting clause operated against the suitor in this case and that he was not therefore entitled to the legacy.)

3. Bequest of prior interest—Effect.—[1] A bequest on the death of a life-tenant is bequest to take effect not on a contingency but on an event which must happen and is therefore vested. (Vol 34) 1947 Oudh 45 (60) (DB). (Bequest by *A* to his wife for life and then to his daughter's son *B* absolutely — *B* acquires vested interest from testator's death) ✠ (Vol 20) 1933 Cal 253 (256) (DB). (Bequest of absolute estate with intervention of two life-estates—*Held*, thing is not unknown to Hindu law and is valid even apart from Succession Act — Possession and not vesting is postponed.) ✠ (Vol 16) 1929 All 102 (104) (DB) ✠ (1928) 109 I C 654 (654) (Lah) ✠ (1905) 27 All 406 (409) (DB). (Remainderman can sue for injunction to restrain the life-estate holder from committing waste.)

[2] Ordinarily the words "after the death of the life-tenant" operate to vest the estate both in the life-tenant and in the remainderman on the death of the testator. The ordinary meaning of vest is vested in interest (Vol 27) 1940 Cal 202 (204, 205) : I L R (1939) 1 Cal 305. (Bequest to wife for life and after her death to vest in his sons who may be then in existence—Vesting held postponed to death of wife—Son's interest held contingent and not vested within S. 119.) ✠ (Vol 24) 1937 Pat 163 (165) (DB). (Life-estate given to two persons by will with remainder to other person — Interest in the remainder is not a mere chance or possibility but vested interest which is transferable.)

[3] The fact that trustees are legatees to take after termination of life-estate does not make any difference. If they predecease the life tenant, representatives of trustees take the interest. (1882) 4 Mad 124 (127) (DB).

[4] A Parsi devised house to his wife for life and then to his son *A* and after his death to his widow and issues if any and then to his another son *B*—*A* died in the life time of testator's wife and did not leave widow or child. It was held that *B* became entitled to the estate subject to life-estate of his mother. (Vol 5) 1918 P C 206 (209): 43 Bom 88: 45 Ind App 257 (PC) ('In the event of death' means 'on' the death.)

[5] Where a will confers life-estate on a widow and vested interest in the sons after her death in equal shares the interest of son dying before widow passes to his heirs, but where an agreement between the brothers provides that they would take the property in equal shares, after their step mother's death, interest of brother dying before the mother, passes to his full brother by inheritance. (Vol 7) 1920 Cal 691 (692).

4. Condition divesting interest.—[1] Interest in favour of wife and sons—Defeasance clause —On construction held, wife's interest was vested and indefeasible but son's interest vested and defeasible. (Vol 17) 1930 P C 7 (8) (PC).

SECTION 120 — SYNOPSIS

1. Contingent interests.
2. Exception.

1. Contingent interests.—[1] Where there is no gift but only a direction to transfer from and after a given event, the vesting would be postponed till after that event has happened, unless, from particular circumstances, contrary intention can be collected. (1817) 2 Mer 363 (387): 35 E R 979, *Leake* v. *Robinson* ✠ (1905) 2 Ch. 295 (298), *In re Francis*; *Francis* v. *Francis*. (A devise of real estate to a devisee "when she shall attain the age of twenty-five years" without more is a contingent bequest). (Vol 12) 1925 P C 27 (28) : 52 Ind App 95 : 49 Bom 167 (PC). (No direct gift to son — Executor to apply the income and even *corpus* if necessary for maintenance of testator's family including son

Illustrations.

(i) A legacy is bequeathed to *D* in case *A*, *B* and *C* shall all die under the age of 18. *D* has a contingent interest in the legacy until *A*, *B* and *C* all die under 18, or one of them attains that age.

(ii) A sum of money is bequeathed to *A* "in case he shall attain the age of 18", or "when he shall attain the age of 18". *A's* interest in the legacy is contingent until the condition is fulfilled by his attaining that age.

(iii) An estate is bequeathed to *A* for life, and after his death to *B* if *B* shall then be living; but if *B* shall not be then living to *C*. *A*, *B* and *C* survive the testator. *B* and *C* each take a contingent interest in the estate until the event which is to vest it in one or in the other has happened.

(iv) An estate is bequeathed as in the case last supposed. *B* dies in the lifetime of *A* and *C*. Upon the death of *B*, *C* acquires a vested right to obtain possession of the estate upon *A's* death.

(v) A legacy is bequeathed to *A* when she shall attain the age of 18, or shall marry under that age with the consent of *B*, with a proviso that, if she neither attains 18 nor marries under that age with *B's* consent, the legacy shall go to *C*. *A* and *C* each take a contingent interest in the legacy. *A* attains the age of 18. *A* becomes absolutely entitled to the legacy although she may have married under 18 without the consent of *B*.

(vi) An estate is bequeathed to *A* until he shall marry and after that event to *B*. *B's* interest in the bequest is contingent until the condition is fulfilled by *A's* marrying.

(vii) An estate is bequeathed to *A* until he shall take advantage of any law for the relief of insolvent debtors, and after that event to *B*. *B's* interest in the bequest is contingent until *A* takes advantage of such a law.

(viii) An estate is bequeathed to *A* if he shall pay 500 rupees to *B*. *A's* interest in the bequest is contingent until he has paid 500 rupees to *B*.

(ix) *A* leaves his farm of Sultanpur Khurd to *B*, if *B* shall convey his own farm of Sultanpur Buzurg to *C*. *B's* interest in the bequest is contingent until he has conveyed the latter farm to *C*.

(x) A fund is bequeathed to *A* if *B* shall not marry *C* within five years after the testator's death. *A's* interest in the legacy is contingent until the condition is fulfilled by the expiration of the five years without *B's* having married *C*, or by the occurrence within that period of an event which makes the fulfilment of the condition impossible.

(xi) A fund is bequeathed to *A* if *B* shall not make any provision for him by will. The legacy is contingent until *B's* death.

(xii) *A* bequeaths to *B* 500 rupees a year upon his attaining the age of 18, and directs that the interest, or a competent part thereof, shall be applied for his benefit until he reaches that age. The legacy is vested.

(xiii) *A* bequeaths to *B* 500 rupees when he shall attain the age of 18, and directs that a certain sum, out of another fund, shall be applied for his maintenance until he arrives at that age. The legacy is contingent.

[1865 — S. 107.]

Vesting of interest in bequest to such members of a class as shall have attained particular age.

121. Where a bequest is made only to such members of a class as shall have attained a particular age, a person who has not attained that age cannot have a vested interest in the legacy.

Section 120 — Note 1 *(contd.)*

to educate him and when son comes of age to hand over the residue to him : *Held*, son's interest is merely contingent.)

[2] A bequest of legacy or an estate on a future contingent event is good under this section. (Vol 1) 1914 Cal 782 (784) : 41 Cal 642 (DB) (Hindu will — Widow authorised to adopt—Bequest to sister's son in case widow dying before adoption or adopted son dying before widow: *Held*, bequest to sister's son is good)

[3] Where a legacy is payable only if and when a contingency occurs and if that contingency occurs in the life-time of the testator, it cannot be claimed under the will. (Vol 17) 1930 Bom 191 (198) : 54 Bom 358.

[4] *A* bequeathing property to *B*—On *B's* death property to devolve on *B's* issue or in default of issue, on *C* —*C* predeceasing *B* who died issueless : *Held*, sub-s. (1) and not (2) applied and *C* did not acquire any vested interest which could descend to his heirs. (1939) 20 Pat L. T. 90 (92) (DB).

2. Exception. — [1] If a share of a residuary estate is given to a person to be paid or transferred to that person on attaining a particular age and there is a maintenance clause providing for maintenance in the meantime out of the income of that share then the share is vested. (1903) 1 Ch 448 (451), *In re Gossling*, *Gossling* v. *Elcock* ✠ (1888) 12 Bom 137 (147) ✠ (1875) 19 E Q 286 (290, 291), *Fox* v *Fox*. (Interest is not less vested because there is a direction conferred on the trustees to apply less than whole income for that purpose.)✠ (1887) 34 Ch D 716 (720), *In re Bevan's Trusts*.

[2] Where the provisions in a will amount to a direction to spend a part of the income for the benefit of the legatee, it would be sufficient to bring the case within the exception. (Vol 10) 1923 Bom 96 (102 (DB). (Reversed in (Vol 12) 1925 P C 27 : 49 Bom 167: 52 Ind App 95 (PC) on another point.)

[3] Direction to executor to spend income from fund for maintenance of family and if there was a surplus to spend it in certain other ways—No definite ascertained interest can be held to arise from the fund within the meaning of the exception. (Vol 12) 1925 P C 27 (28, 29) : 52 Ind App 95 : 49 Bom 167 (PC).

[4] Interest in corpus given to unborn grand-children on attaining 18 and on surviving their father—Gifts are subject to double contingency and exception does not apply. (Vol 31) 1944 P C 67 (70) : I L R (1944) Kar (PC) 238 : 71 Ind App 93 (PC).

[5] Where corpus is not given to the legatee from the date of death but could be spent by executor exception does not apply. (Vol 12) 1925 P C 27 (28, 29) : 52 Ind App 95 : 49 Bom 167 (PC).

Section 121 — Note 1

[1] Where the words of contingency form part of the description of the class of persons to take, such as gift to those "who shall attain the age of twenty-one" the words must receive their natural construction and no estate vests in any one till he attains the prescribed age. (1881) 7 Cal 218 (223).

[2] In the case of words of contingency occurring in the description of persons to take, a mere gift over is not sufficient to change their meaning. (1881) 7 Cal 218 (224).

[3] A testator devised his property to trustees and directed "(1) that the dividends should be applied to maintain his children (2) and that the funds should be distributed when the children attain 21 years of age (3) and in case of the death of any child before attaining

Illustration.

A fund is bequeathed to such of the children of *A* as shall attain the age of 18, with a direction that, while any child of *A* shall be under the age of 18, the income of the share, to which it may be presumed he will be eventually entitled, shall be applied for his maintenance and education. No child of *A* who is under the age of 18 has a vested interest in the bequest.

[1865 — S. 108.]

CHAPTER IX.

OF ONEROUS BEQUESTS.

Onerous bequests.

122. Where a bequest imposes an obligation on the legatee, he can take nothing by it unless he accepts it fully.

Illustration.

A, having shares in (X), a prosperous joint stock company and also shares in (Y), a joint stock company in difficulties, in respect of which shares heavy calls are expected to be made, bequeaths to *B* all his shares in joint stock companies; *B* refuses to accept the shares in (Y). He forfeits the shares in (X).

[1865 — S. 109.]

One of two separate and independent bequests to same person may be accepted, and other refused.

123. Where a will contains two separate and independent bequests to the same person, the legatee is at liberty to accept one of them and refuse the other, although the former may be beneficial and the latter onerous.

Illustration.

A, having a lease for a term of years of a house at a rent which he and his representatives are bound to pay during the term, and which is higher than the house can be let for, bequeaths to *B* the lease and a sum of money. *B* refuses to accept the lease. He will not by this refusal forfeit the money.

[1865 — S 110.]

CHAPTER X.

OF CONTINGENT BEQUESTS.

Bequest contingent upon specified uncertain event, no time being mentioned for its occurrence.

124. Where a legacy is given if a specified uncertain event shall happen and no time is mentioned in the will for the occurrence of that event, the legacy cannot take effect, unless such event happens before the period when the fund bequeathed is payable or distributable.

Illustrations.

(i) A legacy is bequeathed to *A*, and, in case of his death, to *B*. If *A* survives the testator, the legacy to *B* does not take effect.

Section 121 — Note 1 *(contd.)*

21 years the shares shall belong to the survivors in the class" : *Held*, that the children dying before that age took no shares and that 21 years age of the legatee was the age of vesting and not of payment. (1888) 12 Bom 137 (148, 149).

Section 122 — Note 1

[1] Hindu will — Bequest to testator's wife for her life and after her death to son if any adopted by her — In absence of adoption, property to pass absolutely to *A* provided he resided in testator's ancestral house — On failure of *A* to obey the condition to other relations on the same condition — Widow not adopting any son but selling the house — *A* joining widow in sale of house : *Held*, *A's* interest though absolute a condition of a residence was superadded to it. The condition was valid but as its fulfilment was rendered impossible by *A* by joining in the sale, *A* forfeited his interest. (1913) 17 Cal W N 39 (41) (DB).

[2] Ordinarily, the executor or the administrator would be the legal representative and the estate that is to be paid out to the legatees would be the estate minus the liabilities on it. In case, however, there is only one legatee and there is no executor or administrator to manage the estate, it may be taken that the estate that vests in him must be the estate minus all the liabilities on it and the legatee would be liable in respect of such causes of action that survived the deceased. (Vol 32) 1945 All 433 (439) : I L R (1946) All 1 (DB).

Section 123 — Note 1

[1] This section reverses the rule in (1834) 3 My & K 252 (254): 40 E R 96, *Talbot* v. *Earl of Radnor*. (Bequest of lease-hold house and annuity for life — Rent reserved by lease higher than house would let : *Held*, legatee cannot reject lease and retain annuity but must take both.)

[2] When two distinct legacies or gifts are made by a will to one person he is, as a general rule, entitled to take one and disclaim the other, but his right to do so may be rebutted if there is anything in the will to show that it was the testator's intention that that option should not exist. (1883) 22 Ch D 573 (577), *Guthree* v. *Walrond* ✠ (1896) 2 Ch 511 (516), *Frewen* v. *Law Life Assurance Society* ✠ (1886) 32 Ch D 408 (417, 418), *Freke* v. *Calmady*. (It does not at all depend upon the question whether it is given in one sentence or in two sentences.)

[3] Where, however, the question arises upon a single and undivided gift, such gift is a *prima facie* evidence of testator's intention to make the gift indivisible and the legatee has no option. He shall either take it all or none of it. (1883) 22 Ch D 573 (577), *Guthree* v. *Walrond* ✠ (1896) 2 Ch 511 (516, 517), *Frewen* v *Law Life Assurance Society*.

SECTION 124—SYNOPSIS

1. Scope and applicability.
2. "Specified uncertain event".
3. "No time is mentioned".
4. Period of payment or distribution.
5. Event must happen before the period.

1. Scope and applicability. [1] This section embodies the rule enunciated in (1852) 15 Beav 357 (362): 21 L J Ch 324, *Edwards* v. *Edwards*, which is

(ii) A legacy is bequeathed to *A*, and, in case of his death without children, to *B*. If *A* survives the testator or dies in his lifetime leaving a child, the legacy to *B* does not take effect.

(iii) A legacy is bequeathed to *A* when and if he attains the age of 18, and, in case of his death, to *B*. *A* attains the age of 18. The legacy to *B* does not take effect.

(iv) A legacy is bequeathed to *A* for life, and, after his death to *B*, and, "in case of *B*'s death without children," to *C*. The words "in case of *B*'s death without children" are to be understood as meaning "in case *B* dies without children during the lifetime of *A*".

(v) A legacy is bequeathed to *A* for life, and, after his death to *B*, and, "in case of *B*'s death," to *C*. The words "in case of *B*'s death" are to be considered as meaning "in case *B* dies in the lifetime of *A*".

[1865 — S. 111.]

Section 124 — Note 1 *(contd.)*

however, considerably modified by later English decisions (e g. see *O'Mahoney* v. *Burdett*, (1874) 7 H L 388 (404)). It should be applied only to cases strictly coming within its scope. (Vol 2) 1915 P C 101 (103) : 43 Ind App 12 : 43 Cal 432 (P C). (Affirming (Vol 1) 1914 Cal 782 : 41 Cal 642 (DB).)✠ (Vol 20) 1933 Bom 34 (35) (D B).

[2] The reason of the rule is that when there is a gift followed by a contingent gift over the inclination of the gift over is to interfere as little as possible with the first gift; the second gift is therefore read as a gift in substitution and not in remainder. (Vol 7) 1920 Bom 281 (282).

[3] Section 124 only applies, if without doing violence to the terms of the will, it can be held, as a matter of words, that the occurrence of the uncertain event prior to "the period when the fund bequeathed is payable or distributable' is alone within the contemplation of the testator. If the terms of the will make that construction of his words impossible the section then does not apply. (Vol 33) 1946 Cal 55 (59, 60) (DB). (Section embodies both a rule of construction and a rule of law.) ✠ (Vol 19) 1932 P C 269 (272) : 60 Cal 554: 59 Ind App 419 (P C) ✠ (Vol 7) 1920 Bom 281 (282). (The rule in this section is at the most a rule of construction and, therefore, is subject to any other provisions in the will which may rebut its application)

[But see (Vol 20) 1933 Pat 126 (127):12 Pat 18(DB). (The intention of the testator is immaterial.) ✠ (Vol 13) 1926 Pat 356 (356) (D B). (The rule enunciated in this section is a rule of law and not a rule of construction.) ✠ (Vol 2) 1915 Cal 414 (415) (DB). (The rule laid down in this section is a statutory rule of construction which the Courts are bound to follow. It cannot be contradicted by other evidence appearing on the face of the will)]

[4] Applicability of the section should not be based on forced interpretation of the will as opposed to the natural meaning of the words used. (Vol 7) 1920 Cal 81 (82) (D B).

[5] The principle underlying this section cannot be applied as a rule of justice, equity and good conscience in construction of a will to which Succession Act does not apply. (Vol 20) 1933 Bom 34 (35) (D B). (Hindu will prior to 1927.)

[6] This section applies to bequests of all descriptions of property as there is no difference in India between real and personal property. (1896) 23 Cal 563 (573) : 23 Ind App 18 (P C).

[7] This section applies only where the prior bequest is capable of taking effect and is not *ab initio* void. If a bequest fails *ab initio*, the principle laid down in S 116 applies. (1906) 33 Cal 947 (964) (F B)✠ (1896) 23 Cal 563 (573) : 23 Ind App 18 (P C).

[8] Section applicable to cases under Hindu Wills Act, is not applicable to Punjab. (Vol 10) 1923 Lah 649 (650) (D B).

2. "Specified uncertain event"—[1] Gift not made contingent on the happening of an uncertain event — This section does not apply. (1911) 38 Cal 327 (335) : 38 Ind App 7 (P C).

[2] Uncertainty or certainty of event is with reference to time of its happening. (Vol 8) 1921 Mad 258 (268) : 44 Mad 446 (D B).

[3] Death *simpliciter* cannot be specified as uncertain event under this section as of all events death is the most certain. But the mere fact that no express or specific words of contingency are attached to the reference to death is not conclusive that the case is one of death. *Simpliciter* and no qualification is intended. The qualification may be implied in other words of the will or in the words taken as a whole. (Vol 33) 1946 Cal 55 (60) (D B).

[4] Where death is spoken of as a contingency it should be construed, whenever, possible, to mean death before the period of distribution i. e., when the gift is immediate, death before the testator, or when the gift is in remainder, death before the expiration of the particular estate. (Vol 33) 1946 Cal 55 (60) (D B).

[5] Gift over in event of minor legatee not attaining full age is valid — Failure of the minor to attain full age is the uncertain event. (Vol 1) 1914 Cal 570 (571) (D B).

[6] Property bequeathed to one — Intention to dispose it of to another should not be imputed especially when later donee is described as related to the testator and not prior donee. (Vol 19) 1932 P C 269 (273) : 59 Ind App 419 : 60 Cal 554 (P C).

3. "No time is mentioned".—[1] Section is applicable only where the time of the occurrence of an event is left uncertain, as where a contingent gift is made to depend upon the death of the legatee. (Vol 7) 1920 Bom 281 (283). (Bequest to widow and daughter for life and after that alternative gift to daughter's male issue that may be born or to charity — Gift to male issue held void — Gift to charity valid.)

[2] Section does not apply if a period is specified in the will within which the contingent event is to happen. (Vol 19) 1932 P C 269 (272) : 60 Cal 554 : 59 Ind App 419 (P C).

[3] Testator giving his estate to his two sons half and half each taking vested interest in it at the death of the testator—Further direction that in case a son dies issueless, his share to go over to the survivor—*Held* that the contingency was intended to happen after the death of the testator and as the time was thus specified in the will S. 124 did not apply—Further that the clause was a defeasance clause to which S. 131 applied. (Vol 18) 1931 Cal 499 (501) (D B).

[4] Absolute bequest to son with a direction added that in case son dies after the testator's death without marrying or if married without lineal heir, his share should revert equally to his sisters or their heirs — Son claiming legacy absolutely—Plea that direction was good under this section — *Held*, no time was fixed for the event to happen — The period of distribution was testator's death and gift to son became indefeasible at that date under this section. (1913)37Bom 644(649,650).

4. Period of payment or distribution. — [1] Property bequeathed to *A* and in the event of his death without issue to *B*—Death of *A* issueless after testator's death — *B* takes an absolute estate: (Vol 20) 1933 Pat 126 (127) : 12 Pat 18 (DB).

Bequest to such of certain persons as shall be surviving at some period not specified.

125. Where a bequest is made to such of certain persons as shall be surviving at some period, but the exact period is not specified, the legacy shall go to such of them as are alive at the time of payment or distribution, unless a contrary intention appears by the will.

Illustrations.

(i) Property is bequeathed to *A* and *B* to be equally divided between them, or to the survivor of them. If both *A* and *B* survive the testator, the legacy is equally divided between them. If *A* dies before the testator, and *B* survives the testator, it goes to *B*.

(ii) Property is bequeathed to *A* for life, and, after his death, to *B* and *C*, to be equally divided between them, or to the survivor of them. *B* dies during the life of *A* ; *C* survives *A*. At *A*'s death the legacy goes to *C*.

(iii) Property is bequeathed to *A* for life, and after his death to *B* and *C*, or the survivor, with a direction that, if *B* should not survive the testator, his children are to stand in his place. *C* dies during the life of the testator; *B* survives the testator, but dies in the lifetime of *A*. The legacy goes to the representative of *B*.

(iv) Property is bequeathed to *A* for life, and, after his death, to *B* and *C*, with a direction that, in case either of them dies in the lifetime of *A*, the whole shall go to the survivor. *B* dies in the lifetime of *A*. Afterwards C dies in the lifetime of *A*. The legacy goes to the representative of *C*.

[1865 — S. 112.]

Section 124—Note 4 *(contd.)*

[2a] Word 'period' in S. 124 does not mean indefinite period after testator's death during which contingency may occur but lawful period for distribution by executors and "before the period" means "before the commencement of such period." (Vol 20) 1933 Pat 126 (127): 12 Pat 18 (D B).

[2] The period of payment in the section is the period when the last payment which is not of an alternative character is directed in the will. (Vol 8) 1921 Mad 258 (268): 44 Mad 446 (D B). (Such time may be a time when a person attains a certain age)

[3] The ordinary rule of construction where the testator has given an absolute gift to a legatee and then has made a gift simpliciter on a contingency of death is that he was referring to death before the period of distribution, that is the death of the testator. (Vol 2) 1915 Cal 414 (415) (D B).

[4] Bequest to daughters and brother's daughters in equal shares as "maliks"—In the event of any of the daughters dying childless, her share to devolve in equal shares on the surviving daughters—Daughter dying long after testator's death—*Held* as no time was fixed by the will death of the daughter could refer only to death at the period of distribution i. e. the date of death of the testator and that section did not affect the bequest. (1897) 24 Cal 406 (410) (D B).

5. Event must happen before the period.—[1] Estate divided equally between two sons—Another clause directing the half of one son to be given to such son's son if one be born on his attaining his full age—Under the terms of will, half the estate conveyed vested in the son a *morte testatoris*—Gift over to son's son was void under the section son having survived his father. (Vol 1) 1914 P C 18 (20) : 42 Ind App 71 : 39 Bom 296 (P C).

[2] Legacy to "my three sons; if any one dies childless, survivors shall be entitled to whole" — All sons living at testator's death — Gift to three sons becomes indefeasible on that date, executory gift not taking effect afterwards. ('96) 23 Cal 563 (571, 572): 23 Ind App 18 (P C).

[3] Under will testator's daughter on attaining majority to get property and if she be not there eldest son of executor to get it—Death of daughter after attaining majority — S. 124 applies—Bequest over to executor's son does not take effect. (Vol 33) 1946 Cal 55 (62) (D B).

[4] Gift of absolute estate subject to defeasance—Gift over is void if the defeasing event does not happen at close of life in being and subsequent donee is not living then. (Vol 20) 1933 Bom 34 (36) (D B).

[5] Hindu testator creating adopted son as full proprietor—Gift over to nephews if son dies issueless during testator's widow's lifetime — Son dying without issue and without disposing of property duaring testator's widow's life time—*Held* (1) gift over to nephews failed (2) adopted son was absolute owner and gift over was repugnant (3) it created succession unknown to Hindu Law and (4) contingency of son's death should have happened during testator's life under S. 124. (Vol 16) 1929 Cal 145 (148) (D B).

[6] By his will the testator devised his estate to his widow and his two daughters-in-law and then provided as follows: "In case the said three Musammats die, *M* son of *R* my brother's son shall be the heir and possessor of the properties." All the three ladies survived the testator. *Held*, that S. 124 would operate so as to bar the right of *M* to take under the will. (Vol 13) 1926 Pat 356 (356) (D B).

[7] A Hindu will providing "if my wife dies before, my daughter shall get" etc.—Wife not dying before the testator —This section bars daughter's legacy. (Vol 4) 1917 Cal 258 (260): 44 Cal 181 (D B).

[8] Where testator leaves will devising absolute estate to female with proviso that in the event of her death, his nephew is to be heir and no time was specified for the happening of that event, gift over to nephew will not take effect the female will take absolute estate in case she survives the testator. (Vol 21) 1934 Pat 398 (411): 13 Pat 550 (D B).

Section 125—Note 1

[1] Hindu will — Self acquired property divided between and given to two sons—Further clause that should either of two sons die without having had any male issue the survivor to take whole property appertaining to the share of the deceased, after undertaking the expenses of maintenance of his widow and of maintenance and marriage of his minor daughters—Death of testator leaving both sons surviving—Elder dying leaving widow and daughter—Clause held not limited to survivorship occurring before testator's death but pointed to survivorship at any time—Survivor held entitled to share of the deceased subject to obligations of maintaining his widow and daughter. (Vol 1) 1914 P C 60 (62) : 38 Bom 399 (P C).

[2] Survivors or survivor, meaning of. (1919) 1 Ch 138 (145, 146), *Powell* v. *Hellicar* & (1906) 1 Ch 47 (54), *In re Friend's Settlement*; *Cole* v. *Allcot*. (*Held*, 'survivors' means 'others'.)

[3] Presumption as to survivorship—*See* Notes under S. 108, Evidence Act, 1872, *ante*.

[4] See also Notes under S. 24 of the A. I. R. Commentary on the Transfer of Property Act, 1882.

CHAPTER XI.

OF CONDITIONAL BEQUESTS.

Bequest upon impossible condition.

126. A bequest upon an impossible condition is void.

Illustrations.

(i) An estate is bequeathed to *A* on condition that he shall walk 100 miles in an hour. The bequest is void.

(ii) *A* bequeaths 500 rupees to *B* on condition that he shall marry *A*'s daughter. *A*'s daughter was dead at the date of the will. The bequest is void.

[1865 — S. 113.]

Bequest upon illegal or immoral condition.

127. A bequest upon a condition, the fulfilment of which would be contrary to law or to morality, is void.

Illustrations.

(i) *A* bequeaths 500 rupees to *B* on condition that he shall murder *C*. The bequest is void.

(ii) *A* bequeaths 5,000 rupees to his niece if she will desert her husband. The bequest is void.

[1865 — S. 114.]

Section 126 — Note 1

[1] Where the performance of the condition appears to be the motive of the bequest the impracticability of the performance will be a bar to the claim of the legatee. In such a case the bequest does not take effect: (Vol 9) 1922 Cal 116 (117) : 48 Cal 1100 (D B).

Section 127 — Note 1

[1] Even though the provisions of the section are not applicable to Hindus living in the muffussal the principle contained therein is applicable as a rule of equity and good conscience. (1900) 23 Mad 613 (615, 616) (D B).

[2] If the matter of the condition tend to provoke or further the doing of some unlawful act or to restrain or forbid a man the doing of his duty, the condition for the most part is void. And hence also it is that such conditions as are against the liberty of law, as that a man shall not marry or the like, are void. And hence also as are against the public good. (1908) 1 Ch 383 (387), *Beard* v. *Hall*.

[3] According to English law, if a condition subsequent which is to defeat an estate is against the policy of the law the gift is absolute, but if the illegal condition is precedent there is no gift. (1888) 39 Ch D 116 (129, 130), *In re Moore Trafford* v. *Maconychil*. (*J* by his will directed a payment of £ 2 10 sh. to his married sister during such time as she may live apart from her husband before his son attained the age of 21 —*Held* that the gift was not a gift of an annuity subject to a condition but a limited gift the commencement and duration of which were fixed in a way which the law did not allow.)

[4] In determining whether a condition is void or not as opposed to public good the Court ought to ascertain whether its fulfilment necessarily involves any act or conduct *contra bonos mores* or against the welfare of the state. If it does not it is valid even though its fulfilment is capable of being brought about by acts and conduct opposed to the public welfare. (1919) 2 Ch 305 (311, 312), *Champion* v. *Wallace*. (Condition that the residuary estate should go to and vest in testator's sole surviving son if he had obtained the title of Baronet or other superior title and if not to be divided between the British and Indian treasury is not bad.)

[5] Where there is any condition the object of which is to determine and divest, upon the happening of the specified event, estates or interests antecedently vested, and that condition is void as being contrary to public policy the gifts will be absolute both as regards the real and personal estate. (1908) 1 Ch 383 (386), *Beard* v. *Hall*.

[6] Where there is an unconditional gift it is complete at the time when the actual transfer takes place and the parties could not afterwards import a condition. Even if it were otherwise—assuming a condition, and an immoral condition—it would be the condition that is immoral and not the consideration and the gift to which an immoral condition is attached remains good while the condition is void. (1884) 6 All 313 (321) : 11 Ind App 44 (P C). ((1878, 80) 2 All 433 (D B), *Affirmed.*)

[7] Any provision which tends to deter person from entering the naval or military services of the country is against public good and therefore void. (1908) 1 Ch 383 (387), *Beard* v. *Hall*.

[8] Where a bequest was made conditional on the continuance of the immoral relations between devisee and the testator the bequest becomes void. (1900) 23 Mad 613 (615) (D B).

[9] All estates of inheritance created by gift or will so far as they are inconsistent with the general law of inheritance are void as such. (1872-73) Ind App Sup Vol 47 (66) (P C) = (Vol 26) 1939 Cal 226 (228, 229) : I L R (1939) 1 Cal 63 (D B). (Absolute estate on son— Subsequent clause in will prohibiting widow of son or daughter of son from getting the property and giving them only a right to maintenance—*Held* that the subsequent clause was void as it set up a line of inheritance not known to the Hindu law.)

[10] Post-nuptial settlement — Husband assigning lands to trustees for the payment of rents to his wife so long as she continued to cohabit with him or remained his widow—The condition restricting wife's enjoyment of the rent during the time she continued to cohabit is not void as opposed to public policy. (1904) 1 Ch 470 (479), *In re Hope Johnstone* v. *Hope Johnstone*.

[11] Will providing that the legatee should take nothing if she married before the death of her father— Prohibition is valid and not contrary to law and morality. (Vol 19) 1932 Cal 350 (351): 59 Cal 102 (D B).

[12] Every condition which does not directly or indirectly import an absolute injunction to celibacy is a lawful condition. Therefore an injunction to ask consent is a lawful condition as not restraining marriage generally. (1798) Dick 712 (721): 21 E R 448, *Tidd* v. *Clare*.

[13] A parent or appointor disposing by will either of his own property or of any property over which he has a power of appointment is perfectly justified in making a provision in favour of such of his children as shall not embrace a particular faith and such a provision to that effect is not void as opposed to public policy. (1879),11 Ch D 959 (967), *Hodgson* v. *Halford*.

[14] Conditions in the will that no ordained minister or missionary or member of the Baptist Missionary Church should be allowed to be elected as deacon or to canvass votes for his election as such deacon and that fermented and unfermented wine should be kept at the communion service of the chapel and that old practices

128. Where a will imposes a condition to be fulfilled before the legatee can take a vested interest in the thing bequeathed, the condition shall be considered to have been fulfilled if it has been substantially complied with.

Fulfilment of condition precedent to vesting of legacy.

Illustrations.

(i) A legacy is bequeathed to *A* on condition that he shall marry with the consent of *B*, *C*, *D* and *E*. *A* marries with the written consent of *B*, *C* is present at the marriage. *D* sends a present to *A* previous to the marriage. *E* has been personally informed by *A* of his intentions, and has made no objection. *A* has fulfilled the condition.

(ii) A legacy is bequeathed to *A* on condition that he shall marry with the consent of *B*, *C* and *D*. *D* dies. *A* marries with the consent of *B* and *C*. *A* has fulfilled the condition.

(iii) A legacy is bequeathed to *A* on condition that he shall marry with the consent of *B*, *C* and *D*. *A* marries in the lifetime of *B*, *C* and *D*, with the consent of *B* and *C* only. *A* has not fulfilled the condition.

(iv) A legacy is bequeathed to *A* on condition that he shall marry with the consent of *B*, *C* and *D*. *A* obtains the unconditional assent of *B*, *C* and *D* to his marriage with *E*. Afterwards *B*, *C* and *D* capriciously retract their consent. *A* marries *E*. *A* has fulfilled the condition.

(v) A legacy is bequeathed to *A* on condition that he shall marry with the consent of *B*, *C* and *D*. *A* marries without the consent of *B*, *C* and *D*, but obtains their consent after the marriage. *A* has not fulfilled the condition.

(vi) *A* makes his will whereby he bequeaths a sum of money to *B* if *B* shall marry with the consent of *A*'s executors. *B* marries during the lifetime of *A*, and *A* afterwards expresses his approbation of the marriage. *A* dies. The bequest to *B* takes effect.

(vii) A legacy is bequeathed to *A* if he executes a certain document within a time specified in the will. The document is executed by *A* within a reasonable time, but not within the time specified in the will. *A* has not performed the condition, and is not entitled to receive the legacy.

[1865 — S. 115]

129. Where there is a bequest to one person and a bequest of the same thing to another, if the prior bequest shall fail, the second bequest shall take effect upon the failure of the prior bequest although the failure may not have occurred in the manner contemplated by the testator.

Bequest to *A* and on failure of prior bequest to *B*.

Illustrations.

(i) *A* bequeaths a sum of money to his own children surviving him, and, if they all die under 18, to *B*. *A* dies without having ever had a child. The bequest to *B* takes effect.

(ii) *A* bequeaths a sum of money to *B*, on condition that he shall execute a certain document within three months after *A*'s death, and, if he should neglect to do so, to *C*. *B* dies in the testator's lifetime. The bequest to *C* takes effect.

[1865—S. 116.]

Section 127 — Note 1 *(contd.)*

are to be observed are neither illegal not impossible. ('13) 40 Cal 192 (209).

[15] The keeping of a tomb in repair is not an illegal object and no rule of law prohibits the enforcement of a condition creating a perpetual inducement to do a thing which is lawful. ('13) 40 Cal 192 (208, 209).

Section 128 — Note 1

[1] A condition precedent to a legacy could not be imported from outside into a will which gave the legacy (Vol 33) 1946 Oudh 193 (204) : 21 Luck 314 (D B). (*G* agreeing to pay Rs. 50 per month to testator if the latter executed a will giving life estate to testator's wife and remainder to *G* — Testator executing will giving life estate to his wife and remainder to *G*—Agreement of G not referred to in the will : *Held* that the will was not a conditional will within the meaning of the section.)

[2] *W B* by will appointing his wife and two others executors and also appointing his wife the sole guardian of his children during their minority—Legacies to daughters on their attaining twenty-one or on marriage with the consent of guardian or guardians whichever should happen first—One of the daughters before attaining 21 marrying without consent of guardian, a sole guardian having died previously : *Held* that the principle that where a literal compliance with the condition becomes impossible without any default of the party it is sufficient that it is complied with as nearly as practical did not apply to the case as guardian or guardians could have been appointed by the child or by the Court and then the requisite consent obtained. (1881) 18 Ch D 61 (65), *In re Brown's Will*; *In re Brown's Settlement*.

Section 129 — Note 1

[1] The section which merely incorporates the rule of the English law provides that a gift over shall take effect on the failure of a prior bequest although the failure may not have occurred in the manner contemplated by the testator. (Vol 1) 1914 Cal 570 (571) (DB).

[2] The failure contemplated by S. 129, is the failure of a valid gift. When the gift is *ab initio* void the subsequent gifts also must fail. (Vol 29) 1942 Bom 155 (158) : I L R (1942) Bom 441.

[3] Testator bequeathing his property to his minor son and in the event of the minor dying after the testator to the testator's sister—Minor son predeceased the testator : *Held* that S. 129 did not apply to this case as it applied only to the prior gift failing altogether for want of an object. (Vol 22) 1935 Mad 119 (120).

[4] Where the prior gift failed *ab initio* by reason of its object never coming into existence the executory gift was held to have taken effect notwithstanding that it was intended to take effect in defeasance of the prior gift. ('06) 33 Cal 947 (963) (F B) ✠ ('05) 9 Cal W N 1033 (1044). (Bequest to adopted sons, and in case the adopted sons did not survive the wife of the testator or where they survived her if they died subsequently without leaving son or sons, to the daughters and their sons of real and personal estate to be divided equally between the daughters — Defeasance of prior gift to adopted sons by reason of its failure *ab initio*, as its object could never come into existence : *Held* that the daughters were absolutely entitled to the estate in equal shares.)

[5] A testator bequeathed his property in the following terms : "My wife is supposed to be in the family way : should she bring forth a male issue in that case

When second bequest not to take effect on failure of first.

130. Where the will shows an intention that the second bequest shall take effect only in the event of the first bequest failing in a particular manner, the second bequest shall not take effect, unless the prior bequest fails in that particular manner.

Illustration.

A makes a bequest to his wife, but in case she should die in his lifetime, bequeaths to *B* that which he had bequeathed to her. *A* and his wife perish together, under circumstances which make it impossible to prove that she died before him; the bequest to *B* does not take effect.

[1865—S. 117.]

Bequest over, conditional upon happening or not happening of specified uncertain event.

131. *(1)* A bequest may be made to any person with the condition superadded that, in case a specified uncertain event shall happen, the thing bequeathed shall go to another person, or that in case a specified uncertain event shall not happen, the thing bequeathed shall go over to another person.

(2) In each case the ulterior bequest is subject to the rules contained in sections 120, 121, 122, 123, 124, 125, 126, 127, 129 and 130.

Illustrations.

(i) A sum of money is bequeathed to *A*, to be paid to him at the age of 18, and if he shall die before he attains that age, to *B*. *A* takes a vested interest in the legacy, subject to be divested and to go to *B* in case *A* dies under 18.

(ii) An estate is bequeathed to *A* with a proviso that if *A* shall dispute the competency of the testator to make a will, the estate shall go to *B*. *A* disputes the competency of the testator to make a will. The estate goes to *B*.

Section 129 — Note 1 *(contd.)*

he will be the sole heir of my property and effects. If on the other hand she is delivered of a female child all the expenses of her marriage and maintenance till that period should be defrayed from my estate. In case my son dies before attaining proper age all my estate and property should be taken possession of by my brother *N*." Testator's widow gave birth to a female child. On a construction of the will, it was held that the clause which gave possession of property to *N* in the event of son dying before proper age was a clause which purported to give him the property and that the gift over to *N* took effect on the failure of the first gift in whatever mode the failure took place even though not in the precise manner expressed in the terms of the gift. ('88) 15 Cal 282 (289, 291) (S B).

Section 130 — Note 1

[1] Property bequeathed to the minor son of testator and in the event of his death after the death of testator to the sister of the testator: Minor son predeceasing testator—*Held* that S. 130 applied to the case as the first bequest which failed had not failed in the particular manner indicated by the testator and therefore the sister was not entitled to succeed. (Vol 22) 1935 Mad 119 (120).

[2] Will bequeathing the residuary estate to the grandson, or grandsons who may be born to the son of the testator within ten years of the death of the testor — Gift over to granddaughters in the event of grandsons not being born as aforesaid — Grandson born within ten years of testator's death: *Held* that the gift to the grandson was void as it was one made to an unborn person and the gift over to the granddaughters failed because it was subject to a contingency which actually happened. (Vol 13) 1926 Mad 936 (938) (D B).

Section 131 — Note 1

[1] The word 'interest' in S. 28, T. P. Act, has the same meaning as the thing bequeathed in S. 131 of this Act. (Vol 22) 1935 Pat 401 (403): 14 Pat 640 (DB).

[2] A legacy may be bequeathed to *A* and in case of his death before or after that of the testator to *B* by reason of S. 131 even though such a case would fall outside the scope of S. 124. (Vol 19) 1932 P C 269 (272, 273): 59 Ind App 419: 60 Cal 554 (P C).

[3] Testator executing will leaving his estate half and half to his two sons—Any son dying sonless, surviving son to take his share: *Held* that S. 131 applied to the case and the clause of defeasance was valid. (Vol 18) 1931 Cal 499 (501) (D B).

[4] Will providing that *M* one of the two sons of the testator should give one-half of the property to *V* the other son if he should turn to good ways and reside with *M* respectably after the testator's death—Testator died immediately — *V* living in amity with *M* for 2 or 3 years: *Held* that this section applied and therefore half the estate which vested in *M* became vested in *V* on the happening of the uncertain event contemplated by the will. (Vol 11) 1924 Bom 298 (299) (DB).

[5] It is competent to a Hindu in making a will to make provisions that the estates which he creates and gives to the recipient may be divested or defeated by something which takes place after, provided that the event must happen immediately on the close of a life in being at the time of the gift and that the defeasance by way of gift over must be in favour of somebody in existence at the time of the gift. ('89) 16 Cal 383 (392): 16 Ind App 29 (P C) ✠ ('97) 24 Cal 834 (850) (S B) ✠ (1863) 9 Moo Ind App 123 (135) (P C) ✠ (Vol 7) 1920 Bom 281 (283) ✠ (Vol 8) 1921 Bom 262 (264): 45 Bom 1038 (D B). (Bequest of absolute estate, with provision that it should go to the third person if the legatee would die without male issue is valid and not opposed to Hindu law.)

[6] A clause of defeasance in order to be operative must contain express words or words of necessary implication of a gift over to a definite person or persons. ('05) 32 Cal 861 (869) (D B).

[7] Testator after conferring absolute estate on sons providing that in the event of their dying sonless, their widows or daughters shall not get the property but only maintenance: *Held* that the proviso did not operate as a defeasance clause because it did not reduce the absolute estate into a life estate and was also repugnant to the grant of an absolute estate and to the provisions of Hindu law because it set up a line of inheritance unknown to Hindu law. (Vol 26) 1939 Cal 226 (228, 229): I L R (1939) 1 Cal 63 (D B).

(iii) A sum of money is bequeathed to *A* for life, and, after his death, to *B*; but if *B* shall then be dead, leaving a son, such son is to stand in the place of *B*. *B* takes a vested interest in the legacy, subject to be divested if he dies leaving a son in *A*'s lifetime.

(iv) A sum of money is bequeathed to *A* and *B*, and if either should die during the life of *C*, then to the survivor living at the death of *C*. *A* and *B* die before *C*. The gift over cannot take effect, but the representative of *A* takes one-half of the money, and the representative of *B* takes the other half.

(v) *A* bequeaths to *B* the interest of a fund for life, and directs the fund to be divided at her death equally among her three children, or such of them as shall be living at her death. All the children of *B* die in *B*'s lifetime. The bequest over cannot take effect, but the interests of the children pass to their representatives.

[1865 — S. 118.]

Condition must be strictly fulfilled.

132. An ulterior bequest of the kind contemplated by section 131 cannot take effect, unless the condition is strictly fulfilled.

Illustrations.

(i) A legacy is bequeathed to *A*, with a proviso that, if he marries without the consent of *B*, *C* and *D*, the legacy shall go to *E*. *D* dies. Even if *A* marries without the consent of *B* and *C*, the gift to *E* does not take effect.

(ii) A legacy is bequeathed to *A*, with a proviso that, if he marries without the consent of *B*, the legacy shall go to *C*. *A* marries with the consent of *B*. He afterwards becomes a widower and marries again without the consent of *B*. The bequest to *C* does not take effect.

(iii) A legacy is bequeathed to *A*, to be paid at 18, or marriage, with a proviso that, if *A* dies under 18 or marries without the consent of *B*, the legacy shall go to *C*. *A* marries under 18, without the consent of *B*. The bequest to *C* takes effect.

[1865 — S. 119.]

Original bequest not affected by invalidity of second.

133. If the ulterior bequest be not valid the original bequest is not affected by it.

Illustrations.

(i) An estate is bequeathed to *A* for his life with condition superadded that, if he shall not on a given day walk 100 miles in an hour, the estate shall go to *B*. The condition being void, *A* retains his estate as if no condition had been inserted in the will.

(ii) An estate is bequeathed to *A* for her life and, if she do not desert her husband, to *D*. *A* is entitled to the estate during her life as if no condition had been inserted in the will.

(iii) An estate is bequeathed to *A* for life, and, if he marries, to the eldest son of *B* for life. *B*, at the date of the testator's death, had not had a son. The bequest over is void under section 105, and *A* is entitled to the estate during his life.

[1865 — S. 120.]

Section 131 — Note 1 *(contd.)*

[8] Failure of condition subsequent — Estate vests absolutely in legatee. (Vol 12) 1925 Lah 594 (595) (DB).

SECTION 132—SYNOPSIS.

1. Scope.
2. Condition of residence.

1. Scope.—[1] Hindu widow's power to adopt cannot be controlled by the will of her deceased father-in-law — Adoption contrary to the terms of will — Son's right to take under will as *persona designata* will be affected — His rights as grandson of testator however are not affected. (Vol 7) 1920 Bom 295 (295, 296) (DB).

2. Condition of residence. — [1] There is nothing in law to prevent a testator giving an absolute estate with the condition superadded that the legatee shall live in a particular house. ('13) 17 Cal W N 39 (41) (DB). (Life estate to widow with a gift over to *A* absolutely provided *A* lived in testator's ancestral house —On *A*'s failure to reside, gift over to others — *A* joining with widow to sell house: *Held*, *A* himself made fulfilment of condition impossible and hence was not entitled to legacy.) ✠ ('97) 24 Cal 646 (655, 656) (D B). (Will by Hindu husband requiring his widows to reside in family house or in case of quarrel at a holy place to entitle them to their share — Younger widow quarrelling with the elder and residing with her father: *Held* condition was broken and forfeiture incurred.)

[2] To reside at a house means that a man is to be found at that house whenever he is wanted, that for that house he is rated to the poor rate, or is on the Parish or the Government rate-books, and that there he has a home. (1884) 25 Ch D 605 (610). *In re Moir*; *Warner* v. *Moir*. (Devise of residence—Condition that legatee stayed at least for six months, not consecutively, in the house and took possession of the house within six months after the testator's death — Legatee performing condition as to possession but failing to stay for six months although he paid the taxes, kept a staff of servants and his son stayed on the place: *Held* he resided in the house and no forfeiture was incurred.) ✠(1907) 1 Ch 231 (236), *In re Wright*; *Mott* v. *Issott*. (Residing means personally residing; making the place as one's home. Using it as a place of rest and amusement is not residing in it.)

[3] A Hindu widow is not entitled to maintenance by residing elsewhere without a cause if she was directed by her husband to be maintained in the family house. ('91) 15 Bom 236 (237) (D B). (('72-73) Ind App (Suppl) Vol 203 (P.C), *Foll.*) ✠ ('89) 13 Bom 218 (221) (DB). (Bequest to wife to the effect that if she comes to live at testator's place, she is to have one of the houses and Rs. 15 miscellaneous expenses — Wife residing at her parents — Suit by wife for arrears of maintenance: *Held*, she had just cause for residing apart and did not forfeit her maintenance.) ✠ ('08) 8 Cal L Jour 489 (495) (D B). (*Held* widow had just cause not to reside in the places mentioned in the will and maintenance was allowed.)

Section 133 — Note 1

[1] When subsequent bequests are made upon happening of certain condition, fact that these ulterior gifts are not valid does not and cannot affect validity of prior bequest or gift. (Vol 22) 1935 All 1042 (1046): 58 All 467 ✠(1900) 4 Cal W N 671 (677) (DB). (Specific trusts or specific estates good in themselves are not invalidated by a subsequent illegal disposition of the residue or remainder.)

[2] Residue after meeting certain charges and expenses left by testator to his son to be dealt with at his pleasure till the son's sons attained the age of 21—

Bequest conditioned that it shall cease to have effect in case a specified uncertain event shall happen, or not happen.

134. A bequest may be made with the condition superadded that it shall cease to have effect in case a specified uncertain event shall happen, or in case a specified uncertain event shall not happen.

Illustrations.

(i) An estate is bequeathed to *A* for his life, with a proviso that, in case he shall cut down a certain wood, the bequest shall cease to have any effect. *A* cuts down the wood. He loses his life-interest in the estate.

(ii) An estate is bequeathed to *A*, provided that, if he marries under the age of 25 without the consent of the executors named in the will, the estate shall cease to belong to him. *A* marries under 25 without the consent of the executors. The estate ceases to belong to him.

(iii) An estate is bequeathed to *A*, provided that, if he shall not go to England within three years after the testator's death, his interest in the estate shall cease. *A* does not go to England within the time prescribed. His interest in the estate ceases.

(iv) An estate is bequeathed to *A*, with a proviso that, if she becomes a nun, she shall cease to have any interest in the estate. *A* becomes a nun. She loses her interest under the will.

(v) A fund is bequeathed to *A* for life, and, after his death, to *B*, if *B* shall be then living, with a proviso that, if *B* shall become a nun, the bequest to her shall cease to have any effect. *B* becomes a nun in the life-time of *A*. She thereby loses her contingent interest in the fund.

[1865 — S. 121.]

135. In order that a condition that a bequest shall cease to have effect may be valid, it is necessary that the event to which it relates be one which could legally constitute the condition of a bequest as contemplated by section 120.

Such condition must not be invalid under section 120.

[1865 — S. 122.]

136. Where a bequest is made with a condition superadded that, unless the legatee shall perform a certain act, the subject-matter of the bequest shall go to another person, or the bequest shall cease to have effect but no time is specified for the performance of the act; if the legatee takes any step which renders impossible or indefinitely postpones the performance of the act required, the legacy shall go as if the legatee had died without performing such act.

Result of legatee rendering impossible or indefinitely postponing act for which no time specified, and on non-performance of which subject-matter to go over.

Illustrations.

(i) A bequest is made to *A*, with a proviso that, unless he enters the Army, the legacy shall go over to *B*. *A* takes Holy Orders, and thereby renders it impossible that he should fulfil the condition. *B* is entitled to receive the legacy.

(ii) A bequest is made to *A*, with a proviso that it shall cease to have any effect if he does not marry *B's* daughter. *A* marries a stranger and thereby indefinitely postpones the fulfilment of the condition. The bequest ceases to have effect.

[1865 — S. 123.]

Section 133 — Note 1 *(contd.)*

Son to divide it equally amongst them after retaining his share on their attaining that age: *Held* that gift to grandsons of the testator was void under Ss. 114 and 115 and that the son took an absolute estate. ('96) 20 Bom 450 (463) (DB).

Section 134 — Note 1

[1] This section is a departure from English law, *viz.*, that a gift may be coupled with a condition that on the happening or not happening of a specified uncertain event, it shall cease, and that to effectuate the defeasance a gift over is not necessary as required by English law. According to this section, if the condition subsequent is valid, if accompanied by a gift over, it will be equally valid without the gift over. In England it is treated as *in terrorem*. The condition referred to in this section is a condition subsequent which terminates an interest. It is not a conditional limitation which creates an interest in a third person. (Vol 29) 1942 Sind 145 (152): I L R (1942) Kar 392.

[2] Will executed by Hindu in 1899: *Held*, in absence of any rule of Hindu law, the validity and binding effect of a forfeiture clause must be determined according to principle involved in S. 121 of Act of 1865 (now S. 134). (Vol 29) 1942 Sind 145 (152): I L R (1942) Kar 392.

[3] On construction of will, held that the bequest was in favour of testator's daughter's son of the entire taluqa including certain villages and was liable to be defeated so far as the latter villages were concerned, only if certain life tenant thereof died leaving any male issue. (Vol 34) 1947 Oudh 45 (61): 21 Luck 463 (D B).

[4] A Hindu bequeathed certain properties to various persons including his brothers and provided that if any of his brothers raised any dispute regarding any of the provisions of the will and his sole right to the properties bequeathed and refused to acknowledge his right to make the will, he would forfeit any benefit given to him by the will. One of the brothers *M* instituted a suit in 1905 contesting the will. It was held that *M* incurred forfeiture of legacy by institution of the suit. (Vol 29) 1942 Sind 145 (152): I L R (1942) Kar 392.

[5] Where according to the will the devisee was to have an interest so long as he resided in the house of the testator, his maternal grandfather, it was held that the restriction was imposed as a condition and not as an indication that the interest created was a life-estate and that the condition was perfectly legal under this section. (Vol 3) 1916 Cal 654 (656) (D B).

[6] See also Notes under S. 31 of the A. I. R Commentaries on the Transfer of Property Act, 1882.

Section 136 — Note 1

[1] Bequest to wife for life and after her absolutely to *A* provided *A* resided in the ancestral house — On *A's* failure to so reside, property to go to other relations on same condition — *A* joining with testator's widow in selling the ancestral home: *Held A* by his own act rendered the performance of the condition super-

Performance of condition, precedent or subsequent, within specified time. Further time in case of fraud.

137. Where the will requires an act to be performed by the legatee within a specified time, either as a condition to be fulfilled before the legacy is enjoyed, or as a condition upon the non-fulfilment of which the subject-matter of the bequest is to go over to another person or the bequest is to cease to have effect, the act must be performed within the time specified, unless the performance of it be prevented by fraud, in which case such further time shall be allowed as shall be requisite to make up for the delay caused by such fraud.

[1865 — S. 124.]

CHAPTER XII.

OF BEQUESTS WITH DIRECTIONS AS TO APPLICATION OR ENJOYMENT.

Direction that fund be employed in particular manner following absolute bequest of same to or for benefit of any person.

138. Where a fund is bequeathed absolutely to or for the benefit of any person, but the will contains a direction that it shall be applied or enjoyed in a particular manner, the legatee shall be entitled to receive the fund as if the will had contained no such direction.

Illustration.

A sum of money is bequeathed towards purchasing a country residence for *A*, or to purchase an annuity for *A*, or to place *A* in any business. *A* chooses to receive the legacy in money. He is entitled to do so.

[1865 — S. 125.]

Section 136 —Note 1 *(contd.)*

added to his absolute estate impossible and hence incurred forfeiture of the same. ('13) 17 Cal W N 39 (41) (D B).

Section 137 — Note 1

[1] In case of conditional limitation, i.e., a devise over to some other person on happening of event, the Court cannot relieve against forfeiture if the event has taken place. (1807) 14 Ves Jun 341 (346, 347): 33 E R 552, *Simpson* v. *Vickers.*

[2] Even conditions subsequent to defeat vested estates must be construed strictly, and to work a forfeiture there must be shown a breach of a defined line of conduct which the parties concerned must reasonably have known would work a forfeiture (1866) 7 H L C 707 (721, 723), *Swindon Water Works Co.* v. *Wilts and Berkscoud Navigation Co.* (Legatee prevented by vis major from fulfilling condition—There is no forfeiture.)

[3] Neither ignorance, illness nor neglect on the part of the executor to inform the legatee can excuse him from not complying with the direction so as to entitle him to the gift. (1873) 16 Eq 92 (96), *In re Hodges Legacy*; (1874) 16 Eq 290 (297), *Astley* v. *Earl of Essex.* (Want of knowledge of contents of the will.) (1874) 18 Eq 243 (245), *Powell* v. *Rawle.* (Want of knowledge of legacy and failure of executor to give notice.)

[4] Where condition is a condition subsequent and the devisee was prevented from performing it by an act of God he or his representative will not be deprived of the bequest. (1903) 1 Ch 749 (756), *In re Green Wood; Gooddhart* v. *Woodhad.*

[5] Where the legatee is prevented from performing the condition of the will by duress no forfeiture is caused by the failure. ('93) 20 Cal 15 (17) (D B). (Testator providing that any member of his family living away from his house for more than three months would forfeit the property. Widowed daughter-in-law removed from house by her maternal relations with the aid of police : *Held* she did not forfeit.)

[6] A condition subsequent which is impossible of performance will not bind the devisee and he need not comply with it in order to retain the bequest. (1904) 1 Ch 252 (259), *In re Croxon; Croxon* v. *Ferrers.*

[7] See also Notes under S. 37 of the A.I.R. Commentaries on the Transfer of Property Act, 1882.

Section 138 — Note 1

[1] Section applies only where the bequest is absolute and not where it is limited to the life of the particular legatee. (Vol 17) 1930 Cal 731 (732) (DB). (Condition restraining alienation by legatee who is given only a life interest is valid.) (Vol 27) 1940 Bom 76 (77) : ILR (1940) Bom 254 (DB). (Gift followed by directions amounting to trust—Gift to the legatee is not absolute.)

[2] A will contained the following directions as to the devolution of a fund "I hereby give, devise and bequeath to my grand-children by my late daughter, also to my grandson and his step-brother in equal shares the benefit, interest and profit that shall arise and accrue from and out of the fund...." and "I hereby direct that the fund shall be a continuing fund to all time and that the interest and profit derived therefrom shall be received and enjoyed as expressed in this will not only to the legatees to whom such has been bequeathed by me, but the same shall be inherited by any child or children of them from time to time and from one generation to another in accordance with all legal rights" : *Held*, that the words referring to children of the legatees in the latter clause were words of inheritance and not of purchase and that their effect was to give an absolute interest in the fund to the legatees. ('92) 15 Mad 448 (467).

[3] Grant of mirasi taluk to *A* for her life and then to her adopted son if she adopted one for his life — On the death of adopted son the estate to go to his sons, grandsons etc., by right of inheritance in the male line— Estate to revert to grantor or his heirs after *A's* life in the event of *A* not adopting or where she adopted if the adopted son died sonless—Forfeiture also in case the estate was attached or sold : *Held*, on a construction of the grant that no absolute estate was created. ('08) 35 Cal 1069 (1073) (DB). (Case decided under the Transfer of Property Act.)

[4] Bequest to wife of a sum of money to be credited in the books of the shop of *B* and interest to be paid to her half-yearly—Money to be paid to her if demanded by her during her life-time for good works—Otherwise money to be used by *B* at his pleasure : *Held*, that the testator's intention was to bequeath the money absolutely to his wife with directions as to its application or enjoyment and therefore the mention of good works did not limit the absolute right of the testator's wife to the money. ('98) 22 Bom 774 (777) (DB).

[5] When a property is transferred absolutely it must be transferred with all its legal incidents and it is not competent to the grantor to sever from the right of property incidents which the law inseparably annexes to it—There is nothing in Hindu law which

Direction that mode of enjoyment of absolute bequest is to be restricted, to secure specified benefit for legatee.

139. Where a testator absolutely bequeaths a fund, so as to sever it from his own estate, but directs that the mode of enjoyment of it by the legatee shall be restricted so as to secure a specified benefit for the legatee, if that benefit cannot be obtained for the legatee, the fund belongs to him as if the will had contained no such direction.

Illustrations.

(i) A bequeaths the residue of his property to be divided equally among his daughters, and directs that the shares of the daughters shall be settled upon themselves respectively for life and be paid to their children after their death. All the daughters die unmarried. The representatives of each daughter are entitled to her share of the residue.

(ii) A directs his trustees to raise a sum of money for his daughter, and he then directs that they shall invest the fund and pay the income arising from it to her during her life, and divide the principal among her children after her death. The daughter dies without having ever had a child. Her representatives are entitled to the fund.

[1865 — S. 126.]

Section 138—Note 1 *(contd.)*

permits a departure from this principle. ('82) 4 Mad 200 (202, 203) (DB).

[6] A man cannot by gift *inter vivos* or by will give property absolutely to another and yet control his mode of enjoyment in respect of partition or otherwise. ('81) 6 Cal 106 (116) ✠ ('76) 1 Cal 104 (107). (Testator giving property to sons—Prohibition of partition for a certain period was held void.) ✠ ('91) 15 Bom 443 (449). (Testator directing the net income during the joint lives of his wife and his daughter to be applied in payment of monthly allowances to them and the residue for the purposes of the wife and daughter and daughter's children in such manner as the trustees think proper—Directions amount to a gift of residue to use of wife and daughter in equal proportions absolutely—Direction that the trustees should control the manner of the expenditure held could not be given effect to.)

[7] Where a testator gives by express gift to the legatees as maliks and also prohibits alienation directly or indirectly the effect is not to produce a life estate in favour of the legatees but to give them an absolute estate precluding the operation of the restricting clause. ('97) 24 Cal 406 (411, 412) (DB).

[8] Where the will provided that the testator's elder son *P* and younger son *J* were proprietors of the estate of the tastator in equal shares the legatees took an absolute estate and other clauses in the will restricting the powers of enjoyment, alienation and disposal of the property given to *P* and *J* were held invalid, inoperative and opposed to law. (1911) 13 Bom L R 141 (149) (DB).

[9] Bequest of estate absolutely with an added condition that in the event of legatee selling it, she was to pay certain legacies : *Held* that the condition to pay legacies on sale was repugnant and void. (1896) 2 Ch 353 (356, 357), *Kelly* v. *Elliot*.

[10] Where in a deed of gift or will an absolute estate of inheritance is created in favour of a person any subsequent clause which purports to restrict that interest is invalid and the donee or legatee takes an absolute estate as if the deed contained no such restrictive condition. The rule is the same even if the restriction is for a limited period only. (Vol 20) 1933 Lah 201 (202, 203) 14 Lah 353 (DB). (Testator after declaring his sons absolute owners in equal shares of his property restricting alienation or partition until the last of them became a major : *Held* that the restriction was invalid.)

[11] No condition could be annexed to a gift in fee simple which is repugnant to that gift even though the restraint is only for a limited time. (1884) 26 Ch D 801 (823), *Rosher* v. *Rosher*. (Condition restraining sale during the lifetime of a particular individual held void.)

[12] Where there is a direction implying a postponement of the division of the residue for ten years or until the death of the last surviving sons the direction is inoperative, the interest to which it attaches being absolute. (Vol 10) 1923 P C 122 (127) (PC).

[13] A person bequeathed by will his properties to his sons in specific shares—By a second and third will he imposed conditions restraining partition, personal possession of the specific share and alienation of the property allowing the sons to get only profits according to their specific shares : *Held* that these clauses which imposed restrictions were invalid and void and therefore did not affect the gift of the property in the shares specified in the first will. ('88) 15 Cal 409 (420, 421) : 15 Ind App 37 (PC).

[14] If an estate is given in terms which confer an absolute estate on the donee and then further interests are given merely after or on the termination of that donee's interest his absolute interest is not cut down and the further interests fail. (Vol 20) 1933 Lah 365 (368) : 14 Lah 485 (DB). (Donees Hindu widows with full powers of alienation—Gift over will not curtail it.)

Section 139 — Note 1

[1] This section is an enactment in statutory form of a principle laid down by the English decision in *Lassence* v. *Tierney* (1 Mac and G 551) which is that where reading the will as a whole, the intention to confer an absolute estate in the first instance is expressed or implied, and following on that absolute estate there is a provision for settlement which in the event cannot be operative, then the words of prior intention prevail and the absolute estate takes effect notwithstanding the failure of the provision for settlement that follows. (Vol 12) 1925 P C 244 (247) : 48 Mad 906: 52 Ind App 310 (PC) ✠ (Vol 27) 1940 Bom 76 (77, 78) : ILR (1940) Bom 254 (DB).

[*See also* (1920) 2 Ch 33 (37), *Moryoseph* v. *Moryoseph*. (The rule in *Lassenee* v. *Tierney* (1 Mac and G 551) applies to realties as well.)]

[2] In India the words of this section must be followed as laying down the above principle. (Vol 12) 1925 P C 244 (247) : 48 Mad 906 : 52 Ind App 310 (PC).

[3] Where a will by an earlier clause merely directed apportionment or division and not distribution or disposition of property, and by the next clause effected the distribution giving the daughters an income for life, followed by gifts to their children, it was held the will did not confer upon the daughters any such absolute gift as is contemplated by this section but only a gift for life to which case this section did not apply. (Vol 12) 1925 P C 244 (247) : 48 Mad 906 : 52 Ind App 310 (PC).

[4] Direction to sell the property and the sale proceeds to be equally divided between two sons *A* and *B* of the testatrix—As regards half share of *B*, further direction that the amount of his share to be held in

Bequest of fund for certain purposes, some of which cannot be fulfilled.

140. Where a testator does not absolutely bequeath a fund, so as to sever it from his own estate, but gives it for certain purposes, and part of those purposes cannot be fulfilled, the fund, or so much of it as has not been exhausted upon the objects contemplated by the will, remains a part of the estate of the testator.

Illustrations.

(i) *A* directs that his trustees shall invest a sum of money in a particular way, and shall pay the interest to his son for life, and at his death shall divide the principal among his children. The son dies without having ever had a child. The fund after the son's death, belongs to the estate of the testator.

(ii) *A* bequeaths the residue of his estate, to be divided equally among his daughters, with a direction that they are to have the interest only during their lives, and that at their decease the fund shall go to their children. The daughters have no children. The fund belongs to the estate of the testator.

[1865 — S. 127.]

CHAPTER XIII.

OF BEQUESTS TO AN EXECUTOR.

Legatee named as executor cannot take unless he shows intention to act as executor.

141. If a legacy is bequeathed to a person who is named an executor of the will, he shall not take the legacy, unless he proves the will or otherwise manifests an intention to act as executor.

Illustration.

A legacy is given to *A*, who is named an executor. *A* orders the funeral according to the directions contained in the will, and dies a few days after the testator, without having proved the will. *A* has manifested an intention to act as executor.

[1865 — S. 128.]

Section 139—Note 1 *(contd.)*

trust for *B*, interest to be given for *B's* maintenance and should *B* die leaving a widow or issue his share to be given to such widow or issue according as he may devise : *Held* that there was a gift over to the widow or issue of *B* and to that extent *B's* otherwise absolute gift was qualified, and further that should the gift over fail *B's* absolute interest remained unimpaired under this section ('95) 19 Bom 770 (774) (DB). (Affirming on appeal ('95) 19 Bom 221.)

[5] Bequest in favour of testator's wife firstly in the event of her remaining testator's widow to her and testator's daughter and any other child of him through her, for their general benefit and after her death, children to take per stirpes—In case of wife's remarriage and children dying in her life time estate was given half to testator's half-brother and half to the wife, but in case the half-brother died without issue, the whole to the wife—Testator's children died before the widow who did not remarry—It was held that the testator intended by the first devise to give the estate to his wife and children jointly and that what followed was merely a restriction on the mode of their enjoyment. ('94) 21 Cal 488 (496) (DB).

[6] *A* gave by will certain land to his daughter and her son for enjoyment and the grandson was specially prohibited from alienating it and was to act under the directions of his mother. It was held that the mother and son did not take joint interest but that the mother took a life estate with the remainder over to her son and that the prohibition as to alienations took no effect in case of the son. ('98) 21 Mad 425 (428) (DB).

SECTION 141—SYNOPSIS.

1. Scope.
2. "Manifests an intention to act."

1. Scope.—[1] The prohibition in this section is not confined to cases of bequests to executors as such but extends to any bequest, whatever be reason for which it is made, provided legatee is named as executor. (Vol 31) 1944 Mad 335 (337) : I L R (1944) Mad 821 (DB).

[*See also* (1840) 11 Sim 202 (203, 204) : 59 E R 851, *Griffiths* v. *Pruen*. (An executor being also a residuary legatee rule does not apply.)]

[2] This section implies that the executor survives the testator. It therefore cannot apply to a case where the executor predeceases the testator and therefore does not affect the case contemplated by S. 96 (now S. 109) which can only apply to a case where the legatee predeceases the testator whether he has been named an executor or not. ('03) 13 Mad L Jour 351 (353) (FB).

[3] The language of this section is peremptory and it is not left to the Court to decide whether the legacy was given to the person named in his character as executor. It is assumed that it was so given and the prohibition follows. Oral evidence cannot, therefore, be given to prove in what capacity the legacy was given. ('88) 15 Cal 83 (87).

[4] After giving various legacies including one to executor by his name, the remainder or residue of the testator's property placed "at the discretion and at his own disposal" of the executor—Property held received by the executor not by virtue of any gift but simply as an executor and must be disposed of by him as such i. e., in his representative capacity and not for his own benefit. (1914) 2 Ch 173 (181), *In re Howell*; *In re Buckingham*; *Liggins* v. *Buckingham*.

2. "Manifests an intention to act." — [1] Proving of the will when the person is in a position to prove it, is of course the best manifestation of his intention and if he failed to prove it the Court would require a very strong reason for the omission before finding that the intention existed. ('88) 15 Cal 83 (87).

[2] The cases where the executor has clearly shown an intention to act as such but has been prevented by some happening beyond his control from proving the will fall within the meaning of this expression. (Vol 31) 1944 Mad 335 (337) : I L R (1944) Mad 821 (DB). (Executor going to the house of deceased after reading of the will and announcing his intention to take inventory—Objection raised by widow — Executor returning and after four days resigning executorship to avoid unpleasantness and possible trouble to himself : *Held* this did not amount to manifestation of intention required by section.)

[3] Where the executor concurred with other executors in the directions for the funeral of the testator, also in paying certain sums for the burial fees, for

CHAPTER XIV.

OF SPECIFIC LEGACIES.

142. Where a testator bequeaths to any person a specified part of his property, which is distinguished from all other parts of his property, the legacy is said to be specific.

Specific legacy defined.

Illustrations.

(*i*) *A* bequeaths to *B* —

"the diamond ring presented to me by *C*" :

"my gold chain" :

"a certain bale of wool" :

"a certain piece of cloth" :

"all my household goods which shall be in or about my dwelling-house in *M* Street, in Calcutta, at time of my death" :

"the sum of 1,000 rupees in a certain chest" :

"the debt which *B* owes me" :

"all my bills, bonds and securities belonging to me lying in my lodgings in Calcutta" :

"all my furniture in my house in Calcutta" :

"all my goods on board a certain ship now lying in the river Hughli" :

"2,000 rupees which I have in the hands of *C*" :

"the money due to me on the bond of *D*" :

"my mortgage on the Rampur factory" :

"one-half of the money owing to me on my mortgage of Rampur factory" :

"1,000 rupees, being part of a debt due to me from *C*" :

"my capital stock of 1,000*l*. in East India Stock" :

"my promissory notes of the [a][Central Government] for 10,000 rupees in their 4 per cent. loan" :

Section 141—Note 2 *(contd.)*

making coffins and opening the vault it was held that he showed that he meant to act as executor and his death before he executed the will did not defeat his interest. (1817) 4 Ves 212 (216) : 31 E R 110, *Harrison* v. *Rowley*.

[4] An executor to whom a legacy was given was in Australia at the time of testator's death. He sent a power of attorney to England under which his agent administered the estate and also recovered certain rents Executor died without proving the will. It was held that he had sufficiently shown his intention to act as an executor. (1869) 8 Eq 277 (282), *Lewis* v. *Mathews*.

[5] Where the person named as executor was found to be always ready and willing to act and it was proved that after testator's death, he made arrangements for the cremation and shradh or borrowed or advanced the money necessary for those purposes it was held that there were sufficient manifestations of his intention to act as executor. ('88) 15 Cal 83 (89).

Section 142 — Note 1

[1] A specific legacy is in the first place a part of the testator's property whereas a general legacy may or may not be so and secondly it must be a part emphatically, as distinguished from the whole. (1875) 20 Eq 304 (308, 309), *Bothamley* v. *Sherson*.

[2] Where a testator gives his property generally by the words "all my property" or "all my estates" or "all that I have power over" and then proceeds to enumerate particulars such enumeration does not abridge or cut down the effect of the general words. (1876) 4 Ch D 435 (437), *King* v. *George*.

[3] Clause in a will directing the payment in equal proportion to named legatees after realising a fixed deposit belonging to the testatrix in a particular bank — Investment not existing at the time of testatrix's death: *Held* that the legacy was specific as the testatrix was thinking in terms of her actual investments and not in terms of the money value. ('35) 1935 Mad W N 275 (276, 277).

[4] Testator bequeathing rent by specific property to wife and daughters—Bequest is specific and not demonstrative. (Vol 24) 1937 Bom 384 (385) ✻ (Vol 12) 1925 Mad 418 (420) (DB) (*M* bequeathing by will a garden and a bungalow to *S* along with other properties immovable and moveable — *S* directed by will to pay half the net income therefrom to *J* for life and after her death to her children—Provision in the will that if the property should be sold one half of the same amount should be paid to *J* and the children that may be born to her : *Held* that though what was granted to *J* was only a moiety of net rental income from the property still as the payment was not directed to be made only for a limited period and as in the event of the sale of the property half the proceeds was to be paid to *J* the bequest in law was of the specific property itself as a specific legacy to *J*.)

[5] A legacy of stock is a general and not a specific legacy. It is not correct to say that it is general where the sum happened to be a round sum and specific where it happened to be one which ran into pounds, shillings and pence. (1921) 2 Ch 327 (330), *Warwick* v. *Wallcock*.

[6] Person having life interest in certain G. P. Notes bequeathing one third of her income to her servants and directing the maintenance of the Imambara under the belief that she owned the G. P. notes : *Held* that the bequest was specific as she should have meant the expenses of maintaining the Imambara to come out of the general estate. ('32) 8 Cal 1 (6) : 8 Ind App 117 (PC).

[7] Testator making oral agreements of sale leaving directions that sale proceeds when received should be paid towards the legacies in certain proportions : *Held* that legacies are not specific. (Vol 19) 1932 Bom 506 (507) (DB).

[8] Testator having a fixed deposit in a bank gifting a sum of Rs. 12,000 out of that to one of his sons and directing the executors to buy as soon as possible a house of the value of Rs. 12,000 in Madras : *Held* that the gift was not a specific gift but a demonstrative gift and that the direction that it was to be paid out of a specified fund did not make it a specified gift. (Vol 29) 1942 Mad 17 (18).

[9] Testator making a gift by will of all sums of money which he may possess or may be owing to him at the time of his decease together with all the furniture, farming implements, stock and crops belonging to a particular place by name "Asby Hall Estate": *Held* that there was no specific gift. (1876) 3 Ch D 309 (313), *Fairer* v. *Park*.

"all such sums of money as my executors may, after my death, receive in respect of the debt due to me from the insolvent firm of *D* and Company" :
"all the wine which I may have in my cellar at the time of my death" :
"such of my horses as *B* may select" :
"all my shares in the Imperial Bank of India" :
"all my shares in the Imperial Bank of India which I may possess at the time of my death" :
"all the money which I have in the 5½ per cent. loan of the [a][Central Government]" :
"all the Government securities I shall be entitled to at the time of my decease".

Each of these legacies is specific.

(*ii*) *A* having Government promissory notes for 10,000 rupees, bequeaths to his executors "Government promissory notes for 10,000 rupees in trust to sell" for the benefit of *B*. The legacy is specific

(*iii*) *A* having property at Benares, and also in other places, bequeaths to *B* all his property at Benares. The legacy is specific.

(*iv*) *A* bequeaths to *B* —
his house in Calcutta :
his zamindari of Rampur :
his taluq of Ramnagar :
his lease of the indigo-factory of Salkya :
an annuity of 500 rupees out of the rents of his zamindari of *W*.

A directs his zamindari of *X* to be sold, and the proceeds to be invested for the benefit of *B*.

Each of these bequests is specific.

(*v*) *A* by his will charges his zamindari of *Y* with an annuity of 1,000 rupees to *C* during his life, and subject to this charge he bequeaths the zamindari to *D*. Each of these bequests is specific.

(*vi*) *A* bequeaths a sum of money —
to buy a house in Calcutta for *B* :
to buy an estate in zila Faridpur for *B* :
to buy a diamond ring for *B* :
to buy a horse for *B* :
to be invested in shares in the Imperial Bank of India for *B* :
to be invested in Government securities for *B* :

A bequeaths to *B* —
"a diamond ring" :
"a horse" :
"10,000 rupees worth of Government securities" :
"an annuity of 500 rupees" :
"2,000 rupees to be paid in cash" :
"so much money as will produce 5,000 rupees four per cent. Government securities" :

These bequests are not specific.

(*vii*) *A*, having property in England and property in India, bequeaths a legacy to *B*, and directs that it shall be paid out of the property which he may leave in India. He also bequeaths a legacy to *C*, and directs that it shall be paid out of property which he may leave in England. No one of these legacies is specific.

[1865 — S. 129.]

[a] *Substituted* by A. O. for "Government of India".

Bequest of certain sum where stocks, etc., in which invested are described.

143. Where a certain sum is bequeathed, the legacy is not specific merely because the stock, funds or securities in which it is invested are described in the will.

Illustration.

A bequeaths to *B* —
"10,000 rupees of my funded property" :
"10,000 rupees of my property now invested in shares of the East Indian Railway Company" :
"10,000 rupees, at present secured by mortgage of Rampur factory".

No one of these legacies is specific.

[1865 — S. 130.]

Bequest of stock where testator had, at date of will, equal or greater amount of stock of same kind.

144. Where a bequest is made in general terms of a certain amount of any kind of stock, the legacy is not specific merely because the testator was, at the date of his will, possessed of stock of the specified kind, to an equal or greater amount than the amount bequeathed.

Illustration.

A bequeaths to *B* 5,000 rupees five per cent. Government securities. *A* had at the date of the will five per cent. Government securities for 5,000 rupees. The legacy is not specific.

[1865 — S. 131.]

Bequest of money where not payable until part of testator's property disposed of in certain way.

145. A money legacy is not specific merely because the will directs its payment to be postponed until some part of the property of the testator has been reduced to a certain form, or remitted to a certain place.

Illustration.

A bequeaths to *B* 10,000 rupees and directs that this legacy shall be paid as soon as *A*'s property in India shall be realised in England. The legacy is not specific.

[1865 — S. 132.]

When enumerated articles not deemed specifically bequeathed.

146. Where a will contains a bequest of the residue of the testator's property along with an enumeration of some items of property not previously bequeathed, the articles enumerated shall not be deemed to be specifically bequeathed.

[1865 — S. 133.]

Retention, in form, of specific bequest to several persons in succession.

147. Where property is specifically bequeathed to two or more persons in succession, it shall be retained in the form in which the testator left it, although it may be of such a nature that its value is continually decreasing.

Illustrations.

(i) *A*, having lease of a house for a term of years, fifteen of which were unexpired at the time of his death, has bequeathed the lease to *B* for his life and after *B*'s death to *C*. *B* is to enjoy the property as *A* left it, although, if *B* lives for fifteen years, *C* can take nothing under the bequest.

(ii) *A*, having an annuity during the life of *B*, bequeaths it to *C*, for his life, and, after *C*'s death, to *D*. *C* is to enjoy the annuity as *A* left it, although, if *B* dies before *D*, *D* can take nothing under the bequest.

[1865 — S. 134.]

Sale and investment of proceeds of property bequeathed to two or more persons in succession.

148. Where property comprised in a bequest to two or more persons in succession is not specifically bequeathed, it shall, in the absence of any direction to the contrary, be sold, and the proceeds of the sale shall be invested in such securities as the High Court may by any general rule authorise or direct, and the fund thus constituted shall be enjoyed by the successive legatees according to the terms of the will.

Illustration.

A, having a lease for a term of years, bequeaths all his property to *B* for life, and, after *B*'s death, to *C*. The lease must be sold, the proceeds invested as stated in this section and the annual income arising from the fund is to be paid to *B* for life. At *B*'s death the capital of the fund is to be paid to *C*.

[1865—S. 135].

Where deficiency of assets to pay legacies, specific legacy not to abate with general legacies.

149. If there is a deficiency of assets to pay legacies, a specific legacy is not liable to abate with the general legacies.

[1865—S. 136]

CHAPTER XV.

OF DEMONSTRATIVE LEGACIES.

Demonstrative legacy defined.

150. Where a testator bequeaths a certain sum of money, or a certain quantity of any other commodity, and refers to a particular fund or stock so as to constitute the same the primary fund or stock out of which payment is to be made, the legacy is said to be demonstrative.

Section 146 — Note 1.

[1] Where there is a gift of the residue and the testator unnecessarily chooses to enumerate some particular things in that residuary gift that circumstance is not sufficient to constitute the things so enumerated specific gifts. (1857) 1 Deg and J 438 (444) : 44 E R 793, *Fielding* v. *Preston*.

[2] The word "Articles" cannot be construed as including items of immovable property. (Vol 12) 1925 Mad 418 (420) (DB). (Case decided under S. 133 of Act of 1865 corresponding to this section.)

Section 148 — Note 1.

[1] Where property of a perishable nature is given to be enjoyed in succession the object of the testator can only be effected by converting the property into permanent annuities and giving each person in succession the dividend of the fund. But the testator can take the case of any particular bequest out of this rule and small indication of such intention is sufficient. Therefore the persons contesting the application of that rule and the Court which forbids that application should point out the words in the will which exclude the rule. (1851) 51 E R 214 (218) : 14 Beav 72, *Morgan* v. *Morgan* & (1878) 8 Ch D 101 (121), *Macdonald* v. *Irvine*. (Baggallay L. J. *dissenting*.)

[2] In construing a will which bequeathes property to two or more persons in succession it is the duty of the Court to consider whether or not the whole scope and context of the instrument does express an intention by the testator that the tenants for life should enjoy in specie that property which was his at the date of the will. (1875) 19 Eq 395 (415), *Thursby* v. *Thursby*.

[3] The mere absence of any direction by the testator to convert his property cannot be construed to mean that it should be enjoyed in specie by the legatees in succession. (1851) 51 E R 214 (218) : 14 Beav 72 (83), *Morgan* v. *Morgan*.

[4] A bequeathing his real and personal estate upon trust for sale and conversion and the proceeds to be held in trust for his wife till her life-time and after her death for his children — Trustees invested with power to postpone sale so long as they thought fit—Rents profits and income from such unsold real and personal estate to be paid to person or persons in the same manner as indicated in the will when the sale and conversion had been actually made — *Held* that the direction as to payment during the time the sale is postponed exclude the application of the general rule and that the widow was entitled to the profits from the unsold business and not merely to a four per cent interest thereon. (1884) 26 Ch D 42 (46, 47), *Chancellor* v. *Brown*.

Section 150 — Note 1

[1] Sections 137 and 140 of the Act of 1865 (Ss. 150 and 153 of this Act) do not apply to Hindus but they embody the general principles of law applicable to wills

Explanation.— The distinction between a specific legacy and a demonstrative legacy consists in this, that—

where specified property is given to the legatee, the legacy is specific; where the legacy is directed to be paid out of specified property, it is demonstrative.

Illustrations.

(i) *A* bequeaths to *B* 1,000 rupees, being part of a debt due to him from *W*. He also bequeaths to *C* 1,000 rupees to be paid out of the debt due to him from *W*. The legacy to *B* is specific, the legacy to *C* is demonstrative.

(ii) *A* bequeaths to *B*—

"ten bushels of the corn which shall grow in my field of Green Acre":

"80 chests of the indigo which shall be made at my factory of Rampur":

"10,000 rupees out of my five per cent. promissory notes of the [a][Central Government]."

an annuity of 500 rupees "from my funded property":

"1,000 rupees out of the sum of 2,000 rupees due to me by *C*":

an annuity, and directs it to be paid "out of the rents arising from my taluk of Ramnagar."

(iii) *A* bequeaths to *B*—

"10,000 rupees out of my estate at Ramnagar," or charges it on his estate at Ramnagar:

"10,000 rupees, being my share of the capital embarked in a certain business."

Each of these bequests is demonstrative.

[1865—S. 137.]

[a] *Substituted* by A. O. for "Government of India."

Order of payment when legacy directed to be paid out of fund the subject of specific legacy.

151. Where a portion of a fund is specifically bequeathed and a legacy is directed to be paid out of the same fund, the portion specifically bequeathed shall first be paid to the legatee, and the demonstrative legacy shall be paid out of the residue of the fund and, so far as the residue shall be deficient, out of the general assets of the testator.

Illustration.

A bequeaths to *B* 1,000 rupees, being part of a debt due to him from *W*. He also bequeaths to *C* 1,000 rupees to be paid out of the debt due to him from *W*. The debt due to *A* from *W* is only 1,500 rupees; of these 1,500 rupees, 1000 rupees belong to *B*, and 500 rupees are to be paid to *C*. *C* is also to receive 500 rupees out of the general assets of the testator.

[1865 —S. 138.]

CHAPTER XVI.

OF ADEMPTION OF LEGACIES.

Ademption explained.

152. If anything which has been specifically bequeathed does not belong to the testator at the time of his death, or has been converted into property of a different kind, the legacy is adeemed: that is, it cannot take effect, by reason of the subject-matter having been withdrawn from the operation of the will.

Section 150—Note 1 *(contd.)*

as a whole. ('09) 1909 Pun L R No. 16 page 78 (81): 1908 Pun Re No. 109.

[2] To determine whether a particular bequest is specific or demonstrative the only guiding factor can be the exact words used in the will and no other. (Vol 24) 1937 Bom 384 (385).

[3] Legacies which are to be paid out of the sale proceeds of the lands with regard to which the testator had made oral agreements of sale and left direction that they should be sold and after the money was received the payments of the legacies should be made in certain proportions are demonstrative and not specific legacies. (Vol 19) 1932 Bom 506 (507) (DB).

[4] If there is first a gift and then a subsequent direction of the fund out of which it should be paid, it would be demonstrative and payable out of the general estate, in the absence of the existence of the fund at the date of the death of the testator. (Vol 29) 1942 Mad 17 (18).

[5] The Queen of Oudh created a will where one of the clauses said that in the event of the income from the landed properties was not sufficient to meet the purposes of the will her agent was to make up the deficiency from "the pensionary allowances and interest on notes and etc. paid from the treasury." Another clause made provision for payment of Rs. 981 out of the allowance from Washka and notes and etc. from the Government treasury to her relations, servants and other dependents as detailed in the will by her. The pension which was being granted to her by the Government was subsequently stopped; *Held* that on a restricted interpretation of the will the gift of annuities or stipends were to be regarded as demonstrative legacy and were payable out of the general estate of the testatrix in the event of the failure of particular fund pointed out for their payment. (1892) 19 Cal 444 (452): 19 Ind App 83 (PC).

[6] The rule that in the case of demonstrative legacies the legatee is entitled to resort to the general assets on failure of the source intended is subject to any direction to the contrary by the testator. (1906) 29 Mad 155 (159) (DB).

[7] A legacy payable at a further day carries interest only from the time fixed for its payment. But where no time for payment is fixed, the legacy is payable at, and therefore bears interest from the end of the year after the testator's death even though it be expressly made payable out of a particular fund which is not got until after a long interval. (1912) 1 Ch 219 (225), *Kenyon* v. *Walford*.

[8] The Indian law is not different from the rule of English law under which demonstrative legacies also carry interest from one year from the testator's death. The absence of any provision in the Indian Probate and Administration Act for the payment of interest on demonstrative legacies does not imply an intention to disallow interest on them (1906) 29 Mad 155 (160) (DB).

Section 152—Note 1

[1] The doctrine of ademption applies to both special

Illustrations.

(i) *A* bequeaths to *B*—
"the diamond ring presented to me by *C*":
"my gold chain":
"a certain bale of wool":
"a certain piece of cloth":
"all my household goods which shall be in or about my dwelling house in M. Street in Calcutta, at the time of my death";
in his lifetime,—
sells or gives away the ring:
converts the chain into a cup:
converts the wool into cloth:
makes the cloth into a garment:
takes another house into which he removes all his goods.
Each of those legacies is adeemed.

(ii) *A* bequeaths to *B*—
"the sum of 1,000 rupees in a certain chest":
"all the horses in my stable."
At the death of *A*, no money is found in the chest, and no horses in the stable. The legacies are adeemed.

(iii) *A* bequeaths to *B* certain bales of goods. *A* takes the goods with him on a voyage. The ship and goods are lost at sea, and *A* is drowned. The legacy is adeemed.
[1865—S. 139.]

Non-ademption of demonstrative legacy.

153. A demonstrative legacy is not adeemed by reason that the property on which it is charged by the will does not exist at the time of the death of the testator, or has been converted into property of a different kind, but it shall in such case be paid out of the general assets of the testator.
[1865 — S. 140.]

Ademption of specific bequest of right to receive something from third party.

154. Where the thing specifically bequeathed is the right to receive something of value from a third party, and the testator himself receives it, the bequest is adeemed.

Illustrations.

(i) *A* bequeaths to *B*—
" the debt which *C* owes me " :
" 2,000 rupees which I have in the hands of *D* " :
" the money due to me on the bond of *E* " :
" my mortgage on the Rampur factory."
All these debts are extinguished in *A*'s lifetime, some with and without his consent. All the legacies are adeemed.

(ii) *A* bequeaths to *B* his interest in certain policies of life assurance. *A* in his lifetime receives the amount of the policies. The legacy is adeemed.
[1865—S. 141.]

Section 152—Note 1 *(contd.)*
and general power alike. (1902) 1 Ch 100 (124), *Beddington* v. *Beddington* ✠ (1901) 1 Ch 398 (403), *Dowsett* v. *Meakin*.

[2] The question whether an appointment is defeated by reason of a change in investment where the appointor who is not disposing off his own property but is merely designating the persons who are to take property under an instrument which contemplates and authorises a change of investment appoints a particular portion of the property to an object of the power, must depend upon the true construction of the testamentary instrument which is said to have exercised that power. In each case it is a question of intention which is to be gathered from the words used and if the language used is such that a devise of his own property would have failed by reason of some subsequent act an appointment under the special power in the same language must equally fail. (1902) 1 Ch 100 (122, 123), *Beddington* v. *Beddington*.

[3] Testator bequeathing income from certain shares specifically and the shares to the residuary legatees — Testator found lunatic subsequently—Shares sold under order in lunacy and proceeds invested in consols—*Held* that the conversion under order in lunacy was a lawful conversion as if the testator himself had effected it and therefore there was ademption of the specific legacy. (1868) 5 Eq 555 (560), *Jones* v. *Green*.

[4] Testator bequeathing his movable and immovable property to his wife — Testator who had a mortgage decree taking mortgage bond from debtor in satisfaction of decree — *Held* that the mortgage bond having been executed during the lifetime of the testator satisfied also the description of property left by him namely movable and immovable property and therefore no question of ademption under S. 152 arose. (Vol 28) 1941 Pat 18 (19) (DB).

[5] Debenture bonds given under will upon certain trusts—Testator converting them into Debenture stocks of the same company subsequently — *Held* that the bequest was adeemed as the stock was substantially a different thing from what was bequeathed and did not answer the description in the will. (1880) 14 Ch D 856 (858), *Luard* v. *Lane*.

Section 153—Note 1

[1] It is a general rule of English law that demonstative legacies will not fail, although the particular fund out of which they are directed to be paid be called in or be not in existence at the time of the testator's death; but will then be payable out of the general assets. The rule is the same if the particular fund though in existence cannot by reason of some provision of law of which the testator was apparently in ignorance be charged with the payment of the legacy in question. ('09) 1909 Pun L R 16 at p. 81 : 1908 Pun Re No. 109.

Section 154 — Note 1

[1] *J*, who had an estate in Jamaica and certain consols and Bank stock in England, by his will directed the sale of the estate and if the proceeds were insuffi-

Ademption *pro tanto* by testator's receipt of part of entire thing specifically bequeathed.

155. The receipt by the testator of a part of an entire thing specifically bequeathed shall operate as an ademption of the legacy to the extent of the sum so received.

Illustration.

A bequeaths to B "the debt due to me by *C*." The debt amounts to 10,000 rupees. *C* pays to *A* 5,000 rupees the one-half of the debt. The legacy is revoked by ademption, so far as regards the 5,000 rupees received by *A*.

[1865 — S. 142.]

Ademption *pro tanto* by testator's receipt of portion of entire fund of which portion has been specifically bequeathed.

156. If a portion of an entire fund or stock is specifically bequeathed, the receipt by the testator of a portion of the fund or stock shall operate as an ademption only to the extent of the amount so received; and the residue of the fund or stock shall be applicable to the discharge of the specific legacy.

Illustration.

A bequeaths to *B* one-half of the sum of 10,000 rupees due to him from *W*. *A* in his lifetime receives 6,000 rupees, part of the 10,000 rupees. The 4,000 rupees which are due from *W* to *A* at the time of his death belong to *B* under the specific bequest.

[1865 — S. 143.]

Order of payment where portion of fund specifically bequeathed to one legatee and legacy charged on same fund to another, and, testator having received portion of that fund, remainder insufficient to pay both legacies.

157. Where a portion of a fund is specifically bequeathed to one legatee, and a legacy charged on the same fund is bequeathed to another legatee, then, if the testator receives a portion of that fund, and the remainder of the fund is insufficient to pay both the specific and the demonstrative legacy, the specific legacy shall be paid first, and the residue (if any) of the fund shall be applied so far as it will extend in payment of the demonstrative legacy, and the rest of the demonstrative legacy shall be paid out of the general assets of the testator.

Illustration.

A bequeaths to *B* 1,000 rupees, part of the debt of 2,000 rupees due to him from *W*. He also bequeaths to *C* 1,000 rupees to be paid out of the debt due to him from *W*. *A* afterwards receives [a][500] rupees, part of that debt, and dies leaving only 1,500 rupees due to him from *W*. Of these 1,500 rupees, 1,000 rupees belong to *B*, and 500 rupees are to be paid to *C*. *C* is also to receive 500 rupees out of the general assets of the testator.

[1865—S. 144.]

[a.] *Substituted*, by the Repealing and Amending Act, 1927 (10 [X] of 1927), S. 2 and Sch. I, for "5,000".

Ademption where stock, specifically bequeathed, does not exist at testator's death.

158. Where stock which has been specifically bequeathed does not exist at the testator's death, the legacy is adeemed.

Illustration.

A bequeaths to *B*—

" My capital stock of 1,000l in East India Stock :"

" My promissory notes of the [a][Central Government] for 10,000 rupees in their 4 per cent. loan".

A sells the stock and the notes. The legacies are adeemed.

[1865—S. 145.]

[a] *Substituted*, by A. O. for "Government of India."

Section 154 — Note 1 *(contd.)*

cient to pay off the expenses and legacies to sell off the consols and stock or such part of them as may be required for the purpose. He gave what may be remaining of the consols and stock after paying off the legacies and expenses to *G* and *H* equally. Subsequently he drew upon *L and Co.* to whom he had given a power of attorney before he executed the will to receive dividend and sell out his possession in consols and bank stock and authorised them to sell a portion of the bank stock and repay themselves. He died before *L & Co.* actually sold and repaid themselves. It was found that the general assets were sufficient to pay off the purposes mentioned in the will: *Held* that the case stood on a par with the case of a mortgage with the power of re-sale not exercised during the lifetime of the testator and that the specific legatee was entitled to have the debt paid out of the general assets and that there was no partial ademption of the specific legacy. (1848) 64 E R.196(197) : 2 De. G. & Sm. 436, *Harrison* v. *Asher*.

[2] *A* bequeathing policy on his own life to trustees for paying off two debts owing from him and to pay the balance to *J*, his daughter—*A* paying off one of the debts himself before he was declared a lunatic — The committee of his estate paid off the other debt from out of his general estate in the absence of any order in lunacy : *Held* that *J* was entitled to get only the balance out of the money received on the policy after deducting the amount paid by the committee even though such payment was made without the sanction of the Court. (1887) 37 Ch D 310(312), *Larking* v. *Larking*.

Section 158—Note 1

[1] Testator bequeathing ordinary stock held by him in a Water Works Company—Subsequently and before his death company acquired by Metropolitan Board which issued Metropolitan water-board stock as compensation to the testator : *Held* that latter stock did not pass under the will. (1907) 1 Ch 665 (669, 670), *Slater* v. *Slater*.

[2] *R* making specific bequest of certain stock in a Railway Company—*R* found lunatic subsequent to the creation of the will—Stock specifically bequeathed sold under an order in lunacy and proceeds invested in consols and credited to the lunatic under a separate account : *Held* that the specific legacy of stock was

Ademption *pro tanto* where stock, specifically bequeathed, exists in part only at testator's death.

159. Where stock which has been specifically bequeathed exists only in part at the testator's death, the legacy is adeemed so far as regards that part of the stock which has ceased to exist.

Illustration.

A bequeaths to *B* his 10,000 rupees in the 5½ per cent. loan of the [a][Central Government]. *A* sells one-half of his 10,000 rupees in the loan in question. One-half of the legacy is adeemed.

[1865—S. 146.]

[a] *Substituted*, by A. O. for "Government of India."

Non-ademption of specific bequest of goods described as connected with certain place, by reason of removal.

160. A specific bequest of goods under a description connecting them with a certain place is not adeemed by reason that they have been removed from such place from any temporary cause, or by fraud, or without the knowledge or sanction of the testator.

Illustrations.

(i) *A* bequeaths to *B* "all my household goods which shall be in or about my dwelling-house in Calcutta at the time of my death." The goods are removed from the house to save them from fire. *A* dies before they are brought back

(ii) *A* bequeaths to *B* "all my household goods which shall be in or about my dwelling-house in Calcutta at the time of my death." During *A's* absence upon a journey, the whole of the goods are removed from the house. *A* dies without having sanctioned their removal.

Neither of these legacies is adeemed.

[1865 — S. 147.]

When removal of thing bequeathed does not constitute ademption.

161. The removal of the thing bequeathed from the place in which it is stated in the will to be situated does not constitute an ademption, where the place is only referred to in order to complete the description of what the testator meant to bequeath.

Illustrations.

(i) *A* bequeaths to *B* "all the bills, bonds and other securities for money belonging to me now lying in my lodgings in Calcutta." At the time of his death, these effects had been removed from his lodgings in Calcutta.

(ii) *A* bequeaths to *B* all his furniture then in his house in Calcutta. The testator has a house at Calcutta and another at Chinsurah, in which he lives alternately, being possessed of one set of furniture only which he removes with himself to each house. At the time of his death the furniture is in the house at Chinsurah.

(iii) *A* bequeaths to *B* all his goods on board a certain ship then lying in the river Hughli. The goods are removed by *A's* directions to a warehouse, in which they remain at the time of *A's* death.

No one of these legacies is revoked by ademption.

[1865 — S. 148.]

When thing bequeathed is a valuable to be received by testator from third person; and testator himself, or his representative, receives it.

162. Where the thing bequeathed is not the right to receive something of value from a third person, but the money or other commodity which may be received from the third person by the testator himself or by his representatives, the receipt of such sum of money or other commodity by the testator shall not constitute an ademption; but if he mixes it up with the general mass of his property, the legacy is adeemed.

Illustration.

A bequeaths to *B* whatever sum may be received from his claim on *C*. *A* receives the whole of his claim on *C*, and sets it apart from the general mass of his property. The legacy is not adeemed.

[1865 — S. 149.]

Change by operation of law of subject of specific bequest between date of will and testator's death.

163. Where a thing specifically bequeathed undergoes a change between the date of the will and the testator's death, and the change takes place by operation of law, or in the course of execution of the provisions of any legal instrument under which the thing bequeathed was held, the legacy is not adeemed by reason of such change.

Section 158 — Note 1 *(contd.)*

adeemed by the sale and that the consols fell into the residue. (1882) 22 Ch D 622 (628), *Freer* v. *Freer*.

Section 160—Note 1

[1] The principle in S. 160 does not apply when a contrary intention appears in the document. (Vol 7) 1920 Cal 192 (194) (DB).

Section 161—Note 1

[1] The removal of goods out of a ship when the bequest was of "goods in that ship", it being a description so precarious, does not infer an intention to revoke the bequest. If the goods were removed to preserve them, in consideration of several contingencies and accidents this would not defeat the legacy. (1749) 27 E R 1026 (1028), *Chapman* v. *Hart*.

[2] *E* of S before he went overseas devised all his goods and furniture to his wife that were at his house in R at the time of his death — His steward prevailed upon the landlord to accept a surrender of the lease of the house at R and removed the goods to another house of *E*. *E* approved of the act of the steward when informed of it by the latter : *Held* that the wife was not entitled to the goods as there was no fraud or wrongful removal but that the steward acted under a general authority to do as he thought fit and that *E* had consented to what he did. (1866) 23 E R 1089 (1089) : 2 Vern 748 *Shaftsbury* v. *Shaftsbury*.

Section 163—Note 1

[1] Where a change has occurred in the nature of the property even though effected by an Act of Parlia-

Illustrations.

(i) *A* bequeaths to *B* "all the money which I have in the 5½ per cent. loan of the [a][Central Government]." The securities for the 5½ per cent. loan are converted during *A's* lifetime into 5 per cent. stock.

(ii) *A* bequeaths to *B* the sum of 2000*l* invested in Consols in the names of trustees for *A*. The sum of 2000*l* is transferred by the trustees into *A's* own name

(iii) *A* bequeaths to *B* the sum of 10,000 rupees in promissory notes of the [a][Central Government] which he has power under his marriage settlement to dispose of by will. Afterwards, in *A's* lifetime, the fund is converted into Consols by virtue of an authority contained in the settlement.

No one of these legacies has been adeemed.

[1865 — S. 150.]

[a] *Substituted* by A. O. for "Government of India".

Change of subject without testator's knowledge.

164. Where a thing specifically bequeathed undergoes a change between the date of the will and the testator's death, and the change takes place without the knowledge or sanction of the testator, the legacy is not adeemed.

Illustration.

A bequeaths to *B* "all my 3 per cent. Consols." The Consols are, without *A's* knowledge, sold by his agent, and the proceeds converted into East India Stock. This legacy is not adeemed.

[1865 — S. 151.]

Stock specifically bequeathed lent to third party on condition that it be replaced.

165. Where stock which has been specifically bequeathed is lent to a third party on condition that it shall be replaced and it is replaced accordingly, the legacy is not adeemed.

[1865 — S. 152.]

Stock specifically bequeathed sold but replaced, and belonging to testator at his death.

166. Where stock specifically bequeathed is sold, and an equal quantity of the same stock is afterwards purchased and belongs to the testator at his death, the legacy is not adeemed.

[1865 — S. 153.]

CHAPTER XVII.

OF THE PAYMENT OF LIABILITIES IN RESPECT OF THE SUBJECT OF A BEQUEST.

Non-liability of executor to exonerate specific legatees.

167. *(1)* Where property specifically bequeathed is subject at the death of the testator to any pledge, lien or incumbrance created by the testator himself or by any person under whom he claims, then, unless a contrary intention appears by the will, the legatee, if he accepts the bequest, shall accept it subject to such pledge or incumbrance, and shall (as between himself and the testator's estate) be liable to make good the amount of such pledge or incumbrance.

Section 163 — Note 1 *(contd.)*

ment ademption will follow unless there has been a change in name or form only while the matter remains substantially the same thing. (1907) 1 Ch 665 (671, 672), *Stater* v. *Stater*.

[2] Certain shares in a company were specifically bequeathed to 'A.' The company was dissolved and the new company which took its place issued shares in lieu of those bequeathed, and share certificates were issued in the name of the testator after in ignorance of his death. *Held* that the bequest was not adeemed as the amount of the testator's interest in the old company remained and was represented by shares in the new company and was practically the same, and was changed in form and name only. (1912) 1 Ch 828 (830), *Turner* v. *Leeming*.

Section 164—Note 1

[1] Testator having given specific thing becoming insane and remaining so till his death—Specific legatee who was an executor in concurrence with the widow an executrix of the will selling the property and depositing proceeds: *Held* that as the act of another without the knowledge and against the will of the testator resulting in a conversion of the specific thing cannot amount to an ademption of the specific bequest the specific legatee's claim to the proceeds cannot be rejected. (1866) 2 Eq 323 (328), *Jenkins* v. *Jones*.

Section 166—Note 1

[1] One S. I. had £ 400 of S. S. Annuities and £ 400 of E. I. stock. She by her will gave to her servant £ 10 per annum for life to be paid out of dividends on the S. S. annuities. The E. I. stock and S. S. Annuities were bequeathed to *B* subject to the payment of the annuity to servant. Subsequently she bought S. S. annuities for £ 100. She also sold the E. I. stock and by adding to the produce thereof bought S. S. annuities for £ 800. On her refusing to accept reduced interest she was paid off by bank draft £ 400 on S. S. annuities she originally held and the £ 100 she bought subsequently. She delivered the draft to one *F* to invest it in 3 per cent. annuities if he thought fit. *F* invested the amount in the very S. S. annuities sold by her without informing her of it — She before death made a codicil by which she gave her cousin *T. B.* the note for £ 500 which *F* had for her: *Held* that there was ademption and *T. B.* was entitled to £ 500 or what came in lieu of it namely the S. S. annuities bought by *F* and the specific legatee was not entitled to it. (1755) 28 E R 397 (398): 2 Ves Sen 623, *Drinkwater* v. *Falconer*.

Section 167 — Note 1.

[1] A universal legatee is liable to the extent of the property of the testator in his hands for the debts and liabilities of the testator. (Vol 23) 1936 Oudh 7 (9): 12 Luck 1 (DB).

[2] A testator made a gift of certain decrees to '*B*' on the condition that he paid *C* Rs. 15,000 with interest the amount being a debt due from the testator to *C* — *Held*, that a charge was created by will on the property and the legatee was bound to discharge the debt. (1888) 15 Cal 66 (70): 14 Ind App 137 (PC).

[3] *T. H.* devised his copyhold land to his wife for life and then to his son *S* till his grandson *T*

(2) A contrary intention shall not be inferred from any direction which the will may contain for the payment of the testator's debts generally.

Explanation.—A periodical payment in the nature of land-revenue or in the nature of rent is not such an incumbrance as is contemplated by this section.

Illustrations.

(i) *A* bequeaths to *B* the diamond ring given him by *C*. At *A's* death the ring is held in pawn by *D*, to whom it has been pledged by *A*. It is the duty of *A's* executors, if the state of the testator's assets will allow them, to allow *B* to redeem the ring.

(ii) *A* bequeaths to *B* a zamindari which at *A's* death is subject to a mortgage for 10,000 rupees; and the whole of the principal sum, together with interest to the amount of 1,000 rupees, is due at *A's* death. *B*, if he accepts the bequest, accepts it subject to this charge, and is liable, as between himself and *A's* estate, to pay the sum of 11,000 rupees thus due.

[1865 — S. 154]

Completion of testator's title to things bequeathed to be at cost of his estate.

168. Where anything is to be done to complete the testator's title to the thing bequeathed, it is to be done at the cost of the testator's estate.

Illustrations.

(i) *A*, having contracted in general terms for the purchase of a piece of land at a certain price, bequeaths to *B*, and dies before he has paid the purchase-money. The purchase-money must be made good out of *A's* assets.

(ii) *A*, having contracted for the purchase of a piece of land for a certain sum of money, one-half of which is to be paid down and the other half secured by mortgage of the land, bequeaths it to *B*, and dies before he has paid or secured any part of the purchase-money. One half of the purchase-money must be paid out of *A's* assets.

[1865 — S. 155.]

Exoneration of legatee's immovable property for which land-revenue or rent payable periodically.

169. Where there is a bequest of any interest in immovable property in respect of which payment in the nature of land-revenue or in the nature of rent has to be made periodically, the estate of the testator shall (as between such estate and the legatee) make good such payments or a proportion of them, as the case may be, up to the day of his death.

Illustration.

A bequeaths to *B* a house, in respect of which 365 rupees are payable annually by way of rent. *A* pays his rent at the usual time, and dies 25 days after. *A's* estate will make good 25 rupees in respect of the rent.

[1865 — S. 156.]

Exoneration of specific legatee's stock in joint stock company.

170. In the absence of any direction in the will, where there is a specific bequest of stock in a joint stock company, if any call or other payment is due from the testator at the time of his death in respect of the stock, such call or payment shall, as between the testator's estate and the legatee, be borne by the estate; but if any call or other payment becomes due in respect of such stock after the testator's death, the same shall, as between the testator's estate and the legatee, be borne by the legatee, if he accepts the bequest.

Section 167 — Note 1 *(contd.)*

attained the age of 23, and when *T* so attained that age to him and his heirs with a condition that *T* should pay within 2 years of such age the sum of £60 to *E* the grand-daughter. In default the testator empowered *E*, her executors and administrators, to enter into the premises and take the rents thereof till she got the £60. *E* became married and lived till *T* her brother attained the age of 23 but died before the expiry of two years thereafter. *E's* husband as administrator sought to recover the amount and it was held that it ought to be raised out of the copyhold land and paid to him. (1742) 26 E R 705 (706): 2 Atk 507, *Emes* v. *Hancock*.

[4] Testator devising specifically one of his two estates subject to the same mortgage— Other estate which was to pass by residuary devise was also held to be specified devise and that both estates bear the burden rateably. (1869) 7 Eq 371 (375), *Giffins* v. *Eyden*.

[5] Testator directing by will payment of his debts and funeral and testamentary expenses and giving his freehold house to his wife with all the furniture and house-hold contents therein absolutely to do with as she thinks proper. Freehold house subject to a mortgage along with the other real estate of testator: *Held*, that the freehold should bear the mortgage debt rateably and that the words to do with as she thinks proper did not show a contrary intention. (1886) 33 Ch D 195 (197), *Hannington* v. *True*.

[6] The mere expression of a direction that all the debts should be paid out of the personal estate of the testator does not amount to the expression of a contrary intention so as to enable the devisee of an estate mortgaged to take it free of the mortgage and have the mortgage amount paid out of the personal estate. (1862) 54 E R 1117 (1118): 31 Beav 207, *Rauson* v. *Harrison*.

[7] *A* after narrating his intention of entering into an arrangement by charging his real estate for the purpose of acquiring the absolute interest in reversion of certain consols devised the real estate subject to such arrangements he may enter into and the personal estate otherwise. Subsequently he got the consols transferred by mortgaging his real interest and agreeing to re-transfer them if required—The trustees who held the consols and the persons having life interest in them covenanted with testator that they will not call for retransfer except for default in payment of sum due as dividend by testator and for the necessities of the estate. Testator attached to a codicil to his will subsequently not referring to transaction : *Held*, on a claim by the devisee of the personal estate to recover the mortgage that there was clear intention to the contrary both in the will and the subsequent documents. (1893) 2 Ch 206 (215) *Campbell* v. *Campbell*.

Illustrations.

(i) *A* bequeaths to *B* his shares in a certain railway. At *A*'s death there was due from him the sum of 100 rupees in respect of each share, being the amount of a call which had been duly made, and the sum of five rupees in respect of each share, being the amount of interest which had accrued due in respect of the call. These payments must be borne by *A*'s estate.

(ii) *A* has agreed to take 50 shares in an intended joint stock company, and has contracted to pay up 100 rupees in respect of each share, which sum must be paid before his title to the shares can be completed. *A* bequeaths these shares to *B*. The estate of *A* must make good the payments which were necessary to complete *A*'s title.

(iii) *A* bequeaths to *B* his shares in a certain railway. *B* accepts the legacy. After *A*'s death, a call is made in respect of the shares. *B* must pay the call.

(iv) *A* bequeaths to *B* his shares in a joint-stock company. *B* accepts the bequest. Afterwards the affairs of the company are wound up, and each shareholder is called upon for contribution. The amount of the contribution must be borne by the legatee.

(v) *A* is the owner of ten shares in a railway company. At a meeting held durings his lifetime a call is made of fifty rupees per share, payable by three instalments. *A* bequeaths his shares to *B*, and dies between the day fixed for the payment of the first and the day fixed for the payment of the second instalment, and without having paid the first instalment. *A*'s estate must pay the first instalment, and *B*, if he accepts the legacy, must pay the remaining instalments.

[1865 — S. 157.]

CHAPTER XVIII.

OF BEQUESTS OF THINGS DESCRIBED IN GENERAL TERMS.

171. If there is a bequest of something described in general terms, the executor must purchase for the legatee what may reasonably be considered to answer the description.

Bequest of thing described in general terms.

Illustrations.

(i) *A* bequeaths to *B* a pair of carriage-horses or a diamond ring. The executor must provide the legatee with such articles if the state of the assets will allow it.

(ii) *A* bequeaths to *B* "my pair of carriage-horses." *A* had no carriage-horses at the time of his death. The legacy fails.

[1865 — S. 158.]

CHAPTER XIX.

OF BEQUESTS OF THE INTEREST OR PRODUCE OF A FUND.

172. Where the interest or produce of a fund is bequeathed to any person, and the will affords no indication of an intention that the enjoyment of the bequest should be of limited duration, the principal, as well as the interest, shall belong to the legatee.

Bequest of interest or produce of fund.

Illustrations.

(i) *A* bequeaths to *B* the interest of his 5 per cent. promissory notes of the [a][Central Government]. There is no other clause in the will affecting those securities. *B* is entitled to *A*'s 5 per cent. promissory notes of the [a][Central Government].

(ii) *A* bequeaths the interest of his $5\frac{1}{2}$ per cent. promissory notes of the [a][Central Government] to *B* for his life, and after his death to *C*. *B* is entitled to the interest of the notes during his life, and *C* is entitled to the notes upon *B*'s death.

(iii) *A* bequeaths to *B* the rents of his lands at *X*. *B* is entitled to the lands.

[1865 — S. 159.]

[a] *Substituted* by A. O. for "Government of India."

Section 172 — Note 1.

[1] Section 172, although it speaks only of the interest or produce of a fund applies equally to immovable property. (*See* illustration (c) to that section). (1913) 40 Cal 192 (214).

[2] A gift of income without more is a gift of the corpus. (1913) 40 Cal 192 (214). (That gift is to the separate use or through the medium of a trust is immaterial.)

[3] Will dedicating entire property of testator to deity and declaring that the heirs were to have no right of ownership or proprietorship to them — Further direction in the will that the moiety of the income after meeting charges for management, government revenue, expenses of worship of the deity, annual ceremonies and repair of the temple, was to be received as prasada by the heirs for rendering help in the sheba of the deity — *Held*, that the will bestowed a moiety of the profits on the heirs and therefore the heirs were entitled to a moiety of the corpus. (1911) 14 Cal L Jour 618 (620) (DB).

[4] Testatrix appointing executor and giving him power to spend the entire amount for his own benefit —Will providing that if he turned out to be of immoral character one of the properties was to be sold and a temple built out of the proceeds—*Held*, that the intention of the testatrix was to give income of the estate and therefore the estate belonged to the executor by reason of S. 172. (Vol 19) 1932 All 476 (478) (DB). (The clause prohibiting alienation was held to be void as it was inconsistent with what was sought to be given.)

[5] One *G* by his will bequeathed to certain legatees the enjoyment of the interest of a trust fund which he created in the bank *M* and prohibited the withdrawal of the fund at any time and made the enjoyment of the benefit thereof heritable to the children of the legatees from generation to generation. On a construction of the will it was held that the prohibition against the withdrawal of the fund was invalid and that the gift of the benefit, interest and profit of the fund was the gift of the corpus to the legatees and that they

CHAPTER XX.

OF BEQUESTS OF ANNUITIES.

Annuity created by will payable for life only unless contrary intention appears by will.

173. Where an annuity is created by will, the legatee is entitled to receive it for his life only, unless a contrary intention appears by the will, notwithstanding that the annuity is directed to be paid out of the property generally, or that a sum of money is bequeathed to be invested in the purchase of it.

Illustrations.

(i) *A* bequeaths to *B* 500 rupees a year. *B* is entitled during his life to receive the annual sum of 500 rupees.

(ii) *A* bequeaths to *B* the sum of 500 rupees monthly. *B* is entitled during his life to receive the sum of 500 rupees every month.

(iii) *A* bequeaths an annuity of 500 rupees to *B* for life, and on *B*'s death to *C*. *B* is entitled to an annuity of 500 rupees during his life. *C*, if he survives *B*, is entitled to an annuity of 500 rupees from *B*'s death until his own death.

[1865 — S. 160.]

Period of vesting where will directs that annuity be provided out of proceeds of property, or out of property generally, or where money bequeathed to be invested in purchase of annuity.

174. Where the will directs that an annuity shall be provided for any person out of the proceeds of property, or out of property generally, or where money is bequeathed to be invested in the purchase of any annuity for any person, on the testator's death, the legacy vests in interest in the legatee, and he is entitled at his option to have an annuity purchased for him or to receive the money appropriated for that purpose by the will.

Illustrations.

(i) *A* by his will directs that his executors shall, out of his property, purchase an annuity of 1,000 rupees for *B*. *B* is entitled at his option to have an annuity of 1,000 rupees for his life purchased for him or to receive such a sum as will be sufficient for the purchase of such an annuity.

(ii) *A* bequeaths a fund to *B* for his life, and directs that after *B*'s death, it shall be laid out in the purchase of an annuity for *C*. *B* and *C* survive the testator. *C* dies in *B*'s lifetime. On *B*'s death the fund belongs to the representative of *C*.

[1865 — S. 161.]

Section 172 — Note 1 *(contd.)*

took absolutely their respective shares. (1892) 15 Mad 448 (468).

[6] Hindu will providing that the immovable property of the testator to be retained by trustees appointed—Testator's son given the balance of profits, rents etc., after meeting expenses to be dealt with as he might think fit — Son's sons given a gift over with power to call for accounts from the son on their attaining age of 21: *Held*, that the above directions clearly indicated the intention of the testator that the son was to have only a limited estate. (1896) 20 Bom 450 (464) (DB).

[7] There is no distinction between giving the income of the land and the rents and profits of the land. Income means the rents and profits of the land and the rents and profits mean the income. There the gift of the income of the land unrestricted is simply a gift of the fee simple of the land. (1872) 14 Eq. 456 (462), *Mannox* v. *Greener* ✠ (Vol 22) 1935 Sind 235 (242). (Gift of enjoyment of income in the form of rents of certain property — No provision made for remainder and enjoyment not for limited duration—The gift can be construed as gift of the corpus and both the corpus and rents belong to the legatee,) ✠ (1882) 8 Cal 788 (801) (DB). (Testator giving each of his heirs specific share of rents and profits — *Held* that he gave each of them a share in the property corresponding with the share of profits.)

Section 173 — Note 1.

[1] The principle enunciated in S. 160 (corresponding to S. 173 of the Act of 1925) cannot apply when a contrary intention appears in the document. (Vol 7) 1920 Cal 192 (193) (DB).

[2] The simple grant to a person carries no more than a life interest in the annuity in the absence of a contrary intention. (1903) 5 Bom L R 729 (734).

[3] Section 160 (corresponding to S. 173) does not require that the contrary intention of the testator to which it refers should be indicated by express words. It is sufficient if the contrary intention appears sufficiently from the language of the will read as a whole. (1921) 62 Ind Cas 681 (683) (DB) (Cal).

[4] An annuity is perpetual only in those cases where it is a change on a specific property in which circumstances the law assumes that it is not annuity alone, but the property itself that has been bequeathed. (Vol 27) 1940 Pat 257 (259) (DB).

[5] Hindu bequeathing property to one of his sons *B* and directing an annuity to be paid to one of his daughters till her minor sons attained majority and her daughters were married — *Held* that the annuity was payable to the daughter only during her lifetime and that her minor children were not entitled to receive the allowance after her death. (Vol 31) 1944 All 120 (122) : I L R (1944) All 209.

Section 174 — Note 1.

[1] Where money is bequeathed to be invested in the purchase of an annuity for the life of the legatee and the legatee dies before it is laid out or even before the fund is available as during the life of the person after whose death the investment is to be made, yet it is a vested legacy from the death of the testator, and that the legatee for whose benefit it was intended if survives the testator may elect to take the value of it instead of the annuity. The legal representatives of the deceased legatee would be entitled to such sum as at the death of the testator would have purchased the annuity. (1906) 2 Ch 618 (651, 658), *Robbins* v. *Legg*.

[See however (1891) 1 Ch 707 (715), *Pitman* v. *Holborrow*. (Bequest of life annuities charged on land which were devised to trustees for sale — Codicil empowering trustees to purchase government annuities in

Abatement of annuity.

175. Where an annuity is bequeathed, but the assets of the testator are not sufficient to pay all the legacies given by the will, the annuity shall abate in the same proportion as the other pecuniary legacies given by the will.

[1865 — S. 162.]

Where gift of annuity and residuary gift, whole annuity to be first satisfied.

176. Where there is a gift of an annuity and a residuary gift, the whole of the annuity is to be satisfied before any part of the residue is paid to the residuary legatee, and, if necessary, the capital of the testator's estate shall be applied for that purpose.

[1865 — S. 163.]

CHAPTER XXI.

OF LEGACIES TO CREDITORS AND PORTIONERS.

Creditor *prima facie* entitled to legacy as well as debt.

177. Where a debtor bequeaths a legacy to his creditor, and it does not appear from the will that the legacy is meant as a satisfaction of the debt, the creditor shall be entitled to the legacy, as well as to the amount of the debt.

[1865 — S. 164.]

Child *prima facie* entitled to legaac as well as portion.

178. Where a parent, who is under obligation by contract to provide a portion for a child, fails to do so, and afterwards bequeaths a legacy to the child, and does not intimate by his will that the legacy is meant as a satisfaction of the portion, the child shall be entitled to receive the legacy, as well as the portion.

Illustration.

A, by articles entered into in contemplation of his marriage with *B*, covenanted that he would pay to each of the daughters of the intended marriage a portion of 20,000 rupees on her marriage. This covenant having been broken, *A* bequeaths 20,000 rupees to each of the married daughters of himself and *B*. The legatees are entitled to the benefit of this bequest in addition to their portions.

[1865 — S. 165.]

No ademption by subsequent provision for legatee.

179. No bequest shall be wholly or partially adeemed by a subsequent provision made by settlement or otherwise for the legatee.

Illustrations.

(i) *A* bequeaths 20,000 rupees to his son *B*. He afterwards gives to *B* the sum of 20,000 rupees. The legacy is not thereby adeemed.

(ii) *A* bequeaths 40,000 rupees to *B*, his orphan niece whom he had brought up from her infancy. Afterwards, on the occasion of *B*'s marriage, *A* settles upon her the sum of 30,000 rupees. The legacy is not thereby diminished.

[1865—S. 166.]

Section 174 — Note 1 *(contd.)*

the place of annuities given under the will — One of the annuitants dying subsequent to the contract for sale of properties but before completion thereof and payment of purchase money. The annuitant dying after completion and deposit of money — *Held* that the legal personal representative of the former annuitant was not entitled to the value of the annuity while the representative of the latter was held to be so entitled.)]

Section 175 — Note 1.

[1] Provision in will for allowance to be paid out of profits—Allowance, liable to reduction on reduction of profits. (Vol 28) 1941 Oudh 203 (205).

[2] A will contained a general gift of annuity, general gifts of legacies and a gift of the residue and the entire estate was insufficient to pay the annuity: *Held* that the annuity was to be valued in consequence of deficiency of assets and a proportional abatement having been made, the reduced fund was to be set apart. (1847) 63 E R 1103 (1104): 1 De G & Sm 357, *Wroughton* v. *Colquhoun*.

Section 177—Note 1

[1] The principle of S. 177 embodying the general equitable principle can be applied even to wills where the section itself is not applicable. (Vol 17) 1930 Mad 956 (960) (DB).

[2] Section 164 (S. 177 of the Act of 1925) expressly abolishes doctrine of satisfaction in India and although the Act itself is not applicable to Hindus, Mahomedans or Buddhists, yet it announces a correct principle of interpretation universally applicable unless overridden by some special provision of local law or usage. (1913) 37 Bom 211 (214).

[3] Section 164 (S. 177 of the Act of 1925) is advisedly worded so as to narrow the field of enquiry to which large extension had been given in England. Therefore where there is no ambiguity in a clause S. 62 (S. 75 of the Act of 1925), which enacts the general principles upon which English Courts have acted, cannot be invoked to construe a clause in the will by letting in extrinsic evidence. (1910) 12 Bom L R 863 (865, 869).

[4] One *C* by his will said "My elder brother, *V*'s self-acquisition to the extent of about Rs. 10,000 is kept with me. So that money should be given to him"— *Held*, that the bequest of Rs. 10,000 was a legacy meant as satisfaction of the indebtedness of the testator to *V* for money kept with him by *V*. (1902) 25 Mad 361 (363) (DB).

Section 178—Note 1

[1] The grandfather is not in loco parentis to his grandchild for the purpose of raising the doctrine against double portions and a gift by a grandfather to the grandchild is not a portion. (1919) 1 Ch 102 (108), *Swanson* v. *Dawson*.

Section 179 — Note 1

[1] Where S. 179 is found to be inapplicable to a will the principles of the section as embodying the

CHAPTER XXII.

OF ELECTION.

180. Where a person, by his will, professes to dispose of something which he has no right to dispose of, the person to whom the thing belongs shall elect either to confirm such disposition or to dissent from it, and, in the latter case, he shall give up any benefits which may have been provided for him by the will.

Circumstances in which election takes place.

[1865—S. 167.]

Section 179—Note 1 *(contd.)*

general equitable principles can be applied. (Vol 17) 1930 Mad 956 (960) (DB).

[2] The rule of English law as applied to what are called 'double portions' that where the two provisions are of the same nature or there are but slight differences the two instruments afford intrinsic evidence against a double provision and that where the provisions are of a different nature they afford intrinsic evidence in favour of a double provision, is one which is based upon principles of equity, justice and good conscience and is one to be remembered in considering the intentions of the testator even though the will is governed by Hindu law. (1905) 7 Bom L R 299 (304, 305).

[3] The distinction between ademption and satisfaction is that in ademption the former benefit is given by a will which is a revocable instrument alterable at the pleasure of the testator and consequently when he gives benefit by a deed subsequently to the will he may either by express words or by implication of law substitute a second gift for the former. But where a person covenants to settle land or money on the marriage of a child which covenant he can neither adeem or alter, and if he by will gives some benefit to the same objects and states that that is to be in satisfaction of the covenants, the objects of covenant necessarily get the right either to take under the covenant or under the will. In cases of satisfaction, the person intended to be benefited by the covenant and the persons intended to be benefited by the bequest are the same; in cases of ademption they may be different. (1867) 2 H L 71 (90, 91), *Chichester* v. *Coventry*.

Section 180—Note 1

[1] Principle of election applies to all wills whether part 6 of Succession Act is applicable to them or not. (Vol 23) 1936 Mad 497 (498).

[2] The doctrine of election involves compensation and not forfeiture. Therefore where the property which should be sequestered for the purpose of making compensation to the persons who have been disappointed by the failure of the appointment in their favour is given in such a manner that the testatrix herself must be deemed to intend that the persons to whom she gives it shall not deal with it and that it shall not be dealt with adversely to them, to imply a condition of election would be to imply a condition of election against the express language of the will. (1884) 27 Ch D 606 (612), *Smith* v. *Spence*.

[3] The doctrine of election depends on an implied condition that the devisee will comply with all the provisions of the will by renouncing the right to his own property and the doctrine is equally applicable to wills made in India. (1890) 14 Bom 438 (440) (DB).

[4] If anyone has the right by law to take a share of a testator's estate which the testator has not given but otherwise disposed of, that person takes it against the will and cannot go on to found on the will and claim its benefit. ('08) 1908 App Cas 224 (232), *Douglas-Menzies* v. *Umphelby*.

[5] The doctrine of election is utterly inapplicable to creditors and therefore where the creditors take a benefit under a will of the testator by the devise for payment of the debts generally they shall not be prevented from laying claim to the property comprised in the devise to the widow as a provision for her in another part of the will. (1806) 12 Ves 136 (154) : 33 E R 53, *Kidney* v. *Coussmaker*.

[6] A person who accepts a benefit under a will is not precluded from disputing a transaction entered into by the testator long before his death and which is also not the subject of the will. (Vol 9) 1922 Mad 357 (358) (DB).

[7] When the beneficiary does not claim any property bequeathed by the testator as his own no question of election arises. (1909) 9 Cal L Jour 19 (38) (DB).

[8] Where the gifts themselves are void no question of election can arise under the will. (1906) 2 Ch. 288 (293), *Whitworth* v. *Wright*.

[9] Where the Court has to decide whether an election under Ss. 180 and 181 has in fact been made the time factor must enter into the account. A simultaneous approbation and reprobation does not amount to election either to approbate or reprobate. (Vol 26) 1939 Mad 485 (488, 489).

[10] Testator entitled to a provident fund governed by the Provident Funds Act and deposits in two other Funds, bequeathing all to his wife and daughters in definite shares — Nomination in respect of provident fund existing, the fund not disposable by will — *Held*, that the widow or persons representing her interest should elect either to take the Provident Fund alone or to stand by the will. (Vol 26) 1939 Mad 485 (488).

[11] Bequest of properties standing in the name of his wife by the husband—Wife producing will for registration and adopting under power given in will — Wife getting life estate in certain other properties by the will—*Held*, that the wife had elected to waive any right which she might have had in the properties bequeathed by the husband and her election bound her heirs also. (Vol 22) 1935 Mad 1066 (1067).

[12] Person empowered under the marriage settlement to appoint only the children of that marriage to certain hereditaments appointing a son of that marriage to these hereditaments but subject to the charge of all children including those by the second marriage — Appointment of the same son to his own property subject to a similar charge—*Held*, that children by second marriage should elect. (1882) 22 Ch D 555 (560), *White* v. *White*.

[13] *A* advancing a certain sum of money to *B* on the latter assigning to him a covenant by *C* to transfer some stock of certain value and paying interest at a certain rate—*A* by will giving *C* a certain amount of money and moneys due by *C* to her — *A* directing the retention by the executors of an amount equal to the value of the stock covenanted by *C* to transfer to *B* and to pay the surplus over the amount advanced by her to *B* and interest thereon—When *C* predeceased her she directed that the amount given to *C* should become part of her residuary estate and also that *C*'s representatives should not be asked to pay or transfer the stock covenanted for by *C* to *B* and that *B* should not be asked to repay the amount advanced to him by her : *Held*, *M* cannot enforce the covenant for transfer of stock. (1873) 15 Eq 389 (393), *Synge* v. *Synge*.

Devolution of interest relinquished by owner.

181. An interest relinquished in the circumstances stated in section 180 shall devolve as if it had not been disposed of by the will in favour of the legatee, subject, nevertheless, to charge of making good to the disappointed legatee the amount or value of the gift attempted to be given to him by the will.

[1865—S. 168.]

Testator's belief as to his ownership immaterial.

182. The provisions of sections 180 and 181 apply whether the testator does or does not believe that which he professes to dispose of by his will to be his own.

Illustrations.

(i) The farm of Sultanpur was the property of *C*. *A* bequeathed it to *B*, giving a legacy of 1,000 rupees to *C*. *C* has elected to retain his farm of Sultanpur, which is worth 800 rupees. *C* forfeits his legacy of 1,000 rupees, of which 800 rupees goes to *B*, and the remaining 200 rupees falls into the residuary bequest, or devolves according to the rules of intestate succession, as the case may be.

(ii) *A* bequeaths an estate to *B* in case *B*'s elder brother (who is married and has children) shall leave no issue living at his death. *A* also bequeaths to *C* a jewel, which belongs to *B*. *B* must elect to give up the jewel or to lose the estate.

(iii) *A* bequeaths to *B* 1,000 rupees, and to *C* an estate which will, under a settlement, belong to *B* if his elder brother (who is married and has children) shall leave no issue living at his death. *B* must elect to give up the estate or to lose the legacy.

(iv) *A*, a person of the age of 18, domiciled in British India but owning real property in England to which *C* is heir at law, bequeaths a legacy to *C* and, subject thereto, devises and bequeaths to *B* "all my property whatsoever and wheresoever", and dies under 21. The real property in England does not pass by the will. *C* may claim his legacy without giving up the real property in England.

[1865—S. 169.]

Bequest for man's benefit how regarded for purpose of election.

183. A bequest for a person's benefit is, for the purpose of election, the same thing as a bequest made to himself.

Illustration.

The farm of Sultanpur Khurd being the property of *B*, *A* bequeathed it to *C* : and bequeathed another farm called Sultanpur Buzurg to his own executors with a direction that it should be sold and the proceeds applied in payment of *B*'s debts. *B* must elect whether he will abide by the will, or keep his farm of Sultanpur Khurd in opposition to it.

[1865—S. 170.]

Person deriving benefit indirectly not put to election.

184. A person taking no benefit directly under a will, but deriving a benefit under it indirectly, is not put to his election.

Illustration.

The lands of Sultanpur are settled upon *C* for life, and after his death upon *D*, his only child. *A* bequeaths the lands of Sultanpur to *B*, and 1000 rupees to *C*. *C* dies intestate shortly after the testator, and without having made any election. *D* takes out administration to *C*, and as administrator elects on behalf of *C*'s estate to take under the will. In that capacity he receives the legacy of 1000 rupees and accounts to *B* for the rents of the

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Section 180 — Note 1 *(contd.)*

[14] *A* bequeathed his own and *C*'s property and made provision larger than what *C*'s wife would have had from *C*'s ancestral property. *C*'s wife sued for the provision made for her in *A*'s will and got a decree for maintenance. Later she filed a suit for *C*'s ancestral property— *Held*, that she was not entitled to make the claim having elected the provision for maintenance. (1886) 12 Cal 60 (63) (DB).

Section 181 — Note 1

[1] In any case in which the Court has to decide whether an election under Ss. 180 and 181 has in fact been made the time factor must enter into the decision. (Vol 26) 1939 Mad 485 (488). (A simultaneous approbation and reprobation does not amount to an election either to approbate or reprobate.)

[2] Will by husband giving to his wife all his personal and real property charged with an annuity in favour of her in lieu of her dower and free bench—Wife surviving her husband but dying having four persons who were next of kins before making an election—Three of them elected to take under the will, the fourth electing against it—*Held*, each of them had a distinct right to elect and that the person who elected against the will should be credited with an amount equal to his share of the dower annuity. (1868) 7 Eq 494 (497), *Fytche* v. *Fytche*.

Section 182 — Note 1

[1] Where a person has a benefit already vested in him and a benefit which is inconsistent with that is given to him, he must elect between the two. (1870) 9 Eq 519 (523), *Coutts* v. *Acworth*. (*A* settling life interest in a certain sum of money upon her husband and giving the money itself to other persons after his life—Power of revocation reserved under the settlement deed —*A* revoking the deed after marriage by will and giving part of the amount absolutely to the husband and the balance to a different person — *Held*, that the life interest was already vested in the husband which *A* had no power to revoke and therefore the husband must elect to take either under the will or under the settlement.)

[2] *D*, a widow, inheriting movable and immovable property from her husband who died childless leaving by will Rs. 2000 to *R* and the rest of the properties to *M* who were the sons of the sisters of *D*'s husband—*R* claimed as heir to a half share of the properties devised to *M* and also the legacy of Rs. 2000 under the will— *Held*, that the incapacity of *D* to devise the immovable property arose on the ground that a person cannot dispose of by will what does not belong to him and that *R* should be put to election as between accepting legacy under the will or claiming half share as heir. (1890) 14 Bom 438 (441) (DB).

lands of Sultanpur which accrued after the death of the testator and before the death of *C*. In his individual character he retains the lands of Sultanpur in opposition to the will.

[1865—S. 171.]

Person taking in individual capacity under will may in other character elect to take in opposition.

185. A person who in his individual capacity takes a benefit under a will may, in another character, elect to take in opposition to the will.

Illustration.

The estate of Sultanpur is settled upon *A* for life, and after his death, upon *B*. *A* leaves the estate of Sultanpur to *D*, and 2,000 rupees to *B*, and 1,000 rupees to *C*, who is *B's* only child. *B* dies intestate, shortly after the testator, without having made an election. *C* takes out administration to *B*, and as administrator elects to keep the estate of Sultanpur in opposition to the will, and to relinquish the legacy of 2,000 rupees. *C* may do this, and yet claim his legacy of 1,000 rupees under the will.

[1865 — S. 172.]

Exception to provisions of last six sections.

186. Notwithstanding anything contained in sections 180 to 185, where a particular gift is expressed in the will to be in lieu of something belonging to the legatee which is also in terms disposed of by the will, then, if the legatee claims that thing, he must relinquish the particular gift, but he is not bound to relinquish any other benefit given to him by the will.

Illustration.

Under *A's* marriage-settlement his wife is entitled, if she survives him, to the enjoyment of the estate of Sultanpur during her life. A by his will bequeaths to his wife an annuity of 200 rupees during her life, in lieu of her interest in the estate of Sultanpur, which estate he bequeaths to his son. He also gives his wife a legacy of 1,000 rupees. The widow elects to take what she is entitled to under the settlement. She is bound to relinquish the annuity but not the legacy of 1,000 rupees.

[1865 — S. 172.]

When acceptance of benefit given by will constitutes election to take under will.

187. Acceptance of a benefit given by a will constitutes an election by the legatee to take under the will, if he had knowledge of his right to elect and of those circumstances which would influence the judgment of a reasonable man in making an election, or if he waives inquiry into the circumstances.

Illustrations.

(i) *A* is owner of an estate called Sultanpur Khurd, and has a life interest in another estate called Sultanpur Buzurg to which upon his death his son *B* will be absolutely entitled. The will of *A* gives the estase of Sultanpur Khurd to *B*, and the estate of Sultanpur Buzurg to *C*. *B*, in ignorance of his own right to the estate of Sultanpur Buzurg, allows *C* to take possession of it, and enters into possession of the estate of Sultanpur Khurd. *B* has not confirmed the bequest of Sultanpur Buzurg to *C*.

(ii) *B*, the eldest son of *A*, is the possessor of an estate called Sultanpur. *A* bequeaths Sultanpur to *C*, and to *B* the residue of *A's* property. *B* having been informed by *A's* executors that the residue will amount to 5,000 rupees, allows *C* to take possession of Sultanpur. He afterwards discovers that the residue does not amount to more than 500 rupees. *B* has not confirmed the bequest of the estate of Sultanpur to *C*.

[1865 — S. 173.]

Section 185 — Note 1.

[1] *A* devising by will both his properties and his brother's to the nephews giving in lieu thereof suitable maintenance to brother's widow — Widow obtaining decree for maintenance on the basis of the will suing again for share of ancestral property as heir to her deceased husband—*Held*, she was not estopped by her previous election as her second claim was of a totally different character, namely as heir to her deceased husband. (1886) 12 Cal 60 (63) (DB). (But a claim to maintenance on the ancestral property would be barred.)

[2] *C* in his will stating that his brother *V's* self-acquisition to the extent of Rs 10,000 which was with him should be repaid — *V* receiving a part of it and suing for the balance—Previous suit by another brother for partition claiming property in *C's* hand to be joint family property which was dismissed—*V* supporting the claimant and also claiming a share for himself—Contention in *V's* suit that he was estopped from claiming the amount as legacy as he had impeached the will in the partition suit and as he had elected to accept the money as a debt and not as legacy—*Held*, that *V* was not estopped from claiming the legacy by the decision in the partition suit and that there was no question of his having elected to take the money as a debt as he had failed to obtain it as a debt. (1902) 25 Mad 361 (364, 365) (DB).

Section 187 — Note 1

[1] The proposition that one taking possession under a will cannot set up an adverse title is subject to the qualification that the election must be made with full knowledge of circumstances. (Vol 21) 1934 Cal. 356 (359) : 60 Cal. 1406 (DB) ✠(Vol 14) 1927 Cal. 494 (495) (D B) ✠ (Vol 12) 1925 Cal. 724 (726, 727, 729) (DB). (Unconscious acceptance by purdanashin lady of benefits under will of her husband—No knowledge of disadvantageous terms—Not bound by them.)

[2] The obligation to elect is cast upon a person by a rule of equity and not by any rule of law. Though knowledge of law can be imputed to every person knowledge of a rule of equity cannot be so imputed. Therefore where a person who is not proved to have been informed of his obligation to elect cannot be said to have elected when he acts in ignorance of it. (1865) 11 H.L C. 588 (602, 603), *William Spread* v. *William Morgan*.

[3] Two things are essential to constitute a settled and concluded election by any person who takes an interest under a will which disposes of property belonging to that person. There must be in the first place clear proof that the person put to his election was aware of the nature and extent of his rights and in the second place it must be shown that having that knowledge he

Circumstances in which knowledge or waiver is presumed or inferred.

188. *(1)* Such knowledge or waiver of inquiry shall, in the absence of evidence to the contrary, be presumed if the legatee has enjoyed for two years the benefits provided for him by the will without doing any act to express dissent.

(2) Such knowledge or waiver of inquiry may be inferred from any act of the legatee which renders it impossible to place the persons interested in the subject matter of the bequest in the same condition as if such act had not been done.

Illustration.

A bequeaths to *B* an estate to which *C* is entitled, and to *C* a coal mine. *C* takes possession of the mine and exhausts it. He has thereby confirmed the bequest of the estate to *B*.

[1865 — Ss. 174, 175.]

When testator's representatives may call upon legatee to elect.

189. If the legatee does not, within one year after the death of the testator, signify to the testator's representatives his intention to confirm or to dissent from the will, the representatives shall, upon the expiration of that period, require him to make his election ; and, if he does not comply with such requisition within a reasonable time after he has received it, he shall be deemed to have elected to confirm the will.

[1865 — S. 176.]

Postponement of election in case of disability.

190. In case of disability the election shall be postponed until the disability ceases, or until the election is made by some competent authority.

[1865 — S. 177.]

CHAPTER XXIII.

OF GIFTS IN CONTEMPLATION OF DEATH.

Property transferable by gift made in contemplation of death.

191. *(1)* A man may dispose, by gift made in contemplation of death, of any moveable property which he could dispose of by will.

(2) A gift said to be made in contemplation of death where a man, who is ill and expects to die shortly of his illness, delivers to another the possession of any moveable property to keep as a gift in case the donor shall die of that illness.

Section 187 — Note 1 *(contd.)*

intended to elect. (1855) 20 Beav. 67 (74) : 52 E R 527 *Worthington* v. *Wigynton*.

[4] Election as a question of intention implies knowledge, and there may be a series of unequivocal acts from which an intention to elect and the fact of election may be inferred. (1865) 11 H.L.C. 588 (602), *William Spread* v. *William Morgan*.

Section 188 — Note 1.

[1] Section 175 (corresponding to S. 188(2) of the Act of 1925) differs from S. 174 (S. 188 (1)) in that it only permits an inference while the latter section compels an inference. (Vol 12) 1925 Cal. 724 (726, 727, 729) (DB).

[2] The rule contained in S 188 (1) is an equitable rule which may be involved even in cases to which the Act does not apply. (Vol 23) 1936 Mad 497 (498).

[3] Where an heir has chosen deliberately to confirm a devise of lands which without his confirmation would be invalid it is not necessary for the Court to have some distinct evidence of the heir's knowledge of his rights to enable the Court to hold that those claiming under him are bound by his confirmation. (1866) 2 Eq 834 (839), *Dewal* v. *Maitland*.

Section 190 — Note 1.

[1] Court has jurisdiction to bind the equitable interests of lunatics not so found by inquisition where it appears to be for their benefit: (1883) 22 Ch D 263 (269), *Wilder* v. *Pigott*

Section 191 — Note 1.

[1] A gift under S. 191, Succession Act, relates to 'succession' within the meaning of the Succession Act. (Vol 30) 1943 All 95 (96) : I L R (1943) All 193 (D B).

[2] Donationes mortis causa fall into two classes — The first is the class of cases in which there is complete delivery or transfer such as would be sufficient in the case of an ordinary gift and as in the case of a donatio mortis causa would necessitate a retransfer to the donor should he recover; and there is also as regards some kinds of property at all events a second class of cases in which the transaction is sufficiently effectuated by an inchoate or incomplete delivery or transfer such as would not be sufficient in the case of an ordinary gift and as in the case of an intended donatio mortis causa requiring something further to be done by the legal personal representatives of the donor after his death (1915) 1 Ch 195 (202). *Union of Land and Smiths Bank Ltd.* v *Wasserberg*.

[3] Hindu Law recognises some gifts in contemplation of death. But to constitute a valid disposition by gift there must be a giving orally or in writing with the intention of passing the property in the thing given accompanied by its actual delivery and acceptance in the donor's lifetime. (1871) 6 Mad. H C R 270 (273, 274) (DB).

[4] Under the Muhammaden law a gift made during illness operates as a will and is valid as regards one-third of the property comprised therein. (1911) 33 All. 233 (234) (D B). (S. 325-A of Act XIV of 1882 is no bar to the right of making a will.)

[5] The question whether a gift is invalid under the law of marz-ul-maut is essentially a question of fact. (1908) 35 Cal 271 (274) : 35 Ind. App 67 (P C).

[6] Under Mahomedan law, the requirements which constitute a Marz-ul-maut (death-bed illness) are:

(1) Proximate danger of death so that there is a preponderance of khauf or apprehension that at the given time death must be more probable than life.

(2) There must be some degree of subjective apprehension of death in the mind of the sick person.

(3) There must be external indicia, chief among which would be the inability to attend to ordinary avocations. (1907) 31 Bom. 264 (266) (D B).

(3) Such a gift may be resumed by the giver; and shall not take effect if he recovers from the illness during which it was made; nor if he survives the person to whom it was made.

Illustrations.

(*i*) *A*, being ill, and in expectation of death, delivers to *B*, to be retained by him in case of *A's* death, —
a watch :
a bond granted by *C* to *A* :
a bank-note :
a promissory note of the [a][Central Government] endorsed in blank :
a bill of exchange endorsed in blank :
certain mortgage-deeds.
A dies of the illness during which he delivered these articles.
B is entitled to —
the watch :
the debt secured by *C's* bond :
the bank-note :
the promissory note of the [a][Central Government] :
the bill of exchange :
the money secured by the mortgage-deeds.

(*ii*) *A*, being ill, and in expectation of death, delivers to *B* the key of a trunk or the key of a warehouse in which goods of bulk belonging to *A* are deposited, with the intention of giving him the control over the contents of the trunk, or over the deposited goods, and desires him to keep them in case of *A's* death. *A* dies of the illness during which he delivered these articles, *B* is entitled to the trunk and its contents or to *A's* goods of bulk in the warehouse.

(*iii*) *A*, being ill, and in expectation of death, puts aside certain articles in separate parcels and marks upon the parcels respectively the names of *B* and *C*. The parcels are not delivered during the life of *A*. *A* dies of the illness during which he set aside the parcels. *B* and *C* are not entitled to the contents of the parcels.

[1865 — S. 178.]

[a] *Substituted* by A. O. for "Government of India".

PART VII.

PROTECTION OF PROPERTY OF DECEASED.

192. *(1)* If any person dies leaving property, moveable or immoveable, any person claiming a right by succession thereto or to any portion thereof, may make application to the District Judge of the district where any part of the property is found or situate for relief, either after actual possession has been taken by another person, or when forcible means of seizing possession are apprehended.

Person claiming right by succession to property of deceased may apply for relief against wrongful possession.

(2) Any agent, relative or near friend, or the Court of Wards in cases within their cognizance, may, in the event of any minor, or any disqualified or absent person being entitled by succession to such property as aforesaid, make the like application for relief.

[Succession (Property Protection) Act, 1841 — Ss. 1, 2.]

Section 192 — Note 1.

[1] The Succession (Property Protection) Act (corresponding to Part 7 in Act of 1925) has a larger scope than S. 145, Criminal P. C., and affords a more appropriate remedy in cases involving disputes regarding succession to larger estates accompanied by breaches of the peace. (Vol 9) 1922 Pat. 372 (376): 23 Cri. L. Jour 236.

[2] The expression 'succession' is not confined to intestate succession but also applies to testamentary succession. (Vol 13) 1926 Cal. 779 (780) : 53 Cal. 637 (DB) ✠ (Vol 21) 1934 Lah 930 (931).

[3] Section 1 of Act XIX of 1841 (S. 192 of Act of 1925) makes it manifest that an application may be made under it even when the applicant claims a right by succession to a portion only of the property left by the deceased which is sufficient to cover the case where the claim relates to an undivided share of the estate left by the deceased. (1910) 12 Cal. L. Jour 8 (10) (DB).

[4] Sections 192 to 194 will not apply to a case where joint Hindu family property passes by survivorship. (Vol 25) 1938 Lah. 753 (754) : I L R (1939) Lah. 196 ✠ (1912) 23 Mad. L. Jour 537 (538). (Property held by karnavan of tarvad.) ✠ (1907) 34 Cal. 929 (933) (DB), (Case decided under Act XIX of 1841 corresponding to Part 7 of the present Act.)

[5] Person in possession and dispossessed is also protected by S. 192. (Vol 31) 1944 Nag 132 (133) : ILR (1944) Nag. 262.

[6] Although the muth property may not vest in the Mahant as a owner it is he that has a right to its possession and hence an application under S. 192 by a person claiming a right to succeed to the muth property is maintainable. (Vol 29)1942 Pat. 251 (255, 256, 257) : 21 Pat. 197 (DB).

[7] The idols are entitled to make an application under the Act and as the idol must act through some human agency shebaits can apply on their behalf. (Vol 13) 1926 Cal. 779 (780) : 53 Cal. 637 (DB).

[8] Application for relief should be in the nature of a plaint in a summary suit. The proceedings of the Court under Act XIX of 1841 are of interlocutory nature depending upon the filing of an application for relief asking the Court to determine who has the right to possession pending the final determination of the rights of parties in a regular suit. An application for an inventory and appointment of curator is not contemplated by the Act and the Court cannot consider such an application. (Vol 11) 1924 Bom. 507 (509, 510) (DB)

[9] In order to meet the requirements of S. 192 the Court must determine whether the objector to the grant of the application has any title and whether the

193. The District Judge to whom such application is made shall, in the first place, examine the applicant on oath, and may make such further inquiry, if any, as he thinks necessary as to whether there is sufficient ground for believing that the party in possession or taking forcible means for seizing possession has no lawful title, and that the applicant, or the person on whose behalf he applies, is really entitled and is likely to be materially prejudiced if left to the ordinary remedy of a suit, and that the application is made *bona fide*.

Inquiry made by Judge.

[Succession (Property Protection) Act, 1841 — S. 3.]

Section 192 — Note 1 *(contd.)*

claimant is really entitled to any title. (Vol 20) 1933 Cal. 17 (18) (DB).

[10] Revision from decision under S. 192 is allowed. (Vol 25) 1938 Lah 753 (753) : I L R (1939) Lah 196 ✠ (Vol 14) 1927 Nag 253 (255).

[11] Only orders made without jurisdiction or with jurisdiction illegally exercised should be interfered within revision. (Vol 20) 1933 Cal 17 (18) (DB).

[12] Application under S. 192 — Preliminary point as to maintainability decided in applicant's favour— No revision filed by objector till decision on merits— High Court should not exercise discretionary power in revision in respect of preliminary point. (Vol 29) 1942 Pat 251 (254) : 21 Pat 197 (DB).

Section 193 — Note 1

[1] Under S. 3 of Act (XIX [19] of 1841) the Judge has to be satisfied that the applicant is really entitled to the property and is likely to be materially prejudiced if left to the ordinary remedy of regular suit before an order under the Act can be passed. Therefore, an application for interlocutory orders ought not to be entertained under this Act as such orders could be passed in a regular suit by virtue of the wide powers possessed by Courts and as no person could be said to be materially prejudiced if he is referred to a regular suit wherein he could with ordinary diligence ask for such relief. (Vol 11) 1924 Bom 507 (510) (DB).

[2] Section 3 of Act XIX [19] of 1841 (S. 193 of the Act of 1925) merely implies that an application ought not to be granted as a matter of course, but that the Court should proceed with caution and satisfy itself that there are sufficient grounds in support of a *prima facie* case. ('10) 12 Cal L Jour 8 (13) (DB).

[3] Before action can be taken under Act XIX [19] of 1841 (Part 7 of this Act) the provisions of S 3 (S. 193) should be strictly fulfilled. They are that, (1) the opposite party has no title, (2) the person claiming is really entitled to property and (3) that the applicant is likely to be prejudiced materially, if left to the ordinary remedy of a regular suit. ('12) 15 Ind Cas 504 (505) (DB) (Cal) ✠ (Vol 10) 1923 Mad 229 (229) ✠ ('10) 11 Cal L Jour 522 (523) (DB).

[4] Under S. 3 of Act XIX [19] of 1841 as it then stood the Judge who acted on the application supported by a solemn declaration was held to have had sufficient materials to justify his order under the Act. ('10) 34 Bom 115 (120) (DB).

[5] Under S. 3 of Act XIX [19] of 1841 a solemn declaration by the agent of a Pardanashin lady was held sufficient. ('11) 1911 Pun L R No. 65, p. 289 (290).

[6] The Judge must be satisfied that there are strong reasons for believing that the party in possession has no legal title before issuing any notice. (1912) 23 Mad L Jour 537 (538).

[7] Where the party in possession was an heir, but claimed half the property in dispute against the heirs on the ground of himself having been owner of it even during the lifetime of the deceased : *Held* that the Court had jurisdiction to proceed under the Act against him. (Vol 11) 1924 Bom 507 (508, 509) (DB).

[8] Part VII reproduces Act XIX [19] of 1841 under which action could be taken only by the District Judge. Under Succession Act (XXI [21] of 1865) which the present Act replaces it was provided that the District Judge shall be the Court competent to pass orders under that Act and similar provisions are contained in this Act also Therefore so far as the Indian Succession Act alone stands the District Judge alone has jurisdiction to entertain proceedings under it. ('36) 38 Pun L R 398 (399, 400). (Senior Subordinate Judge of Delhi held had jurisdiction to entertain application under S. 192 by virtue of notification issued by the High Court of Lahore under S. 30 of Punjab Courts Act which gave power to High Court to authorise any Subordinate Judge to take cognisance of or any District Judge to transfer to any Subordinate Judge under his control proceedings under the Indian Succession Act.)

[9] Subordinate Judge has no jurisdiction to deal with application under the Act unless there was any general assignment of cases by District Judge. (Vol 5) 1918 Lah 380 (382) : 1918 Pun Re No. 72.

[10] Contravention of the provisions of S. 3 of Act XIX [19] of 1841, (S. 193 of this Act), is a material irregularity and would be interfered with in revision in the absence of any other remedy to the aggrieved party. (Vol 5) 1918 Lah 380 (382) : 1918 Pun Re No. 7 ✠ (Vol 10) 1923 Mad 229 (229). (Order without any finding on the points required by S. 3 of Act of 1841 (S. 193) can be set aside in revision.) ✠ ('15) 15 Ind Cas 504 (505) (Cal) (DB). (Where action has been taken under Act XIX [19] of 1841 (Part 7 of this Act) without considering the requisites contained in S. 3 of Act of 1841 (S. 193) the High Court will set aside the order.)

[11] Although the omission to observe strictly all the requirements of S. 193 of Succession Act may constitute a material irregularity in the exercise of jurisdiction, the High Court will not interfere in revision if the petitioner has availed himself of another remedy open to him by instituting a regular suit. (Vol 29) 1942 Lah 151 (151, 152).

[12] Court refusing to admit indirect evidence on ground that enquiry would be unreasonably prolonged cannot be said to have acted with material irregularity in exercise of its jurisdiction. (Vol 29) 1942 Pat 251 (257) : 21 Pat 197 (DB).

[13] District Judge not actually finding in words that there could be material prejudice—Facts found by him showing that this question was present in his mind— Reference made to S. 3 (S. 193 of Act of 1925) by the Judge : *Held* that the finding was sufficient to maintain the application. (Vol 13) 1926 Cal 779 (781) : 53 Cal 637 (DB).

[14] District Judge holding complete enquiry but committing the technical irregularity of not recording before issuing notice to the opposite party the finding that he has satisfied that the applicant had a *prima facie* title to the property and that he would suffer material prejudice if left to the ordinary remedy of suit—Applicant also taking remedy by way of suit : *Held* that there would be no interference in revision. (Vol 29) 1942 Lah 151 (151, 152).

194. If the District Judge is satisfied that there is sufficient ground for believing as aforesaid but not otherwise, he shall summon the party complained of, and give notice of vacant or disturbed possession by publication, and, after the expiration of a reasonable time, shall determine summarily the right to possession (subject to a suit as hereinafter provided) and shall deliver possession accordingly :

Procedure.

Provided that the Judge shall have the power to appoint an officer who shall take an inventory of effects, and seal or otherwise secure the same, upon being applied to for the purpose, without delay, whether he shall have concluded the inquiry necessary for summoning the party complained of or not.

[Succession (Property Protection) Act, 1841 — S. 4.]

195. If it further appears upon such inquiry as aforesaid that danger is to be apprehended of the misappropriation or waste of the property before the summary proceeding can be determined, and that the delay in obtaining security from the party in possession or the insufficiency thereof is likely to expose the party out of possession to considerable risk, provided he is the lawful owner, the District Judge may appoint one or more curators whose authority shall continue according to the terms of his or their respective appointments, and in no case beyond the determination of the summary proceeding and the confirmation or delivery of possession in consequence thereof :

Appointment of curator pending determination of proceeding.

Provided that, in the case of land, the Judge may delegate to the Collector, or to any officer subordinate to the Collector, the powers of a curator :

Provided, further, that every appointment of a curator in respect of any property shall be duly published.

[Succession (Property Protection) Act, 1841—S. 5.]

Section 194 — Note 1

[1] Section 194 will not apply to a case where joint Hindu family property passed by survivorship. (Vol 25) 1938 Lah 753 (754) : ILR (1939) Lah 196.

[2] Order under S. 194 can be passed only after conditions embodied in S 193 have been fulfilled. (Vol 21) 1934 Lah 930 (931).

[3] In the preliminary stage contemplated by S. 3 of Act XIX [19] of 1841 (now S. 193) the Judge has merely to satisfy himself upon the declaration of the complainant and also upon the examination of witnesses and documents if he deems necessary, whether there are strong reasons to believe that the application is *bona fide* and that judicial action ought to be taken. This merely means that an application ought not to be granted as a matter of course. Where the Judge is satisfied that there are *prima facie* grounds on the affidavit filed by the petitioner and acts under this section there is nothing irregular in the procedure he adopts. ('10) 12 Cal L Jour 8 (10).

[4] Summary rejection of application under S. 4 of Act XIX [19] of 1841 for the protection of property : *Held* that the procedure followed was wrong and that the applicant's deposition should have been taken. ('83) 1883 All W N 184 (184) (DB).

[5] Property ordered to be delivered to a person under S. 194 — No order demanding security from him could be passed under this Act. (O. 32, R. 6 does not apply to such cases). (Vol 20) 1933 Cal 17 (19) (DB).

[6] Court ordering *nazir* to take possession of property of deceased — *Supratdar* failing to deliver possession when required to do so—Court has jurisdiction to enforce liability of *supratdar* in same proceedings. ('42) 1942 Nag L Jour 325 (327).

[7] Failure to comply with provision of S. 21 of Act [19] XIX of 1841 (S. 194 of this Act) is a material irregularity. Revision in such cases is allowed if there is no other remedy open to the aggrieved party. (Vol 5) 1918 Lah 380 (382) : 1918 Pun Re No. 72.

[8] There is no bar as such to the revision being entertained against an order under S. 194. The limits and the grounds of interference have, however, to be sought in S. 115, Civil P. C. (Vol 31) 1944 Nag 132 (132) : ILR (1944) Nag 262.

Section 195 — Note 1

[1] Application for the appointment of curator—Disposal should not be postponed. (Vol 14) 1927 Nag 253 (254).

[2] Conditions necessary for the appointment of a curator are : (1) Presentation of an application and an examination as directed by S. 3 (now S. 193); (2) existence of apprehension of mis-appropriation or waste before summary suit could be determined; and (3) the delay in obtaining security or its insufficiency should be likely to cause considerable risk to the person who is out of possession. (Vol 1) 1914 Lah 523 (524) : 1915 Pun Re No. 11 (DB).

[3] Court has no jurisdiction to act and appoint a curator unless it is satisfied that otherwise the applicant would be materially prejudiced and that the application is *bona fide* and in the absence of any such finding the order can be set aside in revision. (Vol 10) 1923 Mad 229 (229)=(Vol 1)-1914 Lah 523 (524) : 1915 Pun Re No. 11 (DB). (No clear finding that danger of misappropriation was really to be apprehended—Petitioner not asked to give security — Order for appointment of curator was held one passed with material irregularity.)

[4] Court finding that none of the conditions of S. 5 (S. 195 of this Act) was present — Judge passing the order for appointment having no evidence before him : *Held* that he acted with material irregularity and that the order was one without jurisdiction. ('01) 24 Mad 364 (369) (SB).

[5] Before appointing a curator there should ordinarily be a clear statement by the Judge that he is satisfied as regards the requisites. (Vol 18) 1931 All 632 (634, 635) : 54 All 183 (FB). (Omission to do so could not make the appointment illegal.)

[6] The Judge is entitled to take into consideration the long delay which had occurred in applying while deciding the suitability and advisability of appointing a curator. (Vol 14) 1927 Nag 253 (255).

[7] Although proceedings contemplated by S. 195 terminate, appointment of the curator does not neces-

Powers conferable on curator.

196. The District Judge may authorise the curator to take possession of the property either generally, or until security is given by the party in possession, or until inventories of the property have been made, or for any other purpose necessary for securing the property from misappropriation or waste by the party in possession :

Provided that it shall be in the discretion of the Judge to allow the party in possession to continue in such possession on giving security or not, and any continuance in possession shall be subject to such orders as the Judge may issue touching inventories, or the securing of deeds or other effects.

[Succession (Property Protection) Act, 1841—S. 6.]

Prohibition of exercise of certain powers by curators.

197. *(1)* Where a certificate has been granted under Part X or under the Succession Certificate Act, 1889, or a grant of probate or letters of administration has been made, a curator appointed under this part shall not exercise any authority lawfully belonging to the holder of the certificate or to the executor or administrator.

Payment of debts, etc., to curator.

(2) All persons who have paid debts or rents to a curator authorised by a Court to receive them shall be indemnified, and the curator shall be responsible for the payment thereof to the person who has obtained the certificate, probate or letters of administration, as the case may be.

[Succession Certificate Act, 1889—S. 23.]

Curator to give security and may receive remuneration.

198. *(1)* The District Judge shall take from the curator security for the faithful discharge of his trust, and for rendering satisfactory accounts of the same as hereinafter provided, and may authorise him to receive out of the property such remuneration, in no case exceeding five per centum on the moveable property and on the annual profits of the immoveable property, as the District Judge thinks reasonable.

(2) All surplus money realized by the curator shall be paid into Court and invested in public securities for the benefit of the persons entitled thereto upon adjudication of the summary proceeding.

(3) Security shall be required from the curator with all reasonable despatch, and, where it is practicable, shall be taken generally to answer all cases for which the person may be afterwards appointed curator ; but no delay in the taking of security shall prevent the Judge from immediately investing the curator with the powers of his office.

[Succession (Property Protection) Act, 1841—S. 7.]

Report from Collector where estate includes revenue-paying land.

199. *(1)* Where the estate of the deceased person consists wholly or in part of land paying revenue to Government, in all matters regarding the propriety of summoning the party in possession, of appointing a curator, or of nominating individuals to that appointment, the District Judge shall demand a report from the Collector, and the Collector shall thereupon furnish the same :

Provided that in cases of urgency the Judge may proceed, in the first instance, without such report.

(2) The Judge shall not be obliged to act in conformity with any such report, but in case of his acting otherwise than according to such report, he shall immediately forward a statement of his reasons to the High Court, and the High Court, if it is dissatisfied with such reasons, shall direct the Judge to proceed conformably to the report of the Collector.

[Succession (Property Protection) Act, 1841—S. 8]

Institution and defence of suits.

200. The curator shall be subject to all orders of the District Judge regarding the institution or the defence of suits, and all suits, may be instituted or defended in the name of the curator on behalf of the estate :

Provided that an express authority shall be requisite in the order of the curator's appointment for the collection of debts or rents; but such express authority shall enable the curator to give a full acquittance for any sums of money received by virtue thereof.

[Succession (Property Protection) Act, 1841—S. 9.]

Section 195 — Note 1 *(contd.)*

sarily come to an end till he hands over possession of property. (Vol 18) 1931 All 423 (424) (DB).

[8] Where the District Judge had held that in his discretion the case was not a suitable or advisable one for the appointment of a curator the High Court will not go into the question and determine whether or not the discretion was wisely exercised. (Vol 14) 1927 Nag 253 (255).

Section 200 — Note 1

[1] Section 200 does not require specific authorisation from the District Judge to institute or defend suits. (Vol 18) 1931 All 423 (424) (D B).

201. Pending the custody of the property by the curator, the District Judge may make such allowances to parties having a *prima facie* right thereto as upon a summary investigation of the rights and circumstances of the parties interested he considers necessary, and may, at his discretion, take security for the repayment thereof with interest, in the event of the party being found, upon the adjudication of the summary proceeding, not to be entitled thereto.

Allowances to apparent owners pending custody by curator.

[Succession (Property Protection) Act, 1841—S. 10.]

202. The curator shall file monthly accounts in abstract, and shall, on the expiry of each period of three months, if his administration lasts so long, and, upon giving up the possession of the property, file a detailed account of his administration to the satisfaction of the District Judge.

Accounts to be filed by curator.

[Succession (Property Protection) Act, 1841—S. 11.]

203. *(1)* The accounts of the curator shall be open to the inspection of all parties interested; and it shall be competent for any such interested party to appoint a separate person to keep a duplicate account of all receipts and payments by the curator.

Inspection of accounts and right of interested party to keep duplicate.

(2) If it is found that the accounts of the curator are in arrear, or that they are erroneous or incomplete, or if the curator does not produce them whenever he is ordered to do so by the District Judge, he shall be punishable with fine not exceeding one thousand rupees for every such default.

[Succession (Property Protection) Act, 1841—S. 12.]

204. If the Judge of any district has appointed a curator, in respect of the whole of the property of a deceased person, such appointment shall preclude the Judge of any other district within the same Province from appointing any other curator, but the appointment of a curator in respect of a portion of the property of the deceased shall not preclude the appointment within the same Province of another curator in respect of the residue or any portion thereof:

Bar to appointment of second curator for same property.

Provided that no Judge shall appoint a curator or entertain a summary proceeding in respect of property which is the subject of a summary proceeding previously instituted under this Part before another Judge:

Provided, further, that if two or more curators are appointed by different Judges for several parts of an estate, the High Court may make such order as it thinks fit for the appointment of one curator of the whole property.

[Succession (Property Protection) Act, 1841—S. 13.]

205. An application under this Part to the District Judge must be made within six months of the death of the proprietor whose property is claimed by right in succession.

Limitation of time for application for curator.

[Succession (Property Protection) Act, 1841—S. 14.]

206. Nothing in this Part shall be deemed to authorise the contravention of any public act of settlement or of any legal directions given by a deceased proprietor of any property for the possession of his property after his decease in the event of minority or otherwise, and, in every such case, as soon as the Judge having jurisdiction over the property of a deceased person is satisfied of the existence of such directions, he shall give effect thereto.

Bar to enforcement of Part against public settlement or legal directions by deceased.

[Succession (Property Protection) Act, 1841—S. 15.]

Section 205—Note 1

[1] Application under this section should be made within six months of the death of the last deceased holder. (Vol 13) 1926 Cal 779 (780): 53 Cal 637 (DB) ✻ ('10) 34 Bom 115 (119, 120) (DB). *K* a vatandar dying—*B* his wife registered as vatandar —*B* in enjoyment of the property till her death—Nearest heir applying within six months of *B*'s death for possession of the property. *Held B*'s application was filed within proper time. (Case decided under Act XIX of 1841 corresponding to Part 7 of the present Act).)

Section 206 — Note 1

[1] Deceased proprietor having given lawful directions for the possession of his property during the minority of his son, the judge should give effect to them and should not put the Act into force so as to contravene them. (1889) 12 Mad 341 (347) (D B).

[2] Section implies that when the person complained against offers to prove that there are directions given by the deceased the judge acting in summary proceedings should enquire into the allegation before passing any further order. ('12) 23 Mad L Jour 537 (539). (Cases decided under S. 15 Act XIX of 1841 corresponding to S. 206 Part 7 of the present Act).

Court of Wards to be made curator in case of minors having property subject to its jurisdiction.

207. Nothing in this Part shall be deemed to authorise any disturbance of the possession of a Court of Wards of any property; and in case a minor, or other disqualified person whose property is subject to the Court of Wards, is the party on whose behalf application is made under this Part, the District Judge, if he determines to summon the party in possession and to appoint a curator, shall invest the Court of Wards with the curatorship of the estate pending the proceeding without taking security as aforesaid; and if the minor or other disqualified person upon the adjudication of the summary proceeding, appears to be entitled to the property, possession shall be delivered to the Court of Wards.

[Succession (Property Protection) Act, 1841—S. 16.]

Saving of right to bring suit.

208. Nothing contained in this Part shall be any impediment to the bringing of a suit either by the party whose application may have been rejected before or after the summoning of the party in possession, or by the party who may have been evicted from the possession under this part.

[Succession (Property Protection) Act, 1841—S. 17.]

Effect of decision of summary proceeding.

209. The decision of a District Judge in a summary proceeding under this Part shall have no other effect than that of settling the actual possession; but for this purpose it shall be final, and shall not be subject to any appeal or review.

[Succession (Property Protection) Act, 1841—S. 18.]

Appointment of public curators.

210. The [a][Provincial Government] may appoint public curators for any district or number of districts; and the District Judge having jurisdiction shall nominate such public curators in all cases where the choice of curator is left discretionary with him under this part.

[Succession (Property Protection) Act, 1841—S. 19.]

[a.] *Substituted* by A. O., for "Local Government".

PART VIII.

REPRESENTATIVE TITLE TO PROPERTY OF DECEASED ON SUCCESSION.

Character and property of executor or administrator as such.

211. *(1)* The executor or administrator, as the case may be, of a deceased person is his legal representative for all purposes, and all the property of the deceased person vests in him as such.

(2) When the deceased was a Hindu, Muhammadan, Buddhist, Sikh or Jaina or an exempted person, nothing herein contained shall vest in an executor or administrator any property of the deceased person which would otherwise have passed by survivorship to some other person.

[1865—S. 179; Probate and Administration Act, 1881—S. 4.]

Section 208 — Note 1

[1] Where the remedy by way of suit is open to a person under S. 208 it is not necessary for the High Court to exercise its power of revision. (Vol 16) 1929 Nag 317 (318).

Section 209 — Note 1

[1] Two widows, co-heirs of one *A* — Application for immediate possession— Judge passing order giving each widow possession of half of the properties in the proceeding in which he had no jurisdiction to decide title but only had jurisdiction to decide question of actual possession: *Held*, the order amounted only to an arrangement for separate possession leaving the title to each share unaffected. ('67) 11 Moo Ind App 487 (515) (P C).

[2] The decision of the District Judge in a summary suit under the act is not appealable. (Vol 9) 1922 All 337 (338): 44 All 546 (D B).

SECTION 211—SYNOPSIS

1. Vesting in executors—General.
2. Hindu and Muhammdan will.

1. Vesting in executors—General.— [1] S. 179 of Act X of 1865 (S. 211 of the present Act) applies to Parsis. ('03) 27 Bom 281 (283). (*See* Parsi Act XXI of 1865, Section 8.)

[2] The position of an executor or administrator under the section is similar to that of a sebait of an idol. ('05) 29 Bom 96 (100) (D B).

[3] An executor under the law derives his title and authority from the will of his testator and not from the grant of probate; an administrator on the other hand derives his title solely under his grant. (Vol 3) 1916 P C 202 (204): 43 Ind App 113 (P C) ✠ (Vol 9) 1922 Bom 392 (395): 47 Bom 231 (D B).

[4] An administrator derives his title wholly from the Court and has none until the letters of administration are granted and the property of the deceased vests in him only from the time of the grant. (Vol 17) 1930 Mad 218 (219): 53 Mad 480 (D B).

[5] The effect of S. 211 is that the estate of the deceased testator vests in the executor by virtue of the will and from the date of the testator's death. So a person who has obtained probate of the will should be recognized as the legal representative of the testator from the date of his death. (Vol 29) 1942 Pat 120 (127) (D B) ✠ (Vol 17) 1930 Mad 218 (219): 53 Mad 480 (D B) ✠ ('03) 27 Bom 281 (283, 284). (Probate is operative only as the authenticated evidence and not at all as the evidence of the executor's title.)

[6] All the properties of the testator vests in the executor. (Vol 14) 1927 Bom 387 (392) ✠ (Vol 30) 1943 Oudh 151 (154) (D B). (Will appointing 20 executors and providing also for the management of the estate

212. *(1)* No right to any part of the property of a person who has died intestate can be established in any Court of Justice, unless letters of administration have first been granted by a Court of competent jurisdiction.

Right to intestate's property.

(2) This section shall not apply in the case of the intestacy of a Hindu, Muhammadan, Buddhist, Sikh, Jaina or Indian Christian.

[1865—Ss. 190, 331; Native Christians Act, 1901—S. 3.]

Section 211 — Note 1 *(contd.)*

by them. Widow and daughter who were given life interest in possession of substantial portion of property —Executors applying for probate in respect of other portions of the property : *Held* that by force of S. 211 all the property of testator vested in the 20 executors and that they were alone the legal representatives of the deceased testator for all purposes and that therefore no probate for a part of the property could be granted.) ✠ (Vol 20) 1933 Bom 342 (344). (Property vests in executor even before grant of probate.)

[6a] Estate remains vested in an executor until the properties are distributed. (Vol 9) 1922 Mad 306 (307) (D B) (Mortgage by minor legatee before distribution is not binding on the executor— Executor not entitled to sue for declaration that the mortgage is invalid until his possession or title is sought to be disturbed.)

[7] Title in the executor or administrator ordinarily appointed under the Succession Act would not cover the property which has passed to a third person by survivorship. (Vol 22) 1935 Bom 242 (243) : 59 Bom 544 ✠ (Vol 2) 1915 Mad 1077 (1078) : 38 Mad 369 (D B). (Survivorship has the effect of rendering a will invalid only with respect to property which the testator could not dispose of at the time of his death)

[8] Words "all the property of the deceased" must be construed as meaning actual property of deceased, whether held by him for his own benefit or for benefit of others. (Vol 13) 1926 Pat 130 (134) : 5 Pat 80 (DB).

[9] An administrator is entitled to be put in possession of the whole of the properties of the deceased and not only of the shares of those at whose instance letters of administration are obtained. (Vol 16) 1929 Lah 753 (756) : 11 Lah 325 (D B).

[10] An executor or administrator takes by virtue of his office an estate in the property of the deceased and a legal character is vested in him. The estate vests in the legatee for enjoyment but it vests in the executor for administration and enjoyment is postponed to administration. (Vol 8) 1921 Pat 313 (314) (D B).

[11] An executor as such is the owner of the properties of the testator and holds these in the right of the testator and not in the right of the beneficiaries. (Vol 11) 1924 Pat 721 (729) : 3 Pat 880 (D B).

[12] The property vests in the executor for the purposes of administration (Vol 20) 1933 Oudh 555 (556) (D B). (Legatee mortgaging part of property— Administration of estate not interfered with thereby : *Held* the administrator could not challenge the mortgage and obtain a declaration that the mortgage deed did not affect the property comprised therein.

[13] The substratum of Ss. 211 and 307 is that if a stranger has paid consideration to the executor, so far as the estate is concerned it is merely one form of asset taking the place of another. (Vol 22) 1935 Bom 385 (389).

2. Hindu and Muhammadan will.— [1] The executor under a Hindu will before Act V of 1881 came into force holds property only as manager and the property does not vest in him as it does in an executor under an English will. ('98) 25 Cal 103 (105) (DB) ✠ ('88) 12 Bom 621 (623) (D B) ✠ ('78) 2 Bom 388 (406) (D B). (The rule of the common law in England that the undisposed of residue of personal estate vests in the executor's beneficiary does not apply to wills of Hindus.)

[2] Where property is made over for a specific purpose and that fails, and there is clear intention that the person to whom it is made over is not to take it for his own benefit a resulting trust for the heirs of the testator would arsise under the English law. But in a Hindu will before the Hindu Wills Act there is no room and no necessity for the doctrine of resulting trusts which arises out of the conflict between equitable and legal estates. The Hindu executor takes no estate but only a power of management and upon the special purpose failing, the property undisposed of vests at once in the heir. ('79) 4 Cal 455 (469) (D B).

[3] Probate does not confer upon the executor of a Hindu will any personal rights of property analogous to an English estate or interest. The will gives him just such powers of dealing with the property comprehended in it as its words express, and no more. Beyond the scope of the will, and so far as he is not constructively restricted by its directions, it may be that he has the powers which are implied in the bare authority of a manager during minority. ('78) 2 Bom 388 (408) (D B).

[4] Hindu testator appointing by will executors as trustees, for the whole of his property— Executors taking possession of property after testator's death — Grant of letters of administration to executors with consent of widows of testator : *Held* that presumption arose that the executors acted on title derived from will and not from the widows and that they were not express trustees for the heir of the testator except in so far as the terms of the will constituted them such trustees. ('97) 21 Bom 646 (663) (D B).

[5] Self-acquired property of a testator does not come within the exemption provided for in S. 211. (Vol 20) 1933 Lah 740 (740) (D B).

[6] Case not governed by Hindu Wills Act—Estate of deceased vest in executor on testator's death. (Vol 1) 1914 Mad 51 (54) : 37 Mad 175.

[7] In the case of Hindu wills executed in the Moffussil to which the Hindu Wills Act does not apply the estate vests in the executor, who accepts office from the date of the death of the testator. (Vol 13) 1926 Mad 434 (447) : 49 Mad 261 (F B).

[8] Under Mahomedan law, in absence of any letters of administration being granted, estate of deceased vests in heirs. But statutory vesting under Probate and Administration Act must take effect in substitution for vesting in heirs which exists between death of deceased and grant of letters. (Vol 14) 1927 Bom 16 (17) (D B).

Section 212 — Note 1

[1] Sections 212 and 304 must be read together. Section 304 must qualify S. 212. (Vol 27) 1940 Rang. 178 (179, 180) : 1940 Rang. L R 485 (DB) ✠ (Vol 14) 1927 Bom 474 (475, 476) : 51 Bom 771 (DB).

[2] Section 190 of Succession Act (now S. 212) is not applicable to Karen Christians because they are Christians of Asiatic descent. (Vol 12) 1925 Rang 233 (234) (DB).

[3] Deceased a Chinese Buddist—Heirs must obtain letters of administration. (Vol 17) 1930 Rang 218 (220) (DB).

213. *(1)* No right as executor or legatee can be established in any Court of Justice, unless a Court of competent jurisdiction in British India has granted probate of the will under which the right is claimed, or has granted letters of administration with the will or with a copy of an authenticated copy of the will annexed.

Right as executor or legatee when established.

(2) This section shall not apply in the case of wills male by Mohammadans, and shall only apply in the case of wills made by any Hindu, Buddhist, Sikh or Jaina where such wills are of the [a][classes] specified in [b][clauses (a) and (b) of section 57].

[1865—Ss. 187, 331; Hindu Wills Act, 1870—S. 2; Probate and Administration Act, 1903—S. 2 (1)]

[a] *Substituted* by the Indian Succession (Amendment) Act, 1929 (18 [XVIII] of 1929), S. 4, for "class."

[b] *Substituted, ibid.*, for the words and figures "sub-section (1) of S. 57" which had been *substituted* for "S 57" by the Indian Succession (Second Amendment) Act, 1928 (21 [XXI] of 1928), S. 2.

Section 212 —Note 1 *(contd.)*

[4] One of the several heirs of a deceased who died intestate was impleaded as a defendant to a suit as the legal representative of the deceased : *Held* that S. 190 (now S 212) applied to the case and that no right to any part of the property of the deceased could be established in any Court unless letters of administration were granted by a Court of competent jurisdiction. (Vol 5) 1918 Bom 181 (182) (DB).

[5] Co-mortgagees out of whom one dies. If he dies intestate his legal representative who is a necessary party to the suit by other mortgagees to enforce the mortgage is not competent to sue unless he had obtained letters of administration. Such a case is governed by S. 212. (Vol 18) 1931 Bom 547 (548) (DB).

[6] A trespasser cannot oust an apparent owner of property by pleading in defence that the former had not taken out letters of administration for the estate of the deceased. ('95) 19 Bom 828 (832) (DB).

[7] An application to establish the irregularity in the sale of deceased judgment-debtor's property is not one for establishing a right to property and therefore is not governed by S. 212. (Vol 19) 1932 Pat 234 (235, 236) : 11 Pat 424 (DB). (Legal representatives could continue the application without letters of administration)

[8] Insurance sum payable to executors or administrators of deceased policy-holder on particular date — Policy-holder dying intestate before such date — Heirs can claim only after they have obtained letters of administration. ('37) I L R (1937) 1 Cal 433 (436).

[9] In an undivided Hindu family, when a coparcener dies, there are no effects or property of his to which the surviving coparceners can succeed as heirs for they take the whole of the family property by survivorship. They are not bound to take letters of administration for any estate or effect of the deceased because there is no such estate which can be said to have belonged to the deceased. ('03) 27 Bom 140 (144) (DB).

[10] Suit by mortgagee to establish his right to recover his debt by sale of mortgaged property in the hands of executor *de son tort* is not barred by S. 212. (Vol 27) 1940 Rang 178 (179, 180) : 1940 Rang L R 485 (DB).

[11] Mortgage suit for sale where the mortgagor is dead before suit does not fall under S. 212. (Vol 14) 1927 Bom 474 (476) : 51 Bom 771 (DB).

[12] *K* and his three sons, *A P* and *E* owners of a family firm — *A* as manager of firm after *K*'s death borrowing on a mortgage bond in which *E* was an attesting witness—Suit on mortgage impleading *A* and *P* and also the wife and son of *E* because they had obtained letters of administration to the estates of deceased *K* and *E* — Suit dismissed on the ground that the bond given by *A* without obtaining letters of administration in respect of *K*'s property could not be given effect : *Held* in appeal that in the circumstances of the case the debt was not a debt of *K* which could give rise to any claim against *K*'s estate and that therefore S 190, Succession Act (now S. 212) did not apply to the case. ('12) 36 Bom 515 (517, 518) (DB).

[13] *G* dying intestate indebted to *S* at the time of death — *S* suing the brother and sister of *G* who had portion of *G*'s property on the ground that they were heirs of *G*—*S* obtaining decree — Certain immovable property sold in execution and Court ordering *S*'s decree to be satisfied out of the sale proceeds — *R* who applied for letters of administration and order directing payment of sale proceeds to her. Suit by *S* to have the order directing payment to set aside : *Held* that the sale proceeds which *S* sought to obtain was a part of the estate of *G* and that *R* alone was entitled to deal with them and therefore that *S* derived no title to the property by the proceedings taken by him against persons who did not represent the estate. ('82) 4 All 192 (194, 195) (DB).

SECTION 213—SYNOPSIS

1. Scope and applicability.
2. Hindu wills.
3. Right as executor or legatee to be established by probate.
4. Value of probate.
5. Unprobated wills can be used for collateral purposes.
6. Probate obtained after institution of suits.

1. Scope and applicability. — [1] No suit can be brought by an executor or administrator as such in the Court of any other country except that from which he derives his authority to act, and in a foreign country he must obtain new letters of administration and give new security according to the rules of law prescribed in that country before the suit is brought. ('94) 17 Mad 14 (16) (DB).

[2] The meaning of S. 213 is that no Court shall recognize the right of an executor unless he has obtained the probate of the will under which he claims. (Vol 29) 1942 Pat 120 (127) (DB).

[3] *K*, before he died made a will by which he gave his wives *P* and *B* power to adopt and also made provision for them and his two daughters by *B*—*P* adopted and the adopted son when he became of age refused to pay the daughters the allowance given to them in the will —The daughters brought a suit when no letters of administration had been granted — *P* obtaining letters while suit was pending which were subsequently modified by High Court —*P* dying before the District Judge could alter the letters in conformity with High Court's order and the letters therefore remaining unaltered — Adopted son objecting to daughter's suit on the ground that they had not obtained letters of administration: *Held* that there was sufficient compliance with S. 187 (now S. 213) and probate as required under that section had in fact been obtained. ('11) 38 Cal 327 (334) : 38 Ind App 7 (PC).

[4] Section 213 consolidates the previous law about the probate and applies only in the case of wills speci-

Section 213 — Note 1 *(contd.)*

fied in cls. (a) and (b) of S 57. (Vol 32) 1945 Nag 237 (237) : I L R (1945) Nag 562.

[5] To a case not governed by the Hindu Wills Act, S. 187 (now S. 213), Succession Act, is inapplicable. (Vol 1) 1914 Mad 51 (54) : 37 Mad 175.

[6] Where the claim is not for any right as executor or legatee under the will, S. 187 (S. 213 of the present Act) has no application. (Vol 14) 1927 Mad 948 (950) (DB). (Suit for establishment of joint right of trusteeship based on a scheme of management of trust properties made under a will : *Held* that the claim was not for any right as legatee or executor under the will.)

[7] Section 187 (S. 213 of the Act of 1925) does not apply to a case of an authority to adopt since the authority is not a legacy to the widow. ('09) 4 Ind Cas 1046 (1048) (Mad).

[8] Section 213 does not bar the jurisdiction of Court to add a person who has not yet obtained probate or letters of administration as representing the estate of the deceased in a case of originating summons, on his undertaking to take out the probate or letters of administration before a formal decree is drawn up. (Vol 16) 1929 Bom 289 (290) (DB).

[9] The words "This section in sub-s. (2) of S. 213" should be read as "the preceding sub-section." (Vol 24) 1937 Sind 84 (84) : 31 Sind L R 11 (DB).

2. Hindu wills.—[1] Probate is not necessary unless executor is asserting right in Court as plaintiff, in case of will by Hindu. (Vol 8) 1921 Bom 385 (388) : 45 Bom 1186 (DB).

[2] When a will made by a Hindu does not fall under the classes specified in cls. (a) and (b) of S. 57 probate of the will need not be taken out before an executor or a legatee files a suit by reason of the provisions of S. 213. (Vol 24) 1937 Sind 318 (320) (DB). (Residuary legatee under the will of a Hindu male in Sind relating to property situate in Sind is not bound to take probate of a will before he sues as legatee.) ✠ (Vol 24) 1937 Sind 84 (84) : 31 Sind L R 11 (DB). (Hindu making will at Hyderabad in respect of property in that town. Person claiming under that will need not obtain probate of the will for suing a legatee.)

[3] Section 213 does not apply to the case of wills falling within the clauses specified in S. 57 (c). (Vol 32) 1945 Nag 237 (238) : I L R (1945) Nag 562. (Hindu who has sued for possession and mesne profits dying during pendency of suit. His executors under his will can apply to be brought on record without obtaining probate of the will.) ✠ (Vol 25) 1938 All 640 (641). (Will executed by deceased Hindu after 1st January 1927 comes under S. 57 (c) and S. 213 is no bar to application for revocation of succession certificate granted to another person, and it is not necessary for applicant to take out probate of will.)

[4] Section 213 does not apply to wills made by Hindus of Punjab and relating to immovable property situate in Punjab. Legatee can, therefore, claim rights under will without probate. (Vol 21) 1934 Lah 599 (600) : 15 Lah 898.

3. Right as executor or legatee to be established by probate.—[1] Section 213 is not limited in its operation only to cases where the plaintiff brings a suit as executor or legatee or even to cases where the defendant claims as executor or legatee. It extends to all cases where it becomes necessary in the suit to decide that under the will the right as an executor or legatee accrued. (Vol 29) 1942 Cal 401 (406) : I L R (1942) 2 Cal 13 (DB).

[See however (Vol 11) 1924 Mad 67 (71) (DB). (Transferee from executrix in possession of property but who has not taken out probate suing on the basis of title deed given to him to eject a trespasser is not barred by S. 187 (now S 213).) ✠ ('08) 31 Mad 187 (204, 205) (DB). (*C* bequeathing all his properties to *M* as sole legatee—*M* given private instructions as to the disposal of the property—*M* with a view to misappropriate the estate for himself suppressing those instructions — Suit by a person claiming as beneficiary under the secret trust confided to *M* : *Held* that the beneficiary was not barred by reason of S. 187, (S 213 of the present Act) as his suit was not one seeking to establish any right of the defendant and that *M* cannot be allowed to set up his own fraud in not taking out letters of administration to defeat the claims of the beneficiary.)]

[2] Party claiming an interest under a will as well as his successor-in-title must prove execution of the will and its terms by the procedure laid down. (Vol 3) 1916 Mad 512 (514) : 38 Mad 988 ✠ (Vol 18) 1931 Bom 547 (548) (DB). (Co-mortgagees of whom one dies — His legal representative who is a necessary party in a suit to enforce the mortgage is not competent to sue without obtaining probate of the will if any left by the deceased—Such a case is governed by S. 213) ✠ (1891) 15 Bom 657 (669). (Property mortgaged by *N* to *V* subsequently sold by both to *C* under an unregistered sale deed to *C* who entered into possession thereof after paying the purchase money—*N* dying leaving a will by which all properties were given to *V* and appointing him executor — Probate of will was not obtained—*C* selling the property to *H* the deed being signed also by *V* as owner and executor — Purchaser contracting to sell to another and handing over documents relating to the property to the contractee who refused to complete the sale on the ground that there was defect in title — Suit by the former for specific performance : *Held* that as a result of the non-registration of the sale deed to *C* by *N* and *V* the equity of redemption still remained with *N* and at his death passed to *V* as owner and executor and therefore the plaintiff in order to establish his title should show that *V* had a right to convey the equity of redemption to *H* from whom the plaintiff bought and as the only mode of proving this under S. 187, (S. 13 of the present Act) was by a probate of the will of *N* the absence of it was a flaw in plaintiff's title.) ✠ ('74) 22 Suth W R 174 (174) (DB). (Where the plaintiff sued for possession of land to which he claimed title under the will of his uncle it was held his suit should be dismissed on the ground that the plaintiff had not taken probate under S. 187 of Act X of 1865.)

[3] Person governed by Succession Act of 1925 at the time of his death — Probate must be obtained before a claim based upon the will can be established. (Vol 19) 1932 Oudh 85 (87) (DB).

[4] Where title to *debutter* is founded on will, it can only be established by probate or letters of administration to will annexed and cannot be established by merely relying on recitals in will. (Vol 24) 1937 Cal 252 (254) (DB).

[5] No right as executor can be established in any Court of Justice unless competent Court has granted probate of will under which he claims. ('09) 12 Oudh Cas 390 (394, 395) (DB).

[6] Section 187 (now S. 213) of the Succession Act affects not only the establishment of the legatee's right by himself but also debars a person from establishing legatee's right merely as a *jus tertii* for defence. (Vol 3) 1916 Mad 422 (423) : 38 Mad 474 (DB) ✠ (Vol 29) 1942 Cal 401 (406) : I L R (1942) 2 Cal 13 (DB).

4. Value of probate.—[1] Issue of a certified copy of will by Court with a grant of letters of administration is 'probate' within the meaning of the Act. ('11) 38 Cal 327 (334) : 38 Ind App 7 (P C).

Proof of representative title a condition precedent to recovery through the Courts of debts from debtors of deceased persons.

214. *(1)* No Court shall—

(a) pass a decree against a debtor of a deceased person for payment of his debt to a person claiming on succession to be entitled to the effects of the deceased person or to any part thereof, or

(b) proceed, upon an application of a person claiming to be so entitled, to execute against such a debtor a decree or order for the payment of his debt,

except on the production, by the person so claiming, of—

(i) a probate or letters of administration evidencing the grant to him of administration to the estate of the deceased, or

(ii) a certificate granted under section 31 or section 32 of the Administrator General's Act, 1913, and having the debt mentioned therein, or

(iii) a succession certificate granted under Part X and having the debt specified therein, or

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Section 213 — Note 4 *(contd.)*

[2] A probate is authenticated evidence and not foundation of title of an executor, as the vesting of the estate in the executor is complete on the testator's death. (Vol 20) 1933 Bom 342 (344).

[3] Unless a probate or letters of administration are taken under the Act, a will cannot prove that anybody named therein has title to the estate of the testator. (Vol 2) 1915 Cal 207 (208) (DB).

[4] Subsequent limitation of the grant of a probate by the appellate Court does not affect the grant. ('11) 38 Cal 327 (334) : 38 Ind App 7 (P C) ✠ ('06) 4 Cal L Jour 523 (526) (DB). (Letters of administration with the will in respect of the entire estate of the deceased granted on proof of the will of the deceased to one of his widows—High Court subsequently holding that it should have been of limited character for a specific purpose : *Held* that until formally cancelled the letters and probate would be authority in favour of anyone of the legatees or any other claiming under the will.)

[5] No Court other than a Court of Probate is competent to hold that the letters of administration had been imperfectly drawn up or on an investigation of the proceedings of the Probate Court to hold that the letters of administration have the same effect as if a copy of the terms of the will had been annexed thereto. (Vol 2) 1915 Cal 325 (327) (DB).

5. Unprobated wills can be used for collateral purposes.—[1] Per *Schwabe C. J.*—An unprobated will is a perfectly valid document. The executor under it can deal with the property and give perfectly good title though it may be that to complete the title it requires probate to be taken out at a later date. (Vol 11) 1924 Mad 67 (67) (DB).

[2] Under S. 213 an unprobated will cannot be used for establishing any right as executor or legatee. (Vol 13) 1926 Cal 1 (31) (DB).

[3] Will dealing with immovable property — Suit for pecuniary legacy unconnected with same maintainable without probate. (Vol 17) 1930 Mad 956 (959, 961) (DB).

[4] Unprobated will can be looked into for collateral purpose. (Vol 29) 1942 Cal 401 (405) : I L R (1942) 2 Cal 13 (D B) ✠ (Vol 3) 1916 Mad 779 (781) ✠ (Vol 2) 1915 Cal 341 (343) (DB).

[5] A defendant can rely on an unprobated will only when he does not seek to establish his title under the will. But where he defends his possession under the will it must be probated even though he is a defendant. (Vol 14) 1927 Mad 1054 (1059) : 50 Mad 927 (F B). (('10) 33 Mad 91 (DB) Overruled.)

[6] A defendant can prove the unprobated will of the propositus for the purpose of showing that the plaintiff would not be entitled to succeed as heir on intestate succession. (Vol 12) 1925 Mad 861 (869) ✠ (Vol 12) 1925 Mad 1110 (1110).

[See however (Vol 29) 1942 Cal 401 (405) : I L R (1942) 2 Cal 13 (DB). (Title to property claimed by inheritance — Claim cannot be defeated by an unprobated will.)]

6. Probate obtained after institution of suits.—[1] Under S. 213, the grant of probate is not a condition precedent to the institution of the suit—The executor or legatee may institute the suit without obtaining probate but he will not be entitled to a decree unless probate is granted to him before the passing of the decree. (Vol 19) 1932 Bom 13 (14, 15) : 56 Bom 65.

[2] So long as compliance with S. 213 is prior to the decree the fact that it was after the institution of the suit is immaterial. ('11) 38 Cal 327 (334) : 38 Ind App 7 (P C) ✠ (Vol 29) 1942 Cal 571 (574) : I L R (1942) 2 Cal 363 (DB) ✠ (Vol 20) 1933 Cal 234 (236) : 59 Cal 911 (DB) ✠ (Vol 10) 1923 Cal 1 (5) : 50 Cal 49 (DB).

[3] But executor who has not obtained probate can be effectively sued as defendant when he had intermeddled with estate of testator. (Vol 29) 1942 Cal 571 (574) : I L R (1942) 2 Cal 363 (DB).

[4] In a suit instituted without obtaining probate the trial Court is not bound to stay proceedings to enable the plaintiff to obtain probate of will from the Court of competent jurisdiction. (Vol 19) 1932 Oudh 85 (87) (DB).

[5] In a case where the suit is commenced without the necessary letters of administration the Court may grant a conditional decree suspending its operation until letters have been obtained. (Vol 17) 1930 Rang 218 (221) (DB).

[But see (Vol 19) 1932 Bom 13 (14, 15) : 56 Bom 65.]

SECTION 214 — SYNOPSIS

1. Scope and applicability.
2. Persons claiming on succession.
3. Persons claiming by survivorship.
4. Suits to recover mortgage-debts.
5. Assignees of debt.
6. Persons who have obtained probate.
7. "Debt"—Meaning of.
8. Sub-section (2).
9. Payment of his debt by the debtor.
10. Effects of the deceased.
11. Suits filed without succession certificate.
12. Production of certificate at the time of appeal.
13. Decree passed without certificate.
14. Bar of execution.
15. Waiver of certificate.
16. Powers of Court trying claims.

(iv) a certificate granted under the Succession Certificate Act, 1889, or

(v) a certificate granted under Bombay Regulation No. VIII of 1827, and, if granted after the first day of May 1889, having the debt specified therein.

(2) The word "debt" in sub-section *(1)* includes any debt except rent, revenue or profits payable in respect of land used for agricultural purposes.

[Succession Certificate Act, 1889 — S. 4.]

Section 214 *(contd.)*

1. Scope and applicability.—[1] Property vesting in the Crown by escheat — Secretary of State realising the debt due to the person dying heirless need not apply for succession certificate as S. 214 does not apply to Crown. (Vol 19) 1932 All 220 (221) : 54 All 226.

[2] The provisions of the Succession Certificate Act apply to suits in the village Munsif's Court under Act I of 1889, Madras. (1898) 21 Mad 115 (116) (DB).

[3] Section 4, Succession Certificate Act applies also to suits for sale under S. 88 of Transfer of Property Act. ('12) 14 Ind Cas 570 (571) (DB) (All).

[4] Section 4 of Succession Certificate Act is not applicable to payment of dividends by Receiver to creditor entered in schedule for it is applicable only to decrees or orders for the payment of debts. (Vol 13) 1926 Mad 899 (899) : 49 Mad 952 (DB). (Case decided under Act VII of 1889.)

[5] The prohibition against suing without a succession certificate applies only in respect of debts and not to claims against executors or trustees—At all events it does not apply to claims for immovable property. ('76-77) 2 Cal 45 (54).

[6] Administration of estate not complete and residue not ascertained at the time a person died intestate — Person dying has only the right to call upon the Administrator-General to administer the estate in due course— Section 214 does not apply as no relationship of creditor and debtor exists between the Administrator-General and the deceased. (Vol 22) 1935 P C 203 (206, 207) : 63 Cal 677 : 63 Ind App 61 (PC). (Affirming (Vol 20) 1933 Cal 841 : 60 Cal 1135.)

[7] Section 4 of the Succession Certificate Act (now S. 214 of this Act) was adopted to protect a debtor when called upon to pay a debt due by him to a deceased person. Therefore, it does not apply to a case where the heir seeks to recover the amounts due to the estate from a person who had wrongfully collected them. (Vol 8) 1921 All 155 (157) : 43 All 440 (DB). (Succession certificate held not necessary.)

[8] Section 214 not only applies to cases where the suit is instituted by the legal representatives but also to cases where the suit was started by the creditor and his legal representatives are brought on record on his dying during the pendency of the suit (Vol 27) 1940 Bom 285 (286) : I L R (1940) Bom 514 (DB).

[9] Where a claim is not against the debtor of a deceased person but against one of the heirs of a debtor by the creditor himself who has inherited a specific portion of his liability there is no necessity for a succession certificate. (Vol 8) 1921 All 173 (174) : 43 All 493 (DB).

[10] The claim contemplated by S. 4 (1) (a) of Act 7 of 1899 (now S. 214 (1) (a) of the Succession Act 1925) is a claim made by a person in the capacity of and as a personal representative of a deceased person and it is immaterial whether the decree has to be made in favour of a personal representative who has himself instituted the suit or in favour of one who has taken the conduct of the suit in hand after its institution by the original creditor. In both cases when decree is passed it is passed in favour of a person who claims to be entitled to the effects of the deceased person and who must consequently produce proof of the representative title. (Vol 5) 1918 Cal 301 (303) (DB) ✠ (Vol 3) 1916 All 233 (236) : 38 All 474 (DB).

[11] The purpose of S. 214 is merely to make it clear that no debt to a deceased person can be recovered through Court except by a holder of one of the documents specified, the only exceptions being either where the claim is made on survivorship, or where it relates to matters contained in sub section (2). (Vol 27) 1940 Cal 24 (25) (DB).

[12] Suit by widow not as entitled to the effects of her deceased husband, nor for the payment of a debt due to the deceased husband but as trustee of endowment founded by her husband—No certificate of heirship is necessary. ('97) 20 Mad 162 (166) : 24 Ind App 73 (PC).

[13] Executor appointed by will for which probate need not be obtained must obtain succession certificate before obtaining decree for debt due to testator. (Vol 19) 1932 Mad 301 (301).

[14] Section 214 has reference only to suits to enforce payment of simple debts; suits to bring mortgaged property to sale are not within its purview. (Vol 21) 1934 Rang 369 (372) : 12 Rang 690.

[15] No personal decree can be passed under S. 90 of the T. P. Act, in favour of the representatives of the mortgagee who have not obtained succession certificate as S. 4 of Act of 1889 (now S. 214) applies to the case. ('08) 35 Cal 767 (772) (DB).

[16] An application on the part of the successful party in appeal in the appellate Court for restitution from the unsuccessful party, if that is expressed in terms of rupees, is one for the recovery of a debt. Hence the heir of an original party cannot obtain such restitution without providing himself with the necessary succession certificate. (Vol 29) 1942 Mad 445 (445) (DB).

[17] Section 4, Succession Certificate Act, applies even where a part of the sum is claimed and a succession certificate is necessary. (Vol 1) 1914 Lah 457 (457). (Case decided under Act VII of 1889.)

[18] Succession certificate has to be taken in respect of only the share of the applicant in the debt due to the deceased. ('09) 9 Cal L Jour 331 (334, 335) (DB).

[19] Plaintiff who sues for redemption is trying to pay a debt and not recover it and therefore need not produce a succession certificate. (Vol 16) 1929 All 896 (896).

2. Persons claiming on succession. — [1] The word "succession" in the section is inserted to except the case where the claim to be entitled to the effects of the deceased is based on survivorship; it has nothing to do with the question whether the person holding one of the documents mentioned in the section is a heir of the deceased or not. (Vol 27) 1940 Cal 24 (25) (DB).

[2] On the death of a Hindu who had obtained a money decree, his widow obtains the right to execute the decree on succession. (Vol 31) 1944 Nag 243 (245) : ILR (1944) Nag 832 (DB). (Succession certificate necessary to the extent of her interest in the property.)

[3] The Hindu widow does not obtain the right given to her under S. 3, Hindu Women's Rights to Property Act, by survivorship. Nor does she obtain it by inheritance and, therefore, an indorsee of pronote and the two sons of the payee need not obtain a succession certificate to enforce payment against the widow and son of the maker of the promissory note. (Vol 30) 1943 Mad 246 (246).

Section 214—Note 2 *(contd.)*

[4] As a personal representative who is the holder of one of the documents enumerated in S. 214 is a person claiming by succession to the assets of the deceased, an administrator who by virtue of S. 211 is the legal representative of the deceased in relation to all his properties other than those which have passed by survivorship, is a person claiming on succession to be entitled to the assets of the deceased. (Vol 27) 1940 Cal 24 (25) (D B).

[5] Hindu gentleman taking out a policy of insurance payable on his death—Assured adopting a son and also leaving a will in favour of the adopted son — Adopted son being a minor, Court of Wards which took over the property of the deceased demanding payment of the sum due under the policy — Suit filed by the Court of Wards for recovery of the amount on the insurance company refusing to pay without a probate of the will: *Held* that the plaintiff claimed by right of succession to the effects of the deceased and, therefore, S. 214 applied to the case. (Vol 20) 1933 All 1 (2) : 54 All 1026 (D B).

[6] The executor of a will becomes entitled to the 'debt' on succession. (Vol 30) 1943 Pesh 42 (43) (D B).

[7] A Receiver ordinarily is not the representative or agent of either party in the administration of the trust but his appointment is for the benefit of all parties and he holds the property for the benefit of those ultimately found to be the rightful owners. ('10) 37 Cal 754 (757) (DB). (No succession certificate is necessary when he seeks to take the securities and monies of the deceased in the bank.)

[8] Receivers appointed by Court in litigation after the death of a person with authority to sue in their own name to realise outstandings due to the estate of the deceased are not persons claiming on succession to be entitled to the effects of the deceased. (Vol 30) 1943 Mad 210 (210). (Receivers suing need not produce succession certificate.)

[9] The common manager appointed under S. 301 represents the estate of the deceased for all intents and purposes and can sue on a pronote, in favour of the deceased, even if he is not a holder in due course. (Vol 28) 1941 Pat 403 (404). ((Vol 24) 1937 Pat 100 : 16 Pat 74 (FB), *Rel. on.*)

3. Persons claiming by survivorship. — [1] In Hindu law, there is clearly marked distinction between succession and devolution of survivorship and as the succession certificate is designed to facilitate the collection of debts on succession, *prima facie* the cases of devolution by survivorship are not within the ambit of the Act. (Vol 2) 1915 Mad 951 (952).

[2] Section 214 does not require a certificate in respect of a debt due to a person claiming it by survivorship. (Vol 25) 1938 Pat 390 (391) (DB).

[3] Where a member of a joint Hindu family dies the other members succeed to him by the right of survivorship and no succession certificate is necessary for the realisation of debts due to the family. (Vol 2) 1915 Lah 343 (343) ✠(Vol 17) 1930 All 99 (99) : 52 All 252 (DB). (Terms "legal representatives" and 'successors," are not strictly applicable to case of survivors of a joint Hindu family.)✠(Vol 13) 1926 Mad 1188 (1190). (Managing member of joint Hindu family advancing money out of family funds—Pro-note given to the manager — Surviving member can sue and take the benefit of the pro-note without succession certificate.) ✠ (Vol 9) 1922 Cal 149 (149) (DB). (Mitakshara joint family—Amount due to father—Son need not get succession certificate.) ✠ (Vol 6) 1919 Cal 919 (920, 921) (DB). (Dayabhaga joint family—Pro-note in favour of karta *A*—On his death renewed in favour of karta *B*—*A's* heirs need not obtain succession certificate.)✠(Vol 5) 1918 Oudh 326 (327, 328) (DB). (Mortgage-deed in the name of a person who with his sons and nephew formed a joint Hindu family — Suit by sons claiming entire money due on mortgage — Nephew disclaiming any interest as he had already received his share from the sons : *Held* that the plaintiffs being the survivors of a joint Hindu family, a succession certificate was not required to enable them to bring a suit on the mortgage.) ✠ (Vol 1) 1914 All 419 (420) ✠ ('11) 38 Cal 182 (185, 187) (DB).

[4] The fact that a debt is due upon a promissory note in favour of a member of a joint Hindu family does not make any difference in the construction of the section. In all cases the question is whether the moneys sought to be recovered were advanced from joint funds or were the individual earnings of the person in whose favour the document was executed. The Act does not require that upon the face of the document the debt should appear to belong to the family. (Vol 2) 1915 Mad 951 (952)✠(Vol 12) 1925 Mad 1160 (1161).

[But see (Vol 2) 1915 Mad 344 (345).]

[5] Illegitimate son of a Sudra can recover the debts due to his father without a succession certificate as he is a coparcener. (Vol 10) 1923 Nag 67 (67).

[6] An adopted son takes ancestral property as survivor and does not require succession certificate to recover ancestral property. (Vol 2) 1915 Mad 808 (808) (DB).

[7] Succession to impartiable estate is dependent upon and is determined on the footing of survivorship and succession certificate is not necessary. (Vol 25) 1938 Pat 401 (403) (DB). (Decree for costs forming part of the impartible estate in favour of last holder of the estate—Successor need not take out succession certificate to execute decree.) ✠ (Vol 25) 1938 Pat 390 (391) (DB)✠(Vol 9) 1922 Pat 529 (531): 1 Pat 387 (DB). (Impartible estate — Application for personal decree by successor — Succession certificate is not necessary as succession is one by way of survivorship.)

[But see (Vol 30) 1943 Pat 107 (108) : 21 Pat 849 (DB). (Decree for rent in favour of the last holder of impartible estate. Income from estate accrued due to the last holder is not an accretion to the estate but is his separate property—Successor must take out succession certificate before executing the rent decree.)]

[8] Maintenance grant to be paid under ekrarnama to *R* and her daughter *P* and half of that amount to the male issue of *P* after the demise of both *R* and *P* —*P* dying—*R* suing for arrears of maintenance—Contention that arrears upto the death of *P* constituted a debt to *P* and *R* should, therefore, obtain succession certificate before decree can be made in her favour': *Held* that *R* took by survivorship and not by inheritance. ('13) 17 Cal L Jour 87 (92) (DB).

[9] In the case of a partnership if a partner dies the surviving partner does not succeed to the dead partner by survivorship and if the surviving partner claims to be entitled to the effects of the deceased person as due to himself alone a succession certificate is required. (Vol 2) 1915 Lah 343 (343, 344).

4. Suits to recover mortgage debts.—[1] *Obiter.* —Succession certificate is not necessary for maintaining suit by mortgagee for recovery of amount due by sale of mortgaged property. (Vol 27) 1940 Lah 401 (405, 406) : I L R (1941) Lah 71 (FB).

[2] The bar of S. 214 does not apply to a suit on mortgage brought by a representative of the mortgagee. (Vol 25) 1938 Cal 714 (717): I L R (1939) 1 Cal 21 (DB)✠(Vol 6) 1919 Oudh 307 (308). (Decree for enforcement of mortgage right, as against mortgaged property is not decree for debt.)

Section 214—Note 4 *(contd.)*

[3] Certificate under the section is not necessary before a decree can be passed directing sale of mortgaged properties in a suit by heirs of the mortgagee for the recovery of mortgaged debts. ('12) 12 Mad L Tim 202 (202) (DB) ✠ ('04) 28 Bom 630 (635) (DB). (Suit to recover mortgage money by possession also is not barred by the absence of succession certificate.)

[4] Equity of redemption is not a security or debt within the meaning of the section and the person entitled to the equity can file a suit for redemption without a succession certificate or letters of administration. ('12) 15 Ind Cas 425 (426) (DB) (Rang).

[5] Joint family consisting of father *A* and his sons *B* and *C*—*C* taking mortgage in his name in 1912—*C* disappearing and *A* obtaining decree as manager—Certain moneys realised towards decree and deposited into Court — *C*'s widow bringing suit against *B* for mere declaration that moneys belonged to her as mortgage was self-acquired property of *C*: *Held*, that S. 214 did not apply as plaintiff had not claimed any personal relief against mortgagor or defendant *B*. (Vol 20) 1933 Mad 503 (506).

[6] The heir of a Chinese Buddhist who dies intestate cannot be compelled to obtain a grant of letters of administration or a succession certificate before asking the Court to grant them a mortgage decree. (Vol 21) 1934 Rang 369 (372) : 12 Rang 690.

[7] To obtain a personal decree on a simple mortgage succession certificate is necessary. ('06) 29 Mad 77 (80) (DB) ✠ ('04) 28 Bom 630 (635) (DB).

5. Assignees of debt. — [1] Where an assignee from the decree-holder seeks to execute the decree he does not claim to execute it as the heir of the deceased decree-holder but under the assignment or conveyance from the decree-holder and this section has no application to such cases (Vol 12) 1925 Pat 591 (593) (DB).

[2] The succession certificate procedure is obligatory on any person claiming debts or debt, the property of deceased not only by succession but under any title whatsoever. An assignee from the deceased's legal representative is not exempt. (Vol 8) 1921 Mad 168 (169): 44 Mad 499 (FB) ✠ (Vol 7) 1920 All 185 (187) : 42 All 549 (DB).

[3] Suit by assignee of a promissory note from an undivided son of payee based on the ground that assignee is a holder in due course—Debt not really existing—S. 4 does not apply and no succession certificate is necessary. (Vol 3) 1916 Mad 1164 (1164) (DB).

[4] Assignee from a succession certificate holder is entitled to sue and obtain a decree for the recovery of a debt due to the estate of the deceased without producing a succession certificate. (Vol 6) 1919 Mad 879 (879): 42 Mad 130 (DB) ✠ (Vol 1) 1914 All 129 (131) : 36 All 21 (DB). (Certificate-holder assigning debt and handing over the certificate as well to the assignee—Assignment is valid and assignee can sue for recovery of debt)

[See however (1913) 35 All 74 (77, 78) (DB). (Assignee of holder of succession certificate cannot sue for recovery of debt assigned to him)]

6. Persons who have obtained probate. — [1] Where probate or letters of administration have been obtained with regard to estate of deceased, succession certificate is not necessary under S. 4 to entitle person to sue. (Vol 3) 1916 Cal 248 (248) (DB).

[2] Whole of self-acquired property bequeathed in favour of widow constituting her residuary legatee—Widow granted probate—She is entitled as executrix to recover debts due to the deceased. (Vol 20) 1933 Lah 740 (740) (DB).

7. "Debt"—Meaning of.—[1] A debt is a sum of money payable at present or in future by reason of a present obligation. ('09) 36 Cal 936 (938, 939) (FB). (Debt existing during lifetime of creditor but becoming payable after his death—Heirs cannot obtain decree without succession certificate) ✠ (Vol 24) 1937 Cal 423 (424) (DB) ✠ (Vol 20) 1933 Cal 841 (851): 60 Cal 1135 ✠ (1883) 11 Q B D 518 (527), *Webb* v. *Stenton*.

[2] A policy of insurance comes within the definition of 'debt'. (Vol 29) 1942 Pesh 42 (43). (Especially where the policy is for a definite sum.) ✠ (Vol 14) 1927 Mad 359 (359) : 50 Mad 412 (DB). (Insurance money payable after death is a debt within the meaning of S. 4 of Act 7 of 1889 (corresponding to S. 214 of this Act).)

[See however (Vol 3) 1916 Cal 475 (476) (DB). (Insurance policy, unless amount due is ascertained in lifetime of assured, is not debt within Act.)]

[3] *Obiter*. — A mortgage is not a debt within the meaning of S. 214. (Vol 25) 1938 Cal 714 (717) : I L R (1939) 1 Cal 21 (DB).

[4] Wrongful removal of tenant's crops by landlord — Suit by heirs of tenant for value is not a claim in respect of a "debt." (Vol 11) 1924 Rang 139 (139).

[5] Maintenance to be paid to *R* and her daughter *P* during their lifetime and after the death of both to the male issue of *P*—*P* predeceasing *R*—*R* suing for arrears of maintenance: *Held* that arrears upto the death of *P* was not a "debt" due to *P* as the grant could not be construed to mean that it was to the two ladies to the extent of one-half share in favour of each. ('13) 17 Cal L Jour 87 (92) (DB).

8. Sub-section (2).—[1] The words "land used for agricultural purposes' in S. 4 of Act VII of 1889 (now S. 214 of this Act) govern the words "rent, revenue or profits" that precede them. (Vol 5) 1918 Cal 794 (794) (DB). (Suit for arrears of rent in respect of homestead land — Heirs suing for recovery must produce succession certificate.)

[2] A decree for rent not for agricultural land is a debt within the meaning of S 214. (Vol 30) 1943 Pesh 42 (43) (DB).

[3] Lease by owner of impartible estate granting lessee the right to propogate lac on certain kinds of trees—Lease not conferring any right to land — Rent payable under the lease is not rent payable in respect of land used for agricultural purposes. (Vol 30) 1943 Pat 107 (108) : 21 Pat 849 (DB).

[4] Lease back of mortgaged lands to mortgagor in consideration of his paying a yearly sum as profits of land to the mortgagee : *Held*, that the payment was in the nature of rent to the mortgagee. (Vol 24) 1937 Pat 617 (618) (DB). (Succession certificate not necessary to institute suit for recovery of the money.)

[5] Decree for rent — Deposit of the amount under decree after the death of decree holder—It is still rent and the heir of the deceased can withdraw it without succession certificate. ('13) 18 Ind Cas 495 (495) (DB) (Cal).

9. Payment of his debt by the debtor. — [1] Debtor is not under any legal obligation to pay his debt to any person without a succession certificate. ('21) 64 Ind Cas 385 (386) (DB) (Lah).

[2] The phrase "his debt" in the section refers to the whole of the debt due by the debtor to the deceased and not a portion of that. (1911) 33 All 327 (331) (DB).

10. Effects of the deceased.—[1] Section 4 of the Succession Certificate Act (VII of 1889) makes a certificate necessary only in respect of the debt due to the deceased person. ('09) 9 Cal L Jour 331 (334) (DB).

[2] Debt in favour of *K* and *M*—*M* dying *K* obtaining decree impleading *M*'s heir as defendant: *Held* that *M*'s heir cannot have a succession certificate as the debt after the decree had become a judgment-debt in favour of *K*. (Vol 10) 1923 All 265 (266) (DB).

Section 214—Note 10 *(contd.)*

[8] One *G* died leaving a widow *M* who took out a succession certificate in respect of his property — On *M*'s death, three nephews of *G* applied for a succession certificate in respect of the debts and securities payable to the estate of *G*—Debts accruing due long after *G*'s death during *M*'s lifetime—*M* entitled to them only in her capacity as a limited owner : *Held*, that the debt payable to the widow was to be treated as a debt really due, if not to the deceased personally at any rate to the estate of the deceased full owner. ('11) 15 Cal W N 1018 (1020) (DB).

[4] Interest accruing after the death of deceased forms part of the debt due to the deceased. (Vol 25) 1938 Pesh 1 (2) (DB).

[5] *A* and *D* bringing suit to recover money due to them as partners on a partnership account—*A* dying before decree—*D* who claimed to be the adopted son of *A* brought on record and suit decreed — Decree set aside in appeal and suit dismissed on the ground that *D* was not the adopted son of *A* or his representative and therefore was not entitled to recover deceased *A*'s interest without production of a succession certificate : *Held*, that the decree that may be passed in this case was not a decree against the debtor of a deceased person but was a decree against the debtor of the partnership concern and therefore no succession certificate was necessary. ('98) 20 All 365 (366) (DB).

[6] Proceeding to recover provident fund after depositor's death—Parties need not produce succession certificate as the sum vests in them on depositor's death. (Vol 27) 1940 Mad 590 (591) (DB).

[7] Widow of insured applying for succession certificate in respect of the money payable by the Insurance Company: *Held* that no succession certificate was necessary as the applicant was not entitled to the money as part of the effects of the deceased as it did not form part of the deceased's estate. (Vol 4) 1917 Mad 936 (936) (DB).

[But see (1912) 35 Mad 162 (167) (DB). (Insurance money falling due on the death of the insured is a part of the deceased's estate.)]

[8] Note executed in favour of the firm—One of the members dying during pendency of suit — Legal representative who is added as plaintiff need not produce any succession certificate. (Vol 5) 1918 Cal 908 (909) (DB).

[See however ('94) 17 Mad 108 (117) (DB). (A surviving partner can sue alone for the recovery of a partnership debt without a succession certificate. The suit can also be by the surviving partner conjointly with the heir of the deceased partner. But in such a case certificate of heirship would be necessary unless it appears that the debt is a co-parcenary debt.)]

[9] Money due to deceased holder of an impartible estate does not form part of "the effects of the deceased" but is in the nature of a family debt and as such can be recovered by the successor without a succession certificate as in the case of an ordinary joint Hindu family governed by Mitakshara. ('11) 38 Cal 182 (185, 187) (DB).

[But see (Vol 30) 1943 Pat 107 (108) : 21 Pat 849. (Impartible estate—Income of estate accrued due to the last holder is not an accretion to the estate but is the separate property of the last holder.) ✠ ('07) 30 Mad 454 (458) (DB). (A successor to an impartible estate is not a joint owner of the money due before his successor's death and derives his right to the debts only on the death of his predecessor. He claims them as the effects of his late predecessor and therefore succession certificate is necessary.)]

[10] Security for good conduct deposited with the employer is a debt due to the employee or his estate within the meaning of S. 214. (Vol 26) 1939 Pat 688 (688) (DB).

11. Suits filed without succession certificate.—[1] Production of a succession certificate is not a condition precedent to the maintenance of the suit. ('93) 16 Mad 454 (454) (DB). (Application to sue as pauper can be entertained without succession certificate.) ✠ (Vol 22) 1935 Cal 158 (159, 160): 61 Cal 1081 (DB). (An executor can institute a suit before he obtains probate—But he will be entitled to decree only if he produces the probate before the passing of final decree)✠(Vol 5) 1918 Pat. 295 (295) : 3 Pat L J 160 (DB) (Heir of creditor can maintain suit without a succession certificate.)

[2] Section 4 of Act VII [7] of 1889 (S. 214 of this Act) only prohibits the Court from passing a decree or execution of a decree against a debtor of the deceased without the person claiming the same producing a succession certificate. The claimant should be allowed reasonable time for producing the document. ('02) 24 All 138 (142) (DB)✠(Vol 26) 1939 Bom 188 (193) : I L R (1939) Bom 232 (DB). (Final decree in the absence of certificate cannot be passed.)✠(Vol 22) 1935 Cal 158 (159, 160): 61 Cal 1081 (DB)✠(Vol 5) 1918 Pat 295 (295):3 Pat L Jour 160 (DB) ✠ ('35) 16 Pat L Tim 99 (100).

[3] Succession certificate can be produced at anytime before the decree is made. (1909) 9 Cal L Jour 331 (336) (DB)✠(Vol 26) 1939 Bom 188 (193) : ILR (1939) Bom 232 (DB) ✠ (Vol 20) 1933 Cal 841 (851) : 60 Cal 1135.

[4] Court passing judgment but decree postponed till production of certificate. Procedure though undesirable, was not illegal (Vol 7) 1920 Nag 148 (149).

[5] Where a suit is filed without a succession certificate the proper order to pass is to direct its production before decree. (Vol 1) 1914 Mad 58 (58). (Passing decree making its executability conditional upon production of succession certificate is bad.)

[See however (Vol 24) 1937 Rang 470 (470) : 1937 Rang L R 396. (An appellate Court can pass provisional decree allowing production of succession certificate within reasonable time.)]

[6] The Court should not dismiss a suit for non-production of succession certificate but must give time for its production. (Vol 3) 1916 Mad 1164 (1164) (DB). ✠(Vol 18) 1931 Nag 181 (181): 27 Nag L R 152. (If there is failure even after time is granted—Court can pronounce judgment under O. 17, R. 3, Civil P.C.)✠(Vol 7) 1920 All 223 (223)✠(Vol 3) 1916 Cal 248 (248) (DB).

12. Production of certificate at the time of appeal.—[1] Trial Court not giving time for production—Production at hearing of first appeal—Certificate should be admitted. (Vol 10) 1923 Lah 597 (597).

[2] Party failing to produce succession certificate in the Court of first instance—Appellate Court should give him opportunity to produce it on payment of cost. (Vol 2) 1915 Cal 837 (838) (DB).

[3] Objection taken for first time in appeal about non-production of succession certificate—Suit ought not to be dismissed — Opportunity should be given to produce it. (Vol 11) 1924 Pat 525 (526) (DB)✠ (Vol 21) 1934 All 296 (297). (The appellate Court can accept a certificate where objection as to its non-production was taken for the first time in appeal.)

[4] Certificate not obtained in time granted by trial Court and hence suit dismissed—Certificate obtained at appellate stage — Plaintiff cannot claim retrospective effect. (Vol 14) 1927 All 227 (228): 49 All 1 (DB).

13. Decree passed without certificate.—[1] Omission to obtain succession certificate does not render the decree nullity. (Vol 27) 1940 Bom 285 (286) : I L R

Effect on certificate of subsequent probate or letters of administration.

215. *(1)* A grant of probate or letters of administration in respect of an estate shall be deemed to supersede any certificate previously granted under Part X or under the Succession Certificate Act, 1889, or Bombay Regulation No. VIII of 1827, in respect of any debts or securities included in the estate.

(2) When at the time of the grant of the probate or letters any suit or other proceeding instituted by the holder of any such certificate regarding any such debt or security is pending, the person to whom the grant is made shall, on applying to the Court in which the suit or proceeding is pending, be entitled to take the place of the holder of the certificate in the suit or proceeding:

Provided that, when any certificate is superseded under this section, all payments made to the holder of such certificate in ignorance of such supersession shall be held good against claims under the probate or letters of administration.

[Probate and Administration Act, 1881— S. 152 ; Succession Certificate Act, 1889— S. 21.]

Grantee of probate or administration alone to sue, etc., until same revoked.

216. After any grant of probate or letters of administration, no other than the person to whom the same may have been granted shall have power to sue or prosecute any suit, or otherwise act as representative of the deceased, throughout the Province in which the same may have been granted, until such probate or letters of administration has or have been recalled or revoked.

[1865—S. 260 ; Probate and Administration Act, 1881— S. 82.]

Section 214 — Note 13 *(contd.)*

(1940) Bom 514 (DB). ✠ ('35) 16 Pat L Tim 99 (100). (Will not make the decree wholly void.)

[2] Decree granted in disregard of the provisions of S. 214—Executing Court has no jurisdiction to entertain an objection that the decree is a nullity. (Vol 32) 1945 All 400 (401) : ILR (1945) All 914 (DB).

14. Bar of execution.—[1] Where a person succeeding as heir to a deceased person applies to execute a decree obtained by the deceased, he has to produce a succession certificate as required by S. 214 (b), Succession Act. ('41) 22 Pat L Tim 945 (946) (DB). (Decree obtained by father of applicant for execution against father of non-applicant — Execution cannot be proceeded with until the applicant obtains succession certificate.)✠(Vol 25) 1938 Cal 445 (445). (Post-master General holding cash certificate in the name of *R* — Heirs of *R* not getting a valid transfer of them on *R's* death —Decree against *R'* assets in the hands of heirs sought to be executed by attaching cash certificates—*Held* that in view of S. 214 (b), the Court ought not to have proceeded to execute it against the cash certificates✠(Vol 19) 1932 Bom 516 (518, 519) (DB). (Decree obtained by a person trading himself as a firm or in an assumed or trading name — His son cannot execute the decree without a succession certificate.)

[2] Section 214 (1) (b) only bars the institution of execution proceedings by a person claiming on succession and does not bar the continuance of the proceedings which had been instituted by the original decree-holder. (Vol 23) 1936 Pesh 17 (18)✠(Vol 7) 1920 Cal 580 (580).

[But see (Vol 25) 1938 Nag 528 (528) : I L R (1940) Nag 198 (D B). (Death of decree-holder pending execution — Wife applying for being substituted in decree-holder's place and for proceeding with the execution : *Held* that succession certificate was necessary.)]

[3] The application for execution against the debtor under S. 214 (1) (b) must be one for the payment of his debt. (Vol 22) 1935 All 897 (898) (D B). (Personal remedy under mortgage deed barred long before suit— Decree can be only for sale of mortgage property—Application for execution of the decree is not an application to obtain an order for payment and therefore no succession certificate is necessary.)

[4] Decree for rent not for agricultural land—Succession certificate is necessary for executing the decree. (Vol 30) 1943 Pesh 42 (43) (D B).

15. Waiver of certificate. — [1] Necessity for obtaining certificate cannot be waived by the parties. (Vol 27) 1940 Bom 285 (286) : I L R (1940) Bom 514 (D B).

16. Powers of Court trying the claims. — [1] It is doubtful whether a Court trying a claim based on a grant is entitled to go behind the grant. (Vol 27) 1940 Cal 24 (26) (D B).

Section 216 — Note 1

[1] Per Wallis C. J.—The section is not confined to Hindus but applies to all. (Vol 3) 1916 Mad 720 (722) : 39 Mad 365 (D B).

[2] All that the section provides is that until the grant is recalled or revoked, no other person will have the right to act as the representative of the deceased. But the right to represent the estate for the purposes specified in the section is not the same as the right to deal with the benefical interest in the estate. The moment the administration is completed the purpose of the grant will have been fulfilled and the administrator would virtually become *functus officio*. Thereupon the grant would stand revoked in effect if not by a formal order of the Court. (Vol 25) 1938 Cal 714 (719, 720) : I L R (1939) 1 Cal 21 (D B).

[3] Section 82, Probate and Administration Act (now S. 216 of this Act) shows that it is only the executors who have obtained probate that can act as representatives and so an executor who renounces or refuses or is unable to act should be regarded as if he had never been appointed. (1900) 27 Cal 683 (688) (D B).

[4] The effect of the provisions contained in S. 4 and S. 82, Probate and Administration Act (Ss. 211 and 216 of this Act) is that the executor or administrator by virtue of his office takes an estate in the property of the deceased and a legal character is vested in him. (Vol 8) 1921 Pat 313 (314) (D B).

[5] Executor has only a right of retainer and no charge on properties not in his possession which one time formed part of the estate. (Vol 3) 1916 Mad 720 (723) : 39 Mad 365 (D B).

[6] No one but an executor is competent to prosecute a suit as representative of the deceased. (Vol 7) 1920 Pat 159 (160) (Case decided under S. 89, Probate and Administration Act corresponding to this section.) ✠ (Vol 5) 1918 Mad 526 (528) (D B). (Estate of testator vesting in executors after his death under S. 4, Probate and Administration Act—Validity of will not challenged

PART IX.

PROBATE, LETTERS OF ADMINISTRATION AND ADMINISTRATION OF ASSETS OF DECEASED.

217. Save as otherwise provided by this Act or by any other law for the time being in force, all grants of probate and letters of administration with the will annexed and the administration of the assets of the deceased in cases of intestate succession shall be made or carried out, as the case may be, in accordance with the provisions of this Part.

Application of Part.

[1865—S. 2 ; Probate and Administration Act, 1881— Ss. 2, 150.]

CHAPTER I.

OF GRANT OF PROBATE AND LETTERS OF ADMINISTRATION.

To whom administration may be granted, where deceased is a Hindu, Muhammadan, Buddhist, Sikh, Jaina or exempted person.

218. *(1)* If the deceased has died intestate and was a Hindu, Muhammadan, Buddhist, Sikh or Jaina or an exempted person, administration of his estate may be granted to any person who, according to the rules for the distribution of the estate applicable in the case of such deceased, would be entitled to the whole or any part of such deceased's estate.

(2) When several such persons apply for such administration, it shall be in the discretion of the Court to grant it to any one or more of them.

(3) When no such person applies, it may be granted to a creditor of the deceased.

[Probate and Administration Act, 1881—S. 23]

Section 216 — Note 1 *(contd.)*

and right by way of survivorship not claimed by plaintiff — Executors and not plaintiff, held are entitled to sue a debtor of the estate.)

[7] *A* by will leaving all his movables and debts due to *P* his daughter — *R* appointed executor under the will obtaining probate — *P* with the permission of *R* instituting suit on a pro-note: *Held* that her suit was maintainable as it was instituted with the permission of the executor. (Vol 20) 1933 Lah 805 (806) (D B). (*Held* also that she could not realise the money till she obtained the necessary succession certificate.)

[8] Letters of administration obtained by the widow of deceased testator — *G* who in a previous suit obtained declaration that he was entitled as legatee to a four annas share of the rent suing to recover the share of the rent from a tenant of the deceased — Objection to suit on the ground that the widow who had obtained letters of administration alone can sue—All the legatees under the will *pro forma* defendants in both suits—*Held* that *G's* suit was maintainable. ('12) 15 Ind Cas 542 (543) (D B) (Cal).

[9] Decree for redemption in favour of *H* who had obtained probate of the will of the deceased *K*—Probate subsequently revoked on the ground that *K* was not of sound disposing mind when he executed the will : *Held* that the decree passed in favour of *H* was not null and void as against the representatives of *K*. (Vol 18) 1931 Rang 283 (285) : 9 Rang 360 (D B).

[10] General grant continues in force till probate or letters of administration have been recalled or revoked by Probate Court on grounds mentioned in S. 263. (Vol 8) 1921 Cal 292 (293) (D B).

Section 217 — Note 1

[1] Difference between application for probate of will and application for letters of administration — On an intestacy, letters of administration are an expensive luxury. In a will they are an absolute necessity and until probate is taken out or letters of administration granted effect cannot be given to the terms of the will. (Vol 24) 1937 Cal 595 (596) : I L R (1938) 1 Cal 75 (D B).

[2] Distinction between case of letters of administration granted on intestacy and the case of probate or letters of administration with will annexed — In the former case, the deceased having died intestate, his estate has to be distributed by an administrator in accordance with such rules of succession as may apply to the particular individual. In the other cases, the estate has to be distributed in accordance with the wishes of the deceased contained in his will. (Vol 18) 1931 Lah 310 (311) : 12 Lah 584 (D B).

[3] An application for probate or letters of administration is in the nature of an application for permission to perform the duty created by the will or for recognition as a testamentary trustee and the right to apply continues so long as the object of the trust or any part of the trust, if really created, remains to be executed. (Vol 24) 1937 Cal 595 (599) : I L R (1938) 1 Cal 75 (D B).

[4] In considering applications for letters of administration in case of intestate succession, it is the duty of the Court in granting letters to consider whether the estate had or had not been fully administered. But this principle has no application where it is absolutely necessary for the legatees or persons claiming through them to have their title established under the will by proving the will. (Vol 24) 1937 Cal 595 (600) : I L R (1938) 1 Cal 75 (D B).

[5] Probate — Grant of — No debts due by or to testator—Legatees in possession according to will—Still probate should be granted—But if estate had been administered letters need not be granted. (Vol 15) 1928 Cal 277 (278) (D B).

Limitation.

[6] Application for probate or for letters of administration with the will annexed (as well as applications for revocation of probate or letters of administration) are not governed by the law of limitation. (Vol 24) 1937 Cal 595 (598) : I L R (1938) 1 Cal 75 (D B). (Long delay in making the application is no doubt a circumstance which may be taken into account in determining the genuineness of the will.)

SECTION 218 — SYNOPSIS

1. Scope and applicability.
2. "Hindu."
3. "Would be . . . . deceased's estate."
4. Administration of portion of estate.
5. Joint Hindu family property.
6. Discretion of Court.
7. Rival claimants : sub-section (2).
8. Question of title:
9. Res judicata.
10. "Creditor": sub-section (3).

Section 218 *(contd.)*

1. **Scope and applicability.**— [1] Where there is no intestacy, grant of letters of administration is not justified. ('09) 9 Cal L Jour 576 (577) (D B). (Case under S. 23, Probate and Administration Act, 1881 — Gift of maintenance — It is not necessarily only a life-estate and therefore, there is no intestacy necessarily.)

[2] Dispute regarding ownership or succession which can be settled by regular suit — Letters should not be granted. (Vol 6) 1919 Lah 369 (371)✠ (Vol 4) 1917 Lah 442 (442).

[3] No grant of letters of administration is necessary in case where deceased leaves no debts or there is no difficulty in collecting the assets. ('21) 64 Ind Cas 61 (62) (DB) (Cal).

[4] Where there is no estate to be administered letters of administration cannot be granted. (1913) 17 Cal L Jour 66 (69, 70) (DB).

[5] Where the object of the litigation appears to be not to administer the estate left upon the death of the deceased but merely to obtain a declaration of heirship so as to fortify the position of the successful party in a regular suit that may be filed letters of administration ought not to be granted. ('13) 17 Cal L Jour 65 (66) (DB). (('09) 9 Cal L Jour 16 (DB), *Foll.*)

[6] Buddhist heir need not take out letters of administration to sue as representative of deceased mortgagee if he takes out succession certificate. (Vol 10) 1923 Rang 74 (74) (DB).

[7] No letters of administration should be issued to Administrator-General except on application of that officer or of any of parties. (Vol 3) 1916 Low Bur 12 (16) : 8 Low Bur Rul 404 (DB).

2. **"Hindu."**—[1] European lady becoming Hindu and renouncing her religion — Marriage with Hindu according to Vedic rites — Husband entitled to letters even though will by her is invalid. (Vol 15) 1928 Mad 1279 (1284) : 52 Mad 160.

3. **"Would be . . . . deceased's estate."**— When the deceased died intestate and was a Hindu, the party whose grant of administration has been called in must satisfy the Court that a grant can be made to him under S. 218, that he is the person entitled to the deceased's estate or any part of it. (Vol 17) 1930 Mad 915 (918) : 54 Mad 462 (DB).

[2] Letters of administration to the estate of deceased dying intestate — A Court ought never to grant letters of administration without having good *prima facie* evidence that the applicant has such an interest in the estate of the deceased as would entitle him to grant of letters. A person who satisfies the Court that he is the heir or one of the heirs of the deceased, has such an interest. (Vol 2) 1915 All 172 (174) : 37 All 380 (DB).

Deceased's estate.

[3] Person who claims to succeed by survivorship cannot be granted letters of administration, for in that case the deceased leaves no estate. (Vol 10) 1923 Pat 96 (96) (DB) ✠ (Vol 16) 1929 Rang 99 (102) : 7 Rang 39 (DB).

[4] A mohunt is not the owner of the property of a mutt and on his death a person claiming to be his successor in office cannot apply under Act V of 1881 for letters of administration in respect of mutt property especially where there are no assets to be administered. ('13) 17 Cal L Jour 65 (66) (DB). (('12) 16 C W N 798 (DB), *Foll.*)

[5] Applicant entitled to inherit — No rival application—Applicant entitled to grant. (Vol 7) 1920 Pat 343 (349) : 5 Pat L Jour 107 (DB).

[6] Applicant entitled to be appointed administrator if he has beneficial interest in deceased's estate. (Vol 6) 1919 Lah 369 (371).

4. **Administration of portion of estate.** — There is no provision in the Act for granting letters of administration in respect of only a part of the testator's estate. (Vol 5) 1918 Pat 673 (674) : 3 Pat L Jour 495 (DB).

[2] Case under Probate and Administration Act — Administration of a portion of estate: *Held* that S. 23, Probate and Administration Act, 1881, contemplated the grant of administration of the whole estate and not of a portion — It would lead to great inconvenience to grant separate letters of administration for separate portions of one estate to all the various heirs of the deceased. Exceptions might under certain circumstances be made under S. 42. ('09) 9 Cal L Jour 576 (578) (DB).

[3] In granting letters to administer the estate of a deceased person a limited grant of letters should not be awarded to the attorney of an absent sharer if a sharer who is entitled to as much as absent sharer is within the province and is willing to administer the estate. (Vol 2) 1915 Low Bur 126 (126).

5. **Joint Hindu family property.**—[1] In Bombay letters of administration are always granted in respect of Hindu undivided family property. (Vol 23) 1936 Bom 191 (193) (DB).

[2] Coparcener cannot oppose or make application for letters of administration (Vol 11) 1924 Rang 329 (331).

[3] Hindu widow entitled to letters of administration in preference to reversioner. ('21) 64 Ind Cas 61 (62) (DB) (Cal).

6. **Discretion of Court.** — [1] In exercising the discretion under sub s. (2) the Court at all times prefers a sole administrator to a joint administrator and it is only when the circumstances are sufficiently strong that it will be induced to exercise its discretion in favour of joint grant. (Vol 16) 1929 Bom 397 (397) ✠ (Vol 10) 1923 Pat 348 (350) : 2 Pat 508 (DB).

[2] Even though grant of letters may be refused, probate cannot be refused at the discretion of the Court. (Vol 17) 1930 Sind 91 (93) (DB).

[3] Case under Act V [5] of 1881, Ss. 23 and 41 — Where the applicant is legally entitled to the letters of administration, the Court has no power to order that another person, who had no present interest in the estate, should be associated with the applicant in the grant. ('94) 21 Cal 164 (168) (DB).

7. **Rival claimants : sub-s. (2).** — [1] *Prima facie*, where there are a number of rival claimants, and the claim of one of the rivals is admitted by the other claimants, and the applicant for letters of administration whose claim is admitted is a fit and proper person to be granted letters, in the normal course, letters of administration will be granted to him, and it is unnecessary to consider the status of the other rival claimants. But where, as between the rival claimants *inter se*, the claim of none of the claimants is admitted by the other claimants, it is incumbent upon the Court to determine the status of the applicant before letters are issued to him. (Vol 22) 1935 Rang 54 (55) : 12 Rang 629 (DB)✠(Vol 6) 1919 Low Bur 144 (145) : 9 Low Bur Rul 174 (DB).

[2] Where two persons apply for letters of administration to the estate of a deceased person, and the status of one of the applicants to so apply is disputed while the other is entitled to a portion of the estate the correct procedure for the Court is to ignore the question of status and grant the letters of administration to the applicant entitled to a part of the estate. (Vol 7) 1920 Low Bur 60 (61) (DB).

[3] Rival claimants—Burmese Buddhist dying intestate — Contest between sister and minor alleged to be adopted—*Held* that sister was *prima facie* entitled to

219. If the deceased has died intestate and was not a person belonging to any of the classes referred to in section 218, those who are connected with him, either by marriage or by consanguinity, are entitled to obtain letters of administration of his estate and effects in the order and according to the rules hereinafter stated, namely :—

Where deceased is not a Hindu, Muhammadan, Buddhist, Sikh, Jaina or exempted person.

(a) If the deceased has left a widow, administration shall be granted to the widow, unless the Court sees cause to exclude her, either on the ground of some personal disqualification, or because she has no interest in the estate of the deceased.

Section 218 — Note 7 *(contd.)*

letters of administration. (Vol 5) 1918 Low Bur 63 (64) (DB).

[4] Wife living apart for 8 years but not guilty of any misconduct and rendering wifely duties—She is entitled to letters of administration in preference to grandson (Vol 10) 1923 Rang 150 (151) (DB).

[5] Where upon the granting of letters of administration to the step-children, an appeal was filed by the objector on the ground that she was the adopted daughter of the deceased : *Held*, that as the step-children, in any case, were entitled to a small fraction of the estate, they were entitled to apply for letters of administration and that if the objector wanted to get letters of administration, she must apply for the same and prove that she is the adopted daughter and then she would have preferential right. But if she fails to do so, letters of administration should be given to the step-children. (Vol 22) 1935 Rang 280 (281) (DB).

[6] Application for letters of administration filed by *A* and *B*, proved to have been duly adopted by deceased —Application opposed by *C* also claiming to have been adopted—Court should grant letters to *A* and *B*, without deciding question of *C*'s adoption as *A* and *B* together are entitled to a larger share than *C* and are therefore to be preferred to *C*. (Vol 23) 1936 Rang 239 (240) (DB).

[7] Letters of administration should be granted to mother and daughter in preference to eldest son when she is trustee and other beneficiaries desire it. (Vol 1) 1914 Low Bur 201 (202) : 7 Low Bur Rul 362 (DB).

[8] A husband *prima facie* is entitled to letters of administration to his wife's estate but where his status as such or his fitness to administer the estate are challenged, the Court must determine those issues. (Vol 22) 1935 Rang 54 (55) : 12 Rang 629 (DB).

[9] Conflict of unequal interests between applicants for letters of administration—It should be granted to applicant having greatest interest. (Vol 5) 1918 Low Bur 13 (14) (DB).

8. Question of title. — [1] It is not the practice of the Court in its testamentary and intestate jurisdiction to go into questions of title. (1913) 17 Cal W N 613 (615).

[*See* (Vol 25) 1938 Nag 173 (176) : I L R (1939) Nag 413 (DB). (Probate Court has no jurisdiction to determine questions of title.)]

[2] The object of proceedings under the Probate and Administration Act is to determine only the question of representation of the deceased for the purpose of administering the estate, and not for the purpose of determining any question of title. (Vol 5) 1918 Low Bur 63 (64) (DB).

[3] In proceedings for letters of administration on the ground of adoption, if the applicant would be the only person entitled to inherit the estate of the deceased in case his status as adopted person is proved, the Court is perfectly justified in going into the question of the adoption of the applicant. (Vol 21) 1934 Rang 205 (205) (DB).

[4] Where caveator if he establishes his adoption totally excludes applicant from inheriting, question of adoption must be gone into unless Court thinks it is unnecessary to grant letters to any. (Vol 3) 1916 Upp Bur 7 (7) : 2 Upp Bur Rul 101.

[5] Deceased, Burmese Buddhist — Contest between sister and adopted daughter — Court to inquire into *factum* and validity of adoption. (Vol 5) 1918 Low Bur 100 (101) : 9 Low Bur Rul 163 (DB).

[6] See also under Ss. 278 and 283.

9. Res judicata. — [1] Finding as to who is entitled to letters is not *res judicata* in suit on title to properties, as Court in granting letters considers merely question of representation. (Vol 10) 1923 Rang 9 (10) : 11 Low Bur Rul 331 (DB). ((Vol 5) 1918 Lah 185 : 1918 Pun Re No. 53 (DB) *Foll.*; (Vol 1) 1914 Bom S : 38 Bom 309 (FB), *Dissent.*) ✠ (Vol 5) 1918 Low Bur 63 (64) (DB).

[*See* (Vol 24) 1937 Cal 595 (601) : I L R (1938) 1 Cal 75 (DB). (Application for letters of administration where there is will — Decision in probate Court cannot help parties one way or other in contested title suit — Grant of probate or letters of administration is decisive only of genuineness of will and of right of grantee to represent estate.)]

[2] *A* dying leaving widow *B* — On death of *B*, *C* claiming as reversioner applying for letters — *D*, a transferee from *B*, opposing application and denying that *C* was reversioner — Application for letters dismissed as *C* failed to prove his relationship with *A*— *Held* that this finding on the question of relationship did not operate as *res judicata* in a subsequent suit by *C* to recover property from *D*. (1911) 13 Cal L Jour 547 (556) (DB).

10. "Creditor"—Sub-s. (3).—Word 'creditor' in S. 218 (3) includes Muhammadan widow whose dower is unpaid but does not include widow's creditors. (Vol 28) 1941 Nag 8 (9) : I L R (1941) Nag 164 (DB).

[2] Application for letters of administration by creditor of deceased — Estate left insolvent — Grant of letters of administration ordered. (1911) 15 Cal W N 350 (350).

Section 219—Note 1

Clause (a) :

[1] The word "adultery" in Ill. (i) to S. 219 (a) has not that limited meaning given to the offence of adultery in the Penal Code. It has the ordinary meaning of adultery which is sexual intercourse of a married person with a person of the other sex, whether married or unmarried. (Vol 15) 1928 Mad 797 (797) (D B).

[2] *Held*, that where a person died a Christian his widow was entitled to the grant of letters of administration in preference to deceased's brother who was a Hindu. (Vol 24) 1937 Mad 172 (173) (D B).

[3] Application for grant of letters of administration to father of intestate, passing over widow, alleging misconduct against her — Court refused to make grant without citing widow. (1889) 14 P D 23 (23), *In the goods of Middleton.*

Clause (d) :

[4] Under S. 219, Court is not bound to grant joint letters of administration to parties entitled in equal degree. *Prima facie*, the Court should lean against

Illustrations.

(i) The widow is a lunatic or has committed adultery or has been barred by her marriage settlement of all interest in her husband's estate. There is cause for excluding her from the administration.

(ii) The widow has married again since the decease of her husband. This is not good cause for her exclusion.

(b) If the Judge thinks proper, he may associate any person or persons with the widow in the administration who would be entitled solely to the administration if there were no widow.

(c) If there is no widow, or if the Court sees cause to exclude the widow, it shall commit the administration to the person or persons who would be beneficially entitled to the estate according to the rules for the distribution of an intestate's estate :

Provided that, when the mother of the deceased is one of the class of persons so entitled, she shall be solely entitled to administration.

(d) Those who stand in equal degree of kindred to the deceased are equally entitled to administration.

(e) The husband surviving his wife has the same right of administration of her estate as the widow has in respect of the estate of her husband.

(f) When there is no person connected with the deceased by marriage or consanguinity who is entitled to letters of administration and willing to act, they may be granted to a creditor.

(g) Where the deceased has left property in British India, letters of administration shall be granted according to the foregoing rules, notwithstanding that he had his domicile in a country in which the law relating to testate and intestate succession differs from the law of British India.

[1865 — Ss. 200 to 207.]

220. Letters of administration entitle the administrator to all rights belonging to the intestate as effectually as if the administration had been granted at the moment after his death.

Effect of letters of administration.

[1865 — S. 191 ; Probate and Administration Act, 1881 — S 14]

Section 219 — Note 1 *(contd.)*

joint administration. (Vol 28) 1941 Bom 356 (357) (D B)☆ (Vol 10) 1923 Pat 348 (352) : 2 Pat 508 (D B). (Son is to be preferred to daughter —In cases of equal claimants, first in field should be preferred.)

[5] It is well established according to the English cases that the Court should prefer a sole to a joint administration and even where several persons stand in the same degree of kinship to the deceased, it is the rule to select one only, the selection being made according to certain recognized principles. The interest of the estate which has to be administered and the interests of the parties entitled thereto must be primarily looked to and, other things being equal, a person with business experience and capacity will be preferred to one who has none. A son as a rule will be preferred to a daughter and where none of the usual tests can be applied, the Court frequently appoints the applicant who is first in the field. Where the applicants for administration are quarrelling between themselves and are antagonistic to each other, the administration of the estate is likely to suffer. As they must act jointly, one of them, if obstinate, could defeat the proper administration of the estate. This has also undoubtedly been held to be the practice in this country where administration has frequently been refused to more than one person even where the claimants by reason of kinship are equally entitled to it. (Vol 10) 1923 Pat 348 (350): 2 Pat 508 (D B).

Clause (f) :

[6] Under S. 219 *(f)* before letters of administration can be granted to creditor, it must be shown that there is no person connected with deceased by marriage or consanguinity who is entitled to letters of administration and willing to act. It is not enough if application sets out allegation that deceased left no relatives or persons connected with him by marriage or consanguinity who were entitled to letters of administration and willing to act, but it is necessary just as in case of civil suit, that evidence should be given in support of allegations in application. Mere evidence to the effect that deceased had no wife or children and was not married and that applicant had known him for 5 or 6 years is not enough. It is necessary for applicant to produce evidence that enquiries have been made in the place where father and mother of deceased originally lived which would show whether deceased had any relative still surviving. (Vol 21) 1934 All 885 (885) (D B).

Section 220 — Note 1

[1] Grant of letters of administration does not decide any question of title. It merely decides right to administer. (Vol 13) 1926 Pat 356 (358) (D B).

[2] Grant of letters does not vest property of deceased in the administrator as from the date of death, though for certain purposes the grant may relate back to the death of the deceased. (1911) 34 Mad 395 (397) (D B).

[3] Although an act done by a party who afterwards becomes administrator to the prejudice of the estate, is not made good by subsequent administration yet if the act is for the benefit of the estate, the order relates back. (1910) 12 Cal L J our 537 (543) (D B)☆(Vol 23) 1936 Pat 41 (43) (D B). (An alienation of an estate made by a person prior to the grant of letters of administration of such estate to him is not binding on the estate. But where the estate was mortgaged prior to the grant by such person for the payment of court-fees payable by the estate for obtaining letters, the mortgage is valid and binding on the estate.)

[4] It is doubtful whether a Court trying a claim based on a grant is entitled to go behind the grant. (Vol 27) 1940 Cal 24 (26) (D B).

[5] The fact of a co-widow having obtained letters of administration and not having completely administered the estate can be no bar to the maintenance of a partition suit by the other widow. (1904) 8 Cal W N 658 (661) (D B).

Acts not validated by administration.

221. Letters of administration do not render valid any intermediate acts of the administrator tending to the diminution or damage of the intestate's estate.

[1865 — S. 192 ; Probate and Administration Act, 1881 — S. 15.]

Probate only to appointed executor.

222. *(1)* Probate shall be granted only to an executor appointed by the will.

(2) The appointment may be expressed or by necessary implication.

Illustrations.

(i) *A* wills that *C* be his executor if *B* will not. *B* is appointed executor by implication.

(ii) *A* gives a legacy to *B* and several legacies to other persons, among the rest to his daughter-in-law *C*, and adds "but should the within-named *C* be not living I do constitute and appoint *B* my whole and sole executrix". *C* is appointed executrix by implication.

(iii) *A* appoints several persons executors of his will and codicils and his nephew residuary legatee, and in another codicil are these words,—"I appoint my nephew my residuary legatee to discharge all lawful demands against my will and codicils signed of different dates". The nephew is appointed an executor by implication.

[1865 — Ss 181, 182 ; Probate and Administration Act, 1881 — Ss. 6, 7.]

Section 221—Note 1.

[1] Section 221 refers to cases where letters of administration have been granted to the estate of an *intestate*. (Vol 10) 1923 Cal 1 (3) : 50 Cal 49 (D B) ✠ (Case under S 15, Probate and Administration Act, 1881, corresponding to this section.)

[2] Per *Sankaran Nair J.* : Though a person's title as an administrator does not come into existence until the grant of administration, when granted, it relates back to the time of the death of the testator and it is only the intermediate acts tending to the diminution or damage of the intestate's estate, that are not binding. Where the act is done by a party, who afterwards becomes administrator, for the benefit of the estate or to fulfil the wishes of the testator, the relation back subsists and the act is valid. (1908) 31 Mad 187 (205) (D B) ✠ (Vol 23) 1936 Pat 41 (43) (D B). (Where the estate is mortgaged prior to the grant by a person for obtaining letters of administration, the mortgage is valid and binding on the estate.) ✠ (1910) 12 Cal L Jour 537 (543) (D B).

[3] An act done by a party who afterwards becomes administrator, to the prejudice of the estate is not made good by the subsequent administration for it is only in those cases where the act is for the benefit of the estate that the relation back exists, *Morgan* v. *Thomas*, 8 Ex. 302, *Rel on* (Vol 17) 1930 Mad 218 (220): 53 Mad 480 (D B) (Acknowledgment of liability on behalf of deceased before obtaining grant of letters, held not binding as it tends to the diminution of the estate.)

SECTION 222— SYNOPSIS.

1. "Shall be granted".
2. Executor appointed by will.
3. Appointment of executor by implication : Sub-S. (2).
4. Probate of part of will or portion of estate.
5. Miscellaneous.

1. "Shall be granted".— [1] Although the Court has discretion to refuse grant of letters of administration, no such discretion is given in regard to an application for probate by a person selected by a testator for the administration of his estate. (1898) 20 All 189 (191).

[2] The District Judge has no discretion to refuse an application for probate by an executor named in the will on the ground that in the opinion of the Judge, he is not a fit and proper person to be entrusted with that office. (1894) 21 Cal 195 (198) (D B).

[3] The fact that the testatrix had no power to dispose of some or even all of the property which she purported to dispose of is by itself no ground for refusing probate. (1894) 18 Bom 749 (750) (D B). [(1888) 12 Bom 164, *Foll.*]

[4] Where there is a statutory law governing the grant of probate, it is not open to the Court to refuse grant to a named executor on the ground of his disputing the will or any other ground not authorised by law for the refusal of the grant of probate. (Vol 15) 1928 Cal 580 (581) (D B).

2. Executor appointed by will.—[1] Under S. 222, no person who has not been named in will either expressly or by necessary implication can be granted probate of will. (Vol 21) 1934 All 1053 (1054) (D B).

[2] Under S. 222 probate can be granted only to an executor appointed by the will and where the probate is granted to a universal legatee by mistake the grant itself is invalid in law and under such an invalid grant the universal legatee cannot be constituted an executor to exercise any of the powers conferred on executors under the Act. (1902) 6 Cal W N 787 (791).

[3] A mere exhibition of bad temper and levelling foolish charges against the man whom the testator has appointed, ought not to be allowed to prevent the testator's nominee from becoming the executor in the ordinary way. If, after he has taken charge of the estate, it can be shown that he is in any way causing waste to the estate, no doubt the parties will have ample remedy. (Vol 17) 1930 Cal 803 (804) (D B).

[4] If there had been an appointment of executor either expressly or by necessary implication in the will then the person so appointed would by the act of the testator be constituted into a legal representative, but if no such appointment is made, the mere fact that there are certain dispositions of property and legacies in the will has not the effect of making the legatees the legal representatives. (Vol 15) 1928 Mad 243 (243).

[5] Before the applicants are entitled to probate or grant of letters of administration they must show that they are executors or that under the will the property has vested in them. (Vol 10) 1923 Nag 27 (30) (D B).

[6] If member, without being named, of firm is appointed executor, applicant for probate of will must show that he was member of firm both at date of will and at date of testator's death. (Vol 12) 1925 Cal 606 (606).

3. Appointment of executor by implication : sub-s. (2). — [1] Executor by necessary implication is also sometimes called executor according to tenor of will. Appointment of such executor is question of construction. (Vol 27) 1940 Bom 400 (402, 403).

[2] There is nothing in the Act which imposes upon a testator an obligation himself to name his executor. A testator is not precluded from appointing as his executor such person as some one selected by him may name for that purpose. (1903) 5 Bom L R 639 (641) (DB) ✠ (Vol 21) 1934 All 804 (804) : 57 All 235 (DB).

[3] In order to constitute one an executor according to the tenor of the will it must appear on a reasonable construction thereof that the testator intended him to collect assets and pay his debts, funeral expenses and

Persons to whom probate cannot be granted.

223. Probate cannnot be granted to any person who is a minor or is of unsound mind [a][nor to any association of individuals unless it is

Section 222 — Note 3 *(contd.)*

legacies and where these rights, powers and duties are not conferred he cannot be regarded as an executor by necessary implication. (1907) 6 Cal L Jour 453 (460) (D B).

[4] Where a will provided, "I appoint my sons *S*, *R* and *H* and on behalf of my minor son, and grandson their mothers respectively as executors" — *Held* that the minors were appointed executors by necessary implication (Vol 15) 1928 Cal 164 (165) (D B).

[5] Where will stated as follows : "It is devised that my nephew *X* is to discharge debts due by me to world" : *Held*, that nephew *X* was appointed executor by implication. (Vol 18) 1931 Mad 343 (343, 344) : 54 Mad 266 (D B).

[6] Under the will bulk of property left to deceased's minor daughter — Deceased's mother appointed as her guardian — Mother given full power to spend income, but not the principal — Directions that mother should feast poor on his death anniversaries — *Held* that mother was not appointed executrix by implication. (Vol 14) 1927 Lah 770 (770).

[7] Where under a will, certain property was left to the applicant for probate with a direction that she should pay certain debts, held that the direction was insufficient to show that for general purposes of administration, applicant should be executrix. (1899) 22 Mad 345 (346) (D B). (There ought to have been a petition for grant of letters).

[8] The mere fact that a testator has appointed by will his elder son to be trustee of his minor younger son in the event of the testator's death during the younger son's minority, is not sufficient to indicate that the elder son was appointed executor of his will. (Vol 1) 1914 Low Bur 270 (270) : 7 Low Bur Rul 266 (D B).

[9] Certain clause in a will ran as follows : "As to the power which I have, I give the same to *L* and one whom he appoints shall carry on *vahivat* of property. The general power given to *L* was curtailed by other clauses following it — *Held* that *L* was not appointed executor by the will. (Vol 24) 1937 Bom 397 (398).

4. Probate of part of will or portion of estate.—[1] Where a portion of a will has been introduced through fraud or inadvertence, such portion may be rejected and probate granted of the remainder if the two are severable. (1905) 1 Cal L Jour 109 (113) (DB).

[2] As regards partial admission of wills to probate the law is that when the Court is satisfied that a particular clause has been inserted in the will by fraud or when a clause has been added without instructions of the testator it not having been read over to him probate would be granted omitting such a clause but the Court cannot even by consent order a passage of the will to be expunged which the testator being of sound mind intended to form part of it, and therefore the will as a whole should be admitted to probate having all questions as to disposition to be decided between the contestants in a future litigation. (1911) 15 Cal W N 1014 (1018) (DB).

[3] Where the contents of a lost will are not completely proved, probate can be granted of a portion of a will as there is no probibitory word in the section which prohibits the Court from granting a probate for the proved portion of the will. (1899) 26 Cal 634 (636) (DB).

[4] As a general rule, grant of probate should be made for whole estate of deceased person. In certain circumstances Court would be justified in limiting grant to specific portion of estate but in order to justify that circumstances must be special ones. (Vol 18) 1931 Lah 310 (312) : 12 Lah 584 (DB).

[5] The main idea of probate or letters of administration is that the grant should be of all the property to one individual or to two or more jointly and so it is not permissible to grant certificate or letters of administration in fraction to two or more persons. (Vol 16) 1929 Bom 456 (459) (D B).

[6] See also under Ss. 237, 238 and 248.

5. Miscellaneous. — [1] Probate and Letters—Distinction — Right to obtain probate is personal right of executor—Such right cannot devolve on executor's heir — Under S. 233 in certain cases heir of residuary legatee has same right to obtain letters as legatee himself. (Vol 17) 1930 Pat 618 (621): 9 Pat 698 (D B).

[2] Application for probate cannot be converted into one for letters of administration. (Vol 4) 1917 Pat 209 (211) (DB).

[3] According to English practice, probate may be granted of the will of a person domiciled abroad upon proof that it is a valid will according to the law of domicile, and that there are assets within the jurisdiction. (Vol 3) 1916 P C 202 (204) : 43 Ind App 113 (PC).

[4] Probate Court — Duty of —Concerned only with factum of due execution, and not with intention of testator. The question of probability or improbability assumes greater importance where evidence is not convincing, but not where *factum* has been established. (Vol 18) 1931 Cal 96 (99) (D B).

[5] The function of the Court of Probate is to decide whether the will propounded is the last will of the testator and whether the right to represent the estate may be conferred upon the applicant. The Court of Probate does not profess to decide the disputed title to every item of property mentioned in the will. (Vol 15) 1928 Mad 803 (805).

[6] Where testatrix had lost title in property of which she made disposition by will long before date of will, will is nullity and where there is no will in the eye of law, there can be no probate in respect of it. (Vol 20) 1933 Oudh 84 (85) (DB).

[7] Where the executors express their willingness to take out probate, a legatee cannot obtain letters until the executors have been given a chance of applying for probate, and the fact that the executors have not acted in the way expected by the testator and there is strong reason to suspect that some of them are hostile to the testator's intentions is no ground for granting letters to a legatee without giving the executors a chance to apply for probate. (Vol 18) 1931 Cal 96 (99) (D B).

[8] Probate Court cannot stay proceedings and wait indefinitely for decision of suit subsequently instituted in regard to validity of will. It must itself decide whether will was made in fact. (Vol 2) 1915 Lah 299 (300).

[9] As to the proof of will in accordance with law, *see* notes on S. 283.

[10] The Succession Act extends to nuncupative wills and such wills can be admitted to probate. (1900) 24 Bom 8 (12) (D B).

[11] *Held* it was not open to the testator to appoint the official trustee as constituted by Act XVII of 1864 as executor of his will. (1911) 38 Cal 53 (57) (D B).

Section 223 — Note 1

[1] Minors can be appointed executors. (Vol 15) 1928 Cal 164 (165) (D B).

[2] Court cannot refuse executor probate because it considers him unfit to be executor, unless unfitness is of nature of legal incapacity, that is, minority or unsoundness of mind. (Vol 13) 1926 Mad 605 (606) (D B).

a company which satisfies the conditions prescribed by rules to be made by the [b][Provincial Government] in this behalf.]

[1865 — S. 183 ; Probate and Administration Act, 1881 —S. 8.]

[a] *Inserted* by the Indian Succession (Amendment) Act, 1931 (XVII [17] of 1931), S. 2. The words "nor, unless the deceased was a Hindu, Muhammadan, Buddhist, Sikh or Jaina or an exempted person, to a married woman without the consent of her husband" which originally occurred at the end of this section had been *repealed* by the Indian Succession (Amendment) Act, 1927 (XVIII [18] 1927), S. 2. [b] *Substituted* by A. O. for "Governor-General in Council".

Grant of probate to several executors simultaneously or at different times.

224. When several executors are appointed, probate may be granted to them all simultaneously or at different times.

Illustration.

A is an executor of *B's* will by express appointment and *C* an executor of it by implication. Probate may be granted to *A* and *C* at the same time or to *A* first and then to *C*, or to *C* first and then to *A*.

[1865 — S. 184 ; Probate and Administration Act, 1881 — S. 9.]

Separate probate of codicil discovered after grant of probate.

225. *(1)* If a codicil is discovered after the grant of probate, a separate probate of that codicil may be granted to the executor, if it in no way repeals the appointment of executors made by the will.

(2) If different executors are appointed by the codicil, the probate of the will shall be revoked, and a new probate granted of the will and the codicil together.

[1865—S. 185 ; Probate and Administration Act, 1881— S. 10.]

Accrual of representation to surviving executor.

226. When probate has been granted to several executors, and one of them dies, the entire representation of the testator accrues to the surviving executor or executors.

[1865—S. 186 ; Probate and Administration Act, 1881— S. 11.]

Section 223—Note 1 *(contd.)*

[3] Where the minor is the sole executor or sole residuary legatee, the proper course for the Court is to grant, not probate, but letters of administration with the copy of the will annexed according to S. 244 to his legal guardian until the minor attains majority when probate can be granted to him. (Vol 18) 1931 Lah 229 (230).

[4] An association of individuals registered under Act XXI of 1860 does not cease to be an association of individuals by reason of such registration and therefore is not exempted from the operation of Ss. 223 and 236 of the Succession Act. Such a registered society cannot obtain probate. (1947) 49 Pun L R 228 (229).

Section 224 — Note 1

[1] *A* and *B* appointed executors under *C's* will—*A* obtaining probate — *B* can subsequently apply for probate and Court has no discretion to refuse it. (1898) 20 All 189 (191) ✠ (Vol 21) 1934 All 804 (804) (D B).

[2] Widow named as executrix along with other executors in husband's will— Executors applying for grant of probate — Widow joined as opposite party disputing will but praying that if will be proved she be granted probate along with others — Court cannot refuse grant of probate to her. (Vol 15) 1928 Cal 580 (581) (DB).

[3] Some executors obtaining probate without citation on others — Others entitled to probate as well. (Vol 5) 1918 Cal 107 (107) (D B).

[4] Five trustees unanimously or by majority authorised to act by words in a will — Such words do not affect right of one or two executors to apply for probate. (Vol 17) 1930 Sind 91 (91) (DB).

Section 225 — Note 1

[1] There can be no probate of a codicil distinct from probate of will. Codicil may, in certain cases, vary will to very limited extent and in such cases although codicil is subsequent discovery, probate of codicil may be obtained as practical matter in order to add codicil to will or combine codicil with will. Where probate of will is already granted and codicil subsequently discovered vitally changes will, grant of probate of will and codicil together is in effect new grant necessitating revocation of probate of will. (Vol. 28) 1941 Cal. 417 (420).

[2] "Subsequently discovered will" under S. 225, Succession Act, does not mean will subsequently discovered to be probated by Court. (Vol. 28) 1941 Cal. 417 (422).

[3] Subsequently discovered codicil should be proved at place where will is proved. More so in case of codicil discovered prior to probate of will. (Vol. 28) 1941 Cal. 417 (420, 421).

[4] When a will is propounded in a proper proceeding and codicil is referred to in that proceeding and challenged and those interested in propounding the codicil come in and file a caveat substantially and substantively propounding their codicil, the proceeding must be deemed to be proper and effective proceeding in support of the codicil. (Vol. 28) 1941 Cal. 417 (421).

[5] In the first instance any Court which has power to make the grant has power to revoke the grant. But once probate has issued, it is only the Court which has made the grant which retains the power to revoke such grant. (1941) 45 Cal W N 757 (751, 760),

[6] Where there has already been a grant of probate of a will, there cannot be any further grant of probate of codicil having the effect of revoking the will, until the grant in existence has been revoked. (1941) 45 Cal W N 757 (758).

[7] Where a will and codicil have been in existence and the will is afterwards revoked, it must be shown by the party applying for probate of the codicil alone, that it was intended by the deceased that it should operate separately from the will otherwise it will be presumed that as the will is destroyed, the codicil is also revoked. (1865-69) 1 P & D 72 (73), *In the goods of Greeng.*

Section 226 — Note 1

[1] Under the Succession Act, the executor of an executor is not derivative executor of the original testator. (1874) 12 Beng. L. R. 423 (429) ✠(Vol. 16) 1929 Lah. 546 (547): (DB).

[2] The administrator of an executor is not a derivative executor and on the death of an executor or

Effect of probate.

227. Probate of a will when granted establishes the will from the death of the testator, and renders valid all intermediate acts of the executor as such.

[1865—S. 188; Probate and Administration Act, 1881—S. 12]

Administration, with copy annexed, of authenticated copy of will proved abroad.

228. When a will has been proved and deposited in a Court of competent jurisdiction situated beyond the limits of the Province, whether within or beyond the limits of His Majesty's dominions, and a properly authenticated copy of the will is produced, letters of administration may be granted with a copy of such copy annexed.

[1865—S. 180; Probate and Administration Act, 1881—S. 5.]

Section 226 — Note 1 *(contd.)*

administrator without having fully administered the estate the duty of carrying on the administration of that estate will not devolve upon the deceased executor or administrator's personal representative but on a person appointed for the purpose under S. 258. (Vol. 2) 1915 Mad. 1184 (1188).

SECTION 227—SYNOPSIS.

1. Scope and applicability.
2. Effect of grant.

1. Scope and applicability.—[1] The provisions of this section do not suggest that before probate the executor has no title but are only intended to simplify the proof of his title as dating from the testators' death. The object is only to get rid of the multiplicity of proof in every case where either the will itself or anything done under it by the executor is challenged and the proof of execution and of the appointment of executor would be required. (Vol. 19) 1932 P. C. 92 (94): 55 Mad. 443: 59 Ind. App. 112 (P. C.) (Case under S. 12, Probate and Administration Act, 1881).

[2] Under S. 227, an executor derives his title from the will and probate is the only effective evidence of his title and he can act before probate and subsequent probate validates the intermediate acts. But the provisions of that section do not apply to cases of representation in suits. (Vol. 29) 1942 Cal 571 (574): I. L. R. (1942) 2 Cal 363 (DB). ((1910) 14 C. W. N. 256, *Rel on*; (Vol. 18) 1931 Cal 782, *Not approved*) ✠(Vol. 34) 1947 Pat. 257 (260) (DB). ✠ (Vol. 3) 1916 P. C. 202 (204): 43 Ind. App. 113 (P. C.)

[But see (Vol. 20) 1933 Cal. 234 (236): 59 Cal. 911. (DB.) (According to view adopted by Calcutta High Court regarding wills after 1870, on executors obtaining probate, they immediately become vested by force of statute with whole of estate which belonged to testator at time of his death; or, in other words, vesting takes place on taking of probate, but relates back to time of testator's death and to estate which then belonged to him. ((Vol. 13) 1926 Mad. 434: 49 Mad. 261 (FB), *Not foll*)]

[3] Although a grant of probate is an order of the Court, it does not actually order the grantee to do anything. (Vol. 29) 1942 P. C. 31 (35) (P. C.).

2. Effect of grant—[1] Distinction between effects of letters and probate—While the probate of a will renders valid all intermediate acts of executor as such, letters of administration do not render valid any intermediate acts of the administrator tending to the diminution of damage of the intestate's estate although they entitle the administrator to all rights belonging to the intestate as effectually as if the administration had been granted at the moment after his death. (Vol 6) 1919 Cal. 57 (58) (DB).

[2] Probate once granted authenticates the will against all the world; it affords a ready means of proof of the contents of the will; and it is a complete answer by the executor to any challenge of his authority as such. (Vol. 19) 1932 P. C. 92 (94); 59 Ind App. 112: 55 Mad. 443 (P. C.) ((84) 8 Bom. 241, *overruling* (1883) 7 Bom 966, *Approved.*)

[3] The grant of probate is decisive only of the genuineness of the will propounded and of the right of the executors thereby appointed to represent the estate of the testator. It in no respect decides any question as to the disposing power of the testator or as to the existence of any disposable property (1902) 26 Bom. 792 (796) (D.B). ✠(Vol. 24) 1937 Bom. 341 (355) (DB). (Probate gives no efficacy to the provisions of the will. (1879) 4 Cal. 1; (1894) 18 Bom. 749; (1902) 26 Bom. 792; (1904) 28 Bom. 644 and (Vol 9) 1922 P. C. 212: 49 Ind. App. 37 (P. C.), *Rel. on.*) ✠(Vol. 18) 1931 Mad. 37 (38): 54 Mad. 24 (DB.) (Per Cornish J.—Questions of title of testator or powers of disposition not decided.) ✠(Vol. 10) 1923 Mad 131 (133) (DB) ✠(1910) 34 Bom. 589 (592) (DB) ✠(1887) 12 Bom. 164 (166) (DB).

[4] The effect of probate is to declare the person to whom probate is granted to be entitled to the powers of an executor, whatever his powers as such may be. (1887) 14 Cal. 861 (875) ✠(Vol. 8) 1921 Pat. 397 (401) (DB). (Whether if document is will is question solely for probate Courts—Decision thereon not to be questioned by Court of title or of construction.) ✠(Vol. 6) 1919 Cal. 113 (114) (DB).

[5] The judgment of a probate Court granting or refusing probate is a judgment *in rem* and therefore the judgment of any other Court in a proceeding *inter partes* cannot be pleaded in bar of an investigation in the probate Court as to the factum of the will propounded in that Court. (1893) 16 Mad. 380 (383) (DB). (In this connection, see also notes under S. 41, Evidence Act).

[6] The finding as to execution of will of probate Court binds at any rate parties and privies to probate proceedings. (Vol. 14) 1927 Pat. 61 (75): 5 Pat. 777 (DB).

[7] A finding not essential to the judgment in the probate action cannot be said to operate a finding *in rem*. But probate is conclusive proof of the due execution of the will. (Vol. 14) 1927 Pat. 61 (75): 5 Pat. 777 (DB). (In this connection see also notes under S. 41, Evidence Act.)

[8] Effect of order of probate of Mahomedan will—In the case of a Mahomedan, whose testamentary power only extends to one-third of the estate, the two-thirds claimed adversely to the will by the heirs cannot be affected by the terms of the will or by the effect of probate (1906) 33 Cal, 116 (131): 32 Ind. App. 244 (P C).

[9] See also under S. 273.

Section 228—Note 1

[1] Under this section there is some discretion in the Courts to refuse the grant, as the use of the word "may" indicates. (Vol 8) 1921 Pat 206 (216): 6 Pat L Jour 411 (D B). (Considerations which must weigh with the Court in granting or refusing administration under this section stated).

[2] The grant made under this section is only an ancillary grant in order to give efficacy to the grant already made by another Court of competent jurisdiction and the procedure in this section is analogous to the procedure in England which enabled the probate Court in England to re-seal Scotch, Irish or Colonial grants. Grant under this section is in no sense a grant of probate

Grant of administration where executor has not renounced.

229. When a person appointed an executor has not renounced the executorship, letters of administration shall not be granted to any other person until a citation has been issued, calling upon the executor to accept or renounce his executorship:

Provided that, when one or more of several executors have proved a will, the Court may, on the death of the survivor of those who have proved, grant letters of administration without citing those who have not proved.

[1865—S. 193; Probate and Administration Act, 1881—S. 16.]

Form and effect of renunciation of executorship.

230. The renunciation may be made orally in the presence of the Judge or by a writing signed by the person renouncing, and

Section 228 — Note 1 *(contd.)*

or letters of administration either with or without will annexed, but is a grant of letters with a copy of a properly authenticated copy of the will annexed. (Vol 8) 1921 Pat 206 (209, 211) : 6 Pat L Jour 411 (D B).

[3] If a foreign will has already been proved and deposited in a competent Court abroad, this section, following the English law enables a Court in British India to grant letters of administration to the applicant with a properly authenticated copy of such will annexed, and thus to dispense with the necessity of proof of the original will. But where a foreign will has not been so proved, the Judge will have himself to take evidence as to the due execution of the will, according to the law of the country in which the testator was domiciled, in cases where the property in respect of which probate is sought is movable or personal property. (1896) 20 Bom 607 (610) (DB) ✠ (Vol 8) 1921 Pat 206 (216) : 6 Pat L Jour 411 (D B). (Language employed by the Legislature under this section is not accidental but is deliberate.) ✠ (Vol 25) 1938 Lah 349 (350) : I L R (1938) Lah 562.

[4] The section is merely an enabling section and if the Court considers that there is a question to be decided relating to the validity of the will, the Court is bound to try that question before enabling the executor to act under the will. (Vol 25) 1938 Lah 349 (350):I L R (1938) Lah 562.

[5] An application under this section does not require the petitioner to comply with requirements of Ss. 276, 278, 291 for an application for grant of probate or letters. (Vol 8) 1921 Pat 206 (214, 215) : 6 Pat L Jour 411 (D B).

[6] An application for probate under S. 276 held could be allowed to be amended into a petition under S. 228. (Vol 25) 1938 Lah 349 (350) : I L R (1938) Lah 562.

[7] This section does not require that the will should have been deposited once in foreign Court and should have remained in Court for all time. (Vol 6) 1919 Cal 506 (507) (D B).

[8] A copy authenticated by the notarial seal of a notary as provided for by the judicial process of a foreign Court is a properly authenticated copy within the meaning of this section. Copy authenticated under the seal of the foreign Court is not required. (Vol 6) 1919 Cal 506 (507) (D B).

[*See also* (Vol 26) 1939 Cal 237 (242): I L R (1938) 2 Cal 507 (DB) (Word "proved" as used in S. 228, was not necessarily intended to be equivalent of "admitted to probate" or "probated" but to mean authoritatively established as being valid according to law of place where it was made.)]

[9] Even though case is heard *ex parte*, Judge, before granting letters of administration under S. 228, should satisfy himself that all conditions laid down in that section have been complied with. (Vol 30) 1943 Cal 235 (236) (DB). (The statement of the Pleader that will was proved in French India according to law in force there, is not sufficient to satisfy all the conditions laid down in S. 228.).

[10] Letters of administration — Application by executor's attorney after probate of will was obtained in England — Application annexed with copy of will and not original will—*Held* that letters could not be granted under S. 228, if the authority of the attorney did not permit him to obtain anything beyond a limited grant — Nor was application maintainable under S. 241 as only copy of will was produced and not the original will as required under S. 241. ('05) 1905 All W N 251 (251, 252) (D B).

[11] Applicability of Sch. 1, Art. 11, Court-fees Act to an application for letters under S. 228—*See* A I R Commentaries on Court-fees Act, Sch. I. Art 11.

Section 229 — Note 1

[1] Section 229 refers only to grant of letters and not of probate. (Vol 17) 1930 Sind 91 (91) (D B).

[2] This section contemplates that renunciation of executorship can be made by executor without issue of citation. (Vol 11) 1924 Cal 864 (866) : 51 Cal 745 (DB).

[3] Executor disputing validity of will must accept or renounce his executorship before validity of will is adjudicated upon on application for letters of administration by another person. (Vol 28) 1941 Oudh 293 (294, 295) : 16 Luck 454 (F B).

[4] There is no provision for the issue of a citation to an executor on an application by another executor. S. 229 only comes into operation on an application for letters. (Vol 28) 1941 Oudh 293 (294) : 16 Luck 454 (F B).

[5] Special citation, though necessary, need not necessarily precede enquiry into validity of will. (Vol 31) 1944 Mad 189 (190): 1LR (1944) Mad 658 (DB) ✠ (Vol 15) 1928 Cal 580 (581) (D B). (Widow named as one of executors — Other executors applying for probate—Widow disputing will but prayed that if probate is issued it should be issued in her favour as well—*Held* that there was no renunciation by the widow and so S. 230 did not apply to the case and the Court could not refuse grant to widow).

[6] Where position taken up by applicant was that will was forgery and that ladies through whom he claimed were in possession adversely to whole estate and had acquired title to estate — *Held* applicant was incapable to discharge duties as administrator. (Vol 13) 1926 Pat 356 (357) (D B) ✠ (Vol 7) 1920 Cal 874 (875) : 47 Cal 838 (D B). (Executor failing to attend on issue of general citation — Special citation to issue —Letters to be then granted on failure to attend.).

SECTION 230 — SYNOPSIS

1. Renunciation.
2. "Orally in the presence of the Judge".
3. "By a writing signed".
4. Retraction of renunciation.

1. Renunciation — [1] Renunciation in order to be effective must be in express terms. (Vol 18) 1931 Lah 746 (747) : 13 Lah 233 (D B).

[2] An executor is not bound to renounce his executorship until the validity of the will is established. (Vol 7) 1920 Cal 874 (875) : 47 Cal 838 (D B).

when made shall preclude him from ever thereafter applying for probate of the will appointing him executor.

[1865—S. 194; Probate and Administration Act, 1881—S 17.]

Procedure where executor renounces or fails to accept within time limited.

231. If an executor renounces, or fails to accept an executorship within the time limited for the acceptance or refusal thereof, the will may be proved and letters of administration, with a copy of the will annexed, may be granted to the person who would be entitled to administration in case of intestacy.

[1865—S. 195; Probate and Administration Act, 1881—S. 18]

Grant of administration to universal or residuary legatees.

232. When—

(*a*) the deceased has made a will, but has not appointed an executor, or

(*b*) the deceased has appointed an executor who is legally incapable or refuses to act, or who has died before the testator or before he has proved the will, or

(*c*) the executor dies after having proved the will, but before he has administered all the estate of the deceased,

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Section 230 — Note 1 *(contd.)*

[3] An executor may renounce executorship even before proceedings in Court or before any issue of citation. (Vol 18) 1931 Lah 746 (747): 13 Lah 233 (D B).

[4] Mere failure of an executor to appear in Court in pursuance of the citation issued to him does not amount to his renunciation of the executorship. If he fails to appear, his conduct may amount to renunciation in England, but not in India. (Vol 15) 1928 Lah 470 (471). (Affirmed in (Vol 18) 1931 Lah 746 : 13 Lah 233.)

[5] Renunciation by executor is not invalid by his having intermeddled with estate of deceased. (Vol 11) 1924 Cal 864 (867) : 51 Cal 745 (D B).

[6] Widow named as one of the executors — Other executors applying for probate — Widow disputing will but praying that if probate was issued it should be issued in her favour as well — *Held* that there was no renunciation by the widow and S. 230 did not apply to the case — Court could not refuse grant. (Vol 15) 1928 Cal 580 (581) (D B).

[7] No doubt S. 230 applies to the case of an executor but that by itself does not authorise administrator to act contrary to practice laid down in the section. (Vol 16) 1929 Bom 33 (34) : 53 Bom 172.

[8] An executor once having acted unquestionably as an executor cannot renounce that character and all the liabilities which attach to it and having once acted, the subsequent renunciation is void and he continues liable to be sued in the character of an executor. (1908) 32 Bom 364 (369). (*Rogers* v. *Frank*, (1827) 1 Y & J 409: 148 E R 730, *Foll.*)

2. "Orally in the presence of the Judge." — [1] 'Judge' means Judge of Probate Court. (Vol 15) 1928 Lah 470 (471). (Affirmed in (Vol 18) 1931 Lah 746: 13 Lah 233.)

[2] It is open to an executor to openly assert outside the Court that he is renouncing his executorship, but it is by his statement in Court that he will stand or fall. (Vol 13) 1926 Mad 605 (605) (DB). ((1908) 35 Cal 156, *Rel. on.*)

3. "By a writing signed." — [1] Written renunciation need not be made in Court — Written renunciation proved to Court's satisfaction is enough. (Vol 15) 1928 Mad 797 (797) (DB).

[2] Renunciation in writing in absence of Judge need not be addressed to Court. Signature of renunciant executor is sufficient compliance with S. 230. (Vol 18) 1931 Lah 746 (748) : 13 Lah 233 (DB). ((Vol 15) 1928 Lah 470, *Affirmed.*)

4. Retraction of renunciation. — [1] Renunciation once validly made cannot be retracted. (Vol 18) 1931 Lah 746 (748) : 13 Lah 233 (DB). ((Vol 15) 1928 Lah 470, *Affirmed*; (Vol 11) 1924 Cal 864 : 51 Cal 745, *Rel. on.*) ✠ (Vol 11) 1924 Cal 864 (867) : 51 Cal 745 (DB).

[2] Executor is not concluded by renunciation once declared and may retract his renunciation at any time before grant of administration has passed seal. (Vol 18) 1931 Cal 96 (99) (DB).

[3] Retraction of renunciation of right to obtain letters can be allowed only in proper cases — Mere change of mind not enough. (Vol 16) 1929 Bom 33 (35) : 53 Bom 172.

[4] An official trustee, who has retracted his intention of renouncing probate, is not precluded from applying for probate, where there is no formal renunciation. (1908) 35 Cal 156 (159).

[5] Application to withdraw renunciation of executorship two months after grant of probate is too late. (Vol 10) 1923 Cal 444 (445) (DB).

Section 231 — Note 1

[1] Executor called upon to accept or renounce is compellable if he accepts to take out probate within limited time, otherwise, letters of administration with copy of will annexed may be granted to any competent applicant. (Vol 3) 1916 Bom 315 (315) : 40 Bom 666 (DB).

[2] Word "prove" in Ss. 231, 232 and 234 of Act is used primarily in its ordinary meaning. It is not used in sense of taking of letters of administration or of taking of probate in case of executor. (Vol 28) 1941 Oudh 293 (296) : 16 Luck 454 (FB).

Section 232 — Note 1

Scope and applicability.

[1] A universal legatee is not entitled to probate but only to letters of administration with the will annexed. (1892) 19 Cal 582 (583). ((1871) 7 Beng L R 563, *Not Foll.*)

[2] Where probate had been granted to a universal legatee by mistake, the grant is from the first invalid in law. The grantee cannot under such invalid grant be constituted an executor so as to be empowered to exercise the powers conferred on the executors under the Act. (1902) 6 Cal W N 787 (791) (DB).

[3] Merely because an application for letters of administration is not made in proper form, the previous proceedings in which an order granting letters is passed cannot be deemed to be a nullity and the Judge can allow petitioner to make good the defects and then proceed to make a grant upon the petition. (Vol 23) 1936 Sind 150 (153) : 30 Sind L R 201 (DB).

Clause (b):

[4] Will dedicating certain property to a religious institution and the property to be managed by its

an universal or a residuary legatee may be admitted to prove the will, and letters of administration with the will annexed may be granted to him of the whole estate, or of so much thereof as may be unadministered.

[1865—S. 196; Probate and Administration Act, 1881—S. 19.]

Right to administration of representative of deceased residuary legatee.

233. When a residuary legatee who has a beneficial interest survives the testator, but dies before the estate has been fully administered, his representative has the same right to administration with the will annexed as such residuary legatee.

[1865—S. 197; Probate and Administration Act, 1881 —S 20.]

Grant of administration where no executor nor residuary legatee nor representative of such legatee.

234. When there is no executor and no residuary legatee or representative of a residuary legatee, or he declines or is incapable to act, or cannot be found, the person or persons who would be en-

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Section 232 — Note 1 *(contd.)*

mahant—Original application for letters of administration by mahant — On mahant's death, his successor held entitled to claim letters of administration with respect to the will. (Vol 20) 1933 Lah 265 (265).

Clause (c):

[5] Executor dying after applying for probate—Proper course is to proceed under S. 232 — The question of granting letters is, however, to be considered when a proper application is made by a universal or residuary legatee. (Vol 21) 1934 All 1053 (1054) (DB).

[6] Where an executor dies without having fully administered the estate, the duty of carrying on the administration does not devolve on the personal representative of the deceased executor, but upon a person appointed for the purpose under Ss. 19 and 45, Probate and Administration Act, 1881 (corresponding to Ss. 232 and 258 of the present Act). (Vol 2) 1915 Mad 1184 (1188).

[7] Application for probate by executor—Proceedings are in representative character — Death of executor in course of proceedings — Beneficiaries can continue proceedings though prayer for probate must be changed to one for letters of administration with the will annexed. (Vol 20) 1933 Mad 114 (116) : 56 Mad 346 (DB).

Universal or residuary legatee.

[8] Probate Court can on construction of will, consider whether applicant is residuary or universal legatee. (Vol 22) 1935 Cal 154 (155) (DB).

[9] "Universal legacy" means "testamentary disposition by which testator gives to one or more persons whole of property which he leaves at his decease." Testator bequeathed absolutely to his mistress property and life-interest in his other property reversionary interest in which was to vest after her death in his sister's son : *Held*, that mistress was one of universal legatees. (Vol 29) 1942 Oudh 510 (511) (DB).

[10] Residuary legatee is person who takes surplus or residue of property and residuary bequest implies that legatee is entitled to all property belonging to testator at time of death of which he has not made testamentary disposition. No particular mode of expression is necessary and it is sufficient if intention of testator be plainly expressed in will. (Vol 22) 1935 Nag 239 (240) : 31 Nag L R Sup 30. (Testator made will bequeathing his property in favour of his wife. After her death property was to devolve on his two daughters and on their death, on their offsprings. His daughters and daughter's son claimed that they were residuary legatees under will : *Held*, position of daughters and daughter's sons was that of remainderman or reversioners and not that of residuary legatees. While former two have estate in expectancy, last have estate in possession.)

[11] Though beneficially interested in the estate, a residuary legatee, in his personal capacity is not the proprietor of the estate until after the administration is completed. (Vol 11) 1924 Pat 721 (730) : 3 Pat 880 (DB).

[12] Residuary legacy made to idol—Executor failing to apply for probate — Shebait and not purohit can apply for letters. (Vol 10) 1923 Cal 160 (161) : 50 Cal 238 (DB).

Will—Meaning of.

[13] It cannot be said that the "will" used in the section, must be the original document. The word has been obviously used to mean the disposition. Otherwise in no case, where the will is not in existence the universal or residuary legatee can apply. (Vol 1) 1914 Cal 365 (367) (DB).

Administration of whole estate.

[14] Application for grant of letters of administration with will annexed to it — Except in cases covered by S. 232 (c), application must cover entire estate of deceased. (Vol 33) 1946 Lah 277 (277, 278) (DB). ((Vol 12) 1925 Lah 493 *Overruled.*)

[15] Where none of the estate has been administered, it is necessary for petitioner to apply for grant in relation to whole estate. A petitioner cannot under S. 232 apply for the administration of just so much of the property as suits his purpose. (Vol 23) 1936 Sind 150 (152) : 30 Sind L R Sup 201 (DB).

Section 233 — Note 1

[1] Word 'representative,' appearing in Ss. 233 and 234 should not, in case of Hindu, be restricted to 'legal representative.' (Vol 19) 1932 Bom. 270 (271). (Practice prevailing in office of Testamentary Registrar which requires heir of residuary legatee to obtain representation according to law to estate of residuary legatee before he can apply for letters of administration with will annexed to estate of deceased testator is not correct practice.)

[2] Sole legatee under a will, whose application for letters of administration is rejected, dying during pendency of appeal against order of rejection —His heir can be substituted in his place for carrying on the litigation. (Vol 17) 1930 Pat 618 (621) : 9 Pat 698 (DB).

[3] On the death of a residuary legatee, during the pendency of application for letters of administration with a copy of will annexed, his heir has no right to be substituted in the place of his father in probate proceedings. The reason is that the right to a grant of administration is a personal right and although the heir, if the will is established, may be the proper person to obtain a grant, this is so not by virtue of any right to administration, which he inherits from his father, but by virtue of the fact that as heir of his father to the residue he is the person most interested in the estate. (Vol 6) 1919 Cal 197 (197) : 45 Cal 862.

Section 234 — Note 1

[1] The probate Court has a discretion in granting letters under this section and the High Court will not interfere with that discretion unless it is satisfied that that discretion was unreasonably exercised. (Vol 13) 1926 Pat 356 (357) (DB).

titled to the administration of the estate of the deceased if he had died intestate, or any other legatee having a beneficial interest, or a creditor, may be admitted to prove the will, and letters of administration may be granted to him or them accordingly.

[1865—S. 198; Probate and Administration Act, 1881—S. 21.]

Citation before grant of administration to legatee other than universal or residuary.

235. Letters of administration with the will annexed shall not be granted to any legatee other than an universal or a residuary legatee, until a citation has been issued and published in the manner hereinafter mentioned, calling on the next of-kin to accept or refuse letters of administration.

[1865—S. 199; Probate and Administration Act, 1881—S. 22]

Section 234 — Note 1 *(contd.)*

[2] Where the application is for letters of administration with the will annexed, the probate Court cannot decline to exercise its function of getting the will established because the administration is complete. (Vol 13) 1926 Pat 356 (357) (DB).

[3] The probate Court should not deprive a person of his right to administer the estate if he is entitled to the grant under this section, merely because he does not base his claim on the terms of this section. (Vol 13) 1926 Pat 356 (357) (DB).

"Executor"

[4] Where a minor is appointed executor by implication, it is not a case where no executor has been appointed. Nor is it a case of his declining to act, because in law he could not act. Section 234, therefore, has no application to such a case. Such a case is solely provided for by S. 244. (Vol 18) 1931 Mad. 343 (344) :54 Mad 266 (DB).

"Residuary legatee."

[5] The term "residuary legatee" does not include a universal legatee. The representative of a universal legatee, is therefore not entitled to a grant of letters of administration under this section. (Vol 13) 1926 Pat. 356 (357) (DB).

[6] Where under a will no residuary legatee was named, persons who were entitled to the whole of the estate under the will at the time of application for letters of administration, held might be regarded as residuary legatees for the purposes of S. 234. (Vol 24) 1937 Cal 595 (598) : I L R (1938) 1 Cal 75 (D B).

"Representative."

[7] The word "representative" appearing in S. 234 should not at least in the case of a Hindu, be restricted to a legal representative. (Vol 19) 1932 Bom 270 (271).

[8] Property acquired by a mahant belongs to the religious shrine of which he is the mahant and letters of administration can be granted only to the person who can be shown to have near spiritual relationship with the deceased mahant. ('10) 1910 Pun W R No. 46, p. 113 (114).

"Incapable to act."

[9] Where the applicant challenged the validity of the will, held that the applicant was incapable to act in the discharge of his duties as administrator. (Vol 13) 1926 Pat 356 (357) (DB).

"Who would ..... died intestate."

[10] The nephew of the testator is a person entitled to the grant of letters under this section as he is one of the persons "who would be entitled to the administration of the estate of the deceased if he died intestate." (Vol 13) 1926 Pat 356 (356) (D B). (See also under S. 218.)

"Other legatee having a beneficial interest."

[11] Where no one is appointed an executor by the will of a deceased person, it is open to the Court to grant letters of administration with the will annexed to one of the persons having a beneficial interest in the estate. ('11-12) 6 Low Bur Rul 118 (118) (DB).

[12] *V* bequeathing property to his widow *U* and *P* and *S* sons of his first wife's brother — *U* entitled to life-estate and *P* and *S* to enjoy property on *U*'s death — *S* pre-deceasing *V* — *V*, held must be deemed to have died intestate with regard to *S*'s interest — *P* establishing will but found to be neither residuary legatee nor executor—Court, held ought to grant letters of administration to *U* and could not dismiss *P*'s suit. (Vol 28) 1941 Mad 502 (503) (DB).

[13] Executors turning hostile to intentions of testator—No renunciation—Letters with will annexed can be granted to legatee only after an opportunity has been given to the executors and has not been availed of. (Vol 18) 1931 Cal 96 (99) (DB).

"Creditor."

[14] It would only be in the event of a will being put forward possibly to defraud creditors that a creditor would have *locus standi* to come in probate proceedings. (Vol 2) 1915 Cal 680 (680) (DB).

"Will, proof of."

[15] Proof of will—Court cannot take notice of will unless it is duly and formally proved. Absence of denial of execution of will is no ground for dispensing with the formal proof of the will required by law. (Vol 24) 1937 Lah 69 (70). (('78) 1Cal. L R 362, *Foll.*)

Miscellaneous.

[16] English law—Administration—Grant was made to person who had no interest in the estate of an intestate, where the only next-of-kin, who was solely entitled in distribution, had renounced the right to the grant. (1901) 1901 P 42 (43), *In the goods of Trigg.* ((1862) 2 Sw. and Tr. 595, *In the goods of Johnson Foll.*)

Section 235 — Note 1

[1] This section is merely intended to protect the possible right of the next-of-kin to effect the administration of the estate where no executor has been appointed and where the application is made by a mere specific legatee and it does not relieve an applicant for letters of administration even though he be a universal or residuary legatee from the obligation to call upon reversioners and to give them an opportunity of protecting their vested interests in the reversion. (Vol 16) 1929 Pat 385 (386, 387) (DB).

[2] Section 235 is meant to give an opportunity to the next-of-kin to accept or refuse the letters of administration simpliciter— Notice to show cause why grant should not be made is sufficient compliance of S. 235. (Vol 29) 1942 Oudh 510 (511) (DB).

[3] Next-of-kin means a person, or set of persons, standing nearest in blood relationship to another person. It means, in fact, the natural heir or the heirs. (Vol 29) 1942 Oudh 510 (511) (DB).

[4] Denying validity of will by next-of-kin amounts to refusing letters of administration under S. 235— Subsequent statement that if will were proved to be valid, they should be given letters of administration rather than applicant, is not acceptance of letters of administration under S. 235. (Vol 29) 1942 Oudh 510 (511) (DB).

[5] Citations should always issue to parties who are known to Court to be interested or to claim any interest in estate of deceased, but where parties have

To whom administration may not be granted.

236. Letters of administration cannot be granted to any person who is a minor or is of unsound mind, [a][nor to any association of individuals unless it is a company which satisfies the conditions prescribed by rules to be made by the [b][Provincial Government] in this behalf].

[1865—S. 189; Probate and Administration Act, 1881—S 13]

[a] *See* foot-note [a] to S. 223, *supra*. [b] *Substituted* by A. O. for 'Governor-General in Council."

CHAPTER II.

OF LIMITED GRANTS.

Grants limited in duration.

Probate of copy or draft of lost will.

237. When a will has been lost or mislaid since the testator's death, or has been destroyed by wrong or accident and not by any act of the testator, and a copy or the draft of the will has been preserved, probate may be granted of such copy or draft, limited until the original or a properly authenticated copy of it is produced.

[1865 — S. 208; Probate and Administration Act, 1881 — S. 24]

Probate of contents of lost or destroyed will.

238. When a will has been lost or destroyed and no copy has been made nor the draft preserved, probate may be granted of its contents if they can be established by evidence.

[1865 — S. 209; Probate and Administration Act, 1881 — S. 25.]

Section 235 — Note 1 *(contd)*

not complained of proceedings omission to cite them does not call for revocation of the grant. (Vol 14) 1927 Cal 207 (210) (D B).

[6] There is a broad distinction between cases of wills and cases of intestacy in the matter of citations, for in the former cases, the proof of will in a majority of cases acts prejudicially to the legitimate rights of those who would inherit or be entitled to the properties in the absence of a will and omission to cite them is likely to affect such rights of theirs in their absence, while in the latter class of cases, such omission only affects their preferential right to administer or prevents them from objecting to the personnel of the administrator or to like matters and it is not until there is any mal-administration that they are really affected. (Vol 14) 1927 Cal. 207 (209) (DB).

[7] A creditor who has acquired an interest in the properties left by the deceased, after the testator's death is not entitled to any special citation provided for in S. 235 but only to a general citation under S. 283. ('37) 41 Cal W N 120 (123) (D B).

Section 236 — Note 1

[1] Letters of administration cannot be granted to a minor. (Vol 7) 1920 Pat 197 (198): 5 Pat L Jour 347 (D B). (But they may be granted to his legal guardian or to such person as the Court thinks fit in the circumstances provided for S. 244. An application for such letters must be on behalf of his guardian and not on behalf of the minor through his guardian.)✠(Vol 5) 1918 Low Bur 63 (64) (D B)✠(Vol 6) 1919 Low Bur 53 (54): 9 Low Bur Rul 186 (DB) ✠ ('12) 6 Low Bur Rul 118 (118) (D B). (Where he is not the sole residuary legatee, letters cannot be granted to his guardian.)

[2] Under S. 236, letters of administration cannot be granted to any person who is minor; where such grant is made, High Court would set it aside in revision. (Vol 12) 1925 Pat 323 (325) (D B).

[3] Application for grant of letters of administration by person domiciled in native State—Applicant of age by the law of the State though under 18 years of age—Application held must be refused as applicant had not attained 18 years. ('94) 21 Cal 911 (915).

[4] The registration of an association of individuals under Act XXI [21] of 1860, does not exempt such association from the operation of S. 236 and does not entitle such a registered society to a grant of letters of administration. ('47) 49 Pun L R 228 (229).

Section 237 — Note 1

[1] The petitioner, asking for probate of the draft of a will, under S. 237 must prove that the will has been lost or mislaid since the testator's death. (Vol 15) 1928 Cal 307 (309): 55 Cal 482 (D B).

[2] *(Per Ray J.)*—The words "since the testator's death" qualify only the verb "mislaid"; they have no reference to the word "lost". (Vol 1) 1914 Cal 365 (367) (DB).

[3] A person relying on a lost will must not only show that there was a will but also show what were its terms; and it will be quite impossible to admit to probate a document as a codicil when the terms of the codicil will be incapable of being carried out without independent knowledge of what was in the alleged will. (Vol 28) 1941 Rang 33 (35): 1940 Rang L R 654 (DB).

[4] Probate of draft of will cannot be ordered in the absence of evidence to show that it had been drawn up in accordance with instructions of testator. (Vol 15) 1928 Nag 114 (115).

[5] As to the presumption that arises where a will is in the testator's possession and is not forthcoming after his death, see under S. 238.

Section 238 — Note 1

[1] English law — Where a will is shown to have been in the custody of a testator and is not found at his death the presumption arises that the will has been destroyed by the testator for the purpose of revoking it, but that presumption may be rebutted by the facts. (1876) 1 P & D 154 (217, 218), *Sugden* v. *Leonards*. (Although *presumtio juris*, it is not *presumtio de jure* and the presumption will be more or less strong according to the character of the custody which the testator had over the will.) ✠ (1900) 1900 App Cas 604 (610), *Allan* v. *Morrison* ✠ (1865-69) L R 1 P & D 281 (284, 285), *Gekersley* v. *Platt*.

[2] In India the question as to the presumption of the will being revoked by the testator with reference to the fact of its being in his possession till the time of his death is to be decided more or less upon the circumstances of each case. It cannot be laid down as a rule of law that under certain circumstances a presumption should be made that the will was revoked by the testator or not. (Vol 15) 1928 Cal 307 (309): 55 Cal. 482 (D B). ((Vol 1) 1914 Cal 365 and ('04) 31 Cal 885, *Not foll.*) ✠ ('03) 13 Mad L Jour 135 (136) (D B). (If there is any such presumption it is one of fact and depends on circumstances of each case.)

Probate of copy where original exists.

239. When the will is in the possession of a person residing out of the Province in which application for probate is made, who has refused or neglected to deliver it up, but a copy has been transmitted to the executor, and it is necessary for the interests of the estate that probate should be granted without waiting for the arrival of the original, probate may be granted of the copy so transmitted, limited until the will or an authenticated copy of it is produced.

[1865 — S. 210 ; Probate and Administration Act, 1881 — S. 26.]

Administration until will produced.

240. Where no will of the deceased is forthcoming, but there is reason to believe that there is a will in existence, letters of administration may be granted, limited until the will or an authenticated copy of it is produced.

[1865 — S. 211 ; Probate and Administration Act, 1881 — S. 27.]

Grants for the use and benefit of others having right.

Administration, with will annexed, to attorney of absent executor.

241. When any executor is absent from the Province in which application is made, and there is no executor within the Province willing to act, letters of administration, with the will annexed, may be granted to the attorney or agent of the absent executor ; for the use and benefit of his principal, limited until he shall obtain probate or letters of administration granted to himself.

[1865 — S. 212 ; Probate and Administration Act, 1881 — S. 28]

Section 238 — Note 1 *(contd.)*

[See however (Vol 1) 1914 Cal 365 (367) (D B). ((1876) 1 P & D 154, *Sugden* v. *Leonards* and (1858) 27 L J Q B 173, *Brown* v. *Brown*, *Rel. on.*) ✠ ('04) 31 Cal 885 (891) (D B). ((1876) 1 P & D 154, *Sugden* v. *Lord St. Leonards*, *Foll*.)]

[3] The presumption that a will in the testator's possession and not forthcoming after his death has been revoked, does not arise unless there is evidence to satisfy the Court that it was not in existence at the time of his death. ('04) 31 Cal 885 (892) (D B). ((1867) L R 1 P & D 371, *Finch* v. *Finch*, *Rel. on.*)

[4] Secondary evidence of the contents of the lost instrument may be received as much when it is a will as if it were any other instrument. (1876) 1 P & D 154 (220), *Sugden* v. *Lord St. Leonards*. ((1858) 27 L J Q B 173, *Brown* v. *Brown*, *Foll.*)

[*See also* (Vol 2) 1915 Cal 325 (326) (D B). (Where the original will has been lost and its terms have been satisfactorily proved by secondary evidence, a copy of the terms as found by the Court should be annexed to the probate or letters of administration as the case may be.)]

[5] Various statements of the testator whether before or after the execution of his will, are admissible to prove its contents. (1876) 1 P & D 154 (229), *Sugden* v. *Lord St. Leonards*. ((1864) 33 L J (P M & A) 146, *Quick* v. *Quick*, *Overruled.*)

[6] When the contents of a lost will are not completely proved, probate will be granted to the extent to which they are proved. (1876) 1 P & D 154 (230), *Sugden* v. *Lord St. Leonards*.

[7] Probate can be granted of a portion only of a will to the extent to which its contents are proved, where the other portion is lost. There is no prohibition in S. 238, against such a grant. ('99) 26 Cal 634 (636, 637) (D B).

[*See* ('05) 1 Cal L Jour 109 (113) (D B). (Not a case of lost or destroyed will— Probate may be granted of a portion of a will after striking out or omitting such portions of it as are proved to have been inserted in it without the testator's knowledge.)]

[*See also* (Vol 26) 1939 Cal 674 (677) (D B). (If only a part of the will is lost, probate may be granted if the contents are proved.)]

[8] Where a will is found to have been duly and validly executed by the testator the applicant can prove the will by means of certified copy put in, and obtain grant under S. 237. ('04) 31 Cal 885 (894) (DB). (Case of letters of administration.)

[9] Proof by secondary evidence : See S. 65, Evidence Act.

[10] Production of copy—Presumption as to originals: See under S. 90, Evidence Act.

Section 241 — Note 1

[1] Application for grant of letters of administration by attorney of executor who is absent from province falls under S. 241 and not under S. 242. (Vol 27) 1940 Bom 400 (401).

[2] Where the executors in England were intended by the testator to have power of administering his assets in India as well as in England, their attorney was entitled to grant of letters of administration in India. ('75) 15 Beng L R (App) 8 (10).

[3] Section 241 covers application for letters of administration with copy of will annexed when original cannot be produced because it is held by Court abroad as result of that Court having granted probate. Person possessing property in India dying in England—Executor obtaining probate in England and applying in India through agent for grant of letters of administration—Agent is entitled to letters of administration under S. 241 on application with copy of will annexed. Furnishing security is not condition precedent to granting of probate as S. 228 has no application to such case. (Vol 27) 1940 Mad 680 (681) : I L R (1940) Mad 820 (D B). (('75) 15 Beng. L. R. App. 8, *Foll.*)

[See however ('05) 1905 All W N 251 (251) (D B). (Section 241 empowers the Court only to grant letters of administration with the will annexed. Where there is no will annexed to the application, but only a copy of the will, the application is not maintainable under S. 241. Nor can such an application be granted under S. 228, where the power of attorney does not empower the attorney to obtain anything beyond a limited grant.)]

[4] Where a power of attorney is executed before and authenticated by a Notary Public, the authentication by the Notary is to be treated as the equivalent of an affidavit of identity. In addition to this, an affidavit of identity is not necessary. ('06) 33 Cal 625 (628) (S B).

[5] A declaration as to the execution of a power of attorney executed in Glasgow, before the Chief Magistrate of Glasgow, held was sufficient evidence of the execution of power. ('95) 22 Cal 491 (494).

[6] Where the executor of a will, confirmed in Scotland, granted a power of attorney, authorising the donee "to be my lawful attorney for me and on my behalf to produce to the Supreme Court in the probate jurisdic-

Administration, with will annexed, to attorney of absent person who, if present, would be entitled to administer.

242. When any person to whom, if present, letters of administration, with the will annexed, might be granted, is absent from the Province, letters of administration, with the will annexed, may be granted to his attorney or agent, limited as mentioned in section 241.

[1865 — S. 213 ; Probate and Administration Act, 1881 — S. 29.]

Administration to attorney of absent person entitled to administer in case of intestacy.

243. When a person entitled to administration in case of intestacy is absent from the Province, and no person equally entitled is willing to act, letters of administration may be granted to the attorney or agent of the absent person, limited as mentioned in section 241.

[1865 — S. 214 ; Probate and Administration Act, 1881 — S. 30.]

Administration during minority of sole executor or residuary legatee.

244. When a minor is sole executor or sole residuary legatee, letters of administration, with the will annexed, may be granted to the legal guardian of such minor or to such other person as the Court may think fit until the minor has attained his majority at which period, and not before, probate of the will shall be granted to him.

[1865 — S. 215 ; Probate and Administration Act, 1881 — S. 31.]

Administration during minority of several executors or residuary legatees.

245. When there are two or more minor executors and no executor who has attained majority, or two or more residuary legatees and no residuary legatee who has attained majority, the grant shall be limited until one of them shall have attained his majority.

[1865 — S. 216 ; Probate and Administration Act, 1881 — S. 32.]

Administration for use and benefit of lunatic or minor.

246. If a sole executor or a sole universal or residuary legatee, or a person who would be solely entitled to the estate of the intestate according to the rule for the distribution of intestates' estate applicable in the case of the deceased, is a minor or lunatic, letters of administration, with or without the will annex-

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Section 241 — Note 1 *(contd.)*

tion at Calcutta or elsewhere in India the said confirmation under the seal of the said office and to procure the same to be sealed with the seal of the Supreme Court of India in accordance with the laws thereof" it was held that the power of attorney did not authorise a grant of letters of administration with the will annexed to the donee. ('13) 40 Cal 74 (77).

[7] Grant made under S. 241, subsisting—Administrator is legal representative of deceased and has all powers of administrator. (Vol 27) 1940 Bom 400 (401).

Section 242 — Note 1

[1] Section 242 applies where any person who is entitled to administration in case of intestacy, or universal or residuary legatee, or representative of residuary legatee or legatee with beneficial interest, or creditor of deceased, is absent. (Vol 27) 1940 Bom 400 (401).

Section 243 — Note 1

[1] In granting letters to administer the estate of a deceased person, a limited grant of letters should not be awarded to the attorney of an absent sharer, if a sharer who is entitled to as much as the absent sharer is within the Province and is willing to administer the estate. ('15) 26 Ind Cas 743 (743) (Rang).

Section 244 — Note 1

[1] Minor executors are expressly and solely provided for by S. 244. (Vol 18) 1931 Mad 343 (344) : 54 Mad 266 (D B).

[2] Though, under S. 223, probate cannot be granted to minor, yet under S. 244, when minor is sole executor or sole residuary legatee, letters of administration with will annexed may be granted to legal guardian of such minor until he has attained majority at which period and not before probate of will shall be granted to him and not before. (Vol 18) 1931 Lah 229 (230). (Application for probate can be allowed to be amended into one for letters of admini-tration in such case even in appeal.) ✠ (Vol 7) 1920 Pat 197 (198) : 5 Pat L Jour 347 (DB). (An application for such letters must be on behalf of the minor through the guardian.)

[*See also* (Vol 7) 1920 Pat 102 (105) (DB). (Death of executor under will—Universal legatee may be admitted to prove will and letters granted to him — Universal legatee minor—His mother may be administrator during minority.)]

[3] Grant of administration to minors, see S. 236.

[4] None of Ss. 31, 32 or 33 of Probate and Administration Act (now Ss. 244, 245 or 246 respectively of Succession Act 1925) allows grant of letters to guardian of minor when he is neither executor nor residuary legatee. (Vol 4) 1917 Low Bur 142 (143) (DB) ✠ ('12) 6 Low Bur Rul 118 (118) (DB).

[5] Where estate is mainly moveable letters of administration for its recovery need not be obtained. (Vol 4) 1917 Low Bur 142 (143) (DB).

[6] The Court of Wards as such cannot administer the estate and cannot as such be appointed administrator. There is nothing, however, to prevent the High Court from appointing the nominee of such Court (in most instances the manager) administrator of the testator's estate with the will annexed. ('06) 10 Cal W N 241 (245) (S B) ✠ ('98) 25 Cal 795 (796) (DB) (The Court of Wards is not a person and letters of administration cannot under the law be granted to it.)

[7] The term "legal guardian" means a guardian appointed under the authority of law, that is to say, a guardian appointed under the Guardians and Wards Act. (Vol 7) 1920 Pat 197 (198): 5 Pat L Jour 347(DB).

Section 246 — Note 1

[1] None of Ss. 244-246 authorises a grant of letters to the guardian of a minor who is neither an executor nor a residuary legatee. (Vol 4) 1917 Low Bur 142 (143) (DB).

[2] Section 246 does not warrant letters of administration being granted to minors under the guardianship of their father. ('08) 1908 All W N 257 (257) (DB).

[3] The correct procedure under S. 246 is to file two applications—(i) to be appointed as proper person to re-

ed, as the case may be, shall be granted to the person to whom the care of his estate has been committed by competent authority, or, if there is no such person, to such other person as the Court may think fit to appoint, for the use and benefit of the minor or lunatic until he attains majority or becomes of sound mind, as the case may be.

[1865 — S. 217 ; Probate and Administration Act, 1881 — S. 33.]

Administration *pendente lite*.

247. Pending any suit touching the validity of the will of a deceased person or for obtaining or revoking any probate or any grant of letters of administration, the Court may appoint an administrator of the estate of such deceased person, who shall have all the rights and powers of a general administrator, other than the right of distributing such estate, and every such administrator shall be subject to the immediate control of the Court and shall act under its direction.

[1865 — S 218; Probate and Administration Act, 1881 — S. 34.]

Section 246 — Note 1 *(contd.)*

present lunatic and (ii) for grant of letters. Defect in not filing two applications is one of procedure only and does not in any way affect merits of the case. (Vol 20) 1933 Rang 128 (129) (DB).

[4] On being moved under S. 246 to grant letters of administration for the use and benefit of a minor, the appropriate provision of law which the Judge should follow on deciding to proceed in the matter, is that contained in S. 247. (1900) 2 Bom L R 797 (798) (D B)

[5] Application for grant of administration for use and benefit of minors can be made only under S. 246 It must be shown that minors are solely entitled to estate of intestate. (Vol 16) 1929 Bom 397 (398) ✠ (08) 1908 All W N 257 (257) (DB).

[6] Under the Mitakshara School of Hindu law, a coparcener does not lose his status as a coparcener by reason of subsequent lunacy. Where, therefore, such a member becomes the sole surviving member of the family, he takes the whole property by survivorship, and person who has been appointed curator of the lunatic, is entitled under S. 246 to letters of administration in respect of the coparcenary property. (Vol 23) 1936 Bom 191 (192) (DB).

[7] Natural mother is the proper person to administer the estate on behalf of her son who has been adopted and is a lunatic, in the absence of any one else better qualified to do this. (Vol 20) 1933 Rang 128 (129) (DB).

[8] An application by husband for letters of administration for use and benefit of his minor wife is not maintainable until the applicant had been appointed guardian of his minor wife for the purpose of enabling him to obtain letters of administration for her use and benefit. ('07) 34 Cal 706 (708) ✠ (Vol 18) 1931 Mad 343 (344) : 54 Mad 266 (DB). (('07) 34 Cal 706 and (Vol 7) 1920 Pat 197 : 5 Pat L Jour 47 (D B), *Foll.*)

[9] Administrator appointed on behalf of a lunatic executor — The words "for the use and benefit of the lunatic" create a special liability as between the administrator and the lunatic on whose behalf he is appointed to act, but they do not affect the position of any purchaser or creditor dealing with such an administrator. ('09) 12 Oudh Cas 390 (398) (DB).

[10] Where the estate consists mainly of moveable property, letters of administration are not necessary. (Vol 4) 1917 Low Bur 142 (143) (DB).

[11] In Bombay Presidency, it is competent to the Court to grant letters of administration in respect of undivided family property. (Vol 23) 1936 Bom 191 (193) (DB).

[12] The grant of letters of administration under S. 33, Probate and Administration Act, 1881 (corresponding to S. 246) does not amount to the appointment by the Court of a guardian of the property of the minor or lunatic concerned. Consequently, S. 3, Indian Majority Act, 1875, does not operate to extend the period of minority. (1913) 24 Mad L Jour 450 (453) (DB). (('06) 1906 Pun Re No. 19, page 321, *Rel, on.*).

[13] An administrator appointed under this section, has the full powers of disposal conferred by the Act upon the ordinary administrator. ('09) 12 Oudh Cas 390 (398) (DB).

Section 247 — Note 1

Scope :

[1] The appointment of an administrator *pendente lite* under S. 247 is purely discretionary and the Court has to be satisfied as to the necessity of such an administration, as to the fitness of the proposed administrator, and that it is just and proper under the circumstances of the case to appoint an administrator, before subjecting the estate to the cost of such administration. (Vol 20) 1933 Bom 342 (344) ✠ ('11) 13 Cal L Jour 34 (35) (DB). (In contested probate proceedings, where the case is likely to be protracted, an order for an administrator *pendente lite* cannot be made as of course. In each case the Court must be satisfied that the appointment is necessary and proper.)

[2] Probate suit—Appointment of executor not questioned—Court refused to appoint administrator *pendente lite*. (1870) 2 P and D 85 (86), *Mortimer* v. *Paull*.

[3] The Court does not as a rule appoint a receiver as against executors whenever they have obtained probate, unless there is gross misconduct or mismanagement and waste on their part. If they are rightly in possession and there is no dispute as to their title they will not be replaced by the Court receiver except on strong grounds. The Court refuses to appoint an administrator *pendente lite* where there is a person named in the will as executor whose appointment is not questioned and who can discharge the functions of an administrator. But where the appointment of the executors is questioned and their title is in dispute, because the will itself is challenged on various grounds, there should be a grant of administration *pendente lite*. (Vol 20) 1933 Bom 342 (346).

[4] The Court of probate would grant administration *pendente lite* in all cases where the necessity for the grant is made out. This is so because while the suit is pending, there is no one legally entitled to receive or to hold the assets or to give discharges. ('09) 10 Cal L Jour 263 (275) (DB).

[5] The taking of possession by the executor does not take away the jurisdiction of the probate Court to appoint an administrator during the pendency of an appeal to the High Court. (Vol 11) 1924 Cal 631 (633) (DB).

[6] The Court has, apart from the Succession Act, general jurisdiction to appoint a receiver in any case in which it may appear just and convenient to do so. Such an appointment cannot be claimed as of right merely because the proceedings are contested; but whenever there is a *bona fide* dispute and a case of necessity has been made out, the Court in its discretion

Grants for special purposes.

248. If an executor is appointed for any limited purpose specified in the will, the probate shall be limited to that purpose, and if he should appoint an attorney or agent to take administration on his behalf, the letters of administration, with the will annexed, shall be limited accordingly.

Probate limited to purpose specified in will.

[1865 — S. 219; Probate and Administration Act, 1881 — S. 35.]

249. If an executor appointed generally gives an authority to an attorney or agent to prove a will on his behalf, and the authority is limited to a particular purpose, the letters of administration, with the will annexed, shall be limited accordingly.

Administration, with will annexed, limited to particular purpose.

[1865 — S. 220; Probate and Administration Act, 1881 — S. 36.]

250. Where a person dies, leaving property of which he was the sole or surviving trustee, or in which he had no beneficial interest on his own account, and leaves no general representative, or one who is unable or unwilling to act as such, letters of administration, limited to such property, may be granted to the beneficiary, or to some other person on his behalf.

Administration limited to property in which person has beneficial interest.

[1865 — S. 221; Probate and Administration Act, 1881 — S. 37.]

Section 247 — Note 1 *(contd.)*

generally makes the grant. (Vol 20) 1933 Bom 342 (344).

[7] Where an injunction is necessary, the proper procedure to follow is for the aggrieved party to apply to the Court for the appointment of an administrator *pendente lite* under S. 247, as an administrator *pendente lite* appointed under that section takes charge of the entire estate, both movable and immovable, of the deceased. (Vol 2) 1915 Cal 565 (567) (DB).

[8] Where an application is made under S. 247, the probate Court may, if necessary, grant an injunction either in the exercise of its inherent power or under O. 39 R. 7 of the Civil P. C. (Vol 2) 1915 Cal 565 (567) (DB).

Position of administrator pendente lite.

[9] The position of an administrator *pendente lite* is similar to that of a receiver with this distinction that the administrator *pendente lite* represents the estate of the deceased for all purposes except distribution. (Vol 20) 1933 Bom 342 (343).

[10] Administrator *pendente lite*—His position is analogous to that of receiver in partition suit—Court is empowered to direct administrator to do acts necessary in interest of parties. (Vol 6) 1919 Cal 980 (981) (DB).

Duration of functions of administrator pendente lite.

[11] The duties of an administrator and a Receiver *pendente lite* commence from the order of appointment and if the decree in action is appealed from they do not cease until the appeal is disposed of, while the functions of an administrator during the pendency of a suit terminate with a decree pronounced in favour of a will and do not continue until the executor obtains probate. (Vol 11) 1924 Cal 631 (633) (DB).

[*See also* (1894) P 262 (263), *Waeland* v. *Bird*. (The case is the same if there be no executors.) ✠ ('06) 10 Cal W N 566 (569). (L R (1894) P D 262, *Waeland* v. *Bird*, *Foll.*)

"Control of the Court"

[12] The Succession Act itself should be looked to for the powers necessary for the proper custody of property pending the progress of proceedings under that Act, instead of leaving the Court to the enforcement of provisions contained in the Code of Civil Procedure which were not enacted for such special purpose and which are not so indubitably applicable. (1900) 2 Bom L R 797 (798) (DB).

Liability of administrator pendente lite after termination of functions:

[13] An administrator *pendente lite* who intermeddles with the estate of a deceased person after he ceases to be administrator, can be sued as a quasi executor *de son tort*. ('08) 35 Cal 276 (280) (SB). (('67) 2 Ind Jur (N S) 234 and ('81) 3 Mad 359, *Foll.*) ✠ ('06) 10 Cal W N 566 (569).

Court-fee.

[14] Grant of administration *pendente lite* requires court-fee but person to whom full grant is subsequently ordered is, on termination of proceedings, entitled to such grant free of payment. (Vol 13) 1926 Rang 89 (90) (DB).

Section 248 — Note 1

[1] It is not necessary when executor is appointed for limited purpose specified in will that there should be express direction that he should also carry out all general duties of executor. (Vol 27) 1940 Bom 400 (403).

[2] It is true that an executor, who has been appointed by the testator for the administration of a particular fund, is competent to take out probate limited to that particular fund but where there is no direction as to any particular fund and where the applicants for the grant of letters apply in their capacity as heirs, there is no provision of law which empowers the Court to refuse administration of the whole estate and limit it to a fractional undivided portion thereof. (Vol 5) 1918 Pat 673 (674) : 3 Pat L Jour 415 (DB).

[3] In order to see whether the grant of probate was limited in character or unlimited the Court must see the will. (Vol 8) 1921 Pat 313 (314) (DB).

Section 250 — Note 1

[1] Where in the course of partnership business the partners effect insurance on their own lives and obtain policies, and the account in respect of the policies and the premia payable form a partnership account and not the individual account of the partners, the surviving partners can on the death of one of them apply under S. 250 for letters of administration limited to the policy of the deceased, provided he leaves no general representative or one who is unable or unwilling to act as such. (Vol 18) 1931 Bom 428 (429) : 55 Bom 795.

[2] Section 250 is silent about the subsequent or ultimate devolution of property of which the deceased was trustee: and it applies even if the estate of the deceased derive any benefit from the trust property. (Vol 18) 1931 Bom 428 (430) : 55 Bom 795.

[3] No partner can be said to have any beneficial interest in any particular estate or property until the partnership is wound up and accounts taken. (Vol 18) 1931 Bom 428 (429): 55 Bom 795. (('97) 21 Bom 673 and (1897) 1897 App Cas 11, *Lord Sudeley* v. *Attorney-General*, *Foll.*)

251. When it is necessary that the representative of a person deceased be made a party to a pending suit, and the executor or person entitled to administration is unable or unwilling to act, letters of administration may be granted to the nominee of a party in such suit, limited for the purpose of representing the deceased in the said suit, or in any other cause or suit which may be commenced in the same or in any other Court between the parties, or any other parties, touching the matters at issue in the said cause or suit, and until a final decree shall be made therein and carried into complete execution.

Administration limited to suit.

[1865 — S. 222; Probate and Administration Act, 1881 — S. 38.]

252. If, at the expiration of twelve months from the date of any probate or letters of administration, the executor or administrator to whom the same has been granted is absent from the Province within which the Court which has granted the probate or letters of administration exercises jurisdiction, the Court may grant, to any person whom it may think fit, letters of administration limited to the purpose of becoming and being made a party to a suit to be brought against the executor or administrator, and carrying the decree which may be made therein into effect.

Administration limited to purpose of becoming party to suit to be brought against administrator.

[1865 — S. 223; Probate and Administration Act, 1881 — S. 39.]

253. In any case in which it appears necessary for preserving the property of a deceased person, the Court within whose jurisdiction any of the property is situate may grant to any person, whom such Court may think fit, letters of administration limited to the collection and preservation of the property of the deceased and to the giving of discharges for debts due to his estate, subject to the directions of the Court.

Administration limited to collection and preservation of deceased's property.

[1865 — S. 224; Probate and Administration Act, 1881 — S. 40]

254. *(1)* When a person has died intestate, or leaving a will of which there is no executor willing and competent to act or where the executor is, at the time of the death of such person, resident out of the Province, and it appears to the Court to be necessary or convenient to appoint some person to administer the estate or any part thereof, other than the person who, in ordinary circumstances, would be entitled to a grant of administration, the Court may in its discretion, having regard to consanguinity, amount of interest, the safety of the estate and probability that it will be properly administered, appoint such person as it thinks fit to be administrator.

Appointment, as administrator, of person other than one who, in ordinary circumstances, would be entitled to administration.

(2) In every such case letters of administration may be limited or not as the Court thinks fit.

[1865 — S. 225; Probate and Administration Act, 1881 — S. 41.]

Section 250 — Note 1 *(contd.)*

[4] By virtue of a limited grant under this section the grantee does not acquire, nor has he power rightfully to dispose of any interest outside the limits of that grant. ('03) 5 Bom L R 784 (787) (DB).

[5] Under a will certain immovable property was dedicated to the sheba of an idol; the will appointed an executrix, who was also constituted shebait. The executrix was given power to appoint the next shebait. On the death of executrix, without exercising the power of appointment, an application for grant of letters of administration with respect to debutter property was made by the sister's son of the testatrix : *Held* that the idol was a "beneficiary" and as such, it could not undertake the management of the estate. The administration might be granted to some person on its behalf· *Held also* that the applicant's son, in the absence of other nearer heirs, was the heir entitled to grant ('86) 12 Cal 375 (379, 380) (DB).

[6] Section 250 can apply only to property in which a deceased person had ownership so as to constitute it a portion of his estate although he held it in trust. A mohunt of a math has no ownership in the property of the math. It, therefore, does not form any portion of his estate. A person claiming to be his successor cannot therefore apply under S. 250 for grant of letters in respect of the math property. ('12) 16 Cal W N 798 (800, 801) (DB). (('86) 12 Cal 375, *Discussed and Distinguished.*) ✠ ('13) 17 Cal L Jour 65 (66) (DB). (('12) 16 Cal W N 798, *Foll.*)

Section 251 — Note 1

[1] Dishonest heirs, by refusing to take out probate or letters of administration, would be able to escape liability for the torts of a deceased defendant. But, the Succession Act itself provides the remedy, for by S. 251, it gives to the party himself whose interest it is to continue a suit in which the cause of action survives, the power to have constituted an administrator for the purpose of continuing the litigation. (Vol 23) 1936 Rang 17 (25) : 13 Rang 385 (DB).

[2] Death of defendant testator pending suit — Executors under will not getting substituted although repeatedly asked to do so — Administrator *ad litem* appointed — Executors cannot apply for revocation of the grant of letters of administration—But they can be given supplementary grant of probate, keeping the administrator *ad litem* intact. (Vol 26) 1939 Cal 718(718).

[3] The Court to which an application under S. 251 has to be made is the Court as determined by S. 270. ('93) 17 Bom 689 (690) (DB).

Section 254 — Note 1

Scope.

[1] Section 254 applies to a case where for some just cause, the person who is legally entitled to letters of administration ought to be superseded and the grant made to another person (94) 21 Cal 164 (168) (DB).

[2] Section 254 has no application where there is no want of persons entitled to administration, nor does it empower a Court to make an arbitrary selection from among persons contending for a grant. A grant of

Grants with exception.

255. Whenever the nature of the case requires that an exception be made, probate of a will, or letters of administration with the will annexed, shall be granted subject to such exception.

Probate or administration, with will annexed, subject to exception.

[1865—S. 226; Probate and Administration Act, 1881—S 42.]

Section 254 — Note 1 *(contd.)*

administration must be made to the person who is by law entitled to the property, and it is only in exceptional circumstances that this rule should be departed from. (Vol 7) 1920 Pat 197 (199) : 5 Pat L Jour 347 (DB).

[3] It is desirable that a petition filed under S. 254 should plead specifically the existence of such circumstances as would make the section operate. An averment, however, in the petition that the executors named in the will have "slept over the will", thereby making it possible for one of those executors to misappropriate the trust funds, may be treated as a sufficient averment that the executors named in the will are not willing and competent to execute the will. If necessary the petitioner might have been required to amend the petition making the petition more specific But the vagueness of the plea is not of itself a sufficient ground for the rejection of the petition. (Vol 31) 1944 Mad 189 (190) : I L R (1944) Mad 658 (DB).

[4] It is not in the power of the District Judge acting under S. 254 to direct that somebody else who has no present interest in the estate should be associated with the person who under S. 218 is legally entitled to letters of administration. ('94) 21 Cal 164 (168) (DB)

Discretion of Court.

[5] The wording of S. 254 gives the Court a very wide discretion as to the person who is to be appointed administrator on a petition under the section, and a person interested in the estate can, where there is no executor willing or competent to act, ask the Court to appoint a public official or even such person as the Court may think fit as administrator, rather than allow the will to fail. (Vol 31) 1944 Mad 189 (190) : I L R (1944) Mad 658 (DB).

[6] The grant of letters of administration is purely discretionary and as the object of the grant is the protection and benefit of the estate, the Court would not exercise a proper discretion in refusing to make such a grant to a person having the largest interest in the estate, merely on the ground that it would be more satisfactory to make a grant to another person. It is only when the estate, in the hands of a person having the largest interest is likely to suffer irretrievable loss and damage, that a refusal would be justified. (Vol 7) 1920 Pat 197 (199) : 5 Pat L Jour 347 (DB).

[7] If persons who are not next of kin and are not legatees, come before the Court asking grant, then the Court is entitled under this section to say that a proper case must be made out for making such a grant. (Vol 14) 1927 Cal 654 (656) (DB).

[8] A grant of letters may be made under S. 254 to a daughter in-law of the deceased, as guardian of her minor son, who is neither an executor nor a residuary legatee. (Vol 4) 1917 Low Bur 142 (143) (DB).

[9] *A* under a will devoted the whole of property to idol and appointed his wives and son *H* executrices and executor of will. The executrices and executor never applied for probate. The son *H* dealt with the property as if there was no will and mortgaged it. The property was sold in execution of the mortgage decree. Thereafter *H's* minor sons applied for probate of the will under S. 254 through their mother who was a pardanashin woman as their next friend : *Held* that the application could not be considered *bona fide* and therefore could not be granted. The mother, the next friend, was a pardanashin woman and the husband, the defaulting executor, would manage the whole business, if grant was made. ('08) 7 Cal L Jour 558 (559) (DB).

"Leaving a will . . . . to act."

[10] The expression "leaving a will of which there is no executor willing and competent to act" does not mean that at the time of the testator's death, when the will came into effect, there was no executor willing to act, but it clearly refers to the time when the Court has to decide as to whether there is no executor willing and competent. The fact that a named executor has acted for a short time can make no difference, so far as the powers of the Court are concerned, if when the Court has to take action, there is no executor willing and competent to act. (Vol 15) 1928 Mad 797 (798) (DB).

Considerations for exercising discretion.

[11] It is well established according to the English cases that the Court should prefer a sole to a joint administration and even where several persons stand in the same degree of kinship to the deceased, it is the rule to select one only, the selection being made according to certain recognized principles. The interest of the estate which has to be administered and the interests of the parties entitled thereto must be primarily looked to and, other things being equal, a person with business experience and capacity will be preferred to one who has none. A son as a rule will be preferred to a daughter and where none of the usual tests can be applied, the Court frequently appoints the applicant who is first in the field. Where the applicants for administration are quarrelling between themselves and are antagonistic to eath other, the administration of the estate is likely to suffer. As they must act jointly, one of them, if obstinate, could defeat the proper administration of the estate. This has also undoubtedly been held to be the practice in this country where administration has frequently been refused to more than one person even where the claimants by reason of kinship are equally entitled to it. (Vol 10) 1923 Pat 348 (350) : 2 Pat 508 (DB). (('80) 5 Cal L R 368, *Foll.*)

[12] Consanguinity of administrator, safety of estate and probability of proper administration should be looked to—The Court is not to be guided by the wishes or feelings of the parties but by the benefit of the estate. (Vol 12) 1925 Cal 178 (180) (DB).

[*See also* (1872-75) 3 P & D 207 (208, 209), *In the goods of Hale.* (Administration—Person dying intestate —Mere fact that the persons who would be entitled to administration desire that some one else should be appointed administrator, does not constitute such a special state of circumstances as to justify a grant under S. 73, English Probate Act (20 and 21, Vict. C. 77).)]

[13] English law — The Court of probate has no power to refuse probate to any executor appointed by a testator by reason of the badness of his character only, but only in certain cases, namely, he must be resident out of United Kingdom at the time of the testator's death and there must be a necessity or convenience that such person should not be allowed to act. In these cases the Court might make grant of administration to some other person. (1872-75) 3 P & D 48 (49), *In the goods of Samson.*

Section 255 — Note 1

[1] Section 255 deals with those cases wherein certain properties have to be excepted from the letters of administration for special reasons. Under that section

256. Whenever the nature of the case requires that an exception be made, letters of administration shall be granted subject to such exception.

Administration with exception.

[1865—S. 227; Probate and Administration Act, 1881—S. 43.]

Grants of the rest.

257. Whenever a grant with exception of probate, or of letters of administration with or without the will annexed, has been made, the person entitled to probate or administration of the remainder of the deceased's estate may take a grant of probate or letters of administration, as the case may be, of the rest of the deceased's estate.

Probate or administration of rest.

[1865—S. 228; Probate and Administration Act, 1881—S. 44.]

Grant of effects unadministered.

258. If an executor to whom probate has been granted has died, leaving a part of the testator's estate unadministered, a new representative may be appointed for the purpose of administering such part of the estate.

Grant of effects unadministered.

[1865—S. 229; Probate and Administration Act, 1881—S. 45.]

Section 255 — Note 1 *(contd.)*

the Probate Court cannot go into the question of the validity of the will with reference to Hindu law. (Vol 23) 1936 Lah 378 (379).

[2] A will may be in part admitted to probate and in part may be refused. If the Court shall be satisfied that a particular clause has been inserted in the will by fraud without the knowledge of the testator in his life-time or by forgery after his death, or if he has been induced by fraud to make it a part of his will, probate will be granted of the instrument with the reservation of the clause; or where a clause has been introduced *per incuriam* and the deceased executes the paper not having given any instruction for such clause and it not having been read over to him, probate would be granted of the remainders of the paper omitting such clause. ('11) 15 Cal W N 1014 (1017, 1018) (DB) ✠ ('05) 1 Cal L Jour 109 (113) (DB). ((1882) 7 App Cas 192, *Marryann Rhodes* v. *Sarahann Rhodes*; (1847) 1 H L C 191, *Robert Allen* v. *Richard M'Pherson* and (1882) 7 P D 68, *Morrell* v. *Morrell, Foll.*)

[3] There is no provision in the Succession Act which authorizes the Court to grant probate limited to part of the estate in cases where under S. 211 the whole estate is vested in the executor. Section 255 is in no way applicable. ('82) 6 Bom 460 (462) (DB).

[*See also* (Vol 30) 1943 Oudh 151 (154) (DB). (Will appointing 20 persons as sole executors—Under S. 211, property vests in them and they are legal representatives of deceased—Fact that widow and daughter are in possession of substantial portion does not attract S. 255 and no probate can be granted to the executors in respect of portion of estate only in their possession—They must pay court-fee on entire value of estate.)]

[4] Different people cannot get individual grants of letters of administration limited to the particular property. Where there has been one partial grant already there should be no other grant save with reference to rest of estate. (Vol 14) 1927 Cal 654 (654) (DB).

[5] When a provision is found in a will, under which the writer gets a substantial advantage and the evidence is not sufficient to remove the suspicion attaching to the provision and to satisfy the Court that the testator knew and approved of the said provision, probate should not be granted of that part which confers the benefit but probate should not be refused in respect of the remainder of the will. (Vol 16) 1929 P C 45 (50) : 56 Ind App 62 : 8 Pat 382 (PC).

[6] A person to whom coparcenary property has passed by survivorship has right to apply for representation under S. 255 or S. 256 as the case may be. (Vol 22) 1935 Bom 242 (243) : 59 Bom 644.

[7] The grant contemplated by Ss. 255 and 256 need not mention specifically properties in respect of which grant is made. (Vol 22) 1935 Bom 242 (244) : 59 Bom 644.

Section 256 — Note 1

[1] Where there is a will or not, a person to whom coparcenary property has passed by survivorship has the right to apply for representation under S. 255 or S. 256, as the case may be. (Vol 22) 1935 Bom 242 (243) : 59 Bom 644.

[2] As a rule, in all cases, general letters of administration of a Hindu's estate must be taken out for the immovable as well as the movable property. Limited administration can only be granted under special circumstances. ('81) 6 Cal 483 (484) (SB)✠ ('84) 10 Cal 554 (557). (Considering the special circumstances of the case, letters of administration were granted in respect of separate estate of the deceased, departing from the rule laid down in (1880) 5 Cal 2.)

[*See* ('80) 5 Cal 2 (3). (If Hindus take out letters of administration at all, they must take out general letters. Letters of administration limited to certain property cannot be granted.)]

[3] Where property, purchased with the funds of the joint family and belonging to it, stands in the name of the karta of the family in his individual name, the legal estate vests in the karta while the beneficial interest is in the family. On the death of such person, no change takes place so far as beneficial interest is concerned, but the legal estate does not pass by survivorship to the other coparceners, and therefore letters of administration may be granted to the surviving coparceners as his "heirs" to the legal estate in such property and limited to it alone. (Vol 29) 1942 Lah 173 (175) : ILR (1942) Lah 717 (FB).

[4] Court should prefer a sole to a joint administration. (Vol 10) 1923 Pat 348 (350) : 2 Pat 508 (DB).

Section 257 — Note 1

[1] Where there has been one partial grant already, it is unreasonable that there should be any other grant save with reference to the rest of the estate. (Vol 14) 1927 Cal 654 (654) (DB).

[2] Where *A* an executor, appointed by the testator has dealt with certain properties belonging to the testator and where *B* has subsequently obtained letters of administration, the latter will be confined to the properties other than those dealt with by the executor. ('12) 17 Ind Cas 868 (874) (DB) (Low Bur).

Section 258 — Note 1

[1] The word "may" in the section is to be treated as directory and as showing the course which the Legislature intends shall be adopted. ('74) 12 Beng L R 423 (428) ✠('93) 16 Mad 71 (72) (DB).

[2] The Court may properly presume, in the absence of anything to the contrary and after a long lapse of time, that the estate has been administered. ('06) 10 Cal W N 432 (434) (DB).

259. In granting letters of administration of an estate not fully administered, the Court shall be guided by the same rules as apply to original grants, and shall grant letters of administration to those persons only to whom original grants might have been made.

Rules as to grants of effects unadministered.

[1865—S. 230; Probate and Administration Act, 1881—S. 46.]

260. When a limited grant has expired by efflux of time, or the happening of the event or contingency on which it was limited, and there is still some part of the deceased's estate unadministered, letters of administration shall be granted to those persons to whom original grants might have been made.

Administration when limited grant expired and still some part of estate unadministered.

[1865—S. 231; Probate and Administration Act, 1881—S. 47.]

CHAPTER III.

ALTERATION AND REVOCATION OF GRANTS.

261. Errors in names and descriptions, or in setting forth the time and place of the deceased's death, or the purpose in a limited grant, may be rectified by the Court, and the grant of probate or letters of administration may be altered and amended accordingly.

What errors may be rectified by Court.

[1865—S. 232; Probate and Administration Act, 1881—S. 48.]

Section 258 — Note 1 *(contd.)*

[3] Where the will directed six persons to be panchas of whom one was to supervise the work of administration and the panchas were given power to appoint other panchas : *Held*, that power could only be exercised by the whole body of panchas. Any power to appoint by will was excluded. At the most one panch would be a person who might apply for letters of administration *de bonis non*. (Vol 10) 1923 Bom 216 (216) (DB).

[4] As a result of the grant of letters of administration *de bonis non*, it does not follow, as of necessity, that the administrator will obtain any property. Whole of testator's estate created trust for certain idol and two persons appointed executors and also shebaits—Testator's daughter obtaining letters of administration *de bonis non* : *Held* that as soon as debts and legacies and funeral expenses were paid, executors would hold the property upon the trusts of the will and there would be no property administered by the executors, which would pass to any administrator *de bonis non*. (Vol 8) 1921 Cal 142 (143) (DB).

[5] Under will of Hindu, self-acquired property bequeathed to his infant son — Death of executor before estate was fully administered — Suit by testator's son for recovery of arrears of rent by his next friend : *Held* letters *de bonis non* should have been taken out and without them the suit was not maintainable. (1893) 16 Mad 71 (72) (DB).

[6] Dedication, under will, of property to idol—Executrix appointed — Executrix also constituted shebait — Executrix also given power to appoint next shebait — Death of executrix without making appointment—Application for grant of letters in respect of debutter property : *Held* that this section authorised such a grant, inasmuch as no shebait having been appointed, portion of the estate of the testator remained to be administered. ('86) 12 Cal 375 (379) (DB).

[7] Where an executor dies without having fully administered the estate, the duty of carrying on the administration of the estate does not devolve upon the deceased executor or administrator's personal representative but on a person appointed for the purpose under S. 258. (Vol 2) 1915 Mad 1184 (1188) ⁂(Vol 7) 1920 Upp Bur 45 (46) : 3 Upp Bur Rul 208. (The English law of derivative executorship does not apply in India and upon the death of the executor or administrator of a deceased person, the estate of the latter is absolutely unrepresented until some one comes forward and gets a grant of letters.) ⁂('74) 12 Beng L R 423 (429).

Section 259 — Note 1

[1] Section 259 affords an argument against the possibility of there being such a thing as derivative executorship. The existence of a derivative executor is not contemplated by the Act and the representation is treated as coming to an end on the death of the executor. ('74) 12 Beng L R 423 (428).

Section 260 — Note 1

[1] Letters of administration granted to widow of deceased testator *durante minoritate* of infant son—Death of son intestate and still infant—Estate still unadministered : *Held* widow was entitled to administration *de bonis non* to that estate. ('02) 6 Cal W N 581 (582) (SB).

Section 261 — Note 1

[1] No Court other than the probate Court is competent to hold that the letters of administration had been imperfectly or inaccurately drawn up. (Vol 2) 1915 Cal 325 (326, 327) (DB).

[2] Application to rectify clerical error by omitting a word and inserting another which ought to have been there : *Held* that an order for omitting the words could be given but not for inserting another. (1901) Prob. D 190 (192), *In the goods of Louis Schott*.

[3] Will as originally drawn up bequeathing properties to G. B. White whereas the testator intended to bequeath to G. B. Ward—Will executed by striking out the word White and inserting Ward in its place—Change not initialled by testator—Probate issued in the name of White—On an application to amend, the substitution of the word White with Ward was allowed. ('79) 4 Cal 582 (582).

[4] Solicitor, in a will, under a mistake describing testatrix's interest in a property as in undivided moiety thereof — Draft submitted for approval returned with alterations in respect of other particulars—Finding of fact that the testatrix did not approve of that part which contained the restricted description of the extent of her interest in the property — Application to amend the will by deleting the restrictive words was allowed. (1902) Prob D 234 (237), *Brises* v. *Baillie Hamilton*.

Procedure where codicil discovered after grant of administration with will annexed.

262. If, after the grant of letters of administration with the will annexed, a codicil is discovered, it may be added to the grant on due proof and identification, and the grant may be altered and amended accordingly.

[1865—S. 233; Probate and Administration Act, 1881—S. 49.]

Revocation or annulment for just cause.

263. The grant of probate or letters of administration may be revoked or annulled for just cause.

Explanation.—Just cause shall be deemed to exist where—

(a) the proceedings to obtain the grant were defective in substance; or

(b) the grant was obtained fraudulently by making a false suggestion, or by concealing from the Court something material to the case; or

(c) the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant, though such allegation was made in ignorance or inadvertently; or

(d) the grant has become useless and inoperative through circumstances; or

(e) the person to whom the grant was made has wilfully and without reasonable cause omitted to exhibit an inventory or account in accordance with the provisions of Chapter VII of this Part, or has exhibited under that Chapter an inventory or account which is untrue in a material respect.

Illustrations.

(i) The Court by which the grant was made had no jurisdiction.

(ii) The grant was made without citing parties who ought to have been cited.

(iii) The will of which probate was obtained was forged or revoked.

(iv) *A* obtained letters of administration to the estate of *B*, as his widow, but it has since transpired that she was never married to him.

(v) *A* has taken administration to the estate of *B* as if he had died intestate, but a will has since been discovered.

(vi) Since probate was granted, a later will has been discovered.

(vii) Since probate was granted, a codicil has been discovered which revokes or adds to the appointment of executors under the will.

(viii) The person to whom probate was, or letters of administration were, granted has subsequently become of unsound mind.

[1865—S. 234; Probate and Administration Act, 1881—S. 50.]

SECTION 263—SYNOPSIS

1. Scope and applicability.
2. Right to apply.
3. Minors.
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1. Scope and applicability.—[1] Section 263 is exhaustive of the cases in which just cause shall be deemed to exist for the revocation or annulment of the grant of letters of administration. (Vol 28) 1941 Rang 259 (261) : 1941 Rang L R 376 (DB)✠(Vol 7) 1920 Cal 584 (586) : 47 Cal 115 (DB).

[2] The section is exhaustive and not merely illustrative. (Vol 13) 1926 Lah 352 (352) : 7 Lah 270 (DB).

[3] The section applies to the case of a Hindu will and an application for revocation of such a will lies under the provisions of this section. ('81) 5 Bom 638 (640).

[4] A proceeding for the revocation of probate is not suit within the meaning of O. 23, Rr. 1 and 3 of the Civil P. C. ('10) 12 Cal L Jour 91 (95) (DB).

[5] Application for revocation by a person who contested the grant when it was made is in substance an application for review and is not maintainable unless accompanied by a copy of the order. (Vol 26) 1939 Rang 215 (216) : 1939 Rang L R 601 (DB).

2. Right to apply.—[1] Other persons falling within the definition "persons claiming to have any interest etc.", in S. 283 (1) (c) who are not parties to the proceedings in which probate or letters of administration were granted or though entitled to be cited were not served with personal notice thereof have for their only remedy an application for the revocation or annulment of the grant of probate or letters of administration, and in making that application they will be limited by the expression "just cause" as defined in that section. ('81) 6 Cal 460 (471) (DB).

[2] It is not only persons who would be cited before grant of probate who could apply to revoke the probate but also persons who allege that they have been defrauded. (Vol 31) 1944 P C 11 (12, 13) : 71 Ind App 1: ILR (1944) Kar PC 61 Sup (PC).

[3] The applicant for revoking probate must show that he is interested in the alleged will. It may be slight or even a bare possibility; but there must be some interest which the applicant is *prima facie* entitled to claim in the estate of the deceased. (Vol 20) 1933 Bom 370 (372) ✠(Vol 19) 1932 Pat 95 (96): 10 Pat 817 (DB). (Application on the ground that deceased testator had no right to the properties which were alleged as held by him in his official capacity : *Held* the petitioner had no *locus standi*.)

[4] A person disputing the right of a deceased testator to deal with certain property as his own cannot be properly regarded as having an interest in the estate of the deceased. ('90) 17 Cal 48 (52) (DB). (('82) 8 Cal 570 (DB), *Dissented*.)

Section 263—Note 2 *(contd.)*

[5] Applicant for revocation must show interest in the estate of the deceased. (Vol 4) 1917 Pat 532 (532) (DB)✠ (Vol 6) 1919 Low Bur 38 (38) : 9 Low Bur Rul 273 (DB). (Applicant having no right to claim a share in the estate : *Held* he had no interest to apply for revocation.)

[6] No one who has no immediate right to and is not willing to take a grant of letters of administration in substitution should be allowed to apply for revoking a probate. (Vol 7) 1920 Low Bur 106 (107) (DB).

[7] Where an immediate reversioner is precluded from applying for revocation the remoter reversioner can do so. (Vol 9) 1922 Cal 38 (40) (DB)

[8] Legatee under an earlier will has *locus standi* to apply for revocation of probate of later will. (Vol 6) 1919 Cal 1012 (1012) (DB).

[9] *B* died leaving will under which *K* who was appointed executor obtained probate —*N*, the lady's husband, after the death of *B* and before *K's* application for probate selling one of the properties comprised in the will to *C* — *C* applying for revocation first as purchaser of *B's* property from her heir-at-law but later on changing the plea setting up *N* as being independently entitled to it under the will of *N's* father : *Held* that *B's* application for revocation would be only if he claimed the property as purchaser from her heir-at law. (Vol 26) 1939 Cal 87 (88) : ILR (1938) 2 Cal 173 (DB).

[10] A person interested by assignment in the estate of a deceased may, where a will has been set up and proved at variance with his interests, apply for revocation of the probate of the will set up. (Vol 2) 1915 Cal 421 (422) (DB) (Purchaser of interest in property of deceased can apply.)

[11] Assuming that a purchaser from a heir can apply to have the grant of a probate revoked it is doubtful whether an attaching creditor could do so at least in a case which is not founded on the ground that the probate has been obtained in fraud of creditors. ('84) 10 Cal 19 (27, 28) : 10 Ind App 80 (PC).

[12] Alienees since probate are not necessary parties to proceedings for revocation of probate on the ground of proceedings being defective in substance. But after revocation they may be allowed to be heard when the propounder is called upon to prove the will. (Vol 18) 1931 Cal 713 (717) (DB).

[13] An applicant who was a member of joint family with deceased is not entitled to revoke. (Vol 4) 1917 Pat 532 (532) (DB).

[14] Objection that applicant for revocation did not allege any interest in property cannot be raised for first time in appeal — Order will stand unless shown to be wrong on merits. (Vol 12) 1925 Lah 428 (429) : 6 Lah 180 (DB).

[15] The District Judge has no power to commence proceedings to revoke the probate on his own motion. ('04) 31 Cal 628 (640) (DB).

[16] See also under S. 283.

3. Minors. — [1] A minor when properly represented can apply for revocation of probate where guardian was appointed without his consent and refused to accept citation. (Vol 7) 1920 Cal 630 (631) (DB).

[2] Where a minor is interested and no citation is duly served upon the properly appointed guardian *ad litem* of the infant it would be open to the infant on attaining majority to institute proceedings for the revocation of probate. (Vol 14) 1927 Bom 387 (388).

[*See also* (Vol 3) 1916 Cal 885 (887, 888) (DB). (Case of intestacy—Letters of administration obtained by brother—Minor interested as only heir left by deceased, neither cited nor properly represented — After attaining majority, minor heir held entitled to obtain an order for revocation of grant and have the will proved in solemn form.)]

[3] Contentious proceedings — Probate granted in consequence of a compromise between the *sui juris* disputants—Prayer by one of the disputant as guardian on behalf of a minor claimant that compromise be sanctioned — Court passing no formal order : *Held* that the minor had a right to apply for the revocation of probate on attaining age and that he may become debarred from exercising such right by his acquiescence and delay for a long time or by subsequent ratification of the dispositions of the will. ('10) 14 Cal W N 1068 (1073) (DB).

4. Bar of res judicata.—[1] The section allows one party after another to attack in turn the grant of probate but does not allow every succeeding opponent to re-open all previous attacks. It does not also enable parties already defeated to press their attacks over again. (Vol 11) 1924 Mad 578 (581) (DB).

[2] The principle of *res judicata* applies even though the words of S. 11, Civil P. C., may not be strictly applicable where the matter has previously been in issue between the same parties and the validity of the will has been fully and finally established. (Vol 11) 1924 Mad 578 (580) (DB).

[3] *Obiter.*— Decision under S. 263 against the applicant that he had not such interest in the subject-matter of the bequest as to justify his bringing an application for revocation of probate held operated as *res judicata*. (Vol 27) 1940 Cal 236 (240) . ILR (1940) 1 Cal 14.

[4] An application for revocation by a party who contested the order at the time at which it was made, and having had the opportunity did not put forward a particular just cause is *prima facie res judicata* as between the parties. (Vol 26) 1939 Rang 215 (216) : 1939 Rang L R 601 (DB).

[5] When once probate of a will has been granted in solemn form, no one who has been cited or taken part in the proceedings or who was cognisant of those proceedings and stood by can afterwards seek to have it cancelled. ('94) 17 Mad 373 (376) (DB) ✠ ('81) 5 Bom 638 (641) ✠ (Vol 29) 1942 Cal 283 (288) : ILR (1941) 2 Cal 1 (DB)✠(Vol 3) 1916 Cal 623 (626) (DB).

[*See also* (Vol 27) 1940 Cal 296 (301) : ILR (1940) 1 Cal 33 (DB). (If the non-cited party had knowledge of the probate proceedings, absence of citation would be a defect but not a defect of substance sufficient to revoke the grant under S. 263.)]

[See however (Vol 3) 1916 Cal 938 (946) (DB). (Applicant pardanashin lady— Will proved in common form without citation on her — Infants practically deprived of whole inheritance by will — Mere knowledge on the part of applicant of proceedings is not sufficient ground for refusal to recall probate.)]

[6] Where citations have been served and a party in cognisant of the proceedings for probate or letters of administration and chooses to stand by and allow the proceedings to be concluded in his absence, he will not be allowed to come in afterwards and have the grant revoked. (Vol 29) 1942 Cal 283 (286) : ILR (1941) 2 Cal 1 (DB).

[7] Person entitled to special citation not cited but otherwise aware of the proceedings is bound by the proceedings. (Vol 9) 1922 Pat 406 (407) : 1 Pat 86 (DB).

[8] Citation issued to nearest agnate and heir of testator—Unsuccessful contest by him — His son cannot apply for revocation on ground that there was no citation on him (Vol 17) 1930 Pat 488 (492) (DB).

[9] Death of defendant pending suit — Executors under will not getting substituted although repeatedly asked to do so—Administrator ad litem appointed —

Section 263 — Note 4 *(contd.)*

Executors cannot apply for revocation of the grant of letters of administration. (Vol 26) 1939 Cal 718 (718).

[10] Two wills executed by testator, the latter revoking the former—Probate granted under the second will—Application for revocation by executors of first will dismissed on the ground that they had no interest in the subject-matter of the bequest—Representative suit by persons interested in the bequests under former will — Decision in the proceedings by executors does not operate as *res judicata* in the representative suit. (Vol 27) 1940 Cal 236 (240) : ILR (1940) 1 Cal 14.

[11] Application for revocation dismissed in the absence of both parties—Dismissal could not bar a second application. (Vol 31) 1944 Cal 385 (387) (DB).

5. Whether suit lies to set aside grant.— [1] A judgment by a probate Court is a judgment *in rem* and cannot be set aside by a judgment in a civil suit which is conclusive only *inter partes*. Therefore the proper remedy of a person who wants revocation is to apply under S. 263 and not to file a suit. (Vol 31) 1944 Cal 385 (388) (DB)✠(Vol 27) 1940 Cal 236 (240) : ILR (1940) 1 Cal 14✠(Vol 20) 1933 Bom 469 (474) (DB). (Probate issued by High Court—Revocation should be applied for by application invoking the probate and testamentary jurisdiction—Suit in the ordinary original civil jurisdiction is not permissible.)

[But see (Vol 20) 1933 Bom 370 (372). (For revocation there may either be an application to revoke the grant or substantive suit.)]

[2] Where a suit is filed on the original side in which revocation is prayed for among other reliefs the suit cannot be transferred to the Court dealing with testamentary and intestate matter, nor can the one relief appropriate to that division be so transferred, nor can the suit be dismissed on that ground but it must be stayed. (Vol 20) 1933 Bom 469 (474, 475) (DB).

6. Forum.—[1] Where it is alleged that the letters of administration have been wrongly granted the proper course is to apply to the Court which granted the letters to revoke the same. (Vol 16) 1929 Lah 483 (484, 485)✠(DB).

7. Just cause.—[1] The explanation of the term just cause is exhaustive and not merely illustrative. Therefore an application for revocation must fall under one or more of the said grounds. (Vol 20) 1933 Bom 370 (373) ✠ (Vol 7) 1920 Cal 584 (586) : 47 Cal 115 (DB).

[2] The Probate Court cannot revoke the grant of probate on the ground that the terms of the will are contrary to the provisions of the Muhammadan law as that is not one of the just causes set out in the section. (Vol 6) 1919 Cal 113 (114) (DB).

[3] Service on guardian living under the influence of propounder and therefore not in a position to oppose grant of probate or require proof of will which was inofficious—Guardian absent and probate granted without appointing guardian ad litem : *Held* that failure to appoint guardian ad litem was enough to revoke the grant of probate. (Vol 18) 1931 Cal 713 (715) (DB).

[4] Mal-administration of the estate by the administrator is not a just cause for revoking the grant. (Vol 15) 1928 Cal 695 (696) (DB).

8. Delay in filing application.—[1] Per *Das J.*— Mere delay in applying for revocation of grant of letters of administration is no bar in the absence of any finding of acquiescence or waiver. (Vol 34) 1947 Pat 434 (440) : 25 Pat 747 (DB)✠(Vol 18) 1931 Cal 717 (718, 719) (DB). (Probate in common form to certain persons in 1907—Special citations not issued to persons who were heirs in the event of intestacy — Application in 1928 cannot be dismissed on the ground of delay unless it amounted to waiver or acquiescence.)

[See however (Vol 18) 1931 Cal 713 (714) (DB). (Though there is no fixed time during which an application for revocation can be made, even if there may be no acquiescence a person may be debarred by long delay in making such application.) ✠ (Vol 3) 1916 Cal 938 (949) (DB). (*Obiter.*—A person may be barred by long delay in making an application for revocation although there was no acquiescence on his part.)]

[2] In an application to set aside a probate, where knowledge, acquiescence and lapse of time are shown the petitioner must give some reasonable and true explanation of the delay or in other words the application must be made *bona fide* before it can succeed. (Vol 2) 1915 Cal 419 (420) : 42 Cal 480 (DB).

[3] Application to call in letters after 30 years not to be entertained, if object is to frustrate the will. (Vol 6) 1919 Cal 618 (619) (DB).

[4] Testator leaving minor brother, mother, married sisters and childless minor widow. Bulk of property given to brother—Widow receiving small sum of money and maintenance allowance—Mother applying for probate as executrix—Father of widow refusing service of special citation issued to him as guardian ad litem — Probate granted without objection — Statement by widow's father that he and his daughter had no objection to mutation in brother's name—Widow continuing to receive allowance even after attaining majority : *Held*, there was no just cause for revocation of will on application by the widow after six years. (Vol 7) 1920 Cal 743 (746) (DB).

9. Clause (a).—[1] Applicant who shows substantial defect in the proceedings would be entitled to the revocation of the grant and the person who had been granted probate should prove the will in the presence of the application. Where the applicant fails to prove substantial defect he can get the probate revoked only on affirmative proof that the will is a forgery. (Vol 27) 1940 Cal 296 (300) : I L R (1940) 1 Cal 33 (DB).

[2] Where the Court which had granted probate had jurisdiction of the subject-matter, namely the grant of probate but the question was whether the person who applied for probate was competent to do so, the question is not one of jurisdiction but one which the Probate Court had to determine during the exercise of its jurisdiction. Therefore where it decides and grants probate there is no defect in procedure within the meaning of this section. ('10) 37 Cal 387 (397, 398) (DB).

[3] Father, the natural guardian appointed guardian ad litem and served with notice—Mother of minor who was also served with citation not opposing the grant —Father who was resident son-in-law knew of the will to which he was an attesting witness— Father also not opposing grant to avoid the wasting of minor's money — Absence of evidence to show that he was neglecting minor's interest : *Held* that the proceedings for obtaining probate were not defective in substance. (Vol 29) 1942 Cal 236 (237) (DB).

[4] Failure to mention in the application for probate the existence of some relatives who have claim on the estate and to have them represented and cited is defect sufficient to revoke the probate. (Vol 20) 1933 Cal 74 (76) (DB).

[5] Where notice to interested persons was not issued owing to the untrue statements of the applicant for probate, the proceeding to obtain probate is defective in substance within the first clause of the section. (Vol 3) 1916 Cal 623 (625) (DB).

[6] Per *Manohar Lall Ag. C. J.* — Illustration 2 refers not only to cases where it is imperative to issue a special citation, but it refers to all cases where the grant is made without calling the parties who ought in the

Section 263 — Note 9 *(contd.)*
opinion of Court to have been cited. (Vol 34) 1947 Pat 434 (437) : 25 Pat 747 (DB).

[7] Per *Das J.*—The daughter of testator who should succeed under Hindu law on the death of the testator is entitled to citation as she is a person who ought to be cited as contemplated by illustration. (Vol 34) 1947 Pat 434 (437) : 25 Pat 747 (DB).

[8] The probate of a will cannot be revoked on the mere ground of non-citation without a consideration of the other questions arising therefrom. (Vol 2) 1915 Cal 706 (707) (DB) ✠ (Vol 28) 1941 Rang 241 (242) : 1941 Rang L R 285 (DB).

[See however ('28) 109 Ind Cas 243 (245) (DB) (Cal.)]

[9] Absence of citation where citation has been ordered — Defect not one as would involve revocation. (Vol 25) 1938 Rang 261 (263) : 1938 Rang L R 360 (FB). ((Vol 23) 1936 Rang 105 : 14 Rang 146 (DB), *Overruled.*)

[10] Absence of citation alone is not a just cause for revocation of the grant of probate where the person to whom citation has been issued is otherwise aware of the proceedings. (Vol 11) 1924 Mad 578 (581) (DB) ✠(Vol 27) 1940 Cal 296 (301): ILR(1940) 1 Cal 33 (DB).

[11] The absence of citation or failure to serve notice is not sufficient for revoking a probate granted *ex parte*. The proper course is to give the executor an opportunity for proving the will in solemn form. Should the will be found to be forged an order for revocation will follow. (Vol 2) 1915 Cal 85 (86) : 41 Cal 819 (DB).

[12] Absence of citation of minor daughter of testator — Mother, the natural guardian, appearing and contesting grant of letters of administration — Mother not under the influence of the propounder of will and having no adverse interest to the minor : *Held* that there was no defect in substance and therefore no just cause for revoking the grant. (Vol 34) 1947 Pat 434 (438, 440, 441) : 25 Pat 747 (DB).

[13] Mere absence of notice to applicant who had parted with her property and was represented by her vendee was not "just cause" for holding that probate proceedings were defective in substance and liable to be set aside. (Vol 6) 1919 Nag 70 (72).

[14] A reversioner is a person substantially interested in the protection of the devolution of the estate and where letters of administration are granted without issuing the necessary citations to him the procedure is defective. (Vol 16) 1929 Pat 385 (386) (DB).

[15] Person served with citation in such a manner that he had no opportunity to appear : *Held* that proceedings were defective and that the grant should be revoked. (Vol 15) 1928 P C 2 (6) : 55 Ind App 18 : 7 Pat 221 (P C).

[*See also* (Vol 18) 1931 Cal 713 (715) (DB). (Notice of citation on pardanashin female living in mess with and under protection of propounder for herself and as guardian for minors, by throwing it in verandah of the house, held of no effect as notice — (Vol 15) 1928 P C 2 : 55 Ind App 18 : 7 Pat 221 (PC), *Rel. on.*)]

[16] Where the parties themselves have not complained of the proceedings having taken place in their absence the omission to cite them does not call for revocation of the grant. (Vol 14) 1927 Cal 207 (210) (DB).

10. Clause (b).— [1] In a contentious proceeding, probate can be granted in a common form in consequence of a compromise between the disputants resulting in the withdrawal of opposition and it cannot afterwards be revoked except upon proof of fraud or circumvention practised either upon the Court or upon the parties. ('10) 14 Cal W N 1068 (1071) (DB).

[2] Service of notice upon one who had transferred before such service his interest in the properties — Applicant also aware of transfer of the interest : *Held* grant was obtained fraudulently by making of false suggestion or by concealing from Court something material to the case. (Vol 2) 1915 Cal 421 (422) (DB).

[3] Where the creditors apply for revocation of probate on the ground that the will was put forward and the probate obtained in fraud of creditors and the alleged will in fact was not put foward till 8 years after the death of the testator the creditors are entitled to have an order revoking the will. ('13) 17 Cal L Jour 230 (232, 233) (DB).

[4] Creditor of an heir can apply for revocation of the grant on the ground that he is being or likely to be defeated in his rights against the heir by reason of property which otherwise appeared to be in possession of the heir being withdrawn by a will and that therefore the probate was obtained fraudulently. (Vol 31) 1944 P C 11 (12, 13) : 71 Ind App 1 : I L R (1944) Kar P C 61 Sup. (PC).

11. Clause (c).—[1] Mis-statement that the petitioner is named as executor in the will whether wilfully untrue or not constitutes a just cause under clause (c). (Vol 33) 1946 All 357 (359) : I L R (1946) All 398 (DB).

12. Clause (d).—[1] Clause (d) contemplates that there is an administrator who under certain circumstances is incapable of acting so that the estate is practically without an administrator. (Vol 15) 1928 Cal 695 (696) (DB).

[2] Administration of estate completed — Clause (d) will not apply to such case—No application for revocation can be made. (Vol 26) 1939 Cal 737 (739) : I L R (1939) 2 Cal 1.

[3] Where under the terms of the will there are still duties to be performed by the executors the grant cannot be said to have become inoperative. (Vol 8) 1921 Cal 527 (528) : 48 Cal 1051 (DB) ✠ (Vol 15) 1928 Cal 695 (696) (DB). (Administrator left only with the duty of distributing legacies—Grant does not become useless and inoperative.)

[4] Probate can be revoked where the administrator had either left the country or absconded or could not be traced or expressed a desire to withdraw. (Vol 22) 1935 Lah 963 (963). (Four out of seven executors dead—Others unwilling to continue administration — Grant held became useless and inoperative and hence should be revoked.)

[5] Clause (d) applies not only where the circumstances making the grant inoperative were in existence when the grant was made though unknown either to the Court or the party but also where they happened since the grant. (Vol 7) 1920 Cal 584 (586) : 47 Cal 115 (DB) ✠(Vol 22) 1935 Lah 963 (963).

[6] That the grant has become useless and inoperative because of disagreement between the administrators is not a just cause for annulling the letters. ('13) 40 Cal 50 (55) (DB).

13. Clause (e). — [1] Proceedings to obtain the grant are defective in substance where no schedule in the prescribed form is attached to the application. (Vol 23) 1936 Sind 150 (153) : 30 Sind L R 201 (DB).

[2] Where an application is made years after the grant of letters of administration to revoke the letters, cause should be shown why this should be done. The mere fact that the inventory has not been filed is not a sufficient cause unless it can be shown that the inventory was withheld wilfully and unreasonably. (Vol 6) 1919 Cal 260 (260) (DB).

[3] Probate need not be revoked on the ground that an inaccurate inventory was furnished especially when an accurate one is not possible. (Vol 4) 1917 Mad 399 (399) (DB).

CHAPTER IV

OF THE PRACTICE IN GRANTING AND REVOKING PROBATES AND LETTERS OF ADMINISTRATION.

Jurisdiction of District Judge in granting and revoking probates, etc.

264. *(1)* The District Judge shall have jurisdiction in granting and revoking probates and letters of administration in all cases within his district.

(2) Except in cases to which section 57 applies, no Court in any local area beyond the limits of the towns of Calcutta, Madras and Bombay, [a][* * *] shall, where the deceased is a Hindu, Muhammadan, Buddhist, Sikh or Jaina or an exempted person, receive applications for probate or letters of administration until the [b][Provincial Government] has, by a notification in the [c][Official Gazette] authorised it so to do.

[1865 — S. 235 ; Probate and Administration Act, 1881 — Ss. 2 and 51; Devolution Act, 1920 — S. 2 and Schedule.]

[a] The words "and the province of Burma" were *repealed* by A. O. [b] *Substituted* by A. O. for "Local Government". [c] *Substituted* by A. O. for "local official Gazette".

Section 263—Note 13 *(contd.)*

[4] The beneficiary who thinks that the executor has been misappropriating money and submitting untrue accounts can apply for revocation of the probate on the ground that the executor has exhibited an account untrue in a material respect, (Vol 25) 1938 Cal 294 (295) ✠ (Vol 8) 1921 Cal 527 (529) : 48 Cal 1051 (DB).

[5] The petition for revocation on the ground that the accounts were untrue should specifically state as to what items in the accounts were untrue and in what respect the items challenged were untrue — It is not enough to make vague allegations that the accounts are untrue. (Vol 8) 1921 Cal 527 (529) : 48 Cal 1051 (DB).

14. Limitation.—[1] There is no period of limitation for alleging a good cause under the section. (Vol 11) 1924 Mad 578 (581) (DB).

[2] There is no time limit fixed for an application for revocation of probate by a person in whom no citation had been issued. (Vol 3) 1916 Cal 938 (941, 942, 949) (DB). (Will not genuine— Court should not refuse to revoke probate merely on the ground of probate.)

[3] Article 178, Limitation Act, does not apply to an application for revocation of a probate. (Vol 18) 1931 Cal 717 (718) (DB).

15. Powers of Court.—[1] The power given to a Court to revoke letters of a dministration is a discretionary one. (Vol 12) 1925 Rang 236 (238) (DB). (Where no prejudice is caused to applicant by the bequests letters will not be revoked.)

[2] When a just cause has been made out the Court has no discretion to refuse to revoke the letters of administration. (Vol 16) 1929 Pat 385 (386) (DB).

[3] Where revocation is likely to cause very great inconvenience as in a case where administration had gone on for several years and has barely come to an end it would be disastrous to reopen all thathad been meanwhile done under an order. ('10) 37 Cal 387 (396) (DB).

[But see (Vol 34) 1947 Pat 434 (441) : 25 Pat 747 (DB). (Per Das J. — *(Obiter)* Where the Court finds just cause for revocation, the mere fact that the propounder of will would experience great difficulty in proving the will due to the lapse of many years will not stand in the way of revoking the grant.)]

[4] The Court has power to revoke a grant where it has demanded fresh security and it has not been given. (Vol 28) 1941 Rang 259 (261):1941 Rang LR 376 (DB).

[See however (Vol 12) 1925 Lah 354 (355). (Failure to give security as required by order by which letters of administration have been granted is no ground for revoking letters.)]

[5] Because a probate has the effect over all the property comprised in the probate the subject-matter of an application to revoke the probate would extend to the whole of the property covered by the probate. The subject-matter cannot be divided in proportion to the interest acquired by the applicant and there cannot be a limited revocation of the probate especially when it is sought on the ground that the will is forged. (Vol 20) 1933 Bom 77 (79) : 57 Bom 143 (DB).

[6] While dealing with an application for revocation of probate or letters of administration the only matter for the consideration of the Court is whether the applicant has shown a just cause for the revocation — The question of genuineness of the will does not arise at all till the probate is revoked and therefore the Court cannot turn down an application on the ground that the applicant has not let in evidence sufficient to cast a doubt upon the genuineness of the will. (Vol 12) 1925 Cal 223 (223, 224) (DB) ✠ (Vol 2) 1915 Cal 421 (422) (DB).

[7] When an application is made for revocation of a grant of probate on the ground that the proceedings are defective in substance, the Court on a consideration of all the facts of the case will have to consider whether the proceedings are substantially defective. (Vol 29) 1942 Cal 236 (237) (DB).

[8] Irrespective of this section, when the condition on which alone the grant can be made is not satisfied, the Court has inherent power to withdraw the order for grant and thus prevent the abuse of its process. (Vol 13) 1926 Lah 352 (352) : 7 Lah 270 (DB).

[*See also* (Vol 2) 1915 All 172 (174) : 37 All 380 (DB). (Apart from S. 263, Court can reconsider order of grant of letters under S. 114, Civil P. C., and exercise its inherent powers.)]

16. Review.—[1] Right of review under the Civil Procedure Code is an entirely different right from that given to the Courts under this Act for revoking probate and letters of administration and can be exercised by the Court which had been dealing with a contentious matter in proceedings for the grant of letters of administration. (Vol 12) 1925 Rang 314 (316, 317) : 3 Rang 261 (DB).

Section 264 — Note 1

"District Judge."

[1] Additional District Judge exercising powers as District Judge can grant probate or letters of administration in all cases whether there was contention or not. (Vol 10) 1923 Nag 41 (41).

[2] When function of District Judge is transferred to Additional District Judge, he has the same jurisdiction as the District Judge with respect to the grant and revocation of probate and letters of administration, even as regards revocation of probates granted by District Judge. (Vol 11) 1924 Pat 593 (593, 594) : 3 Pat 609 (DB).

Power to appoint Delegate of District Judge to deal with non-contentious cases.

265. *(1)* The High Court may appoint such judicial officers within any district as it thinks fit to act for the District Judge as Delegates to grant probate and letters of administration in non-contentious cases, within such local limits as it may prescribe :

Provided that, in the case of High Courts not established by Royal Charter, such appointment shall not be without the previous sanction of the [a][Provincial Government].

(2) Persons so appointed shall be called "District Delegates."

[1865 — S. 235A ; Probate and Administrat on Act, 1881—S. 52 ; District Delegates Act, 1881 — S. 2.]

[a] *Substituted* by A. O. for ' Local Government".

District Judge's powers as to grant of probate and administration.

266. The District Judge shall have the like powers and authority in relation to the granting of probate and letters of administration, and all matters connected therewith, as are by law vested in him in relation to any civil suit or proceeding pending in his Court.

[1865 — S 236 ; Probate and Administration Act, 1881 — S. 53.]

Section 264—Note 1 *(contd)*

[3] 'District Court' — High Court exercising testamentary and intestate jurisdiction also included. (Vol 17) 1930 Mad. 779 (782) : 53 Mad 237 (DB).

"Jurisdiction."

[4] The jurisdiction to revoke is limited to the Probate Court. (Vol 27) 1940 Cal 236 (240) : I L R (1940) 1 Cal 14.

[*See also* (Vol 7) 1920 Cal 159 (161) (DB). (Proper Court to set aside grant of letters of administration is the probate Court and not civil Court.)]

[5] In order to determine the district within which a case for grant of probate is to be instituted, the Court must see whether the deceased, at the time of his death, had his fixed place of abode or had some property, movable or immovable, situate within the jurisdiction of the particular District Judge to whom the application is made. The same test of jurisdiction is to be applied to a case of revocation of probate (1882) 8 Cal 570 (573) (DB).

[6] Normally an application for revocation should be made to the Court from which the grant has been made Assuming that there is power in more than one Court to revoke a grant, the "proper" Court to exercise such jurisdiction is the Court which made the grant; the other Court having such jurisdiction will not exercise it because it is not the "proper" Court, but will refer the applicant to the Court by which the original grant was made. (1941) 45 C W N 757 (758, 759)✠(Vol 28) 1941 Cal 417 (422). (Affirmed in (Vol 29) 1942 Cal 283 : I L R (1941) 2 Cal 1 (DB))

[7] It is the District Judge that constitutes the probate Court and as such has the jurisdiction in the matter of granting and revoking probate. It is only in non-contentious cases that the power of granting probate and letters of administration can be delegated to the officers appointed under S. 265. An application for revocation of a probate being a contentious matter, the District Delegate cannot decide it. He should return such application for being presented to the Court of the District Judge. (Vol 31) 1944 Cal 385 (386) (DB).

Section 265—Note 1

[1] There can be no District Delegate except by appointment by the High Court. Where the Additional District Judge was not appointed as such and was exercising powers as a District Judge, he could grant probate or letters of administration in all cases whether there was a contention or not. (Vol 10) 1923 Nag 41 (41, 42).

[2] Section 265 contains by implication ample warrant for the delegation (it may be only partial in certain cases) of his functions by the District Judge to his delegate. Where on account of a compromise between the parties, the objectors did not press their objection and the District Judge sent the case to the District Delegate for enquiry and report, it was held that the District Judge did not act irregularly. (1910) 14 C W N 1068 (1070) (DB).

[3] For meaning of contention, see S. 286, Explanation.

[4] The powers of the District Delegates are confined to non-contentious cases. Where respondents appear and file objections against an application for grant of letters of administration with copy of will annexed, the proceedings cease to be non-contentious. (Vol 21) 1934 Oudh 442 (442) (DB).

[5] District Delegate cannot decide application for revocation of probate, the application being contentious matter. Applicat on should be returned for presentation to Court of District Judge. (Vol 31) 1944 Cal 385 (387) (DB).

[6] Where the District Delegate proceeds with the case after it has become contentious, he exceeds his jurisdiction (Vol 21) 1934 Oudh 442 (442) (DB).

[7] In a case where one and the same officer is both a Subordinate Judge and a District Delegate, although as District Delegate he cannot dispose of contentious proceeding, nevertheless he can do so as Subordinate Judge if the proceeding is transferred to him by order of the District Judge. (Vol 22) 1935 Oudh 38 (39) : 10 Luck 316 (DB).

Section 266—Note 1

[1] Under S. 23 (2) (d), Bengal North-Western Provinces and Assam Civil Court Act (XII [12] of 1887) the District Judge can transfer an application for probate instituted in his Court to that of the Subordinate Judge and therefore the Subordinate Judge has jurisdiction to try it, whether the case is contentious or non-contentious. (1898) 25 Cal 340 (343) (DB).

[*See also* (Vol 22) 1935 Oudh 415 (416) : 11 Luck 196 (DB).]

[2] The appointment of a receiver in proceedings in relation to grant of probate or letters of administration are to be regulated by the Code of Civil Procedure. (1893) 17 Bom 388 (391). (*See also* under S. 269.)

[3] A District Court in its capacity as a Court of probate has no jurisdiction to determine any question of title regarding the property which the will purports to dispose of; nor has it jurisdiction to determine whether the testator had or had not a disposing power over the property or to go into the question of the void or valid nature of such bequests. (Vol 25) 1938 Nag 173 (176) : I L R (1940) Nag 391 (DB) ✠ (Vol 3) 1916 Pat 382 (383) (DB).

[4] Words "and all matters connected therewith" in S. 266 do not include proceedings under S. 19-H Court-fees Act. Those words have reference to matters such as, revocation of probate, production of accounts, and similar other matters. (Vol 10) 1923 Cal 406 (407): 50 Cal 239 (DB).

District Judge may order person to produce testamentary papers.

267. *(1)* The District Judge may order any person to produce and bring into Court any paper or writing, being or purporting to be testamentary, which may be shown to be in the possession or under the control of such person.

(2) If it is not shown that any such paper or writing is in the possession or under the control of such person, but there is reason to believe that he has the knowledge of any such paper or writing, the Court may direct such person to attend for the purpose of being examined respecting the same.

(3) Such person shall be bound to answer truly such question as may be put to him by the Court, and, if so ordered, to produce and bring in such paper or writing, and shall be subject to the like punishment under the Indian Penal Code, in case of default in not attending or in not answering such questions or not bringing in such paper or writing, as he would have been subject to in case he had been a party to a suit and had made such default.

(4) The costs of the proceeding shall be in the discretion of the Judge.

[1865 — S. 237 ; Probate and Administration Act, 1881 — S. 54.]

Proceedings of District Judge's Court in relation to probate and administration.

268. The proceedings of the Court of the District Judge in relation to the granting of probate and letters of administration shall, save as hereinafter otherwise provided, be regulated, so far as the circumstances of the case permit, by the Code of Civil Procedure, 1908.

[1865 — S. 238 ; Probate and Administration Act, 1881—S. 55.]

Section 267—Note 1

[1] Applicant for letters of administration need not produce will from his own possession and with the petition—Having an interest in estate is sufficient. (Vol 18) 1931 Lah 130 (133).

Section 268 — Note 1

[1] The judgment of a probate Court granting or refusing probate is a judgment *in rem* and, therefore, the judgment of any other Court in a proceeding *inter parties* cannot be pleaded in bar of an investigation of the probate Court as to the factum of the will propounded in that Court. (1893) 16 Mad 380 (383) (DB).

[2] The action of a probate Court of competent jurisdiction when it admits a will to probate or rejects it as not duly attested and executed, is in the nature of a proceeding *in rem*, and so long as the order remains in force, it is conclusive as to the due execution and the validity of will, not only upon all the parties who may be before the Court, but also upon all other persons whatever, in all proceedings arising out of the will or claims under or connected therewith. All judgments of this character should be founded upon an investigation of the facts by the Court itself and ought not to be based upon consent of parties. (1910) 12 Cal L Jour 91 (97) (DB).

[*See also* (Vol 8) 1921 Cal. 292 (294) (DB).]

[3] The dismissal for default of an application for probate would not debar an application, by another person claiming an interest under the will and therefore necessarily also by the executor himself. An executor presenting an application for probate of a will cannot be regarded as a plaintiff who brings a suit in respect of a cause of action. (Vol 12) 1925 Mad. 861 (869, 870) ✠ (1910) 12 Cal L Jour 185 (187) (DB).

[4] Section 295, Succession Act, does not apply to an application for revocation of probate which is governed by S. 268, Succession Act. A proceeding for revocation of a probate is not a suit within the meaning of O. 23, R. 3, Civil P. C. (1910) 12 Cal L Jour 91 (95) (DB).

[5] It is contrary to public policy to introduce into the probate that is granted to the executor terms of a private compromise that might have been arrived at between him and any objector. (Vol 18) 1931 All 745 (746) (DB).

[6] Where the executor was not in and could not get possession of the property of the testator so as to be able to pay the necessary fees, and he himself had no money wherewith he could take the necessary steps, *held* he could apply for and obtain probate in *forma pauperis*. (1894) 18 Bom 237 (239).

[7] In matters of probate strictest relevancy in interrogatories may not be necessary but Court should exclude whatever is offensive or improper. Order 11, Civil P. C. applies to proceedings in probate. (Vol 3) 1916 Cal 953 (954) : 43 Cal 300 (DB).

[8] Where in a petition for probate the caveator sets up another will of the testator, revoking the will set up by the petitioner it is obligatory on the caveator to file a separate petition to propound the will set up by him. On such petition being filed there would be really two separate proceedings for obtaining grant in respect of two different wills alleged to have been left by the same testator and the parties interested in opposing the grant would have to file respective caveats in each case. The two suits could then be heard together or consolidated. There may be exceptional circumstances where this procedure cannot be followed, e. g., when the later will set up by the caveator is alleged to have been revoked. But save and except such extraordinary circumstances, there is no difficulty in adopting this procedure : (Vol 33) 1946 Cal 40 (42-44) (DB) ((Vol 17) 1930 Bom 29 : 53 Bom 829, *Rel. on.*) ✠ (Vol 17) 1930 Bom 29 (32) : 53 Bom 829.

[9] Under provisions of S. 268, probate Court has same power in ordering inventory to be made as ordinary Civil Court has under O. 39, R. 7, Civil P. C. (Vol 16) 1929 Cal 496 (496) (DB).

[10] Probate Court can grant injunctions. (Vol 2) 1915 Cal 565 (567) (DB).

[11] Probate proceeding is not a suit with respect to property — It involves question of representation of estate — No question of title is to be gone into. (Vol 2) 1915 Cal. 565 (567) (DB).

[12] Petition for revocation of probate on ground of want of citation — *Held* that the petitioner ought to be given opportunity to satisfy the Court that he had no notice or knowledge of the previous proceedings — If petitioner is able to do so, proper order to make will then be that there be a new trial as to the factum of the will, and upon such new trial, the burden of proving the factum of the will under the ordinary rule, will lie upon the person who propounded it. (1882) 8 Cal 880 (882) (DB).

When and how District Judge to interfere for protection of property.

269. *(1)* Until probate is granted of the will of a deceased person, or an administrator of his estate is constituted, the District Judge, within whose jurisdiction any part of the property of the deceased person is situate, is authorised and required to interfere for the protection of such property at the instance of any person claiming to be interested therein, and in all other cases where the Judge considers that the property incurs any risk of loss or damage; and for that purpose, if he thinks fit, to appoint an officer to take and keep possession of the property.

(2) This section shall not apply when the deceased is a Hindu, Muhammadan, Buddhist, Sikh or Jaina or an exempted person, nor shall it apply to any part of the property of an Indian Christian who has died intestate.

[1865 — S. 239 ; Native Christians Act, 1901 — S. 3.]

When probate or administration may be granted by District Judge.

270. Probate of the will or letters of administration to the estate of a deceased person may be granted by a District Judge under the seal of his Court, if it appears by a petition, verified as hereinafter provided, of the person applying for the same that the testator or intestate, as the case may be, at the time of his decease had a fixed place of abode, or any property, moveable or immoveable, within the jurisdiction of the Judge.

[1865 — S. 240; Probate and Administration Act, 1881 — S. 56.]

Section 268 — Note 1 *(contd.)*

[13] Neither an executor nor the Probate Court can refer the question of the factum of the will to arbitration. Nor can the Probate Judge refer the execution of a will to arbitration. (1897) 21 Bom 335 (342, 343) (DB).

[14] The refusal by the caveator to answer a question put to him cannot justify the Court in dispensing with proof of the will and making an order for grant of probate. (1885) 9 Bom 241 (244) (DB).

[15] An application for revocation of grant of letters of administration by a person who contested grant is in substance an application for review—Provision of Civil P. C. apply and application is defective and not if it is not accompanied by copy of order appealed from. (Vol 26) 1939 Rang 215 (216):1939 Rang L R 601 (DB).

[16] Application for probate cannot be disposed of by compromise. Law imposes on Court the duty of deciding whether 'will' is genuine or not. (Vol 4) 1917 Pat 41 (42) : 2 Pat L Jour 535 (DB).

[17] When probate has actually been revoked by a Court of first instance on the ground that the will propounded is a forgery, the parties are not entitled to bring the matter on appeal to the High Court and then by compromise to obtain a reversal of the decision and a revival of the probate without any adjudication on the merits. Such a compromise is not lawful within the meaning of O. 23, R. 3, Civil P. C. (1910) 12 Cal L Jour 91 (97) (DB).

[18] Application for probate dismissed for default—Applicant's heir can plead existence of will as defence to suit for property. (Vol 12), 925 Mad 861 (869).

[19] Procedure in contentious cases: See under S. 295.

Limitation.

[20] The Limitation Act does not apply to application for probate or letters of administration. (1894) 17 Mad 379 (381)✠(1899) 9 Mad L Jour 382 (384) (D B) ✠ (1892) 19 Cal 48 (50) (D B) ✠ (1885) 8 Mad 207 (208) (DB) ✠ (1883) 7 Bom 213 (214) (DB).

Section 269 — Note 1

[1] The power which the District Judge exercises under S. 269 is only protective in order to leave the property of the deceased in exactly the same condition as it was at his death. That section creates a special jurisdiction in the District Judge authorising him to interfere for the protection of the deceased's property for which ultimately an administrator may be constituted. (Vol 20) 1933 Nag 173 (175) : 29 Nag L R 238.

[2] The District Judge has under S. 269 powers of interference in respect of property situate outside limits of the province. (Vol 20) 1933 Nag 173 (174) : 29 Nag L R 238.

[3] Section 269 gives very wide powers of exceptional nature to District Judge and in exercise of these powers, he could pass any order which he considers most effective in particular circumstances of case. He can appoint person already in possession of property to keep such possession until administrator is duly constituted. (Vol 20) 1933 Nag 173 (175) : 29 Nag L R 238.

[4] The power to interfere for protection of property given under S. 269 has to be exercised independently by the District Judge only for the purpose of averting any risk of loss or damage and the dismissal of the application for letters of administration will not result in vacating an order under S. 269. (Vol 20) 1933 Nag 173 (175) : 29 Nag L R 238.

[5] The District Judge has no jurisdiction to give directions with reference to the property of a testator after an administrator has been appointed though such directions can be given under S. 269 so long as no person has been appointed administrator of the estate or granted probate of a will (Vol 7) 1920 Bom 19 (19) : 44 Bom 682 (DB).

Receiver, appointment of.

[6] The probate Court has, apart from the Succession Act, general jurisdiction to appoint a receiver in any case in which it may appear just and convenient to do so. Such appointment cannot be claimed as of right merely because the proceedings are contested. (Vol 20) 1933 Bom 342 (344).

[*See also* (1893) 17 Bom 388 (391).]

[7] The Court does not as a rule appoint a receiver as against executors whenever they have obtained probate unless there is gross misconduct or mismanagement or waste on his part. (Vol 20) 1933 Bom 342 (346).

[8] It is true that the Court of Chancery will not appoint a receiver against an executor on slight grounds and requires a much stronger case to be made out for a receiver against an executor than against other persons. But there is not same reason why the appointment by a Mahomedan testator of an executor should receive the same consideration as the appointment of an executor by an English testator does in England. (1895) 19 Bom 83 (85).

Section 270 —Note 1

[1] The District Judge has no jurisdiction to grant letters of administration to the estate of a deceased who had not a fixed place of abode, nor owned property within his jurisdiction. (1893) 17 Bom 689 (690) (D B).

Disposal of application made to Judge of district in which deceased had no fixed abode.

271. When the application is made to the Judge of a district in which the deceased had no fixed abode at the time of his death, it shall be in the discretion of the Judge to refuse the application, if in his judgment it could be disposed of more justly or conveniently in another district, or, where the application is for letters of administration, to grant them absolutely, or limited to the property within his own jurisdiction.

[1865 — S. 245; Probate and Administration Act, 1881 — S. 57.]

Probate and letters of administration may be granted by Delegate.

272. Probate and letters of administration may, upon application for that purpose to any District Delegate, be granted by him in any case in which there is no contention, if it appears by petition, verified as

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Section 270—Note 1 *(contd.)*

[2] Section 270 is general and is quite irrespective of the place where the will was executed or of the nationality of the testator or of the place of his domicil. Thus, a District Judge in British India has jurisdiction to grant probate of a will executed in Baroda by the testator who was a subject of the Baroda state, if the testator had at the time of his death property within the jurisdiction of the District Judge. (1896) 20 Bom 607 (609) (D B).

[3] Main property in Oudh — Only small portion in Agra—District Judge in Agra Province held had jurisdiction to grant letters of administration with the will annexed. (Vol 31) 1944 P C 29 (31) : I L R (1944) Kar (P C) 216 (P C). ((Vol 24) 1937 All 670, *Affirmed*)

[4] A Court is not competent to refuse to grant probate merely on the ground that a part of the estate of the deceased is situate outside its jurisdiction or outside the province, if some part of the estate is situated or the deceased resided at the time of his death within its jurisdiction. (Vol 16) 1929 Lah 72 (73).

[5] "Fixed" cannot possibly mean "permanent" because no one in this world can be said to have a permanent place of abode. Where the deceased, a railway servant, was stationed at a place for 20 years, it was held that he had a fixed place of abode at that place, though he was liable to be transferred from it. (Vol 10) 1923 Nag 145 (145) : 19 Nag L R 54.

[6] In the case of an application for probate, it is sufficient for the purpose of giving jurisdiction to the District Judge that the property claimed by the deceased testator as his own should be actually in the possession of the deceased. (1879) 4 Cal L R 498 (500) (D B).

[7] The Court within whose jurisdiction the office of the Chief Accounts Officer dealing with the provident fund due to a deceased railway servant lies can entertain an application for grant of probate for the provident fund money. (Vol 33) 1946 Oudh 73 (76).

[8] Debts to be paid according to terms of agreement to deceased or his heirs within jurisdiction of Court must be regarded as assets situated within jurisdiction of Court. (Vol 23) 1936 Sind 150 (151) : 30 Sind L R 201 (D B).

[9] Deposit in bank within jurisdiction of Court is movable property. (Vol 16) 1929 Lah 282 (283).

Section 271—Note 1

[1] In case of concurrent jurisdiction in the probate proceeding, it is very necessary to avoid a conflict. In determining whether the Court should have regard and defer to a jurisdiction with which it may come into conflict or whether the Court can fairly expect the other jurisdiction to defer to it, two points should be considered (i) priority in time and (ii) extent of relief asked for or obtainable in the other jurisdiction. (Vol 29) 1942 Cal 283 (287) : I L R (1941) 2 Cal 1 (D B). ((Vol 28) 1941 Cal 417, *Affirmed.*)

[2] Under S. 271, when between Courts of different districts in British India there is a question as to which of such Courts can most justly or conveniently grant probate, the Judge has a discretion to refer the applicant to the more convenient Court. (1896) 20 Bom 607 (609) (D B).

[3] But when there is no Court of concurrent jurisdiction in British India to which the applicant can apply for probate the Judge is vested with no such discretion. (1896) 20 Bom 607 (610) (D B).

[4] The High Court has at least the discretion given by the Act to the Judge of a District. The discretion under S. 271 is exercisable by the Court whenever the Court is placed in the position of having to decide what order is to be made upon the application for probate of the will. The Court is not precluded from exercising the discretion afresh in the light of new facts though, of course, it will not exercise it to the contrary effect whilst the facts remained the same. (Vol 29) 1942 Cal 283 (287) : I L R (1941) 2 Cal 1 (D B).

[5] Section 271 does not go to jurisdiction but to discretion. (Vol 31) 1944 P C 29 (31) : I L R (1944) Kar (PC) 216 (PC). (Appeal from (Vol 24) 1937 All 670.)

[6] Applicant for probate is *dominus litis* and his choice should be given effect to in absence of special reason to contrary. (Vol 8) 1921 Cal 124 (125) (D B).

[7] Application for letters of administration made to District Judge within whose jurisdiction deceased had no fixed place of abode — Only small portion of deceased's property situate in his district — District Judge held has jurisdiction to entertain such application— It should not dismiss it. (Vol 24) 1937 All 670 (671) (D B). (*Affirmed* in (Vol 31) 1944 P C 29: I L R (1944) Kar (P C) 216 (P C).)

[8] Where the District Judge refused to grant letters of administration as he was led to suspect from the trifling nature of the deceased's property found in his jurisdiction that the applicant had kept those articles for creating evidence, and the deceased had no plea of abode within the District: *Held* that the District Judge had exercised the discretion properly. (1899) 1 Bom L R 666 (667) (D B).

[9] When District Judge exercises his discretion under S. 271, he cannot be said to be making order under Act. He is merely deciding to proceed with application and therefore, no right of appeal is granted by S. 299 against such order. (Vol 29) 1942 Bom 276 (277) : I L R (1942) Bom 712 (D B). ((Vol 19) 1932 All 379 (D B), *Foll.*)

[10] It is not correct to say that in deciding what relief claimed is, one must not consider property with respect to which letters of administration are sought. (Vol 30) 1943 Cal 19 (22) : I L R (1942) 2 Cal 194.

Section 272—Note 1

[1] District Delegates have no jurisdiction to grant probate in contentious cases. But where an officer is both a Subordinate Judge and a District Delegate, he can dispose of a contentious case as a Subordinate Judge, when it is transferred to him by the District Judge. (Vol 22) 1935 Oudh 38 (39) : 10 Luck 316 (DB)

hereinafter provided, that the testator or intestate, as the case may be, at the time of his death had a fixed place of abode within the jurisdiction of such Delegate.

[1865 — S. 241A; Probate and Administration Act, 1881 — S. 58; District Delegates Act, 1881 — S. 3.]

Conclusiveness of probate or letters of administration.

273. Probate or letters of administration shall have effect over all the property and estate, moveable or immoveable of the deceased, throughout the Province in which the same is or are granted, and shall be conclusive as to the representative title against all debtors of the deceased, and all persons holding property which belongs to him, and shall afford full indemnity to all debtors, paying their debts and all persons delivering up such property to the person to whom such probate or letters of administration have been granted :

Provided that probates and letters of administration granted —

(a) by a High Court, or

(b) by a District Judge, where the deceased at the time of his death had a fixed place of abode situate within the jurisdiction of such Judge, and such Judge certifies that the value of the property and estate affected beyond the limits of the Province does not exceed ten thousand rupees,

shall, unless otherwise directed by the grant, have like effect throughout [a][the other Provinces of India.]

[b][The proviso to this section shall apply in British India [c]after the separation of Burma and Aden from India to probates and letters of administration granted in Burma and Aden before the date of the separation or after that date in proceedings which were pending at that date.]

[d][The proviso shall also apply in the Provinces of India after the separation[e] of Pakistan from India to probates and letters of administration granted before the date of the separation, or after that date in proceedings pending at that date, in any of the territories which on that date constituted Pakistan.]

[1865 — S. 242; Probate and Administration Act, 1881 — S. 59; *ibid*, 1903 — Ss. 2 (2), 3 (1).]

[a] *Substituted* for "the whole of British India" by the Indian Independence (Adaptation of Central Acts and Ordinances) Order, 1948 [23-3-1948]. [b] *Inserted* by A. O. [c] i. e., the 1st April 1937. [d] *Added* by the Indian Independence (Adaptation of Central Acts and Ordinances) Order, 1948 [23-3-1948]. [e] i. e., the 15th August 1947.

SECTION 273 — SYNOPSIS.

1. Scope.
2. "Over all the property."
3. "Province."
4. "Conclusive."
5. "High Court."
6. Miscellaneous.

1. Scope.— [1] This section gives jurisdiction to grant probate having effect beyond the limits of the Province, but it will be necessary for him to certify that the value of the property affected beyond the limits of the Province does not exceed Rs. 10,000. ('13) 1913 Pun L R No. 221 Page 736 (739) : 1913 Pun Re No. 21 (D B).

[2] The whole scheme of Ss. 216, 220 and 273 and other provisions of the Act, is only to provide for representation of the deceased's estate for purposes of administration and is not intended to cut down the rights of the beneficiaries. (Vol 25) 1938 Cal 714 (719) : I L R (1939) 1 Cal 21 (D B).

[3] Where the Court granting the probate is not a High Court, the grant is not effective with respect to assets beyond the limits of the Province in which the Court is situated; but this only means that with regard to the other assets the grantee must apply to the appropriate Court for a grant of letters of administration with the will annexed. (Vol 29) 1942 Cal 283 (288) : I L R (1941) 2 Cal 1 (D B).

2. "Over all the property". — [1] Letters with respect to part of assets of deceased — Although letters of administration are to be taken out in respect of all the properties, movable and immovable of the deceased, so far as the personal assets of the deceased are concerned, the position is not quite the same when the deceased dies in possession of the joint family properties. In the case of a joint family property, both legal and the beneficial interest vest in the whole body of coparceners and on the death of the manager or the father as the case may be, his interest becomes extinct and the property passes by survivorship to the remaining body of coparceners. In such a case, therefore, there is no occasion for taking out letters of administration because the legal title has already passed on the death of the manager or the father to the whole body of coparceners. But where the manager or the father dies leaving shares of joint stock companies standing in his name, the legal title in such property vests in the deceased and the beneficial interest thereof remains in the whole body of coparceners. In such a case, the joint stock companies require that letters of administration must be taken out, for, in the case of shares, the legal title to the shares vests, *vis a vis* the companies, in the person in whose name the share stand. In such a case, it is competent to take out letters of administration limited only to the shares, the legal title of which vested in the deceased manager or the father. (Vol 33) 1946 Bom 163 (164, 165) (D B). ((Vol 29) 1942 Lah 173 : I L R (1942) Lah 717 (F B); (1905) 29 Bom 161 (D B) and (Vol 11) 1924 Bom 228 : 48 Bom 75 (F B), *Rel. on.*) ✠ (Vol 29) 1942 Lah 173 (175) : I L R (1942) Lah 717 (F B).

[2] Probate limited to collection of debts cannot be made. (Vol 33) 1946 Bom 109 (110) : I L R (1946) Bom 106 (D B).

3. "Province."— [1] Word "province" in S. 273 must be given same meaning given to it in S. 2 (g)— District Judge of Agra Province can grant letters of administration which would be effective only throughout Province of Agra which is under Allahabad High Court and Province of Oudh, which is under Chief Court of Oudh is beyond his jurisdiction. (Vol 24)

Section 273—Note 3 *(contd.)*

1937 All 670 (674) (D B). (Note.—This case went in appeal before the Privy Council, where their Lordships declined to express any opinion on this point: *See* (Vol 31) 1944 P C 29 : I L R (1944) Kar (P C) 216 (P C).)

[2] Section 273 applies only to property situate in a province in British India and not to property situate in a Native State. (Vol 16) 1929 Lah 72 (73).

[3] By clause 29 of the Zanzibar order in council, Zanzibar is for the purposes of probate a district in the Presidency of Bombay and therefore, probate granted by the Zanzibar Court has effect over property and estate of the deceased in Bombay. (1906) 8 Bom L R 725 (733) (D B).

[4] The grant under S. 273 will have effect only within the province and will not affect the property of the deceased which is outside the province. (Vol 16) 1929 Lah 72 (73).

[5] There is no law under which a Court is competent to refuse to grant probate merely on the ground that a part of the estate of the deceased is situate outside its jurisdiction or outside the province, if some part of the estate is situated or the deceased resided at the time of his death within its jurisdiction. (Vol 16) 1929 Lah 72 (73).

[6] Government securities and shares of over Rs. 10,000 of deceased lying with bankers at Calcutta — Safe custody receipt granted by bankers found in deceased's effects at Bhagalpur—District Judge at Bhagalpur held had no jurisdiction to grant letters of administration in respect of property at Calcutta. (Vol 30) 1943 Cal 19 (21) : I L R (1942) 2 Cal 194.

[7] If assets left by testator. are situated in more than one province, grant of probate, in respect of all assets which are likely to come to executor's hands, shall have effect only over property situate in province in which probate is granted. (Vol 8) 1921 Pat 206 (209): 6 Pat L Jour 411 (D B).

[8] Safe custody receipt of Bankers in respect of securities and shares of deceased cannot bring properties to which safe custody receipt relates within jurisdiction of Court within the meaning of S. 273 because receipt does not represent securities of shares but is merely document to evidence that Bank possessed certain property of constituent in its safe custody. (Vol 30) 1943 Cal 19 (21) : I L R (1942) 2 Cal 194.

4. "Conclusive." — [1] With the exceptions of a later will and fraud, probate in solemn form cannot be impeached by any person who has been a party to the action whether as plaintiff, defendant or intervener, or party cited or who has been privy thereto. And it is to be observed that a person having an interest need not be a party to a probate action to be bound by its result; if he was cognizant of it and was content to stand aside while others contested the action, he is precluded from re-opening the case. (Vol 29) 1942 Cal 283 (286, 288) : I L R (1941) 2 Cal 1 (DB). ((Vol 2) 1915 Cal 393 (DB), *Rel. on.*)

[2] The action of a Court of competent jurisdiction when it makes a grant of letters of administration is in the nature of proceedings *in rem* and so long as the order remains in force, it is conclusive not only against all parties who may be before the Court but also against all other persons whatsoever. (Vol 32) 1945 Oudh 152 (161) : 20 Luck 194 (DB).

[3] The effect of Ss. 213 and 273 is to make the probate the title of the executor to the property and also to make it evidence of the contents of the will itself as against legatees. (1872) 8 Beng L R 208 (220).

[4] Section 273 makes the probate conclusive as to the representative title of the executor against debtors of the deceased and persons holding property of his and gives a complete indemnity to those who pay debts or deliver up property to the executor holding the probate. (1906) 33 Cal 116 (130) : 32 Ind App 244 (PC).

[5] The grant of letters of administration so long as it subsists is conclusive evidence as regards the proper execution of the will and the legal character conferred upon the executor. (Vol 16) 1929 Lah 483 (485) (DB).

[6] The grant of probate is the decree of a Court which no other Court can set aside, except for fraud or want of jurisdiction. The grant of probate is conclusive as to the genuineness of the will and it cannot be subsequently questioned in a civil suit in which the will is relied on. Where the probate has been alleged to be wrongly granted, the proper course is to apply to the Court granting the same to revoke it. (1879) 4 Cal 360 (362, 363) (DB).

[7] Where a Bank paid the moneys which a customer had deposited with them to his administrators but it appeared that the Bank had knowledge of the fiduciary capacity of the administrators and of the trust in favour of the plaintiff created by a will and that the administrators were dealing with the trust money in a manner inconsistent with that trust—*Held* that the Bank were not entitled to the indemnity given by S. 273. (Vol 20) 1933 Mad 628 (630) (DB).

[8] A Mahomedan testator can only deal with one-third of his property, the remaining two-thirds pass to his heirs whatever the terms of the will may be. The grant of a probate of the will of the Mahomedan therefore does not create an estoppel against the heirs in a subsequent suit so far as the two-thirds of his property is concerned, although the grant was opposed by the heirs. In such a suit, the heirs are entitled to question the validity of transactions and release confirmed by the will in the subsequent suit. (1906) 33 Cal 116 (131) : 32 Ind App 244 (PC).

[9] There is nothing in the Act to suggest that a grant either of probate or of letters of administration becomes on revocation void *ab initio*. (Vol 18) 1931 Rang 15 (16, 18) : 8 Rang. 463 (DB).

[10] The decision of the Probate Court is conclusive only to the limited extent that the instrument admitted to probate is the will of the testator and so far as the question of *animus testandi* goes, but not as to what the Court must hold to be its construction as to the rights of the property disposed of by the will. (Vol 33) 1946 Oudh 193 (200) : 21 Luck 314 (DB) ✠ (Vol 20) 1933 Mad 114 (114) : 56 Mad 346 (DB).

[11] Grant of probate or letters of administration is decisive only of genuineness of will and of right of grantee to represent estate. It is impossible to say, therefore, that grant of probate or letters of administration with copy of will annexed would be a bar to determination of question of title or to a suit for construction of will. (Vol 24) 1937 Cal 595 (601) : I L R (1938) 1 Cal 75 (DB).

[12] Probate is conclusive as to representative title of executors, and also as to validity and contents of will. It is not conclusive as to collateral matter, it is not strictly even *prima facie* evidence of death, and does not prove that testator owned property which he purported to dispose of. (Vol 23) 1936 Rang 103 (104) ✠ (Vol 28) 1941 Pat 475 (478) (DB).

[*See also* (Vol 3) 1916 Pat 382 (383) (DB). (Title of testator to properties covered by his will or question whether or not person was adopted by testator are not matters which could be decided in probate proceedings.) ✠ (1913) 9 Nag L R 152 (154). (All that the Court of probate can do is to decide such questions as whether the will was validly executed, whether the applicant is the proper person to be granted probate as executor and what are the contents of the will. It has no authority to decide whether the will was void.)]

Transmission to High Courts of certificate of grants under proviso to section 273.

274. *(1)* Where probate or letters of administration has or have been granted by a High Court or District Judge with the effect referred to in the proviso to section 273, the High Court or District Judge shall send a certificate thereof to the following Courts, namely:

(a) when the grant has been made by a High Court, to each of the other High Courts;

(b) when the grant has been made by a District Judge, to the High Court to which such District Judge is subordinate and to each of the other High Courts.

(2) Every certificate referred to in sub-section *(1)* shall be made as nearly as circumstances admit in the form set forth in Schedule IV, and such certificate shall be filed by the High Court receiving the same.

(3) Where any portion of the assets has been stated by the petitioner, as hereinafter provided in sections 276 and 278, to be situate within the jurisdiction of a District Judge in another Province, the Court required to send the certificate referred to in sub-section *(1)* shall send a copy thereof to such District Judge, and such copy shall be filed by the District Judge receiving the same.

[1865 — S. 242A; Probate and Administration Act, 1881 — S. 60; *ibid*, 1903 — Ss. 2 (3), 3 (2).]

Conclusiveness of application for probate or administration if properly made and verified.

275. The application for probate or letters of administration, if made and verified in the manner hereinafter provided, shall be conclusive for the purpose of authorising the grant of probate or administration; and no such grant shall be impeached by reason only that the testator or intestate had no fixed place of abode or no property within the district at the time of his death, unless by a proceeding to revoke the grant if obtained by a fraud upon the Court.

[1865—S. 243; Probate and Administration Act, 1881—S. 61.]

Petition for probate.

276. *(1)* Application for probate or for letters of administration, with the will annexed, shall be made by a petition distinctly written in English or in the language in ordinary use in proceedings before the Court in which the application is made, with the will or, in the cases mentioned in sections 237, 238, and 239, a copy, draft, or statement of the contents thereof, annexed, and stating—

(a) the time of the testator's death,

(b) that the writing annexed is his last will and testament,

(c) that it was duly executed,

(d) the amount of assets which are likely to come to the petitioner's hands, and

(e) when the application is for probate, that the petitioner is the executor named in the will.

Section 273—Note 4 *(contd.)*

[13] It is not the province of a Court of probate to determine questions of title to property which the testator purports to dispose of by his will. The reason being that the grant of probate does no more than establish the factum of the will and the appointment of executors (if any) named in the will. (Vol 18) 1931 Mad 37 (38) : 54 Mad 24 (DB) ✠ (Vol 24) 1937 Bom 341 (355) (DB). (Probate Court cannot go into question whether deceased's property was joint or separate.) ✠ (Vol 20) 1933 Oudh 84 (85) (DB) ✠(Vol 2) 1915 Cal 289 (289) (DB).

[14] Grant of probate does not confer on executor any title to property which testator had no right to dispose of. It does not decide question of disposing power. (Vol 24) 1937 Bom 341 (355) (DB).

[15] In proceedings for letters of administration, the decision on the question of relationship between the applicant and the testator, does not operate as *res judicata*. (1911) 13 Cal L Jour 547 (556) (DB).

[16] The only judgment that can be put forward in a Court of probate in support of the plea of *res judicata* is a judgment of a competent Court of probate. Mother's application under Guardians and Wards Act for being appointed as guardian of person and property of minor — Objection by person who claimed to have been appointed guardian by a will of the deceased father of the minor — Will found to be not genuine — *Held* the decision regarding the will did not operate as *res judicata* in an application by the objector for grant of probate of the will. (1893) 16 Mad 380 (383, 384) (DB).

[17] See also under Ss. 218, 263 and 283.

5. "High Court." — [1] The Oudh Chief Court is a High Court within the meaning of S. 273 and has jurisdiction to grant probate of will with effect throughout British India. (Vol 29) 1942 Cal 283 (287) : I L R (1941) 2 Cal 1 (DB).

6. Miscellaneous. — [1] Where appeal from the decision granting letters of administration was compromised and the effect of the compromise was not the withdrawal of the question of determination of the genuineness of the will, though order was varied and the objector was added as co-administrator, the proceedings are undisturbed by the compromise and the reversioners who were aware of the proceedings are bound by the compromise. (Vol 16) 1929 Pat 385 (388) (DB).

Section 276 — Note 1.

Scope.—[1] Section 276 must be read with S. 19-I, Court-fees Act. Where to an application for grant of probate is not attached a schedule or annexure required by S. 19-I, Court-fees Act, application is defective and it is not competent for Court to allow this defect to be made good. (Vol 23) 1936 Sind 150 (151) : 30 Sind L R 201 (DB).

[2] An application for the grant of the probate of an oral will can be entertained under the Succession Act. (Vol 18) 1931 All 489 (490) : 53 All 687 (FB).

[3] An application for probate cannot be converted into one for letters of administration. (Vol 4) 1917 Pat 209 (211) (DB).

[4] Where, under S. 276, an application for probate of will is made, copy of the will having been obtained,

(2) In addition to these particulars, the petition shall further state,—

(a) when the application is to the District Judge, that the deceased at the time of his death had a fixed place of abode, or had some property, situate within the jurisdiction of the Judge ; and

(b) when the application is to a District Delegate, that the deceased at the time of his death had a fixed place of abode within the jurisdiction of such Delegate.

(3) Where the application is to the District Judge and any portion of the assets likely to come to the petitioner's hands is situate in another Province the petition shall further state the amount of such assets in each Province and the District Judges within whose jurisdiction such assets are situate.

[1865 — S. 244; Probate and Administration Act, 1881 — S. 62; *ibid*, 1889 — Ss. 2, 4; *ibid*, 1903 — Ss. 2 (4), 3 (3).]

In what cases translation of will to be annexed to petition. Verification of translation by person other than Court translator.

277. In cases wherein the will, copy or draft, is written in any language other than English or than that in ordinary use in proceedings before the Court, there shall be a translation thereof annexed to the petition by a translator of the Court, if the language be one for which a translator is appointed; or, if the will, copy or draft, is in any other language, then by any person competent to translate the same, in which case such translation shall be verified by that person in the following manner, namely :—

"I *(A. B.)* do declare that I read and perfectly understand the language and character of the original, and that the above is a true and accurate translation thereof."

[1865—S. 245; Probate and Administration Act, 1881—S. 63.]

Section 276—Note 1 *(contd.)*

true one being deposited in foreign Court, but it is found that application should have been for letters of administration under S. 228, Court can grant letters of administration with copy of will annexed or at least can allow application to be amended. (Vol 25) 1938 Lah 349 (350) : I L R (1938) Lah 562.

[5] A second application for probate of a will is maintainable in spite of the fact that the first was not proceeded with being withdrawn without obtaining leave to file fresh one. Order 23, R. 1, Civil P. C., is not applicable to probate proceedings. (1945) 49 Cal W N 636 (637) (DB).

Requirements for petition.

[6] It is the duty of the person applying for grant of probate to bring to the notice of the Court who are the persons who *prima facie* have a claim on the estate. If due to the applicant's omission, some of the claimants are not cited the probate proceedings are radically defective in substance and such defect is sufficient to revoke the probate. (Vol 20) 1933 Cal 74 (75, 76) (DB)✠ (Vol 3) 1916 Cal 623 (625) (DB).

[7] No doubt, S. 276 which lays down certain legal requirements for a petition for letters of administration, does not refer to the special circumstances which have to be established in order to justify an appointment under S 254. It is, however, desirable that a petition under S. 254 should plead specifically the existence of such circumstances as would make the section operate. (Vol 31) 1944 Mad 189 (190) : I L R (1944) Mad 658 (DB).

[8] The petitioner, under this section ought to state all the assets which are likely to come to the petitioner's hands, not merely such part of them as she chooses to name. (1899) 22 Mad 345 (346) (DB).

[9] An application for the grant of letters of administration with the will annexed, relating to one particular item need not contain an inventory of the entire property and can be granted. (Vol 12) 1925 Lah 493 (493).

[10] There is no law which provides that the petitioner for letters of administration with the will annexed must produce it from his own custody and with the petition. It is quite sufficient if he has an interest in the administration of the estate and can establish the existence of the will and if necessary can secure the production thereof by the person in whose possession it is : *See* S. 267. (Vol 18) 1931 Lah 130 (133).

Practice.

[11] It is not the business of the Court receiving an application for probate to hold an enquiry as to the property of the deceased or to consider any issue as to the title of the testator or his power to dispose of the property which the will purports to deal with. (Vol 4) 1917 Pat 209 (210) (DB).

[12] A testamentary Court dealing with the question of issuing a grant of probate is to see whether the will is duly executed as required by law by a testator of sound and disposing state of mind. It is no part of the testamentary Judge to consider the question of title to the property. (Vol 28) 1941 Bom 60 (61) ✠ (Vol 17) 1930 Oudh 272 (273) (DB).

[13] Application for grant of letters of administration with the will annexed — It is not the function of the probate Court to go into the question of the validity of the will with reference to the nature of the property disposed of by it—In such cases only question is whether will is proved to be duly executed. (Vol 18) 1931 Lah 130 (131).

[14] See also under Ss. 218, 273 and 283.

Limitation.

[15] The Limitation Act is not applicable to an application for probate. (1881) 6 Cal 707 (708) (DB).

Court-fee.

[16] The necessity for stating the particulars required under sub-s. (1) (d) and sub-s (3) of S. 276, is that without these facts it is impossible to assess the proper court-fee payable on the grant. (Vol 8) 1921 Pat 206 (214) : 6 Pat L Jour 411 (DB). ((1897) 21 Bom 139, *Dissent from.*)

[17] For court-fee see also Notes under Sch. 1, Art. 11 and Ss. 19G and 19J, Court-fees Act.

[18] See also Notes under S. 278.

Section 277 — Note 1

[1] In the case of a will executed in vernacular the Court is not for the purpose of construing it bound by the English translation officially made at the time of the grant of probate and is entitled to look at the original will itself. (Vol 33) 1946 Cal 55 (58) (DB).

Petition for letters of administration.

278. *(1)* Application for letters of administration shall be made by petition distinctly written as aforesaid and stating—

(a) the time and place of the deceased's death ;

(b) the family or other relatives of the deceased, and their respective residences;

(c) the right in which the petitioner claims;

(d) the amount of assets which are likely to come to the petitioner's hands;

(e) when the application is to the District Judge, that the deceased at the time of his death had a fixed place of abode, or had some property, situate within the jurisdiction of the Judge; and

(f) when the application is to a District Delegate, that the deceased at the time of his death had a fixed place of abode within the jurisdiction of such Delegate.

(2) Where the application is to the District Judge and any portion of the assets likely to come to the petitioner's hands is situate in another Province, the petition shall further state the amount of such assets in each Province and the District Judges within whose jurisdiction such assets are situate.

[1865—S 246; Probate and Administration Act, 1881 — S. 64; *ibid*, 1903, Ss. 2 (4), 3 (3) ; District Delegates Act, 1881—S 4.]

Section 278 — Note 1

[1] Contents of petition—Petition not containing all the particulars—Other material before Court acquainting it with details — Section is sufficiently complied with. (Vol 10) 1923 Pat 348 (350) : 2 Pat 508 (DB).

[2] The necessity for stating the particulars required under S. 278 (1) (d) and sub-s. (2) is that without these facts it is impossible to assess the proper court-fees payable on the grant. (Vol 8) 1921 Pat 206 (214) : 6 Pat L Jour 411 (DB) ((1897) 21 Bom 139, *Dissent from.*)

[3] For court-fee, *see* Notes on Sch. 1 Art. 11; Ss. 19G and 19I, Court-fees Act.

[4] A Court of Probate is not only entitled but even bound to enter into questions of title, if it is necessary to decide that question in order to determine which of the two contesting parties is entitled to a grant of letters of administration. Where, however, a caveator does not himself apply for letters of administration but merely sets up a paramount title, e. g, that he being an adopted son is entitled to the whole estate not by inheritance but by survivorship, the probate Court is not entitled to go into the merits of the title set up by the caveator and the nature of the estate left by the deceased. (Vol 7) 1920 Pat 343 (345, 347) : 5 Pat L Jour 107 (DB).

[5] In case of grant of letters of administration, the Court has to see that the person properly entitled to represent the estate of the deceased according to the Succession Act has come to Court, and is given the grant. It is no part of the testamentary Judge to consider the question of title to property. (Vol 28) 1941 Bom 60 (61).

[6] For jurisdiction of the probate Court to determine question of title *see also* notes under Ss. 218, 273 and 283.

[7] Where there is no estate which stands in need of administration, no suggestion that any creditors have to be paid or any debts due to the estate have to be collected, and an application for letters of administration is a transparent device to secure from the probate Court a decision upon a contested question of title to the estate, there is no occasion for the grant of letters of administration. (Vol 28) 1941 Oudh 474 (475, 476) : 17 Luck 78 (DB) ✠ (1921) 64 Ind Cas 61 (62) (DB) (Cal).

[8] It is not necessary for the probate Court to decide, what assets are likely to come to the hands of the petitioner for administration, but it is the duty of the Court in granting letters of administration to consider whether there is any estate whatever to be administered. (1912) 15 Cal L Jour 305 (307) (DB).

[9] As a rule, general letters of administration of a Hindu's estate must be taken out. Limited administration can only be granted under special circumstances. (1881) 6 Cal 483 (484, 485) (SB).

[*See* (1880) 5 Cal 2 (3). (If Hindus take out letters of administration at all, they must take out general letters. The Court cannot grant limited letters of administration)]

[10] A member of a joint Hindu family with a deceased person is not competent to apply for letters of administration to that person's estate. In such a case, the estate passes by survivorship and there is nothing left to administer. (Vol 6) 1919 Lah 235 (236); 1919 Pun Re No. 56.

[11] Where shares in a bank purchased with the funds of the joint Hindu family and belonging to it stand in the name of the *karta* alone, the legal estate vests in him, while the beneficial interest is in the family. On the death of *karta*, no change takes place so far as the beneficial interest is concerned. It continues to be, as it has always been in the family. The legal estate, however, does not pass by survivorship to the other coparceners and, therefore, an application for grant of letters of administration by the surviving coparceners limited to the shares in question is competent even though the beneficial interest had, on the death of the *karta*, vested jointly in the other coparceners and his widow under Hindu Women's Right to Property Act (XVIII of 1937 as amended by Act XI of 1938). (Vol 29) 1942 Lah 173 (175) : I L R (1942) Lah 717 (FB) ✠ (Vol 33) 1946 Bom 163 (164, 165) (DB). ((Vol 29) 1942 Lah 173 : I L R (1942) Lah 717 (FB) ; (1905) 29 Bom 161 (DB) and (Vol 11) 1924 Bom 228 : 48 Bom 75 (FB), *Rel. on.*)

[12] Court should not refuse to grant letters unless it finds (1) that will is not executed by deceased or (2) that he was not in sound and disposing state of mind at time of making it or (3) will was not his own voluntary act. (Vol 5) 1918 Lah 121 (122).

[13] A finding as to the relationship between the applicant and the deceased in proceedings under the Succession Certificate Act is not a bar to trial of the same question between the same parties in a proceeding under S. 64, Probate and Administration Act, (corresponding to S. 278, Succession Act). (Vol 12) 1925 Oudh 670 (670).

[14] As soon as the probate Court is informed of the existence of the minor heir of the deceased in case of intestacy, it is its duty to issue notice upon the minor and to have a guardian *ad litem* appointed for her.

Addition to statement in petition, etc., for probate or letters of administration in certain cases.

279. *(1)* Every person applying to any of the Courts mentioned in the proviso to section 273 for probate of a will or letters of administration of an estate intended to have effect throughout British India, shall state in his petition, in addition to the matters respectively required by section 276 and section 278, that to the best of his belief no application has been made to any other Court for a probate of the same will or for letters of administration of the same estate, intended to have such effect as last aforesaid,

or, where any such application has been made, the Court to which it was made, the person or persons by whom it was made and the proceedings (if any) had thereon.

(2) The Court to which any such application is made under the proviso to section 273 may, if it thinks fit, reject the same.

[1865— S. 246 (A); Probate and Administration Act, 1881 — S. 65; *ibid* 1903 — S. 2 (5).]

Petition for probate, etc., to be signed and verified.

280. The petition for probate or letters of administration shall in all cases be subscribed by the petitioner and his pleader, if any, and shall be verified by the petitioner in the following manner, namely :—

"I *(A. B.)*, the petitioner in the above petition, declare that what is stated therein is true to the best of my information and belief".

[1865—S. 247 ; Probate and Administration Act, 1881— S. 66.]

Verification of petition for probate by one witness to will.

281. Where the application is for probate, the petition shall also be verified by at least one of the witnesses to the will (when procurable) in the manner or to the effect following, namely : —

"I *(C. D.)*, one of the witnesses to the last will and testament of the testator mentioned in the above petition, declare that I was present and saw the said testator affix his signature (*or* mark) thereto (*or* that the said testator acknowledge the writing annexed to the above petition to be his last will and testament in my presence)."

[1865— S. 248 ; Probate and Administration Act, 1881— S. 67.]

Punishment for false averment in petition or declaration.

282. If any petition or declaration which is hereby required to be verified contains any averment which the person making the verification knows or believes to be false, such person shall be deemed to have committed an offence under section 193 of the Indian Penal Code.

[1865—S. 249 ; Probate and Administration Act, 1881— S. 68.]

Powers of District Judge.

283. *(1)* In all cases the District Judge or District Delegate may, if he thinks proper,—

(a) examine the petitioner in person, upon oath:

Section 278 — Note 1 *(contd.)*

(Vol 3) 1916 Cal 885 (886) (DB). ((1898) 2 Cal W N 100, *Foll.*)

[15] See also Notes under S. 276.

Section 279 — Note 1

[1] Under S. 279 an applicant for probate, to have effect throughout British India, must mention any previous proceedings for probate and the Court is empowered to reject such an application. This section clearly contemplates that the Court before whom an application is brought, has a discretion in the exercise of its powers. (1941) 45 Cal W N 757 (759, 760).

[2] If the Court has power to reject, the parties cannot waive or deprive the Court of that power. (Vol 28) 1941 Cal 417 (423).

[3] With regard to the phrase "same will" in S. 279, the intention is that applicant should disclose all proceedings in respect of any testamentary document of testator in respect of whose testamentary document or documents he is himself taking proceedings. (Vol 28) 1941 Cal 417 (423).

[4] Concurrent jurisdiction — In case of concurrent jurisdiction in a probate action it is very necessary to avoid a conflict. In determining whether the Court should have regard and defer to a jurisdiction with which it may come into conflict, two points should be considered, priority in time and extent of relief asked for or obtainable in the other jurisdiction. (Vol 29) 1942 Cal 283 (287) : I L R (1941) 2 Cal 1 (DB). (Two sets of proceedings for probate going on at the same time in Oudh Chief Court for probate of will and in Calcutta High Court for probate and codicil—On facts held, proceedings in Calcutta High Court should be stayed.)

Section 280 — Note 1

[1] Petition by Administrator-General for letters of administration containing a statement as to the value of the estate followed by a prayer for remission of court-fee under R. 697, Belchambers' Rules and Orders — Administrator-General should not be required to verify otherwise than by his signature the statement as to the value of the assets likely to come to his hands. (1893) 20 Cal 879 (880).

Section 281 — Note 1

[1] Provision as to verification by attesting witness is directory and not mandatory and omission can be cured. (Vol 10) 1923 Nag 41 (42).

SECTION 283 — SYNOPSIS

1. Clause (b)—"Due execution" (General).
2. Knowledge and approval of deed by testator.
3. Will executed under suspicious circumstances.
4. Delay in propounding will.
5. Testamentary instrument — Illustrative cases.
6. Compromise.
7. Registration of will.
8. Burden of proof.

(*b*) require further evidence of the due execution of the will or the right of the petitioner to the letters of administration, as the case may be;

(*c*) issue citations calling upon all persons claiming to have any interest in the estate of the deceased to come and see the proceedings before the grant of probate or letters of administration.

(*2*) The citation shall be fixed up in some conspicuous part of the court house, and also in the office of the Collector of the district and otherwise published or made known in such manner as the Judge or District Delegate issuing the same may direct.

(*3*) Where any portion of the assets has been stated by the petitioner to be situate within the jurisdiction of a District Judge in another Province, the District Judge issuing the same shall cause a copy of the citation to be sent to such other District Judge, who shall publish the same in the same manner as if it were a citation issued by himself, and shall certify such publication to the District Judge who issued the citation.

[1865—S. 250 ; Probate and Administration Act, 1881— S. 69 ; *ibid*, 1903 — Ss. 2 (6), 3 (4) ; District Delegates Act, 1881—S. 9.]

Section 283 *(contd.)*

9. Oral will — Proof of.
10. Clause (c)—Special citation (General).
11. "Persons claiming to have any interest in the estate of the deceased".
12. Res judicata—See Notes under S. 263.
13. Party to proceedings.

1. Clause (b)— "Due execution" (General). — [1] The term "duly executed" does not mean merely the technical sense of it, the fact of execution by the testator and the subscription of two witnesses as required by the statute but what is meant is the proof of execution which carries with it a conviction that the testator knew and approved of the contents of the instrument. This of course involves in the proposition that he was a free and capable testator, since knowledge implies his possession of the capacity without which he could not know the contents of the will, and approval cannot be real and complete without a free exercise of the will. (1894) 21 Cal 279 (289) (DB). (*Mitchell* v. *Thomas*, (1847) 6 Moo P C 150 : 13 E R 641, *Foll.*)

[2] In unopposed application for probate, *prima facie* proof of the execution of the will is sufficient to warrant the grant. (1881) 7 Cal L R 387 (392) (DB).

[3] The standard of proof required by the Indian statutes to establish a will propounded is the standard of a prudent man. (1912) 39 Cal 245 (255) (DB).

[4] In a proceeding for the probate of a will, the will must be duly proved either in a common form or *per testes* : if the proceeding is contentious it must be proved in solemn form. The consent of parties that probate should be granted cannot give validity to a grant of probate, as no grant can be valid unless the will be proved in some form and the Judge be in a position to pronounce that it is proved and registered before him (1904) 31 Cal 357 (362) (DB). ((1897) 21 Bom 335 (DB), *Foll.*)

[5] When their Lordships of the Privy Council have to deal with the question of whether a document (e. g., a will) is forged it is of first importance that they should have either the document or at any rate a photostatic copy of it, before them. (Vol 31) 1944 P C 11 (13) : I L R (1944) Kar P C 61 : 71 Ind App 1 (P C).

[6] Section 283 and other sections preclude the possibility of the probate Judge referring the question of the execution of a will to arbitration, unless possibly all the beneficiaries appear before him and consent to that course and even then it is doubtful whether the Court can refer it. The probate Court must be itself satisfied by admissible evidence that the will is the will of the testator. (1897) 21 Bom 335 (342) (DB).

[7] In granting probate, the Court is to satisfy itself on all points regarding the will and proceed on evidence on record and contentions of parties. (Vol 6) 1919 Cal 74 (75) (DB).

[8] In the absence of any circumstance, to suggest forgery of the will or perjury by the witnesses, the argument against the genuineness of a will based on the fact that the witnesses to the execution of the will were not men of superior social position, is unsound and contrary to law. Something more than mere suspicion is necessary to make convincing an argument based on the social position of the witnesses. (Vol 3) 1916 P C 157 (160) (P C). ✠ (1895) 22 Cal 519 : 22 Ind App 12 (P C) ✠ (1913) 36 All 93 : 41 Ind App 76: 16 Oudh Cas 386.)

[9] A Court of probate is not a Court of probity and the Court has not to ask whether the testator bequeathed his property as they think he ought to have done. If the propounders prove the *bona fides* of the transaction and there are no circumstances suggesting suspicion, probate can be granted. (Vol 25) 1938 Rang 251 (254) (DB).

[10] Secondary evidence of will — Will shown to have been last in proper custody and to have been lost —Will more than 30 years old—Secondary evidence of will held might be admitted without proof of the execution of the original. (1880) 5 Cal 886 (888).

[11] Will giving testator's widow power to adopt and directing his property to be held in a particular way— Adoption made with the knowledge of the members of family — Will acted upon and recognised by testator's family for 27 years — Will held was proved. (1872) 14 Moo Ind App 67 (76, 84) (PC).

[12] Will attested by 12 witnesses — No signature of testator but name written by uncle—Court remarking that all evidence need not be given — Procedure held defective—Will required to be carefully scrutinised and it was necessary to place before Court all available evidence so that Judge could form right conclusion, having free mind. (Vol 6) 1919 Cal 186 (187) (DB).

[13] According to English practice, probate may be granted of the will of a person domiciled abroad upon proof that it is a valid will according to the law of domicile and that there are assets within the jurisdiction and it is not necessary that it should be first proved in the Courts of domicile. (Vol 3) 1916 P C 202 (204) : 43 Ind App 113 (PC).

[14] The mere fact that the party objecting to the application for grant of letters of administration does not categorically deny the execution of the will by the alleged testator is no sufficient ground for dispensing with the formal proof of the will as required by law. (Vol 24) 1937 Lah 69 (70).

Section 283 *(contd.)*

2. Knowledge and approval of deed by testator. —[1] In ordinary cases, execution of a will by a competent testator raises the presumption (sufficient, if nothing appears to the contrary, to establish) that he knew and approved the contents of the will. Also, under ordinary circumstances, the competency of a testator will be presumed, if nothing appears to rebut the ordinary presumption. As the result of these two presumptions in ordinary cases, at least in many cases, proof of execution of the will is enough But where the mental capacity of the testator is challenged the Court ought to find whether upon the evidence the testator was of sound disposing mind and did know and approve of the contents of the will. (1894) 21 Cal 279 (290) (D B).

[2] Before any grant of letters is made, the Judge must require strict proof of the execution of the will. It is not enough for witnesses to say that they saw the testator sign the will and that he was in his senses. It must also be proved that he understood the contents of the paper to which he was putting his signature, and for this purpose it should be shown that the will, if not written by himself, was read over to him. (1899) 22 Mad 345 (347) (D B).

[3] Ability to sign one's name does not necessarily imply the possession of the full mental powers requisite for a complete disposition of property. (1911) 10 Mad L Tim 304 (310) (D B).

[4] In all cases in which the evidence is conflicting it is the duty of a Court of Appeal to have great regard to the opinion formed by the Judge in whose presence the witnesses gave their evidence as to the degree of credit to be given to it, and probably the advantage of hearing the witnesses give their evidence is of special value, where there is conflict between them as to; the mental capacity of a person whose conduct they have observed and whose state of mind they depose to; for the original Court has not merely the better opportunity of judging of the truthfulness of the evidence from the manner in which it is given but also of judging how far the witnesses possess those qualities on which depends much of the value of evidence given in good faith, power of observation, of judgment, accuracy of expression, general intelligence. (1894) 21 Cal 279 (284) (D B).

3. Will executed under suspicious circumstances.—[1] Where the case of petitioners for grant of letters of administration carries certain element of suspicion, the Court should in such circumstances, insist on a very strict standard of proof and ought not to make a grant unless it is satisfied that the suspicion has been removed. (Vol 26) 1939 Cal 595 (596) (D B).

[2] Mere grounds of suspicion are not sufficient to refuse probate. (Vol 3) 1916 P C 157 (163) (P C).

[3] Will alleged to be executed in suspicious circumstances—The suspicion must be one inherent in the transaction itself and not the doubt that may arise from a conflict of testimony which becomes apparent on an investigation of the transaction. (1912) 39 Cal 245 (253) (D B).

[4] If a party writes or prepares a will under which he takes a benefit, that is a circumstance that ought generally to excite the suspicion of the Court and call upon it to be vigilant and jealous in examining the evidence in support of the instrument in favour of which it ought not to pronounce unless the suspicion is removed. (1911) 13 Bom L R 38 (46) (DB). (*Tyrrell* v. *Painton* (1894) P D 151 and *Barry* v. *Butlin* (1838) 2 Moo P C 480 : 12 E R 1089, *Rel. on.*)

[5] Will one day before death — Spiritual preceptor made residuary legatee — In granting probate Court should see if undue influence was used. (Vol 6) 1919 Cal 186 (187) (D B).

[6] Party taking benefit writing will—Such action raises suspicion — But this suspicion is removed if large legacies are left to other persons also. (Vol 20) 1933 Sind 262 (266, 267).

[7] Scribe and attesting witnesses proving will— Caveator's case resting on suspicion—Court to listen to caveator with greatest caution. (Vol 12) 1925 Pat 363 (364) (D B).

4. Delay in propounding will. — [1] Late presentation of will in public is not by itself material. (Vol 3) 1916 P C 157 (160) (P C).

[2] Long delay in propounding will, will give room to much suspicion and Courts are in such cases bound to scrutinize evidence very carefully. (Vol 5) 1918 Cal 161 (162) (D B).

[3] The probate of a will, which appears to be natural and in accord with the tenor of the life of the deceased, should not be refused on the mere ground of delay in the production of the will. (Vol 4) 1917 Pat 151 (152) (D B).

[4] Where an unregistered will is sought to be propounded after the lapse of more than 20 years it is required that all manner of doubt and suspicion which are likely to arise should be removed by propounders. No probate can be granted unless such suspicion is removed. (Vol 26) 1939 Cal 535 (539) (D B).

5. Testatmentary instrument—Illustrative cases. —[1] Will by Hindu testator — Hindu uncle joint with his nephew executing "Vyavastha patra" before death — Deed declaring testator to be separate from nephew from date of execution of deed in symbolical way —Uncle and nephew declared to be owners of their separate shares — Testator sonless and forbidding his wife to make adoption after his death — Disposition in favour of wife and daughters of part of his separate share — No provision for devolution of his separate share after death of widow — Appointment of vyavasthapaka to manage property—Deed held was will and not family arrangement — Probate could be granted. (Vol 24) 1937 Bom 341 (354, 355) (D B).

[2] A taluqdar in Oudh, in reply to a letter from the Government asking him to declare the custom of succession obtaining in his estate, executed the following document: "After my death, *U* (the eldest son) (*sic*) my estate should continue in my family undivided in accordance with the custom of raj gaddi and that the younger brothers shall be entitled to get maintenance from the gaddinashin" — *Held* that the instrument was testamentary disposition by the taluqdar of his estate in favour of his eldest son. (1911) 33 All 344 (355) : 38 Ind App 104 : 14 Oudh Cas 133 (PC).

[3] Sanad executed by taluqdar in Oudh through the mediation of family friends, stated: "For who is my son I fix Rs. 300 annually as maintenance. Besides this, whatever I may give I will give equally to the 3 sons except provisions, which they may take from my godown. The marriage and gauna expenses of the sons and daughters shall be borne by me. After me the three sons are to divide the property"— *Held* that the document was a non-testamentary instrument It was a family arrangement intended to be operative immediately. It required to be registered to make it effective (1911) 33 All 344 (355) : 38 Ind App 104 : 14 Oudh Cas 133 (P C).

6. Compromise.— [1] A Court exercising probate jurisdiction cannot grant or refuse probate of a will by consent and without taking evidence. This principle has for its basis the fact that a probate or an order refusing probate operates as judgment *in rem*. (1944) 48 Cal W N 294 (299) (D B) ✠(1904) 31 Cal 357 (362, 363) (D B). (An agreement or compromise as regards the genuineness and due execution of the will, if its effect is to exclude evidence in proof of the will,

Section 283 — Note 6 *(contd.)*
is not lawful.) ✠ (Vol 18) 1931 All 745 (745) : 53 All 1000 (D B).

[2] In a contentious proceeding, probate may be granted in common form in consequence of a compromise between the disputants, resulting in the withdrawal of opposition. It cannot afterwards be revoked except on proof of fraud or circumvention practised either upon the Court or upon the parties. (1910) 14 Cal W N 1068 (1071) (D B).

[3] When a will is put before the probate Court for proof, the parties before the Court can enter into an agreement which changes the terms of the will and say that probate be granted. The effect of such an agreement will be the withdrawal of the objections to the proof of the will in consideration of the division of the estate in the manner agreed upon. In such a case the probate Court will have to take evidence about the will and if it comes to the conclusion that the will is valid it must grant probate of the will as it stands and unmodified by the terms of the agreement but should make the agreement arrived at between the parties an annexture to the decree. The parties agreeing would be bound to regulate their rights *inter se* according to that agreement. (1944) 48 Cal W N 294 (299, 300).

[4] Where there is a *bona fide* dispute about the validity of a will, an agreement between the interested parties arrived at by way of compromise that none of them would approach the Court for adjudicating upon the validity of that document and that they would divide the property included in the deed in a certain manner is binding upon the parties to the agreement. (1944) 48 Cal W N 294 (300) (D B).

[5] There can be no dismissal of probate case in accordance with the terms of a petition of compromise. (Vol 3) 1916 Pat 82 (83) : 1 Pat L Jour 377 (D B).

7. Registration of will.—[1] Effect of registration of a will — The registration is a solemn act, to be performed in the presence of a competent official appointed to act as Registrar, whose duty it is to attend the parties during the registration and see that the proper persons present are competent to act and are identified to his satisfaction; and all things done before him in his official capacity and verified by his signature will be presumed to be done duly and in. Order of course it may be shown that, a deliberate fraud upon him has been successfully committed. (1906) 33 Cal 537 (544): 33 Ind App 60 (PC).

[2] Absence of registration of will is not by itself material in proving due execution of will. (Vol 3) 1916 P C 157 (160) (P C).

8. Burden of proof.—[1] The burden of proving a will in solemn form is cast upon the propounders. (Vol 26) 1939 Cal 535 (539) (D B).

[2] In all cases the onus is imposed on the party propounding a will; it is in general discharged by proof of capacity and the fact of execution from which the knowledge of and assent to the contents of the instrument are assumed. (1894) 21 Cal 279 (290) (D B). (*Barry* v. *Butlin* (1838) 2 Moo P C 480 : 12 E R 1089, *Foll.*)

[*See also* (1911) 13 Bom L R 38 (46) (D B). (The onus lies in every case upon the party propounding a will and he must satisfy the conscience of the Court that the instrument so propounded is the last will of a capable testator—*Barry* v. *Butlin*, (1838) 2 Moo P C 480; 12 E R 1089 and *Tyrrel* v. *Painton*, (1894) P D 151, *Foll.*)]

[3] Onus of proving existence of disposing mind lies on person applying for probate of will. (Vol 21) 1934 Lah 682 (683).

[4] Where circumstances are suspicious, it is for those who propound the will to remove such suspicions and to prove affirmatively that the testator knew and approved of the contents of the document, and it is only where this is done that the onus is thrown on those who oppose the will to prove fraud or undue influence. (1911) 10 Mad L Tim 304 (310) (D B).

[5] Will complying with all requisites of formality and also reasonable in its provisions — Burden is on those opposing the grant of its probate to prove that the Court ought to refuse probate either on account of the incapacity of the testator at the time of the alleged execution or on any other ground. (1892) 19 Cal 65 (74) : 18 Ind App 132 (P C).

9. Oral will—Proof of — [1] The Succession Act extends to nuncupative wills. The Courts regard an oral will with suspicion and require it to be established by clear proof. (1900) 24 Bom 8 (12) (D B).

[2] The onus of establishing an oral will is always a very heavy one. It must be proved with the utmost precision, and with every circumstance of time and place. (Vol 18) 1931 P C 285 (287) : 58 Ind App 362 (P C). ((1869) 12 Moo Ind App 1 (P C), *Foll.*)✠(Vol 29) 1942 All 201 (219) : I L R (1942) All 759 (F B). (Per Division Bench.))

[3] The fact that the substance of the oral will was taken down at the time the will was made could not make any difference in the eye of the law. That fact would only be a strong piece of evidence to prove the contents of the oral will. (Vol 18) 1931 All 489 (490) : 53 All 687 (F B).

[4] An oral declaration made by the deceased of testamentary intentions to which effect was to be given by a written will, held could not be regarded as an oral will. It could not be inferred that there was the necessary *animus testandi* or intention that an oral declaration should itself operate as a testamentary disposition of the declarant's property. (Vol 18) 1931 P C 285 (287) : 58 Ind App 362 (P C).

10. Clause (c)—Special citation (General)— [1] There is no difference in principle between a special and a general citation issued under S. 283 (1), cl. (c), Succession Act. The object of both is to give notice to persons interested in the estate of the deceased of the proceedings for grant. As a testamentary grant works *in rem*, it is of the utmost importance to give a wide publication to the proceedings. When the discretion is exercised and a general citation is issued, it is necessary that it should be published as required by sub-ss. (2) and (3) of S. 283. (Vol 27) 1940 Cal 296 (301) : I L R (1940) 1 Cal 33 (DB).

[2] General citation issued — Special citation to one of executors to join not necessary. (Vol 17) 1930 Sind 91 (91) (DB).

[3] It is obligatory upon the Court when it is brought to its notice that there is a person entitled to special citation, to issue such citation and it is the bounden duty of a propounder to have special citation served upon a person who under the law is entitled thereto. (Vol 18) 1931 Cal 497 (498) (DB).

[4] In a probate proceeding as soon as the Judge is informed of the existence of a minor heir of the deceased in case of intestacy, it becomes incumbent upon him to issue notice upon the minor and to have a guardian *ad litem* appointed for him. (Vol 3) 1916 Cal 885 (886) (DB).

[5] There is a broad distinction between cases of wills and cases of intestacy in the matter of citations, for in the former cases the proof of a will in a majority of cases acts prejudicially to the legitimate rights of those who would inherit or be entitled to the properties in the absence of a will, and omission to cite them is likely to affect such rights of theirs in their absence; while in the latter cases such omission only affects their

Section 283 — Note 10 *(contd.)*

preferential right to administer or prevents them from objecting to the personnel of the administrator or to like matters and it is not until there is any mal-administration that they are really affected. (Vol 14) 1927 Cal 207 (209) (DB).

[6] Section 283 vests the District Judge in regard to citations with full discretion which should be exercised with proper care: and when a will is propounded which alters the devolution of property, a special citation should be directed to be served upon the person or persons who is or are immediately affected by the will. (1882) 8 Cal 570 (576) (DB) ✠ (Vol 3) 1916 Cal 623 (625) (DB).

[7] Section 283 allows a discretion and that which the law expressly allows, the Courts ought not, by implication, to take away. Different considerations arise when the testator is a Hindu and when he is a Christian. It is not in every case where a will alters a devolution of property that a special citation need be issued. (Vol 20) 1933 Sind 262 (265, 266).

[8] In every case in which probate of a Hindu will is asked, a special citation ought to be served upon those persons whose interests are directly affected by the will. e. g., the next presumptive reversioners. (1882) 8 Cal 570 (575) (DB)✠(1900) 27 Cal 350 (351). (Minor widow of testator entitled to maintenance and residence under the will living—Special citation should issue upon widow and served personally on her and also on her father with whom she occasionally resided.)

Absence of citations — Effect.

[9] Section 283 (1) (c) makes it discretionary for Court to issue citations on all persons claiming to have interest in estate of deceased. Absence of citations which are discretionary does not in itself invalidate grant (Vol 20) 1933 Bom 370 (374)✠(Vol 25) 1938 Rang 261 (262, 263): 1938 Rang L R 360 (FB). ((Vol 23) 1936 Rang 105:14 Rang 146, *Overruled.*)✠(Vol 18) 1931 Cal 497 (499) (DB)✠(1911) 13 Bom L R 38 (42) (DB).

[10] Absence or non-service of special citation is itself a good ground for revocation in the absence of other circumstances on which the Court may refuse revocation. (Vol 27) 1940 Cal 296 (301) : I L R (1940) 1 Cal 33 (DB).

[11] Citation against minor — Should be issued to the guardian — Issue only discretionary—No issue of citation — Grant of probate not vitiated — Minor can apply for revocation after majority. (Vol 14) 1927 Bom 387 (388).

[12] Citations should always issue to parties who are known to the Court to be interested or to claim any interest in the estate of the deceased, but where such persons themselves have not complained for such omission, the omission to cite them does not call for the revocation of the grant. (Vol 14) 1927 Cal 207 (210) (DB)

[13] See also under S. 263.

11. "Persons claiming to have any interest in the estate of the deceased."—[1]' It is suggested that it is only those persons who could be cited before the grant of probate who are the persons who could apply to revoke the probate. In their Lordships' view that is putting it on much too narrow a footing." (Vol 31) 1944 PC 11(13): 71 Ind App 1: ILR (1944) Kar (PC).61(PC).

[2] The term "persons claiming to have any interest in the estate of the deceased" used in S. 283 (1) (c), does not necessarily refer to any particular property, but to the claim of any person to succeed by inheritance or otherwise to any portion of the estate of the deceased by reason of an interest, not on an adverse title to the testator to any particular property, but in the estate itself whatever that may consist of. (1890) 17 Cal 46 (52) (DB).

[3] *Fazl Ali J.*—The interest which entitles a person to object to the grant of probate must be an interest in the estate and not merely an interest in the result of the probate proceedings or "interest" in any remote sense of the term. (Vol 28) 1941 Pat 151 (155) : 20 Pat 75 (DB).

[4] Per *Waller J.*—The words "persons claiming to have any interest in the estate of the deceased" are intended to bear the same meaning as the words in the English Act, "having or pretending interest in the (personal) estate affected by a will." (Vol 13) 1926 Mad 1193 (1196) : 49 Mad 960 (DB). ((1901) 28 Cal 441 (DB), *Foll.*)

[5] Per *Devadoss J.*—A person who is entitled to any portion of the estate left by the deceased or a right to claim maintenance from the estate of the deceased has an interest within the meaning of S. 283. It is not necessary that he should claim through the testator in order to enable him to oppose the grant. (Vol 13) 1926 Mad 1193 (1196) : 49 Mad 960 (DB).

[6] Only a real interest, however small, entitles the man to oppose a grant or to apply for revocation of a grant for just cause. (Vol 27) 1940 Cal 296 (299) : ILR (1940) 1 Cal 33 (DB).

[7] Citations should be served upon all persons who have an interest in the estate, in other words all persons who have a *locus standi* to be heard on the question of grant of probate. (Vol 19) 1932 Pat 89 (90): 10 Pat 812 (DB).

[8] Creditor of deceased testator is not entitled to object to grant of letters of administration regarding immovable property unless will is in fraud of creditors. (Vol 1) 1914 Low Bur 43 (44) : 7 Low Bur Rul 293 (DB)✠(Vol 28) 1941 Pat 151 (152, 155):20 Pat 75 (DB). (A simple creditor of the deceased cannot ordinarily object to the grant of probate.)

[9] A creditor of the heir of the testator is entitled to apply for revocation of the probate on the ground that the grant was obtained fraudulently. (Vol 31) 1944 P C 11 (13) : 71 Ind App 1 : ILR (1944) Kar (PC) 61 (PC). ((Vol 27) 1940 Cal 296 : I L R (1940) 1 Cal 33 (DB), *Affirmed*)

[*See also* (1881) 6 Cal 460(464)(DB). (Attaching creditor and a mortgagee from heir of te tator held had such interest as entitled them to oppose the grant of a will which had the effect of passing property which should otherwise come to the heir—(1881) 6 Cal. 429 (DB), *Foll*.) ✠ (1884) 10 Cal 413 (416) (DB)]

[10] By no stretch of reason it can be said that a debtor of a deceased testator, by merely contracting a loan, becomes interested in the estate of the deceased within the meaning of S. 283 (1) (c). He has, therefore, no *locus standi* to object to the grant of the letters of administration. (Vol 28) 1941 Pat 18 (18) (DB).

[11] A person who is named in the will as executor cannot object to the grant of probate of the testator's will. (Vol 28) 1941 Pat 151 (152) : 20 Pat 75 (DB).

[12] A person who has a real interest in the estate which is likely to be prejudicially affected by the will can oppose grant. It is not necessary for the objector to show that he had an interest in the estate at the time of the testator's death. (Vol 19) 1932 Cal 734 (735): 59 Cal 1308 (DB)✠(Vol 27) 1940 Cal 296 (299, 300) : I L R (1940) 1 Cal 33 (DB). (Interest in estate of deceased need not exist at time of his death but may be acquired subsequently before application for probate is made or while probate proceedings are pending.)

[13] A purchaser from an heir has a *locus standi* to come in and allege that the will is a forgery and that the probate should be revoked. (1911) 13 Bom L R 38 (41) (DB).

[14] A reversioner under Hindu law is interested in the devolution of the property left by the deceased. (Vol 3) 1916 Cal 623 (625) (DB).

[15] Will by Hindu—Immediate reversioner entering into settlement with propounders of will—Remote

Caveats against grant of probate or administration.

284. *(1)* Caveats against the grant of probate or administration may be lodged with the District Judge or a District Delegate.

(2) Immediately on any caveat being lodged with any District Delegate, he shall send copy thereof to the District Judge.

(3) Immediately on a caveat being entered with the District Judge, a copy thereof shall be given to the District Delegate, if any, within whose jurisdiction it is alleged the deceased had a fixed place of abode at the time of his death, and to any other Judge or District Delegate to whom it may appear to the District Judge expedient to transmit the same.

Form of caveat.

(4) The caveat shall be made as nearly as circumstances admit in the form set forth in Schedule V.

[1865—Ss. 251, 252, Probate and Administration Act, 1881 — Ss. 70, 71; District Delegates Act, 1881—S. 5.]

Section 283 — Note 11 *(contd.)*

reversioners held had *locus standi* to enter caveats against grant of probate (Vol 5) 1918 Cal 183 (185) (DB)

[16] Government has no *locus standi* to oppose grant of probate in presence of heirs. (Vol 3) 1916 Cal 804 (805) (DB).

[17] The interest which entitles a person to lodge a caveat must be an interest in the estate of the deceased, that is to say, there must be no dispute as to the title of the deceased to the estate. (Vol 18) 1931 Mad 37 (38): 54 Mad 24 (DB). ((Vol 15) 1928 Mad 803, Affirmed) ✠(1910) 34 Bom 459 (461) (DB) (But the person who wishes to come in as the caveator must show some interest in the estate derived from the deceased by inheritance or otherwise.)

[18] A person who claims outside and independently of a will or claims adversely to the testator and disputes his right to deal with the property, can in no sense be deemed to claim an interest in the estate of the deceased within the meaning of S. 283 (1913) 20 Ind Cas 342 (342) (DB) (Cal) ✠ (Vol 28) 1941 Pat 475 (477) (DB)✠(Vol 17) 1930 Pat 354 (355). (Objectors held to have no *locus standi* to contest grant of probate —Order of Court granting probate is not binding on them and does not affect estate which testator could not dispose of)✠(Vol 9) 1922 Cal 181 (182) (DB)✠(1890) 17 Cal 48 (52) (DB). ((1882) 8 Cal 570 (DB), *Dissent. from.*)✠(1910) 34 Bom 459 (462) (DB).

[*See also* (Vol 19) 1932 Pat 343 (344) (DB). (Objectors claiming a paramount interest and challenging the title of the testator have no *locus standi* to oppose grant.) ✠ (Vol 19) 1932 Pat 95 (96) : 10 Pat 817 (DB). (Person disclaiming interest in estate has no *locus standi* in probate Court.)]

[19] Person claiming by survivorship has no *locus standi* to object to grant of letters of administration, even where citation has been served on him (Vol 19) 1932 Pat 89 (90) : 10 Pat 812 (DB).

[20] Fact that testator disposed of by will jewels belonging to a person does not amount to interest in deceased's property which would entitle such person to oppose grant of probate (Vol 18) 1931 Mad 37 (38) : 54 Mad 24 (DB). ((Vol 15) 1928 Mad 803, Affirmed.)

[21] Before a person can be permitted to contest a will, the party propounding it has a right to call upon him to show that he has some interest. A bare possibility of filling a character which would give the party concerned an interest is not sufficient. There must be a possibility of having an interest in the result of setting aside the will. (Vol 10) 1923 Mad 131 (131) (DB).

[22] See also Notes under Ss 263 and 284.

12. Res judicata : *See* Notes under S. 263.

13. Party to proceedings. — [1] Relations whose names are given in application for probate are not necessary parties to proceedings as law does not require notice to be given to them. (Vol 14) 1927 Lah 609 (609) (Only necessary parties to appeal are caveators.)

[2] Even a possibility of an interest is sufficient to entitle a person to become a party to probate proceedings—Party entitled to intervene in lower Court is also entitled to support the will as a respondent in the Appellate Court. (Vol 5) 1918 Pat 525 (525) : 3 Pat L Jour 409 (DB).

SECTION 284 — SYNOPSIS

1. "Caveat."
2. Locus standi to oppose grant.
3. Sub-section (4).
4. Practice and procedure.
5. Appeal

1. "Caveat." — [1] Caveat which is in the nature of a precautionary measure intended to assure that there shall be no proceeding in respect of estate of deceased without notice to person who files caveat is not necessary if persons interested in estate of deceased appear upon citation. (Vol 4) 1917 Cal 311 (311) (DB).

[2] Petitioner should *prima facie* show that caveator has no interest and then caveator is to be called upon to rebut presumption. (Vol 5) 1918 Pat 54 (55) (DB).

[3] A petition filed by a relative of the deceased testator, upon whom citation has been issued, intimating her intention to oppose grant of probate is not a caveat and does not require a stamp under Court fees Act (1870), Sch. 2, Art 12. (Vol 4) 1917 Cal 311 (311) (DB). (A stamp of 8 annas is sufficient.)

2. Locus standi to oppose grant.—[1] The provisions of the Succession Act clearly contemplate that the entry of a caveat must be made by a person who wishes to oppose the grant of probate. (Vol 27) 1940 Oudh 16 (17) : 15 Luck 107.

[2] In dealing with question whether caveator has necessary interest, test is whether grant displaces any right to which caveator would otherwise be entitled. If so, he has such an interest if not, he has not. In every case it must be shown that the caveator, but for the will, would be entitled to a right of which that will deprives him. (Vol 15) 1928 Mad. 803, (805).

[3] Interest of caveator must be interest in estate of deceased—Interest claiming title paramount to testator is not caveatable interest. (Vol 18) 1931 Mad. 37 (38) : 54 Mad. 24 (DB).

[4] Fact that testator disposed of by will jewels belonging to caveator does not amount to interest in deceased's property which would entitle caveator to oppose grant of probate. (Vol 18) 1931 Mad. 37 (38) : 54 Mad. 24 (DB).

[5] Any interest, however slight, and even the bare possibility of an interest, is sufficient to entitle a person to enter caveat in a probate proceeding. (1945) 49 Cal. W N 713 (714) (DB).

[6] Before a person can be permitted to contest a will the party propounding it has a right to call upon him to show that he has some interest. A bare possi-

285. No proceeding shall be taken on a petition for probate or letters of administration after a caveat against the grant thereof has been entered with the Judge or District Delegate to whom the application has been made or notice has been given of its entry with some other Delegate, until after such notice to the person by whom the same has been entered as the Court may think reasonable.

After entry of caveat, no proceeding taken on petition until after notice to caveator.

[1865 — S. 253; Probate and Administration Act, 1881 — S. 72; District Delegates Act, 1881 — S. 6.]

286. A District Delegate shall not grant probate or letters of administration in any case in which there is contention as to the grant, or in which it otherwise appears to him that probate or letters of administration ought not to be granted in his Court.

District Delegate when not to grant probate or administration.

Explanation.—"Contention" means the appearance of any one in person, or by his recognized agent, or by a pleader duly appointed to act on his behalf, to oppose the proceeding.

[1865 — S. 253A; Probate and Administration Act, 1881 — S 73; District Delegates Act, 1881 — S. 7.]

Section 284 — Note 2 *(contd.)*

bility is sufficient provided it rests on existing facts, but the possibility of filling a character which would give the party concerned an interest is not sufficient. There must be a possibility of having an interest in the result of setting aside the will. (Vol 10) 1923 Mad. 131 (131) (D B).

[7] Will passing property which should otherwise come to heir—Attaching creditor and a secured creditor (mortgagee) of heir of testator held were entitled upon proof of their interest, to file a caveat and oppose the grant of the will. (1881) 6 Cal 460 (464) (D B). ((1881) 6 Cal. 429 (DB), *Foll.*) ✠ (1884) 10 Cal. 413 (416) (DB).

[8] A creditor can have *locus standi* to oppose the grant only where will is put forward to defraud a creditor. (Vol 2) 1915 Cal. 680 (680) (DB).

[9] Testamentary suit—Immediate reversioner compromising with propounder of will—Next immediate reversioner gets *locus standi* to enter caveats. (Vol 5) 1918 Cal 183 (185) (DB).

[10] Grant of letters of administration may be opposed by person claiming interest in estate by purchase at sale in execution of decree against sons of deceased who would have taken estate in event of intestacy. (Vol 15) 1928 Cal. 277 (278) (DB).

[11] Where a deceased Hindu's wife's brother's daughter applied for letters of administration and a person who was neither a sapinda, sakulya nor a sumanodaka of the deceased, but who was related to the family of the deceased through a common link, filed a caveat: *Held* caveator had sufficient interest in circumstances of case, though he was not legal heir, to entitle him to appear and watch and, if necessary, to oppose application. (Vol 18) 1931 Cal. 470 (471, 472) (DB).

[12] A person disclaiming interest in estate is not entitled to citation and has no *locus standi* in Probate Court. (Vol 19) 1932 Pat. 95 (96) : 10 Pat. 817 (DB).

[13] Caveat cannot be sustained on mere ground that property is joint family estate. Caveator should file suit to establish his title to property, and if adequate grounds are made out, to obtain appointment of Receiver or injunction against administrator. (Vol 28) 1941 Bom. 60 (61). ((1904) 28 Bom. 644 (DB), *Foll.*; (1912) 14 Bom. L R 1031, *Not foll.*)

[14] Will contested by heirs — Government has no *locus standi* to oppose grant of probate in presence of heirs. (Vol 3) 1916 Cal. 804 (805) (DB).

[15] Widow of predeceased son of testator has no *locus standi* to contest will. (1913) 17 Cal. W N 1141 (1142). ((1901) 25 Bom. 263 (DB) *Dissent.*; (1899) 22 Mad. 205 (DB), *Foll.*)

[16] Will by Hindu widow in respect of her stridhan — Probate, application for—Widow governed by Dayabhaga School—Half sister's son of widow is preferential heir to daughter's son of great grandson of great great grandfather of her husband—Application by former cannot be opposed by latter. (1913) 40 Cal. 82 (87, 88) (D B).

[17] The mere fact that certain person had applied for letters of administration to the estate of testator and that the Court had issued a citation upon him, would not entitle him to come in and oppose the grant of probate if it is found that he has no interest in the estate of the deceased. (1913) 40 Cal. 82 (88) (DB).

[18] See also under Ss. 263 and 283.

3 Sub-section (4).—[1] Objections to application for grant of letters of administration to be in form of pleadings as also replies to objections. (Vol 11) 1924 Rang. 273 (274) (DB).

4. Practice and procedure.—[1] It is not the practice of a probate Court entertaining an application for grant of probate to consider any issue as to the title of the testator to the property with which the will purports to deal or as to what disposing power the testator may have possessed over such property. (1897) 19 All. 458 (461, 462) (DB) ✠ (Vol 2) 1915 Cal. 565 (567) (DB).

[2] There is no provision in the Succession Act for the discharge of a caveat. The only rule of procedure governing such proceeding is O. 1. R. 10, Civil P. C. A caveat should only be discharged where it is shown that the caveator has no interest in the estate. (Vol 5) 1918 Pat. 54 (55) (D B).

[3] A caveator by way of counter-claim cannot pray for grant of probate of another will of the testator set up by him. He must file a separate petition to propound such a will. The two petitions should then be heard together or be consolidated. But where the petitioner himself has set up a second codicil and the issue of revocation arises on his own petition, no probate can be granted till he satisfies the Court that the codicil has been revoked. (1946) 50 Cal, W N 126 (128) ((Vol 17) 1930 Bom 29 : 53 Bom. 829, *Rel. on.*)

5. Appeal.—[1] Order that person has *locus standi* to contest will, is not equivalent to decree and is not appealable. (1913) 17 Cal. L Jour 230 (232) (DB).

[2] *Obiter* : Order that person has no *locus standi* to contest the will is equivalent to decree and is appealable. (1913) 17 Cal. L Jour 230 (232) (DB).

Section 286 — Note 1

[1] Under this section, the District Delegates can dispose of non-contentious cases only and have no jurisdiction to grant probate in any case in which there is contention as to the grant. (Vol 22) 1935 Oudh 38 (38) : 10 Luck. 316 (D B).

[2] Section 286 does not apply to the District Judge. The fact that the contentious case had been instituted in the Court of the Subordinate Judge is no bar to the District Judge granting the probate. (Vol 19) 1932 Lah. 48 (49).

Power to transmit statement to District Judge in doubtful cases where no contention.

287. In every case in which there is no contention, but it appears to the District Delegate doubtful whether the probate or letters of administration should or should not be granted, or when any question arises in relation to the grant, or application for the grant, of any probate or letters of administration, the District Delegate may, if he thinks proper, transmit a statement of the matter in question to the District Judge, who may direct the District Delegate to proceed in the matter of the application, according to such instructions as to the Judge may seem necessary, or may forbid any further proceeding by the District Delegate in relation to the matter of such application, leaving the party applying for the grant in question to make application to the Judge.

[1865 — S. 253B; Probate and Administration Act, 1881 — S. 74; District Delegates Act, 1881 — S. 7.]

Procedure where there is contention or District Delegate thinks probate or letters of administration should be refused in his Court.

288. In every case in which there is contention, or the District Delegate is of opinion that the probate or letters of administration should be refused in his Court, the petition, with any documents which may have been filed therewith, shall be returned to the person by whom the application was made, in order that the same may be presented to the District Judge, unless the District Delegate thinks it necessary, for the purposes of justice, to impound the same, which he is hereby authorised to do; and, in that case, the same shall be sent by him to the District Judge.

[1865 — S. 253C; Probate and Administration Act, 1881 — S. 75; District Delegates Act, 1881 — S. 7.]

Grant of probate to be under seal of Court.

289. When it appears to the District Judge or District Delegate that probate of a will should be granted, he shall grant the same under the seal of his Court in the form set forth in Schedule VI.

[1865 — S. 254; Probate and Administration Act, 1881 — S. 76; District Delegates Act, 1881 — Ss. 8, 9]

Section 286 — Note 1 *(contd.)*

[3] When a District Delegate proceeds with a case after it has become contentious, he exceeds his jurisdiction. (Vol 21) 1934 Oudh 442 (442) (DB).

[4] If the nature of the proceeding is such that no contest is involved—as in probate common form business—the proceeding is non-contentious If a contest is involved, it is contentious (06) 29 Mad. 426 (430) (FB). (The word "contentious" is used in S. 52, T.P. Act in the sense in which it is used in the Probate Act Practice.)

[5] The form of caveat shows that the entry of a caveat does not necessarily make the probate proceedings contentious. Nor does the entry necessarily imply any intention to oppose the grant: it is merely a request that nothing be done in the matter of the estate of *A B*, deceased, without notice to the caveator. The caveator may only want time to make enquiries and obtain information. The petition becomes contentious only on the filing of affidavit in support of the caveat. ('98) 22 Bom 261 (265).

[6] When respondents appear and file objections against an application for grant of letters of administration with copy of will annexed, the proceedings cease to be non-contentious. (Vol 21) 1934 Oudh 442 (442) (D B).

[7] An application for revocation of a probate is a contentious matter. The District Delegate, therefore, cannot decide it. He should return such application for being presented to the Court of the District Judge. (Vol 31) 1944 Cal 385 (387) (DB).

[8] Withdrawal of pleader on opposite side does not make contentious suit non-contentious one, but makes it undefended suit. (Vol 12) 1925 Cal 75 (76) (D B).

[9] There is nothing in the Succession Act which renders the Subordinate Judge as such incompetent to dispose of contentious proceedings—Same officer both Subordinate Judge and District Delegate—Contentious probate case transferred to such officer by District Judge— He has jurisdiction to dispose of such proceeding as Subordinate Judge, though he cannot do so as District Delegate. (Vol 22) 1935 Oudh 38 (39) : 10 Luck 316 (DB).

Section 288 — Note 1

[1] An application for revocation of a probate is a contentious matter. The District Delegate, therefore, cannot decide it. He should return such application for being presented to the Court of the District Judge. (Vol 31) 1944 Cal 385 (387) (DB).

Section 289 — Note 1

[1] In granting probate, Court must satisfy itself on all points regarding the will and in coming to its conclusion must proceed on evidence on record, and also must have due regard to the contentions of the parties. (Vol 6) 1919 Cal 74 (75) (D B) ✠ ('37) 41 Cal W N 848 (850) (DB). (Unless will is proved in some form, no grant of probate can be made merely on consent of parties.)

See also under S. 283.

[2] Under the Act, as under other systems of law, probate is granted in the case of domestic wills, of the will itself and not of any translation and the Courts are entitled to look at the original and indeed bound to do so where there is no agreement between the parties as to the correct translation. (Vol 33) 1946 Cal 55 (58) (DB).

[3] Probate in common form will be issued on oath of applicant where will is not contested — If contested it is issued in solemn form after hearing evidence and pronouncing validity of will. (Vol 12) 1925 Cal 75 (76, 77) (DB).

[4] Where the defendant, at any stage, withdraws his objection, whether under compromise or otherwise, proceedings may become non-contentious, in which case probate will be granted in common form. Court has, however, no power in such case to incorporate terms of compromise in probate or to annex them in form of Schedule. (Vol 18) 1931 All 745 (746): 53 All 1000 (DB).

[5] General grant in terms of S. 289 is operative under S. 216 until probate shall have been recalled or revoked under S. 263. (Vol 8) 1921 Cal 292 (293) (DB).

[6] District Judge refusing probate on the ground that will was not proved—High Court in appeal ordering grant of probate holding that the will was proved — Effect of the appellate order is to deem that the will was proved before the District Court and the District

290. When it appears to the District Judge or District Delegate that letters of administration to the estate of a person deceased, with or without a copy of the will annexed, should be granted, he shall grant the same under the seal of his Court in the form set forth in Schedule VII.

Grant of letters of administration to be under seal of Court.

[1865 — S. 255; Probate and Administration Act, 1881 — S. 77; *ibid.*, 1889 — Ss. 5, 13; District Delegates Act, 1881 — Ss. 8, 9.]

291. *(1)* Every person to whom any grant of letters of administration, other than a grant under section 241, is committed, shall give a bond to the District Judge with one or more surety or sureties, engaging for the due collection, getting in, and administering the estate of the deceased, which bond shall be in such form as the Judge may, by general or special order, direct.

Administration bond.

(2) When the deceased was a Hindu, Muhammadan, Buddhist, Sikh or Jaina or an exempted person—

(a) the exception made by sub-section *(1)* in respect of a grant under section 241 shall not operate;

(b) the District Judge may demand a like bond from any person to whom probate is granted.

[1865 — S. 256; Probate and Administration Act, 1881 — S. 78; *ibid.*, 1889 — S. 6.]

Section 289 — Note 1 *(contd.)*

Court should grant the probate. ('93) 17 Bom 686 (687) (DB).

[7] The date of the grant of probate is the date on which the order granting probate is passed and not the date on which probate is ordered to be issued. (Vol 10) 1923 Cal 444 (445) (DB).

[8] Court-fee on probate or letters of administration — See Notes under Ss. 19-G and 19-I and Sch. I, Art. 11, Court-fees Act.

Section 290 — Note 1

[1] When application for probate does not mention that the petitioner is appointed executor, and he is not also appointed executor by will, Court should grant only letters of administration with will annexed under S. 290. (Vol 10) 1923 Nag 41 (42).

[2] Executors or administrators or holders of certificates are all in nature of *quasi* trustees in fiduciary position, and what the beneficial interest of any of them may be in property or estate ought to form no operative part of order granting them administration. (Vol 16) 1929 Bom 456 (458) (DB).

[3] Where there is no estate which stands in need of administration, no suggestion that any creditors have to be paid or any debts due to the estate have to be collected, and an application for letters of administration is a transparent device to secure from the probate Court a decision upon a contested question of title, there is no occasion for the grant of letters of administration. The proper course is to obtain an adjudication of the rights in a regular suit. (Vol 28) 1941 Oudh 474 (475, 476) : 17 Luck 78 (DB).

[4] The delay in the application should put the Court on an enquiry as to whether there is anything to be administered, but that applies to a case where the application is for letters of administration, not for letters of administration with will annexed. It is of the paramount necessity that the will should be established and the establishment of the will is one of the functions of the probate Court and the probate Court cannot decline to exercise that function because the administration is complete. (Vol 13) 1926 Pat 356 (357) (DB).

[5] In other parts of the British Empire, the Colonial Probate Act applies, and the practice is not to make a grant of letters of administration with copy of the will annexed but to send an exemplication of the probate granted in any part of the United Kingdom, and this exemplication is re-sealed by the Court to which it is sent. That practice and Act have not been extended to British India. The practice there is to require administration with will annexed to the estate of a deceased British subject who left property in British India. ('13) 40 Cal 74 (76).

SECTION 291 — SYNOPSIS.

1. Scope.
2. Surety, liability and discharge of.
3. Recovery of amount under bond.
4. Sub-section (2).
5. Security from executors : Sub-s. (2), cl. (b).
6. Appeal.

1. Scope.—[1] The security under S. 291 is only required to guard against mal-practices, and the security is enough if it affords a reasonable protection against mal practices which require time to be carried out. ('07) 6 Cal L Jour 453 (460) (DB).

[2] Section 291 requires a bond to be given in every case where letters of administration are granted. But it is open to the Court to make a special order as to the form of the bond. ('99) 26 Cal 408 (408). (Form of bond in the case of special or limited administration stated.)

[3] Under S. 291, the probate Court can take a second bond with fresh sureties if the necessity arises. ('02) 29 Cal 68 (71) (DB) ✠ (Vol 7) 1920 Cal 584 (586) : 47 Cal 115 (DB).

[4] Failure to give security is not 'just cause' within the meaning of S. 263 for revoking the grant. (Vol 12) 1925 Lah 354 (355).

2. Surety, liability and discharge of. — [1] A surety to an administration bond cannot discharge himself without an order of the Court. He is not a common law surety and cannot be regarded in the light of surety under the Contract Act. (Vol 26) 1939 Cal 737 (739) : I L R (1939) 2 Cal 1.

[2] Liability of surety to administration bond is immediate and permanent and is only to disappear on the fulfilment of the obligations by administrator. Default by the latter is no ground for discharging the bonds. It may be ground for revoking the grant or taking other steps to control administration. (Vol 26) 1939 Cal 737 (739) : I L R (1939) 2 Cal 1.

[3] Report of Commissioner as to liability of administrator to estate is not binding on surety unless latter has opportunity of testing its correctness. (Vol 14) 1927 Rang 28 (29) : 4 Rang 358 (DB).

[4] Letters of administration annulled on ground of fraud: *Held* that so long as letters granted remained unrevoked, the grantee, although a rogue and an impostor, was to all intents and purposes administrator. For his acts and defaults as administrator, the sure-

Assignment of administration bond.

292. The Court may, on application made by petition and on being satisfied that the engagement of any such bond has not been kept, and upon such terms as to security, or providing that the money received be paid into Court, or otherwise, as the Court may think fit, assign the same to some person, his executors or administrators, who shall thereupon be entitled to sue on the said bond in his or their own name or names as if the same had been originally given to him or them instead of to the Judge of the Court, and shall be entitled to recover thereon, as trustees for all persons interested, the full amount recoverable in respect of any breach thereof.

[1865 — S. 257; Probate and Administration Act, 1881 — S. 79]

Section 291 — Note 2 *(contd.)*

ties become and must remain responsible under the administration bond. ('08) 35 Cal 955 (959, 960) : 35 Ind App 109 (PC). (('06) 33 Cal 713 (FB), *Affirmed*)

[5] There is no provision in the Succession Act enabling sureties to make an application to the Court for their discharge. ('10) 33 Mad 373 (375) (DB).

[6] Sureties to administration bond are bound thereby so long as administration of estate is incomplete, and are not absolved from liability to suit their own convenience. (Vol 8) 1921 Upp Bur 25 (26): 4 Upp Bur Rul 22.

[7] Surety to administration bond is not entitled as matter of right to be relieved of future obligation at his choice by merely alleging misconduct on part of administrator. (Vol 12) 1925 Cal 158 (159) (DB).

[*See also* ('05) 28 Mad 161 (166) (DB). (A surety to an administration bond is not entitled to an order discharging him from future liability on an application in the probate proceedings to the Judge or officer who is the obligee under the bond of suretyship *A fortiori* he is not entitled to that relief where he claims it in a separate suit — ('02) 29 Cal 68 (DB), *Not foll.*; ('95) 19 Bom 245 (DB), *Foll.*)]

[8] Where the administratix has been guilty of maladministration of the estate, the surety who is not a beneficiary has the right of being discharged from his suretyship as regards future transactions. ('02) 29 Cal 68 (71) (DB).

[*See also* (Vol 27) 1940 Lah 38 (39) : I L R (1939) Lah 424. (Court can release surety of future liability if administrator is adjudged insolvent and commits waste.)]

[9] The High Court to which a guarantee is given by a surety has power to exonerate the surety from all future liability. (Vol 19) 1932 All 262 (262) : 54 All 293 (DB).

[10] Section 130, Contract Act, does not apply to the special contract of suretyship which is entered into by a surety to an administration bond. ('05) 28 Mad 161 (166) (DB) ✠ (Vol 8) 1921 Upp Bur 25 (26) : 4 Upp Bur Rul 22.

[But see ('02) 29 Cal 68 (71) (DB). (Section 130, Contract Act, applies to administration bond.)]

3. Recovery of amount under bond. — [1] An administration bond does not come within the meaning of the Exception to S. 74, Contract Act. Upon its breach, therefore, only reasonable compensation, not the whole amount of the bond, can be awarded. ('22) 64 Ind Cas 366 (368) (DB) (Cal).

[2] Letters of administration obtained by Hindu widow to estate of her deceased husband after executing usual administration bond — Liability under bond was confined only to acts of waste and mismanagement attributable to her as administratrix and did not extend to such acts as could be attributed to her as the widow in possession under Hindu law after the administration was over. (Vol 2) 1915 Mad 1184 (1186).

4. Sub-section (2).—[1] Where the deceased was a Christian, security cannot be demanded under S. 291. (Vol 25) 1938 Lah 151 (151, 152).

5. Security from executors: sub-s. (2), cl. (b).— [1] Taking of bond is compulsory in case of administrator but discretionary in case of executors. (Vol 7) 1920 Cal 584 (585) : 47 Cal 115 (DB).

[2] *Obiter.*—Where the executor is the sole legatee, if the District Judge thinks it necessary to take any bond, the security fixed must be a nominal sum. (Vol 16) 1929 Cal 733 (734) (DB).

[3] Where in the will the testator mentions that the executors should obtain probate of the will without security, it is not the function of the Judge to distrust the executor and ask for security quite contrary to testator's desire. (Vol 16) 1929 Cal 733 (734) (DB).

[4] Before granting probate, ordering of security to be furnished by executor is discretionary and appellate Court should not interfere with the way in which it is exercised unless very strong reasons are shown to persuade Court that result is incorrect. (Vol 25) 1938 Rang 67 (68) (DB).

6. Appeal. — [1] No appeal lies from order for security from the petitioner for probate. (Vol 16) 1929 Cal 733 (734) (DB).

[2] Order calling upon executor to furnish fresh security is appealable. (Vol 27) 1940 Lah 38 (38): I L R (1939) Lah 424.

[3] An order as to security, made whether by the High Court or District Judge, is not appealable on the ground that the security is insufficient. ('93) 20 Cal 245 (245) (DB).

[4] See also under S. 299.

Section 292 — Note 1

[1] Under this section the Court has no authority to direct the Registrar of the Court to assign the administration bond. ('06) 33 Cal 713 (738) (FB).

[2] Per *Das and Carr JJ., Cunliffe J.* contra: Sureties to administration bond — Cannot be proceeded against under S. 145, C. P. C. — Remedy is to obtain an assignment of bond and sue on same. (Vol 15) 1928 Rang 249 (252) : 6 Rang 474 (DB).

[3] Proceedings of assignment of administration bond are not binding on surety unless he is party to those proceedings. (Vol 14) 1927 Rang 28 (29) : 4 Rang 358 (DB).

[4] The administration bond does not come within the Exception to S. 74, Contract Act, and therefore, the whole amount mentioned in the bond does not become payable on its breach. Hence an assignee of the bond cannot recover more damage than he has proved to have resulted. ('88) 10 All 29 (34, 35) (DB).

[5] Where there is technical breach of terms of administration bond executed in favour of Court, whole of amount of bond is not recoverable by the assignee and only reasonable compensation can be awarded. ('22) 64 Ind Cas 366 (368) (DB) (Cal).

[6] The Court is not authorised to assign the administration bond again while the first assignment is still in force. ('12) 39 Cal 563 (567) (DB).

[7] Application under S. 292 is really made in proceedings in nature of execution and is no bar to fresh application being entertained in exercise of inherent

Time for grant of probate and administration.

293. No probate of a will shall be granted until after the expiration of seven clear days, and no letters of administration shall be granted until after the expiration of fourteen clear days from the day of the testator or intestate's death.

[1865—S. 258; Probate and Administration Act, 1881 —S. 80.]

Filing of original wills of which probate or administration with will annexed granted.

294. *(1)* Every District Judge, or District Delegate, shall file and preserve all original wills, of which probate or letters of administration with the will annexed may be granted by him, among the records of his Court, until some public registry for wills is established.

(2) The [a][Provincial Government] shall make regulations for the preservation and inspection of the wills so filed.

[1865—S. 259 ; Probate and Administration Act, 1881—S. 81.]

[a] *Substituted* by A. O. for "Local Government".

Procedure in contentious cases.

295. In any case before the District Judge in which there is contention, the proceedings shall take, as nearly as may be, the form of a regular suit, according to the provisions of the Code of Civil Procedure, 1908, in which the petitioner for probate or letters of administration, as the case may be, shall be the plaintiff, and the person who has appeared to oppose the grant shall be the defendant.

[1865—S. 261, Probate and Administration Act, 1881—S. 83.]

Section 292 — Note 1 *(contd.)*

jurisdiction when first application had been dismissed in default and not on merits. (Vol 22) 1935 Lah 145 (145).

Limitation.

[8] A suit to enforce the bond by a person to whom it has been assigned under S. 292, is a suit upon a bond within the meaning of Art. 68, Lim. Act. (Vol 28) 1941 P C 6 (9) : 67 Ind App 416 : I L R (1941) Bom 202 : I L R (1941) Kar P C 11 (PC).

[9] Section 292 has not the effect of conferring a new cause of action on the assignee and therefore it cannot be said that the condition of the bond is not broken for the purposes of Limitation Act until the date of assignment. (Vol 28) 1941 P C 6 (10) : 67 Ind App 416 : I L R (1941) Bom 202 : I L R (1941) Kar P C 11 (PC). ((Vol 23) 1936 Bom 363 : 60 Bom 1027 (DB), *Overruled.*)

[10] Letters of administration granted to widow for benefit of minor sons and limited to period of minority of any of them — Administration bond under S. 291 Succession Act, furnished — Death of widow — Bond assigned to one of sons after he attained majority — Suit on bond brought more than 3 years after death of widow held barred under Art. 68, Limitation Act. (Vol 28) 1941 P C 6 (10) : 67 Ind App 416 : I L R (1941) Bom 202 : I L R (1941) Kar P C 11 (PC). ((Vol 23) 1936 Bom 363: 60 Bom 1027 (DB), *Overruled.*)

Appeal.

[11] Orders under S. 292 are appealable and appeals are governed in procedure by Civil P. C. relating to appeals. (Vol 16) 1929 Rang 109 (110) (DB) ✠ (Vol 23) 1936 Lah 684 (684).

[But see ('12) 39 Cal 563 (566) (DB) (An order assigning the administration bond under S. 291 is not appealable, but is revisable)]

Section 294 — Note 1

[1] Saving of the provisions of S. 294, under the Registration Act — *See* S. 46, Registration Act.

SECTION 295 — SYNOPSIS.

1. Scope and applicability.
2. "In which there is contention."
3. "Form of a regular suit."
4. Applicability of Civil P. C. provisions.
5. Caveator setting up another will — Procedure.
6. "Defendant."
7. Compromise.
8. Costs, pleader's fee, etc.
9. Revocation proceedings.

1. Scope and applicability. — [1] Section 295 applies only to an application for probate or letters of administration. It cannot apply for an application for revocation of probate. The section applicable to such proceeding is S. 268 (1900) 4 Cal W N 600 (601) (DB).

[2] The fact that a suit as to the validity of the will is instituted in the Court of the subordinate Judge is no bar to the District Judge granting a probate if he is satisfied as to the genuineness of the will. The section applicable to the proceedings before the District Judge is S. 295. (Vol 19) 1932 Lah 48 (49).

2. 'In which there is contention."—[1] Not the entry of a caveat, but the filing of an affidavit in support of the caveat is the point on which the petition for probate becomes contentious. ('98) 22 Bom 261 (265).

[2] See also under S. 286.

3. "Form of a regular suit." — [1] A contested application for probate is not a 'suit". (Vol 15) 1928 All 51 (52) : 50 All 238 (DB). (('09) 33 Bom 256 and 41 Cal 637 : (Vol 1) 1914 Cal 523 (DB), *Foll.*)

[2] Where there is contention, the proceedings must take form of regular suit. It is not permissible for the Court to refuse to make a full enquiry, proceed to decide the matter in a summary fashion, leaving his decision subject to modification in a suit to be filed afterwards. (Vol 25) 1938 Mad 502 (503) (DB).

[3] So long as a petition for probate or letters of administration is non-contentious, it is to be dealt with by the Registrar; as soon as it becomes 'contentious' it is to be treated as the plaint in a suit and the suit is governed as far as practicable by the procedure prescribed by the Civil P. C. ('98) 22 Bom 261 (264).

4. Applicability of Civil P. C. provisions.— [1] Where, in consequence of the filing of the affidavit in support of the caveat, the matter becomes a suit, the whole suit must be disposed of by the decree of the Court. It follows that where at the hearing of the suit the defendant does not appear in support of the caveat, it is not a correct procedure for the Court merely to dismiss the caveat, leaving it to the Registrar to dispose of the petition as non-contentious matter. In such a case the proper form of order is that the caveat be dismissed and that probate or letters of administration issue, provided that the Court is satified that the papers are in order and, in the case of probate, of the due execution of the will. ('98) 22 Bom 261 (266).

Applicability of S. 10, Civil P. C.

[2] Until caveat has been entered and supported by an affidavit there is no suit and no defendant within the

Section 295 — Note 4 *(contd.)*

meaning of S. 10, Civil P. C. Until that is done such person has no *locus standi* to object to the appointment of receiver and apply for stay of proceedings under S 10, Civil P. C. (Vol 27) 1940 Oudh 16 (17) : 15 Luck 107.

[3] Direction in S 295 is only that procedure of suit shall be followed and not that proceedings, on becoming contentious, shall "become" regular suits instituted on date of their becoming contentious. Section 10, Civil P. C, is therefore not strictly applicable. (Vol 27) 1940 Oudh 113 (116) : 15 Luck 290

Res judicata.—[4] Contentious probate proceedings constitute a 'suit' within the meaning of S 11, Civil P. C. Therefore, the finding of fact of a probate Court in such proceedings (e g., that the testator was not of sound disposing mind when the alleged will was made) operates as *res judicata* between the parties to the proceedings, although such judgment is not judgment as is contemplated in S. 41, Evidence Act. (Vol 1) 1914 Bom 8 (15) : 38 Bom 309 (F B).

[5] Application for probate opposed by *A*, an infant, represented by *B* — *B* withdrawing opposition and probate granted by consent —*A* on attaining majority, applying for revocation on ground that executor not properly administering estate and praying in the alternative for grant of joint probate to the executor and him — Application refused — Subsequent application by *A* for revocation on ground that will was forged: *Held* that assuming S. 11, Civil P. C., applied, second application was not barred by constructive *res judicata*, as it was not obligatory on the petitioner to raise in previous proceedings the plea raised subsequently. ('06) 4 Cal L Jour 492 (495) (D B).

[6] Where an application for probate by a legatee has been dismissed for default, the legatee's heirs can nevertheless plead the existence of the will as a defence to a suit for the property which they claim as belonging to them under the will. (Vol 12) 1925 Mad. 861 (870). (('10) 12 Cal L Jour 185 (D B), *Foll.*)

Applicability of O. 9, R. 9, Civil P. C.—[7] Order 9, R. 9 applies to probate proceedings. (Vol 23) 1936 Lah 712 (713). (('10) 12 Cal L Jour 185 (D B) and (Vol 13) 1926 Cal 1057 : 53 Cal 578 (D B), *Dissent.*)

[*See also* (Vol 6) 1919 Mad 112 (112) (D B). (O. 9, R. 9 is applicable to dismissal of application for probate.)]

Applicability of O. 16, R. 20, Civil P. C. — [8] Where the caveator refused to answer a question put to him by the Court, held S. 177, Civil P. C. (1882) (corresponding to O. 16, R. 20 of the present Code) could not justify the Court in dispensing with proof of the will and making an order for grant of probate. ('85) 9 Bom 241 (244) (D B).

Applicability of O. 23, R. 3, Civil P. C. — [9] Order 23, R. 3, Civil P. C., read with this section do not say that it is competent to the Court to allow the parties to divide the testator's property without proving the will. (Vol 3) 1916 Pat 82 (83) : 1 Pat L Jour 377 (D B).

Powers of remand.—[10] Where the District Judge has given no opportunity to a party to probate proceedings to cross-examine witnesses called by his opponent, and the evidence of the witnesses is to be used against him, the appellate Court must take this fact into consideration and decide whether or not the procedure of the District Judge has been so manifestly in disregard of the first principles of procedure as to make it incumbent upon them to remand the case for further hearing. ('10) 11 Cal L Jour 124 (130) (F B).

Order 41, R. 1, Civil P. C. — [11] An appeal filed against an order passed in a contentious proceeding is an appeal filed under O. 41, R. 1, Civil P.C., and not under S. 104 of the Code. Hence an appeal against an order in a contentious proceeding granting probate or letters of administration with the will annexed is incompetent without the production of a copy of a formal decree prepared in terms of such order. Form of decree should be one adopted by Calcutta High Court. (Vol 25) 1938 Sind 36 (37) (F B).

Appeal —[12] The decision in a contentious proceeding under the Succession Act amounts to an appealable order. Hence no decree sheet need be prepared by the Court passing such order, and it is not necessary that appeals from such orders should be decided by the Bench. The court fee payable would also be the court-fee which is due on appeals from orders. (Vol 32) 1945 Pesh 22 (24) (D B) (('13) 35 All 448 (D B) and (Vol 25) 1938 Sind 36 (FB), *Dissent.*)

5. Caveator setting up another will — Procedure. – [1] Where, in a petition for probate, the caveator sets up another will of the testator, it is obligatory on the latter to file a separate petition to propound the will set up by him, except in exceptional cases such as when the subsequent will set up by the caveator itself is said to have been revoked. Where the caveator is alleged to be an executor under the will set up by him, he can apply for probate, otherwise he can apply for letters of administration under S. 231. On such a petition being filed, there would be really two separate proceedings for obtaining grant in respect of two different wills alleged to have been left by the same testator and the parties interested in opposing the grant will have to file respective caveats in each case. The two suits could then be heard together or consolidated. (Vol 33) 1946 Cal 40 (42, 44) (DB). ((Vol 17) 1930 Bom 29 : 53 Bom 829, *Rel. on.*)(Vol 17) 1930 Bom 29 (30): 53 Bom 829.

6. "Defendant" — [1] Merely citing a person in a probate does not make him defendant. Under S. 295, the case must be contentious and the person cited must appear to oppose the grant before he becomes defendant (Vol 2) 1915 Cal 85 (86): 41 Cal 819 (D B).

7. Compromise. — [1] If a compromise has been made and the objector withdraws from the contest the Court will grant probate in common form, but the Court cannot dismiss the case altogether and embody the terms of the compromise as if the decree was one capable of execution by him. (Vol 3) 1916 Pat 82 (83) : 1 Pat L Jour 377 (D B).

[2] Where there is a *bona fide* dispute about the validity of a will, an agreement between the interested parties arrived at by way of compromise that none of them would approach the Court for adjudicating upon the validity of that document and that they would divide the property included in the deed in a certain manner, is binding upon the parties to the agreement. ('44) 48 C W N 294 (300) (DB).

[3] On a petition for the grant of probate to an additional executor, the Court has no jurisdiction to sanction a compromise between the executors, imposing a heavy burden on the estate. (Vol 3) 1916 Mad 720 (722) : 39 Mad 365 (D B).

[4] Objector agreeing to compromise can subsequently resile from it and insist upon the trial of the issue whether the will was duly executed. (Vol 3) 1916 Pat 82 (83) : 1 Pat L Jour 377 (D B).

[5] See also under S 283.

8. Costs, pleader's fee, etc. — [1] If application for probate is strongly opposed and petitioner is put to very heavy and needless expense, Court has ample power to award his costs as in a suit. (Vol 7) 1920 Pat (180) (180) (D B).

[2] Contested application for probate — Taxation of costs — Case has to be decided by R. 26, Chap. 21, General Rules (Civil) for subordinate Civil Courts — Rule 22 has no application—Chapter 16, R. 2, Allaha-

Surrender of revoked probate or letters of administration.

296. *(1)* When a grant of probate or letters of administration is revoked or annulled under this Act, the person to whom the grant was made shall forthwith deliver up the probate or letters to the Court which made the grant.

(2) If such person wilfully and without reasonable cause omits so to deliver up the probate or letters, he shall be punishable with fine which may extend to one thousand rupees, or with imprisonment for a term which may extend to three months, or with both.

[1865—S. 333; Probate and Administration Act, 1881—S. 157; *ibid*, 1889—Ss. 10, 17.]

Payment to executor or administrator before probate or administration revoked.

297. When a grant of probate or letters of administration is revoked, all payments *bonâ fide* made to any executor or administrator under such grant before the revocation thereof shall, notwithstanding such revocation, be a legal discharge to the person making the same; and the executor or administrator who has acted under any such revoked grant may retain and reimburse himself in respect of any payments made by him which the person to whom probate or letters of administration may afterwards be granted might have lawfully made.

[1865—S. 262; Probate and Administration Act, 1881—S. 84.]

Power to refuse letters of administration.

298. Notwithstanding anything hereinbefore contained, it shall, where the deceased was a Muhammadan, Buddhist or exempted person, or a Hindu, Sikh or Jaina to whom section 57 does not apply, be in the discretion of the Court to make an order refusing, for reasons to be recorded by it in writing, to grant any application for letters of administration made under this Act.

[Probate and Administration Act, 1881—S. 85.]

Appeals from orders of District Judge.

299. Every order made by a District Judge by virtue of the powers hereby conferred upon him shall be subject to appeal to the High Court in accordance with the provisions of the Code of Civil Procedure, 1908, applicable to appeals.

[1865—S. 263; Probate and Administration Act, 1881—S. 86.]

Section 295 — Note 8 *(contd.)*

bad High Court Rules, has also no application. (Vol 15) 1928 All 51 (51, 52) : 50 All 238 (D B).

[3] Full fee should be allowed where there are contentious proceedings. (Vol 17) 1930 Oudh 272 (274) (DB).

[4] Contested probate proceedings — Letters of administration and costs granted—Rupees 80 only could be allowed as pleader's fee under Chap. 6, R. 42 (a), General Rules and Circular Orders of the Calcutta High Court—Chapter 6, R. 36 (a) has no application. (Vol 1) 1914 Cal 523 (523, 524) : 41 Cal 637 (D B).

[5] Proceeding for revocation of probate is a miscellaneous proceeding and cannot be regarded as a civil suit for awarding costs. The pleader's fee in such proceedings ought not to exceed Rs. 80. (1900) 4 Cal W N 600 (601, 602) (D B).

9. Revocation proceedings. — [1] Application for revocation is a suit under Ss. 268 and 295—Application for revoking grant dismissed on ground that applicant had no *locus standi* — Decision amounts to decree and is appealable. ('04) 8 Cal W N 748 (749, 750) (D B).

[2] See also under S. 263.

Section 297 — Note 1

[1] There is nothing in the Succession Act to suggest that grant either of probate or of letters of administration becomes on revocation void *ab initio*. Where, therefore, after grant of probate administrator creates mortgage, mortgage does not become invalid merely on account of subsequent revocation of probate by Court. (Vol 25) 1938 Rang 43 (43, 44) (DB). ((Vol 18) 1931 Rang 15, *Foll.*) ⁂ (Vol 18) 1931 Rang 15 (18) : 8 Rang 463 (DB).

[2] Where a will has been declared to be a forgery and, therefore, void *ab initio*, any acts done by a person under any title created by that will must be held to be in law void. Under S. 297, however, the executor or administrator is entitled to reimburse himself out of the assets of the deceased testator, in respect of payments made by him while acting under the revoked probate. ('02) 6 Cal W N 787 (791, 793) (D B).

Section 298 — Note 1

[1] Although it is within the discretion of the Court to refuse to grant an application for letters of administration, no such discretion is given in regard to an application for probate. (Vol 17) 1930 Sind 91 (93) (DB) ⁂ ('98) 20 All 189 (191).

[2] An application for letters of administration with the will annexed stands on the same footing as an application for probate and the Court is bound to grant the letters unless it finds that the will was not executed by the testator or that he was not of a disposing mind at the time of making it or that the will was not his own voluntary act. (Vol 5) 1918 Lah 121 (122).

SECTION 299 — SYNOPSIS

1. Order made by District Judge.
2. Appeals to be in accordance with Civil P. C.
3. Appealable orders.
4. Non-appealable orders.
5. Discretionary orders —High Court will not interfere.
6. Parties.
7. Appeal to Privy Council.
8. Revision.
9. Court-fee payable on appeals.

1. Order made by District Judge.— [1] An order by a senior Subordinate Judge invested with powers of a District Judge for the grant of letters of administration is covered by this section. (Vol 23) 1936 Lah 378 (378).

[2] Order passed by Subordinate Judge to whom proceedings under this Act were transferred for disposal by the District Judge under powers vested in him under S. 23, Bengal, North Western Province and Assam Civil Courts Act — Appeal lies to the High Court and not the District Court. (Vol 20) 1933 Pat 276 (277) (D B).

Section 299 — Note 1 *(contd.)*

[3] Recorder of Rangoon is a District Judge within the meaning of the definition in the Act. ('97) 24 Cal 30 (32) (D B).

2. Appeals to be in accordance with Civil P. C. —[1] Per *Beachcroft J.*— By virtue of S. 86 (Probate and Administration Act, 1881) all orders under Act made by District Judge are appealable and procedure provided by the C. P. C, for appeals applies to such appeals. (Vol 3) 1916 Cal 473 (475) (D B) ✠ (Vol 16) 1929 Rang 109 (110) (D B).

[2] An appeal against the order of District Judge lies only in cases in which an appeal is allowable under the Civil Procedure Code. ('94) 21 Cal 539 (540) (DB).

[3] Order of District Judge granting or refusing to grant letters of administration with copy of will annexed is decree and is appealable. ('13) 35 All 448 (449) (DB).

[4] Every order of a District Judge is appealable subject to the rules contained in the Code of Civil Procedure applicable to appeals. One of such rules is that save as otherwise expressly provided no appeal shall lie from any order. ('12) 39 Cal 563 (566) (D B).

[5] Appeal under this section is subject to there being a right of appeal against an interlocutory order under Civil P. C. (Vol 13) 1926 Cal 180 (180) (D B).

[6] Order refusing letters of administration with copy of will annexed—Order passed in a contentious proceedings by a single Judge of the High Court : *Held* that according to the practice of the High Court it was an appeal from a decree. ('13) 35 All 448 (450) (DB).

[7] Under the Code of Civil Procedure, a memo of appeal should be accompanied by the copy of the decree appealed against. Therefore an appeal under this section admitted without a copy of the decree, on the statement of the appellant made without enquiry that no decree was drawn up in the case while in fact a decree was in existence, is not an appeal which ought to be entertained by the Court. ('12) 16 Cal L Jour 116 (118) (D B).

3. Appealable orders. —[1] Every order made by a District Judge by virtue of powers conferred upon him by the Act is appealable. (Vol 29) 1942 Bom 276 (277) : I L R (1942) Bom 712 (D B).

[2] Appeal is competent whether order was passed in an interlocutory proceeding or is a final order. (Vol 17) 1930 Oudh 424 (425). (Order passed appointing a commissioner to check the accounts and inventory filed by executors under S. 317 on the application of widow of testator : *Held* that the order was appealable.)

[3] An appeal lies from an order granting probate or letters of administration. (Vol 19) 1932 Cal 734 (735) : 59 Cal 1308 (D B) ✠ (Vol 17) 1930 Pat 354 (355).

[4] A conditional order for grant of probate is appealable. (Vol 25) 1938 Lah 151 (152). (Grant made conditional upon the furnishing of security.) ✠ (Vol 3) 1916 Cal 290 (291) : 43 Cal 625 (D B). (Order refusing to issue probate till a sum of money, not legitimately leviable, is paid as succession duty is appealable)

[5] Order calling upon the executor to furnish fresh security is appealable. (Vol 27) 1940 Lah 38 (38): I L R (1939) Lah 424.

[6] Per *Chatterjee J.*—Order permitting administrator to sell property in the presence of party objecting to sale is appealable. (Vol 3) 1916 Cal 473 (474) (D B). (Order is analogous to a decree.) ✠ (Vol 11) 1924 Rang 237 (239) : 2 Rang 117 (D B).

[7] An order admitting a person as caveator is appealable. ('90) 17 Cal 48 (51) (D B).

[8] Appeal from an order dismissing an application to set aside an order of dismissal in default of an application for probate lies. (Vol 23) 1936 Lah 712 (713). (Order 9, R. 9, Civil P. C., applies to proceedings in probate)✠ (Vol 23) 1936 Lah 863 (864) (D B). (Order 9 R 9, Civil P. C., applies to probate proceedings)

4. Non-appealable orders — [1] An order by a District Judge holding that the objector to the grant of a probate of a will has no *locus standi* to object and that the applicant is entitled to probate on proof of the will in common form is not open to appeal (Vol 7) 1920 Cal 459 (460) (D B) ✠ (Vol 1) 1914 Cal 259 (259) (D B)

[2] An order that a certain person has *locus standi* to oppose the application for letters of administration with the will annexed is not appealable. (Vol 13) 1926 Cal 180 (180) (D B).

[3] Order refusing to make a person a party defendant in an application for grant of probate : *Held* that no appeal lay against the order. ('94) 21 Cal 539 (541) (D B) ✠ ('86) 13 Cal 100 (101) (D B). (Application for being made party to a pending suit relating to the estate of applicant's deceased father —Order refusing application on the ground that at that stage it was not clear whether the applicant was a necessary party : *Held* that the order was not appealable.)

[4] Order refusing to add applicants as party defendants to suit on the ground that their rights and interests could not be dealt with in the suit and that if they were made defendants there might be a misjoinder of parties : *Held* no appeal lay against the order. ('78-80) 2 All 904 (904) (D B).

[5] No appeal lies against an order requiring security from the petitioner for probate. (Vol 16) 1929 Cal 733 (734) (D B).

[6] District Judge exercising his discretion under S. 271 merely decides to proceed with the application and makes no order. Therefore no appeal lies against such decision. (Vol 29) 1942 Bom 276 (277) : I L R (1942) Bom 712 (D B) ✠ (Vol 19) 1932 All 379 (381) (D B). (District Judge deciding to hear the application for letters of administration after turning down objector's motion for refusal of the application and exercise of his discretionary power to return it for presentation to proper Court ; *Held* that he did not make any order by virtue of his powers under S. 271, which would amount to a final order implying an adjudication on the rights of the parties or a direction to be carried out by them and therefore no appeal lay)

[7] No appeal lies against an order assigning an administration bond. ('12) 39 Cal 563 (566) (D B).

[But see (Vol 23) 1936 Lah 684 (684). (Order in some respects similar to one under S. 145, Civil P. C. and is appealable.)]

[8] No appeal lies against an order passed by a single Judge of High Court on an application under S. 302. (Vol 32) 1945 Oudh 54 (55) (D B).

5. Discretionary orders — High Court will not interfere. — [1] High Court will not interfere with discretion exercised by the lower Court in granting letters of administration unless it is satisfied that that discretion was unreasonably exercised. (Vol 13) 1926 Pat 356 (357) (DB).

6. Parties. — [1] A person who was not allowed to contest the grant of probate or letters of administration on the ground that he had no *locus standi* is competent to appeal. (Vol 19) 1932 Cal 734 (735) : 59 Cal 1308 (DB).

[2] *C* legatee and executrix under codicil revoking a previous will applying for probate of codicil — Court finding that codicil was not genuine granting probate of will—Pending her appeal, *C* making gift of a legacy she was to receive under the codicil to *D* and others — On *C's* death, the donees *D* and others were entitled to be substituted in place of *C* in the appeal. (Vol 19) 1932 Cal 206 (207) (DB).

7. Appeal to Privy Council. — [1] According to the Code of Civil Procedure the Recorder of Rangoon is

Concurrent jurisdiction of High Court.

300. *(1)* The High Court shall have concurrent jurisdiction with the District Judge in the exercise of all the powers hereby conferred upon the District Judge.

(2) Except in cases to which section 57 applies, no High Court, in exercise of the concurrent jurisdiction hereby conferred over any local area beyond the limits of the towns of Calcutta, Madras and Bombay [a][* * *] shall, where the deceased is a Hindu, Muhammadan, Buddhist, Sikh or Jaina or an exempted person, receive applications for probate or letters of administration until the [b][Provincial Government] has, by a notification in the [c][Official Gazette], authorised it so to do.

[1865—S 264; Probate and Administration Act, 1881—Ss. 2, 87; Devolution Act, 1920—S. 2 and Sch. I.]

[a] The words "and the province of Burma" were *repealed* by the A. O.

[b] *Substituted* by A. O. for "Local Government."

[c] *Substituted* by A. O. for 'local official Gazette."

Removal of executor or administrator and provision for successor.

301. The High Court may, on application made to it, suspend, remove or discharge any private executor or administrator and provide for the succession of another person to the office of any such executor or administrator who may cease to hold office, and the vesting in such successor of any property belonging to the estate.

[1865 — S. 264A; Probate and Administration Act, 1881 — S. 87A; Repealing and Amending Act, 1919 — Sch. I.]

Section 299 — Note 7 *(contd.)*

included within the meaning of the term High Court and an appeal from his order refusing probate lies to the Privy Council and not to the Rangoon High Court. ('97) 24 Cal 30 (32) (DB).

8. Revision. — [1] An order passed without following the procedure indicated by S. 3 of the Act of 1841 (S. 193 of this Act) is one passed illegally and with material irregularity in the exercise of jurisdiction vested in the Judge and therefore could be interfered with in revision. ('10) 11 Cal L Jour 521 (523) (DB).

[2] *Semble* — Where a probate is granted to a party no revision lies to the High Court. (Vol 17) 1930 Pat 354 (355).

[3] An order refusing right to oppose grant of probate on ground of absence of interest can be revised by the High Court on an application under S. 115, Civil P. C. (Vol 7) 1920 Cal 459 (460) (DB) ✠ ('94) 21 Cal 539 (542) (DB). (Application for probate—Widow of deceased colluding with petitioner withdrawing opposition — Daughter applying to be made party defendant — Daughter refused to be added and case heard as unopposed case — Contention that daughter had no such interest in the estate as would entitle her to be heard in the proceedings : *Held* that there were grounds for interfering in revision and that the Court acted illegally and with material irregularity in refusing to hear the daughter in the circumstances of the case.)

[4] An administration bond enures for the benefit of the District Judge who can assign it on conditions. But he cannot re-assign the bond while the first assignment is in force unless there is a condition that the assignment should be void if the assignee failed to comply with the requirements. Therefore where the Judge re-assigns the bond in the absence of such conditions the order is one without jurisdiction and can be revised by the High Court. ('12) 39 Cal 563 (566, 567) (DB).

[5] Order passed by single Judge of High Court in an application made under S. 302 — No revision lies as such Judge is not subordinate to High Court. (Vol 32) 1945 Oudh 54 (55).

9. Court-fee payable on appeals. — [1] Order refusing letters of administration with will annexed passed by a single Judge of the High Court — Appeal treated as first appeal from a decree and held that court-fee of Rs. 10 was payable under Art. 17, cl. 6, Sch. 2 of the Court-fees Act. ('13) 35 All 448 (450).

Section 300 — Note 1

[1] The expression 'High Court' in S. 300 is not confined to the appellate side alone. Therefore the original side of the High Court can exercise jurisdiction under S. 300 (Vol 27) 1940 Cal 264 (265) : ILR (1940) 1 Cal 79 (DB).

[2] High Court having no original jurisdiction cannot grant a succession certificate. (Vol 21) 1934 All 958 (958) : 57 All 302 (DB).

[3] High Court to which a guarantee is given by surety has power to exonerate him from future transactions if satisfied that there is ground for it after providing safeguards for the heirs of the deceased. (Vol 19) 1932 All 262 (262) : 54 All 293 (DB).

Section 301 — Note 1

[1] Will creating trust wrongly describing trustees as executors — Suit to remove such persons does not lie under this section. (Suit lies under S. 92, Civil P. C.) (Vol 25) 1938 All 197 (198).

[2] The power to remove an executor and to provide for a successor is one conferred on the High Court alone and such relief cannot be sought by regular suit. (Vol 22) 1935 Lah 406 (408) : 16 Lah 975 (DB). (Such suits will not lie under S. 9 of the Civil P. C.)

[3] If the removal of an executor is sought and not an indirect restraint on him by merely getting Receiver appointed, the only remedy that is open is under this section (Vol 14) 1927 Mad 994(995): 50 Mad 956 (DB).

[4] Where an application is made for removal of executor under this section the dispute relates to a matter of testamentary succession of an original nature and the application should be presented to that department which exercises original testamentary jurisdiction. (Vol 27) 1940 Cal 264 (265) : ILR (1940) 1 Cal 79.

[5] The High Court has power to discharge an executor on his own application provided that he makes out a case for the discharge. ('05) 29 Bom 188 (190). (Executor applying for discharge old and shattered in health—Disagreement between the executor and co-executrix— Estate not requiring anything to be done : *Held* that a proper case for discharge was made.)

[6] The use of the word "may" in this section shows merely that a proper case must be made out though the section does not try to exhaust the kinds of charges that may be brought against an executor or other circumstances that ought to be made out before his removal can be obtained. (Vol 14) 1927 Mad 994 (995) : 50 Mad 956 (DB).

302. Where probate or letters of administration in respect of any estate has or have been granted under this Act, the High Court may, on application made to it, give to the executor or administrator any general or special directions in regard to the estate or in regard to the administration thereof.

Directions to executor or administrator.

[1865 — S. 264B; Probate and Administration Act, 1881 — S. 87B; Repealing and Amending Act, 1919 — Sch. I.]

CHAPTER V.

OF EXECUTORS OF THEIR OWN WRONG.

303. A person who intermeddles with the estate of the deceased, or does any other act which belongs to the office of executor, while there is no rightful executor or administrator in existence, thereby makes himself an executor of his own wrong.

Executor of his own wrong.

Exceptions.—(1) Intermeddling with the goods of the deceased for the purpose of preserving them or providing for his funeral or for the immediate necessities of his family or property, does not make an executor of his own wrong.

Section 301 — Note 1 *(contd.)*

[7] A Court may not dismiss a petition under this section without any kind of enquiry into the allegations made. (Vol 14) 1927 Mad 994 (995) : 50 Mad 956 (DB).

Section 302 — Note 1

[1] Court exercising jurisdiction under this section acts in pursuance of testamentary and intestate jurisdiction with which it is vested under Cl. 34, Letters Patent and not of its ordinary original jurisdiction. (Vol 17) 1930 Cal 258 (261).

[2] Cases dealing with S. 43 of Trustees' and Mortgagees' Powers Act have no application to proceedings under this section. (Vol 15) 1928 Mad 356 (358) : 51 Mad 849.

[3] Deceased appointing *G* as executor of his property and guardian of his minor son—*G* realising large sums of money and paying into his own banking account—*G* not keeping proper accounts and not filing inventory in Court but giving false explanation—Minor's maintenance and education made difficult—Application by one *R* under Ss. 301, 302 and 317 — Contention that the Court had no jurisdiction to entertain it as the executor had paid off the debts and expenses and therefore had become *functus officio—Held* that he continued to be the executor till he handed over the money to the minor and therefore the Court properly entertained the application and passed orders. (Vol 26) 1939 Lah 463 (465) (DB).

[4] High Court can, under S. 302, order any monies in hands of administrator to be deposited with Registrar of Court. (Vol 32) 1945 Oudh 82 (83) (DB).

[5] Application to recover annuity payable under will is maintainable. (Vol 27) 1940 Pat 254 (254, 255).

[6] Will making specific bequests and providing that residue should be divided among certain persons in particular proportion — Administrator-General appointed executor — Caveat entered into by a party and the matter treated as contentious suit — Withdrawal of caveat on compromise between parties other than Administrator-General — Application on the death of a legatee by a person entitled to succeed him for direction to executor to pay legatee's share to applicant—*Held* that Court could entertain the application under this section. (Vol 22) 1935 P C 203 (208) : 63 Ind App 61 : 63 Cal 677 (P C).

[7] Probate granted to executor—Simultaneous agreement recorded between beneficiaries to have properties disposed of by executor not in complete accordance with terms of will—Even though executor agrees to distribute according to the terms of the agreement he holds property as executor and not as trustee—Heir of residuary legatee who has not received share can invoke the aid of S. 104 by an application under this section — Such person need not be relegated to a suit. (Vol 20) 1933 Cal 841 (843) : 60 Cal 1135.

[8] When possession of certain properties is claimed by an applicant under S. 302 on the ground that the properties were surrendered to him, the question whether the surrender was valid and should be given effect to cannot be properly dealt with in a proceeding under S. 302 for the application is virtually a suit in ejectment. (Vol 27) 1940 Pat 194 (196).

[9] The High Court has power under this section to give the directions which the Court of Chancery in England has. (Vol 15) 1928 Mad 356 (358) : 51 Mad 849.

[10] Under this section the High Court has got power to give to the executor or administrator any general or special directions in regard to the estate or its administration. (Vol 15) 1928 Mad 356 (358) : 51 Mad 849.

[11] Though the High Court has jurisdiction to give directions it would refrain from doing so in cases where the matter has been properly litigated in civil Court and adjudicated upon. (Vol 15) 1928 Mad 356 (359) : 51 Mad 849.

[12] Any directions as regards the administration of the estate means such directions as the executor may seek in order to administer the estate properly. The section gives ample power to settle questions arising between the executor and the legatees themselves and also a power to construe the will whenever the Court is asked to do so. (Vol 15) 1928 Mad 356 (358) : 51 Mad 849.

[But see (Vol 15) 1928 Pat 348 (349) : 7 Pat 396. (Probate Court cannot construe will.)]

[13] Power of giving directions for summary disposal of disputes is vested in High Court, but exercise of power is discretionary. If matter is complicated proper remedy for person seeking relief is to bring suit. (Vol 21) 1934 Lah 120 (121).

[14] The Court under this section is not competent to determine any disputed question of title, its jurisdiction being confined to the issue of directions to the executor relating to the management of the estate. (Vol 17) 1930 Cal 258 (261)✠(Vol 27) 1940 Pat 194 (196). (Assuming it has powers it would act wisely in the exercise of its discretion by refusing to give directions in favour of any party who does not come before it with a clear title and where the title set up may be appropriately dealt with in a civil suit.)

Section 303 — Note 1

[1] Section 303 applies to Hindus as well. (Vol 16) 1929 Sind 19 (22) (DB).

[2] There is nothing repugnant in Hindu law in holding a stranger executor *de son tort* who takes possession of the assets of a deceased person and who deals with them in such a way as would make him liable as such according to English law. ('06) 10 Cal W N 566 (570)✠('90) 17 Cal 620 (630) (DB). *(Obiter.)*

(2) Dealing in the ordinary course of business with goods of the deceased received from another does not make an executor of his own wrong.

Illustrations.

(i) *A* uses or gives away or sells some of the goods of the deceased, or takes them to satisfy his own debt or legacy or receives payment of the debts of the deceased. He is an executor of his own wrong.

(ii) *A*, having been appointed agent by the deceased in his lifetime to collect his debts and sell his goods, continues to do so after he has become aware of his death. He is an executor of his own wrong in respect of acts done after he has become aware of the death of the deceased.

(iii) *A* sues as executor of the deceased, not being such. He is an executor of his own wrong.

[1865—S. 265.]

Liability of executor of his own wrong.

304. When a person has so acted as to become an executor of his own wrong, he is answerable to the rightful executor or administrator, or to any creditor or legatee of the deceased, to the extent of the assets which may have come to his hands after deducting payments made to the rightful executor or administrator, and payments made in due course of administration.

[1865—S. 266.]

Section 303 — Note 1 *(contd.)*

[3] Principle of executor of his own wrong—Applies even to wills not governed by Act. (Vol 13) 1926 Cal 1 (50) (DB).

[4] A person who unlawfully possesses himself of the assets of an intestate is an executor *de son tort*. ('73) 16 E Q 534 (545), *Coote* v. *Whittington*.

[5] A person who intermeddles with the estate of a deceased person is known as an executor *de son tort*. ('81) 3 Mad 359 (863) (DB) ✠ ('99) App Cas 62 (69), *The Newyork Breweries Co. Ltd.* v. *The Attorney-General*. (*C* an American citizen holding shares of a company registered in England with its head office at London — *C's* executors obtaining probate of will in America but not taking probate or letters of administration in England—Company transferring *C's* shares into the names of the executors and paying them the dividends and interest: *Held* that the company were executors *de son tort* and that they had *prima facie* taken possession of and administered the property in question belonging to the deceased.) ✠ ('08) 35 Cal 276 (279) (SB). (An administrator *pendente lite* who intermeddles with the estate after his appointment as such ceases is a *quasi* executor *de son tort*.)

[6] Son obtaining probate of will of deceased mother —Money set apart by mother as due to another after obtaining letters of administration to the estate of her mother *E*—Money invested by son in Bank for interest: *Held* that the son was not an executor *de son tort* and that what he did was not wrong. (Vol 22) 1935 Cal 511 (512): 62 Cal 120.

[7] A very slight intermeddling with the estate of the deceased will make a person executor *de son tort* (Vol 13) 1926 Cal 1 (50) (DB)✠('08) 32 Bom 364 (369).

[8] A person whose hand is not the first to take the property of the deceased as where he relieved it from an executor or executor *de son tort* is not an executor *de son tort* unless he colluded with the executor or executor *de son tort* with the object of obtaining the property without consideration and defeating or hindering creditors. ('81) 3 Mad 359 (363) (DB).

[9] If a person sets up in himself a colourable title to the goods of the deceased though he may not be able to make out his title completely he shall not be deemed an executor *de son tort*. But the claim must be *bona fide*. (Vol 22) 1935 Cal 1 (50): 61 Cal 670 (DB).

[10] The English rule of law that where there is a personal representative of right against whom the creditors can bring their actions an other person who intermeddles does not become an executor *de son tort* does not apply to a case where the estate is represented under the Hindu law by the heir. Therefore where a party intermeddles with the estate of a Hindu the fact that there is a personal representative of the deceased does not make him any the less an executor *de son tort*. ('05) 28 Mad 351 (353) (DB).

SECTION 304 — SYNOPSIS.

1. Scope and applicability.
2. Rights and liabilities of executor de son tort.
3. Suit by administrators.
4. Suit by creditors.

1. Scope and applicability. — [1] Section 304 applies to the case of a Hindu as well. (Vol 16) 1929 Sind 19 (22) (DB).

[2] The section is not exhaustive and does not deal with all the rights and liabilities of an executor *de son tort*. (Vol 13) 1926 Cal 1 (52) (DB).

[3] The section must be read with the proviso to S. 212 and a suit covered by this section would not be barred by S. 212. (Vol 14) 1927 Bom 474 (475, 476): 51 Bom 771 (DB)✠(Vol 27) 1940 Rang 178 (179, 180): 1940 Rang L R 485 (DB). (Suit by mortgagee to establish his right to recover his debt by sale of the mortgaged property in possession of the executor *de son tort* is covered by S. 304.)

2. Rights and liabilities of executor de son tort. — [1] Under both Hindu law and English law those persons who take the property of the deceased person subject themselves to liability for the debts of the deceased. ('81) 3 Mad 359 (363) (DB).

[2] The mere fact that a person did not profess to act as executor does not relieve him from the liability. (Vol 13) 1926 Cal 1 (51) (DB).

[3] A person whose hand was not the first to take the property of the deceased as in the case of one who received it from an executor or executor *de son tort*, is not liable as executor *de son tort* unless he had colluded with such other persons with the object of obtaining the property without consideration and defeating or hindering creditors. ('81) 3 Mad 359 (363) (DB).

[4] If a person claims a title not derived from the testator but a paramount title, he does not make himself liable as executor *de son tort*. (Vol 13) 1926 Cal 1 (51) (DB).

[5] The liabilities of an executor *de son tort* continue only so long as he continues to intermeddle with the estate of the deceased. ('09) 11 Bom. L R 1187 (1191).

[6] *Obiter*—Executor intermeddling with the estate of the deceased is liable to account. (Vol 11) 1924 Cal 864 (867): 51 Cal 745 (DB).

[7] Executor *de son tort* is liable to account to administrator for the rents and profits of the estate of the deceased for a period of 12 years before suit. (Vol 16) 1929 Lah 753 (756, 758): 11 Lah 325 (DB).

[8] Payments of valid debts of the deceased made proportionately to the assets available are payments "made in due course of administration". But where certain creditors are paid more than the rateable share

CHAPTER VI.

OF THE POWERS OF AN EXECUTOR OR ADMINISTRATOR.

In respect of causes of action surviving deceased and debts due at death.

305. An executor or administrator has the same power to sue in respect of all causes of action that survive the deceased, and may exercise the same power for the recovery of debts as the deceased had when living.

[1865—S. 267; Probate and Administration Act, 1881—S. 88.]

Demands and rights of action of or against deceased survive to and against executor or administrator.

306. All demands whatsoever and all rights to prosecute or defend any action or special proceeding existing in favour of or against a person at the time of his decease, survive to and against his executors or administrators; except causes of action for defamation, assault, as defined in the Indian Penal Code, or other personal injuries not causing the death of the party; and except also

Section 304—Note 2 *(contd.)*

due to them having regard to the claims of other creditors who are not paid at all, the payments are not in the due course of administration and the executors *de son tort* are liable to be required to refund the excess after deducting payments made to the rightful executor or administrator and payments made in due course of administration. (Vol 26) 1939 Mad 662 (663).

[9] Where the person who has taken possession of the estate under the *bona fide* belief that he has a right thereto, and paid off a decree debt due by the deceased which therefore is neither a voluntary nor an unnecessary payment, he is entitled to recover it from the person who subsequently deprives him of the estate by establishing her right to it as heir of the deceased. ('84) 7 Mad 586 (587) (DB).

[10] An executor *de son tort* does not come within the purview of S. 10 of the Limitation Act as that section has no application to such trusts as the law implies merely from the existence of particular facts or fiduciary relations. (Vol 16) 1929 Lah 753 (757) : 11 Lah 325 (DB).

3. Suit by administrators.—[1] Suit by administrator for account for mesne profits against the heir of deceased who acted as executor *de son tort*—Other heirs though not necessary parties are parties — Court can implead them with the consent of parties even while the suit is before it as a result of remand by the High Court. (Vol, 16) 1929 Lah. 753 (759): 11 Lah. 325 (DB).

[2] Suit by an administrator of an intestate person against an executor *de son tort* is governed by Art. 123 of the Limitation Act. (Vol. 16) 1929 Lah. 753 (758): 11 Lah. 325 (DB).

4. Suit by creditors—[1] The creditors can sue the executor *de son tort* as representing the estate of the deceased for the debt due and are not compelled to ask for administration only. (1905) 28 Mad. 351 (354) (DB).

[2] Rateable distribution of assets by executor *de son tort* among creditors of deceased—One of the creditors omitted therefrom—The creditor so omitted is entitled to a rateable share in those assets proportionate to his debt in comparison with the debts of the other creditors. (Vol. 26) 1939 Mad. 662 (663).

[3] Under the Hindu and English law, persons who take the property of the deceased persons subject themselves to the liability for the debts of the deceased debtor and an administrator *pendente lite* who continues to hold and deal with the property after his appointment had ceased can be sued by creditors of the deceased. (1908) 35 Cal. 276 (279, 280) (SB). [Affirming (1906) 10 Cal. W N. 566].

[4] A creditor of the deceased can expect payment of the debt due to him only from the person who has received the property of the deceased by descent or, where the deceased has left a will, from the executor or from the person who has taken out letters of administration. The only way by which he can recognize such a person is by the fact of such person dealing with the property of the deceased. He may sue such person on the fact of that possession only without going to the root of the authority under which the possession is had. It is then for the person who is sued to prove that he holds no such character of executor and that he has the property by some other title. Otherwise he will be held liable in the same way and to the same extent to discharge the creditor's claim as if he was actually clothed with one of the character of an executor, administrator or a person who received the property by descent. (1906) 10 Cal. W. N. 566 (569).

[5] An executor *de son tort* sued as such cannot plead *plene administravit* by having in evidence or by specially pleading a retainer for his own debts. ('05) 28 Mad. 351 (354) (DB). (A paying debt due by *B* the deceased and removing the goods belonging to *B* from his shop—*Held* that *A* by paying *B's* debt became a creditor of the estate).

[6] That the heir to the estate assented to the executor *de son tort* paying himself out of the estate cannot be a valid defence in a suit by creditors of the deceased against the executor *de son tort*. (1905) 28 Mad. 351 (354) (DB).

Section 305—Note 1.

[1] Section 305 puts the executor in the same position as the deceased would have been in with regard to any causes of action which survive the deceased. (Vol. 33) 1946 Cal. 299 (302).

[2] A cause of action is every fact which it would be necessary for the plaintiff to prove if traversed in order to support his right to the judgment of the Court. It does not comprise every piece of evidence which is necessary to prove each fact but every fact which is necessary to be proved. (1896) 18 All. 131 (137) (DB) (1888) 22 Q. B. D. 128 (131), *Read* v. *Brown*.

[3] Cause of action means the whole cause of action and would include every fact essential to the maintenance of the action. Each of these facts separately is but a part of the cause of action. (1866-68) 3 Mad. H. C. R. 384 (390) (DB).

[4] A cause of action has no relation whatever to the defence which may be set up nor does it depend upon the character of the relief prayed for by the plaintiff. It refers entirely to the grounds set forth in the plaint as the cause of action or in other words, the media upon which the plaintiff asks the Court to arrive at a conclusion in his favour. (1889) 16 Cal. 98 (102): 15 Ind. Appt. 156 (P. C.)

[5] Institution of suits by executor or administrator without probate or letters of administration—See notes under S. 214.

SECTION 306—SYNOPSIS.

1. Scope and applicability.
2. Personal injuries.
3. Cases where rights of the deceased survive.
4. Cases where rights of the deceased abate.
5. Powers of executors and administrators.

cases where, after the death of the party, the relief sought could not be enjoyed or granting it would be nugatory[a].

Illustrations.

(i) *A* collision takes place on a railway in consequence of some neglect or default of an official, and a passenger is severely hurt, but not so as to cause death. He afterwards dies without having brought any action. The cause of action does not survive.

(ii) *A* sues for divorce. *A* dies. The cause of action does not survive to his representative.

[1865—S 268, Probate and Administration Act, 1881—S. 89.]

[a] Section 102 of the Motor Vehicles Act, 1939 (IV of 1939) is as follows:—"Notwithstanding anything contained in S. 306 of the Indian Succession Act 1925, the death of a person in whose favour a certificate of insurance had been issued, if it occurs after the happening of an event which has given rise to a claim under the provisions of this Chapter, shall not be a bar to the survival of any cause of action arising out of the said event against his estate or against the insurer."

Section 306 *(contd.)*

6. Institution of suits by executors and administrators.
7. Death of executor pending appeal.
8. Validity of decree where executor was not a party.

1. Scope and applicability.—[1] Section 306 has no application to criminal prosecution. (Vol. 28) 1941 Rang. 202 (204): 1941 Rang. L. R. 224: 42 Cr. L. J. 801. ✠(Vol. 11) 1924 Lah. 72 (72): 4 Lah. 7: 24 Cr. L. J. 29 (DB). ✠(Vol. 8) 1921 Mad. 278 (278, 279): 44 Mad. 417: 23 Cr. L. Jour 117 (DB.) (The section has reference to civil actions only. The word "prosecute" in the section implies no connection with criminal proceedings but is used in the same sense as in Ss. 14 and 16 of the Limitation Act.)✠(Vol. 9) 1922 Lah. 227 (228) : 2 Lah. 27 : 22 Cr. L. Jour 166 (DB). (Proceedings once initiated do not abate on the death of the complainant or the person injured).

[2] Section 306 applies not only to actions or suits but also to special proceedings, and the term "special proceeding" in S. 306, is wide enough to cover summary proceeding under S. 235, Companies Act. (Vol. 26) 1939 All. 1 (3): I. L. R. (1939) All. 6.

[3] Section 306 only applies where the law is silent as to whether a right to sue or continue proceedings survives against the legal representative of deceased man. (Vol. 26) 1939 All. 1 (4): I. L. R. (1939) All. 6.

[4] Section 306 is a part of fasciculus of sections dealing with the powers of executors and administrators and is to be construed within the limits of that context. (Vol. 33) 1946 Cal. 299 (302).

[5-6] The object of the section is to protect suits for wrongs done to the property of a deceased person but it does not extend that protection to compensation for personal injury, the right to which dies with the death of the person injured. (Vol. 13) 1926 All. 610 (612): 48 All. 630 (DB) ✠(Vol. 7) 1920 Pat. 841 (842): 4 Pat. L. Jour 676 (DB). (Personal injuries not causing death excluded from operation of the section.)

[7] In India doctrine of *actio personalis moritur cum persona* does not form part of law. (Vol. 14) 1927 Cal. 277 (278): 53 Cal. 987 (DB).

[8] Section 306 expresses a qualification of the rule *actio personalis moritur cum persona* to the extent that it indicates that among causes of action which survive are included some actions of a personal nature, that is, personal actions other than those expressly excluded by the section itself. (Vol. 33) 1946 Cal. 299 (302).

[9] The section which governs Englishman as well as various peoples of this country makes a large innovation upon the personal law of Englishmen as expressed in the maxim *actio personalis moritur cum persona* as well as necessarily upon the personal law of Mahomedans and Hindus. Therefore, its operation must be strictly confined to the persons named in it and cannot be extended to include heirs and representatives who are neither executors nor administrators within the clear definition of those terms contained in the Act. (1912) 36 Bom. 144 (145, 146) (DB).

[10] Cause of action under S. 306 survives against executors and administrators but not against heirs. (Vol. 23) 1936 Rang. 17 (25): 13 Rang. 385. (Heirs are not included in definition of either terms) ✠(Vol. 26) 1939 All 1 (3): I. L. R (1939) All 6. (Words "executor or administrator" in section mean persons who are appointed by Court to administer estate of deceased person in absence of will or persons nominated by testator in his will to administer his estate, and these words are not so wide as to include or embrace heirs representing estate).

[11] The scheme of the section is to divide personal injuries into two classes, those causing death and those not causing death, making a separate provision for each class. The two personal injuries named assault and defamation are given as illustrative examples of injuries that appertain to the body and of those that do not so appertain. (Vol. 5) 1915 Mad. 1100 (1103) (DB).

[12] General rule as laid down in S. 306, is that right to prosecute action survives. It is for person claiming exemption from this rule to show that his case falls within exception. (Vol 23) 1936 Lah. 271 (273)(DB).

2. "Personal injuries".—[1] Words 'personal injuries' mean "physical", "corporal" or "bodily injuries", injuries to "person" as opposed to injuries to property or reputation. (Vol. 23) 1936 Rang. 17 (19): 13 Rang 385 ✠(Vol. 22) 1935 All. 995 (1001): 58 All. 342 (DB). ✠(Vol. 23) 1936 Rang 17 (19): 13 Rang 385 ✠(Vol. 8) 1921 Mad. 1 (7): 44 Mad. 357 (FB). ("Personal injuries" means wrongs to person which do not necessarily cause damage to the estate of the person wronged.)

[2] The word "personal" cannot be restricted merely to physical injuries to the person but mean all personal injuries commonly accepted as such. (Vol. 18) 1931 Nag. 9 (10): 27 Nag. L. R. 237.

[2a] (Vol 22) 1935 Lah. 705 (708) (DB). (The expression "personal injury" in S. 306 does not include injuries of all descriptions caused by tortious act and is restricted to bodily injuries.)

[3] The words "other personal injuries" refer to bodily injuries and also to injuries like defamation or malicious prosecution. (Vol. 5) 1918 Mad. 1100 (1103) (DB).

[4] "Personal injuries not causing death of the party" are not *ejusdem generis* with defamation. It is hardly reasonable to say that defamation is "personal injury not causing death". Reason why defamation also is specifically mentioned among exceptions is, because defamation has always been regarded as reacting upon injured party in special way, mental distress that is caused by it being akin, if it does not actually amount to physical injury. (Vol. 23) 1936 Rang. 17 (20): 13 Rang, 385.

[5] Malicious prosecution is a personal injury within the meaning of S. 306. (Vol. 18) 1931 Nag. 9 (10): 27 Nag. L. R. 237.

Section 306 — Note 2 *(contd.)*

[6] The right of pre-emption is personal in the sense that it cannot form the subject-matter of a voluntary transfer. When described as personal in that sense only, its attribute of heritability by reason of its being attached to or inherent in land is not taken away. (Vol. 33) 1946 Pesh. 9 (11) (DB).

—3. Cases where the rights of the deceased survive.

[1] Although no action for a tort could be revived or commenced against the representatives of the person who committed it, yet the case is different where the act is not a mere tort but is a breach of a quasi contract where the claim is founded on breach of a fiduciary relation or on failure to perform a duty. ('12) 16 Cal L Jour 282 (286, 287) (DB). (Defendant, legal representative of person alleged to have been the agent of plaintiff—Plaintiff's suit for accounts—Contention by defendant that the cause of action did not survive against them—*Held*, that though the suit was not properly framed yet the claim was maintainable for money misappropriated by the deceased and also for recovery of damages for the loss suffered by reason of the negligence or misconduct of the deceased provided it was proved that the deceased was the agent of the plaintiff.) ✠(Vol 23) 1936 Lah 268 (271) : 17 Lah 262 (DB). (Property belonging to another appropriated and added to his estate by the deceased—Remedy can be pursued against his representatives) ✠ (Vol 33) 1946 Cal 123 (124, 125) (DB). (Damages for conversion is a chose in action which survives to the legal representative of the deceased.)

[2] The real effect of Ss. 305 and 306 is that whereas S. 305 puts the executor or administrator in the same position as the deceased would have been with regard to any causes of action which survive the deceased S. 306 makes clear what those causes of action are. The two sections read together indicate that causes of action affecting property do survive to persons other than the executor or administrator. (Vol 33) 1946 Cal 299 (302) ✠ (Vol 33) 1946 Pesh 9 (11) (DB). (Right of pre-emption accruing to person on basis of ownership of land passes to his heirs on his death along with land.)✠ (Vol 4) 1917 Bom 276 (280) : 41 Bom 636 (DB). (An administrator is entitled to continue a suit for pre-emption launched by the deceased though he would not be entitled to initiate a suit for pre-emption.)

[3] Person promising to settle all his properties upon a boy if his parents would give the boy in adoption dying before he settled the properties on the adopted boy—*Held* that the equity to compel his heir and legal personal representative to specifically perform the contract survived him. ('78) 2 Bom 67 (71) (DB).

[4] Cause of action in respect of injury to credit and reputation survives to the executors and administrators of the estate of the deceased. (Vol 23) 1936 Rang 17 (20) : 13 Rang 385.

[5] Right to sue for damages for negligence survives against the representatives of the wrongdoer. (Vol 14) 1927 Cal 277 (278) : 53 Cal 987 (DB)✠(Vol 21) 1934 Mad 507 (508) : 57 Mad 951 (DB). (Suit for damages for negligently causing death — Death of defendant—Cause of action survives against defendant's heirs under S. 306)

[6] Criminal prosecution under S. 323, Penal Code does not abate by reason of death of the person injured. (Vol 8) 1921 Mad 278 (278) : 44 Mad 417 : 23 Cri L Jour 117 (DB).

[7] Death of the husband does not abate a criminal proceeding under S. 498, Penal Code. (Vol 11) 1924 Lah 72 (73) : 4 Lah 7 : 24 Cri L Jour 29 (DB).

[8] Where the deception was the direct cause of pecuniary loss to a company and no mental or physical suffering was directly inflicted on any person the liability for loss survives to the executors and the estate of the person causing loss should pay damages just as he would have to pay had he been alive. (Vol 22) 1935 All 995 (1001) : 58 All 342 (DB).

4. Cases where the rights of the deceased abate. —[1] Suit for personal injury abates on the death of the sufferer. (Vol 18) 1931 Nag 9 (10) : 27 Nag L R 237.

[2] Cause of action for malicious prosecution does not survive to the legal representatives of the deceased party. (Vol 7) 1920 Pat 841 (842) : 4 Pat L Jour 676 (DB) ✠(Vol 8) 1921 Mad 1 (8) : 44 Mad 357 (FB). (Defendant in suit for malicious prosecution dying pending suit—The suit abates) ✠ (Vol 5) 1918 Mad 1100 (1103) (DB) (Cause of action for damages for wrongful search also will not lie) ✠ (Vol 13) 1926 All 610 (611) : 48 All 630 (DB). (Right to sue for legal expenses or other losses caused by a malicious prosecution.) ✠(Vol 10) 1923 Bom 408 (408, 409) : 47 Bom 716 (DB). (Suit to recover pecuniary loss caused by the defence in a malicious prosecution — Legal representatives cannot continue on the death of the person.)✠(Vol 31) 1944 Mad 405 (406). (Suit for expenses incurred in prosecuting defendants for defamation—Suit dismissed—Plaintiff appellant dying pending appeal — Cause of action held did not survive to his legal representatives.)

[3] Suit for malicious prosecution partly decreed and partly dismissed — Appeal and cross-objections preferred—Plaintiff dying pending appeal—Cross-objections abate but the appeal does not. (Vol 21) 1934 Nag 119 (120, 121) : 30 Nag L R 186 (DB).

[4] Proceedings under S. 235, Companies Act, being intended to be brought against director during his lifetime and not against his legal representatives or heirs, the right does not continue against his legal representatives or heirs by reason of S. 306. (Vol 26) 1939 All 1 (4) : I L R (1939) All 6.

[5] Right to sue for the specific performance of a contract does not survive to the representatives where any personal quality of such deceased party to the contract is a material ingredient in the contract. ('03) 30 Cal 265 (275).

[See however ('90) 17 Cal 115 (121) (DB). (*Obiter* —A contract in favour of a person who has since died whose material elements consist in the considerations connected with the person with whom the contract is made would with all its benefit and the right to sue on it would pass to the executors carrying on the same business.)]

5. Powers of executors and administrators.—[1] Executors acting *bona fide* have power to settle claims in respect of the estate of their testator and this power cannot be disputed by the legatee. (Vol 1) 1914 All 157 (157) : 36 All 217 (DB).

[2] An administrator can terminate the leave and licence given by the deceased. (Vol 21) 1934 Rang 291 (291, 292). (Person who occupied the premises with the leave and licence of the deceased must vacate it when demanded to do so by the administrator.)

6. Institution of suits by executors or administrators.—[1] An executor has the authority to institute an action before he proves will. But an administrator cannot do so till he obtains the letters of administration. (Vol 3) 1916 P C 202 (204) : 43 Ind App 113 (P C).

[2] See also Notes under S. 214.

7. Death of executor pending appeal.—[1] Executor and legatee plaintiffs—Executor dying—His legal representative not brought on record — Appeal abates against executor while it survives against the legatee. (Vol 17) 1930 Lah 138 (138) (DB).

8. Validity of decree where executor was not a party.—[1] Decree against a legal representative with-

307. *(1)* Subject to the provisions of sub-section *(2)*, an executor or administrator has power to dispose of the property of the deceased, vested in him under section 211, either wholly or in part, in such manner as he may think fit.

Power of executor or administrator to dispose of property.

Illustrations.

(*a*) The deceased has made a specific bequest of part of his property. The executor, not having assented to the bequest, sells the subject of it. The sale is valid.

(*b*) The executor in the exercise of his discretion mortgages a part of the immoveable estate of the deceased. The mortgage is valid.

(2) If the deceased was a Hindu, Muhammadan, Buddhist, Sikh or Jaina or an exempted person, the general power conferred by sub-section *(1)* shall be subject to the following restrictions and conditions, namely : —

(i) The power of an executor to dispose of immoveable property so vested in him is subject to any restriction which may be imposed in this behalf by the will appointing him, unless probate has been granted to him and the Court which granted the probate permits him by an order in writing, notwithstanding the restriction, to dispose of any immoveable property specified in the order in a manner permitted by the order.

(ii) An administrator may not, without the previous permission of the Court by which the letters of administration were granted,—

(a) mortgage, charge or transfer by sale, gift, exchange or otherwise any immoveable property for the time being vested in him under section 211, or

(b) lease any such property for a term exceeding five years.

(iii) A disposal of property by an executor or administrator in contravention of clause (i) or clause (ii), as the case may be, is voidable at the instance of any other person interested in the property.

(3) Before any probate or letters of administration is or are granted in such a case, there shall be endorsed thereon or annexed thereto a copy of sub-section *(1)* and clauses (i) and (iii) of sub-section *(2)* or of sub-section *(1)* and clauses (ii) and (iii) of sub-section *(2)*, as the case may be.

(4) A probate or letters of administration shall not be rendered invalid by reason of the endorsement or annexure required by sub-section *(3)* not having been made thereon or attached thereto, nor shall the absence of such an endorsement or annexure authorise an executor or administrator to act otherwise than in accordance with the provisions of this section.

[1865—S. 269; Probate and Administration Act, 1881—S. 90; *ibid*, 1889—S. 14.]

Section 306—Note 8 *(contd.)*

out impleading the executor under the will of the deceased is invalid. (Vol 15) 1928 Rang 83 (84) : 5 Rang 742.

SECTION 307—SYNOPSIS.

1. Executor or administrator may dispose of the property of the deceased.
2. Executor or administrator carrying on the trade of the deceased.
3. "In such manner as he may think fit".
4. Mortgage.
5. Sale.
6. Lease.
7. Compromise.
8. Rights of alienees from executors or administrators.
9. Sub-section (2).
10. Restrictions in will on powers of executor in respect of immovable property—Sub-s. (2)(i).
11. Court's power to remove restrictions.
12. Restrictions on administrator — Court has power to direct—Sub-section 2 (ii).
13. Sub-section (2) (ii) (a).
14. Sub-section (2) (ii) (b).
15. Sub-section (2) (iii).
16. Appeal.

1. Executor or administrator may dispose of the property of the deceased.— [1] Section 307 gives the executor powers at least as extensive as those of an executor in England before 1926. (Vol 20) 1933 Cal 429 (432) : 60 Cal 394.

[2] The powers of an executor under a will are far wider than that of an administrator and he can do whatever is not expressly forbidden by the will. (Vol 3) 1916 Low Bur 22 (23) (D B).

[See however (Vol 6) 1919 Oudh 29 (29, 30). (Executor after probate is entitled to mortgage assets even if there is direction in will that he is not to sell or mortgage — He is entitled to renew mortgage created by testator.)]

[3] An executor can act and exercise the powers given to him under the Act without obtaining probate. (1913) 36 Mad 575 (578) (D B)✠ (Vol 9) 1922 Bom 392 (395) : 47 Bom 231 (D B). (Can sell and convey without probate) ✠ (Vol 11) 1924 Mad 67 (70) (D B). (Can deal with the property and give a perfectly good title though it may be that to complete that title a probate has to be taken out at a later date.)

[4] The section applies to Hindu widows and a Hindu widow who is appointed an executrix is entitled to sell as executrix the property left by her husband if no restriction is imposed on her disposing powers by the will. (Vol 9) 1922 Bom 179 (182) : 46 Bom 162.

[5] Where an executor deals with a property of the intestate he is presumed to deal with it as executor. (Vol 15) 1928 Mad 817 (819)✠(Vol 9) 1922 Bom 179 (182): 46 Bom 162. (Sale of part of husband's estate by a Hindu widow who was the executrix under the will of her husband—Deed silent as to the capacity in which she made the sale but merely reciting all her capacities—*Held* that the sale was effected in her capacity as executrix.)

Section 307 — Note 1 *(contd.)*

[6] The executor has power to dispose of the property for all purposes binding upon the estate. (Vol 17) 1930 Mad 956 (959) (D B).

[7] An executor or an administrator does not have an absolute power to dispose of the property of the deceased if it is not necessary for the purpose of the administration of the estate. (Vol 15) 1928 Cal 412 (415) : 55 Cal 892 (D B). (Bona fide purchaser may be protected in certain cases where a transfer is not for that purpose.)

[8] Unsecured debt incurred by administrator accompanied by declaration that he is in possession as administrator — *Held* that the transaction is not a disposal of property under the section. (1909) 12 Oudh Cas 414 (417) (D B).

[9] Mahomedan heirs entitled to shares only in net assets remaining after payment of debts and funeral expenses—Till net assets are realised executor is *prima facie* entitled to exercise his powers of disposition. (Vol 9) 1922 Bom 392 (395) : 47 Bom 231 (D B).

[10] So long as a person entitled to the estate has not taken it out of the possession of the executors they are entitled to continue in possession of the estate. (Vol 8) 1921 Cal 527 (528) : 48 Cal 1051 (D B).

[11] Widow adopting son to testator under his authority—Adoption puts an end to executor's power of disposal —Adopted son dying few days after adoption makes no difference in this respect. (Vol 14) 1927 Mad 782 (782, 783).

[12] Section 307 onwards deal with powers of administrators as such and in no way govern the powers of persons with life or absolute estate. Therefore the daughter or the widow of the deceased as an administrator would be limited to the powers granted under the Act, but their powers as having absolute estate would be different. (Vol 25) 1938 Pat 301 (303) (D B).

[See however (Vol 6) 1919 Cal 2 (4) (D B). (Powers of Hindu widow as administrator are same as those of any other administrator — Order of District Judge authorising sale by administrator not to be questioned in land acquisition proceedings).]

[13] Administrator appointed to manage estate of deceased Mahomedan is the only person who can charge the estate so as to bind the heirs. But this cannot be done unless he complies with the provision of the section. (Vol 3) 1916 Low Bur 22 (24) (D B).

[14] Any and every testamentary executor, in whom the property of the deceased testator have been legally vested by virtue of his probate, can devolve the property with all powers and duties relating to its management and administration on the Administrator-General under S. 31 of the Administrator-General's Act provided the Administrator-General consents to the transfer. (1895) 22 Cal 788 (796) (D B).

2. Executor or administrator carrying on trade of the deceased.— [1] An executor (unless expressly authorised by will) or an administrator is not entitled to continue the business of the deceased except for the purposes of winding it up. If he does continue it for any other purpose he does so at his own risk. (Vol 29) 1942 Bom 54 (56) (D B).

[2] In India business left by deceased is a heritable asset which passes to his heirs, and in the case of a will to the executor. As regards his duties in carrying on that business, whether for winding it up or for handing it over to the heirs as a going concern there is no difference between him and executors in England. (Vol 5) 1918 Cal 688 (692) : 45 Cal 538 (D B).

[3] An executor is not entitled to mortgage or charge the general assets of the estate for the purposes of carrying on the testator's business unless he is so authorised by the will. (Vol 26) 1939 Mad 922 (923) I L R (1940) Mad 211 (D B).

[But see (Vol 5) 1918 Cal 688 (692) : 45 Cal 538 (D B). (An executor may pledge any portion of his testator's estate in order to raise money for the purpose of administration even when it is necessary to carry on a business left by the testator.)]

[4] An executor carrying on the trade of his testator under a testamentary trust is entitled to use as a trader the trade assets of the testator. He does not violate his trust by carrying on the trade in conjunction with his co-executor who is not named as a trustee. (1910) 34 Bom 209 (217) (D B).

[5] Executor directed to carry on business of testator —Mortgage of immovable property for purpose of business is valid. (1935) 62 Cal 552 (567) (D B).

[6] Testator among other things directing the executors to carry on his business of printing—Property consisting, among other properties, dwelling house and the premises where printing was carried on— Mortgage of these properties for the purpose of fulfilling a contract for printing —*Held* that the executors in a question as between the estate and the mortgagees had the power to mortgage. (Vol 27) 1940 P C 30 (32) : I L R (1940) Kar (P C) 76 : 67 Ind App 102 (P C).

[7] Where the will gives the executors powers to pledge "the credit" of the business for the purpose of carrying it on, it expressly limits their power of charge, for the purposes of the business, to the trade assets. Similarly, the clause authorising the executors to deal with "the various items" of his estate should not be read as enlarging the powers of the executors. (Vol 26) 1939 Mad 922 (925) : I L R (1940) Mad 211 (D B).

3. "In such manner as he may think fit."—[1] An executor although he has the power to dispose of the property of the deceased in such a manner as he thinks fit must be able to give reasons for doing so. (Vol 6) 1919 Cal 996 (997) (D B).

4. Mortgage.— [1] An executor in India can bind the estate of the testator by creating a mortgage. (Vol 13) 1926 Rang 10 (13) : 3 Rang 443 (D B).

[2] Where under will continuance of executorship is doubtful, *bona fide* mortgage by executor assented to by legatees binds estate. (Vol 6) 1919 Cal 128 (129) (D B).

[3] Power of sale given in a will includes power to mortgage unless will excludes it. (Vol 10) 1923 Mad 84 (84) : 45 Mad 867 (D B).

[But see (Vol 6) 1919 Low Bur 115 (116, 117) : 10 Law Bur Rul 1 (D B) (Will directing sale of property after testator's death to pay debts is a restriction on the power to mortgage it for payment of debts and if mortgaged the mortgage is voidable).]

[4] An administrator cannot by merely incurring an unsecured debt under a pronote accompanied by a declaration that he is in possession as administrator create any charge binding on the estate. (1909) 12 Oudh Cas 414 (417) (D B).

[5] Even if person has executed mortgage as administrator, it would have to be proved that mortgage was executed in due course of administration and also that he was entitled to mortgage general estate as distinct from business. (Vol 29) 1942 Bom 54 (55, 56) (D B).

[6] If the beneficiaries were competent to assent and did so assent to a mortgage by the executor which was in contravention of the provision of the will, they would be estopped from questioning the effect of the mortgage to bind their interest in the estate. (1906) 3 Cal L Jour 260 (273) (D B).

5. Sale. — [1] Natural father of legatee who was also executor under will selling certain properties of the deceased — No directions in the will either extend-

Section 307 — Note 5 *(contd.)*

ing or restricting the scope of the powers of executor — *Held*, that the only rules applicable to regulate his powers were the rules relating to the powers and duties of executors and administrators and the act of the executor in this case could not be considered as having been in his capacity as the guardian of the legatee and therefore the sale was binding on the legatee. (1913) 36 Mad 575 (576, 577) (DB).

[2] An executor of a Hindu will who has not obtained probate can clothe a vendee with full title. (Vol 13) 1926 Mad 434 (446) : 49 Mad 261 (FB).

6. Lease. — [1] An executor cannot grant a lease of the testator's property for a term of ninety-nine years at a fixed rent with a condition in the agreement that the lessee will have the option to purchase the whole or a portion of the property at any time during the period of lease for a sum of money stated therein in consideration of the improvements effected by him. (Vol 19) 1932 Bom 604 (606).

7. Compromise. — [1] The executor of a will is competent to compromise a suit by agreeing the creation of a charge on the estate of the deceased for the maintenance of the deceased's widow. (Vol 20) 1933 Pat 306 (418) : 12 Pat 359 (DB).

[2] Executors acting *bona fide* have power to settle claims in respect of the estate of their testator. (Vol 1) 1914 All 157 (157) : 36 All 217 (DB). (Power cannot be disputed by legatees.)

8. Rights of alienees from executors or administrators. — [1] Outsiders who have to deal with the executor on the faith of the property being vested in him must be protected. Therefore while the property is vested in the executor even though it may be found afterwards to have been wrongly so vested, all acts of the executor in respect of the property where bona fide purchasers are concerned must be regarded as valid. (Vol 14) 1927 Bom 387 (392).

[2] Mortgage by the residuary legatee of the same property subsequent to the sale of the same property by the executor under orders of Court does not affect the right of the purchaser from the legatee. (Vol 12) 1925 Cal 703 (704) (DB).

[3] Sanction obtained by fraud and misrepresentation — Purchasers with knowledge of the fraud get no title even though they were not privies to the fraud. (Vol 6) 1919 Cal 730 (739, 740) (DB).

[4] A transferee who deals with a transferor (who happens to be an executor) not as executor but as owner is not entitled to the protection available to transferees from executors acting *qua* executors. (Vol 20) 1933 Cal 429 (432) : 60 Cal 394.

[5] Even where the executor deals with the property for purposes not strictly binding upon the estate the alienation cannot be questioned so as to defeat an alienee who had no notice of the fact that the executor was using his power for purposes not binding upon the estate. (Vol 17) 1930 Mad 956 (959) (DB).

[6] Alienee from the executor with notice that the executor was using his powers for his own purposes will not be protected. (Vol 17) 1930 Mad 956 (959) (DB).

[7] In the case of a transfer by an executor, there is a presumption that the transfer is valid *qua* the transferee until and unless it is established that the executor was acting in breach of trust. (Vol 20) 1933 Cal 429 (430) : 60 Cal 394. (Failure by mortgagee to scrutinise will—No inference that he had notice that loan was not necessary for the administration can be drawn.)

[8] Property not mentioned in will sold by executor without dividing it among sharers. Vendee knowing will must be deemed to be aware of executor's infirmity of title. (Vol 14) 1927 P C 151 (155) : 54 Ind App 276: 5 Rang 427 (PC).

9. Sub-section (2). — [1] A Hindu executor is entitled to deal with the property of his testator in the same manner as the owner himself would have dealt with it unless his powers are restricted or limited by the terms of the will. (Vol 25) 1938 Bom 71 (73) (DB).

[2] A testator can impose restriction upon the powers or discretion of an executor. (1906) 3 Cal L Jour 260 (267) (DB). (Will providing that the executor when it became necessary could alienate property of over certain value with the consent of another person — *Held*, that it was not a void condition and therefore a mortgage without such consent is one in contravention of the condition.)

[3] The restriction by the terms of the will upon the powers of an executor to deal with immovable property may be either express or implied. (Vol 25) 1938 Bom 71 (74) (DB).

[4] A will provided that "my said trustees shall also hold annual *Miglas* or meeting of the whole of my relations and acquaintances and feast them in Bombay etc., and pay such expenses in connexion therewith as they may think proper and defray the same out of the income of the said trust premises." It was contended that the testatrix could not have intended that the trustees should have unlimited powers of expenditure over the income and therefore the Court should fix the limit. It was held that a discretion was given by the testatrix to the trustees to determine as to how much of the income was to be spent for the purposes in which the Court would not interfere. (1902) 4 Bom L R 199 (202).

[5] Will of Hindu testator devising the residue of his estate to his widow as *malik* thereof containing the words "she shall during her lifetime apply and spend the same in a good way . . . " — *Held*, that the word *malik* imported full proprietary rights to the devisee in the absence of words of restriction and the fact that the devisee was Hindu widow did not alter the position and that in this case the effect of the words "she shall during her life time" etc. was to cut down the estate of the widow to a life-estate with full powers of disposition by acts inter vivos. (Vol 9) 1922 Bom 179 (181) : 46 Bom 162.

[6] Two documents constituting a will showing intention on the part of testator that his debts should be paid—Fact that direction for payment of debt appears in one document relating to a particular property does not lead to the inference that the testator intended to restrict the alienation of other properties — Also the fact that testator did not intend the division of property till his sons attained majority gives rise to the inference that the testator intended to restrict the power of the executor to alienate. (Vol 18) 1931 Bom 533 (536, 537) (DB).

10. Restrictions in will on powers of executor in respect of immovable property — Sub-s. (2) (i)— [1] Executors under will directed to carry on testator's business of printing — Property consisting of dwelling house and business premises mortgaged for executing a printing contract — *Held* on a construction of the will that there was no restriction imposed by the will on the statutory power of the trustees. (Vol 27) 1940 P C 30 (32) : I L R (1940) Kar (PC) 76 : 67 Ind App 102 (PC).

[2] Will containing the following clause "The executor shall pay all my debts which are due to moneylenders and to *B* as shown by his Khatas: if there be any difficulty in paying off the debts from the money due to me, the executor shall either sell the whole or a portion of my estate or make any other settlement such as putni or dur putni etc, and shall pay off my debts from the consideration money thus acquired" was

Section 307—Note 10 *(contd.)*
held not to give the executor the power to mortgage any part of the estate. ('99) 3 Cal W N 515 (517) (DB).

[3] Testator leaving directions that a particular legacy was to be paid by mortgaging the property to a particular named person — Mortgage given to one of the co-executors : *Held*, that the mortgage was invalid as one in contravention of the directions in the will and conveyed no right to the mortgagee. ('77) 1 All 753 (759, 761) (DB).

[4] One *R* died leaving a will by which he declared that his wife was to have full powers, but that during the lifetime of his son she was not to transfer any portion of the property without legal necessity — Power given to her to mortgage property for the purpose of raising money to pay Government revenues and other debts : *Held*, that the will gave her no more power to alienate property as manager of it on behalf her minor son than she had as a Hindu widow and that the mortgage which she executed was therefore not valid as the circumstances at the time did not point out any necessity for it. ('99) 26 Cal 707 (710, 711) : 26 Ind App 97 (PC).

11. Court's power to remove restrictions —[1] Where a testator had imposed restrictions on the powers of the executor and such restrictions prove injurious to the actual administration of the estate the executor can apply to the Court for suitable directions. ('06) 3 Cal L Jour 260 (267) (DB).

[2] Where the powers of a Hindu executor are restricted by the terms of the will he cannot dispose of the immovable property without the permission of the Court which the Court can give in a proper and fit case notwithstanding the restrictions imposed by the will. (Vol 25) 1938 Bom 71 (74) (DB).

[3] Application for sale of property covered by will made after obtaining probate— Application not specifically headed as one under the section — Court should find out whether it has jurisdiction in the matter of the application or not under any provision of law. (Vol 22) 1935 All 360 (361) (DB).

[4] Order granting permission to executor to sell property after completion of administration is not one without jurisdiction. (Vol 19) 1932 Cal 828 (829) (DB).

12. Restriction on administrator — Court has power to direct—Sub-s. (2)(ii).—[1] An administrator cannot alienate without the permission of the Court. (Vol 3) 1916 Low Bur 22 (23) (DB).

[2] Where there is specific direction as regards the investment of the money in the will, the administrators are not entitled to invest the money otherwise than as directed by the testator unless with the sanction of the Court. (Vol 20) 1933 Mad 628 (630) (DB).

[3] An administrator by disposing of property of the estate vested in him without permission of the Court cannot thus defeat the claims of the creditors of the deceased. (Vol 14) 1927 Bom 16 (17) (DB).

[4] The object of S. 307 (2) (ii) is to enable the District Judge as a Court of testamentary jurisdiction to see that the transfer applied for is necessary in the interest of the administration of the estate. It is not proper for the administrator to apply for sanction under the said section and to sell the properties with such sanction when there is nothing to administer and the property in the hands of the administrator has only to be handed over to the legatee. (Vol 18) 1931 All 212 (214):53 All 422(DB). (Devise of property to a society—Estate without encumbrance—No other legatee to be paid : *Held* that an application under this section for sale on the ground that the society would find it more convenient to have it sold will not lie.)

[5] Power to sell immovable property is to be granted to administrator only when debts cannot otherwise be discharged. The fact that the estate can be conveniently wound up by distributing the sale proceeds among the heirs is no ground for granting permission to sell. (Vol 6) 1919 Low Bur 44 (44) (DB).

[6] The previous permission which enables an administrator to mortgage the estate implies that there should be a sanction by Court of all the essential elements of the transaction and therefore a mere bald sanction to the transaction is not sufficient. (Vol 14) 1927 Nag 57 (61). (Permission obtained without full disclosure of material and essential elements of the transaction — Court trying suit based on the transaction can go behind the permission and give relief.)

[7] Sale by administrator with sanction of Judge in a case where there is nothing to administer and the property has to be only handed over to the legatee — Successor discovering mistake can set aside the sale. (Vol 18) 1931 All 212 (214) : 53 All 422 (DB).

[8] Preliminary decree for accounts and enquiry passed by Rangoon High Court in administration suit — Administrator of the same estate appointed by another Court can be permitted by that Court to sell the property. (Vol 12) 1925 P C 261 (263) (PC).

13. Sub-section (2) (ii) (a).— [1] Permission to sell properties to which third parties also claim can be given only when other properties are not available and there is urgent necessity for sale. (Vol 11) 1924 Rang 237 (239) : 2 Rang 117 (DB).

[2] Power of sale given by the Court does not enable an administrator to mortgage. (Vol 3) 1916 Low Bur 22 (23) (D B) ✠ (Vol 14) 1927 Bom 49 (50) : 51 Bom 16 (D B) ✠ (Vol 16) 1929 Rang 5 (6) : 6 Rang 411 (DB). (Does not *ipso facto* give permission.)

[3] An alienation with permission does not operate as absolute alienation so as to exclude all enquiries into the question whether the permission was obtained through fraud or misrepresentation. (Vol 14) 1927 Nag 57 (60).

14. Sub-section (2) (ii) (b).—[1] Lease for a period of over five years without sanction is voidable on equitable terms of reimbursement. (Vol 11) 1924 Cal. 636 (636) (DB).

[2] Administrator compromising suit on the terms that he would alienate the property of deceased on lease and that before such execution would obtain leave from Court for doing so : *Held* that such an agreement was clearly in contravention of law and if a suit was compromised on those terms by the administrator, admittedly acting in excess of his powers, the Court was entitled to refuse to pass a decree on those terms and that where a decree was by inadvertence made on the basis of an agreement or compromise contrary to law the Court of execution had power to refuse to execute it. ('10) 11 Cal L Jour 346 (350) (DB).

15. Sub-section (2) (iii).—[1] The disposal of property by an administrator in contravention of the directions of the Court is only voidable and not void and until avoided the terms of the contract as entered into by the administrator would be binding. (Vol 9) 1922 Cal 23 (26) : 49 Cal 626 (DB) ✠ (Vol 10) 1923 Rang 69 (70) (DB) ✠ (Vol 18) 1931 Rang 277 (278) : 9 Rang 34 (DB). (Mortgage without leave of Court.) ✠ ('04) 8 Cal W N 54 (55) (D B). (Lease granted by an administrator for a term of more than five years — As between the administrator-lessor and his lessee the lease is valid.)

[See however (Vol 16) 1929 Rang 5 (6) : 6 Rang 411 (DB). (Administrator mortgaging without Court's permission—Mortgage not binding on heirs.)]

308. An executor or administrator may, in addition to, and not in derogation of any other powers of expenditure lawfully exercisable by him, incur expenditure—

General powers of administration.

(*a*) on such acts as may be necessary for the proper care or management of any property belonging to any estate administered by him, and

(*b*) with the sanction of the High Court, on such religious, charitable and other objects, and on such improvements, as may be reasonable and proper in the case of such property.

[1865—S. 269A; Probate and Administration Act, 1881—S. 90A.]

Section 307 — Note 15 *(contd.)*

[2] Conveyance without sanction of Court is voidable only by person interested in property i.e., heirs of the deceased or beneficiaries. (Vol 13) 1926 Pat 130 (134) : 5 Pat 80 (DB).

[3] Where a person who could have sold the property of the deceased by a heritable right chooses to obtain letters of administration, the whole estate vests in that person as administrator and not as heir, and any sale made without leave of Court before the administration was over could be avoided by a person interested in the estate. ('14) 7 Low Bur Rul 93 (94). (Creditor of the deceased, a person who could so avoid provided he acts within a reasonable time.)

[4] Where an executor compromises suit by agreeing to the creation of a charge upon the estate of the deceased for the maintenance of the deceased's widow when he had no such power, the transaction is only voidable at the instance of any other person interested in the property. (Vol 20) 1933 Pat 306 (418) : 12 Pat 359 (DB).

[5] Per *Mookerjee J.*—Where Hindu widow clothed with the character of administratrix made an alienation with the sanction of the District Judge, although the sale may not be operative in the same way as a sale by order of the Court in administration yet the burden would lie very heavily upon the persons who impeach it. (Vol 3) 1916 Cal 126 (134) (DB).

[6] Sale by administrator without leave of Court — Purchaser selling it to another : *Held* that the law made no exceptions in favour of *bona fide* purchaser for value and that both the title of original purchaser and the purchaser from him was defeasible provided the person interested took steps to avoid the sale within reasonable time. ('14) 7 Low Bur Rul 93 (94).

[7] An alienation with permission of Court obtained by fraud or misrepresentation being voidable only its avoidance could be even by setting up a defence to a suit to enforce it and not necessarily by bringing a suit to have it set aside. (Vol 14) 1927 Nag. 57 (60, 61).

[8] Person who wishes to avoid a disposal of property made by the administrator without leave of Court must in equity reimburse the party who *bona fide* entered into the transaction with the administrator. (Vol 25) 1938 Bom 71 (74, 75) (DB). (*Bona fide* purchaser deprived of property purchased is entitled to be reimbursed for the value of permanent improvements effected by him.)✠(Vol 18) 1931 Rang. 277 (278); 9 Rang 34 (D B). (Mortgagee entitled to refund of money *bona fide* advanced.)

[9] Executor mortgaging immovable property in contravention of condition in the will : *Held* that the mortgage was voidable only and that the person who so wants to avoid that should restore any benefit which the estate received from the mortgagee in the absence of which the mortgagee was to enforce his security against the estate precisely to the same extent. ('06) 3 Cal L Jour 260 (268, 272) (DB).

[10] Natural guardian of legatee who was executor under will selling certain property of deceased — Legatee's suit for recovery of the property that the sale was not binding upon him— Purchaser from executor alleging that the sale was effected for discharging the debt of the testatrix : *Held* that the legatee must have alleged and proved that the purchaser was aware that the sale was not a proper act of administration and was not required for the purpose of discharging the debts to disentitle the purchasers from executors of the protection to which they are entitled to under the law. ('13) 36 Mad 575 (577) (DB).

[11] Administratrix mortgaging without sanction— Suit by mortgagee—Court has powers to join the beneficiaries who wanted to contend that the mortgage was voidable as one without sanction and ought to do so in spite of mortgagee's unwillingness to join them—Administratrix also can plead want of sanction for mortgage. (Vol 14) 1927 Bom 49 (50) : 51 Bom 16 (D B).

[12] Suit to set aside sale by administrator is governed by Art 91, Limitation Act. (Vol 14) 1927 Rang 186 (188) : 5 Rang 266 (DB).

16. Appeal.— [1] Per *Chatterjee J.* — An order of District Judge permitting the administrator to sell property is analogous to a decree and is therefore appealable. (Vol 3) 1916 Cal 473 (474) (D B) ✠ (Vol 11) 1924 Rang 237 (239) : 2 Rang 117 (DB).

Section 308 — Note 1

[1] An executor is in the same position as the owner but it is all to enable him to do the acts which the will authorises him to do and to exercise those powers and discharge those duties which the law vests in him. There is nothing that entitles him to borrow. (Vol 19) 1932 Cal 182 (188) : 59 Cal 216 (DB).

[2] Where an executor or his attorney borrows money for the benefit of an estate without any authority in that behalf contained in the will itself the creditor has no right against the estate. (Vol 33) 1946 Pat 66 (67, 68) : 24 Pat 541 (DB).

[See however ('10) 34 Bom 209 (218) (D B). (The creditor has a personal right to sue the executor and get a judgment and to make him a bankrupt. He has also yet an equitable right to follow the trust assets which having been devoted to carry on the trade, it would not be right that the *cestui que trust* should get the benefit of the trade without paying the liabilities, and that is not affected by the introduction into the business by the trustee executor of co-executor not authorised to carry on the trade.)]

[3] An executor who borrows money for the purposes of the administration of the estate is personally responsible for the payment of the debts, though he can get indemnity out of the estate in respect of the borrowings if he shows that it was reasonably and properly made. (Vol 5) 1918 Cal 688 (691) : 45 Cal 538 (DB).

[4] When probate is granted, testator's estate and business vest in executors who can carry on business only to realise debts and assets : executors are personally liable for debts and have no right of indemnity against the estate. (Vol 8) 1921 Cal 419 (421).

[5] Suit on promissory note given by one of the four executors of deceased's estate for goods apparently supplied to the estate : *Held* that the executor who gave the pronote was personally liable and not the estate of the deceased. ('04) 31 Cal 253 (255) (DB).

[6] In the absence of any special power given to the executor to borrow or charge the estate for loans made

309. An executor or administrator shall not be entitled to receive or retain any commission or agency charges at a higher rate than that for the time being fixed in respect of the Administrator General by or under the Administrator General's Act, 1913.

Commission or agency charges.

[1865—S. 269B; Probate and Administration Act, 1881—S. 90B.]

310. If any executor or administrator purchases, either directly or indirectly, any part of the property of the deceased, the sale is voidable at the instance of any other person interested in the property sold.

Purchase by executor or administrator of deceased's property.

[1865—S. 270; Probate and Administration Act, 1881—S. 91.]

311. When there are several executors or administrators, the powers of all may, in the absence of any direction to the contrary, be exercised by any one of them who has proved the will or taken out administration.

Powers of several executors or administrators exercisable by one.

Illustrations.

(*i*) One of several executors has power to release a debt due to the deceased.
(*ii*) One has power to surrender a lease.
(*iii*) One has power to sell the property of the deceased whether moveable or immoveable.
(*iv*) One has power to assent to a legacy.
(*v*) One has power to endorse a promissory note payable to the deceased.
(*vi*) The will appoints *A*, *B*, *C* and *D* to be executors, and directs that two of them shall be a quorum. No act can be done by a single executor.

[1865—S. 271; Probate and Administration Act. 1881—S. 92.]

Section 308 — Note 1 *(contd.)*

to him for the benefit of the estate, a decree obtained on the basis of such loan cannot bind the estate in the hands of the executor. ('03) 7 Cal W N 104 (105).

[7] On a claim for money lent to the executors they are liable personally and a judgment cannot be directed against the assets of the testator. ('09) 11 Bom L R 250 (254) (DB).

[8] In a suit for recovery from the estate of money borrowed by executors for administration the executors cannot fully represent the estate, as their personal interests as executors are opposed to those of the estate. (Vol 5) 1918 Cal 688 (692) : 45 Cal 538 (DB).

Section 310—Note 1

[1] A trustee cannot get a benefit to himself by dealing with the trust property. ('80-81) 18 Ch D 93 (103), *Pillgrem* v. *Pillgrem*.

[2] As a general rule an executor cannot be allowed either immediately or by means of a trustee to be a purchaser for himself of any part of the assets, but is considered trustee for the persons interested in the estate and must account to the utmost extent of advantages made by him of the subject so purchased. The position, however, is somewhat different when an executor or administrator purchases the interests of a legatee. The executor stands in the position of a trustee and the legatee in the position of *cestui que trust*. Such a case has to be tested by principles applicable to cases where a trustee has entered into dealings with the *cestui que trust*, dealings which may be legitimate but which are open to examination when complained of. ('09) 9 Cal L Jour 383 (394) (DB).

[3] There is no prohibition against a trustee buying trust property from a *cestui que trust*. But under equity if transaction of that kind is challenged in proper time the Court will examine it and will throw upon the trustee the onus of proving that he gave full value and that all information was laid before the *cestui que trust* when it was sold. Independently of the statute of limitations acquiescence for a period in a concluded transaction of the kind, a transaction which is not void but at most only voidable and may be a reasonable and proper transaction, will disentile the person who contests the transaction to that relief in a Court of equity which he might have had if he had come when the transaction was recent. (1877) 2 App Cas 215 (236), *Henry Thomson* v. *Eastwood*.

[4] A transaction by which trustee acquires trust property from the *cestui que trust* would be looked at with grave suspicion by the Court and the trustee has to prove affirmatively that he has passed full information and has given an adequate price. It is not for the person who impeaches the transaction to prove negatively that no information was given. (1902) 1902 App Cas 197 (202), *John Dougan* v. *James Macpherson*.

[5] A contract of sale by one executor who obtained probate to another who was named under the will as a co-executor but who never acted as such at all and never held any fiduciary position cannot be treated as an unfair bargain merely because the purchaser was named an executor, where the contract was fair in all other respects. (1884) 9 App Cas 733 (738), *David Guillan Clark* v. *John Guillan Clark*.

Section 311—Note 1

[1] The section should be confined to cases where probate is compulsory before dealing with the property. (Vol 3) 1916 Mad 720 (725) : 39 Mad 365 (DB).

[2] The section has no application to a case where a will overrides it and provides that it is only the opinion of the majority of the executors appointed under it that should bind the estate. (Vol 3) 1916 Mad 1054 (1058) (D B). (Contract by some of the executors without reference to others where the will provided that the majority opinion should prevail will not bind the estate.)✠(Vol 20) 1933 Sind 232 (234). (Trustees directed to act by majority—Minority not entitled to file suit against wish of majority.)

[3] The effect of the section so far as it relates to executors is that where several executors obtain probate none of them can act singly where the will directs them all to act together; but the section is not intended to disqualify, by reason of any such direction in the will, one of several executors who alone has obtained probate, the others having either renounced or refused to accept office. (1900) 27 Cal 683 (688) (DB)✠(Vol 8) 1921 Cal 292 (295) (SB). (Will providing that six executors at least should beacting at time — Exercise of power by only such of the executors as have proved will not be affected.

Survival of powers on death of one of several executors or administrators.

312. Upon the death of one or more of several executors or administrators, in the absence of any direction to the contrary in the will or grant of letters of administration, all the powers of the office become vested in the survivors or survivor.

[1865 — S. 272; Probate and Administration Act, 1881 — S. 93.]

Powers of administrator of effects unadministered.

313. The administrator of effects unadministered has, with respect to such effects, the same powers as the original executor or administrator.

[1865 — S. 273; Probate and Administration Act, 1881 — S. 94.]

Powers of administrator during minority.

314. An administrator during minority has all the powers of an ordinary administrator.

[1865 — S 274; Probate and Administration Act, 1881 — S. 95.]

Powers of married executrix or administratrix.

315. When a grant of probate or letters of administration has been made to a married woman, she has all the powers of an ordinary executor or administrator.

[1865 — S. 275; Probate and Administration Act, 1881 — S. 96.]

CHAPTER VII.

OF THE DUTIES OF AN EXECUTOR OR ADMINISTRATOR.

As to deceased's funeral.

316. It is the duty of an executor to provide funds for the performance of the necessary funeral ceremonies of the deceased in a manner suitable to his condition, if he has left property sufficient for the purpose.

[1865 — S. 276; Probate and Administration Act, 1881 — S. 97.]

Inventory and account.

317. *(1)* An executor or administrator shall, within six months from the grant of probate or letters of administration, or within such further time as the Court which granted the probate or letters may appoint, exhibit in that Court an inventory containing

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Section 311 — Note 1 *(contd.)*

[4] Where any one of executors is authorised by will to sell property, mortgage by one of them is valid. (Vol 15) 1928 Mad 817 (818).

[5] In the absence of any direction to the contrary in the will a pronote executed by two out of three executors is valid. (Vol 9) 1922 Mad 214 (215) (DB).

[6] Very large powers of compromising are given to executors by common law as well as by statute. Co-executors are seised of their office *per mie et per tout*; each of them represents the estate for all purposes. Therefore one executor can compromise the claim of his co-executor. ('04) 1 Ch 622 (625, 626), *Hawley* v. *Blake*

[7] Per *Wallis J.*— It is doubtful whether an executor can enter into a compromise at all with his co-executor. (Vol 3) 1916 Mad 720 (724) : 39 Mad 365 (DB). ([Per *Seshagiri Ayyer J.*]—It is not competent to an executor to compromise the claim of the co-executors.)

[8] *Obiter*—In the case of co-executors, a suit cannot be held properly constituted unless all of them are on record. (Vol 25) 1938 Mad 982 (993) (DB).

[9] Under the Civil Procedure Code where there are several executors they must all be made parties to the suit except an executor living beyond the local limits of the jurisdiction of the Court. ('05) 2 Cal L Jour 484 (488, 489) (D B).

[10] Probate of will granted to two executors named therein — Suit for rent by one of them impleading other who resided out of the jurisdiction of the Court as defendant : *Held* the frame of suit was not defective on the ground that both the executors did not join as plaintiffs. (Vol 7) 1920 Cal 91 (92).

[11] When one of administrators represents the estate fully a decree passed against him and the estate represented by him is perfectly valid until it is set aside. (Vol 2) 1915 Mad 150 (154) (DB).

[12] Joint executors advancing money on mortgage —On suit by one payment to the other pleaded : *Held* that though money formed part of the estate of the deceased it did not vest in the executors as such but vested in them by virtue of the mortgage bonds and therefore the endorsement by one of the executors did not amount to a discharge. (Vol 3) 1916 Cal 568 (568, 569) (D B).

Section 312—Note 1

[1] Chapter VI of Part IX of the Act where S. 312 occurs may apply to Muhammadans in so far as they are not expressly exempted from the application of these provisions. (Vol 33) 1946 Lah 200 (214) : I L R (1945) Lah 554 (DB). (Whether section governs the matter of mutawalli is doubted.)

[2] Where a power is vested in executors (though it may not be one reposed in them by the law) if on the true construction of the will it appears that the power was coupled with executorial office, it will survive to the holders of the office for the time being, as though it were a power attached to the office. ('97) 24 Cal 589 (605, 606).

Section 316—Note 1

[1] Duty of the executor is to administer the estate of the deceased only so far and so long as to enable him to carry out the terms of the will. His authority to manage ceases after the estate becomes the property of the residuary legatee. (Vol 5) 1918 Cal 41 (43) (DB). (('04) 31 Cal 89 (DB), *Foll.*)

[2] Expenses on obsequies of testator — No direction in will—Expenses usually spent at the funerals of persons of some rank and fortune as the deceased may be allowed as proper. (1829) 1 Knapp 245 (247), *Mullick* v. *Mullick*.

SECTION 317—SYNOPSIS

1. Scope.
2. 'Inventory'—Essentials of.
3. "Assets".
4. Period of account.
5. Duty to render accounts—When discharged.

a full and true estimate of all the property in possession, and all the credits, and also all the debts owing by any person to which the executor or administrator is entitled in that character; and shall in like manner, within one year from the grant or within such further time as the said Court may appoint, exhibit an account of the estate, showing the assets which have come to his hands and the manner in which they have been applied or disposed of.

(2) The High Court may prescribe the form in which an inventory or account under this section is to be exhibited.

(3) If an executor or administrator, on being required by the Court to exhibit an inventory or account under this section, intentionally omits to comply with the requisition, he shall be deemed to have committed an offence under section 176 of the Indian Penal Code.

(4) The exhibition of an intentionally false inventory or account under this section shall be deemed to be an offence under section 193 of that Code.

[1865 — S. 277; Probate and Administration Act, 1881 — S. 98; *ibid*, 1889 — Ss. 7, 15.]

Section 317 *(contd.)*

6. Powers of Court.

7. Co-executors.

8. Sub-sections (3) and (4).

1. Scope.—[1] The section is clear and imposes on the grantee of the probate the duty of furnishing the inventory to the Court which issued the probate. (Vol 3) 1916 Mad 908 (909) (D B).

[2] The object of the accounts and inventories being exhibited seems to be that the accounts and inventories should be available for inspection by the parties interested in the administration of the estate. (Vol 17) 1930 Oudh 424 (426).

[3] Where a will gives executors liberty to have their work done through agents and servants it does not relieve them of their duties and liability or empower them to delegate to others the fiduciary character which belonged to them as executors; the executors cannot say that they never kept accounts and that they never called for the same regularly from the gumasthas. (Vol 21) 1934 Cal 296 (298) (DB).

[4] The fact that this section gives the administrator certain period for filing inventory and accounts is no bar to a person claiming an interest in the estate to take legal measures to enforce his claim if denied. (Vol 5) 1918 Upp Bur 40 (41) : 3 Upp Bur Rul 23.

[5] The protection afforded to parties interested in the will is that if the inventory and the accounts are intentionally false in any particular, the executor or administrator makes himself liable to punishment under the Indian Penal Code. The other remedy open to the interested parties would be to file an action against the executor or administrator, questioning the correctness of the accounts. (Vol 14) 1927 Bom 438 (439).

[6] Though under a will the executors are not liable to render accounts, still accounts of the estate must be exhibited to the Probate Court though the Court is not in such a case concerned with accounts of management of the estate. (Vol 5) 1918 Cal 107 (107) (DB).

[7] Accounts rendered by an executor to the probate Court are presumably rendered by him as executor only, and does not exonerate him from the liability to render accounts showing how he has dealt with the property of co-sharers of which he is in possession as trustee. (Vol 6) 1919 Cal 113 (114) (DB).

2. 'Inventory'—Essentials of.—[1] It is essential for a document to be an inventory to contain a full and true estimate of all the property in possession. A document which is merely a list of immovable property without a single figure or any estimate does not amount to an inventory. ('14) 41 Cal 556 (566, 567) : 40 Ind App 236 (PC).

3. "Assets".—[1] "Assets" usually mean and include property of deceased person chargeable with and applicable to the payment of his debts and legacies. ('04) 31 Cal 572 (583) (DB).

[2] Acquisition of property for the estate by executor by purchase out of its assets form part of the estate. ('09) 36 Cal 28 (40).

4. Period of account. — [1] Section 98 (Probate and Administration Act) requires one initial inventory and one final account and not yearly accounts. (Vol 3) 1916 Sind 11 (11, 12) : 9 Sind L R 134 (DB) ✠ (Vol 8) 1921 Cal 527 (529) : 48 Cal 1051 (DB). (What the section contemplates is the submission of one inventory and one account.) ✠ (Vol 5) 1918 Cal 109 (109) (D B). (Order directing executor to furnish accounts annually is not in accordance with section.)

[2] If executor or administrator is not able to exhibit such account within one year from grant, he may obtain extension of time from the Court. But the fact that time has been extended does not enlarge the scope of the accounts. (Vol 8) 1921 Cal 527 (529) : 48 Cal 1051 (DB).

5. Duty to render accounts—When discharged. —[1] An administrator must be held to have discharged his duty of rendering account so long as the accounts submitted by him are complete and the account is honest, contains no omissions, false or fraudulent entries. ('11) 15 Cal W N 832 (834)

6. Powers of Court. — [1] Where the executor has neither filed the accounts in time nor asked for extension of time the Probate Court is entitled to call for the accounts up to date on which it is submitted giving the Court an idea of the condition of the testator's estate in his hands up to the date of his filing the account. ('39) 43 Cal W N 754 (756)✠(Vol 3) 1916 Low Bur 10 (11) : 8 Low Bur Rul 422 (DB). (Section imposes the duty of rendering account on the executors —It is discretionary and not obligatory on part of Court to call for it.)

[2] Section does not require the Court to enquire into the correctness of the account or to call for vouchers. Sole duty of the Court is to satisfy itself that the accounts filed *prima facie* satisfy the requirements of the section. (Vol 3) 1916 Sind 11 (12) : 9 Sind L R 134 (DB).

[3] The proceedings are summary. The Court should not hold any extensive or minute enquiry as regards the correctness or otherwise of the accounts and inventories. (Vol 17) 1930 Oudh 424 (426).

[4] The appointment of an auditor for the checking and examination of the accounts and for local inquiries about income and expenditure is beyond the scope of the authority of the Court under S. 317, Succession Act. The Court has, however, the right to see that the accounts and inventories filed *prima facie* comply with the requirements of the section. (Vol 17) 1930 Oudh 424 (425, 426) ✠ ('04) 31 Cal 628 (640) (DB). (Court cannot order judicial enquiry at executor's costs or appoint commissioner under Civil P. C. to audit the accounts.

Inventory to include property in any part of British India in certain cases.

318. In all cases where a grant has been made of probate or letters of administration intended to have effect throughout [a][the Provinces of India], the executor or administrator shall include in the inventory of the effects of the deceased all his moveable and immoveable property situate in British India, and the value of such property situate in each Province shall be separately stated in such inventory, and the probate or letters of administration shall be chargeable with a fee corresponding to the entire amount or value of the property affected thereby wheresoever situate within British India.

[1865 — S. 277A; Probate and Administration Act, 1881 — S. 99 ; *ibid*, 1889—S. 16; *ibid*, 1903—S. 2 (7).]

[a] *Substituted* for "the whole of British India" by the Indian Independence (Adaptation of Central Acts and Ordinances) Order, 1948 [23-3-1948.]

As to property of, and debts owing to, deceased.

319. The executor or administrator shall collect, with reasonable diligence, the property of the deceased and the debts that were due to him at the time of his death.

[1865 — S. 278; Probate and Administration Act, 1881 — S. 100.]

Section 317 — Note 6 *(contd.)*

[5] The Court has, under this section, liberty to look into the accounts rendered by the executor but has no power to call for revised accounts when they have been already exhibited and accepted as *prima facie* true. In case they appear materially untrue the Court has to take the action under sub-s. (4). ('04) 31 Cal 628 (638) (DB)✠('11) 15 Cal W N 832 (834).

[6] The inventory and accounts filed should be regarded as final so far as the proceedings on the testamentary side are concerned. (Vol 14) 1927 Bom 438 (439). (Practice of Bombay High Court.)

[7] The Court which is seized of the proceeding under Ss. 302 and 303, Succession Act, in relation to administration has every right to take cognizance of and scrutinize the accounts, filed under S. 317, *suo motu* and particularly so where it has been moved by an application under Ss. 301 and 302 in which it was essentially necessary for it to examine the accounts in order to see whether the executor has so misconducted himself as to make it necessary for him to be removed. (Vol 26) 1939 Lah 463 (466) (DB). (Executor realizing large sum and paying into his own banking account — No proper accounts kept — Inventory of property not filed—Explanations given found false : *Held*, that the executor was still executor of estate—Burden of showing that he had done everything was on him.)

[8] The section contemplates orders merely directing the exhibiting of accounts in Court. Orders purporting to fix the capital of the trusts and giving directions for their administration are entirely outside the scope of this section. (Vol 5) 1918 Sind 37 (38) : 12 Sind L R 27 (DB).

7. Co-executors.—[1] An executor may at any time apply for probate and this interest is sufficient to entitle him to call upon his co-executors who have obtained probate and are managing the estate to exhibit an inventory and account. ('03) 27 Bom 281 (284).

8. Sub-sections (3) and (4). — [1] Court ought not to sanction a prosecution under this section when the party at whose instance the accounts are called for does not think it worth his while to examine them. ('98) 2 Cal W N 597 (600) (DB).

[2] Prosecution of administrator under S. 406, Penal Code, cannot be made without sanction of High Court —Probate Court passing accounts filed by administrator does not absolve him from liability for sums misappropriated. (Vol 8) 1921 Cal 431 (431, 432) :22 Cri L Jour 295 (DB).

[3] Executor not having filed accounts during executorship ordered to file them after probate was revoked —Failure to file accounts in given time — Sanction to prosecute executor given—Subsequent filing of account — Sanction made dependent on examination of them and afterwards restored : *Held* the order making sanction dependent on examination of accounts was wrong and that sanction should not have been given without enquiring whether the omission to file was intentional or whether they were intentionaly false. ('98) 2 Cal W N 597 (600) (DB).

Section 319 — Note 1

[1] Under this section it is the duty of the executors to collect the estate of the deceased with all reasonable speed even if the probate is not issued to them early. ('07) 31 Bom 418 (428)✠(1857) 6 H L C 217 (234) : 10 E R 1278, *Stubbs Wightwick* v. *Lucy Lord*.

[2] An executor may appoint a proper agent for looking after the testator's business. But in the selection and the supervision of the agent it is incumbent on the executor to act with the same degree of care as a man of ordinary prudence would in his own affairs. ('05) 29 Bom 170 (182) (DB). (Executor held liable for loss occasioned by want of due diligence on his part in supervising agent's work.)

[3] The purpose of Ss. 319 to 323 is not the regulation of the rights of creditors against the estate of the testator but the regulation of claims of priorities *inter se* among various kinds of creditors. The provisions assume that a certain fund is available in the hands of the executor, and then proceed to lay down in what order of priority that fund ought to be disbursed. (Vol 24) 1937 Mad 484 (486).

[4] The estate vests in the legatee for enjoyment but it vests in the executor for administration, and enjoyment is postponed to administration; and therefore an executor can sue for recovery of debt due to the family even after the death of the sole legatee. (Vol 8) 1921 Pat 313 (314) (DB).

[5] *A* claiming under a will of deceased and *B* claiming as his adopted son—*A* and *B* compromising their claims—*A* obtaining letters of administration is entitled to collect debts of testator—Plea of discharge by payment to *B* set up by debtor not valid. (Vol 7) 1920 Nag 32 (33) :16 Nag L R 212.

[6] Whole of self-acquired property bequeathed in favour of widow constituting her residuary legatee — Widow also the executor : *Held* that in the absence of any restrictions imposed upon her by the will she was entitled to recover the debts due to her husband. (Vol 20) 1933 Lah 740 (740) (DB).

[7] Executor *de son tort* is not entitled to recover debts due to estate of which he has wrongfully taken possession. (Vol 25) 1938 Nag 298 (299) : ILR (1939) Nag 526.

[8] Collection of assets does not necessarily mean realisation by sale or by actual receipt or possession yet it implies the doing of some act in connection with the assets whereby the administrator incurred trouble, expenses or responsibility. ('98) 25 Cal 65 (73) ✠ (1863) 1 Mad H C R 171 (175) (DB).

320. Funeral expenses to a reasonable amount, according to the degree and quality of the deceased, and death-bed charges, including fees for medical attendance, and board and lodging for one month previous to his death, shall be paid before all debts.

Expenses to be paid before all debts.

[1865 — S. 279 ; Probate and Administration Act, 1881 — S. 101.]

321. The expenses of obtaining probate or letters of administration, including the costs incurred for or in respect of any judicial proceedings that may be necessary for administering the estate, shall be paid next after the funeral expenses and death-bed charges.

Expenses to be paid next after such expenses.

[1865 — S. 280; Probate and Administration Act, 1881—S. 102.]

Section 319 — Note 1 *(contd.)*

[9] When a debtor accepts to be an executor he must be presumed, in equity, to have at once paid his debt and to hold the amount, whether in fact paid or not, as assets. ('08) 10 Bom L R 346 (349) ✠ ('04) 31 Cal 519 (539) (FB).

[10] Where cause of action has accrued after death of testator but before administration is completed beneficiary will be barred if executor fails to sue within period prescribed by law. (Vol 11) 1924 Pat 721 (732, 735) : 3 Pat 880 (DB).

Section 320 — Note 1

[1] Where under the will of a Muhammadan, executors have been appointed, the debts and funeral expenses etc. have first to be paid before the net assets to which heirs are entitled can be ascertained. (Vol 9) 1922 Bom 392 (395) : 47 Bom 231 (DB).

Section 321 — Note 1

[1] The purpose of Ss. 319 and 323 is not the regulation of rights of creditors against the estate but the claims of priorities *inter se* among various kinds of creditors. The provisions assume the availability of certain funds with the executor and proceed to lay down in what order of priority it ought to be disbursed. S. 321 does not declare a charge on the estate as between the lender and those interested in the estate. (Vol 24) 1937 Mad 484 (486, 487).

[2] Creditor lending money to executor to obtain probate is not entitled to a charge on the estate but is only entitled to the indemnity which the executor enjoys. (Vol 26) 1939 Mad 817 (818) : I L R (1940) Mad 45 (DB).

[3] It does not follow that a party is entitled to his costs out of the estate because there is *justa causa litigandi*. The costs are in the discretion of the Court and may be directed to be paid out of the estate of the deceased in a suitable case. ('09) 9 Cal L Jour 383 (391, 392) (DB).

[4] The costs may be properly paid out of the estate, if the course of litigation takes its origin in the faults of the testator or of those interested in the residue ; or if there is sufficient and probable ground to question either the execution of the will or the capacity of the testator or to put forward a charge of undue influence or fraud, the losing party may properly be relieved of the costs of his successful opponent. In cases where neither the testator by his own conduct nor the executors or persons interested under the will by their conduct have brought about the litigation as to its validity, but the opponents, after due enquiry into the facts, believe in the existence of a state of things, which if it did exist, would justify the litigation and the opposition is unsuccessful each party must pay his own costs. ('09) 9 Cal L Jour 383 (392) (DB) ✠ (Vol 20) 1933 Cal 482 (484, 485) (DB). (Revocation proceedings started by omission of citation to persons interested in the estate—Case containing elements of doubt as to the validity of the will : *Held* that these circumstances warranted the order for payment of costs out of the estate.)

[5] A shebait has the right to be reimbursed all sums properly expended by him in the preservation of the trust estate, as for instance, moneys paid in respect of Government revenue and the like. Similarly he is entitled to all the moneys properly spent by him in defending his position as shebait against an unsuccessful challenge of it by another. He is also entitled to be reimbursed all moneys properly spent by him in performing the obligations imposed on him by the testator's will. The right of indemnity is incident to the position of a trustee and the liability in respect of it is a first charge upon the estate. ('10) 37 Cal 229 (234) : 37 Ind App 27 (PC).

[6] Where the defence by the trustee was for the benefit of the estate the fact that he had also to incidentally defend his character cannot be a reason for making him bear his own costs. The principle that a trustee while he acts in due discharge of his duty is to be indemnified against all loss ought to be enforced with strictness. (1877-78) 7 Ch D 504 (509, 510), *Walters* v. *Woodbridge*.

[7] A direction in a will to pay testamentary expenses and debts, includes the costs of an administration suit. (1875) 20 Eq 471 (473) *Harloe* v. *Harloe*.

[8] A creditor's action against a deceased person's estate is an administration suit. (1905) 29 Bom 96 (101) (DB).

[9] A suit to administer the estate on the ground that the executors have been guilty of maladministration is not barred by any of the provisions of the Code of Civil Procedure. Only such questions should not be gone into in execution proceedings so as to fix liability upon the executor. ('08) 35 Cal 1100 (1103) (DB).

[10] *S* sued by *H* on a mortgage dying pending suit—*P*, son of *S* obtaining letters of administration resisting *H*'s suit—Suit decreed by first Court— Pending appeal *H* buying the property under the decree of trial Court—Decree reversed in appeal—Compromise between *H* and *P* under which *H* was allowed to retain the property on payment of Rs. 240 as *P*'s costs in the suit and expenses incurred in taking out letters of administration — Suit by another creditor attacking the compromise on the ground of fraud : *Held* that *P* was entitled to deduct expenses of obtaining letters of administration and also the costs incurred in respect of judicial proceedings that might have been necessary for administering the estate. ('93) 17 Bom 637 (644) (DB).

[11] The words "executorship expenses" in a will means the same thing as "testamentary expenses." They are expenses incident to the proper performance of the duty of an executor viz., that of ascertaining the debts and liabilities due to the estate, payments of such debts and liabilities and proper distribution of estate among persons entitled. They not only include costs of all the parties in an administration suit whether instituted by the executor or by a beneficiary for directions of the Court where the executor is unable to decide questions relating to the administration, but also fee paid to solicitor or counsel for advice given outside the suit as to the distribution of the assets. They also include the funeral expenses and the ware-housing charges of the

Wages for certain services to be next paid, and then other debts.

322. Wages due for services rendered to the deceased within three months next preceding his death by any labourer, artizan or domestic servant shall next be paid, and then the other debts of the deceased according to their respective priorities (if any).

[1865 — S. 281; Probate and Administration Act, 1881 — S. 103.]

Save as aforesaid, all debts to be paid equally and rateably.

323. Save as aforesaid, no creditor shall have a right of priority over another; but the executor or administrator shall pay all such debts as he knows of, including his own, equally and rateably as far as the assets of the deceased will extend.

[1865 — S. 282; Probate and Administration Act, 1881 — S. 104.]

Section 321—Note 1 *(contd.)*

specific legacies. (1878-79) 10 Ch D 468 (470, 471, 472), *Sharp* v. *Lush*.

[12] The section does not justify the inference that if one beneficiary sets up a false will and another beneficiary successfully resists his application the latter is as a matter of right entitled to be paid his costs out of the estate. ('09) 9 Cal L Jour 383 (391) (DB).

[13] "Testamentary expenses" includes expenses incurred in cases of intestacy. The existence of a testament is not essential for the proper use of the word and it may equally apply to the case where there is no testament and the estate is being administered according to the law of the land. (1900) 2 Ch 182 (191, 192, 195), *Yeo* v. *Clemow*.

[14] The extent or value of the property and the rights of the testator therein are irrelevant in probate proceedings which are entirely confined to the question whether the petitioner is entitled to the probate of the document executed by the testator irrespective entirely of the property and therefore pleader's fee assessed ad valorem cannot be included in the costs ordered to be paid to the opposite party. (Vol 1) 1914 Cal 523 (523, 524): 41 Cal 637 (DB). (*Held* that a fee of Rs. 80 was to be allowed under R. 42 A, Ch. 6 of Calcutta High Court Rules and Orders and R. 36 (a) does not apply.)

[But see ('07) 6 Cal L Jour 453 (456) (DB). (In a contested application for probate or letters of administration the Judge has discretion as to costs on account of pleader's fee and may allow a fee according to the valuation of the estate or according to such a sum, not exceeding the valuation, as may be reasonable or according to the importance of the subject of the dispute. Rule 36 (a) of the General Rules and Circular Orders (Civil) applies to such a case)]

Section 322 — Note 1

[1] The Crown is not bound by S. 322. (Vol 27) 1940 Rang 36 (38): 1939 Rang L R 701 (DB).

Section 323 — Note 1

[1] The Crown is not bound by S. 323. (Vol 27) 1940 Rang 36 (37): 1939 Rang L R 701 (DB).

[2] The prohibition contained in the section against an executor preferring one creditor to another would apply even where no decree is passed in the administration suit but only an order for taking accounts is passed. ('09) 11 Bom L R 250 (254) (DB). (*B* and *H* executor and executrix of *D* borrowing money from *S* to pay off a debt due by *D* — *R* daughter of *D* filing suit for administration — Pending administration suit *S* suing *B* and *H* for recovery of her debt—Decree passed against estate and execution stayed till a certain date— *S* applying for execution of decree — *R*'s suit decreed with directions as to the fund out of which she was to be paid and referring to commission for taking of account —*S* dying pending her application and before decree in *R*'s suit leaving a will — Executor of *S* attaching property of the estate : *Held* that *S*'s executor was entitled to seek remedy only in the administration suit which was pending then.)

[3] The purpose of Ss. 319 to 323 is not the regulation of the rights of creditors against the estate of the deceased but the regulation of priorities *inter se* among various kinds of creditors. The provisions assume that a certain fund is available with the executor and then proceed to lay down in what order that fund ought to be disbursed. (Vol 24) 1937 Mad 484 (486, 487).

[4] In some respects, result under S. 323 is similar to that where trust is created, and representative is considered trustee for persons interested in estate and must account for any advantage made by him. (Vol 22) 1935 Bom 385 (388).

[5] Section 323 is so worded as to present the law primarily from former aspect— of creditor's rights, executor's duty being to render to them their rights. In so far as S. 323 places limit on powers of executor to pay one creditor in preference to another, and distinguishes executor's rights from rights of testator, it may be contrasted with S. 220 which generally entitles administrator to all rights belonging to intestate. (Vol 22) 1935 Bom 385 (389).

[6] The section deals with the creditor's rights as regards the general assets of their deceased debtor and apart from any question of lien, the object is to prevent any one creditor obtaining an advantage over another in respect of the payment of his debt and to provide for the payment of all claims proportionately out of the assets of the estate. ('98) 25 Cal 54 (61) ✻ (Vol 22) 1935 Bom 385 (389). (Executor cannot mortgage assets for making any payment in excess of the rateable and equal payment to creditors.)

[7] Clause in will that executrices are to be paid money out of property of deceased every month in lieu of services as long as administration continued : *Held* the payment was a gratuitous bequest and not a debt. (Vol 22) 1935 Bom 84 (90) (DB).

[8] Specialty debts have no priority over others. ('71) 8 Bom H C R 20 (25).

[9] An English executor or administrator is not bound to plead the statute of limitations against the demand of one claiming to be a creditor of the estate of the deceased. The effect of the Indian Act of Limitation is not to destroy the debt or demand but only to deny absolutely the remedy by suit and therefore an administrator can pay a barred debt in India also. ('78) 1 Mad 267 (275, 276) (DB). (Administrator-General who derives his authority from the statute and the letters of administration granted to him can pay a barred debt.)

[10] Section 323 deals only with such debts as the executor knows of. (Vol 22) 1935 Bom 385 (389).

[11] The knowledge intended under the section must be deemed to be as actual as distinguished from a constructive or imputable knowledge. Actual knowledge of the existence of a debt may be inferred from undue precipitancy in disposing of the assets or fraud or anything unfair in the conduct of the executor or administrator. ('71) 8 Bom H C R 20 (26, 27).

[12] The section merely lays down a rule of procedure that must be followed by an executor or administrator and is not applicable where a creditor who has

Application of moveable property to payment of debts where domicile not in British India.

324. *(1)* If the domicile of the deceased was not in British India, the application of his moveable property to the payment of his debts is to be regulated by the law of British India.

(2) No creditor who has received payment of a part of his debt by virtue of sub-section *(1)* shall be entitled to share in the proceeds of the immoveable estate of the deceased unless he brings such payment into account for the benefit of the other creditors.

(3) This section shall not apply where the deceased was a Hindu, Muhammadan, Buddhist, Sikh or Jaina or an exempted person.

Illustration.

A dies, having his domicile in a country where instruments under seal have priority over instruments not under seal leaving moveable property to the value of 5,000 rupees, and immoveable property to the value of 10,000 rupees, debts on instruments under seal to the amount of 10,000 rupees, and debts on instruments not under seal to the same amount. The creditors holding instruments under seal receive half of their debts out of the proceeds of the moveable estate. The proceeds of the immoveable estate are to be applied in payment of the debts on instruments not under seal until one-half of such debts has been discharged. This will leave 5,000 rupees which are to be distributed rateably amongst all the creditors without distinction, in proportion to the amount which may remain due to them.

[1865 — Ss. 283, 284; Probate and Administration Act, 1881 — S. 9.]

Debts to be paid before legacies.

325. Debts of every description must be paid before any legacy.

[1865 — S. 285; Probate and Administration Act, 1881 — S. 105.]

Section 323 — Note 1 *(contd.)*

obtained a decree against the estate of the deceased applies for execution of such decree : ('12) 6 Low Bur Rul 158 (159, 160) (D B) ✠ ('99) 22 Mad 194 (195, 196) (DB). (This section does not affect the right of a decree-holder under the Civil P. C., to have his debt paid out of the assets of the deceased in the hands of the legal representative which have not yet been duly disposed of.) ✠ (Vol 23) 1936 Bom 423 (434)✠('74) 12 Beng L R 287 (288) (DB). (He can also have it satisfied out of the property of the executor where he did not duly apply the property of the deceased.)

[But see (Vol 22) 1935 Bom 385 (393). (Creditor getting decree on the pledge by executrix in lieu of amount due — Decree does not bind other creditors and the creditor gets no priority.)

[13] Joint decree against *P* and *B* — Administrator-General obtaining letters of administration of the estate of *B* on his death subsequent to the decree : *Held* that there was nothing in the Administrator Generals Act or Civil P. C., to change the Administrator-General's position or to give him a better position than any ordinary suitor and therefore that execution can proceed against the estate of *B*. ('84) 10 Cal 929 (930).

[14] Decree obtained against administrator in respect of a debt owing from the estate of deceased—Execution of decree and property purchased by the decree-holders under sale deed executed by the administrator with leave of Court—Contention in a suit to set aside the decree and sale by the succeeding administrator that decree-holder could execute the decree only under this section by asking for rateable distribution in due course of administration : *Held* that the decree obtained and execution had was binding upon the successor whatever might have been the right way of executing such decrees. ('05) 29 Bom 96 (100) (DB).

[15] The rateable payment referred to in the section is rateable payment out of the assets. There is nothing in the Act to show that it shall be made out of the nett income of the estate or any other specific part of the assets. ('98) 25 Cal 54 (61).

[16] Income accruing to an executor under the will of testator is liable for income-tax and no personal exemption exists in that Act of which he can take advantage. (Vol 2) 1915 Cal 621 (621) : 42 Cal 151 (DB).

Section 324 — Note 1

[1] The *lex loci* of India like the *lex loci* of all other countries is applicable to the immovable property of foreigners sojourning but not domiciled here but not to their moveable property. This general principle is not disturbed by S. 44 (S. 21 of the Act of 1925) which resolves in a particular way the dispute as to the application of the principle. The Succession Act, where either the husband or the wife has an Indian domicile, submits both their moveables and immoveables to the territorial law of India. S. 283 (S. 324 of the Act of 1925) merely repeats and applies the above rule of law to a particular case. ('76) 1 Cal 412 (420, 421).

[2] Every administrator, principal or ancillary, must apply the assets reduced into possession under his grant in paying all the debts of the deceased whether contracted in the jurisdiction from which the grant issued or out of it and whether owing to creditors domiciled or resident in that jurisdiction or out of it, in that order of priority which according to the nature of the debts or assets is prescribed by the law of the jurisdiction from which the grant issued. (1884) 28 Ch D 175 (177), *Kannreuther* v. *Geiselbrecht*.

[3] In a case in which the assets in a different country were distributed so as to give creditors of that country as such a priority the English Courts while distributing the English assets would see that no creditor of that country comes in and receives payment until the English creditors have been paid a proportionate amount so as to equalise payments. (1884) 28 Ch D 175 (177), *Kannreuther* v. *Geiselbrecht*.

Section 325 — Note 1

[1] The section casts upon the executor the obligation to discharge all the debts of the testator of which he has notice before paying or delivering the legacies bequeathed under a will. (Vol 33) 1946 Mad 209 (213) : I L R (1946) Mad 707 (D B) ✠ (Vol 30) 1943 Mad 276 (278) : I L R (1943) Mad 477 (D B). (Property bequeathed subject to mortgage — Executor to pay off mortgage and deliver property to legatee.)

[2] It is the duty of executor first to ascertain what the position is and unless it is sufficiently clear to him that the estate is solvent not to pay the legacies before the debts have been discharged. If there has been an administration decree the same principle applies. The debts will be ascertained and until the position has been clarified by an account being taken or it having reached such a stage when it becomes apparent that these payments can be made without risk to the creditors, no payment should be made. (Vol 21) 1934 Cal 609 (610) (D B).

Executor or administrator not bound to pay legacies without indemnity.

326. If the estate of the deceased is subject to any contingent liabilities, an executor or administrator is not bound to pay any legacy without a sufficient indemnity to meet the liabilities whenever they may become due.

[1865 — S. 286; Probate and Administration Act, 1881 — S. 106.]

Abatement of general legacies.

327. If the assets, after payment of debts, necessary expenses and specific legacies, are not sufficient to pay all the general legacies in full, the latter shall abate or be diminished in equal proportions, and, in the absence of any direction to the contrary in the will, the executor has no right to pay one legatee in preference to another, or to retain any money on account of a legacy to himself or to any person for whom he is a trustee.

[1865 — S. 287; Probate and Administration Act, 1881 — S. 107.]

Non-abatement of specific legacy when assets sufficient to pay debts.

328. Where there is a specific legacy, and the assets are sufficient for the payment of debts and necessary expenses, the thing specified must be delivered to the legatee without any abatement.

[1865 — S. 288; Probate and Administration Act, 1881 — S. 108.]

Section 325 — Note 1 *(contd.)*

[3] The debts of the deceased take priority over all the legacies. ('40) 42 Pun L R 379 (382) (D B).

[4] Under Muhammadan law payment of debts of deceased takes precedence over legacies. The decreeholder can proceed against the property in the hands of legatees irrespective of the fact whether the other assets of the deceased are or are not sufficient for the payment of the decretal amount. (Vol 27) 1940 Lah 348 (349) (D B).

[5] Under this section it is not the duty of the executor in every case, whether the estate is solvent or insolvent, to pay each creditor before he pays any legatee. The section lays down only the priority. It does not stand in the way of an admittedly solvent estate, of the executor paying a legatee before he has discharged the debts of the deceased. (Vol 21) 1934 Cal 609 (609) (D B).

[6] The section merely provides that the debts must be paid before any legacy is paid. It does not say that where the legacy is paid before debts and the legatee deals with the property by way of mortgage or otherwise the transaction must be taken to be invalid. Therefore where a legatee takes the legacy before debts are paid he takes it subject to the debts and a mortgage created by the legatee cannot be said to be invalid. ('05) 2 Cal L Jour 138 (141, 142) (D B).

[7] When the estate of a deceased person is under administration by the Court or out of Court, a purchaser from a residuary legatee or heir buys subject to any disposition which has been or may be made of the deceased's estate in due course of administration. In fact the right of residuary legatee or heir is only to share in the ultimate residue which may remain for final distribution after all the liabilities of the estate including the expenses of the administration have been satisfied. ('05) 32 Cal 198 (218) : 32 Ind App 1 (P C).

[8] The "legal right" of an unsatisfied creditor to proceed against an asset of the testator in the hands of the executor cannot be resisted by the latter on the plea that he holds it as a legatee whose title has been perfected by his own breach of duty in not completing the administration of the estate and discharging the creditors' debt and the creditor can levy execution against the asset in the hands of the executor under the decree obtained by him against the executor as legal representative of the testator. (Vol 33) 1946 Mad 209 (213) : I L R (1946) Mad 707 (D B).

[9] The only persons who are protected against the priority of claims given to the creditors are *bona fide* purchasers for value without notice. ('40) 42 Pun L R 379 (382) (D B) & (Vol 23) 1936 Mad 256 (259) (D B). (Mortgagee from executor with knowlege that testator's debts are not paid — Not protected even though *bona fide* transferee.)

[10] Property forming the subject of legacy subject to mortgage—Executor leasing property before redemption — Lease is not a claim adverse to the legatee. (Vol 30) 1943 Mad 276 (278) : I L R (1943) Mad 477 (D B).

[11] Executor can admit and dispose of claims against testator's estate—Executor can acknowledge debt within meaning of Limitation Act, S. 19. (Vol 17) 1930 Mad 218 (219) : 53 Mad 480 (D B).

[12] Executor can promise to pay time-barred debts of testator. (Vol 15) 1928 Bom 539 (542) (D B).

Section 326 — Note 1

[1] *V* dying leaving *S* his concubine and *R* a minor son — *V's* will providing for a payment of Rs. 5000 to *S*—Suit by *S* for payment of her legacy to her — Another suit by *V's* brother for half share on the ground that the property was joint family property that *V* had no power to dispose of by will : *Held* that *S* could get payment on her executing a bond undertaking to indemnify the executors for any loss which may arise in consequence of the payment of the legacy being declared void in the suit of *V's* brother. ('92) 2 Mad L Jour 180 (185) (D B).

[2] Testator, a share-holder of a company—Executor paying off legacy without providing for liability attaching to the estate in respect of the shares : *Held* that executor was liable to pay to the official liquidators. (1870) 10 E Q 477 (478) *Taylar* v. *Taylar*.

Section 327 — Note 1

[1] If estate of testator proves insufficient to pay all legacies in will in full, share of each will abate proportionately. ('35) 1935 Mad W N 46 (47) (D B).

Section 328 — Note 1

[1] Where the will indicated that another legacy was to be paid out of the funds included in a specific legacy, that might create a charge thereon. But it is doubtful whether the mere absence of a general fund out of which a general legacy can be paid would be sufficient to infer that legacy is to be paid out of the funds earmarked as a specified legacy to others. (Vol 27) 1940 Mad 785 (788) (D B).

[2] Testator bequeathing specific legacy of the net income from house to wife — Testator subsequently selling the house and by a codicil directing a part of sale proceeds to be held in trust for the wife and interest thereon to be paid to her : *Held* the testator preferred her to all other legatees and that his intention was to benefit her. ('35) 1935 Mad W N 46 (48) (D B).

329. Where there is a demonstrative legacy, and the assets are sufficient for the payment of debts and necessary expenses, the legatee has a preferential claim for payment of his legacy out of the fund from which the legacy is directed to be paid until such fund is exhausted and if, after the fund is exhausted, part of the legacy still remains unpaid, he is entitled to rank for the remainder against the general assets as for a legacy of the amount of such unpaid remainder.

Right under demonstrative legacy when assets sufficient to pay debts and necessary expenses.

[1865 — S. 289; Probate and Administration Act, 1881 — S. 109.]

330. If the assets are not sufficient to answer the debts and the specific legacies, an abatement shall be made from the latter rateably in proportion to their respective amounts.

Rateable abatement of specific legacies.

Illustration.

A has bequeathed to *B* a diamond ring valued at 500 rupees, and to *C* a horse, valued at 1,000 rupees. It is found necessary to sell all the effects of the testator; and his assets, after payment of debts, are only 1,000 rupees. Of this sum rupees 333-5-4 are to be paid to *B*, and rupees 666-10-8 to *C*.

[1865 — S. 290; Probate and Administration Act, 1881 — S. 110.]

331. For the purpose of abatement, a legacy for life, a sum appropriated by the will to produce an annuity, and the value of an annuity when no sum has been appropriated to produce it, shall be treated as general legacies.

Legacies treated as general for purpose of abatement.

[1865 — S. 291; Probate and Administration Act, 1881 — S. 111.]

CHAPTER VIII.

OF ASSENT TO A LEGACY BY EXECUTOR OR ADMINISTRATOR.

332. The assent of the executor or administrator is necessary to complete a legatee's title to his legacy.

Assent necessary to complete legatee's title.

Illustrations.

(i) A by his will bequeaths to *B* his Government paper which is in deposit with the Imperial Bank of India. The Bank has no authority to deliver the securities, nor *B* a right to take possession of them, without the assent of the executor.

Section 329 — Note 1

[1] Where the particular sources of income out of which the testator directed that his widow's monthly allowances should be paid, be not sufficient, the rest of the movable property or rather the income derived from it as well as the rents derived from the immovable property must contribute. ('85) 9 Bom 491 (510).

[2] Testatrix giving her servants small annuities — Will containing the following clauses—"Rupees 981 of the Queen's coin out of my allowance from my wasika and notes etc., and shall be paid monthly from Government treasury to my relations, dependents and servants as detailed below. . .and the remainder of my allowance from wasika etc., shall be divided among my grandsons and grand-daughters according to their lawful shares": *Held* that these annuities or stipends must be regarded as a demonstrative legacy and would be payable out of the testatrix's general estate in the event of the failure of the particular fund pointed out for their payment. ('92) 19 Cal 444 (451, 452) : 19 Ind App 83 (P C).

[3] The rule that the legatee entitled to a demonstrative legacy is entitled to resort to general assets on failure of the source intended is subject to any direction to the contrary by the testator. ('06) 29 Mad 155 (159) (D B). (Testator directing that it "shall not be paid out of the principal" : *Held* that the legacy was to be paid out of the income and not out of any portion of the estate itself.)

Section 330 — Note 1

[1] Testator bequeathing rent of specific property to his wife and daughters — Bequest is specific and liable to abatement in proportion to fall of rent of property. (Vol 24) 1937 Bom 384 (385).

Section 331 — Note 1

[1] The section is an amplification of the definition and illustration of specific bequests contained in the Act. ('11) 13 Bom L R 319 (322, 323).

[2] A bequest of rent producing property on trust, the trustees to apply rents and profits for the benefit of a legatee cannot fall within the meaning of specific bequests, for the objects of the testator would not attain a fixed and named annual sum. The rents and profits would fluctuate from year to year and therefore would fall without the definition of specific bequests in the Act. ('11) 13 Bom L R 319 (322).

Section 332 — Note 1

[1] Essence of the matter is that, as protection to the executor, law ordains that every legatee, whether general or specific, and whether of chattels, real or personal, must obtain the executor's assent to the legacy before his title can be complete. (Vol 10) 1923 Cal 21 (23) : 50 Cal 171 (DB).

[2] The executor is not, however, entitled to withhold his assent arbitrarily and if he does so, the legatee can bring a suit to recover the property bequeathed to him by joining the executor with the transferees to whom the property has been transferred by the executor. (Vol 18) 1931 Nag 69 (70) ✠ ('13) 37 Bom 211 (214). (Law really did not mean to leave legatees completely at the mercy of perverse or capricious executors.)

[3] Executor has power to give assent to a legacy even before obtaining the probate of the will. (Vol 27) 1940 Pat 40 (44) : 18 Pat 828 (D B). ((Vol 19) 1932 P C 92 : 59 Ind App 112 : 55 Mad 443 (P C), *Rel. on*; (1900) 27 Cal 683 (D B), *held overruled.*)

[4] Even before such assent is given by an executor the legatee has an inchoate right to the legacy such as is transmissible to his own personal representatives in case of his death before it is paid or delivered. (Vol 10) 1923 Cal 21 (23) : 50 Cal 171 (D B) ✠(Vol 16) 1929 Sind 19 (22) (DB).

[5] Assent not given to legatee's title — Adminis-

(ii) *A* by his will has bequeathed to *C* his house in Calcutta in the tenancy of *B*. *C* is not entitled to receive the rents without the assent of the executor or administrator.

[1865—S. 292; Probate and Administration Act, 1881—S. 112.]

333. *(1)* The assent of the executor or administrator to a specific bequest shall be sufficient to divest his interest as executor or administrator therein, and to transfer the subject of the bequest of the legatee, unless the nature or the circumstances of the property require that it shall be transferred in a particular way.

Effect of executor's assent to specific legacy.

(2) This assent may be verbal, and it may be either express or implied from the conduct of the executor or administrator.

Illustrations.

(i) A horse is bequeathed. The executor requests the legatee to dispose of it, or a third party proposes to purchase the horse from the executor, and he directs him to apply to the legatee. Assent to the legacy is implied.

(ii) The interest of a fund is directed by the will to be applied for the maintenance of the legatee during his minority. The executor commences so to apply it. This is an assent to the whole of the bequest.

(iii) A bequest is made of a fund to *A* and after him to *B*. The executor pays the interest of the fund to *A*. This is an implied assent to the bequest to *B*.

(iv) Executors die after paying all the debts of the testator, but before satisfaction of specific legacies. Assent to the legacies may be presumed.

(v) A person to whom a specific article has been bequeathed takes possession of it and retains it without any objection on the part of the executor. His assent may be presumed.

[1865—S. 293; Probate and Administration Act, 1881—Ss. 113, 148.]

334. The assent of an executor or administrator to a legacy may be conditional, and if the condition is one which he has a right to enforce, and it is not performed, there is no assent.

Conditional assent.

Illustrations.

(i) *A* bequeaths to *B* his lands of Sultanpur, which at the date of the will, and at the death of *A*, were subject to a mortgage for 10,000 rupees. The executor assents to the bequest, on condition that *B* shall within a limited time pay the amount due on the mortgage at the testator's death. The amount is not paid. There is no assent.

(ii) The executor assents to a bequest on condition that the legatee shall pay him a sum of money. The payment is not made. The assent is nevertheless valid.

[1865—S. 294; Probate and Administration Act, 1881—Ss. 114, 148.]

335. *(1)* When the executor or administrator is a legatee, his assent to his own legacy is necessary to complete his title to it, in the same way as it is required when the bequest is to another person, and his assent may, in like manner, be expressed or implied.

Assent of executor to his own legacy.

(2) Assent shall be implied if in his manner of administering the property he does any act which is referable to his character of legatee and is not referable to his character of executor or administrator.

Illustration.

An executor takes the rent of a house or the interest of Government securities bequeathed to him and applies it to his own use. This is assent.

[1865—S. 295; Probate and Administration Act, 1881—Ss. 115, 148.]

Section 332—Note 1 *(contd.)*

trator and not legatee is entitled to sue. (Vol 28) 1941 Nag 181 (183) : I L R (1942) Nag 92 (D B).

[6] No Court has in a suit of civil nature any jurisdiction to decree a legacy simply, unless the executors have assented to that particular legacy or unless the whole matter of the estate is before them for administration. ('90) 17 Cal 387 (389) (D B). (Presidency Towns Small Cause Court has no jurisdiction to try the suit.)

[7] Where the executors have not consented to pay the legacy, a suit for its payment by the legatee must be treated as being in the nature of administration suit. ('92) 2 Mad L Jour 182 (186) (D B).

[8] Legatee entitled to debts under the will — Suit by legatee with permission of the executor on a promissory note — Suit is maintainable by the legatee though the legatee will not be entitled to realise the money until succession certificate is obtained. (Vol 20) 1933 Lah 805 (806) (D B).

Section 333 — Note 1

[1] This section relates to specific bequests, that is to say, to bequests of particular articles or kinds of property and not to general bequests. (Vol 28) 1941 Oudh 146 (148) : 16 Luck 213 (D B).

[2] In case of specific legacies, the legacy vests in the legatee immediately after the executor's assent and he can maintain an action at law in respect of it. (1909) 2 Ch 180 (185), *West* v. *Roberts*.

[3] An executor after having given his assent to a legacy is not competent to deal further with the property bequeathed. (Vol 6) 1919 Cal 996 (997) (D B).

[4] Where a specific legatee who is appointed executor dies six years after the order of probate and full administration of the estate, the assent of the executor to the specific bequests must be presumed. (Vol 20) 1933 Cal 482 (485) (D B).

Section 335 — Note 1

[1] Where the executor executes a mortgage in his individual capacity as a legatee with respect to the properties bequeathed to him and applies the money to his own use, and not to administer the estate of his testator, the executor assents to the legacy in his own favour on the date he gives the mortgage. (Vol 27) 1940 Pat 40 (44) : 18 Pat 828 (D B).

Effect of executor's assent.

336. The assent of the executor or administrator to a legacy gives effect to it from the death of the testator.

Illustrations.

(i) A legatee sells his legacy before it is assented to by the executor. The executor's subsequent assent operates for the benefit of the purchaser and completes his title to the legacy.

(ii) *A* bequeaths 1,000 rupees to *B* with interest from his death. The executor does not assent to his legacy until the expiration of a year from *A*'s death. *B* is entitled to interest from the death of *A*.

[1865—S. 296; Probate and Administration Act, 1881—Ss. 116, 148.]

Executor when to deliver legacies.

337. An executor or administrator is not bound to pay or deliver any legacy until the expiration of one year from the testator's death.

Illustration.

A by his will directs his legacies to be paid within six months after his death. The executor is not bound to pay them before the expiration of a year.

[1865—S. 297; Probate and Administration Act, 1881—Ss. 117, 148.]

CHAPTER IX.

OF THE PAYMENT AND APPORTIONMENT OF ANNUITIES.

Commencement of annuity when no time fixed by will.

338. Where an annuity is given by a will and no time is fixed for its commencement, it shall commence from the testator's death, and the first payment shall be made at the expiration of a year next after that event.

[1865—S. 298 ; Probate and Administration Act, 1881—S. 118.]

When annuity, to be paid quarterly or monthly, first falls due.

339. Where there is a direction that the annuity shall be paid quarterly or monthly, the first payment shall be due at the end of the first quarter or first month, as the case may be, after the testator's death ; and shall, if the executor or administrator thinks fit, be paid when due, but the executor or administrator shall not be bound to pay it till the end of the year.

[1865—S. 299 ; Probate and Administration Act, 1881—Ss. 119, 148.]

Dates of successive payments when first payment directed to be made within a given time or on day certain : death of annuitant before date of payment.

340. *(1)* Where there is a direction that the first payment of an annuity shall be made within one month or any other division of time from the death of the testator, or on a day certain, the successive payments are to be made on the anniversary of the earliest day on which the will authorises the first payment to be made.

(2) If the annuitant dies in the interval between the times of payment, an apportioned share of the annuity shall be paid to his representative.

[1865—S. 300 ; Probate and Administration Act, 1881—S. 120.]

CHAPTER X.

OF THE INVESTMENT OF FUNDS TO PROVIDE FOR LEGACIES.

Investment of sum bequeathed, where legacy, not specific, given for life.

341. Where a legacy, not being a specific legacy, is given for life, the sum bequeathed shall at the end of the year be invested in such securities as the High Court may by any general rule authorise or direct, and the proceeds thereof shall be paid to the legatee as the same shall accrue due.

[1865—S. 301 ; Probate and Administration Act, 1881—S. 121.]

Investment of general legacy to be paid at future time: disposal of intermediate interest.

342. *(1)* Where a general legacy is given to be paid at a future time, the executor or administrator shall invest a sum sufficient to meet it in securities of the kind mentioned in section 341.

Section 336 — Note 1

[4] Under a will made by the plaintiff's father, the plaintiff was entitled to all the movables and debts due to her father at the time of his death. She instituted a suit on a promissory note. An executor had been appointed under the will and he had taken out probate. The lower Court held that only the executor could sue : *Held*, that as the executor had given his permission to sue and this assent, under S. 336, referred back to the date of the death of the testator, the plaintiff could sue on the basis of the pro-note though she would not be entitled to realize the money until she obtained the succession certificate. (Vol 20) 1933 Lah 805 (806) (D B).

Section 337 — Note 1

[1] One year is given by the law to the executors to liquidate the estate. For one year from the death, no legacy residuary or otherwise can be claimed. ('05) 7 Bom L R 755 (758).

[2] The period is only for convenience and there is no doubt that the property vests at the death of the testator. (1827) 10 Ves 1 (13) : 32 E R 743, *Garthshore* v *Chalie*.

Section 341 — Note 1

[1] An executor is bound to make fund productive and in order to do this, he must invest it in some form of security. If he fails to do so, he will be liable for the consequent loss. (Vol 19) 1932 All 384 (385) : 54 All 605 (D B).

(2) The intermediate interest shall form part of the residue of the testator's estate.

[1865—S. 302 ; Probate and Administration Act, 1881—Ss. 122, 148.]

Procedure when no fund charged with, or appropriated to annuity.

343. Where an annuity is given and no fund is charged with its payment or appropriated by the will to answer it, a Government annuity of the specified amount shall be purchased, or, if no such annuity can be obtained, then a sum sufficient to produce the annuity shall be invested for that purpose in securities of the kind mentioned in section 341.

[1865—S. 303 ; Probate and Administration Act, 1881—S. 123.]

Transfer to residuary legatee of contingent bequest.

344. Where a bequest is contingent, the executor or administrator is not bound to invest the amount of the legacy, but may transfer the whole residue of the estate to the residuary legatee, if any, on his giving sufficient security for the payment of the legacy if it shall become due.

[1865—S. 304 ; Probate and Administration Act, 1881—Ss. 124, 148.]

Investment of residue bequeathed for life, without direction to invest in particular securities.

345. *(1)* Where the testator has bequeathed the residue of his estate to a person for life without any direction to invest it in any particular securities, so much thereof as is not at the time of the testator's decease invested in securities of the kind mentioned in section 341 shall be converted into money and invested in such securities.

(2) This section shall not apply if the deceased was a Hindu, Muhammadan, Buddhist, Sikh or Jaina or an exempted person.

[1865—S. 305.]

Investment of residue bequeathed for life, with direction to invest in specified securities.

346. Where the testator has bequeathed the residue of his estate to a person for life with a direction that it shall be invested in certain specified securities, so much of the estate as is not at the time of his death invested in securities of the specified kind shall be converted into money and invested in such securities.

[1865—S. 306 ; Probate and Administration Act, 1881—S. 125.]

Time and manner of conversion and investment.

347. Such conversion and investment as are contemplated by sections 345 and 346 shall be made at such times and in such manner as the executor or administrator thinks fit ; and, until such conversion and investment are completed, the person who would be for the time being entitled to the income of the fund when so invested shall receive interest at the rate of four per cent. per annum upon the market-value (to be computed as at the date of the testator's death) of such part of the fund as has not been so invested :

Provided that the rate of interest prior to completion of investment shall be six per cent. per annum when the testator was a Hindu, Muhammadan, Buddhist, Sikh or Jaina or an exempted person.

[1865—S. 307 ; Probate and Administration Act, 1881—Ss. 126, 148.]

Section 343 — Note 1

[1] A gift of an annuity must be regarded as a legacy of the definite sum which would have purchased the annuity and the legal personal representative of the annuitant is entitled to that sum. (1909) 1 Ch 276 (278), *In re Brunning* ; *Gammon* v. *Dale*✠(1907) 2 Ch 8 (12), *In re Robbins* ; *Robbins* v *Legge*.

Section 345 — Note 1

[1] This section is based on the rule laid down in (1802) 7 Ves 137 (148) : 32 E R 56, *Howe* v. *Earl of Dartmouth*.

[2] The above rule only means that the Court will assume that by the gift of personal estate to several persons in succession, the testator intended that the whole of his estate should be converted, that being the only means by which in the case of wasting property the several persons would be enabled to enjoy it in succession. (1909) 2 Ch 111 (117, 120), *In re Nicholson* ; *Eade* v. *Nicholson*. (There is no distinction between unauthorised securities of a wasting and those of permanent nature for applying this rule.)

[3] The rule does not apply to a case where the testator has shown an intention that the property should be enjoyed in specie. (1899) 2 Ch 336 (339), *In re Bland* ; *Muller* v. *Bland* ✠(1878) 8 Ch D 101 (112, 124), *Macdonald* v. *Irvin*. (The burden is on the person who says that the rule should not be applied.) ✠(1907) 1 Ch 22 (29), *In re Bates* ; *Hodgson* v. *Bates*. (Legacy of shares in a large and successful trading company — Securities held hazardous but on interpretation of testator's intention trustees were held authorised to retain them and give the tenant for life the income derived from them.)

Section 347 — Note 1

[1] Power to postpone sale and conversion is a power to postpone it for a reasonable time for the benefit of the estate. (1914) 1 Ch 192 (202), *In re Marshall* ; *Marshall* v. *Marshall* ✠(1884) 26 Ch D 42 (46), *In re Chancellor* ; *Chancellor* v. *Brown*.

[2] As to rate of interest payable on the value of securities during the period of postponement of sale and conversion of wasting securities, see (1904) 2 Ch 4 (12, 13), *Gabellime* v. *Woods*.

Procedure where minor entitled to immediate payment or possession of bequest, and no direction to pay to person on his behalf.

348. *(1)* Where, by the terms of a bequest, the legatee is entitled to the immediate payment or possession of the money or thing bequeathed, but is a minor, and there is no direction in the will to pay it to any person on his behalf, the executor or administrator shall pay or deliver the same into the Court of the District Judge, by whom or by whose District Delegate the probate was, or letters of administration with the will annexed were, granted, to the account of the legatee, unless the legatee is a ward of the Court of Wards.

(2) If the legatee is a ward of the Court of Wards, the legacy shall be paid to the Court of Wards to his account.

(3) Such payment into the Court of the District Judge, or to the Court of Wards, as the case may be, shall be a sufficient discharge for the money so paid.

(4) Money when paid in under this section shall be invested in the purchase of Government securities, which, with the interest thereon, shall be transferred or paid to the person entitled thereto, or otherwise applied for his benefit, as the Judge or the Court of Wards, as the case may be, may direct.

[1865—S. 303; Probate and Administration Act, 1881—S. 127; District Delegates Act, 1881—S. 8.]

CHAPTER XI.

OF THE PRODUCE AND INTEREST OF LEGACIES.

Legatee's title to produce of specific legacy.

349. The legatee of a specific legacy is entitled to the clear produce thereof, if any, from the testator's death.

Exception.—A specific bequest, contingent in its terms, does not comprise the produce of the legacy between the death of the testator and the vesting of the legacy. The clear produce of it forms part of the residue of the testator's estate.

Illustrations.

(i) *A* bequeaths his flock of sheep to *B*. Between the death of *A* and delivery by his executor the sheep are shorn or some of the ewes produce lambs. The wool and lambs are the property of *B*.

(ii) *A* bequeaths his Government securities to *B*, but postpones the delivery of them till the death of *C*. The interest which falls due between the death of *A* and the death of *C* belongs to *B*, and must, unless he is a minor, be paid to him as it is received.

(iii) The testator bequeaths all his four per cent. Government promissory notes to *A* when he shall complete the age of 18. *A*, if he completes that age, is entitled to receive the notes, but the interest which accrues in respect of them between the testator's death and *A*'s completing 18, form part of the residue.

[1865—S. 309; Probate and Administration Act, 1881—S. 128.]

Residuary legatee's title to produce of residuary fund.

350. The legatee under a general residuary bequest is entitled to the produce of the residuary fund from the testator's death.

Exception.—A general residuary bequest contingent in its terms does not comprise the income which may accrue upon the fund bequeathed between the death of the testator and the vesting of of the legacy. Such income goes as undisposed of.

Illustrations.

(i) The testator bequeaths the residue of his property to *A*, a minor, to be paid to him when he shall complete the age of 18. The income from the testator's death belongs to *A*.

(ii) The testator bequeaths the residue of his property to *A* when he shall complete the age of 18. *A*, if he completes that age, is entitled to receive the residue. The income which has accrued in respect of it since the testator's death goes as undisposed of.

[1865—S. 310; Probate and Administration Act, 1881—S. 129.]

Interest when no time fixed for payment of general legacy.

351. Where no time has been fixed for the payment of a general legacy, interest begins to run from expiration of one year from the testator's death.

Section 349 — Note 1

[1] The legatee of a specific legacy is entitled to mesne profits from the date of the testator's death. (Vol 5) 1918 Mad 256 (257) (DB).

[2] Demonstrative legacy partly specific and partly general to be paid out of specified property — Interest payable from one year after testator's death. (Vol 12) 1925 Mad 164 (166) (DB).

SECTION 351 — SYNOPSIS.

1. Scope.
2. Demonstrative legacy—Interest on.
3. Exception (1).
4. Exception (2).

1. Scope.—[1] By a rule that has been adopted for the sake of general convenience the Court holds the personal estates to be reduced into possession within a year after the death of the testator. Upon that ground interest is payable upon legacies from that time unless some other period is fixed by the will. (1807) 13 Ves 325 (333, 334) : 33 E R 316.*Wood* v. *Penoyre*.

[2] Sections 351 and 355 relate to interest on annuities or legacies payable by executor, and cannot apply

Exception.—(1) Where the legacy is bequeathed in satisfaction of a debt, interest runs from the death of the testator.

(2) Where the testator was a parent or a more remote ancestor of the legatee, or has put himself in the place of a parent of the legatee, the legacy shall bear interest from the death of the testator.

(3) Where a sum is bequeathed to a minor with a direction to pay for his maintenance out of it, interest is payable from the death of the testator.

[1865—S. 311; Probate and Administration Act, 1881—S. 130.]

Interest when time fixed.

352. Where a time has been fixed for the payment of a general legacy, interest begins to run from the time so fixed. The interest up to such time forms part of the residue of the testator's estate.

Exception.—Where the testator was a parent or a more remote ancestor of the legatee, or has put himself in the place of a parent of the legatee and the legatee is a minor, the legacy shall bear interest from the death of the testator, unless a specific sum is given by the will for maintenance, or unless the will contains a direction to the contrary.

[1865—S. 312; Probate and Administration Act, 1881—S. 131.]

Rate of interest.

353. The rate of interest shall be four per cent. per annum in all cases except when the testator was a Hindu, Muhammadan, Buddhist, Sikh or Jaina or an exempted person, in which case it shall be six per cent. per annum.

[1865—S. 313; Probate and Administration Act, 1881—S. 132.]

No interest on arrears of annuity within first year after testator's death.

354. No interest is payable on the arrears of an annuity within the first year from the death of the testator, although a period earlier than the expiration of that year may have been fixed by the will for making the first payment of the annuity.

[1865—S. 314; Probate and Administration Act, 1881—S. 133.]

Interest on sum to be invested to produce annuity.

355. Where a sum of money is directed to be invested to produce an annuity, interest is payable on it from the death of the testator.

[1865—S. 315; Probate and Administration Act, 1881—S. 134.]

Section 351—Note 1 *(contd.)*

to sum directed to be paid out of profits of immovable property which legatee was entitled to as part of properties obtained by him under will and devolved upon his heirs. (Vol 7) 1920 Cal 232 (236) (DB).

[3] Where no time is fixed for the payment of a legacy but the amount is expressly made payable out of a particular fund which is not to be got in until after a longer interval, the case is governed by this section and the interest is payable from the end of the year of testator's death. (Vol 3) 1916 Cal 937 (938): 43 Cal 201. ((1867) 2 Ch A 782, *Lord* v. *Lord*, Rel. on.) ✠ (Vol 19) 1932 Bom 506 (508) (DB).

[4] Where legacies were intended to be given as from testatrix's death and to become due at once though it was recognized by the testatrix that they would not in fact be paid until the determination of a certain litigation, interest was allowed from one year after the death of the testator to be accumulated for the sole benefit of the residuary legatee. (Vol 9) 1922 Mad 457 (462) : 46 Mad 190 (SB).

2. Demonstrative legacy—Interest on.—[1] Demonstrative legacy partly general and partly specific, to be paid out of specific property — Interest thereon runs from one year after the testator's death even though the will does not provide for it. (Vol 12) 1925 Mad 164 (166) (DB).

[2] According to English law, demonstrative legacies carry interest from one year from the testator's death. The Indian law is not different. In the matter of interest demonstrative legacies are viewed as general legacies and interest is allowed thereon from the expiry of one year from date of testator's death. ('06) 29 Mad 155 (160) (DB) ✠ (Vol 3) 1916 Cal 937 (938) : 43 Cal 201 ✠ (Vol 19) 1932 Bom 506 (507) (DB).

[3] Testator making oral agreements of sale leaving directions that sale proceeds be distributed in certain proportions — Legacies are demonstrative and not specific. (Vol 19) 1932 Bom 506 (507) (DB).

3. Exception (1).—[1] Where a Court decrees a legacy to be a satisfaction of a debt, the Court gives interest always from the death of the testator. (1744) 3 Atk 96 (99) : 26 E R 858 *Clarke* v. *Sewell.* ✠ ('02) 25 Mad 361 (365) (DB).

4. Exception (2).—[1] Legacies to the daughters of the testator are governed by Excep. 2 and bear interest from the date of death of testator. (Vol 19) 1932 Bom 506 (508) (DB).

Section 352 — Note 1

[1] Demonstrative legacy— Will silent as to interest —Rate of interest is 4 per cent. per annum. (Vol 3) 1916 Cal 937 (938) : 43 Cal 201.

Section 353 — Note 1

[1] The plaintiff entitled to receive annuity under will is entitled, in a suit for arrears, to interest at the rate of 6 per cent. on amount claimed under this section. The fact that he waited for long time before coming to Court is no ground for refusing statutory interest. (Vol 25) 1938 Pat 600 (603) : 17 Pat 350 (DB).

Section 355 — Note 1

[1] Section relates to interest on annuities or legacies payable by executor and not to sums payable out of profits of immovable property to which a legatee was entitled as part of properties obtained under the will and devolved upon his heirs. (Vol 7) 1920 Cal 232 (236) (DB).

CHAPTER XII.

OF THE REFUNDING OF LEGACIES.

356. When an executor or administrator has paid a legacy under the order of a Court, he is entitled to call upon the legatee to refund in the event of the assets proving insufficient to pay all the legacies.

Refund of legacy paid under Court's orders.

[1865—S. 316; Probate and Administration Act, 1881—Ss. 135, 148.]

357. When an executor or administrator has voluntarily paid a legacy, he cannot call upon a legatee to refund in the event of the assets proving insufficient to pay all the legacies.

No refund if paid voluntarily.

[1865—S. 317; Probate and Administration Act, 1881—Ss. 136, 148.]

358. When the time prescribed by the will for the performance of a condition has elapsed, without the condition having been performed, and the executor or administrator has thereupon, without fraud, distributed the assets; in such case, if further time has been allowed under section 137 for the performance of the condition, and the condition has been performed accordingly, the legacy cannot be claimed from the executor or administrator, but those to whom he has paid it are liable to refund the amount.

Refund when legacy has become due on performance of condition within further time allowed under section 137.

[1865—S. 318; Probate and Administration Act, 1881—Ss. 137, 148.]

359. When the executor or administrator has paid away the assets in legacies, and he is afterwards obliged to discharge a debt of which he had no previous notice, he is entitled to call upon each legatee to refund in proportion.

When each legatee compellable to refund in proportion.

[1865—S. 319; Probate and Administration Act, 1881—Ss. 138, 148.]

360. Where an executor or administrator has given such notices as the High Court may, by any general rule, prescribe or, if no such rule has been made, as the High Court would give in an administration suit, for creditors and others to send in to him their claims against the estate of the deceased, he shall, at the expiration of the time therein named for sending in claims, be at liberty to distribute the assets, or any part thereof, in discharge of such lawful claims as he knows of, and shall not be liable for the assets so distributed to any person of whose claim he shall not have had notice at the time of such distribution:

Distribution of assets.

Provided that nothing herein contained shall prejudice the right of any creditor or claimant to follow the assets, or any part thereof, in the hands of the persons who may have received the same respectively.

[1865—S. 320; Probate and Administration Act, 1881—S. 139.]

361. A creditor who has not received payment of his debt may call upon a legatee who has received payment of his legacy to refund, whether the assets of the testator's estate were or were not sufficient at the time of his death to pay both debts and legacies: and whether the payment of the legacy by the executor or administrator was voluntary or not.

Creditor may call upon legatee to refund.

[1865—S. 321; Probate and Administration Act, 1881—Ss. 140, 148.]

Section 360 — Note 1

[1] The expression "distribution" covers payments both to creditors and legatees. (Vol 22) 1935 Bom 385 (390).

[2] The proviso to S. 360 restricts the effect of the notices to the liability of the executor alone; it leaves the other rights untouched. (Vol 22)1935 Bom 385(390).

[3] Proviso to this section does not create a right but saves one if the statute has given one. Thus, it saves the right of the creditor when he finds that the estate has been distributed by the executor properly and enables him to proceed against the legatee. (Vol 23) 1936 Bom 423 (435, 438). (Position of creditors guilty of latches discussed.)

Section 361 — Note 1

[1] Mahomedan law — Will— Payments of debts of deceased takes precedence over legacies — Property in the hands of legatee can be proceeded against for payment of debt even if other property of the deceased is sufficient to pay debt. (Vol 27) 1940 Lah 348 (349) (DB). (Section 361 also referred to.)

[2] The legal right of an unsatisfied creditor to proceed against an asset of the testator in the hands of executor cannot be resisted by the latter on the plea that he holds it as a legatee whose title has been perfected by his own breach of duty in not having completed the administration of the estate and discharging the creditor's debt. (Vol 33) 1946 Mad 209 (213) : I L R (1946) Mad 707 (DB).

[3] General administration action is not the only means of enforcing right under S. 361. (Vol 33) 1946 Mad 209 (213, 214) : I L R (1946) Mad 707 (DB). (*A* dying pending suit by creditor against him—*A*'s son claiming to be executor and legatee under will of *A* substituted and decree passed — Decree can be executed against property held by *A* as legatee.)

[But see (Vol 17) 1930 Cal 762 (763, 764) : 58 Cal 170 (DB). (Right has to be exercised by a suit and not merely by levying execution against assets in the hands of legatee.)]

[4] If an executor who is also residuary legatee sales or mortgages an asset of the testator for valuable consi

362. If the assets were sufficient to satisfy all the legacies at the time of the testator's death, a legatee who has not received payment of his legacy, or who has been compelled to refund under section 361, cannot oblige one who has received payment in full to refund, whether the legacy were paid to him with or without suit, although the assets have subsequently become deficient by the wasting of the executor.

When legatee, not satisfied or compelled to refund under section 361, cannot oblige one paid in full to refund.

[1865—S. 322; Probate and Administration Act, 1881—S. 141.]

363. If the assets were not sufficient to satisfy all the legacies at the time of the testator's death, a legatee who has not received payment of his legacy must, before he can call on a satisfied legatee to refund, first proceed against the executor or administrator if he is solvent; but if the executor or administrator is insolvent or not liable to pay, the unsatisfied legatee can oblige each satisfied legatee to refund in proportion.

When unsatisfied legatee must first proceed against executor, if solvent.

[1865—S. 323; Probate and Administration Act, 1881—S. 142]

364. The refunding of one legatee to another shall not exceed the sum by which the satisfied legacy ought to have been reduced if the estate had been properly administered.

Limit to refunding of one legatee to another.

Illustration.

A has bequeathed 240 rupees to *B*, 480 rupees to *C*, and 720 rupees to *D*. The assets are only 1,200 rupees and, if properly administered, would give 200 rupees to *B*, 400 rupees to *C*, and 600 rupees to *D*. *C* and *D* have been paid their legacies in full, leaving nothing to *B*. *B* can oblige *C* to refund 80 rupees, and *D* to refund 120 rupees.

[1865—S. 324; Probate and Administration Act, 1881—S. 143.]

Refunding to be without interest.

365. The refunding shall in all cases be without interest.

[1865—S. 325; Probate and Administration Act, 1881—S. 144.]

366. The surplus or residue of the deceased's property, after payment of debts and legacies, shall be paid to the residuary legatee when any has been appointed by the will.

Residue after usual payments to be paid to residuary legatee.

[1865—S. 326; Probate and Administration Act, 1881—S. 145.]

367. Where a person not having his domicile in British India[a] has died leaving assets both in British India and in the country in which he had his domicile at the time of his death, and there has been a grant of probate or letters of administration in British India with respect to the assets there and a grant of administration in the country of domicile with respect to the assets in that country, the executor or administrator, as the case may be, in British India, after having given such notices as are mentioned in section 360, and after having discharged, at the expiration of the time therein named, such lawful claims as he knows of, may, instead of himself distributing any surplus or residue of the deceased's property to persons residing out of British India who are entitled thereto, transfer, with the consent of the executor or administrator, as the case may be, in the country of domicile, the surplus or residue to him for distribution to those persons.

Transfer of assets from British India to executor or administrator in country of domicile for distribution.

[1865—S. 326A; Probate and Administration Act, 1881—S. 145A; *ibid*, 1890—Ss. 9, 16.]

[a] *See* S. 5, Legislative-note (a).

Section 361—Note 1 *(contd.)*

deration to a person who has no notice of the existence of unsatisfied debts of the testator, or of any ground which rendered it improper for the executor so to deal with the asset, that person's purchase or mortgage is valid against any unsatisfied creditor of the testator. (1896) 1 Ch 968 (974, 975), (Rule applies to acquitable as well as legal assets provided either executor or Court has no control over the assets.)

[5] A mortgage by an executor who is also a residuary legatee to secure his private debt may be set aside even at the suit of a pecuniary legatee for the nature of the claims of the legatees they taking under the will, may be ascertained. (1909) 33 Bom 1 (21) : 35 Ind App 139 (P C). (Mortgage by executor who was also a legatee — Mortgagee having constructive notice of unpaid legacy —Claims of legatees prevail over those of mortgagee.)

Section 366 — Note 1

[1] Residuary legatee does not become "proprietor" until after the administration has been completed and his interest ascertained and made over to him by the executor. (1909) 36 Cal 28 (42) ✠ (1905) 7 Bom L R 755 (758).

[2] The only right a residuary legatee has is to have the administration completed and the residuary estate ascertained and realised. But before the administration is completed the legatee has no right or claim to any part of the estate. (1897) App Cas 11 (21), *Lord Sudeley* v. *Attorney-General* ✠ (1857) 6 H L 217 (226, 227), *Wightwick* v. *Lord*.

CHAPTER XIII.

OF THE LIABILITY OF AN EXECUTOR OR ADMINISTRATOR FOR DEVASTATION.

Liability of executor or administrator for devastation.

368. When an executor or administrator misapplies the estate of the deceased or subjects it to loss or damage, he is liable to make good the loss or damage so occasioned.

Illustrations.

(i) The executor pays out of the estate an unfounded claim. He is liable to make good the loss.

(ii) The deceased had a valuable lease renewable by notice which the executor neglects to give at the proper time. The executor is liable to make good the loss.

(iii) The deceased had a lease of less value than the rent payable for it, but terminable on notice at a particular time The executor neglects to give the notice. He is liable to make good the loss.

[1865—S. 327; Probate and Administration Act, 1881—S. 146.]

Liability of executor or administrator for neglect to get any part of property.

369. When an executor or administrator occasions a loss to the estate by neglecting to get in any part of the property of the deceased, he is liable to make good the amount.

Illustrations.

(i) The executor absolutely releases a debt due to the deceased from a solvent person, or compounds with a debtor who is able to pay in full. The executor is liable to make good the amount.

(ii) The executor neglects to sue for a debt till the debtor is able to plead that the claim is barred by limitation and the debt is thereby lost to the estate. The executor is liable to make good the amount.

[1865—S. 328; Probate and Administration Act, 1881—S. 147.]

SECTION 368 — SYNOPSIS.

1. Scope.
2. "Misapplies" or "subjects to loss or damage."
3. Liability of co-executors and successive executors.
4. Agent of executor—Liability for.
5. Legal representative of executor—Liability of.

1. Scope.—[1] The liability under this section is confined only to such acts of waste and mismanagement as can be attributed to the executor as an executor as such and not as a legatee. (Vol 2) 1915 Mad 1184 (1186). (Hindu widow appointed as administratrix —Acts of waste and mismanagement after administration is over and she is in possession as a Hindu widow —She is not liable under administration bond.)

[2] All the property of the deceased is vested in the executor and should the executor abuse his powers in respect of such property while it is vested in him, the remedy can only be a personal remedy against the executor himself. (Vol 14) 1927 Bom 387 (392).

[3] Limitation—Time for suit against administrator for misappropriation runs from time of ascertainment of amount misappropriated and not from date of misappropriation. (Vol 14) 1927 Rang 28 (29): 4 Rang 358 (DB).

2. "Misapplies" or "subjects to loss or damage." —[1] An executor who is also a residuary legatee is not entitled to help himself before paying debts and specific legacies. His taking money for himself before such payments is a breach of trust. (Vol 20) 1933 Cal 286 (290): 60 Cal 30 (DB). (Court has power to pass interlocutory order directing him to bring money in Court or to furnish security.)

[2] An executor or administrator who risks the funds of an estate by mixing them with his own and employs these for his own purposes, even temporarily, is in a great danger of criminal as well as civil liability. (1881) 6 Cal 70 (76).

[3] Sale by administrator of a portion of assets to his brother at a gross under-value during suit for administration—Sale held fraudulent and void against creditors of the estate (1848) 11 Beav 265 (270, 272): 50 E R 818, *Rice* v. *Gordon*.

[4] If-next-of-kin with full knowledge of fact but under a mistake as to their legal rights authorises the administrator to pay the amount to a third person who is not in law entitled to it, and the administrator pays accordingly he acts in due course of administration and there is no breach of trust in that act of payment. (1910) 12 Bom L R 53 (62) (DB). (Mistake of fact on the part of next-of-kin does not entitle them to any relief against executor.)

[5] Estate in state of considerable embarrassment — Executor obliged to sell portion to meet liabilities— Failure to raise money on interest does not necessarily amount to dereliction of duty on executor's part unless damage is proved to have resulted from sale. (Vol 3) 1916 Cal 110 (116) (DB).

3. Liability of co-executors and successive executors. — [1] A devastavit by one of two executors or administrators will not charge his companion provided he has not intentionally or otherwise contributed to it. (1909) 10 Cal L Jour 503 (515) (DB). ((1840) 2 Beav 472, *William* v. *Nixon*, *Rel. on.*)

[2] It is the duty of all executors to watch over and if necessary to correct the conduct of each other and an executor who stands by and sees a breach of trust committed by his co-executor becomes responsible for that breach. (1909) 10 Cal L Jour 503 (515) (DB).

[3] Successive executors — Second executor is not liable for accounts of predecessors or his wrongful acts — It is however incumbent on him to call upon representatives of the predecessors to render account and respond in damages for devastavit, mismanagement or breach of duty. (Vol 3) 1916 Cal 110 (112) (DB).

4. Agent of executor—Liability for.—[1] Where an executor appoints an agent to carry on business of the trust, it is incumbent on him to act with the same degree of care as a man of ordinary prudence would in his own affairs. But where there is want of diligence on the part of the executor both in the selection and the supervision of the agent and the loss sustained by the estate can be directly connected with such want of diligence there is a clear breach of duty for which executor is liable. (1905) 29 Bom 170 (184, 185) (DB).

5. Legal representative of executor — Liability of.—[1] The legal representative of a deceased executor is not only liable for a devastavit committed by the latter but may also be called upon to render any account which the latter should have, but has not rendered. (1910) 7 Ind Case 805 (806) (Cal). (Plaintiff held failed to establish her claim to an account from the executor.)

Section 369 — Note 1

[1] The principle on which S. 147, Probate and Administration Act, corresponding to this section is based is that title gained by stranger as against exe-

PART X.
SUCCESSION CERTIFICATES.

Restriction on grant of certificates under this Part.

370. *(1)* A succession certificate (hereinafter in this part referred to as a certificate) shall not be granted under this Part with respect to any debt or security to which a right is required by section 212 or section 213 to be established by letters of administration or probate:

Provided that nothing contained in this section shall be deemed to prevent the grant of a certificate to any person claiming to be entitled to the effects of a deceased Indian Christian, or to any part thereof, with respect to any debt or security, by reason that a right thereto can be established by letters of administration under this Act.

(2) For the purposes of this Part, "security" means—

(a) any promissory note, debenture, stock or other security of the [a][Central Government] or of a [b][Provincial Government];

(b) any bond, debenture, or annuity charged by Act of Parliament on the revenues of India;

(c) any stock or debenture of, or share in, a company or other incorporated institution;

(d) any debenture or other security for money issued by, or on behalf of, a local authority;

(e) any other security which the [c][Provincial Government] may, by notification in the [d][Official Gazette], declare to be a security for the purposes of this Part.

[Succession Certificate Act, 1889—Ss. 1 (4), 3 (2); Native Christians Act, 1901—S. 5.]

[a] *Substituted* by A. O. for "Government of India". [b] *Substituted* by A. O. for "Local Government". [c] *Substituted* by A. O. for "Governor-General in Council." [d] *Substituted* by A. O. for "Gazette of India".

Court having jurisdiction to grant certificate.

371. The District Judge within whose jurisdiction the deceased ordinarily resided at the time of his death, or, if at that time he had

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Section 369 — Note 1 *(contd.)*

cutor is good against beneficiary for on no other view can the neglect of the executor be regarded as occasioning a loss to the estate. (Vol 11) 1924 Pat 721 (736) : 3 Pat 880 (DB).

[2] No one is bound to become an executor but if he does accept the position he must act with the ordinary care and prudence of a reasonable and diligent business man. He must make the fund productive by investing it in some form of security and if he fails to do it, he will be liable for consequent loss to the estate. (Vol 19) 1932 All 384 (385) : 54 All 605 (DB).

[3] Mortgage loan out of testator's estate—Knowledge of mortgagor's embarrassed financial position—Failure to realise the mortgage money — Executor held personally liable for the amount. (Vol 4) 1917 Mad 126 (128) (DB).

[4] Compromise by an executor of unfounded claim of a mortgagee and giving up his claim to the refund of the amount by the mortgagee under an appellate decree, held, was clearly a loss to the estate occasioned by neglect of the executor, which he was liable to make good. (1893) 17 Bom 637 (644) (DB).

[5] The fact that the trustees acted on the advice of a counsel does not exonerate them from the consequences of their acts. (1859) 27 Beav 45 (49) : 54 E R 18, *In re Knight's Trusts.*

[6] No action lies for neglect to take out probate. (1898) 1 Ch 162 (177), *In re Stevens*; *Cook* v. *Stevens.*

[7] The Court will not appoint a receiver against an executor on slight grounds. (1895) 19 Bom 83 (85). (*Held*, this rule did not apply to Mahomedan will.)

SECTION 370 — SYNOPSIS

1. Sub-section (1).
2. Sub-section (2).

1. Sub-section (1).—[1] The Succession Certificate Act (Part 10 of this Act) is partially a fiscal enactment and it is to be administered as far as possible leniently and must be construed in favour of the subject. (Vol 21) 1934 All 296 (297).

[2] The existence of a validly executed will by the testator bars the grant of a succession certificate in respect of any part of his estate. (Vol 25) 1938 Nag 47 (48) ✠ (1911) 11 Ind Cas 261 (262) (Sind).

[3] If succession certificate is to be given in respect of the estate of the deceased it must be in respect of an estate which goes to heirs of the deceased person. (Vol 16) 1929 Sind 177 (178, 179) : 23 Sind L R 359 (DB). (Gratuity not forming part of the estate—No certificate can be granted.)

[4] The mere fact that the applicant might have applied for a probate is not an adequate ground for refusing to entertain his application for a succession certificate. (Vol 7) 1920 Lah 497 (498) ✠ (Vol 3) 1916 Lah 277 (278).

[5] An heir of a Buddhist need not take out letters of administration in order to sue as representative of a deceased mortgagee and can do so by obtaining succession certificate. (Vol 10) 1923 Rang 74 (74) (DB).

2. Sub-section (2).—[1] Security which is defined in S. 370 includes share in company. (Vol 30) 1943 Mad 743 (746).

[2] The word "share" refers to the holding in the company and not to each individual share. Therefore the entire holding of an individual in a company must be regarded as his security and it makes no difference whether that holding is covered by one share certificate or more than one share certificate. (Vol 32) 1945 Pat 318 (320) : 24 Pat 100

[3] A fixed deposit in a bank is not a security within the meaning of the section. (1906) 28 All 477 (478) (DB).

[4] An insurance policy is not contemplated by the section and the insurance money upon a policy of life assurance except in so far as it became an ascertained debt before the death of the assured is not included in the Act. (Vol 3) 1916 Cal 475 (476) (DB)

[5] Mortgage is not security within S. 370. (Vol 25) 1938 Pat 68 (68) (DB).

Section 371 — Note 1.

[1] Under S. 2, (as amended in 1929), the High Court on the original side has power to issue succession certificate. (Vol 18) 1931 Rang 281 (281) : 9 Rang 205 ✠ (Vol 17) 1930 Mad 779 (782) : 53 Mad 237 (D B) ✠ (Vol 18) 1931 Cal 580 (581) : 58 Cal 801.

[2] The definition of a District Judge as inserted by the Act of 1929 would not include a High Court which has no original jurisdiction and hence such a High

no fixed place of residence, the District Judge, within whose jurisdiction any part of the property of the deceased may be found, may grant a certificate under this Part.

[Succession Certificate Act, 1889—S. 5.]

Application for certificate.

372. *(1)* Application for such a certificate shall be made to the District Judge by a petition signed and verified by or on behalf of the applicant in the manner prescribed by the Code of Civil Procedure, 1908, for the signing and verification of a plaint by or on behalf of a plaintiff, and setting forth the following particulars, namely :

(a) the time of the death of the deceased ;

(b) the ordinary residence of the deceased at the time of his death and, if such residence was not within the local limits of the jurisdiction of the Judge to whom the application is made, then the property of the deceased within those limits ;

(c) the family or other near relatives of the deceased and their respective residences;

(d) the right in which the petitioner claims ;

(e) the absence of any impediment under section 370 or under any other provision of this Act or any other enactment, to the grant of the certificate or to the validity thereof if it were granted ; and

(f) the debts and securities in respect of which the certificate is applied for.

(2) If the petition contains any averment which the person verifying it knows or believes to be false, or does not believe to be true, that person shall be deemed to have committed an offence under section 198 of the Indian Penal Code.

[a][*(3)* Application for such a certificate may be made in respect of any debt or debts due to the deceased creditor or in respect of portions thereof.]

[Succession Certificate Act, 1889—S. 6.]

[a] *Inserted* by the Indian Succession (Amendment) Act, 1928 (14 [XIV] of 1928), S. 2.

Section 371 — Note 1 *(contd.)*

Court cannot grant a succession certificate. (Vol 21) 1934 All 958 (958) : 57 All 302 (D B) ✠ (Vol 31) 1944 Nag 273 (273) : I L R (1945) Nag 148. (Nagpur High Court is not a District Court within the meaning of S. 2 (bb) and therefore has no jurisdiction to issue a certificate.)

[3] Certificate cannot be granted if deceased were not resident within Court's jurisdiction at death except when deceased had no fixed place of residence at all. (Vol 10) 1923 Rang 238 (239) (DB).

[4] Court has sufficient authority to dispose of proceedings where deceased at his death had his ordinary place of residence within its jurisdiction and did his business there. (Vol 3) 1916 Lah 277 (278).

[5] Words "has no fixed place of residence" mean "has no fixed place of residence in British India." If deceased had no fixed place of residence in British India, but had some property in British India, then application should be made to District Judge where property is situated. (Vol 22) 1935 Lah 646 (647).

Section 372 — Note 1.

[1] Proceeding under Act is not to be availed of for deciding conflicting claims or to ascertain shares of different claimants in a particular debt due to the estate of the deceased. (Vol 8) 1921 All 221 (223) : 43 All 341 (D B).

[2] As the certificate that is to be granted must be in accordance with the petition made under S 372, it is only proper that the application for certificate should conform strictly to the requirements of that section. (Vol 28) 1941 Cal 663 (665) : I L R (1941) 2 Cal 311 (D B).

[3] An applicant is not bound to mention all the debts in the application. (1895) 5 Mad L Jour 36 (38).

[4] A Hindu to whom Succession Act in respect of provisions regarding the obtaining of probate or letters of administration does not apply can apply for succession certificate. (1905) 2 All L Jour 126 (127) (DB).

[5] Person applying for certificate must have beneficial interest in debt or security to be collected. (Vol 23) 1936 Rang 466 (467)✠(Vol 10) 1923 All 265 (266) (DB). (Joint debt in favour of *K* and *M* —*K* suing after *M's* death impleading his widow as *pro forma* defendant—Decree passed in favour of *K* — *M's* daughter applying for a certificate for collecting *M's* share in the debt — *Held* that the debt became judgment debt in favour of *K* and that *M* cannot obtain certificate in respect of it.)

[6] Assignee of representative of deceased can apply for certificate (Vol 4) 1917 Pat 593 (594): 2 Pat L Jour 350 (D B) ✠ (1892) 15 Mad 419 (420) (DB). (Though the Act does not in terms refer to assigns of the heirs of a deceased person it does not follow that the right of succession is not the basis of the claim to recover the debt when it is made by the assignee of the heir.)✠(Vol 7) 1920 All 185 (187) : 42 All 549 (DB).

[7] The legal guardian under S. 27 of Guardians and Wards Act of a minor can receive from any debtor the sum due by him to his ward and to give a receipt for the same. This constitutes the rights under which he can claim for a succession certificate. (1904) 28 Bom 344 (345) (D B).

[8] Next friend of a minor can apply on behalf of a minor for a succession certificate. (1912) 16 Ind Cas 797 (797) (DB) (Mad).

[9] A minor is not precluded from applying for a certificate and S. 9, Succession Certificate Act, does not in any way prevent him. (1913) 36 Mad 214 (215) (DB).

[But see (1910) 4 Sind L R 266 (267).]

[10] A person may apply for a certificate to enable him to recover a portion of the debt due to the deceased (Vol 1) 1914 Cal 369 (372): 42 Cal 10 (DB)✠(1896) 18 All 45 (46) ✠ (1912) 15 Cal L Jour 384 (386) (D B).

[11] Where the first application for a certificate was dismissed on the default of the applicant in fulfilling a condition imposed by the Court, he can apply a second time. (Vol 3) 1916 All 10 (10) (D B). (First application dismissed on failure to furnish security.)

373. *(1)* If the District Judge is satisfied that there is ground for entertaining the application he shall fix a day for the hearing thereof and cause notice of the application and of the day fixed for the hearing—

Procedure on application.

(a) to be served on any person to whom, in the opinion of the Judge, special notice of the application should be given, and

(b) to be posted on some conspicuous part of the court-house and published in such other manner, if any, as the Judge, subject to any rules made by the High Court in this behalf, thinks fit,

and upon the day fixed, or as soon thereafter as may be practicable, shall proceed to decide in a summary manner the right to the certificate.

(2) When the Judge decides the right thereto to belong to the applicant, the Judge shall make an order for the grant of the certificate to him.

(3) If the Judge cannot decide the right to the certificate without determining questions of law or fact which seem to be too intricate and difficult for determination in a summary proceeding, he may nevertheless grant a certificate to the applicant if he appears to be the person having *prima facie* the best title thereto.

(4) When there are more applicants than one for a certificate, and it appears to the Judge that more than one of such applicants are interested in the estate of the deceased, the Judge may, in deciding to whom the certificate is to be granted, have regard to the extent of interest and the fitness in other respects of the applicants.

[Succession Certificate Act, 1889—S. 7.]

SECTION 373 — SYNOPSIS.

1. Scope and applicability.
2. Judge to be satisfied that the application can be entertained.
3. Notice.
4. Scope and nature of enquiry.
5. Sub-section (2).
6. Sub-section (3).
7. Sub-section (4).

1. Scope and applicability. — [1] Civil Procedure Code does not apply to proceeding for the grant of a certificate except in so far as if it is expressly introduced by Ss. 19 and 26 of the Succession Certificate Act (corresponding to Ss. 384 and 388 of this Act). (Vol 11) 1924 All 376 (378) : 46 All 372 (D B). (*Held*, S. 141 does not apply and the Succession Certificate Court has no jurisdiction to appoint a receiver.)

[2] The object of grant of succession certificate is to facilitate collection of debts and in application by widow, objections by third parties should not be heard. (Vol 17) 1930 Lah 700 (700).

[3] Certificate is unnecessary where succession is by survivorship. (Vol 1) 1914 All 68 (68) : 36 All 380.

[4] Where the deceased has left a validly executed will the issue of a succession certificate to any part of the estate is prohibited by S. 370. (Vol 25) 1938 Nag 47 (48).

[5] A Court cannot grant a certificate except upon a petition as under the provisions of the Act. It must specify each debt and security in respect of which the certificate is asked for. (1910) 8 Ind Cas 996 (997) (D B) (Low Bur).

[6] No doubt where an application is substantially defective no succession certificate should be granted on such an application. But where the petition is defective in that the name of the person whose estate is claimed is not correctly given but the petitioner takes up the correct position by putting in another petition before hearing, the petition should be allowed to be amended and not dismissed by reason of such defect. (Vol 28) 1941 Cal 663 (665) : I L R (1941) 2 Cal 311 (DB).

[7] An application for a succession certificate as contemplated by the Succession Act must be an application in respect of some property belonging to a deceased person. The Act does not contemplate the case of a person applying for a certificate in respect of property which he claims as belonging to himself. (Vol 30) 1943 All 303 (304) : I L R (1943) All 680.

2. Judge to be satisfied that the application can be entertained.—[1] The District Judge is entitled to dismiss an application for succession certificate if he is satisfied that there are no grounds for entertaining it. (Vol 29) 1942 Mad 709 (709) : I L R (1943) Mad 280 (D B).

[2] District Judge after entertaining an application cannot dismiss it on the ground that complicated questions of law or fact should have to be gone into before rights of parties can be determined but should act under sub-section (2) or (3). (Vol 29) 1942 Mad 709 (709) : I L R (1943) Mad 280 (D B).

[3] A reasonable and sensible claim to proceed against a person as being the debtor of the deceased is sufficient for the purpose of giving jurisdiction under S. 373 and may be regarded as a ground for entertaining the application. (Vol 16) 1929 Cal 661 (663); 57 Cal 814 (F B).

3. Notice— [1] There is no legal bar to the Court issuing notice to or impleading debtors of the deceased as parties to the proceedings for grant of succession certificate. (Vol 24) 1937 Lah 196 (198).

4. Scope and nature of enquiry.— [1] The enquiry contemplated in Part 10 is an enquiry between rival claimants to the estate of a deceased person. (Vol 22) 1935 Pat 478 (479) (D B).

[2] Barring the very exceptional cases in which on facts admitted by both parties, the Court can determine the right to the certificate, some inquiry ought to be held even in cases in which many facts are admitted by both sides. (Vol 1) 1914 Mad 669 (669) (D B).

[3] Application by widow of deceased for a certificate — Nephews objecting to the grant on the ground that they and the deceased constituted a joint family— *Held*, that though the Judge was not bound to sift the question whether the family was joint or not he ought to have held some enquiry so as to base his decision on *prima facie* evidence before he granted the certificate to the widow. (1905) 27 All 452 (453) (D B).

[4] Proceedings under this part are of a summary nature in which the Court merely decides the right of the applicant to the certificate. (1911) 33 All 327 (332, 333) (D B) ✠ (Vol 3) 1916 Lah 277 (278). (No elabo-

Section 373 — Note 4 *(contd.)*

rate or lengthy enquiry is required for the grant of a succession certificate) ✠ (Vol 24) 1937 Lah 196 (198)✠ (Vol 16) 1929 Bom 456 (458) (D B). (Apart from that there is jurisdiction to go into the question of heirs.)

[5] The section requires that question arising under this part should be determined by a summary proceeding. By summary proceeding is meant that the Court should decide the question by a short enquiry leading upto and resulting in a rapid decision as contrasted with the lengthy inquiry which may be required for a more tardy determination of a regular suit. The nature of this enquiry must depend on the circumstances of each case. (1901) 25 Bom 523 (525) (D B) ✠ (1911) 14 Oudh Cas 53 (56, 57).

[6] In an enquiry before the grant of a certificate the Court has not to determine definitely and finally as to who has the best right to the estate. All that is required is to hold a summary enquiry into the right to the certificate with a view, on the one hand, to facilitate the collection of debts due to the deceased and prevent their being time-barred and on the other hand to afford protection to the debtors by appointing a representative to the deceased and authorising him to give a valid discharge for the debt. (Vol 24) 1937 Lah 196 (198).

[7] In a proceeding for succession certificate, the Courts are not concerned with any question of title. (Vol 32) 1945 Cal 384 (384) (D B) ✠ (Vol 16) 1929 Cal 661 (664) : 57 Cal 814 (F B).

[8] There cannot be an enquiry in one proceeding as to which of a number of deceased persons was entitled to a particular money. (Vol 22) 1935 Pat 478 (479) (D B).

[9] Where a will has been left by the deceased the Court before granting a succession certificate must decide whether the will was validly executed. But this will not involve the question whether the deceased was entitled to dispose of the property mentioned in the will. (Vol 25) 1938 Nag 47 (48) ✠ (1909) 31 All 236 (237) (D B).

[10] The Court granting a certificate is not required to hold an enquiry into the existence of any debt alleged by the person applying to be due as condition precedent to the grant. The Court has merely to ascertain the representative character of the applicant. (1904) 28 Bom 119 (123) (D B).

[But see (Vol 22) 1935 Pat 478 (479) (D B). (Some sort of enquiry as to the existence of debt is necessary to enable the Court to grant a certificate.)]

[11] In an application for succession certificate the question whether the debt in respect of which the certificate is applied for belonged to the deceased or not is irrelevent and cannot be gone into. (Vol 1) 1914 Mad 637 (637) (D B)✠ (1907) 17 Mad L Jour 257 (257) (D B). (Petitioner stating in the petition that a particular debt is due to the estate. The Court before granting the certificate is not required to enquire whether the debt is really due to the estate before granting the certificate.) ✠ (Vol 16) 1929 Cal 661 (663) : 57 Cal 814 (F B). (The Judge is not required to ascertain whether the debts were due to the deceased within the meaning of S. 214.)

[But see (1898) 25 Cal 320 (321) (D B). (The Court is bound to enquire into the matter and require at least some evidence to show that there is a *prima facie* case that the property in respect of which the certificate is granted belonged to the deceased person.)✠(Vol 28) 1941 Cal 663 (665) : I L R (1941) 2 Cal 311 (D B).]

[12] On an application for a succession certificate by an assignee of a debt, the only question which the Court has to decide is whether the applicant is a representative of the person to whom the debt is alleged to have been due and not whether the assignor had a valid title or not or whether the assignment conveyed any title to the applicant or whether the debt secured was recoverable or not. (Vol 3) 1916 All 16 (16) : 38 All 438 (D B).

5. Sub-section (2).— [1] The only right which entitles a person to a succession certificate is a beneficial interest in the debt or security collected. (Vol 23) 1936 Rang 466 (467).

[2] Succession certificate ought not to be refused on the ground that regular suit involving the question of succession is pending. (Vol 1) 1914 Lah 457 (458).

[3] If there are grounds for entertaining an application but the right to the certificate is contested the District Judge should issue the certificate to one party or the other which he can do under sub-section (2) after going into the merits of the case. (Vol 29) 1942 Mad 709 (709) : I L R (1943) Mad 280 (D B).

[4] Applicant for certificate in possession of will in his favour — Possession of the will is sufficient ground for granting certificate. (Vol 26) 1939 Pesh 30 (33) (D B).

[5] There is no prohibition against the grant of a certificate to a minor through his next friend. (1898) 20 All 352 (354) (D B) ✠ (Vol 23) 1936 Rang 466 (468) ✠ (Vol 14) 1927 Sind 187 (190) : 22 Sind L R 206 (D B).

[6] A legal guardian of a minor can be granted a certificate. (1904) 28 Bom 344 (345) (D B).

[7] Succession certificate can be granted to the guardian of a minor only when the guardian has been appointed guardian of the property of the minor under the Guardians and Wards Act. (Vol 20) 1933 Bom 436 (436) (D B).

[8] Succession certificate cannot be issued to certificated guardian personally, in his own name. (Vol 14) 1927 Sind 187 (190) : 22 Sind L R 206 (D B).

[9] Reversionary heirs of a deceased Hindu can take out certificate in respect of debt due to the estate of the deceased. That the application is filed long after the death of the deceased will not be material where it was due to the interposition of the estate by the widow of the deceased. (1911) 15 Cal W N 1018 (1020) (D B).

[10] Will creating present interest to certain persons in certain properties and contingent interest to others in certain other properties — Heir of deceased whose claim is independent of the will applying for certificate—*Held* that he was to be granted certificate only in respect of properties in which contingent interest is created. (Vol 4) 1917 Cal 24 (25) (D B).

[11] Donee under a gift under S. 191 of the Act is entitled to a succession certificate. (Vol 30) 1943 All 95 (96) : I L R (1943) All 193 (D B).

[12] Sale of a debt due to deceased in execution of decree against the deceased—Purchaser claims the debt as part of deceased's effects and is therefore entitled to a certificate. (1894) 18 Bom 315 (316) (D B).

[13] Heir of deceased applying for certificate in respect of amount due under an insurance policy— Policy assigned to another and the company acknowledging the assignment as valid and recognising it. The heir cannot be granted the certificate. (Vol 33) 1946 Pat 415 (417) : 25 Pat 253 (D B).

[14] A legatee claiming under the will of the deceased could obtain a certificate if he can show that the property is the self-acquired property of the deceased. (Vol 3) 1916 Mad 962 (963) (D B).

[15] No certificate can be granted to the representative of an assignee by devise until he has proved his title to it which would involve questions such as the validity of the will and the status of the deceased assignee by devise under the will. (1879) 4 Cal 645 (646) (D B).

374. When the District Judge grants a certificate, he shall therein specify the debts and securities set forth in the application for the certificate, and may thereby empower the person to whom the certificate is granted—

Contents of certificate.

(*a*) to receive interest or dividends on, or

(*b*) to negotiate or transfer, or

(*c*) both to receive interest or dividends on, and to negotiate or transfer, the securities or any of them.

[Succession Certificate Act, 1889—S. 8.]

Section 373 — Note 5 *(contd.)*

[16] An assignee of a debt from a legal representative of a deceased person to whom the debt was due is entitled to a certificate in respect of the debt assigned. (Vol 3) 1916 All 16 (16) : 38 All 438 (D B) ✠ (Vol 4) 1917 Pat 593 (594) : 2 Pat L Jour 350 (D B).

[17] An assignee of the heir has to prove not only the assignment but also the assignor's right of succession. (1892) 15 Mad 419 (420) (D B).

6. Sub-section (3).—[1] While dealing with an application for the certificate, the Courts ought not to enter on the determination of intricate questions of law or fact but should issue the certificate to the person who has *prima facie* the clearest title and leave the person whose claim to a superior title is under dispute on reasonable grounds to establish his title by regular suit. (1884) 7 Mad 452 (453) (DB) ✠ (Vol 29) 1942 Mad 709 (709) : I L R (1943) Mad 280 (D B).

[2] Where the applicant prays to allot specific securities to him and details them in the certificate it amounts to a division thereof which is beyond the powers of a Court granting succession certificates. (Vol 15) 1928 Lah 892 (893).

[3] The question whether there was re-union between the deceased and his divided brother would be too intricate for a summary enquiry on an application by the widow of the deceased for certificate and a certificate can properly be granted to the widow without going into the question of re-union. (1895) 5 Mad L Jour 36 (38) ✠ (Vol 5) 1918 Pat 581 (582) (D B).

[4] Court must make some enquiry into the title set up by the applicant before it proceeds to dispose of his application under sub-s. (3). (1896) 23 Cal 431 (434, 435) (D B).

[See however (1912) 24 Mad L Jour 198 (199) (DB). It is not necessary that in all cases in which the Court holds that the question raised is too intricate and difficult for decision in a summary trial to hold some inquiry as to claim by an applicant. The pleadings themselves may be sufficient for the purpose.)]

7. Sub-section (4). — [1] The main idea of probate or administration is that the grant should be of all the property to one individual or to two or more jointly and so it is not permissible to grant certificate or letters of administration in fraction to two or more persons. (Vol 16) 1929 Bom 456 (459) (D B).

[2] The Court while dealing with an application for succession certificate is bound to decide though in a summary way the question as to the right to the certificate especially when there is a conflict between two parties. (1904) 31 Cal 133 (136) (D B) ✠ (1866) 2 Bom H C R 375 (381). (Referring the parties to a Civil suit is not proper).

[3] Where there are more than one applicant for a certificate it is in the discretion of the Court to grant certificate to one having regard to the extent of interest and the fitness of applicants. (Vol 16) 1929 Bom 456 (460) (D B)✠(Vol 21) 1934 Pat 304 (305) (D B)✠(1882) 5 Mad 4 (4) (D B). (Karnavan of Tharwad applying for certificate to enable him to collect debts due to his predecessor — Large part of the amount to be collected from the applicant himself due under decree obtained against him by predecessor — *Held* that the District Judge properly exercised his discretion in refusing certificate).

[4] Section 373, sub-s. (4) is confined to cases where there are more applicants than one for certificate and it appears to the Judge that more than one of such applicants are interested in the estate of the deceased. (Vol 23) 1936 Pat 430 (432) (D B).

[5] *H* died leaving a widow *G* who applied for succession certificate to recover debts due to *H* — Two step-brothers of *H* opposed the application on the ground that *H* and they constituted a coparcenary and therefore *G* had no right to collect the debts due to *H*. The District Judge disagreeing with the brothers gave the widow the certificate — *Held* that the case did not fall either under sub-s. (3) or (4). (Vol 22) 1935 Pesh 140 (141).

[6] Though order granting certificate to more persons than one might be inconvenient, yet there is nothing illegal in granting it under S. 373 (4). (Vol 24) 1937 Rang. 336 (336): 1937 Rang L R 403.

[7] There may be cases when the several applicants have the same degree of interest in the estate of the deceased and there are no circumstances present which would enable the Judge to say that one is better qualified than the other. Under such circumstances the granting of joint certificate is not illegal. (Vol 28) 1941 Cal 663 (666) : I L R (1941) 2 Cal 311 (D B).

[8] *N* applying for certificate as adopted son of *S* — *K* opposing the grant claiming himself to be the adopted son of *A* the undivided brother of *S* — *Held* that a joint certificate in the name of *N* and *K* could be granted as the object of the application was to raise questions as to the validity of the adoption of *K* (1896) 19 Mad 497 (498).

[9] A joint certificate can be granted where all the persons to whom it is granted agree to have that granted to all of them. (1913) 35 All 470 (471) (DB)✠(Vol 28) 1941 Cal 663 (666) : I L R (1941) 2 Cal 311 (D B).

Section 374 — Note 1

[1] A certificate when granted must specify each debt and security covered by it. (1910) 8 Ind Cas 996 (997) (D B) (Low Bur).

[2] Succession certificate when granted should include both principal and interest. (1913) 35 All 249 (250) (D B) (Certificate to Hindu widow to realise interest only is *ultra vires*)✠(1911) 9 Ind Case 571 (572) (D B) (All). (Grant of succession certificate to a Hindu widow with the direction that the money was to be paid into the bank and only the interest was to be drawn by her — *Held* that the order was *ultra vires*).

[3] The Succession Certificate Act does not contemplate the grant of a certificate for the collection of any portion of a debt. (Vol 8) 1921 All 221 (221) : 43 All 341 (D B)✠(1911) 33 All 327 (333) (S B)✠(1910) 32 All 335 (337) (D B).

[See however (Vol 15) 1928 Lah 892 (893). (Legality of certificate to applicants' share is doubtful) ✠ (1907) 17 Mad L Jour 37 (37). (It may not be proper to grant separate certificates in respect of separate moieties of the same debt. But where it has been so granted the certificates cannot be regarded as nullity)].

[But see (Vol 1) 1914 Cal 369 (372) : 42 Cal 10 (D B)✠(1896) 18 All 45 (46)].

Requisition of security from grantee of certificate.

375. *(1)* The District Judge shall in any case in which he proposes to proceed under sub-section *(3)* or sub-section *(4)* of section 373, and may, in any other case, require, as a condition precedent to the granting of a certificate, that the person to whom he proposes to make the grant shall give to the Judge a bond with one or more surety or sureties, or other sufficient security, for rendering an account of debts and securities received by him and for indemnity of persons who may be entitled to the whole or any part of those debts and securities.

(2) The Judge may, on application made by petition and on cause shown to his satisfaction, and upon such terms as to security, or providing that the money received be paid into Court, or otherwise, as he thinks fit, assign the bond or other security to some proper person, and that person shall thereupon be entitled to sue thereon in his own name as if it had been originally given to him instead of to the Judge of the Court, and to recover, as trustee for all persons interested, such amount as may be recoverable thereunder.

[Succession Certificate Act, 1889 — S. 9.]

Section 374 — Note 1 *(contd.)*

[4] The Court has inherent power to amend a certificate in order to correct a misdescription in it. (Vol 15) 1928 Lah 892 (892).

Section 375 — Note 1.

[1] Security bond is taken under the section to ensure safety of the debts received. (Vol 7) 1920 Nag. 140 (142).

[2] The statutory provision which enables the Court to require the person to whom it proposes to issue the certificate to furnish security, protects the rights of heirs *inter se* so that the person who is ultimately found to be entitled to the whole or part of the debts is indemnified. (Vol 24) 1937 Lah. 196 (198).

[3] The Court has no discretion to dispense with security when it grants a certificate under S. 373 (3). (1912) 11 Mad. L Tim 384 (384) (DB). (Case decided under Act, VII [7] of 1889)

[4] *M*, father of *V*, applying for certificate in respect of debts due to *G* his deceased paternal uncle on the ground that *V* his son was adopted by *B* the widow of *G*—Another person disputing the adoption claiming certificate on the ground that he himself was the truly adopted son—Certificate issued to *M* without demanding security — *Held* that the grant of the certificate to *M* as the guardian of minor *V* without security was improper — *Held also* that the grant might be treated as one under S. 373 (3) and that the certificate would be given only on *M* furnishing security. ('01) 25 Bom. 523 (526) (DB).

[5] Declaration by *L* in respect of his provident fund that his three daughters should have it in equal shares — Two daughters who survived him taking 1/3 share each—Widow of *L* applying for certificate in respect of the balance 1/3 and opposed by the two daughters one of whom presented a petition for certificate in her favour— Succession certificate granted to the widow in respect of 2 annas share and in favour of the daughters 5 as. 4 ps. each—Balance of 3 as. 4 ps. left undisposed as the other heirs entitled to it did not apply — *Held* that a more suitable order would have been to issue a certificate in favour of one of the heirs subject to her providing security under this section. (Vol 21) 1934 Pat. 304 (305) (DB).

[6] Case not falling under S. 373 (3) or (4) — It is discretionary with Court to ask for security — It need not be asked for to protect contingent rights of reversioners. (Vol 22) 1935 Pesh. 140 (141).

[7] It is a matter within the discretion of the trial Judge to require or not to require security where he had held that the matter before him was not intricate or difficult for his determination. (Vol 29) 1942 Pesh. 42 (43).

[8] By taking security under the section the contingent interests of the reversionary heirs are not protected when the certificate granted in the same proceeding is granted to the real heir. (1903) 5 Bom. LR 929 (931) (DB).

[9] Section 375 does not bar the issue of a certificate to a minor as the guardian can execute a bond so as to bind the minor though the minor himself is incapable of executing the bond. ('13) 36 Mad. 214 (215) ✠ (Vol 14) 1927 Sind 187 (190) : 22 Sind LR 206 (DB) ✠ (Vol 23) 1936 Rang. 466 (468). (Court has no power to require next friend of minor to execute bond required by S. 375.)

[10] It is not obligatory on Courts to demand security whenever a Hindu widow applies for the grant of certificate to her. (Vol 3) 1916 Mad. 740 (740) (D B).

[11] In the absence of special circumstances, security should not be ordered as a condition precedent to the issue of a certificate to a widow in respect of debts due to her deceased husband. (Vol 5) 1918 All. 406 (407) : 40 All 81 (D B) ✠ (Vol 10) 1923 All. 579 (579, 580) (D B) ✠ (Vol 22) 1935 Pat. 10 (11) (D B). (Widow of separated Hindu applying for certificate to enable her to collect debts due to her husband — Ordinarily she ought not to be called upon to furnish security.) ✠ (Vol 31) 1944 Mad. 374 (375) : I L R (1945) Mad. 44 (DB). (Deceased living separate from brother)—Widow's application for certificate to be granted without security.) ✠(Vol 32) 1945 Mad. 505 (505, 506). (Widow's application for certificate in respect of shares of Bank — No security should be required.)

[But see ('95) 5 Mad. L Jour 36 (37, 38). (Widow claiming certificate alleging her husband to have separated—Brother of deceased claiming in preference to the widow—*Held* that even assuming that the deceased was separated from his brother the brother had an interest as reversioner and therefore security was to be demanded from the widow.) ✠ (Vol 28) 1941 Cal. 663 (666) : ILR (1941) 2 Cal. 311 (D B). (Application by Hindu widow — Security should be demanded in the interest of reversioners.)]

[12] Judge ordering money to lie in deposit and interest paid to widow who was the applicant for a certificate — *Held* that all that the Court could do was to require as a condition precedent that the widow should give a bond that she would render proper accounts. ('11) 9 Ind. Cas 571 (572) (D B) (All) ✠ ('13) 35 All. 249 (250) (D B). (Hindu widow applying for certificate in respect of debts due to her deceased husband — Court granting a certificate for the realisation of interest only

Extension of certificate.

376. *(1)* A District Judge may, on the application of the holder of a certificate under this Part, extend the certificate to any debt or security not originally specified therein, and every such extension shall have the same effect as if the debt or security to which the certificate is extended had been originally specified therein.

(2) Upon the extension of a certificate, powers with respect to the receiving of interest or dividends on, or the negotiation or transfer of, any security to which the certificate has been extended may be conferred, and a bond or further bond or other security for the purposes mentioned in section 375 may be required, in the same manner as upon the original grant of a certificate.

[Succession Certificate Act, 1889 — S. 10.]

Forms of certificate and extended certificate.

377. Certificates shall be granted and extensions of certificates shall be made, as nearly as circumstances admit, in the forms set forth in Schedule VIII.

[Succession Certificate Act, 1889 — S. 11.]

Amendment of certificate in respect of powers as to securities.

378. Where a District Judge has not conferred on the holder of a certificate any power with respect to a security specified in the certificate, or has only empowered him to receive interest or dividends on, or to negotiate or transfer, the security, the Judge may, on application made by petition and on cause shown to his satisfaction, amend the certificate by conferring any of the powers mentioned in section 374 or by substituting any one for any other of those powers.

[Succession Certificate Act, 1889 — S. 12.]

Mode of collecting Court-fees on certificate.

379. *(1)* Every application for a certificate or for the extension of a certificate shall be accompanied by a deposit of a sum equal to the fee payable under the Court-fees Act, 1870, in respect of the certificate or extension applied for.

(2) If the application is allowed, the sum deposited by the applicant shall be expended, under the direction of the Judge, in the purchase of the stamp to be used for denoting the fee payable as aforesaid.

(3) Any sum received under sub-section *(1)* and not expended under sub-section *(2)* shall be refunded to the person who deposited it.

[Succession Certificate Act, 1889 — S. 14.]

Section 375 — Note 1 *(contd.)*

so as to dispense with the necessity for security— *Held* that the order was *ultra vires* and that all that the Court could do was to require as a condition precedent to the grant of the certificate that the widow should give security for rendering an account of the debts and securities received by her and indemnifying the persons who may be entitled to the whole or any part of the debt.)

[13] Appeal—*See* notes on S. 384.

Section 376 — Note 1.

[1] Extension of certificate can be applied for only by the person who is the holder of the certificate and therefore could not be granted to any person other than the holder. ('69) 19 Mad. L Jour 456 (456).

[2] Appeal—*See* notes on S. 384.

Section 378 — Note 1.

[1] *S* applying on behalf of himself and his minor brother for succession certificate in respect of money deposited by his father in a bank—On objections on behalf of minor, certificate granted to *S* in respect of half of the amount in pass book deposit — Subsequent discovery that only a part of the amount was in current account the balance being in the shape of securities and war bonds — *S* applying for amending the certificate changing "pass book deposits" into current dues and amount due on security as the Court thought proper to transfer to the applicant's name—*Held* that what was sought was in effect a division of the securities and that was beyond the province of the Court to do. (Vol 15) 1928 Lah. 892 (893).

Section 379 — Note 1.

[1] Under Art. 11 and Art. 12, C. F. Act, the fees which are payable are on the probate and the certificate respectively. Under Art. 12 the words are "on the amount or value of any debt or security specified in the certificate". The word "any" used in this context embraces all the debts and securities specified in the certificate and must be the aggregate of all of them which determines the amount of the fee which has to be paid and not each of the items specified in the certificate. (Vol 34) 1947 Bom. 30 (31) (DB).

[But see (Vol 21) 1934 Oudh 414 (415): 10 Luck. 196 (DB).]

[2] Court-fee payable on succession certificate — Sch. I Art. 12 of Court-fees Act as amended in Central Provinces prescribing a fee when the amount or value of any debt or security specified in certificate under S. 374 of the Succession Act exceeds one thousand rupees but does not exceed five thousand rupees—*Held* that the words "any debt or security" mean

Local extent of certificate.

380. A certificate under this Part shall have effect throughout the whole of British India.

[a][This section shall apply in British India [b]after the separation of Burma and Aden from India to certificates granted in Burma and Aden before the date[b] of the separation, or after that date in proceedings which were pending at that date.]

[Succession Certificate Act, 1889 — S. 15.]

[a] *Inserted* by A. O. [b] *i. e*, the 1st April, 1937.

Effect of certificate.

381. Subject to the provisions of this Part, the certificate of the District Judge shall, with respect to the debts and securities specified therein, be conclusive as against the persons owing such debts or liable on such securities, and shall, notwithstanding any contravention of section 370, or other defect, afford full indemnity to all such persons as regards all payments made, or dealings had, in good faith in respect of such debts or securities so or with the person to whom the certificate was granted.

[Succession Certificate Act, 1889—S. 16.]

Section 379—Note 1 *(contd.)*
individual debts and individual securities and not aggregate of debts. (Vol 27) 1940 Nag. 400 (401).

[3] Entire holding of an individual in a company must be regarded as his security and it makes no difference whether that holding is covered by one share certificate or more than one share certificate. An artificial division into different scrips or share certificates makes no difference for the purpose of assessing court-fees. (Vol 32) 1945 Pat. 318 (320) : 24 Pat. 100.

[4] The deposit is made necessary under the section to ensure payment of court-fee when the succession certificate is to be issued and cannot be considered to be court-fee payable on the application for certificate. The court-fee on the certificate is payable under Sch. I Art. 12 of the Court-fees Act and is paid after the certificate is issued i.e, after the termination of the proceedings under the Succession Act. (Vol 22) 1935 All. 735 (736) (DB).

[5] Clauses (2) and (3) of the section should be read together. If the order for grant of certificate has been made the sum in deposit becomes at once legally appropriated, as duty, to the extent of the debt covered by the order and cannot be refunded. ('98) 21 Mad. 241 (242) (DB).

[6] Further court-fee has to be paid by a Hindu daughter on an application for a certificate in succession to her mother in respect of her father's property for which succession certificate was obtained on payment of the prescribed court-fee by the mother when she succeeded. (Vol 4) 1917 Cal. 380 (381) (DB).

[7] An applicant is entitled to a refund of the deposit made by him under S 379 (1) with his application for a succession certificate when his application is dismissed for his failure to furnish the security subject to which his application was allowed and the deposit has not been expended under S. 379 (2). (Vol 28) 1941 Lah 399 (400) : I L R (1942) Lah. 74 & (Vol 27) 1940 Nag. 65 (66) : ILR (1941) Nag. 576.

SECTION 381 — SYNOPSIS

1. Scope and applicability.
2. Rights of persons to whom succession certificate is granted.
3. Judgment-debtor cannot resist certificate holder's claim.
4. Payment to certificate holder effects valid discharge of debts.

1. Scope and applicability. — [1] Provisions of S. 381 are not applicable to Crown where the property vests in Crown by escheat and no succession certificate is necessary for Secretary of State for realization of debt due to person dying heirless. (Vol 19) 1932 All 220 (221): 54 All 226.

[2] Section 381 does not apply to the provident fund of a Railway Employee in deposit with the railway company as such fund is neither a debt nor a security payable to the employee as mentioned in the section. (Vol 24) 1937 Cal 314 (318) (D B).

[3] A mortgage is not a debt within the meaning of S. 381. (Vol 25) 1938 Pat 68 (68) (D B). (Production of succession certificate is not sufficient title to sue on the mortgage.)

[4] The object of a grant of succession certificate is to facilitate the collection of debt due to a deceased creditor. (Vol 17) 1930 Lah 700 (700).

[5] The succession certificate is intended to facilitate collection of debts, regulate administration of succession and to protect persons who deal with the alleged representatives of deceased person against the contingency which occurs when disputes arise as to whether a claimant is or is not entitled as such personal representative. (Vol 3) 1916 All 233 (234): 38 All. 474 (D B).

[6] The object in granting a certificate is firstly to enable the debtors to pay the debts due by them with safety to the representatives of deceased Hindus etc.; and secondly to facilitate the collection of such debts by removing all doubts as to the legal title to demand and receive the same. In other words, the object is to enable debtors to get sufficient acquittances when they pay money due to the estate of the deceased; and to preserve that estate from loss by giving some one the right to collect lest the debts should be lost by limitation or otherwise. ('82) 8 Cal 868 (869, 870) (D B).

[7] Certificate obtained by a wrong person is still conclusive against the debtor. (Vol 15) 1928 Mad 213 (213).

[8] Until revoked the succession certificate must be deemed to be valid. (Vol 21) 1934 Lah 79 (79).

[9] On the death of one of the persons to whom the certificate is granted jointly the certificate becomes wholly inoperative and the rest of them cannot exercise any powers under it. (Vol 28) 1941 Cal. 663 (666): ILR (1941) 2 Cal 311 (D B).

2 Rights of person to whom succession certificate is granted. — [1] Person who has been granted a succession certificate obtains a conclusive title to recover what is due to the estate of the deceased. ('12) 35 Mad. 162 (163) (D B). (Insurance company cannot

382. Where a certificate in the form, as nearly as circumstances admit, of Schedule VIII has been granted [a][to a resident within an Acceding State by a District Judge of that State, or] to a resident within a Foreign State by the [b][representative of India] accredited to the State, or where a certificate so granted has been extended in such form by [c][such Judge or representative], the certificate shall, when stamped in accordance with the provisions of the Court-fees Act, 1870, with respect to certificates under this Part, have the same effect in British India as a certificate granted or extended under this Part.

Effect of certificate granted or extended by British representative in Foreign State.

[Succession Certificate Act, 1889—S. 17.]

[a] *Inserted* by the Indian Independence (Adaptation of Central Acts and Ordinances) Order, 1948. [23-3-1948.]
[b] *Substituted* for 'British representative', *ibid.* [c] *Substituted* for 'such representative', *ibid.*

Section 381—Note 2 *(contd.)*

refuse to pay the certificate holder amount due on the policy of the deceased) ✠ (Vol 21) 1934 Lah. 79 (79) (Therefore in a suit based on the certificate the question of title to the amount concerned cannot be raised.)

[2] The holder of a succession certificate who has to collect the debt due to the estate of the minor cannot be compared with a certificated guardian. The succession certificate holds good until the minor takes steps on attaining majority to revoke it and does not become void as soon as he attains the age of eighteen. Therefore any payments made to the certificate holder is not an unauthorised payment. (Vol 11) 1924 Bom. 394 (395) (D B).

[3] The grant of a succession certificate does not establish the title of the grantee as the heir of the deceased but only furnishes him with an authority to collect debts and allows the debtors to make payments to him without incurring any risk. (Vol 3) 1916 Lah. 277 (279)✠(Vol 28) 1941 Cal 663 (666): I L R (1941) 2 Cal. 311 (D B)✠(Vol 24) 1937 Rang. 274 (274).

[4] Grant of succession certificate in respect of debts and securities not merely empowers the person to whom it is granted to receive interest or dividends on the securities but also to negotiate or transfer them. (Vol 30) 1943 Mad 743 (746).

[5] Grant of succession certificate does not entitle the holder to recover possession of properties movable and immovable. ('09) 1 Ind Cas 205 (206) (D B) (Cal.)

[6] Grantee of succession certificate does not thereby acquire a general power of administration of the estate of the deceased. (Vol 3) 1916 Cal 475 (476) (D B).

[7] The holder of a succession certificate is not entitled to compromise without the intervention of Court. (Vol 11) 1924 Bom. 394 (394) (D B).

3. Judgment-debtor cannot resist certificate holder's claim.— [1] Where the debt remains unpaid upto the grant of the certificate the certificate is conclusive and compels the debtors to pay it to the certificate holder. (Vol 13) 1926 Mad 407 (408).

[2] Debtor must pay the debt to the certificate holder even if there is litigation regarding the devolution of property. (Vol 15) 1928 Mad. 56 (57) (D B).

[3] Holder of succession certificate suing to recover from a person with whom the deceased had deposited certain money which was covered by the certificate — Latter pleading oral will under which he claimed that he was appointed trustee with directions to spend on funeral expenses of deceased and in certain charities — Defendant failing to prove the will —*Held* that he was bound to pay the certificate holder the debt less the funeral expenses incurred by him. (Vol 18) 1931 Sind 81 (82) (D B).

[4] Payment by debtor to person really entitled before grant of certificate affords a complete defence to the suit by the certificate holder. (Vol 13) 1926 Mad 407 (408)

[5] A judgment-debtor cannot go behind the terms of the succession certificate. (Vol 6) 1919 Cal. 985 (986) (D B).

[6] Judgment-debtor cannot resist execution by succession certificate-holders even though they are not heirs of deceased. (Vol 12) 1925 All. 66 (66, 67).

4. Payment to certificate-holder effects valid discharge of debts.— [1] Payment to grantee of the succession certificate is good discharge of the debt. (Vol 4) 1917 Mad. 1 (2) (D B) ✠ (Vol 6) 1919 Pat. 237 (238).

[2] The succession certificate affords full indemnity to all the persons who are liable on securities specified in the certificate as regards all dealings in good faith in respect of such securities. (Vol 8) 1921 Bom. 204 (205): 45 Bom 138 (D B).

[3] Even if payment is made without due care and caution, still if it is made "honestly" it will be payment "in good faith." (Vol 15) 1928 Mad. 484 (484).

[4] Section 381 does not confine question of good faith only to cases in which there has been some defect in issuing certificate but also when it is regularly obtained. ('34) 1934 Mad. W N 1047 (1050, 1051) (D B).

Section 382—Note 1.

[1] Copy of probate of a will issued by the native Court of Cutch certified by the Political Agent of Cutch —*Held* that it was not a certificate granted by a British representative in a foreign state within the meaning of the Section. ('94) 17 Mad. 14 (16) (D B).

[2] Certificate granted by Political Agent where the applicant did not give him the requisite information as to the other relatives of the family and without issuing notices to them — Irregularities may be grounds for asking the Political Agent to cancel the certificate but are not grounds for the District Court where a claim is made on the basis of the certificate to treat the certificate as a nullity. ('95) 19 Bom. 145 (149) (D B).

[3] *R* holder of a certain number of shares in Bank of Bombay dying—Succession certificate was granted in respect of those shares by the Political Agent of the State who was also the District Judge — Bank refusing to accept the certificate demanding probate of the will or letters of administration under S. 23 of the Presidency Banks Act—*Held* that the bank had the right to accept or refuse the certificate. (Vol 8) 1921 Bom. 204 (205): 45 Bom. 138 (D B).

Revocation of certificate.

383. A certificate granted under this Part may be revoked for any of the following causes, namely :—

(a) that the proceedings to obtain the certificate were defective in substance;

(b) that the certificate was obtained fraudulently by the making of a false suggestion, or by the concealment from the Court of something material to the case;

(c) that the certificate was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant thereof, though such allegation was made in ignorance or inadvertently;

(d) that the certificate has become useless and inoperative through circumstances;

(e) that a decree or order made by a competent Court in a suit or other proceeding with respect to effects comprising debts or securities specified in the certificate renders it proper that the certificate should be revoked.

[Succession Certificate Act, 1889—S. 18.]

Appeal.

384. *(1)* Subject to the other provisions of this Part, an appeal shall lie to the High Court from an order of a District Judge granting, refusing or revoking a certificate under this Part, and the High Court may, if it thinks fit, by its order on the appeal, declare the person to whom the certificate should be granted and direct the District Judge, on application being made therefor, to grant it accordingly, in supersession of the certificate, if any, already granted.

Section 383—Note 1.

[1] Ordinarily the revocation of succession certificate must be made by the Court which granted it if it still exercises jurisdiction in that district. (Vol 2) 1915 Cal 738 (739) (DB). (Certificate granted—Subordinate Judge invested with powers of District Judge—District Judge cannot revoke it.)

[2] Application for cancellation of certificate on the ground that District Court did not possess jurisdiction in the case to grant it as the deceased at the time of his death was not within its jurisdiction — The Court should insist upon evidence to support allegation and the certificate-holder should be given notice to show cause as to why the certificate should not be recalled. ('71) 6 Beng L R (App) 128 (128) (DB).

[3] No suit to annul a certificate lies. Annulment of certificate can be had only by the method provided for that purpose in the Act. ('69-70) 5 Mad H C R 283 (285) (DB) ✠ (Vol 1) 1914 All 420 (421) : 36 All 423 (D B). (Suit to set aside the certificate on the ground that it was obtained by the use of false evidence.)

[See however ('93) 16 Mad 405 (406, 407) (DB). (Certificate granted by Political Resident in Native State —Suit to set aside certificate filed in British Court— *Held* that the plaintiff could sue to declare his right in the Native State Court itself and then apply to Resident for grant of certificate or sue the Secretary of State for India making the certificate holder party to the suit.)]

[4] As a general rule the Court must be moved by the parties interested in the revocation of the certificate to exercise its authority though in certain case the Court can do so of its own motion as where a minor obtains a certificate on a fraudulent representation of his age or where an executor obtains probate of the will of a living person. ('95) 19 Bom 821 (826) (DB).

[5] The District Judge can revoke a certificate granted under a mistake of fact. ('95)19-Bom 821(826)(DB).

[6] Next friend obtaining certificate fraudulently and by concealing material facts from Court — Grant can be revoked. (Vol 25) 1938 Sind 160 (162)

[7] Misleading nature of the schedule annexed as also absence of citation to a legatee justify revocation of a certificate. (Vol 11) 1924 Pat 520 (521) (DB).

[8] The Court may of its own motion revoke a certificate if it appears that the application contained an untrue allegation of fact essential in point of law to justify the grant thereof. ('11) 11 Ind Cas 261 (262) (Sind). (Application stating that no impediment to the grant of a certificate where actually a will was in existence—Certificate was revoked.)

[9] *Obiter.*—Where a certificate is inoperative from the beginning and useless for the purpose for which it was obtained, it can be revoked with respect to that part. (Vol 30) 1943 Bom 50 (52) : I L R (1943) Bom 25 (DB).

[10] A certificate-holder does not lose the right to transfer the corpus of the debt. Such a transfer of the corpus is not to be necessarily followed by the revocation of the certificate already granted. (Vol 1) 1914 All 129 (131) : 36 All 21 (DB).

[11] Certificate in respect of entire debt granted — Subsequent change of circumstances bringing into operation cl. (d) or cl. (e) or both — Court can partially revoke the certificate or modify the terms as the interests of justice may require. (Vol 7) 1920 All 139 (140) : 42 All 347 (DB).

[12] Appeal—*See* notes on S. 384.

SECTION 384 — SYNOPSIS

1. Scope and applicability.
2. Orders in applications for extension of certificate.
3. Orders in application for revocation of certificates.
4. Orders for furnishing security.
5. Conditional orders for certificate upon the furnishing of security.
6. Other illustrative cases.
7. Sub-section (3).

1. Scope and applicability.—[1] An appeal lies against the order granting certificate and it is not necessary that the appellant should move the lower Court to revoke the certificate. (Vol 7) 1920 All 195 (195) : 42 All 512 (DB).

[2] The Court has no power to hear an appeal as to any other matters than those which are connected with the propriety or otherwise of an order made granting a certificate. ('93) 20 Cal 245 (246) (DB).

[3] Person who has consented to succession certificate being given to himself and two others jointly can-

(2) An appeal under sub-section *(1)* must be preferred within the time allowed for an appeal under the Code of Civil Procedure, 1908.

(3) Subject to the provisions of sub-section *(1)* and to the provisions as to reference to and revision by the High Court and as to review of judgment of the Code of Civil Procedure, 1908, as applied by section 141 of that Code, an order of a District Judge under this Part shall be final.

[Succession Certificate Act, 1889—S. 19.]

Effect on certificate of previous certificate, probate or letters of administration.

385. Save as provided by this Act, a certificate granted thereunder in respect of any of the effects of a deceased person shall be invalid if there has been a previous grant of such a certificate or of probate or letters of administration in respect of the estate of the deceased person and if such previous grant is in force.

[Succession Certificate Act, 1889—S. 20.]

Validation of certain payments made in good faith to holder of invalid certificate.

386. Where a certificate under this Part has been superseded or is invalid by reason of the certificate having been revoked under section 383, or by reason of the grant of a certificate to a person named in an appellate order under section 384, or by reason of a certificate having been previously

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Section 384—Note 1 *(contd.)*

not challenge its validity by way of appeal. ('13) 35 All 470 (471) (DB).

[4] The section refers only to appeals and there is no provision for filing a memorandum of objection. As the memorandum is in the nature of a cross-appeal the probable intention of the Act is that the respondent should also prefer an appeal. ('95) 5 Mad L Jour 36 (38).

[5] An order will not be interfered with merely on the ground that there was some formal defect. (Vol 22) 1935 Pat 478 (479) (DB).

[6] No second appeal lies in any case as both Ss. 384 and 388 declare that the orders of the District Court shall be final. ('94) 17 Mad 167 (167) (DB).

[7] Any express provision in the Act conferring rights of appeal, revision or review does not render the provisions of Civil P. C., regarding procedure inapplicable to the Act. (Vol 14) 1927 Sind 187 (189) (DB).

[8] Senior Sub-Judge taking cognizance of proceedings under Succession Act acts as District Judge under S. 23 (3) of N. W. F. P. Courts Regulation, 1931, and therefore, appeal from his order lies to Judicial Commissioner's Court under S. 384. (Vol 26) 1939 Pesh 30 (33) (DB).

2. Orders in applications for extention of certificate [1]— The extension of a certificate to additional debts is not the grant of a certificate so as to give a right of appeal against the extension. ('02) 25 Mad 634 (635) (DB).

[2] Order refusing extension of certificate under S. 10 is appealable. (Vol 11) 1924 Cal 208 (208) (D B).

3. Orders in application for revocation of certificates. [1] Order refusing to revoke a certificate is not appealable. (Vol 20) 1933 Lah 56 (56), (Especially where the application does not pray for the grant of a certificate.) ✠ (Vol 30) 1943 Bom 50 (51) : I L R (1943) Bom 25 (DB) ✠ (Vol 18) 1931 All 242 (243) (DB).

[2] Where an application is made not only for revocation of a succession certificate which had been granted but also for the grant of a certificate to the applicant, an order dismissing the application is open to appeal. (Vol 33) 1946 Pat 415 (417) : 25 Pat 253 (DB).

4. Orders for furnishing security.—[1] No appeal lies against an order directing security to be taken. ('10) 7 Mad L Tim 246 (246) (DB) ✠ ('95) 5 Mad L Jour 36 (38).

[2] No appeal lies as to the form of the security taken by the Judge in his discretion. ('95) 5 Mad L Jour 36 (38).

[3] The question as to whether the security accepted as sufficient is worth it or not is not a question involving the propriety or otherwise of granting a certificate and therefore is not appealable under this section. ('93) 20 Cal. 245 (246) (DB).

5. Conditional orders for certificate upon the furnishing of security.—[1] Order granting certificate accompanied by condition that security should be given is appealable. ('12) 36 Bom 272 (275) (DB). ✠('98) 25 Cal 320 (321) (DB) ✠('97) 20 Mad 442 (443): (DB) ✠('09) 1909 Pun L R No. 4, page 21 (24) (DB).

[See however (Vol 19) 1932 Pat 117 (119): 10 Pat. 835 (DB). (Where a succession certificate is granted to a person on his furnishing security no appeal lies against that part of the order which deals with the furnishing of security.)]

[But see ('05) 2 All L Jour 606 (607) (DB) ✠ ('04) 26 All. 173 (176, 177) (DB)]

[2] An order to the effect that no certificate will be granted unless security is furnished is not an order either actually granting or refusing a certificate and is therefore not appealable. (Vol 8) 1921 Nag 77 (77, 78).

6. Other illustrative cases.—[1] Order rejecting an application for review of an order granting such application is not appealable. (Vol 4) 1917 All 218 (218, 219) (DB).

[2] District Judge declining certificate but ordering that he would consider an application in a different form if made: *Held* the order was appealable. (Vol 1) 1914 Cal. 369 (370): 42 Cal. 10 (DB).

7. Sub-section (3).—[1] Where in the exercise of his jurisdiction the District Judge acts illegally and with material irregularity the High Court can interfere in revision. ('10) 11 Cal L Jour 521 (522, 523) (DB).

Section 385—Note 1

[1] Succession certificate in respect of property for which probate has already been granted is invalid. (Vol 17) 1930 Lah 574 (575).

[2] Political agent granting certificate—Irregularities in procedure does not make it a nullity and unless cancelled by the political agent himself no Court can issue another certificate. ('95) 19 Bom 145 (148, 149) (DB).

granted, or for any other cause, all payments made, or dealings had, as regards debts and securities specified in the superseded or invalid certificate, to or with the holder of that certificate in ignorance of its supersession or invalidity, shall be held good against claims under any other certificate.

[Succession Certificate Act, 1889—S. 22.]

Effect of decisions under this Act, and liability of holder of certificate thereunder.

387. No decision under this Part upon any question of right between any parties shall be held to bar the trial of the same question in any suit or in any other proceedings between the same parties, and nothing in this Part shall be construed to affect the liability of any person who may receive the whole or any part of any debt or security, or any interest or dividend on any security, to account therefor to the person lawfully entitled thereto.

[Succession Certificate Act, 1889—S. 25.]

Investiture of inferior Courts with jurisdiction of District Court for purposes of this Act.

388. *(1)* The [a][Provincial Government] may, by notification in the [b][Official Gazette], invest any Court inferior in grade to a District Judge with power to exercise the functions of a District Judge under this Part.

(2) Any inferior Court so invested shall, within the local limits of its jurisdiction, have concurrent jurisdiction with the District Judge in the exercise of all the powers conferred by this Part upon the District Judge, and the provisions of this Part relating to the District Judge shall apply to such an inferior Court as if it were a District Judge:

Provided that an appeal from any such order of an inferior Court as is mentioned in sub-section *(1)* of section 384 shall lie to the District Judge, and not to the High Court, and that the District Judge may, if he thinks fit, by his order on the appeal, make any such declaration and direction as that sub-section authorises the High Court to make by its order on an appeal from an order of a District Judge.

(3) An order of a District Judge on an appeal from an order of an inferior Court under the last foregoing sub-section shall, subject to the provisions as to reference to and revision by the High Court and as to review of judgment of the Code of Civil Procedure, 1908, as applied by section 141 of that Code, be final.

(4) The District Judge may withdraw any proceedings under this Part from an inferior Court, and may either himself dispose of them or transfer them to another such Court established within the local limits of the jurisdiction of the District Judge and having authority to dispose of the proceedings.

(5) A notification under sub-section *(1)* may specify any inferior Court specially or any class of such Courts in any local area.

Section 387—Note 1.

[1] No title can be judicially determined between the parties as a result of an enquiry made under the Act. The enquiry the Judge is bound to make is only for the purpose of ascertaining as to which title was made out for the purpose of the legal requirements of the Act. ('77-78) 3 Cal 616 (618) (DB).

[2] The value of succession certificate in proving title is nil. ('38) 1938 R D 42 (42) (DB). (*N*, a Muhammadan, died leaving three residuaries and his heir the widow *S*—*S*, who was in possession, disputed the residuaries' claim to a 12 annas share as heirs of the sister of *N* in mutation proceedings under U. P. Land Revenue Act—The residuaries obtained succession certificate—*Held* that the widow could challenge the finding that they were residuaries.)

[3] Decision in a proceeding for the grant of succession certificate is not conclusive and the same question may be tried in any other suit or proceedings between the same parties. (Vol 7) 1920 Lah 497 (498) ✠(Vol 11) 1924 Lah 493 (494): 5 Lah 105 (DB) ✠ (Vol 24) 1937 Lah. 196 (198). (The grant of a certificate to a person does not give him an absolute right to the debt.)

[4] In view of this section, a finding as to relationship in proceedings for the grant of succession certificate is not a bar to the trial of the same question between the same parties in a proceeding for the grant of letters of administration. (Vol 12) 1925 Oudh 670 (670).

[5] Proceeding under this Act does not bar suit on title. ('85) 11 Cal 301 (307): 12 Ind App 23 (PC).

[6] British Resident of Cochin granting certificate to *K* domiciled in Cochin to recover certain sums due as interest on securities—*A* who also was a domicile sued to establish his right to recover the amount in British Cochin Court: *Held* that *A*'s suit was one for setting aside the certificate of heirship issued by the Political Resident and also that he could either sue in the Native Cochin Court to establish his right and then apply to the Resident for the issue of a certificate or sue the Government of India making *K* a party to the suit. ('93) 16 Mad 405 (406, 407) (DB).

Section 388 — Note 1.

[1] Sub-Judge, second class, invested with powers of District Court can entertain application for a succession certificate in respect of debts exceeding rupees five thousand. (Vol 7) 1920 Lah 497 (498).

[2] The section gives the District Court the same appellate authority over an order of an inferior Court as is conferred on the High Court over the order of a District Court. ('94) 17 Mad 167 (167) (D B).

(6) Any civil Court which for any of the purposes of any enactment is subordinate to, or subject to the control of, a District Judge shall, for the purposes of this section, be deemed to be a Court inferior in grade to a District Judge.

[Succession Certificate Act, 1889—S. 26]

[a] *Substituted* by A. O. for "Local Government." [b] *Substituted* by A. O. for "local official Gazette."

Surrender of superseded and invalid certificates.

389. *(1)* When a certificate under this Part has been superseded or is invalid from any of the causes mentioned in section 386, the holder thereof shall, on the requisition of the Court which granted it, deliver it up to that Court.

(2) If he wilfully and without reasonable cause omits so to deliver it up, he shall be punishable with fine which may extend to one thousand rupees, or with imprisonment for a term which may extend to three months or with both.

[Succession Certificate Act, 1889—S. 27.]

Provisions with respect to certificates under Bombay Regulation VIII of 1827.

390. Notwithstanding anything in Bombay Regulation No. VIII of 1827, the provisions of section 370, sub-section *(2)*, section 372, sub-section *(1)*, clause *(f)*, and sections 374, 375, 376, 377, 378, 379, 381, 383, 384, 387, 388 and 389 with respect to certificates under this Part and applications therefor, and of section 317 with respect to the exhibition of inventories and accounts by executors and administrators, shall, so far as they can be made applicable, apply, respectively, to certificates granted under that Regulation, and applications made for certificates thereunder, after the 1st day of May, 1889, and to the exhibition of inventories and accounts by the holders of such certificates so granted.

[Succession Certificate Act, 1889—S. 28.]

PART XI.

MISCELLANEOUS.

Saving.

391. Nothing in Part VIII, Part IX or Part X shall—

(i) validate any testamentary disposition which would otherwise have been invalid;

(ii) invalidate any such disposition which would otherwise have been valid;

(iii) deprive any person of any right of maintenance to which he would otherwise have been entitled; or

(iv) affect the Administrator General's Act, 1913.

[Probate and Administration Act, 1881—S. 149.]

392. *[Repeals.] Repealed by the Repealing Act, 1927 (XII [12] of 1927), S. 2 and Schedule.*

Section 388 — Note 1 *(contd.)*

[3] The inferior Court invested with the powers of District Judge under S. 388 (1) does not become a District Court but merely exercises certain functions of the District Judge under Part 10 of the Act. (Vol 27) 1940 Nag 162 (162).

[4] Appeals against orders granting, refusing or revoking a certificate passed by the Subordinate Judge invested with powers under the Act will lie to the District Judge only and not to the High Court. ('20) 2 Lah L Jour 312 (313) ✠ ('13) 16 Oudh Cas 197 (198) (DB)✠(Vol 4) 1917 Lah 276 (277). (Senior Subordinate Judge rejecting application for a succession certificate appeal lies to the District Court and not to the High Court.)

[5] Powers of District Court in a particular area taken away and Subordinate Judge invested with the same — Subordinate Judge exercising power in respect of the grant of certificate does so in his capacity as Subordinate Judge and not as Additional District Judge and therefore appeals from his orders lie to the District Court only and not to the High Court. (Vol 27) 1940 Nag 162 (162).

[6] Munsiff invested with powers of District Judge under this section — Appeal from his orders lies to the District Judge only —The District Judge cannot transfer the appeal to a subordiate Court for disposal. ('12) 34 All 148 (149).

[7] Where there has been no notification under sub-section (1) by the Local Government proviso to sub-section (2) will not apply. (Vol 26) 1939 Pesh 30 (32) (DB) ✠ (Vol 25) 1938 Pesh 62 (62). (Subordinate Judge invested with power but not by a notification issued by the local Government under this section — *Held* that the normal course of appeal would prevail and an appeal would lie to the Judicial Commissioners Court and not to the District Court.)

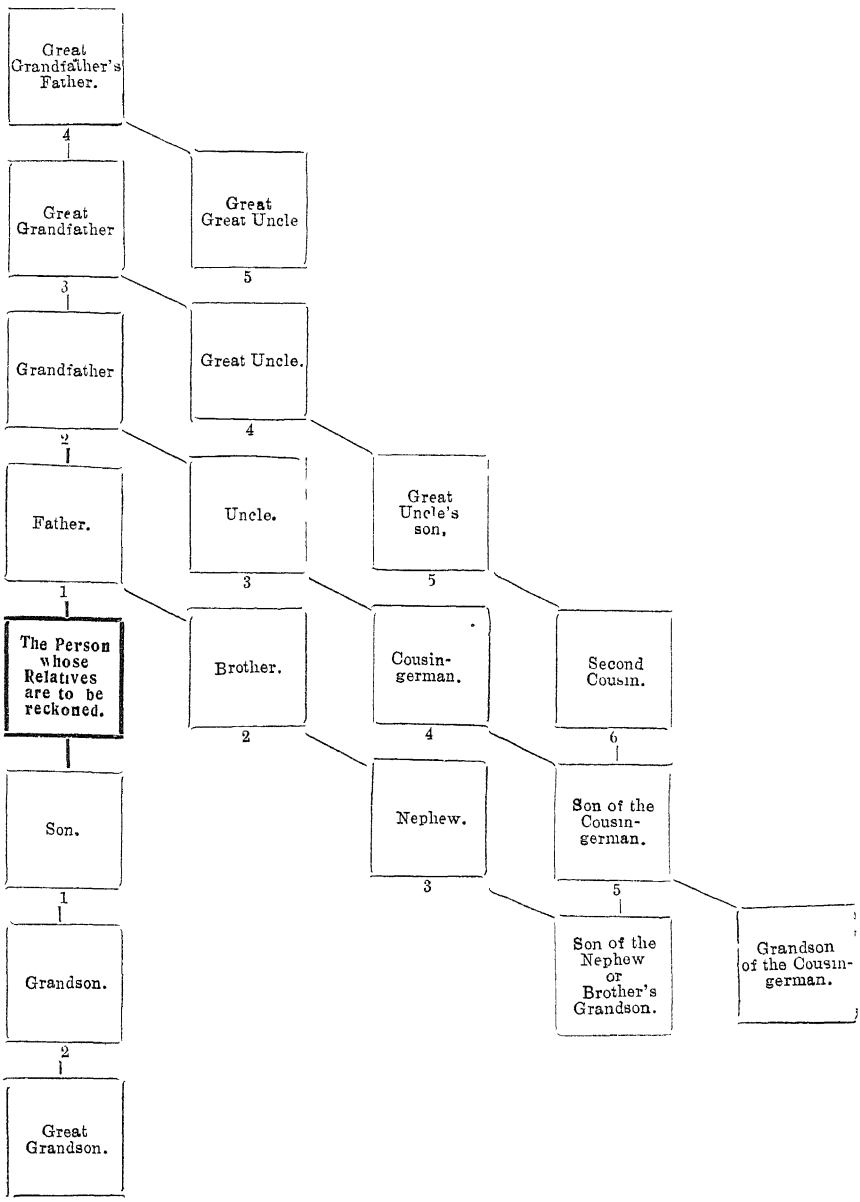
Section 390 — Note 1.

[1] Appeal against the refusal to revoke an order to deliver property under Chap. 2 Bombay Regulation 8 of 1827—Pleader's fee chargeable under Bombay Pleaders Act and included in the security for costs to be deposited by the appellant whether to be a fixed fee under R. 5 Sch. 3 or *ad valorem* fees under R. 1 (c) (ii) by reading therein the words "Indian Succession Act 1925" in the place of the words 'Indian Succession Act 1865," because by S. 390 of the Succession Act 1925 S. 383 and S. 384 are made applicable to proceedings under Bombay Regulation 8 of 1827 — *Held* on a construction of Bombay Pleaders Act only a fixed fee was leviable. (Vol 14) 1927 Bom 499 (500) (D B).

SCHEDULE I.

(See section 28.)

TABLE OF CONSANGUINITY.



[a][SCHEDULE II

PART I

(See section 54.)

(1) Father and mother.

(2) Brothers and sisters (other than uterine brothers and sisters) and lineal descendants of such of them as have predeceased the intestate.

(3) Paternal grandfather and paternal grandmother.

(4) Children of the paternal grandfather and the lineal descendants of such of them as have predeceased the intestate.

(5) Paternal grandfather's father and mother.

(6) Paternal grandfather's father's children and the lineal descendants of such of them as have predeceased the intestate.

PART II

(See section 55.)

(1) Father and mother.

(2) Brothers and sisters (other than uterine brothers and sisters) and lineal descendants of such of them as shall have predeceased the intestate.

(3) Paternal grandfather and paternal grandmother.

(4) Children of the paternal grandfather and the lineal descendants of such of them as have predeceased the intestate.

(5) Paternal grandfather's father and mother.

(6) Paternal grandfather's father's children and the lineal descendants of such of them as have predeceased the intestate.

(7) Uterine brothers and sisters and the lineal descendants of such of them as have predeceased the intestate.

(8) Maternal grandfather and maternal grandmother.

(9) Children of the maternal grandfather and the lineal descendants of such of them as have predeceased the intestate.

(10) Widows of brothers or half-brothers.

(11) Paternal grandfather's son's widow.

(12) Maternal grandfather's son's widow.

(13) Widowers of deceased lineal descendants of the intestate who have not married again before the death of the intestate.

(14) Maternal grandfather's father and mother.

(15) Children of the maternal grandfather's father and lineal descendants of such of them as have predeceased the intestate.

(16) Children of the paternal grandmother and the lineal descendants of such of them as have predeceased the intestate.

(17) Paternal grandmother's father and mother.

(18) Children of the paternal grandmother's father and the lineal descendants of such of them as have predeceased the intestate.]

[a.] *Substituted* by the Indian Succession (Amendment) Act, 1939 (17 [XVII] of 1939), S. 3.

SCHEDULE III.

(See section 57.)

PROVISIONS OF PART VI APPLICABLE TO CERTAIN WILLS AND CODICILS DESCRIBED IN SECTION 57.

Sections 59, 61, 62, 63, 64, 68, 70, 71, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 95, 96, 98, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, [a][117,] 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, and 190.

Restrictions and modifications in application of foregoing sections.

1. Nothing therein contained shall authorise a testator to bequeath property which he could not have alienated *inter vivos*, or to deprive any persons of any right of maintenance of which, but for the application of these sections, he could not deprive them by will.

2. Nothing therein contained shall authorise any Hindu, Buddhist, Sikh or Jaina, to create in property any interest which he could not have created before the first day of September, 1870.

3. Nothing therein contained shall affect any law of adoption or intestate succession.

4. In applying section 70 the words "than by marriage or" shall be omitted.

5. In applying any of the following sections, namely, sections seventy-five, seventy-six, one hundred and five, one hundred and nine, one hundred and eleven, one hundred and twelve, one hundred and thirteen, one hundred and fourteen, one hundred and fifteen, and one hundred and sixteen to such wills and codicils the words "son," "sons," "child," and "children" shall be deemed to include an adopted child ; and the word "grandchildren" shall be deemed to include the children, whether adopted or natural-born, of a child whether adopted or natural-born; and the expression "daughter-in-law" shall be deemed to include the wife of an adopted son.

[a] *Inserted* by the Transfer of Property (Amendment) Supplementary Act, 1929 (21 [XXI] of 1929), S. 14.

SCHEDULE IV.

[*See section 274 (2).*]

FORM OF CERTIFICATE.

I, A. B., Registrar (*or* as the case may be) of the High Court of Judicature at (*or* as the case may be) hereby certify that on the day of , the High Court of Judicature at (*or* as the case may be) granted probate of the will (*or* letters of administration of the estate) of C. D., late of , deceased, to E. F. of and G. H. of , and that such probate (*or* letters) has (*or* have) effect over all the property of the deceased throughout the [a][Provinces of India.]

[a] *Substituted* for "whole of British India" by the Indian Independence (Adaptation of Central Acts and Ordinances), Order 1948. [23-3-1948.]

SCHEDULE V.

[*See section 284 (4).*]

FORM OF CAVEAT.

Let nothing be done in the matter of the estate of A. B., late of , deceased, who died on the day of at , without notice to C. D. of .

SCHEDULE VI.

[*See section 289.*]

FORM OF PROBATE.

I, , Judge of the District of [*or* Delegate appointed, for granting probate or letters of administration in (*here insert the limits of the Delegate's jurisdiction*)], hereby make known that on the day of in the year , the last will of , late of , a copy whereof is hereunto annexed, was proved and registered before me, and that administration of the property and credits of the said deceased, and in any way concerning his will was granted to , the executor in the said will named, he having undertaken to administer the same, and to make a full and true inventory of the said property and credits and exhibit the same in this Court within six months from the date of this grant or within such further time as the Court may, from time to time, appoint, and also to render to this Court a true account of the said property and credits within one year from the same date, or within such further time as the Court may, from time to time, appoint.

SCHEDULE VII.

(See Section 290)

FORM OF LETTERS OF ADMINISTRATION.

I, , Judge of the District of [*or* Delegate appointed for granting probate or letters of administration in *(here insert the limits of the Delegate's jurisdiction)*], hereby make known that on the day of letters of administration (with or without the will annexed, as the case may be), of the property and credits of late of , deceased, were granted to , the father (*or* as the case may be) of the deceased, he having undertaken to administer the same and to make a full and true inventory of the said property and credits and exhibit the same in this Court within six months from the date of this grant or within such further time as the Court may, from time to time, appoint, and also to render to this Court a true account of the said property and credits within one year from the same date, or within such further time as the Court may, from time to time, appoint.

SCHEDULE VIII.

(See Section 377.)

FORMS OF CERTIFICATE AND EXTENDED CERTIFICATE.

In the Court of

To A. B.

Whereas you applied on the day of for a certificate under Part X of the Indian Succession Act, 1925, in respect of the following debts and securities namely:—

Debts.

Serial number.	[a]Number of debtor.	Amount of debt, including interest, on date of application for certificate.	Description and date of instrument, if any, by which the debt is secured.

[a] *Sic.* Should be "Name."

Securities.

Serial number.	DESCRIPTION.			Market-value of security on date of application for certificate.
	Distinguishing number or letter of security.	Name, title or class of security.	Amount or par value of security.	

This certificate is accordingly granted to you and empowers you to collect those debts [*and*] [*to receive*] [*interest*] [*dividends*] [*on*] [*to negotiate*] [*to transfer*] [*those securities*].

Dated this day of .

District Judge.

In the Court of

On the application of A. B. made to me on the day of , I hereby extend this certificate to the following debts and securities, namely :—

Debts.

Serial number	Name of debtor.	Amount of debt, including interest, on date of application for extension.	Description and date of instrument, if any, by which the debt is secured.

Securities.

Serial number.	DESCRIPTION.			Market-value of security on date of application for extension.
	Distinguishing number or letter of security.	Name, title or class of security.	Amount or par value of security.	

This extension empowers A. B. to collect those debts [*and*] [*to receive*] [*interest*] [*dividends*] [*on*] [*to negotiate*] [*to transfer*] [*those securities*].

Dated this day of

District Judge.

SCHEDULE IX. — [*Enactments Repealed.*] *Repealed by the Repealing Act, 1927 (12 [XII] of 1927), S. 2 and Sch.*

(ACT XV of 1934)

CONTENTS.

SECTIONS
1. Short title, extent and commencement.
2. Definitions.
3. Declaration of controlled areas and fixing of prices.
4. Previous publication of notifications under S. 3.
5. Penalty for purchase of sugar-cane in contravention of notification under S. 3.
6. Sanction for prosecution under this Act.
7. Power of Provincial Government to make rules.
8. Power of Provincial Government to make rules.

STATEMENT OF OBJECTS AND REASONS.

"It was announced by the Honourable Finance Member in the course of his speech introducing the budget proposals for 1934-35 that the Government of India would introduce legislation which would enable Provincial Governments to apply schemes for enforcing a minimum price for cane to be paid by the factory to the grower. This decision is consequential upon the imposition of an excise duty on factory sugar. As initiative in the matter of fixing prices for cane must be left to Provincial Governments so as to suit local conditions, it is proposed that the Act should come into force in any Province on such date as the Local Government may direct. The scheme of the Bill is that after prior publication of its proposals and due consideration of the objections received, a Local Government should declare controlled areas within which purchase of cane by factories shall be limited to growers of cane or licensed persons and societies at fixed prices. In order to provide for elasticity of procedure in the administration of the scheme, it is also proposed to give wide rule-making powers to Local Governments."

—Gazette of India, 1934, Part V, page 72.

ACT HOW AFFECTED BY SUBSEQUENT LEGISLATION.

—Adapted by A. O.
—Amended in its application to the Punjab by Punj. Act IX [9] of 1943.
—Repealed in its application to:—
(a) Bihar by Bihar Act VII [7] of 1937;
(b) United Provinces by U. P. Act I [1] of 1938.

[THE] SUGAR-CANE ACT, 1934.

[ACT XV OF 1934][a]

[1st May, 1934.]

An Act to regulate the price of sugar-cane intended for use in sugar factories.

WHEREAS it is expedient, for the purpose of assuring to sugar-cane growers a fair price for their produce, to regulate the price at which sugar-cane intended to be used in the manufacture of sugar may be purchased by or for factories; It is hereby enacted as follows:—

[a]. In its application to the respective Provinces, this Act is *repealed* by the Bihar Sugar Factories Control Act, 1937 (Bih. Act VII [7] of 1937), S. 31 and the United Provinces Sugar Factories Control Act, 1938 (U. P. Act I [1] of 1938), S. 31.

Short title, extent and commencement.

1. *(1)* This Act may be called the Sugar-cane Act, 1934.

(2) It extends to the whole of British India[a], including [aa][* * *] the Sonthal Parganas.

(3) This section shall come into force at once; the remaining sections of this Act shall come into force in any Province on such date as the [b][Provincial Government] may, by notification in the [c][Official Gazette], appoint in that behalf.

[a] The expression "the whole of British India", in its application to the Dominion of India, means 'all the Provinces of India'—*See* I. O., Art. 4 (2); and, in its application to the Dominion of Pakistan, means 'all the provinces of Pakistan' — *See* P. O., Art. 4 (2); [15-8-1947]. [aa] The words "British Baluchistan and" were *omitted* by the Indian Independence (Adaptation of Central Acts and Ordinances) Order 1948 [23-3-1948]. [b] *Substituted* by A. O. for "Local Government." [c] *Substituted* by A. O. for "Local Official Gazette."

Definitions.

2. In this Act, unless there is anything repugnant in the subject or context,—

(1) "controlled area" means any area specified in a notification issued under sub-section (1) of section 3;

(2) "factory" means any premises (including the precincts thereof) wherein twenty or more workers are working or were working on any day of the preceding twelve months and in any part of which any manufacturing process connected with the production of sugar is being carried on or is ordinarily carried on with the aid of power; and

(3) "sugar" means any form of sugar containing more than ninety per cent. of sucrose.

Preamble — Note 1.

[1] The object of the Sugar-cane Act is to secure to sugarcane growers fair price and method adopted is to regulate price at which sugar-cane may be purchased by or for factories. (Scope and nature of the Act discussed.) (Vol 24) 1937 Pat 242 (244) : 16 Pat 251 : 38 Cr L Jour 750 (DB).

Provincial Amendments.

Punjab.

In S. 2—

(a) after clause (1) the following clauses shall be deemed to be *inserted*, namely,—

"(1-a) 'Cane Commissioner' means any officer specially appointed by the Provincial Government to perform the functions of a Cane Commissioner under this Act and such other duties as may be prescribed;

(1-b) 'Cane grower' means a person who cultivates cane either by himself or by members of his family or by tenants or by hired labour and who is not a member of a Cane-growers' Co-operative Society;

(1-c) 'Cane-growers' 'Co-operative Society' means a Society registered under the Co-operative Societies Act, 1912, one of the objects of which is to sell cane grown by its members;

(1-d) 'Collector' means the Collector of a district, and includes a Deputy Commissioner and any Officer specially appointed by the Provincial Government to perform the functions of a Collector under this Act;

(1-e) 'Crushing season' means the period commencing on the fifteenth day of October in any year and ending on the thirteenth day of June of the next following year;"

(b) in clause (2), the word 'and' shall be *omitted* ;

(c) after clause (2), the following clauses shall be deemed to be *inserted*, namely,—

"(2-a) 'occupier of a factory' means the person who has ultimate control over the affairs of a factory : Provided that where the affairs of a factory are entrusted to a managing agent such agent shall be deemed to be the occupier of the factory;

(2-b) 'prescribed' means prescribed by rules made under this Act;

(2-c) 'reserved area' means an area specified in order issued under S. 3-B; and".

—Punjab Act IX [9] of 1943, S. 2 [30-11-1943].

Sections 2-A to 2-C.

Punjab.

After S. 2 of the said Act, the following sections shall be deemed to be *inserted*, namely:—

"2-A. No person shall commence the construction of any building intended to be used as a factory or any extension of the plant of an existing factory which is likely to increase its capacity for crushing cane unless he has been granted a licence by the Provincial Government on such terms and conditions as may be prescribed.

Construction and extension of a factory.

2-B. *(1)* After such date as the Provincial Government may by notification in the Official Gazette specify in this behalf, no cane shall be crushed in a factory unless the occupier thereof has obtained a licence authorising him so to do.

Licences for crushing cane.

(2) A licence granted under sub-section (1), shall be subject to such terms and conditions as the Provincial Government may impose in respect of all or any of the following matters, namely:—

Conditions of licences for crushing cane.

(a) membership of any organization of the sugar industry recognised by the Provincial Government the main object of which is to regulate the sale of sugar;

(b) the price above or below which the terms and conditions on which and the persons to whom or the organizations to which or through whose agency, any variety, grade or quantity of sugar produced in the factory may be sold;

(c) the manner in which sugar produced in the factory shall be graded, marked, packed or stored for sale;

(d) the minium quantity of the cane that shall be purchased during the crushing season; and

(e) such other matters as may be prescribed, including conditions of labour.

2-C. *(1)* No factory shall commence to crush cane unless the occupier sends to the Collector a notice in the prescribed form appointing a person to be the manager of the factory for the purposes of this Act and the rules made thereunder.

Appointment of manager.

(2) Any person so appointed shall deposit as security such amount not exceeding one thousand rupees as may be prescribed.

(3) Whenever another person is appointed as manager, the occupier shall send to the Collector a written notice of the change within fourteen days from the date on which the new manager assumes charge.

(4) If no person has been appointed manager of a factory under this section, or if the person appointed as manager does not manage the factory, or has not made the requisite deposit, any person found acting as manager, or, if no such person is found, the occupier himself shall be deemed to be the manager of the factory for the purposes of this Act and the rules made thereunder."

—Punjab Act IX [9] of 1943, S. 3. [30-11-1943].

3. *(1)* The [a][Provincial Government] may, by notification in the [b][Official Gazette], declare any area specified in the notification to be a controlled area for the purposes of this Act.

Declaration of controlled areas, and fixing of prices.

(2) [c][* * *] The [a][Provincial Government] may, by notification in the [b][Official Gazette], fix a minimum price or minimum prices for the purchase in any controlled area of sugar-cane intended for use in any factory.

(3) The [a][Provincial Government] may, by notification in the [b][Official Gazette], prohibit in any controlled area the purchase of sugar-cane intended for use in any factory otherwise than from the grower of the sugar-cane or from a person licensed by the [a][Provincial Government] to act as a purchasing agent.

[a] *Substituted* by A. O. for "Local Government". [b] *Substituted* by A. O. for "local official Gazette".
[c] The words "Subject to the control of the Governor-General in Council" were *repealed* by A. O.

Provincial Amendments.

Sections 3A to 3F.

Punjab

After section 3, the following sections shall be deemed to be *inserted*, namely : —

"3-*A.* *(1)* The Provincial Government may by order require the occupier of any factory to submit to the Cane Commissioner, on or before the prescribed date, an estimate in the prescribed form of the quantity of cane which will be required in the factory during such crushing season as may be specified in the order.

Estimate of quantity of cane required by factory.

(2) The Cane Commissioner shall examine every such estimate and shall publish the same in the prescribed manner with such modifications, if any, as he may think fit.

(3) An estimate published under sub-section *(2)* may be revised by the prescribed authority.

3-*B.* *(1)* The Cane Commissioner may, after consulting the occupier of the factory and after considering any objections that may be raised, issue an order declaring any area to be a reserved area for the purpose of the supply of cane to a particular factory during the ensuing crushing season, and may likewise at any time cancel such order or alter the boundaries of an area so reserved :

Declaration of reserved area.

Provided that unless the parties concerned consent no portion of an area reserved for one factory shall, so long as the agreements entered into by the occupier of such factory with the cane growers in such area for the supply of cane remain in force, be included within the reserved area of another factory.

(2) Any person aggrieved by an order of the Cane Commissioner under sub-section *(1)* may appeal therefrom to the prescribed authority.

3-*C.* *(1)* The Provincial Government may order a survey to be made of the area reserved for a factory under section 3-B and may recover the cost of such survey from the occupier of such factory.

Survey of reserved area.

(2) Every such survey shall be made by such officer as the Provincial Government may, by general or special order, appoint in this behalf.

(3) Every person owning, or occupying land in any area in respect of which a survey is being made shall afford the officer making the survey such assistance for making the survey as may be prescribed.

(4) Any amount due from the occupier of a factory under sub-section *(1)* shall be recoverable from such occupier as an arrear of land revenue

3-*D.* *(1)* A cane-grower or a Cane-grower's Co-operative Society in a reserved area may offer to supply to the occupier of the factory for which the area is reserved, cane grown by the cane grower or by the members of such Cane-growers' Co-operative Society, as the case may be, not exceeding the quantity, if any, prescribed for such grower or Cane-growers' Co-operative Society.

Purchase of cane in reserved area.

(2) The occupier or manager of a factory for which an area is reserved shall enter into an agreement to purchase the cane offered in accordance with sub-section *(1)* :

Provided that he shall not enter into an agreement to purchase cane from a person who is a member of a Cane-growers' Co-operative Society.

(3) Except with the permission of the Provincial Government, cane grown in a reserved area shall not be purchased in such area by a purchasing agent, or by any person other than the occupier of the factory for which such area has been reserved.

(4) Cane grown in a reserved area shall not be sold by any person other than a cane grower or a Cane-growers' Co-operative Society:

Provided that a cane-grower or a Cane-growers' Co-operative Society may deliver cane intended for use in factory through another cane-grower or through a carrier.

(5) If the Provincial Government are satisfied that there is likely to be in the area reserved for a factory any quantity of cane available for sale to the occupier of the factory in excess of the quantity for which he is required to enter into agreement, the Provincial Government may, during the crushing season, direct that cane shall not be purchased outside the reserved area until the occupier of the factory enters into agreement to purchase all the cane offered to him in the reserved area;

Provided that such prohibition shall not apply in respect of cane for the supply of which agreements in writing have been entered into before such direction was issued.

3-*E.* *(1)* If any person commences the construction of a new factory or if the occupier of a factory makes any extension of the plant of the factory, in contravention of the provisions of sub-section *(1)* of section 2A, he shall be punishable with fine which may extend to five thousand rupees.

Penalties.

(2) If the occupier of a factory crushes cane without obtaining a licence under section 2B, he shall be punishable with fine which may extend to five hundred rupees for each day on which cane is crushed at the factory without such licence.

(3) If the Provincial Government are satisfied that there has been a breach of the conditions of a licence granted under section 2-B, they may refer the same for advice to a tribunal constituted in the prescribed manner, and on the advice of such tribunal, cancel the licence and impose on the occupier of the factory concerned any one or more of the following penalties, that is to say—

(a) if the breach consists of a failure to produce or to sell sugar in accordance with the conditions of the licence, the penalty may extend to an amount calculated at eight annas per maund of the sugar produced or sold in contravention of such conditions :

(b) if the breach consists of the wilful failure to purchase a minimum quantity of cane, the penalty may extend to an amount, calculated at a rate not exceeding one anna per maund of cane which he has failed to purchase; and

(c) in any other case of a breach of a condition or conditions of the licence, the penalty shall not exceed the sum of five thousand rupees.

(4) If the occupier or manager of a factory—

(a) intentionally fails to enter into agreement as required by sub-section *(2)* of section 3-D, or

(b) intentionally fails to purchase cane in accordance with the terms of an agreement entered into under sub-section *(2)* of section 3-D, or

(c) purchases cane outside a reserved area in contravention of the provisions of sub-section *(5)* of section 3-D, or

(d) knowingly enters into an agreement with a cane-grower, who is a member of a Cane-growers' Co-operative Society in contravention of the provisos to sub-section *(2)* of section 3-D.

he shall be punishable with fine which may extend to two thousand rupees.

(5) If any person knowingly purchases or sells cane in a reserved area in contravention of the provisions of sub-section *(3)* or sub-section *(4)* of section 3-D, he shall be punishable with imprisonment which may extend to six months or with fine which may extend to two thousand rupees or with both.

(6) Any person contravening any of the provisions of this Act for which no penalty is otherwise provided shall be punishable with fine which may extend to two thousand rupees.

(7) Any penalty imposed on the occupier of a factory under sub-section *(3)* shall be recoverable from such occupier as an arrears of land revenue.

Tax on sale of cane.

3-*F.* *(1)* The Provincial Government may by notification in the official gazette impose a tax on the sale of sugarcane at a rate not exceeding six pies per maund or at a rate not exceeding five per cent of the sale price, and may, by like notification, exempt from such tax sales in any area, or any class or classes of such sales to be specified therein.

(2) If any agreement for the sale of cane is entered into before the imposition of a tax under this section, the seller will be entitled to recover from the buyer in addition to, and as part of, the contract price, the amount of such tax to which the seller may be liable.

(3) Any sum payable under this section shall be recoverable as an arrear of land revenue."

Punjab Act IX [9] of 1943, S. 4 [30-11-1943]

Previous publication of notifications under section 3.

4. Not less than thirty days before the issue of any notification under sub section *(1)* or sub-section *(2)* of section 3, the [a][Provincial Government] shall publish in the [b][Official Gazette] and in such other manner (if any) as it thinks fit a draft of the proposed notification specifying a date on or after which the draft will be taken into consideration, and shall consider any objection or suggestion which may be received from any person with respect to the draft before the date so specified.

[a] *Substituted* by A. O. for "Local Government". [b] *Substituted* by A. O. for "Local Official Gazette".

Penalty for purchase of sugar-cane in contravention of notification under section 3.

5. Whoever in any controlled area purchases any sugar-cane intended for use in a factory at a price less than the minimum price fixed therefor by notification under sub-section *(2)* of section 3 or in contravention of any prohibition made under sub-section *(3)* of section 3 shall be punishable with fine which may extend to two thousand rupees.

Sanction for prosecution under this Act.

6. No Court shall take cognizance of any offence punishable under section 5 except upon complaint made by order of, or under authority from, the District Magistrate.

Power of Provincial Government to make rules.

7. *(1)* The [a][Provincial Government] may, by notification in the [b][Official Gazette], make rules for the purpose of carrying into effect the objects of this Act.

(2) In particular and without prejudice to the generality of the foregoing power, such rules may provide for—

(a) the carrying out of inquiries preliminary to the exercise of the powers conferred by section 3;

SECTION 7 — SYNOPSIS.

1. Bihar and Orissa Rules.
2. United Provinces Rules.

1. Bihar and Orissa Rules.—[1] Interpretation of rules under Sugar-cane Act, under S. 7 is controlled by General Clauses Act. (Vol 24) 1937 Pat 4 (6) : 16 Pat 92 : 38 Cr L Jour 210.

[2] Sections 63 to 70 of the I. P. C. are applicable to all fines imposed under any Act, Regulation, rule or bye-law, unless the Act, Regulation, rule or bye-law contains an express provision to the contrary. (Vol 24) 1937 Pat 4 (6) : 16 Pat 92 : 38 Cr L Jour 210.

[3] Breach of rules made under S. 7 is offence for purposes of Ss. 64, 67, Penal Code — Imprisonment in default of fine can be imposed. (Vol 24) 1937 Pat 4 (6) : 16 Pat 92 : 38 Cr L Jour 210.

[4] Rules 9 and 11 — Sanction for prosecution for breach of Rr. 9-11 obtained—Sessions Judge subsequently finding breach of R. 13 — No further sanction is required—Once bar to Court taking cognizance of case is removed, then if it appears that some other offence also has been committed, it is not necessary to have fresh complaint. (Vol 24) 1937 Pat 4 (5) : 16 Pat 92 : 38 Cr L Jour 210.

[5] Rules 11 and 13 making it obligatory on purchasing agents to buy sugarcane in a particular manner by weight are within power conferred by S. 7. (Vol 24) 1937 Pat 4 (6) : 16 Pat 92 : 38 Cr L Jour 210.

[6] Purchasing agent is also liable under R. 15 if person acting on his behalf is guilty unless it has been shown that purchasing agent had used all due diligence to enforce observance of rules and that offence was committed without his knowledge or consent. (Vol 25) 1938 Pat 366 (367) : 39 Cr L Jour 732.

[7] Rules 15 (e) and (f) have been made with the object of protecting the cultivators who are not always educated from the wiles of persons dealing with persons

(b) establishing Advisory Committees for any purpose connected with the administration of this Act and defining the powers, functions and procedure of such Committees,

(c) the issue of licences to purchasing agents, the fees for such licences, and the regulation of the purchase and sale of sugar-cane by and to such agents;

(d) the organisation of growers of sugar-cane into societies for the sale of sugar-cane to factories;

(e) the authorities by which any functions under this Act or the rules made thereunder are to be performed; and

(f) the records, registers and accounts to be maintained for ensuring compliance with the provisions of this Act.

(3) In making any rule under sub-section *(1)* or under clause *(c)* or clause *(f)* of sub-section *(2)*, the [a][Provincial Government] may provide that a breach of the rule shall, where no other penalty is provided by this Act, be punishable with fine not exceeding two thousand rupees.

[a] *Substituted* by A. O. for "Local Government". [b] *Substituted* by A. O. for "local Official Gazette".

Provincial Amendments.

PUNJAB.

In S. 7.—

(a) in sub-section (2)—

(i) in clause *(e)* the word 'and' shall be *omitted*;

(ii) after clause *(f)*, the following clauses shall be deemed to be *added*, namely,—

"*(g)* the issuing and renewal of licences, the forms and conditions of licences, the periods for which they are to be issued and the fees to be charged therefor;

(h) the amount of deposit under sub-section (2) of section 2-C;

(i) the procedure to be followed in making a survey under section 3-C, the manner of calculating the cost of such survey and the powers to be exercised and the duties to be performed by the officer making the survey;

(j) the form in which and the date by which an offer under sub-section (1) of section 3-D shall be made; and

(k) the form in which, the date by which and the terms and conditions subject to which, an agreement under sub-section (2) of section 3-D shall be entered into;"

(b) in sub-section (3), the words, brackets and letters, "under clause *(c)* or clause *(f)* of" shall be deemed to be *omitted*.

—Punjab Act IX of 1943, S. 5 [30-11-1943.]

Power of Provincial Government to make rules.

8. The [a][Provincial Government] after previous publication may, by notification in the [b][Official Gazette], make rules providing for the exemption of factories or any class of factories from the provisions of this Act.

[a] *Substituted* by A. O. for "Governor-General in Council". [b] *Substituted* by A. O. for "Gazette of India".

Section 7 — Note 1 *(contd.)*

on behalf of the purchasing agent. (Vol 25) 1938 Pat 366 (367): 39 Cr L Jour 732.

[8] District Magistrate on report of Inspector sanctioning prosecution and taking cognisance of offence under S. 190 (1) and directing examination of Inspector under S. 200 (aa), Cr. P. C. — Provisions of R. 20 are sufficiently complied with. (Vol 25) 1938 Pat 366 (367): 39 Cri L Jour 732.

[9] Rule 15 creates a number of new penal offences in connection with administration of the Act, but R. 20 debars institution of prosecution under rules except by order of, or under authority from, District Magistrate. (Vol 24) 1937 Pat 146 (146): 38 Cri L Jour 136.

[10] The Act contemplates first a sanction by the District Magistrate and secondly a complaint to a Court within a period of limitation prescribed and then the trial of the person complained against according to the procedure prescribed by the Criminal Procedure Code. (Vol 24) 1937 Pat 146 (146): 38 Cri L Jour 136.

2. United Provinces Rules.—[1] Rule 8 (2) relates only to weighments. It has nothing to do with payment with which R. 9 deals. Weight has to be ascertained only for purpose of payment. (Vol 24) 1937 All 423 (423): 38 Cri L Jour 795.

[2] Rule 9 (4)—Rule 9 deals with payment. It provides for an allowance for half a seer per full maund in case the cane is brought bound in bundles and weighed in bundles. (Vol 24) 1937 All 423 (423): 38 Cri L Jour 795.

[3] Rule 9 (1) and R. 12 (2) (a)—Breach of R. 9 (1) by licensed purchasing agent — Conviction cannot stand. (Vol 24) 1937 Oudh 386 (387): 13 Luck 252: 38 Cri L Jour 532.

[4] Two persons acting jointly as agents of person mentioned in R. 13—Both can be convicted in respect of price of same cane purchased on same day. (Vol 26) 1939 Oudh 36 (37): 40 Cri L Jour 161: 14 Luck 342.

[5] Sub-rule (1) *(i)* of R. 13 has to be read with R. 11 (7). Under R. 11 (7), registers and records shall be kept at purchasing centre. What sub-rule (1) *(i)* of R. 13 means is that all registers and records as required by R. 11 (7) shall be kept at purchasing centre and shall be produced for inspection when asked for by Inspector. (Vol 25) 1938 Oudh 56 (57): 39 Cri L Jour 160.

[6] Section 7 — Rules under (U. P.) R. 14 — Word "shall" in part 2 of the rule deals with complaint made by District Magistrate. When there is a complaint by a District Magistrate presumption is that he has satisfied himself that there was general complaint of non-payment within prescribed time. On complaint by a District Magistrate Court is competent to take cognisance. (Vol 24) 1937 All 421 (421): 38 Cri L Jour 800.

[THE] SUGAR INDUSTRY (PROTECTION) ACT, 1932

(ACT XIII OF 1932)[a].

[8th April, 1932.]

An Act to provide for the fostering and development of the sugar industry in [b][*the Provinces of India*]

WHEREAS it is expedient, in pursuance of the policy of discriminating protection of industries in [b][the Provinces of India] with due regard to the well-being of the community, to provide for the fostering and development of the sugar industry for a period ending with the 31st day of March, [c][1948], by determining the extent of the protection to be conferred up to the 31st day of March, 1938, and by making provision for the determination of the extent of the protection to be conferred for the remainder of the period; It is hereby enacted as follows:—

[a] For Statement of Objects and Reasons, *see* Gazette of India, 1932, Pt. V, p. 43; for Report of Select Committee, *see ibid.*, p. 91 [b] *Substituted* for "British India" by the Indian Independence (Adaptation of Central Acts and Ordinances) Order, 1948 [23-3-1948]. [c] *Substituted* by the Indian Tariff (Amendment) Act, 1947 (25 [XXV] of 1947), S. 3 [18-4-1947], for "1947" which had been *substituted* by the Protective Duties Continuation Act, 1946 (16 [XVI] of 1946), S. 3, for "1946." [18-4-1946.]

Short title. **1.** This Act may be called the Sugar Industry (Protection) Act, 1932.

2. Amendment of Sch. II, Act (VIII [8] OF 1894). *[Repealed by the Repealing Act, 1938 (I [1] of 1938), S. 2 and Schedule.]*

Statutory inquiry. **3.** The [a][Central Government] shall cause to be made, by such persons as [b][it] may appoint in this behalf, an inquiry to ascertain if the protection of the sugar industry during the period from the 31st day of March, 1938, to the 31st day of March, [c][1948], should be continued to the extent conferred by this Act or to a greater or lesser extent, and shall, not later than the 31st day of March, [c][1948], lay [d][its] proposals in this behalf before the [e][Central Legislature].

[a] *Substituted* by A. O. for "Governor-General in Council". [b] *Substituted* by A. O. for "he". [c] *Substituted* for "1947" by the Indian Tariff (Amendment) Act, 1947 (25 [XXV] of 1947), S. 3. [18-4-1947.] [d] *Substituted* for "his" by A. O. [e] *Substituted* for "Indian Legislature" by the Indian Independence (Adaptation of Central Acts and Ordinances) Order, 1948. [23-3-1948.]

Power to increase duty imposed by section 2. **4.** If the [a][Central Government] is satisfied after such inquiry as [b][it] thinks fit, that sugar not manufactured in India is being imported into British India at such a price as is likely to render insufficient the benefits intended to be conferred upon the sugar industry by the duties imposed by section 2, [b][it] may, by notification in the [c][Official Gazette], increase such duty to such extent as [b][it] thinks fit.

[a] *Substituted* by A. O., for "Governor-General in Council". [b] *Substituted* by A. O., for "he". [c] *Substituted* by A. O., for "Gazette of India".

Power to make rules requiring returns. **5.** The [a][Central Government] may, by notification in the [b][Official Gazette], make rules requiring the owners of sugar factories in British India to make such returns relating to the production of sugar in their factories as the [a][Central Government] may consider to be desirable, prescribing the form of such returns, the dates of their submission and the authority to which they shall be submitted.

[a] *Substituted* by A. O., for "Governor-General in Council." [b] *Substituted* by A. O., for "Gazette of India."

Power to make rules requiring notices of prices of sugar-cane to be posted up in sugar factories. **6.** *(1)* The [a][Provincial Government] may, by notification in the [b][Official Gazette], make rules requiring that there shall be affixed, in conspicuous places near the entrances to sugar factories, notices for the information of sellers of sugar-cane, and such rules may prescribe the form and languages of such notices, and the particulars to be included therein relating to prices at which suger-cane is being bought at the factory.

(2) In making such rules the [a][Provincial Government] may provide that a contravention thereof shall be punishable with fine which may extend to five hundred rupees.

Explanation. — In this section and in section 5 "factory" has the meaning assigned to it in clause *(3)* of section 2 of the Indian Factories Act, 1911.[c]

[a] *Substituted* by A. O., for "Local Government". [b] *Substituted* by A. O., for "Local Official Gazette". [c] *See* now the Indian Factories Act, 1934 (25 [XXV] of 1934), S. 2 (j).

SCHEDULE. — [Amendments to be made in Sch. II to the Indian Tariff Act, 1894.] *Repealed by the Repealing Act, 1938 (I [1] of 1938), S. 2 and Schedule.*

Preamble — Note 1

[1] Sugar Industry (Protection) Act, 1932, (Central) is not Federal law. (Vol 29) 1942 All 156 (161, 162): I L R (1942) All 302: 43 Cr. L Jour 674.

[THE] SUGAR (TEMPORARY EXCISE DUTY) ACT, 1947.

(Act IX of 1947)[a]

An Act to provide for the completion of the temporary excise duty on sugar.

[11th March, 1947.]

WHEREAS the duty of excise on sugar levied by the Sugar (Temporary Excise Duty) Ordinance, 1946, cannot be fully recovered before the expiry of the said Ordinance[b];

AND WHEREAS it is expedient to make provision for the completion of the recovery of the said duty, and for a certain incidental matter;

It is hereby enacted as follows:—

[a] For Statement of Objects and Reasons, *see* Gazette of India, 1947, Part V, page 28 [b] This Ordinance No. XXV of 1946 was published in the Gazette of India, Extra-ordinary, dated 23-10-1946.

Short title and extent.

1. *(1)* This Act may be called the Sugar (Temporary Excise Duty) Act, 1947.

(2) It extends to the whole of British India.[a]

[a] The expression "the whole of British India", in its application to the Dominion of India, means "all the Provinces of India" — *See* I. O., Art. 4 (2); and, in its application to the Dominion of Pakistan, means "all the Provinces of Pakistan"—*See* P. O., Art. 4 (2). [15-8-1947.]

Continuance of provisions for recovering excise duty on sugar.

2. The expiry[a] in due course of the Sugar (Temporary Excise Duty) Ordinance, 1946, shall not affect the liability to pay the duty levied thereby or the liability to any penalty or punishment incurred thereunder, and for the purposes of completing and enforcing the recovery of the said duty and penalties, all the provisions of the said Ordinance shall, on its expiry, continue to have effect as if they were enacted in this Act.[b]

[a] That is 22nd April 1947. [b] For the full text of the Sugar (Temporary Excise Duty) Ordinance, 1946, *see* Appendix to this Act.

Effect of levy of duty on certain sales.

3. Without prejudice to the provisions of section 64A of the Indian Sale of Goods Act, 1930, where in any contract for the sale of any sugar on which a duty of excise was levied by the Sugar (Temporary Excise Duty) Ordinance, 1946, the seller was prevented by the operation of any law then in force from adding to or including in the contract price an amount equivalent to the duty payable on the sugar, he shall, provided that he has paid the said duty or that there was included in the price which he himself paid for the sugar an amount equivalent as aforesaid, be entitled to be paid such amount by the buyer and to sue for and recover such amount.

APPENDIX

(*See* Section 2 of the Sugar (Temporary Excise Duty) Act, 1947.)

SUGAR (TEMPORARY EXCISE DUTY) ORDINANCE, 1946.

(NO. XXV OF 1946.)

[23rd October, 1946.]

An Ordinance to impose a temporary duty of excise on certain sugar produced in British India.

WHEREAS an emergency has arisen which makes it necessary to impose a temporary duty of excise on certain sugar produced in British India;

AND WHEREAS the Indian Legislature is not in session;

NOW, THEREFORE, in exercise of the powers conferred by section 72 of the Government of India Act, as set out in the Ninth Schedule to the Government of India Act, 1935 (26 Geo. 5, c. 2), the Governor-General is pleased to make and promulgate the following Ordinance:—

Short title, extent and commencement.

1. *(1)* This Ordinance may be called the Sugar (Temporary Excise Duty) Ordinance, 1946.

(2) It extends to the whole of British India.

(3) It shall come into force at once.

Definitions.

2. In this Ordinance, unless there is anything repugnant in the subject or context,—

(a) "Assessing Officer" and "Circle Officer" mean, respectively, any officer appointed by the Provincial Government or by the Collector of Central Excise having jurisdiction in the area to exercise the powers of an Assessing Officer or a Circle Officer under this Ordinance;

(b) "Assistant Collector" means an Assistant Collector of Central Excise and includes any officer specially authorised by the Central Board of Revenue or by the Provincial Government to exercise in any specified area all or any of the powers of the Assistant Collector for the purposes of this Ordinance;

(c) "factory" means any premises wherein or within the precincts of which the production of sugar or any process connected with the production of sugar is being or has been carried on with the aid of power on any day of the twelve months preceding the date of the commencement of this Ordinance;

(*d*) "sugar" means any form of sugar containing more than ninety per cent. of sucrose but excludes the following :—

(i) Khandsari sugar, that is to say, sugar in the manufacture of which neither a vacuum pan nor a vacuum evaporator is employed ;

(ii) Palmyra sugar, that is to say, sugar manufactured from jaggery obtained by boiling the juice of the palmyra palm ;

(*e*) "wholesale dealer" means any person who buys or sells sugar wholesale and includes a broker or commission agent who in addition to making contracts for the sale or purchase of sugar for others, stocks sugar belonging to others as an agent for the purpose of sale.

Imposition of duty.

3. A duty of excise shall be levied, and shall be payable to the Central Government, on all sugar produced in any factory in British India before the commencement of this Ordinance and owned or possessed at the commencement of this Ordinance by an owner of a factory or by a wholesale dealer, at the rate of four rupees and four annas per standard maund.

Disclosure of stocks.

4. Every person owning or possessing sugar liable to the duty imposed by section 3 shall, within seven days of the date of the commencement of this Ordinance submit to the Assessing Officer having jurisdiction in the area a full account in writing, containing the particulars entered in Form A set out in the Schedule and verified in the manner indicated in that form, of all sugar in his ownership or possession on the date of the commencement of this Ordinance, and shall specify therein the place where such sugar is stored and, if it is in transit from one place to another, the date, place and manner of despatch, its destination, the name and address of the consignee, and the date on which it is expected to reach such destination.

Assessment and payment of duty.

5. (*1*) On receipt of the return referred to in section 4 and after such further enquiry, if any, as he may think necessary, the Assessing Officer shall assess the duty payable on the sugar. If no return is submitted within the period specified in section 4, the Circle Officer, or, if the sum assessed exceeds two hundred rupees, the Assistant Collector, may at any time make a summary assessment of the duty on such information as may be available to him.

(*2*) The amount so assessed shall be communicated in writing to the person owning or possessing the sugar with the particulars contained in Form B as set out in the Schedule; and that person shall within ten days of such communication, unless he obtains permission under sub-section (3) to pay by instalments, pay it into the local Treasury or any other Treasury approved by the Assessing Officer.

(*3*) Such payment may, with the permission of the Assessing Officer obtained when the assessment is communicated under sub-section (2), be made in instalments not more than three in number, of which, when three instalments are allowed, the first shall be not less than one-third of the total amount due and shall be paid within ten days of such communication, and the second shall be not less than one-half of the balance due and shall be paid within thirty days thereafter, and the third shall be paid within a further period of thirty days; and, when two instalments are allowed, the first shall be not less than one-half of the total amount due and shall be paid within thirty days of such communication and the second shall be paid within a further period of thirty days.

Recovery of duty with penalty.

6. If the duty payable under section 3 is not paid in full within the period allowed or if any instalment is not paid in full by the time fixed by section 5, the Circle Officer, or, if the deficit exceeds one hundred rupees, the Assistant Collector may, in lieu of the amount left unpaid, recover any sum not exceeding double the amount left unpaid.

Mode of recovery of duty.

7. When default is made in the payment of any duty payable under section 3, or when any sum is to be recovered under section 6, the Assistant Collector may prepare a certificate signed by him specifying the amount due from the person liable to pay the same and send it to Collector of the district in which such person resides or conducts his business and the said Collector, on receipt of such certificate, shall proceed to recover from the said person the amount specified therein as if it were an arrear of land revenue.

Power to obtain information.

8. An Assessing Officer or any person authorised in writing in this behalf by an Assistant Collector may at all reasonable times enter any place in which he has reason to believe that sugar liable to the duty imposed by section 3 is kept, and may inspect such place and may require any person found therein who is for the time being in charge thereof to produce to him and allow him to examine such accounts, books or other documents as may relate to the business carried on in such place and to furnish to him such information as he may require for the purpose of ascertaining whether or what sugar liable to duty is kept in such place or is elsewhere in the ownership or possession of the owner of such place.

Disposal of sugar liable to duty.

9. No person owning or possessing sugar liable to the duty imposed by section 3 shall, except so far as he may be allowed by the Assessing Officer, sell or otherwise dispose of any sugar until the order of assessment under section 5 has been communicated to him and until he holds a release order signed by the officer making the assessment :

Provided that nothing in this section shall apply to sugar sold retail in quantities not exceeding two pounds to one person at one time.

Offences and penalties.

10. Whoever commits any of the following offences, namely :—

(*a*) fails to supply the information required by section 4 or under section 8 or (unless with a reasonable belief, the burden of proving which shall be upon him, that the information supplied by him is true) supplies false information,

(*b*) evades the payment of any duty payable by him under this Ordinance,

(*c*) obstructs any Assessing Officer or other authorised person in the exercise of his powers under section 8,

(*d*) contravenes the provisions of section 9,

(*e*) attempts to commit, or abets the commission of, the offences mentioned in the foregoing clauses of this section,

shall, for every such offence, be punishable with imprisonment for a term which may extend to one year, or with fine, or with both, and where the offence is committed, attempted or abetted in respect of sugar liable to duty

under section 3 such fine may extend to five times the duty leviable on the sugar in respect of which the offence is committed, attempted or abetted.

Power of Courts to order forfeiture.

11. Any Court trying an offence under this Ordinance may order the forfeiture to His Majesty of any sugar in respect of which the Court is satisfied that an offence under this Ordinance has been committed, and may also order the forfeiture of any receptacles, packages or coverings in which such sugar is contained and the animals, vehicles, vessels or other conveyances used in carrying the sugar :

Provided that in ordering forfeiture under this section the Court shall give the owner of the goods an option to pay in lieu of forfeiture such fine as the Court thinks fit.

Appeals.

12. *(1)* Any person aggrieved by any decision or order passed under section 5 or section 6 may, within one month from the date of such decision or order, appeal therefrom to the Collector of Central Excise ; but no such appeal shall be considered until the amount demanded under section 5 or 6, if payable at the time, has been deposited.

(2) The Collector of Central Excise may thereupon make such further inquiry and pass such order as he thinks fit, confirming, altering, or annulling the decision or order appealed against ; and if the money deposited by the person making the appeal exceeds the amount directed by the Collector of Central Excise to be paid, the money deposited in excess of such amount shall be refunded.

(3) Every order passed in appeal under this section shall, subject to the power of revision conferred by section 13, be final.

Revision by the Central Board of Revenue.

13. The Central Board of Revenue may, on the application of any aggrieved person, reverse or modify any decision or order made under section 5, 6 or 12.

Copy of Order to be filed.

14. Every appeal or application for revision shall be accompanied by a copy of the decision or order by which the appellant or applicant, as the case may be, is aggrieved.

Power to grant exemption and relaxation.

15. *(1)* The Central Government may, by notification in the official Gazette, exempt any sugar generally or in any specified area, from the whole or any part of the duty leviable thereon under this Ordinance.

(2) The Central Board of Revenue may by special order in any particular case, exempt any sugar from the payment of the duty in circumstances of an exceptional nature.

Bar of legal proceedings.

16. No suit, prosecution or other legal proceeding shall lie against any person for anything in good faith done or intended to be done under this Ordinance.

Saving of other laws.

17. Nothing in this Ordinance shall affect the levy of duty on sugar under the Central Excise and Salt Act, 1944 (I of 1944), and the provisions of the said Act shall have no application to the levy of duty under this Ordinance.

THE SCHEDULE.

[*See* sections 4 and 5 (2)]

FORM A

PARTICULARS TO BE CONTAINED IN ACCOUNT RENDERED UNDER SECTION 4.

I/We .....of.....

owner of.....factory

doing business as a wholesale dealer and holding licence No.....hereby declare that the following stocks of sugar were held by me/us on the.....October 194 :—

Place of storage. If any quantities are in transit, state hereunder the date, place and manner of despatch of each consignment, the name and address of the consignee and the date on which it is expected to reach such destination.	Number of bags	Average weight of contents of bags in maunds and seers	Total quantity		Remarks
			Mds	Seers	

1. I/We.....hereby declare the above particulars to be true.
2. I/We wish to pay the sum leviable hereon in..... .....instalments.

Signature of factory owner.....

Date..... or other stockholder.....

FORM B

PARTICULARS TO BE CONTAINED IN COMMUNICATION OF ASSESSMENT UNDER SECTION 5

To.....of.....owner of.....factory

doing business as a wholesale dealer and holding licence No.....

Duty on.....maunds of sugar owned or possessed by you on the.....has been assessed at Rs.....

You are required to pay the whole of this amount before the .....day of.....194 .

You are permitted to pay this amount in two/three instalments.

Signature.....

Assessing Officer.

Date.....

[THE] SUITS VALUATION ACT, 1887.

(ACT VII of 1887.)

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Statement of Objects and Reasons.

"The principal object of this Bill is to prescribe a simple mode of valuing suits relating to land for the purpose of determining the jurisdiction of the Courts with respect to them. Most of those suits are of course cognizable exclusively by Civil Courts, but some of them, as for instance, suits in the Punjab under S. 9 of the Specific Relief Act, may be tried by Revenue Courts.

It has been brought to the notice of the Government that, while the Civil Courts Acts of the several Provinces, with the exception of that in force in the Presidency of Madras, prescribe no special rules for fixing the value for jurisdiction of the subject-matter of land-suits, but simply define the limit of the jurisdiction of each grade of Court by the money value of the subject matter in suit, thus leaving the market-value to be the strictly legal criterion, a practice has sprung up, generally in the inferior Courts, of accepting, in the absence of any express provision of law to the contrary, the court-fee valuation as laid down in S. 7, para. (v), of Act VII of 1870, for purposes of jurisdiction also.

The generally admitted result is that land-suits are undervalued and disposed of by Courts not strictly competent to try them. In order to remedy this state of things the present Bill has been prepared. It empowers (S 2) the Local Government to frame rules, subject to the sanction of the Governor-General in Council, for determining the value of land in the territories under its administration for purposes of jurisdiction in the suits mentioned in S. 7, paras (v) and (vi), and para. (x), cl. (d) of the Court fees Act, 1870, namely, suits for possession of land, to enforce a right of pre emption, and for specific performance of an award relating to land. These rules are to be made after consultation with the High Court; and the Bill provides (S. 7) a procedure for the publication of proposed rules, so that the Courts and the public may have an opportunity of preferring any objections which they may have to them before the rules are made. The Bill further declares (S. 3) that where a suit mentioned in para. (iv) of S. 7, or Art. 17 of Sch. II of the Court-fees Act, relates to land, the amount at which for purposes of jurisdiction the relief sought in the suit is valued shall not exceed the value of the land to which the suit relates as determined by the rules under the Act.

In addition to the foregoing provisions, which relate exclusively to land-suits, S. 4 provides that in other suits in which court-fees are payable *ad valorem*, the value for purposes of jurisdiction shall be estimated in accordance with the rules which regulate the value for court-fee purposes.

Section 5 of the Bill is taken from Ss. 206-208 of the North-Western Provinces Rent Act, 1881, and has been inserted at the suggestion of Sir Charles Turner, late Chief Justice of Madras. It lays down a special procedure for cases in which the objection that a suit was not properly valued for purposes of jurisdiction is taken in an appellate Court, an objection which the Bill declares may not be entertained unless it was taken in the Court of first instance.

Lastly, the Bill (S. 6) repeals S. 14 of the Madras Civil Courts Act, 1873, which enacts the rule of valuation which it is the object of this Bill to abolish, namely, the valuation for jurisdiction in the case of land suits shall be in accordance with the court-fee valuation prescribed by S. 7, para. (v) of the Court-fees Act, 1870. In order, however, to prevent hardship or inconvenience to suitors, it is provided that this repeal shall not affect any suit instituted before the rules under the proposed Act take effect."

— Gazette of India, 1886, Part V, page 791.

Act how affected by subsequent legislation.

—Amended by Act 38 of 1920.
—Adapted by A. O.
—Amended in its application to—
(a) the Punjab by Punjab Acts 1 of 1938; 13 of 1942.
(b) United Provinces by U. P. Act 7 of 1939.
—Repealed in part by Act 12 of 1891.

[THE] SUITS VALUATION ACT, 1887.

(ACT NO. VII OF 1887)[a]

[11th February, 1887.]

An Act to prescribe the mode of valuing certain suits for the purpose of determining the jurisdiction of Courts with respect thereto.

WHEREAS it is expedient to prescribe the mode of valuing certain suits for the purpose of determining the jurisdiction of Courts with respect thereto; It is hereby enacted as follows:—

[a] For Report of the Select Committee, *see* Gazette of India, 1887, Part IV, page 18.

The Act has been declared to be in force in British Baluchistan by the British Baluchistan Laws Regulation, 1913 (Reg. 2 [II] of 1913).

Title. 1. This Act may be called the Suits Valuation Act, 1887.

PART I.

SUITS RELATING TO LAND.

Extent and commencement of Part I. 2. This Part shall extend to such local areas, and come into force therein on such dates as the [a][Provincial Government], by notification in the [b][Official Gazette], directs.[c]

[a] *Substituted* by A. O for "Governor-General in Council." [b] *Substituted* by A. O. for "Gazette of India."

[c] Part I of the Act has, under S. 2, been declared to extend to the Punjab, and to come into force therein on the 1st day of March, 1889, *see* Gazette of India, 1889, Part I, page 107.

Provincial Amendment

PUNJAB.

The heading "Suits relating to land" of Part I was *omitted*.

—*Punjab Act XIII of 1942, S. 3.* [22-11-1942.]

Power for Provincial Government to make rules determining value of land for jurisdictional purposes. 3. *(1)* The [a][Provincial Government] may [b][* * *] make rules for determining the value of land for purposes of jurisdiction in the suits mentioned in the Court-fees Act, 1870, section 7, paragraphs v and vi and paragraph x, clause *(d)*.

(2) The rules may determine the value of any class of land, or of any interest in land in the whole or any part of a local area, and may prescribe different values for different places within the same local area.

[a] *Substituted* by A. O. for "Local Government". [b] The words "[subject to the control] of the Governor General in Council" were *repealed* by A. O. The words in the brackets were *substituted* by the Devolution Act, 1920 (XXXVIII [38] of 1920), S. 2 and Sch. I, for the words "with the previous sanction".

Provincial Amendment

UNITED PROVINCES.

(a) After the figure "1870" the words "as in force for the time being in United Provinces" were *inserted*.

(b) For the words and figures "and VI and paragraph x, clause *(d)*" the figures and letters "VA and VB" were *substituted*.

(c) For the fullstop at the end a colon was *substituted* and the following was *added* as a fresh paragraph, viz.: "Provided that such rules shall provide that the value of land for the purposes of jurisdiction shall in no case be less than the value as determinable for the computation of court-fees."

—*U. P. Act VII of 1939; S. 2.* [16-7-1939.]

Preamble — Note 1

[1] This Act does not deal with the question as to what are the limits of the pecuniary jurisdiction of different classes of Courts. (Vol 19) 1932 All 413 (414) (DB).

[2] It is doubtful if the Act applies to Sonthal Parganas but the spirit of the Act should nevertheless be applied. (Vol 21) 1934 Pat 184 (185) : 13 Pat 329 (SB).

Section 3 — Note 1

[1] The power of making rules under this section exists only in those Provinces to which the provisions of Part I of this Act have been extended by the Provincial Government by notification.

[2] The section does not apply to the valuation of houses. ('99) 1899 Pun Re No. 72, p. 314 (315).

[3] Rules for the valuation of a contingent interest in land are not contemplated by this section. ('97) 1897 Pun Re No. 18, p. 69 (71) (Reversionary rights.)

[4] In a suit for possession of certain land after removing the building illegally erected thereon by the defendant, the value of the land alone is to be taken into consideration, and not of the building sought to be removed. ('97) 7 Mad L Jour 49 (50) (DB).

[5] In the case of a suit for pre-emption, the value of the land is to be determined in accordance with the rules framed by the Provincial Government: *See* the following cases: (Vol 13) 1926 Lah 346 (347) (DB) ✠ (Vol 11) 1924 Lah 380 (381) ✠ (Vol 6) 1919 Mad 1062 (1063) : 41 Mad 721 (DB).

[6] The subject-matter of a suit for pre-emption is the property sought to be pre-empted and not the amount which has to be paid by the pre-emptor. (Vol 11) 1924 Lah 380 (381) ✠ ('12) 1912 Pun Re No. 93 : 15 Ind Cas 348 (DB).

[7] This section does not apply to a suit for redemption of a mortgage where the property is in the possession of the mortgagee. ('10) 8 Ind Cas 464 (466) : 1 Upp Bur Rul 10.

[8] Section 4, and not S. 3, applies to a suit for declaration relating to land. (Vol 14) 1927 Mad 563 (563, 564) : 50 Mad 646 (DB).

[9] The value for purposes of jurisdiction will be the same as the value for purposes of court-fees (subject to

Valuation of relief in certain suits relating to land not to exceed the value of the land.

4. Where a suit mentioned in the Court-fees Act, 1870, section 7, paragraph iv, or Schedule II, article 17, relates to land or an interest in land of which the value has been determined by rules under the last foregoing section, the amount at which for purposes of jurisdiction the relief sought in the suit is valued shall not exceed the value of the land or interest as determined by those rules.

Provincial Amendments.

PUNJAB.

After the word and figures "article 17" the word and figures "or 22" were *inserted*.

—*Punjab Act I of 1938, S. 3.* [30-4-1938.]

UNITED PROVINCES.

For section 4 the following section was *substituted*, viz.:

Valuation of certain suits for the purposes of jurisdiction.

"4. Suits mentioned in paragraphs IV (a), IVA, IVB, V, VA, VB, VI, VIA, VIII and X (d) of section 7 and Arts. 17, 18 and 19 of Sch. II of the Court-fees Act, 1870, as in force for the time being in the United Provinces, shall be valued for the purposes of jurisdiction at the market-value of the property involved in or affected by or the title to which is affected by the relief sought, or at the amount involved in or affected by or the title to which is affected by the relief sought, and such value shall in the case of land, be deemed to be the value as determinable in accordance with the rules framed under section 3." —*U. P. Act VII of 1939, S. 3.* [16-7-1939.]

Making and enforcement of rules.

5. *(1)* The [a][Provincial Government] shall, before making rules under section 3, consult the High Court with respect thereto.

(2) A rule under that section shall not take effect till the expiration of one month after the rule has been published in the [b][Official Gazette].

[a] *Substituted* by A. O. for "Local Government". [b] *Substituted* by A. O. for "local official Gazette."

Repeal of section 14 of the Madras Civil Courts Act, 1873.

6. On and from the date on which rules under section 3 take effect in any part of the territories under the administration of the Governor of Fort Saint George in Council to which the Madras Civil Courts Act, 1873, extends, section 14 of that Act shall be repealed as regards that part of those territories.

PART II.

OTHER SUITS.

Extent and commencement of Part II.

7. This part extends to the whole of British India, and shall come into force on the first day of July, 1887.

Provincial Amendment.

PUNJAB

In Part II the heading "Other Suits" was *omitted*.

— *Punjab Act XIII of 1942, S 3.* [22-11-1942.]

Section 3 — Note 1 *(contd.)*

condition in S. 4) in the cases of a suit for a declaration relating to land, falling under S. 7 (iv) (c) of the Court-fees Act. (Vol 1) 1914 Lah 214 (220) : 1913 Pun Re No. 111 (FB).

[10] Where the suit is for a bare declaration and comes under Sch. II, Art. 17 (iii) of the Court-fees Act, the value of the land (subject to the limit mentioned in S. 4) will determine the value of the suit for purposes of jurisdiction. (Vol 20) 1933 All 903 (904) : 56 All 198 (DB) ✠ (Vol 14) 1927 Mad 563 (563, 564) : 50 Mad 646 (DB)✠(Vol 8) 1921 Pat 32 (32): 5 Pat L Jour 397 (DB)✠ ('92) 1892 Pun Re No. 145, p. 499 (501, 502) (DB).

[*See also* (Vol 29) 1942 Pat 79 (80) (DB).]

[See however (Vol 22) 1935 Mad 262 (264).]

Section 4 — Note 1

[1] The plaintiff is not entitled to value the suit in any manner he pleases subject to the maximum limit mentioned in this section. (Vol 20) 1933 All 903 (904) : 56 All 198 (DB).

[2] A suit by an occupancy tenant for a declaration that the landlord (defendant) is not entitled to recover from the plaintiff by way of rent more than a sixteenth share of the produce, falls under this section. (Vol 1) 1914 Lah 95 (95) : 1914 Pun Re No. 54 (DB).

[3] Where a suit coming under Sch. II, Art. 17 of the Court-fees Act relates to land but no rules have been made as to the valuation of such land, the market-value of the land will be the value of the suit for purposes of jurisdiction. ('07) 31 Bom 73 (79, 80) (DB).

[4] Section 4 gives no room for the idea of a notional value. Where the sole question for decision is whether the title as trustees of certain villages vests in the public or in private person, the title to these villages is affected by the relief sought and therefore the valuation for the purposes of jurisdiction is the market-value of the property itself. (Vol 28) 1941 Oudh 405 (406, 407) : 17 Luck 116 (DB). (Case under the section as amended in U. P.)

[5] Suit for declaration against alienation of ancestral land, falling under Court-fees Act, Sch. II, Art. 22, Punjab — Lahore High Court, Rules and Orders Vol. 1, Chap. 3-C. R 2 — Where suit relates to land with regard to which rules have been made under S. 3, Suits Valuation Act, value of suit for jurisdiction cannot exceed value under such rules. (Vol 34) 1947 Lah 80 (82) (DB).

Section 6 — Note 1

[1] Section 14 of the Madras Civil Courts Act (III of 1873), seems to cover the suits mentioned in Ss. 3 and 4 of this Act. (Vol 20) 1933 Mad 439 (441) : 56 Mad 716 ✠ (Vol 6) 1919 Mad 1062 (1063) : 41 Mad 721 (DB).

[See however (Vol 14) 1927 Mad 563 (563, 564) : 50 Mad 646 (DB) (Section 14 only applies to suits coming under S. 3, Suits Valuation Act, and hence does not apply to suit for declaration.)]

[2] Section 14 of the Madras Civil Courts Act must be read as subject to the provisions of S. 8 of this Act. (Vol 1) 1914 Mad 98 (99) : 38 Mad 795.

8. Where in suits other than those referred to in the Court fees Act, 1870, section 7, paragraphs V, VI and IX, and paragraph X, clause (d), court-fees are payable *ad valorem* under the Court-fees Act, 1870, the value as determinable for the computation of court-fees and the value for purposes of jurisdiction shall be the same.

Court-fee value and jurisdictional value to be the same in certain suits.

Objects and Reasons.

"We have excepted from the operation of section 8 (section 4 of the Bill as introduced) the suits to which para. IX of section 7 of the Court-fees Act relates. In a suit for foreclosure or sale the principal and interest due under the mortgage-deed represent the value of the suit for the purposes of jurisdiction, while the value for the computation of court-fees is the principal only." — S. C. R.

Provincial Amendment

UNITED PROVINCES

For the words "the Court-fees Act, 1870, section 7, paragraphs V, VI and IX and paragraph X, clause *(d)*," the word and figure "section 4" were *substituted*: and after the figure and comma "1870," occurring for the second time, the words "as in force for the time being in the United Provinces" were *added*.

—*U. P. Act VII of 1939, S. 4* [16-7-1939.]

SECTION 8 — SYNOPSIS.

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3. Valuation for jurisdiction — General.
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5. Suit for declaration and consequential relief.
6. Suit for declaration where consequential relief is not prayed.
7. Suit for injunction.
8. Suit for accounts.
9. Suit for administration.
10. Suit for possession of immovable property.
11. Suit for possession by landlord against tenant.
12. Suit for ejectment of a licensee.
13. Suit for pre-emption.
14. Suit for redemption.
15. Suit for foreclosure.
16. Suit to enforce mortgage by sale.
17. Suit for specific performance.
18. Suit by Hindu reversioner challenging alienation by widow.
19. Suit relating to office of trustee, etc.
20. Suit for restitution of conjugal rights.
21. Suits under Order 21, Rule 63, Civil P. C.
22. Suit for setting aside decree and execution sale.
23. Suit to set aside or establish adoption.
24. Suit to avoid an instrument.
25. Suit to enforce registration.
26. Suit to establish or disprove right of occupancy.
27. Interpleader suit.
28. Court's power to pass decree in excess of its pecuniary jurisdiction.
29. Jurisdiction with regard to plea of set-off.
30. Forum of appeal.

1. Scope and applicability. — [1] The value of the suit for court-fees is to be applied for jurisdiction and not vice versa. (Vol 21) 1934 Rang 268 (269) : 12 Rang 335 ✠ (Vol 17) 1930 Cal 686 (688) : 58 Cal 281 ✠ (Vol 14) 1927 Lah 890 (891) : 9 Lah 366 (DB)

[2] The proper procedure under the section is to determine the value for court-fees and then adopt the same valuation for jurisdiction. (Vol 26) 1939 Cal 155 (156) : I L R (1938) 2 Cal 411 (DB) ✠ (Vol 8) 1921 Cal 84 (85).

[But see (Vol 24) 1937 Mad 922 (925) (DB).]

[3] In cases not coming under this section, it is the real value of the subject-matter that will determine jurisdiction. (Vol 27) 1940 Cal 375 (375) (DB) ✠ (Vol 22) 1935 Mad 655 (656) : 59 Mad 159. (Suit for getting rate of maintenance under decree reduced — Mode of valuation shown.) ✠ (Vol 14) 1927 Mad 563 (564) : 50 Mad 646 (DB).

[4] Where a fixed court-fee is payable under the Court-fees Act it is the real value of the subject-matter that must be considered for the purpose of jurisdiction. (Vol 5) 1918 P C 188 (191): 43 Bom 507: 46 Ind App 24 (PC).

[5] Section 9 is more than an exception to S. 8. Section 8 does not apply to cases falling under S. 9 or rules framed thereunder. Section 8 applies to ad valorem cases where the value is satisfactorily ascertainable while S. 9 applies to all cases, whether ad valorem or not, in which the value of the subject-matter cannot be satisfactorily ascertained. (Vol 33) 1946 Lah 94 (96, 97) (FB).

[6] Where a suit falls both under this section and S. 14, Madras Civil Courts Act, the former section will apply. (Vol 20) 1933 Mad 721 (721) : 57 Mad 186 (DB). (Suit for injunction relating to land.) ✠ (Vol 3) 1916 Mad 942 (943) : 39 Mad 873 (DB). (Suit by landlord for possession against tenant — S. 8, Suits Valuation Act, and not S. 14, Madras Civil Courts Act applies.)

[7] It is doubtful (in view of the proviso to S. 2, Sonthal Parganas Act) if the Suits Valuation Act applies to Sonthal Parganas in case of suits in which the subject-matter in dispute does not exceed Rs. 1000, but the principle of the Act should nevertheless be applied. (Vol 21) 1934 Pat 184 (185) : 13 Pat 329 (SB).

2. "Ad valorem." — [1] Court-fee for suits for setting aside a decree falling under Sch. II, Art. 17 (v) as amended in Bombay, is ten rupees if the value of the property involved does not exceed five-hundred rupees and the fee is fifteen rupees in other cases. This has been held not to be "ad valorem" fee and hence this section does not apply. (Vol 32) 1945 Bom 474 (475) : I L R (1945) Bom 1033 (DB) ((Vol 31) 1944 Bom 316 : I L R (1944) Bom 352 *Dissent.*)

3. Valuation for jurisdiction — General. — [1] The term "value" denotes market-value. (Vol 14) 1927 Mad 563 (564) : 50 Mad 646 (DB).

[2] Where the subject-matter of a suit is wholly unrelated to anything which can be readily stated in definite money terms, the plaintiff must put a more or less arbitrary value and the Court will accept that valuation. (Vol 14) 1927 Mad 563 (565) : 50 Mad 646 (DB).

[3] Even where the subject-matter is not incapable of valuation, *prima facie* the valuation by the plaintiff would determine jurisdiction. (Vol 29) 1942 Rang 10 (10) (DB) ✠ (Vol 13) 1926 Nag 71 (72) (DB) ✠ (Vol 12) 1925 Rang 278 (278) (DB) ✠ ('99) 2 Oudh Cas 103 (108) ✠ ('76) 25 Suth W R 76 (76) (DB).

[See however (Vol 9) 1922 Oudh 249 (250) : 25 Oudh Cas 184. (Not so if challenged by defendant.) ✠ (Vol 8) 1921 Pat 32 (32): 5 Pat L Jour 397 (DB). (Do.)]

[4] Where through gross negligence or deliberate design the suit is over-valued or under-valued, the true

Section 8 — Note 3 *(contd.)*

value as determined by the Court will determine jurisdiction. (Vol 2) 1915 Mad 444 (445) ✠ ('12) 6 Sind L R 256 (258) (DB) ✠ ('84) 8 Bom 31 (33, 34) (DB).

[5] The value of the suit depends on the value of the subject-matter at the time of the institution of the suit. (Vol 22) 1935 Pat 160 (162, 163) : 14 Pat 414 (DB) ✠ (Vol 13) 1926 Nag 71 (72) (DB) ✠ ('84) 8 Bom 31 (33) (DB) ✠ (Vol 5) 1918 Mad 998 (1002) : 40 Mad 1 (FB). (Subsequent change in value.)

[6] The aggregate value of all the subjects will be the value for jurisdiction. (Vol 5) 1918 Mad 998 (1001): 40 Mad 1 (FB) ✠ ('12) 36 Bom 628 (637) (DB).

[7] In considering the nature of a suit for valuation, it is the allegations in the plaint that must be considered. (Vol 22) 1935 Pesh 174 (175) ✠ (Vol 21) 1934 Pat 184 (185, 186) : 13 Pat 329 (SB) ✠ ('12) 6 Sind L R 114 (115) (DB) ✠ (Vol 15) 1928 Nag 288 (288) : 24 Nag L R 23 (Defendant's allegations are immaterial) ✠ (Vol 14) 1927 Pat 140 (141) : 5 Pat 631 (DB). (Do) ✠ ('02) 1902 Pun Law Rep No. 38, p. 155 (156). (Do.) ✠ ('88) 10 All 524 (528) (DB). (Do.)

[See however (Vol 11) 1924 Cal 969 (969) (DB). (If in future, circumstances come to light as the case progresses the Court is at liberty to revise the order regarding the valuation.)]

[8] In determining the nature of a suit, its maintainability is immaterial. (Vol 22) 1935 Pat 160 (161) : 14 Pat 414 (DB).

[9] The relief asked for and not the relief ultimately awarded will determine jurisdiction. (Vol 2) 1915 Mad 683 (684) (DB).

[10] A question of valuation should be tried as a preliminary issue. ('07) 31 Bom 73 (77) (DB) ✠ ('82) 8 Cal 975 (977) (DB).

[*See also* (Vol 20) 1933 Oudh 191 (192): 8 Luck 676 (DB).]

4. Suit for partition.— [1] The value of a suit for partition depends on the value of only the plaintiff's share. (Vol 29) 1942 Mad 103 (103) ✠ (Vol 25) 1938 Nag 149 (151) : I L R (1939) Nag 300 ✠ (Vol 20) 1933 Oudh 547 (549) : 9 Luck 219 ✠ (Vol 16) 1929 Rang 211 (212) : 7 Rang 164. (Suit by a Mubammadan for partition of share on inheritance.) ✠ (Vol 8) 1921 Pat 78 (80) : 5 Pat L Jour 540 (DB) ✠ (Vol 2) 1915 Lah 131 (132) (DB) ✠ ('12) 6 Sind L R 256 (259) (DB) ✠ ('02) 24 All 381 (382) (DB) ✠ ('98) 22 Bom 315 (316) (DB) ✠ ('88) 1888 Pun Re No. 110, p 310 (312) (FB). (('87) 1887 Pun Re No. 8, *OVERRULED.*)

[But see (Vol 12) 1925 Cal 320 (320, 321) : 52 Cal 128 (DB) ✠ ('06) 3 Cal L Jour 137 (198) (DB).]

[2] Where the plaintiff is in joint possession and there is no dispute as to his title, the value of the entire property will determine jurisdiction and those in which his title is denied and he is not in joint possession, the value of the plaintiff's share will determine the jurisdiction. (Vol 10) 1923 Pat 342 (343): 2 Pat 432 (DB).

[3] It is the market value that is to be considered, in determining its value for jurisdiction. (Vol 29) 1942 Mad 103 (103) ✠ ('09) 33 Bom 658 (661, 663) (DB).

[4] Where a suit is for avoiding a prior partition deed or decree and for a fresh partition, this section will apply and the value for jurisdiction will be the same as the value for court-fees. (Vol 8) 1921 Pat 78 (80) : 5 Pat L Jour 540 (DB).

5. Suit for declaration and consequential relief. —[1] The value for purposes of jurisdiction of suit for a declaration and consequential relief, will be the amount at which the relief is valued in the plaint for purposes of court-fees (Vol 24) 1937 Bom 167 (169) : I L R (1937) Bom 623. (This Act affects the construction of S. 24, Bombay Civil Courts Act, 1869.) ✠ (Vol 24) 1937 Nag 316 (317) : I L R (1938) Nag 302 ✠ (Vol 5) 1918 P C 135 (136) : 46 Ind App 15 : 43 Bom 376 (P C) ✠ (Vol 1) 1914 Lah 214 (220) : 1913 Pun Re No. 111 (FB).

[2] In a case coming under S. 7 (iv) (c), Court-fees Act, the plaintiff merely states the value for jurisdiction but not for court-fee. The plaintiff must be required to pay court-fees on the value stated. (Vol 19) 1932 Lah 132 (133) : 13 Lah 311 (DB) ✠ (Vol 13) 1926 Mad 591 (592) ✠ (Vol 3) 1916 Cal 649 (649) (DB).

[3] The plaintiff sues for a declaratory decree and some other relief. He treats the two reliefs as separate and pays separate fees. He values the suit for jurisdiction at a high figure. The Court holds that the suit falls under S. 7 (iv) (c). The Court can treat the value given for jurisdiction as the value for court-fees also. (Vol 30) 1943 Sind 24 (26) : I L R (1942) Kar 354 (DB) ✠ (Vol 28) 1941 Lah 97 (108, 109) : I L R (1941) Lah 451 (FB) ✠ (Vol 21) 1934 Rang 152 (153) (DB) ✠ (Vol 12) 1925 All 602 (604) : 47 All 501 ✠ (Vol 11) 1924 All 597 (599) : 46 All 419 ✠ (Vol 7) 1920 Bom 105 (107) : 44 Bom 331 (DB) ✠ ('13) 40 Cal 245 (249) (DB).

[4] When a plaint contains a valuation for purposes of only jurisdiction it would apply to court-fees also. (Vol 13) 1926 Mad 591 (591, 592).

[5] Where rules have been made under S. 9 for the valuation of suits for declaration and consequential relief, the value of the suit for purposes of court fee as well as jurisdiction will be the value as fixed in accordance with such rules. (Vol 1) 1914 Lah 214 (220) : 1913 Pun Re No. 111 (FB).

[6] Where the suit relates to land in respect of which the Provincial Government has made rules under S. 3, the value of the suit for purposes of jurisdiction cannot exceed under S. 4, the value of the land as fixed under such rules. (Vol 1) 1914 Lah 214 (220) : 1913 Pun Re No. 111 (FB).

6. Suit for declaration where consequential relief is not prayed.— [1] Under S. 9, the High Court can make rules as to the mode of valuing such suits. In the absence of any such rules, the value of the suit for jurisdiction will have to be decided by Court. (Vol 5) 1918 Lah 246 (246) : 1918 Pun Re No. 81 (DB).

[2] The plaintiff cannot value such suits in any way he likes, and thereby virtually choose his own forum. (Vol 9) 1922 Oudh 249 (250) : 25 Oudh Cas 184.

[3] The value of the right in respect of which the declaration is sought should be regarded as the value of the suit for purposes of jurisdiction. (Vol 23) 1936 Oudh 317 (319) (DB) ✠ (Vol 22) 1935 Mad 874 (874) ✠ (Vol 17) 1930 Lah 18 (19) (DB) ✠ ('96) 20 Bom 736 (742) (DB) ✠ ('75) 1 Bom 538 (541) (DB) ✠ (Vol 14) 1927 Mad 568 (569) ✠ (Vol 8) 1921 Pat 32 (32, 33) : 5 Pat L Jour 397 (DB).

[*See* (Vol 19) 1932 Bom 160 (163) : 58 Bom 8 (DB). (The real value of the property should be considered for this purpose.) ✠ (Vol 14) 1927 Mad 563 (565) : 50 Mad 646 (DB). (Do.) ✠ (Vol 5) 1918 P C 188 (191) : 43 Bom 507 : 46 Ind App 24 (P C). (Do)]

[4] Where the suit for declaration relates to land as to the valuation of which the Provincial Government has made rules under S. 3 the value for jurisdiction cannot under S. 4 exceed the value of the land under such rules. (Vol 5) 1918 Lah 246 (246) : 1918 Pun Re No 81 (DB).

[5] A suit to obtain a declaration that a decree passed by a Court was obtained by fraud and is not binding on the plaintiff can be laid in a Court of inferior jurisdiction to the Court which passed the decree provided the subject-matter is otherwise within the jurisdiction of the Court. (Vol 6) 1919 Mad 223 (224) (DB).

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7. Suit for injunction. — [1] This section applies to suits for injunctions. (Vol 27) 1940 Bom 242 (243) (DB) ✠ (Vol 27) 1940 Pat 247 (248) (DB) ✠ (Vol 16) 1929 Lah 566 (568) (DB) ✠ (Vol 1) 1914 Cal 879 (880) (DB) ✠ ('12) 6 Sind L R 114 (115) (DB).

8. Suit for accounts. — [1] This section applies to a suit for accounts and its value for jurisdiction will be the amount at which the relief is valued in the plaint for court-fee. (Vol 22) 1935 Lah 40 (41) ✠ (Vol 11) 1924 Rang 354 (354) : 2 Rang 408 (DB) ✠ ('14) 22 Ind Cas 71 (72) (DB) (Bom) ✠ ('95) 22 Cal 692 (708) (SB)✠('94) 18 Bom 40 (42) (DB). (Even for appeal.)

9. Suit for administration. — [1] A suit for administration is treated as a suit for accounts and hence it falls under this section and the value for jurisdiction is that given by the plaintiff for court-fee. (Vol 23) 1936 Bom 353 (356) (DB) ✠ (Vol 22) 1935 Rang 13 (14) : 12 Rang 512 (DB) ✠ (Vol 5) 1918 Cal 883 (886).44 Cal 890 (DB).

[But see (Vol 30) 1943 Mad 242 (242) : I L R (1943) Mad 497. (Value of the estate.) ✠ (Vol 29) 1942 Mad 247 (248, 249) : I L R (1942) Mad 455.]

10. Suit for possession of immovable property. —[1] Normally, it is the market-value of the property that would have to be taken into account for purposes of jurisdiction. (Vol 27) 1940 Cal 375 (375) (DB) ✠ ('35) 158 Ind Cas 296 (297) (Oudh).

[2] Where the suit relates to land and rules have been made under S. 3 by the Provincial Government for the valuation of the land, a suit for recovery of land will have to be valued in accordance with such rules. ('09) 3 Ind Cas 980 (980) (Lah).

[3] Even for purposes of court-fees, there are some cases in which under S. 7 (v) of the Court fees Act, the suit is required to be valued according to the market-value and the Court is given power to enquire into the market value and require payment of court fees accordingly. In such cases the value found by the Court would also be the value for purposes of jurisdiction. ('14) 25 Ind Cas 24 (24) (DB) (Lah)✠ ('08) 1908 Pun Re No. 19, p. 124 (127) (FB).

[4] In a suit for the possession of land after demolishing the buildings thereon erected by the defendant, the value for land only should be considered ('08) 11 Oudh Cas 45 (46, 47) ✠ ('83) 1883 All W N 89 (89) (DB).

[5] When the plaintiff claims only the land without the structures erected by the defendant, the value of the suit for jurisdiction is the value of land only. (Vol 15) 1928 Lah 852 (853).

[6] Where the plaintiff claims the land as well as the buildings on it, the value of the suit is the value of the land plus the value of the buildings. ('86) 1886 All W N 106 (107) (DB).

[7] Suit for possession of a house by a mortgagee against a third party in actual possession — The value for jurisdiction held to be the value of the property itself. ('96) 1896 Pun Re No 1, p. 1 (2) (FB).

11. Suit for possession by landlord against tenant. — [1] The value for purposes of jurisdiction in case of suit for possession by an ex-landlord against an ex-tenant is the same as the value for purposes of court-fees, i. e., the amount of the rent for the year next before the suit. (Vol 24) 1937 Mad 91 (91, 92) ✠ (Vol 21) 1934 All 825 (827) (DB)✠(Vol 17) 1930 Cal 42 (44, 45): 57 Cal 349 (DB) ✠ ('26) 93 Ind Cas 291 (291) (Oudh) ✠ (Vol 12) 1925 All 142 (143) (DB) ✠ ('10) 5 Ind Cas 910 (910) : 1910 Pun Re No 27.

[But see (Vol 25) 1938 Nag 162 (163) : I L R (1940) Nag 391 ✠ (Vol 15) 1928 Cal 753 (753) ✠ (Vol 10) 1923 Nag 310 (311).]

[2] Suit for recovery of possession from a tenant — S. 14 of Madras Civil Courts Act, applicable — The value for purposes of jurisdiction will be the rent for the year next before the suit and not the amount arrived at by applying the rules under S. 7 (v) of the Court-fees Act (Vol 3) 1916 Mad 942 (943):39 Mad 873 (DB)✠ (Vol 1) 1914 Mad 98 (99) : 38 Mad 795.

12. Suit for ejectment of a licensee.—[1] Suit for ejectment of a licensee of a house with an incidental prayer for determination of plaintiff's title — S. 7 (v), Court-fees Act, held applied—The subject-matter of the suit held to be the right to eject the defendant and the value of such right to be the value at which the defendant's right to remain in the house under the licence might be valued. (Vol 14) 1927 Pat 140 (141) : 5 Pat 631 (DB).

13. Suit for pre-emption. — [1] The subject-matter of a suit for pre-emption is the property sought to be pre-empted. ('08) 1908 Pun L R No. 215, p. 681 (682).

[Bue see ('86) 13 Cal 255 (256) (DB)]

[2] Where the property sought to be pre-empted is land in respect of the valuation of which rules have been framed under S. 3 the value of the land will have to be fixed in accordance with such rules. (Vol 20) 1933 Lah 767 (768) (DB)✠(Vol 13) 1926 Lah 346 (347) (DB).

[3] The market value of the property sought to be pre-empted is the value for jurisdiction. (Vol 12) 1925 Oudh 493 (494)✠('78) 1878 Pun Re No. 54, p. 201 (202) (FB).

[4] The amount which the plaintiff alleges to be the market-value is the value for jurisdiction. (Vol 13) 1926 Oudh 140 (141). (Except where the plaintiff deliberately mis-states value.)✠('03) 6 Oudh Cas 255 (260, 261). (Do.) ✠ (1900) 1900 Pun Re No. 101, p. 402 (405)(DB). (Do.)

[5] The amount stated in the sale deed as the consideration will not necessarily be the value of the property. ('11) 9 Ind Cas 414 (414) (Oudh).

[6] Where a pre-emptor states that the value of the property is greater than the consideration stated in the sale-deed, the value of the suit should be measured by the consideration stated in the deed which is *prima facie* the value of the pre-emptive right asserted by the plaintiff. ('09) 12 Oudh Cas 31 (32).

[7] In the Madras Presidency a suit for pre-emtion is governed by S 14, Madras Civil Courts Act, 1873, and the value for jurisdiction will be that arrived at by calculation under S. 7 (v), Court-fees Act. (Vol 6) 1919 Mad 1062 (1063) : 41 Mad 721 (D B).

14. Suit for redemption.—[1] The following views have been expressed as to what is the value for jurisdiction of a suit for redemption:

(a) The principal amount secured by mortgage determines the value. ('09) 31 All 44 (45) (D B) ✠ (Vol 28) 1941 Mad 115 (115) ✠ (Vol 1) 1914 Mad 445 (446) : 37 Mad 420 (D B) ✠ (Vol 16) 1929 Nag 1 (2) : 24 Nag L R 197 (DB)✠ (Vol 20) 1933 Pat 625 (625) ✠ (Vol 13) 1926 Oudh 346 (347) : 2 Luck 221 (D B).

(b) The amount remaining on the mortgage determines the value. ('89) 13 Bom 489 (492) (D B). (Value as stated by plaintiff—('87) 11 Bom 594, *Foll.*)✠(Vol11) 1924 Cal 783 (785) : 51 Cal 737 (D B). (Value found by Court.)✠(Vol 28) 1941 Pesh 28 (29) (DB) (Do.)✠(Vol 13) 1926 Lah 376 (378) : 7 Lah 570 (FB). (Do — Overruling the earlier view).

(c) In case of simple mortgage, the principal amount and in case of usufructuary mortgage, the market value of the mortgage property determines the value. ('10) 5 Low Bur Rul 208 (212) (FB). (Simple mortgage.) ✠(Vol 14) 1927 Rang 304 (306) : 5 Rang 499 (D B). (Usufructuary mortgage.)

[2] If the integrity of the mortgage has not been broken up, the value of the suit by a co-mortgagor to

Section 8 — Note 14 *(contd.)*

redeem only his share will be the same as that of suit for redemption of the entire mortgage. ('83) 5 All 332 (333) (D B).

[3] Where the integrity of the mortgage has been broken up a suit to redeem his share by a co-mortgagor will be valued at a proportionate amount corresponding to his share. ('86) 8 All 438 (443) (F B).

[4] Where a plaintiff sues to redeem certain mortgages admitted in his plaint and the defendant mortgagee sets up other encumbrances on the same property the value of the suit has to be decided with reference only to the mortgages admitted by the plaintiff. ('86) 9 Mad 208 (211, 212) (D B).

[5] The addition of a claim for surplus profits or for damages to the relief of redemption does not alter the value of a suit for redemption. (Vol 28) 1941 Mad 115 (116) ✠ (Vol 20) 1933 Pat 625 (625)✠(Vol 16) 1929 Nag 1 (2) : 24 Nag L R 197 (DB). ((Vol 7) 1920 Nag 74, *Dissent.*) ✠ ('10) 13 Oudh Cas 32 (34).

15. Suit for foreclosure.—[1] The value of a suit for foreclosure is the market-value of the land mortgaged. ('08) 11 Oudh Cas 154 (157) (D B).

[But see ('13) 9 Nag L R 161 (162)✠('12) 8 Nag L R 179 (181).]

[2] Where a mortgagee obtains a decree for foreclosure and sues to recover possession, the value for jurisdiction of such suit will be as determined by the rules, if any, framed for valuing suits for possession. ('93) 1893 Pun Re No. 20, p. 104 (106) (D B) ✠ ('78) 1 Cal L R 473 (474) (D B).

16. Suit to enforce mortgage by sale. — [1] The value of a suit to enforce a mortgage by sale is the amount claimed as due by the plaintiff in his plaint. (Vol 29) 1942 Mad 205 (207) : I L R (1942) Mad 438 (D B) ✠ (Vol 18) 1931 Cal 159 (159, 160) : 58 Cal 829 (D B) ✠(Vol 28) 1941 Nag 138 (140) : I L R (1941) Nag 194 (D B). (This is so, even where subsequent mortgagees are joined in a suit to enforce a prior mortgage.)

[2] Co-mortgagee suing to recover his own share of the mortgage-money must value his suit according to the full amount due on the mortgage. (Vol 29) 1942 Mad 205 (207, 208): I L R (1942) Mad 438 (D B). ((Vol 17) 1930 Mad 985, *OVERRULED.*)

[3] Claim by mortgagee against attachment —Genuineness of mortgage disputed — Claim dismissed —Suit by mortgagee to set aside the order and to establish genuineness of his mortgage — Mortgagor also made party to the suit—Suit should be valued at the amount due on the mortgage. (Vol 22) 1935 Mad 1002 (1003).

17. Suit for specific performance.— [1] The value of a suit for specific performance of a contract of sale is the amount of consideration for the sale. (Vol 15) 1928 Lah 635 (635) ✠ (Vol 10) 1923 Oudh 252 (253).

[See however (Vol 16) 1929 Pat 642 (642). (Suit for specific performance and possession — Market-value of land is value for jurisdiction.)]

[2] The value of a suit for specific performance of a contract of lease is the aggregate amount of the fine or premium (if any) and of the rent agreed to be paid during the first year of the term. (Vol 8) 1921 Cal 84 (85).

18. Suit by Hindu reversioner challenging alienation by widow.—[1] The value of such a suit will be value of the property in respect of which the declaration is sought. (Vol 19) 1932 Mad 671 (672) ✠ ('82) 1882 All W N 130 (130) (D B).

19. Suit relating to office of trustee, etc.—[1] Suit for removal of defendant and appointment of plaintiff as mortgagor — Value of suit is the value of trust property. ('85) 8 Mad 516 (519) (D B).

[2] Suit for possession of office as manager of school committee — Value for jurisdiction is value of school properties. (Vol 26) 1939 Mad 776 (779).

[3] Suit for removal of co-trustee for misappropriation — Value of trust property must be guide for jurisdiction. ('10) 8 Ind Cas 545 (545) (D B) (Mad).

[4] Suit for a declaration that certain orders passed by trustees and the Hindu Religious Endowments Board, dismissing plaintiff from the office of *archaka* were *ultra vires* : *Held* that plaintiff in substance asked for also restoration to the office and that the emoluments attached to the office was the value of suit for jurisdiction. (Vol 33) 1946 Mad 94 (94, 95).

20. Suit for restitution of conjugal rights.— [1] The value of a suit for restitution of conjugal rights is the value assigned to it by the plaintiff. (Vol 22) 1935 Cal 338 (340) (D B)✠(Vol 28) 1941 Rang 187 (188, 189): 1941 Rang L R 495 (F B). (Unless vitiated by improper motives.) ✠ ('10) 34 Bom 236 (237). (Do.)✠ ('07) 34 Cal 352 (356) (F B). (Do.) ✠ ('06) 28 All 545 (548, 549) (FB). (Do.)

21. Suits under O. 21, R. 63, Civil P. C.—[1] This section will not therefore apply to a suit under O. 21, R. 63, Civil P. C. (Vol 22) 1935 Mad 219 (220)✠(Vol 14) 1927 Pat 289 (290) : 6 Pat 420 (D B).

[2] Suit under O. 21, R. 63 — Value of property exceeding the decretal amount — Decretal amount determines jurisdiction. (Vol 31) 1944 Nag 308 (310) : I L R (1944) Nag 783.

[3] In a suit brought under O. 21, R. 63 where the sole question is whether the property is or is not liable to be attached and sold, and the value of the property is less than the decree amount, the value for purposes of jurisdiction is the value of the property. (Vol 21) 1934 Rang 302 (302, 303) : 12 Rang 666✠(Vol 20) 1933 All 249 (250) : 55 All 315 (FB) ✠ (Vol 19) 1932 Rang 20 (21) ✠ (Vol 16) 1929 Mad 323 (324) (D B) ✠ ('08) 1908 Pun Re No. 94, p 436 (438) (FB)✠('02) 15 CPLR 161 (162) ✠ ('88) 15 Cal 104 (106, 107) (DB) ✠ ('74) 11 Bom H C R 186 (188) (DB).

[4] Where a suit under O. 21, R. 63 involves the avoidance of a transfer of the property by the judgment-debtor in fraud of the creditors, the valuation for purposes of jurisdiction will be the value of the property. (Vol 21) 1934 Rang 332 (333) : 12 Rang 670 ✠ (Vol 21) 1934 Rang 302 (302, 303) : 12 Rang 666.

[5] Judgment-debtor made party to suit but no relief claimed against him — Value of the suit will be the amount of the decree or the value of the property whichever is less. (Vol 20) 1933 All 249 (250) : 55 All 315 (FB) ✠ (Vol 1) 1914 Lah 356 (357) (DB) ✠ ('07) 30 Mad 335 (338, 339) (FB).

[6] Where a declaration of title to the attached property is also asked for against the judgment-debtor who is impleaded as party to the suit under O. 21, R. 63 the suit should be valued on the basis of the value of the property attached. (Vol 19) 1932 Rang 20 (21) ✠(Vol 3) 1916 Mad 858 (859): 39 Mad 602 (DB)✠('13) 17 Ind Cas 196 (197) : 1913 Pun Re No. 41 (D B) ✠ ('06) 2 Nag L R 87 (89) ✠ ('95) 17 All 69 (74, 75, 76) (DB).

[7] A suit for a declaration that certain property is not liable to be attached and sold, without previously preferring an objection in execution decree is in the nature of a suit under O. 21, R. 63. ('40) 42 Pun L R 364 (365). (Relief as to declaration also claimed against judgment-debtor who was impleaded.) ✠ (Vol 22) 1935 Oudh 271 (272): 11 Luck 1 (DB). (Judgment-debtor was made pro forma defendant and value of property greater than amount of decree.)

[8] A suit to set aside an order in claim proceedings that the plaintiff's mortgage of property attached in execution is not subsisting need not be valued on the amount for which the property is attached but on the amount of the mortgage sought to be declared as subsisting. ('09) 2 Ind Cas 522 (522) (D B) (Mad).

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22. Suit for setting aside decree and execution sale. — [1] Suit for a declaration that certain decree was obtained by fraud and for consequential relief that the sale in execution of the decree might be set aside and the plaintiff's possession be confirmed. It was held that the value of the suit was the value of the property which by virtue of this section was also the value for jurisdiction. (Vol 26) 1939 Pat 254 (254) (Where the suit was instituted before execution, the value of suit would be value of decree.)

[2] See also the following cases. ('01) 1901 Pun Re No. 42, p. 133 (135) ✠(Vol 11) 1924 Cal 239 (239) : 50 Cal 892 (DB)✠('74) 12 Beng L R 370 (372) (F B).

23. Suit to set aside or establish adoption. — [1] The value of a suit to set aside or establish an adoption is the market value of the property affected thereby. (Vol 14) 1927 Mad 563 (564) : 50 Mad 646 (DB)✠('83) 6 Mad 192 (196) (DB) ✠ (Vol 22) 1935 Mad 279 (279) (DB)✠('93) 3 Mad L Jour 46 (47) (DB). (Joint family property — Value of whole property.)

[But see ('93) 15 All 378 (379) (DB). (Valuation put by the plaintiff is the value for jurisdiction.)✠ ('11) 35 Bom 264 (265) (DB). (Do)✠('10) 37 Cal 860 (862) (DB). (Do).]

24. Suit to avoid an instrument. — [1] In a suit for cancellation of a sale-deed the consideration expressed in the sale-deed determines the value of the suit. (Vol 20) 1933 Rang 40 (40).

[2] In a suit for cancellation of a mortgage-deed the amount for which the mortgage-deed was executed is the value of the suit ('11) 11 Ind Cas 443 (443, 444) : 1912 Pun Re No. 21 ✠ ('11) 7 Nag L R 190 (192) ✠ ('74) 7 Mad H C R 372 (374).

[3] In Punjab a suit to declare a sale-deed as not binding on the plaintiff cannot be valued at an amount exceeding 30 times the land revenue, though the consideration may exceed such limit. ('12) 15 Ind Cas 272 (273) (DB) (Lah)✠('05) 1905 Pun Re No 58, p. 199 (200) (DB).

25. Suits to enforce registration. — [1] Where no rules are framed under S. 9, the value of suit to enforce registration will be the value of the interest created by the instrument. ('08) 31 Mad 89 (92) (FB)✠ ('95) 1895 Pun Re No. 21, p. 88 (88) (DB).

[2] The valuation of a suit for registration not with regard to any land or interest in land will be the valuation put by the plaintiff on the property mentioned in the document sought to be registered. (Vol 13) 1926 Cal 1091 (1091) : 53 Cal 1023 (DB).

26. Suit to establish or disprove right of occupancy. — [1] In a suit to establish a right of occupancy the value of plaintiff's interest alone determines the value for jurisdiction. (Vol 1) 1914 Cal 530 (530) (DB).

27. Interpleader suit. — [1] A tenant who owed Rs. 54 as rent instituted an interpleader suit valuing it at Rs 7000, the value of the property. It was held that the suit was rightly valued. (Vol 27) 1940 All 452 (452).

28. Court's power to pass decree in excess of its pecuniary jurisdiction.—[1] In suits for accounts or mesne profits a tentative valuation put by the plaintiff for purposes of court-fees will be its value for purposes of jurisdiction. If the Court subsequently finds that a sum in excess of its pecuniary jurisdiction is due to the plaintiff the Court can pass a decree for such amount. ('94) 16 All 286 (290) (DB) ✠ (Vol 19) 1932 Bom 111 (112) : 56 Bom 23 (DB) ✠ (Vol 12) 1925 Cal 1076 (1081) : 53 Cal 14 (FB). (Overruling (Vol 2) 1915 Cal 352 . 43 Cal 650 and (Vol 7) 1920 Cal 517.)✠(Vol 5) 1918 Mad 998 (1002) : 40 Mad 1 (FB) ✠ (Vol 21) 1934 Pat 204 (207) : 13 Pat 344 (FB) ✠ ('13) 9 Nag L R 112 (116) (DB) ✠ (Vol 24) 1937 Rang 320 (321, 322, 324) : 1937 Rang L R 214 (FB). (Overruling (Vol 11) 1924 Rang 354: 2 Rang 408.)✠(Vol 12) 1925 Sind 324 (325) : 18 Sind L R 286 (DB).

[But see (Vol 21) 1934 Lah 545 (549, 550) : 15 Lah 512 (FB). (Suit for partnership accounts.)]

[2] The Court cannot, in a suit for damages pass a decree in excess of its pecuniary jurisdiction. (Vol 13) 1926 Cal 596 (596) (DB).

29. Jurisdiction with regard to plea of set-off — [1] Where both the amount of the claim in the suit and the value of the set off are each within the jurisdiction of the Court, it is immaterial that the combined amount of the two claims is beyond its jurisdiction. ('89) 1889 Pun Re No. 69, p. 220 (221).

[2] The valuation of the set-off is the entire sum pleaded and not the difference between the plaintiff's claim and the defendant's claim. (Vol 12) 1925 Rang 65 (66, 67) : 2 Rang 462. (Equitable set off.)✠(Vol 12) 1925 Rang 22 (25) 2 Rang 349 (DB) ✠ ('93) 20 Cal 527 (532) (SB)✠ ('90) 1890 Pun Re No. 17, p. 46 (47) (DB).

[3] Where the plaintiff admits in the plaint any portion of the defendant's claim, that portion must be deducted in determining the jurisdiction of the Court to try the set-off. (Vol 12) 1925 Rang 65 (67) : 2 Rang 462.

[4] In a small cause suit, a set-off beyond the pecuniary limits of the Small Cause Court's jurisdiction cannot be entertained, even though it may be within the pecuniary limits of that Court sitting on the original side ('90) 14 Bom 371 (372) (DB). (See S. 33 Act IX [9] of 1887)

[But see ('88) 12 Bom 31 (33) (DB).]

[5] Where the amount of set-off exceeds the pecuniary jurisdiction of the Court and the defendant can reduce his claim to bring it within the jurisdiction, he will be barred from claiming the balance by a separate suit. (Vol 29) 1942 Mad 580 (581) : I L R (1942) Mad 836 (DB).

30. Forum of appeal. — [1] Suits Valuation Act does not apply to appeals but only to suits. (Vol 33) 1946 Bom 356 (358).

[2] The amount or value of the subject-matter in dispute in the appeal is immaterial for determining the appellate forum. (Vol 12) 1925 Lah 534 (534) ✠ ('91) 13 All. 320 (322, 323) (D B) ✠ (Vol 5) 1918 Mad 998 (1002, 1006) : 40 Mad 1 (F B). (Overruling ('94) 4 Mad L Jour 43.)

[3] In cases to which this section applies, the appellate forum will depend on the amount at which the suit is valued for purposes of court-fees. (Vol 14) 1927 Pat 224 (224) : 6 Pat 597 (D B) ✠ ('07) 4 Low Bur Rul 120 (121) (D B) ✠ ('03) 1903 Pun L R No. 43, p. 121 (122)✠('93) 18 Bom 207 (209) (D B).

[4] Where a suit embraces two or more causes of action, the aggregate value of the different causes of action will be the value of the suit for the original as well as the appellate Court. ('12) 36 Bom 628 (637) (D B) ✠ ('07) 30 Mad 61 (64) ✠ ('93) 16 Mad 328 (329) (D B).

[5] Where separate trials have been ordered by the original Court, the value of the appeal will depend on the value of the particular cause of action to which it relates. ('71) 15 Suth W R 31 (31) (D B).

[6] Where alternative reliefs based on different causes of action are prayed for in respect of the same property, although the court-fees are assessable separately, the value of the suit for purposes of jurisdiction is determined by the value of the property. ('10) 6 Ind Cas. 715 (716) : 1910 Pun. Re No. 41 (D B).

[But see ('07) 30 Mad 61 (64) (D B).]

[7] Where the plaintiff claims a definite sum of money, the appellate forum depends on the amount

9. When the subject-matter of suits of any class, other than suits mentioned in the Court-fees Act, 1870, section 7, paragraphs V and VI, and paragraph X, clause (*d*), is such that in the opinion of the High Court it does not admit of being satisfactorily valued, the High Court may, with the previous sanction of the [a][Provincial Government], direct that suits of that class shall, for the purposes of the Court-fees Act, 1870, and of this Act and any other enactment for the time being in force, be treated as if their subject-matter were of such value as the High Court thinks fit to specify in this behalf [b]

Determination of value of certain suits by High Court.

[a] *Substituted* by A. O. for "Local Government". [b] For rules as to valuation of certain classes of suits under this section, *see* different local Rules and orders.

Provincial Amendment

UNITED PROVINCES

For the words and figures "the Court fees Act, 1870, S. 7, paragraphs V and VI and paragraph X clause *(d)*" the words and figures "section 4 or 8" were *substituted*.

—*U. P. Act VII of 1939, S. 5.* [16-7-1939.]

Section 8—Note 30 *(contd.)*

claimed. (Vol 20) 1933 Lah 8 (9) ✠ (Vol 14) 1927 Lah Lah 187 (188)✠('07) 34 Cal 954 (959) (F B).

[8] In suits for accounts or mesne profits, where the Court passes a decree for an amount exceeding that claimed by him the amount found due and decreed determines the appellate forum. (Vol 21) 1934 Lah 488 (491, 492): 15 Lah 151 (F B) ✠ ('96) 20 Bom 265 (268) (D B). (Doubted in ('98) 22 Bom. 963) (D B)) ✠ ('07) 34 Cal 954 (959, 960) (F B) ✠ (Vol 14) 1927 Cal 616 (617) (D B) ✠ (Vol 13) 1926 Cal 378 (379) (D B) ((Vol 12) 1925 Cal 1076: 53 Cal. 14 *Distinguished* as relating to mesne profits pendente lite and not prior to the suit.)

[But see (Vol 12) 1925 Cal 1076 (1082): 53 Cal 14 (F B)✠(Vol 12) 1925 All 376 (377): 47 All 534 (D B) ✠ (Vol 33) 1946 Bom 356 (361). (Suit for administration.) ✠ (Vol 5) 1918 Mad 998 (1006): 40 Mad 1 (F B) ('94) 4 Mad L Jour 43 overruled.) ✠ ('13) 9 Nag L R 112 (113) (D B).]

[9] Where, in a suit for accounts or mesne profits the amount decreed is less than the amount mentioned in the plaint, the value stated in the plaint determines the appellate forum. (Vol 21) 1934 Lah. 488 (491, 492): 15 Lah 151 (F B)✠('02) 6 Cal W N 346 (348) (D B) ✠ ('88) 12 Bom 675 (677): 1888 Bom P J 1 (D B).

[10] The forum of appeal from a preliminary decree in a suit for accounts or for mesne profits depends on the plaint valuation. (Vol 17) 1930 Lah. 832 (833) (D B) ✠(Vol 15) 1928 Pat. 535 (536) (D B).

[11] The forum of appeal from a preliminary decree in an administration suit depends on the plaint valuation. (Vol 26) 1939 Sind 305 (306, 307): I L R (1940) Kar 1 ✠ (Vol 23) 1936 Bom 453 (356) (D B) ✠ ('95) 19 Bom. 198 (201) (D B).

[12] In cases not governed by S. 8 the value as given by the plaintiff will determine the appellate forum unless it appears that purposely or through gross negligence the true value of the suit has been altogether mis-represented in the plaint. (Vol 30) 1943 Oudh 186 (187, 188) (D B)✠ (Vol 18) 1931 Oudh 58 (61): 6 Luck 426 (D B) ✠ (Vol 13) 1926 Nag. 71 (72) (D B)✠ (Vol 12) 1925 All. 376 (377): 47 All. 534 (D B) ✠ (Vol 5) 1918 Mad. 998 (1002, 1006): 40 Mad. 1 (F B)✠(Vol 6) 1919 Cal. 447 (448) (D B). (Suit for possession—Forum of appeal depends upon value of suit as accepted by plaintiff after adjudication and not as adjudged.)

[But see (Vol 25) 1938 Lah. 311 (312). (Suit for pre-emption.) ✠(Vol 15) 1928 Lah. 670 (671) (D B). (Do.)✠ (Vol 12) 1925 Lah 1 (2): 5 Lah 481 (F B). (Suit for possession of land.) ✠('08) 1908 Pun Re No. 19, p. 124 (127) (F B). (Suit for possession of a house.)]

[13] The forum of appeal in a suit for possession of immovable property is determined by its market-value. ('05) 29 Bom. 96 (98) (D B)✠('80) 5 Cal. 489 (492, 493) (D B).

[14] The appellate forum in a suit for pre-emption depends on the value of the property, as stated in the plaint. ('03) 6 Oudh Cas 255 (260, 261) ✠ ('91) 13 All. 320 (323) (D B).

[But see (Vol 25) 1938 Lah. 311 (312)✠(Vol 15) 1928 Lah. 670 (671) (D B) ((Vol 10) 1923 Lah. 107: 3 Lah. 386. *Followed.*)]

[15] The value of compensation for improvements ordered to be paid by the plaintiff cannot be taken into consideration in determining the appellate forum in the case of a suit for pre-emption. (Vol 28) 1941 Pesh. 14 (15).

[16] That the jurisdictional value of a suit, for foreclosure is the amount claimed by the plaintiff and not the amount found due. ('04) 17 C P L R 139 (142).

[17] In a suit for partition the value of the plaintiff's share has been held to determine the forum of appeal. ('21) 62 Ind. Cas. 979 (980) (D B) (Lah) ✠('91) 14 Mad. 462 (464) (D B).

[18] An appeal from orders in execution of a decree will lie only to the Court which would have been competent to entertain an appeal from the original decree. (Vol 20) 1933 Lah. 8 (8, 9) ✠ (Vol 18) 1931 Cal. 159 (159, 160): 58 Cal. 829 (D B) ✠ (Vol 12) 1925 Lah. 534 (534)✠('73) 5 N W P H C R 108 (109) (F B).

[19] An amendment in the law relating to valuation after the institution of the suit does not affect the forum of appeal. (Vol 14) 1927 Mad. 977 (979, 980): 50 Mad. 857 (F B).

[See however ('81) 4 Mad. 220 (222) (D B).]

Section 9 — Note 1.

[1] Section 8 has no application to cases falling under S. 9 or Rules framed under S. 9. Section 8 is restricted to *ad valorem* cases only, while S. 9 applies to all cases, whether *ad valorem* or not, in which the value cannot be satisfactorily ascertained. (Vol 33) 1946 Lah. 94 (96) (F B).

[2] Rules under this section may be made not only for jurisdiction but also for court-fees. (Vol 17) 1930 Nag 20 (20) (D B).

[3] Suits for the restitution of conjugal rights, suits to set aside or establish adoption and suits for the custody of a child are instances of suits contemplated by this section. (Vol 28) 1941 Rang. 187 (188): 1941 Rang. L R 495 (F B) ✠ ('10) 34 Bom. 236 (237) (D B). (Restitution of conjugal rights — Plaintiff's valuation should be accepted in the absence of rules.) ✠ ('06) 28 All. 545 (548, 555) (F B) (Do.)✠(Vol 5) 1918 Nag. 1 (3): 15 Nag. L R 24 (D B) (Suit to establish adoption) ✠ ('10) 37 Cal. 860 (862) (D B). (Do.)✠ ('03) 2 Low Bur. Rul. 140 (144) (F B). (Custody of child.)

[4] Suits for partition have been held not to admit of satisfactory valuation. (Vol 32) 1945 Mad. 56 (56).

[5] It has been held that the powers vested in the High Courts by this section could be exercised in res-

10. [Repeal of section 22, Punjab Courts Act, 1884 (XVIII of 1884).] *Repealed by the Amending Act 1891 (XII [12] of 1891), S. 2 and Sch. I.*

PART III.

SUPPLEMENTAL PROVISIONS.

Procedure where objection is taken on appeal or revision that a suit or appeal was not properly valued for jurisdictional purposes.

11. *(1)* Notwithstanding anything in section 578 of the Code of Civil Procedure,[a] an objection that by reason of the over-valuation or under-valuation of a suit or appeal a Court of first instance of lower appellate Court which had not jurisdiction with respect to the suit or appeal exercised jurisdiction with respect thereto shall not be entertained by an appellate Court unless—

(a) the objection was taken in the Court of first instance at or before the hearing at which issues were first framed and recorded, or in the lower appellate Court in the memorandum of appeal to that Court, or

(b) the appellate Court is satisfied, for reasons to be recorded by it in writing, that the suit or appeal was over-valued or under-valued and that the over-valuation or under-valuation thereof has prejudicially affected the disposal of the suit or appeal on its merits.

(2) If the objection was taken in the manner mentioned in clause *(a)* of sub-section *(1)*, but the appellate Court is not satisfied as to both the matters mentioned in clause *(b)* of that sub-section and has before it the materials necessary for the determination of the other grounds of appeal to itself, it shall dispose of the appeal as if there had been no defect of jurisdiction in the Court of first instance or lower appellate Court.

(3) If the objection was taken in that manner and the appellate Court is satisfied as to both those matters and has not those materials before it, it shall proceed to deal with the appeal under the rules applicable to the Court with respect to the hearing of appeals; but if it remands the suit or appeal, or frames and refers issues for trial, or requires additional evidence to be taken, it shall direct its order to a Court competent to entertain the suit or appeal.

(4) The provisions of this section with respect to an appellate Court shall, so far as they can be made applicable, apply to a Court exercising revisional jurisdiction under section 622 of the Code of Civil Procedure[b] or other enactment for the time being in force.

(5) This section extends to the whole of British India, and shall come into force on the first day of July, 1887.

[a] *See* now the Code of Civil Procedure, 1908 (Act V [5] of 1908), S. 99. [b] *See* now, *ibid.*, S. 115.

Objects and Reasons

"We have so amended section 11 (Section 5 of the Bill as introduced) as to give the appellate Court a discretion as to proceeding with an appeal in a suit which was instituted in a Court without jurisdiction as regards the value, and we have made the provisions of the section applicable to an appellate Court apply also to a Court exercising revisional jurisdiction".

—S. C. R.

Provincial Amendment

PUNJAB.

The heading of Part III "Supplemental Provisions" was *omitted.*

To sub-s. *(1)* the following Proviso was added :

"Provided that in a suit for accounts the value for purposes of jurisdiction as determined by the Court at any stage of the trial shall be final and conclusive and shall not be liable to be contested in appeal or revision".

—*Punjab Act XIII of 1942, S. 3.* [22-11 1942.]

Section 9—Note 1 *(contd.)*

pect of those suits alone which did not relate to land. (Vol 24) 1937 Lah. 677 (679) (D B).

[6] The rules framed under this section have the force of law. (Vol 17) 1930 Nag. 20 (20) (D B)✠ (Vol 5) 1918 Nag. 1 (4) : 15 Nag L R 24 (D B) (Court cannot question discretion of the High Court.)

[7] Where rules are framed for valuation for purposes of jurisdiction under this section, the value of the suit for purposes of court-fees will not be the value for purposes of jurisdiction. ('04) 1904 Pun. Re. No. 6, p. 31 (34) (F B)✠(Vol 33) 1946 Lah. 94 (97) (F B).

[8] Under S. 9, it is not necessary that one value should be fixed for all purposes. There may be one valuation for jurisdiction and another for court-fees. (Vol 33) 1946 Lah. 94 (97) (F B).

[9] *A* institutes a suit for the custody of wife, valuing it for court-fee and jurisdiction according to the law in force at the date of the suit. Between the date of the suit and the date of the appeal, rules framed under this section come into force. The rules will not alter the value for determining the appellate forum. ('09) 1909 Pun. Re. No. 31, p. 87 (90) (D B)✠(Vol 33) 1946 Lah. 94 (95) (F B). (Blacker J in Order of Reference.)

SECTION 11 — SYNOPSIS

1. Scope.
2. "Over-valuation or under-valuation."
3. Objection as to jurisdiction, when to be taken.
4. "For reasons to be recorded."
5. "Has prejudicially affected."
6. Appellate Court cannot raise objection suo motu.
7. Procedure.
8. Res judicata.

1. Scope.—[1] Where there is no dispute as to valuation but the contention is that on the valuation given by the plaintiff the lower Court had no jurisdiction, this section does not apply and the objection can be taken at any time. (Vol 29) 1942 Oudh 481 (482)

Section 11 — Note 1 *(contd.)*

(DB) ✠ (Vol 33) 1946 All 456 (457) : I L R (1946) All 454 (DB) ✠(Vol 33) 1946 Sind 103 (108) : I L R (1945) Kar 445. (Principle of S. 11 applies to question of jurisdiction arising not only from mistake in valuation but also from mistake in pecuniary jurisdiction) ✠ (Vol 30) 1943 Oudh 338 (342) : 18 Luck 683 (FB).

[2] Where there has been no under valuation or over-valuation, but the nature of the suit was wrongly understood this section cannot apply. (Vol 28) 1941 Lah 313 (314). ((Vol 12) 1925 Lah 290 : 6 Lah 105 (FB), *Distng*)

[3] Where the objection relates to valuation this section will apply. (Vol 21) 1934 Rang 268 (269) : 12 Rang 335.

[4] The section does not apply where the objection is taken before the superior Court pending the disposal of the case by Court not having jurisdiction. (Vol 25) 1938 Cal 161 (162) ✠ (Vol 17) 1930 Lah 195 (197) ✠ (Vol 16) 1929 Mad 396 (397, 398) (DB) ✠ ('01) 24 Mad 427 (428, 429) (DB). (Lower appellate Court remanding case to trial Court — Section applies)

[5] Change of jurisdiction (due to erroneous valuation) from a Court of exclusive jurisdiction like a Court of Small Causes to that of a Munsif—Section applies. ('97) 24 Cal. 661 (665) (DB).

[6] Objection that the suit is under-valued or over valued and that on its true valuation the appeal will not lie to the Court to which it has been presented—The party objecting is not precluded from raising the objection, by the fact that he did not question that valuation of the suit for the purpose of the jurisdiction of the lower Court. (Vol 18) 1931 Oudh 58 (60) : 6 Luck 426 (DB) ✠ (Vol 12) 1925 Pat 488 (489) (DB) ✠ ('98) 16 Mad 326 (327) (DB).

[But see (Vol 26) 1939 All. 552 (553) : I L R (1939) All 557 ✠ ('12) 8 Nag L R 179 (181).]

2. "Over-valuation or under-valuation." —[1] This section applies to all cases of over-valuation or under-valuation however it may be caused. ('04) 31 Cal 849 (856) (DB).

[2] The section applies to cases where the valuation depends on definite rules which have been contravened. (Vol. 26) 1939 All 552 (553): I L R (1939) All 557 (DB) ✠(Vol 21) 1934 Pat 240 (242) : 13 Pat 290 (DB) ✠(Vol 12) 1925 Lah 290 (294) : 6 Lah 105 (FB). (Overruling (Vol 7) 1920 Lah 112 ; (Vol 2) 1915 Lah 185; 1901 Pun Re No 35 ; ('10) 8 Ind Cas 1043 (Lah) and 1894 Pun Re No. 132.)

[3] The section applies to cases where the objection taken is to the principle or mode of valuation adopted. (Vol 7) 1920 Mad 1017 (1019) (DB) ✠ (Vol 7) 1920 Mad 843 (846) (DB) ✠ ('13) 9 Nag L R 161 (163).

[4] The section applies even though the erroneous valuation has been deliberately made by the plaintiff. ('13) 16 Oudh Cas 257 (259) ✠ ('97) 24 Cal 661 (666, 667) (DB).

[5] The section is applicable even if the value of the suit has not been set out in definite terms in the plaint. ('11) 1 Upp Bur Rul 82. (('91) 14 Mad 183, *Followed* ; ('02) 1 Low Bur Rul 85, *Dissented*)

3. **Objection as to jurisdiction, when to be taken.**—[1] Where there is no question of valuation involved and the proceedings are on the face of them beyond the jurisdiction of the Court which has disposed of them, the objection can be taken at any stage. ('88) 12 Bom 155 (157) (DB).

[2] A question of over-valuation or under-valuation is a matter with regard to which a party can waive an enquiry. (Vol 19) 1932 Lah 538 (539) ✠ (Vol 7) 1920 Pat 92 (94) (DB).

[3] The objection that there has been an under-valuation or over-valuation of a suit or appeal and the matter dealt with by a wrong Court, can ordinarily be entertained only if it is raised at an early stage of the proceedings. (Vol 21) 1934 Pat 184 (186) : 13 Pat 329 (SB) ✠ (Vol 12) 1925 Lah 290 (294) : 6 Lah 105 (FB) ✠(Vol 11) 1924 All 388 (389) : 46 All 250 (DB)✠(Vol 5) 1918 P C 188 (191, 192) : 43 Bom 507 : 46 Ind App 24 (P C).

[4] Objection taken in the trial Court itself but after the first hearing has been held not enabling the defendant to raise such objection in the appellate Court (Vol 28) 1941 Pat 532 (534) (DB).

[5] It has been held that the objection to the jurisdiction of the trial Court should be raised in the grounds of appeal to the lower appellate Court if the appellant wishes to agitate the point at the hearing of the appeal in the lower appellate Court. (Vol 10) 1923 Oudh 252 (253).

Objection as to jurisdiction of Court of first instance :

[6] A party cannot object in appeal to a valuation not questioned by him at the trial of the suit. (Vol 26) 1939 All 552 (553) : I L R (1939) All 557 (DB) ✠(Vol 15) 1928 Lah 825 (827) : 9 Lah 118 ✠ ('12) 8 Nag L R 179 (181).

[7] The objection cannot be raised for the first time in second appeal. (Vol 25) 1938 Pesh 77 (78) (DB) ✠(Vol 18) 1931 Lah 605 (606) ✠ (Vol 17) 1930 Mad 541 (542, 543) ✠ (Vol 10) 1923 Pat 581 (583, 584) (DB).

[8] If the objection is not taken at the proper time, the appellate Court cannot entertain the objection unless it is satisfied for reasons to be recorded in writing, that the valuation has prejudiced the disposal of the suit on the merits. (Vol 21) 1934 Pat 204 (208) : 13 Pat 344 (SB) ✠(Vol 19) 1932 Lah 538 (539) ✠(Vol 11) 1924 All 388 (389, 390) : 46 All 250 (DB).

[*See* (Vol 23) 1936 Oudh 179 (180): 12 Luck 68 (DB). (Defendant not admitting valuation of suit, but not pressing the point is not barred from raising the point.)]

[9] Where a suit is transferred to another Court for trial the latter Court will be the "Court of first instance." (Vol 28) 1941 Pat 532 (534) (DB).

[10] An objection taken at the proper time and overruled both by the trial Court and the lower appellate Court can be taken again in the second appeal. ('01) 24 Mad 43 (45) (DB)

[11] The trial Court will be justified in refusing to hear an objection as to its jurisdiction put forward at a late stage. (Vol 21) 1934 Pat 184 (186) : 13 Pat 329 (SB).

Objection to jurisdiction of lower Appellate Court :

[12] An objection as to the jurisdiction of the lower appellate Court not taken in such Court, cannot be entertained in second appeal unless the disposal of the appeal on the merits has been prejudicially affected. (Vol 14) 1927 Lah 860 (860) ✠ (Vol 5) 1918 Pat 315 (316) (DB) ✠ ('89) 1889 All W N 169 (170) (DB).

Objection in execution proceedings:

[13] An objection as to under-valuation or over-valuation of the suit cannot be taken before the executing Court as a bar to the execution of the decree. (Vol 29) 1942 Pat 152 (155, 156) (DB) ✠(Vol 25) 1938 Pesh 77 (78) (DB) ✠ (Vol 24) 1937 Cal 430 (431) (DB) ✠(Vol 24) 1937 Oudh 379 (380) : 13 Luck 340 (DB) ✠(Vol 21) 1934 Pat 240 (242) : 13 Pat 290 (DB).

Objection in collateral proceedings.

[14] A decree passed in one suit cannot be impeached in collateral proceeding, as passed by a Court which, owing to defective valuation, had no jurisdiction. (Vol 16) 1929 Mad 323 (324) (DB). (Suit to declare decree as void.)✠(Vol 14) 1927 Mad 201 (202)✠(Vol 11) 1924 All 388 (389, 390) : 46 All 250 (DB). (Suit to set aside

Proceedings pending at commencement of Part I or Part II.

12. Nothing in Part I or Part II shall be construed to affect the jurisdiction of any Court—

(a) with respect to any suit instituted before rules under Part I applicable to the valuation of the suit take effect, or Part II has come into force, as the case may be, or

(b) with respect to any appeal arising out of any such suit.

Section 11 — Note 3 *(contd.)*

decree on ground that Court had no jurisdiction to pass it is not maintainable.)

Objection to jurisdiction of High Court.

[15] After a High Court has disposed of an appeal an application for review that the appeal was over-valued and did not fall within its jurisdiction does not lie. (Vol 24) 1937 All 628 (629) : I L R (1937) All 592 (DB).

Estoppel.

[16] A plaintiff will not be estopped from contending in appeal that the mode in which he valued the suit was wrong and that the trial Court had no jurisdiction. (Vol 20) 1933 All 249 (252) : 55 All 315 (FB).

[But see (Vol 16) 1929 Bom 341 (343) : 53 Bom 552 (DB).]

[17] A party to a suit having adopted a certain valuation cannot in the same suit object to that valuation. ('73) 1 Ind App 84 (88) (PC).

4. "For reasons to be recorded." — [1] The requirement in sub-s. (1), clause (b) as to recording of reasons does not apply where the appellate Court holds that there has been no prejudice on the merits. (Vol 14) 1927 All 359 (360).

5. "Has prejudicially affected." — [1] Though an objection is taken at proper time in the lower Court the appellate Court is not entitled to interfere unless the disposal of the case on the merits has been prejudicially affected. (Vol 28) 1941 Pat 532 (534, 536) (DB) ✠ (Vol 16) 1929 Lah 509 (511) : 11 Lah 15 (DB) ✠ (Vol 16) 1929 Rang 228 (229) ✠ (Vol 5) 1918 Mad 590 (591) (DB)✠(Vol 34) 1947 Mad 135 (136)✠(Vol 33) 1946 Mad 209 (214) : ILR (1946) Mad 707 (DB) ✠ (Vol 4) 1917 All 79 (80) (DB)✠('13) 16 Oudh Cas 257 (259)✠('04) 31 Cal 344 (348) (DB).

[2] Intimate connection between under-valuation and wrong disposal on merits must be established merely showing that the decision of the suit is wrong is not sufficient. (Vol 34) 1947 Mad 135 (136).

[3] The mere fact that due to wrong valuation a case has been disposed of by a Court of inferior grade cannot be considered to have affected the disposal of the case on the merits. (Vol 28) 1941 Pat 532 (534, 536) (DB)✠(Vol 26) 1939 Lah 451 (452)✠(Vol 20) 1933 All 249 (251) : 55 All 315 (FB)✠(Vol 16) 1929 Lah 566 (568) (DB)✠(Vol 5) 1918 Mad 590 (591) (DB) ✠ ('13) 9 Nag L R 161 (163).

[But see (Vol 20) 1933 Lah 8 (9)✠(Vol 5) 1918 Lah 369 (370) : 1918 Pun Re No. 21.]

[4] The fact that a party has been deprived of a right of appealing to the High Court on facts due to wrong valuation of the suit, will not amount to a prejudicial disposal on merits. (Vol 27) 1940 Oudh 164 (170) : 15 Luck 619 (DB)✠(Vol 14) 1927 All 359 (360) ✠ (Vol 11) 1924 Mad 6 (14, 15) : 46 Mad 631 (FB) ✠ ('13) 9 Nag L R 161 (163).

[5] Mere fact that suit is tried as small cause or that party is deprived of right of first appeal to High Court because of the incorrect valuation, does not amount to prejudicial disposal on merits. (Vol 34) 1947 Mad 135 (137).

[6] Over-valuation necessitating appeal being filed in High Court—High cost of appeal : *Held*, merits affected. (Vol 20) 1933 All 249 (252) : 55 All 315 (FB).

[But see (Vol 13) 1926 Pat 351 (353) : 5 Pat 505 (DB)✠(Vol 12) 1925 Oudh 561 (563, 564) : 28 Oudh Cas 203 (DB)✠(Vol 8) 1921 Pat 32 (33) : 5 Pat L Jour 397 (DB).]

[7] Where even if the suit had been properly valued it would have lain to the same Court, the objection cannot be to the jurisdiction of the trial Court. (Vol 13) 1926 Pat 351 (352) : 5 Pat 505 (DB).

[8] On the valuation by the trial Court itself, the suit was beyond its jurisdiction and yet such Court disposed of the suit : *Held* that the decision was "prejudiced" within the meaning of this section. (Vol 6) 1919 Cal 984 (985) (DB).

6. Appellate Court cannot raise objection suo motu. — [1] The appellate Court has no power to raise a point as to valuation *suo motu* when no objection has been taken in the lower Court or before itself by any party ('12) 16 Ind Cas 46 (47) (DB) (Cal).

[See however ('70) 14 Suth W R 195 (196) (DB). (Suit for pre-emption valued at certain amount tried by Court without any objection to jurisdiction—Appellate Court dismissing suit on ground of under-valuation: *Held*, order was justified.)]

7. Procedure. — [1] Under sub-sections (2) and (3), the appellate Court, on coming to the conclusion that there has been over-valuation or under-valuation, must consider the question of prejudice before disposing of the appeal. (Vol 29) 1942 Pat 152 (155, 156) (DB)✠ (Vol 28) 1941 Pat 532 (536) (DB) ✠ (Vol 7) 1920 Mad 1017 (1019) (DB)✠('11) 11 Ind Cas 742 (743) : 1 Upp Bur Rul 82✠('03) 25 All 174 (178) (FB) ✠ ('03) 1903 Pun Re No. 74*n*, p. 313 (314)✠('02) 31 Cal 344 (348) (DB).

[2] A return of the plaint for presentation to the proper Court is authorised by sub-section (3). (Vol 17) 1930 All 869 (873) (DB) ✠ (Vol 5) 1918 Mad 590 (591) (DB).

[But see (Vol 17) 1930 Lah 182 (184).]

[3] Objection taken in lower Court — Merits of the disposal also affected—Material on record sufficient for disposal of appeal by appellate Court—Appellate Court must dispose of the appeal on merits. (Vol 17) 1930 Lah 182 (184).

[4] Valuation of plaint and appeal amended in second appeal and deficit court-fee paid — Amended valuation found to be beyond jurisdiction of District Court, the first appellate Court—Appeal to High Court was treated as first appeal, ignoring the decree of the District Court as being without jurisdiction. (Vol 34) 1947 Pat 78 (78) (DB).

8. Res judicata. — [1] A prior decision cannot be questioned on the ground that the suit in which it was pronounced was owing to incorrect valuation, tried by a Court which on the true valuation, had no jurisdiction. (Vol 25) 1938 Mad 257 (261, 262) (DB)✠(Vol 30) 1943 All 340 (342) : ILR (1943) All 834 (DB).

[2] The plaintiff cannot get rid of the bar of *res judicata* by deliberately over-valuing the same claim in a subsequent suit. (Vol 4) 1917 Pat 409 (410) (DB).

[THE] SUPREME COURTS' OFFICERS TRADING ACT, 1848.[a]
(ACT XV OF 1848.)

[17th June 1848.]

An Act to forbid trading by the Officers of the Supreme Courts.

Preamble.

FOR the better discharge of their duties by the officers of the undermentioned Courts of Justice; it is enacted as follows:—

Prohibition in case of officers of Supreme Courts, against accepting gifts; holding certain offices; carrying on dealings.

1. No officer of any of the Courts of Judicature established by Royal Charter within the territories subject to the government of the East India Company, or any Court established for the relief of insolvent debtors within the said territories, shall, directly or indirectly, by himself, or by any other person or persons on his behalf, accept from any person or persons any gift or reward for any act or behaviour in his office other than his legal salary and fees and profits of office, or hold any office in any bank or public company, except as hereinafter excepted, or carry on or be concerned in any dealings as a banker or trader, or as agent, factor, or broker, either for his own advantage or for the advantage of any other person or persons, except such dealings as it may be part of the duty of any such officer by virtue of his office to carry on.

[a] Short title given by the Indian Short Titles Act, 1897 (14 [XIV] of 1897).

Exemption of officers who are also advocates, &c.

2. This Act shall not be construed to forbid any officer of any of the said Courts, who is also a practising advocate, attorney, solicitor, or proctor in any of the said Courts, from taking the usual fees and emoluments of advocates, attorneys, solicitors, or proctors, nor to apply to any advocate, attorney, solicitor, proctor, sheriff, assignee, receiver, or committee, so far as he is held to be in that capacity merely for some purposes an officer of any of the said Courts.

Holding unpaid office in society.

3. This Act shall not be construed to forbid any officer of any of the said Courts from holding any unpaid office in any society for charitable purposes, or for the advancement of knowledge, or for the encouragement of science, art, or manufactures.

Punishment for contravention of Act.

4. Every officer of any of the said Courts who shall knowingly offend against this Act shall, on conviction thereof, be liable to be punished by deprivation of his office, and also, by the sentence of the Court before which he shall be convicted, may be declared incapable, and in that case shall become incapable, of being appointed to the same or any other office of the same Court, or to serve Her Majesty [a][* * *] in the territories under the government of the East India Company, or in such part of the said territories as shall be specified in the sentence, or in the discretion of the Court may be otherwise punished by fine or fine and imprisonment for his misdemeanour as to the Court shall seem fit, regard being had to the nature of his offence.

[a] The words "or the East India Company" were *repealed* by the Repealing Act, 1876 (12 [XII] of 1876).

[THE INDIAN] TARIFF ACT, 1934.
(ACT XXXII OF 1934.)

CONTENTS.

SECTIONS

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THE FIRST SCHEDULE.—Import Tariff.

THE SECOND SCHEDULE.—Export Tariff.

THE THIRD SCHEDULE.—*[Repealed.]*

STATEMENT OF OBJECTS AND REASONS.

"The Schedule of import duties contained in the Indian Tariff Act, 1894, has, under the influence of a long succession of amending Acts, become amorphous and the numbering of the items has lost its serial character. The classification of articles is far from scientific, and, in order to ascertain the amount of the duty imposed on many of the items contained in the Schedule and the duration of the duty, it is necessary to collate the Act with other Acts such as the Indian Finance Act, 1931, the Indian Finance (Supplementary and Extending) Act, 1931, and the various protection Acts. In practice commercial bodies and importing merchants have recourse, for the vital information required by them regarding customs duties, to a compilation known as the Indian Customs Tariff drawn up by the Department of Commercial Intelligence and Statistics, which goes some way towards supplying an intelligible statement of the Indian Tariff. This compilation, while reproducing the items contained in the Second Schedule to the Indian Tariff Act, 1894, has recognised the necessity for an extensive rearrangement of the order of those items and for stating the rate of duty on each article not as it appears in the Schedule to the Indian Tariff Act but as it stands when the effect of the surcharges imposed by the two Finance Acts of 1931 and the modifications of duty made by subsidiary Acts has been allowed for. Despite these readjustments, the arrangements of items in this compilation also leaves much to be desired, and its variation from the Schedule to the Tariff Act, with which it can be co ordinated only by the use of a complicated index is a source of continual trouble.

The object of the present Bill is to consolidate the existing provisions of law now to be sought in a multiplicity of enactments as far as possible into one measure, thereby enabling the whole or parts of some fifty Acts to be repealed. The Schedule of import tariffs will thus exhibit as far as possible the actual rate duty payable on each article under the tariff law for the time being, the only duties not included being those imposed by the Salt (Additional Import Duty) Act, 1931, an Act which contains matter which it would be unsuitable to include in the present Bill. At the same time, the items subject to duty have been rearranged upon a scientific plan enabling any particular item to be found without the use of an index, and affording a suitable basis for future modification or supplement by legislation.

The Economic Committee of the League of Nations has recently devised the framework of a customs nomenclature designed for general international use by countries imposing tariffs on imports. While this frame work is still merely a draft scheme not yet adopted by any nation, it offers a scientific classification made by experts of all articles commonly liable to import duties in accordance with which it is possible to rearrange the items contained in our present Tariff Schedule.

The framework arranges the whole body of imports under 21 main classes which form the headings of 21 sections. These sections are sub-divided into 86 chapters, which are again sub-divided into 991 basic items capable themselves of further sub-division into sub-items.

It has not been possible in this Bill to assimilate the items in our Tariff Schedule to the 991 items in this frame work. To do so would necessitate changes of substance which would be unjustified in what is intended to be a purely consolidating measure, which makes no change in the existing law. But it has been possible without making any change of substance to adopt the 21 sectional headings with one subsidiary section for "Articles not otherwise specified," and to group the existing items in our Tariff Schedule under the 86 chapters of the frame work, adopting the numbering of these chapters but not their headings.

We are thus enabled to take advantage of the logical scheme of classification of commodities evolved by a body of experts. There are obvious advantages in framing our tariff on a model which is likely to be universally adopted, not the least being the fact that familiarity with the British Indian Tariff Schedule will enable Indian Commercial interests to understand the tariffs of other countries. Subsequent changes in our tariff Schedule will not have the effect of producing increased divergence. On the contrary, it will be possible, by using the frame work as a guide when alterations are being made, to approximate more and more to the League of Nations Scheme."

—Gazette of India, 1934, Part V, page 329.

ACT HOW AFFECTED BY SUBSEQUENT LEGISLATION.

—Amended by the following Acts, namely:—
2 of 1935; Finance Act, 1935; 10 of 1936; 12 of 1936; Finance Act, 1937; 21 of 1937; 27 of 1937; 14 of 1938; 16 of 1938; Finance Act, 1939; 1 of 1939; 18 of 1939; 20 of 1939; Indian Tariff (Third Amendment) Act, 1939; 29 of 1939; 16 of 1940; 21 of 1940; 22 of 1940; 7 of 1941; 8 of 1941; 9 of 1941; 11 of 1942; 13 of 1944; Finance Act, 1945; 6 of 1945; 7 of 1946; 16 of 1946; 20 of 1947; 25 of 1947; 42 of 1947; 5 of 1948; 18 of 1948; 20 of 1948.
—Adapted by A. O.
—Repealed in part and amended by Act 20 of 1937.
—Repealed in part by Acts 3 of 1937 and 41 of 1940.

[THE INDIAN] TARIFF ACT, 1934.

(ACT XXXII OF 1934.)[a]

[*8th September, 1934.*]

An Act to consolidate the law relating to customs duties.

WHEREAS it is expedient to consolidate the law relating to customs duties on goods imported into or exported from British India by sea and to customs duties on goods imported into or exported from British India by land; It is hereby enacted as follows :

[a] For Statement of Objects and Reasons, *see* Gazette of India, 1934, Part v, page 329.

Short title, extent and commencement.

1. *(1)* This Act may be called the Indian Tariff Act, 1934.

(2) It extends to [a]the whole of British India [b]* *

(3) It shall come into force on such date[c] as the [d][Central Government] may, by notification in the [e][Official Gazette], appoint in this behalf.

[a] The expression "the whole of British India" in its application to the Dominion of India, means "all the Provinces of India." *See* I. O., Art. 4 (2) ; and in its application to the Dominion of Pakistan, means "all

the Provinces of Pakistan". *See* P. O., Art. 4 (2). (15-8-1947). [b] The words "except the Chief Commissionership of Aden" were *repealed* by A. O. [c] 1st January, 1935 : *See* Gazette of India, 1934, Part I, page 1377. [d] *Substituted* by A. O. for "Governor General in Council". [e] *Substituted* by A. O. for "Gazette of India".

Duties specified in Schedules to be levied.

2. *(1)* There shall be levied and collected in every port to which this Act applies, the duties specified in the First and Second Schedules.

(2) The [a][Central Government] may, by notification in the [b][Official Gazette], fix, for the purpose of levying the said duties, tariff values of any articles enumerated, either specifically or under general headings, in the said Schedules as chargeable with duty *ad valorem* and may alter any tariff values for the time being in force.

(3) Different tariff values may be fixed for different classes or descriptions of the same article.

(4) Nothing in this Act shall authorise the levy of customs duties on any article carried from one customs port in [c]British India to another such port except salt, opium and spirit.

[a] *Substituted* by A. O. for "Governor-General in Council". [b] *Substituted* by A. O. for "Gazette of India". [c] The expression "British India" in its application to the Dominion of India, means "all the Provinces of India". *See* I. O., Art. 4 (2) ; and in its application to the Dominion of Pakistan, means "all the Provinces of Pakistan". *See* P. O., Art. 4 (2). (15-8-1947).

Levy of duty where standard rate and preferential rate are specified.

3. *(1)* Where in respect of any article a preferential rate of revenue duty is specified in the First Schedule if the article is the produce or manufacture of the United Kingdom or of a British Colony, the duty to be levied and collected shall be at the standard rate, unless the article is the produce or manufacture of the United Kingdom or of a British Colony and the article is determined, in accordance with rules made under sub-section *(2)*, to be such produce or manufacture.

(2) The [a][Central Government] may, by notification in the [b][Official Gazette], make rules—

(a) for determining if any article is the produce or manufacture of the United Kingdom or a British Colony; and

(b) making provision in cases where at the time of importation proof is not forthcoming where required in accordance with the rules made under clause *(a)* that any article is the produce or manufacture of the United Kingdom or a British Colony—

(i) whereby duty may be levied at the standard rate and a refund given of the extra duty paid, if such proof is produced within a prescribed period, and

(ii) whereby duty may be accepted provisionally at the preferential rate on execution of a bond for the payment of the balance of duty if such proof is not produced within the prescribed period, and for the recovery of any balance due after the expiry of the prescribed period as if such balance were duty short-levied, within the meaning of section 39 of the Sea Customs Act, 1878.

(3) For the purposes of this section and of the First Schedule, the expression "United Kingdom" means the United Kingdom of Great Britain and Northern Ireland, and the expression "British Colony" includes a British Protectorate and any of the Mandated Territories of Tanganyika, the Cameroons under British Mandate and Togoland under British Mandate.

[a] *Substituted* by A. O. for "Governor-General in Council." [b] *Substituted* by A. O. for "Gazette of India".

Power of Central Government to alter protective duties.

4. *(1)* Where, in respect of any article chargeable under the First Schedule with a duty characterised in the third column thereof as protective, the [a][Central Government] is satisfied, after such inquiry as [b][it] thinks necessary, that such duty has become ineffective or excessive for the purpose of securing the protection intended to be afforded by it to a similar article manufactured in India, [b][it] may, by notification in the [c][Official Gazette], increase or reduce such duty to such extent as [b][it] thinks necessary either generally or in respect of such article when imported from or manufactured in any country or countries specified in the notification :

Provided that the duty leviable on any such article shall in no case be less than the duty leviable on a like article of British manufacture.

[d][*(2)* For the purpose of giving effect to the provisions of Article 10 of the Trade Agreement between His Majesty's Government in the United Kingdom and the Government of India, signed in London on the 20th day of March, 1939, the Central Government may by notification in the Official Gazette, vary from time to time such of the rates of duty set out in Items Nos. 48 (3) and 48 (9) of the First Schedule as are applicable to cotton fabrics of British manufacture.]

[e][*(3)*] The [a][Central Government] may by notification in the [c][Official Gazette] prescribe the

conditions subject to which articles shall be deemed to be of British manufacture for the purposes of this section and of the First Schedule.

[a] *Substituted* by A. O. for "Governor-General in Council". [b] *Substituted* by A. O. for "he". [c] *Substituted* by A. O. for 'Gazette of India". [d] Sub-section (2) was *inserted* by the Indian Tariff (Third Amendment) Act, 1939, S. 2. [27-5-1939]. [e] Original sub-section (2) was *re-numbered* as sub section (3), *ibid.*

Duties on imports and exports by land.

5. Where a customs duty at any rate prescribed by or under this Act or any other law for the time being in force is leviable on any article when imported into, or on any article when exported from, a port in [a]British India, the [b][Central Government] may, by notification in the [c][Official Gazette], direct that a duty of customs at the like rate shall be leviable on any such article when imported or exported, as the case may be, by land from or to any territory outside [a]British India, which [d][it] may, by a like notification, declare to be foreign territory for the purposes of this section.

[a] *See* Legislative-note (c) under S. 2. [b] *Substituted* by A. O. for "Governor-General in Council". [c] *Substituted* by A. O. for "Gazette of India". [d] *Substituted* by A. O. for "he".

Duty on salt, opium and spirit, when protected by a certificate.

6. *(1)* Salt, opium and spirit imported from any port in British India and protected by the certificate of any officer empowered in that behalf by the [a][Central Govenment] [b][* *] are chargeable with only the amount, if any, by which the duty leviable thereon under the First Schedule exceeds the duty shown by such certificate to have been already paid in respect thereof.

(2) The amount, if any, paid to the Government as the price of such salt or opium is not duty within the meaning of this section.

(3) Nothing in this section applies to spirit which is exported under bond for excise duty from one customs-port to another customs-port under the provisions of Chapter XIV of the Sea Customs Act, 1878.

[a] *Substituted* by A. O. for "Governor-General in Council". [b] The words "or the Local Government" were *repealed* by A. O.

7. [Application of certain provisions as to duties and goods.] *Repealed by the Land Customs (Amendment) Act, 1937 (3 [III] of 1937), S. 6 and Schedule.*

Additional import duty on bountyfed articles.

8. *(1)* Where any country, dependency or colony pays or bestows, directly or indirectly, any bounty or grant upon the production therein or the exportation therefrom of any article and the article is chargeable with duty under the provisions of this Act, then, upon the importation of any such article into British India, whether the same is imported directly from the country of production or otherwise, and whether it is imported in the same condition as when exported from the country of production or has been changed in condition by manufacture or otherwise, the [a][Central Government] may, by notification in the [b][Official Gazette], impose an additional duty equal to the net amount of such bounty or grant, however the same be paid or bestowed.

(2) The net amount of any such bounty or grant as aforesaid shall be, from time to time, ascertained, determined and declared by the [a][Central Government], and the [a][Central Government] may, by notification in the [b][Official Gazette], make rules for the identification of such articles and for the assessment and collection of any additional duty imposed upon the importation thereof under sub-section *(1)*.

[a] *Substituted* by A. O. for "Governor-General in Council". [b] *Substituted* by A. O. for "Gazette of India".

Special import duty on sugar in certain cases.

9. *(1)* Where the rate of duty or other taxation imposed in any country, dependency or colony upon sugar not produced therein exceeds the rate of duty or other taxation imposed upon sugar produced therein by more than the equivalent of six francs per one hundred kilogrammes in the case of refined sugar or five francs and fifty centimes per one hundred kilogrammes in the case of other sugar, then, upon the importation of any sugar from such country, dependency or colony into British India, whether the same is imported directly from the country of production or otherwise, and whether it is imported in the same condition as when exported from the country of production or has been changed in condition by manufacture or otherwise, the [a][Central Government] may, by notification in the [b][Official Gazette], impose, in addition to any other duty or taxation imposed under this Act or any other law for the time being in force, a special duty not exceeding one moiety of such excess.

(2) The [a][Central Government] may, from time to time, by general or special order, declare, for the purposes of sub-section *(1)*, —

(a) what articles or substances containing any saccharine matter shall be deemed to be "sugar" and what kinds of sugar shall be deemed to be "refined sugar" or "other sugar", respectively; and

(b) what sums in the currency of British India shall be deemed to be the equivalent of "francs" and "centimes", respectively.

(3) The amount of the excess referred to in sub-section *(1)* shall be from time to time ascertained, determined and declared by the [a][Central Government], and the [a][Central Government] may, by notification in the [b][Official Gazette], make rules for the identification of sugar and for the assessment and collection of any special duty imposed upon the importation thereof under sub-section *(1)*.

[a] *Substituted* by A. O. for "Governor-General in Council". [b] *Substituted* by A. O. for "Gazette of India".

[a]**10.** [In contracts amount of increased or decreased duty to be added or deducted.] *Repealed by the Indian Sale of Goods (Amendment) Act, 1940 (41 [XLI] of 1940), S. 3 (1).* [3-12 1940].

[a] The repeal of S. 10 shall not however affect or be deemed to affect—
(a) any right, title, interest, obligation or liability already acquired, accrued or incurred before the commencement of Act 41 of 1940 ; (b) any legal proceedings or remedy in respect of any such right, title, interest, obligation or liability ; or (c) anything done or suffered, before the commencement of Act 41 of 1940.
The repealed section has been re-enacted as section 64-A of the Indian Sale of Goods Act, 1930 (3 [III] of 1930), vide section 2 of Act 41 of 1940.

Duration of protective duties and power of Central Government to modify or remit certain duties.

11. *(1)* When the duty specified for any article in the First Schedule is characterised as protective in the third column of that Schedule, that duty shall have effect only up to the date, if any, specified in the seventh column of that Schedule.

(2) If, after such inquiry as [a][it] thinks necessary, the [b][Central Government] is of opinion that the duty specified in the First Schedule in respect of wheat has become unnecessary or excessive, [a][it] may, by notification in the [c][Official Gazette], remit such duty or reduce it to such extent as [b][it] thinks fit.

(3) If, after such inquiry as [a][it] thinks necessary, the [b][Central Government] is of opinion that the duty specified in the First Schedule in respect of wheat flour is excessive, [a][it] may, by notification in the [c][Official Gazette], reduce such duty to such extent as [a] [it] thinks fit, but not so as to make it lower than an *ad valorem* duty of twenty per cent.

[a] *Substituted* by A. O. for "he". [b] *Substituted* by A. O. for "Governor-General in Council". [c] *Substituted* by A. O. for "Gazette of India".

Power to cancel notifications.

12. All notifications published under this Act may be cancelled by the authority publishing the same.

13. [Repeals.] *Repealed by the Repealing and Amending Act, 1937 (20 [XX] of 1937), S. 3 and Sch. II.*

THE FIRST SCHEDULE.

Note:—(1) The schedules printed below have been amended from time to time by various Acts which have been given at the beginning of this Act under the heading "Act how affected by subsequent legislation". These amendments have been duly incorporated in the respective items, which have been given in the amended form, the amendments incorporated being brought up to 31-3-1948 so as to include those introduced by the Indian Finance Act, 1948 (XX of 1948). But as it is not practicable to indicate how each item was amended, by which Act it was amended and other particulars as usual in the foot notes, they have not been given.

Note:—(2) Additional duties of customs.

Section 5 of the Indian Finance Act, 1948 (XX of 1948) is as follows :

"Where any goods chargeable with a duty of customs under the First Schedule to the Indian Tariff Act 1934, or under the said Schedule read with any notification of the Central Government for the time being in force, are assessed to duty, there shall, up to the 31st DAY OF MARCH 1949, be levied and collected as an addition to, and in the same manner as, the total amount so chargeable—

(a) a sum equal to one-half of such amount, in the case of goods comprised in Items Nos. 22 (3) and 22 (4) and sub-items (a), (c) and (d) of Item No. 22 (5) of the said Schedule, and

(b) a sum equal to one-fifth of such amount, in any other case :

Provided that such additional duty of customs shall not be levied and collected on the goods specified in the First Schedule to this Act".

The First Schedule to the Indian Finance Act, 1948, referred to in the proviso of section 5 of that Act, is as follows:—

"Goods on which additional duty of customs is not leviable.

A. Goods comprised in the following Items of the First Schedule to the Indian Tariff Act, 1934, namely—

Nos. 8 (2), 8 (3), 9 (5), 20 (1), 20 (3), 20 (4), 24, 24 (1), 24 (2), 24 (3), 25 (1), 27 (4), 27 (5), 27 (6), 28 (15), 28 (16), 28 (17), 28 (18), 29, 29 (1), 30 (9), 30 (10), 43, 44, 46 (3), 61 (2), 61 (3), 62 (1), 62 (2), 63 (30), 63 (31), 63 (32), 63 (33), 70 (2), 70 (3), 71 (7), 71 (8), 72, 72 (1), 72 (2), 72 (3), 72 (11), 75 (1), 75 (5), 75 (6), 75 (7), 75 (8).

B. Goods comprised in the following Items of the First Schedule to the Indian Traiff Act, 1934, when the Customs Collector is satisfied that such goods are the produce or manufacture of Burma, namely—

No. 7 (Potatoes and onions only) and Nos. 9, 9 (3), 13 (2), 17 and 34 (4) (a)."

IMPORT TARIFF.

Item No.	Name of article.	Nature of duty.	Standard rate of duty.	Preferential rate of duty if the article is the produce or manufacture of		Duration of protective rates of duty.
				The United Kingdom.	A British Colony.	
	SECTION I.					
	LIVE ANIMALS AND PRODUCTS OF THE ANIMAL KINGDOM.					
1	ANIMALS, living, all sorts.	...	Free . . .	...	...	...
2	BACON and HAM not canned or bottled.	Revenue .	25 per cent. *ad valorem.*	...	...	...
3	FISH, not otherwise specified.	Revenue .	25 per cent. *ad valorem.*	...	...	...
3 (1)	FISH, salted, wet.	Revenue .	Such rate or rates of duty not exceeding one rupee per Indian maund of 82-2/7 lbs. avoirdupois weight as the Central Government may, by notification in the Official Gazette, from time to time prescribe, *plus* 6¼ per cent. *ad valorem.*	...	...	...
3 (2)	FISH, salted, dry .	Revenue .	15 per cent. *ad valorem.*	...	...	...
3 (3)	FISH, unsalted, dry .	Preferential revenue.	30 per cent. *ad valorem.*	...	20 per cent. *ad valorem.*	...
3 (4)	FISHMAWS, including singally and sozille and sharkfins.	Revenue .	25 per cent. *ad valorem.*	...	...	...
4	BUTTER, CHEESE and GHEE.	Revenue .	25 per cent. *ad valorem.*	...	...	...
4 (1)	MILK, condensed or preserved, including milk cream.	Revenue .	25 per cent. *ad valorem.*	...	...	...
5	CORAL, unprepared .	Revenue .	25 per cent. *ad valorem.*	...	...	...
5 (1)	COWRIES and SHELLS .	Revenue .	25 per cent. *ad valorem.*	...	...	...
(2)	IVORY, unmanufactured.	Preferential revenue.	30 per cent. *ad valorem.*	...	20 per cent. *ad valorem.*	...
	SECTION II.					
	PRODUCTS OF THE VEGETABLE KINGDOM.					
6	PLANTS, living, not otherwise specified.	...	Free . . .	...	...	...
6 (1)	RUBBER STUMPS .	...	Free . . .	...	...	...
7	VEGETABLES, all sorts, fresh, dried, salted or preserved, not otherwise specified.	Preferential revenue.	30 per cent. *ad valorem.*	...	20 per cent. *ad valorem.*	...
8	FRUITS, all sorts, fresh, or preserved, not otherwise specified.	Preferential revenue.	30 per cent. *ad valorem.*	...	20 per cent. *ad valorem.*	...
8 (1)	CURRANTS	Revenue ...	Re. 1-4 per cwt.	...	...	...
8 (2)	FRUITS, dried (salted and all other kinds) not otherwise specified.	Preferential revenue.	36 per cent. *ad valorem.*		24 per cent. *ad valorem.*	...
8 (3)	FRUITS, candied and crystallised.	Protective.	80 per cent. *ad valorem*	...	...	December 31st, 1948.

Item No.	Name of article.	Nature of duty.	Standard rate of duty.	Preferential rate of duty if the article is the produce or manufacture of		Duration of protective rates of duty.
				The United Kingdom.	A British Colony.	
9	COFFEE not otherwise specified.	Preferential revenue.	25 per cent. *ad valorem plus* one anna per pound.	...	25 per cent. *ad valorem.*	...
9 (1)	COFFEE canned or bottled.	Preferential revenue.	30 per cent. *ad valorem*	...	20 per cent. *ad valorem.*	...
9 (2)	TEA	Preferential revenue.	Five annas per pound.	...	Three annas per pound.	...
9 (3)	The following SPICES whether ground or unground namely:— Cardamoms, cassia, cinnamon, cloves, nutmegs and pepper—	Preferential revenue	45 per cent. *ad valorem.*	...	37½ per cent. *ad valorem.*	...
9 (4)	The following UNGROUND SPICES, namely:— Chillies, ginger and mace.	Preferential revenue.	30 per cent. *ad valorem.*	...	22½ per cent. *ad valorem.*	...
9 (5)	BETELNUTS	Preferential revenue.	Five annas per lb.	...	Four annas and six pies per lb.	...
9 (6)	VANILLA BEANS ...	Revenue ...	25 per cent. *ad valorem.*	...	...	...
10	GRAIN and PULSE, not otherwise specified, including broken grains and pulse, but excluding flour.	...	Free	...	...	...
10 (1)	WHEAT	Revenue ...	Free	...	...	...
*	*	*	*	*	*	*
11	FLOUR not otherwise specified.	Revenue ...	25 per cent. *ad valorem.*	...	...	...
11 (1)	WHEAT FLOUR	Revenue ...	Free	...	...	...
11 (2)	SAGO FLOUR ...	...	Free	...	...	...
11 (3)	SAGO TAPIOCA and TAPIOCA FLOUR	Preferential revenue.	30 per cent. *ad valorem.*	20 per cent. *ad valorem.*	...	...
11 (4)	STARCH and FARINA ...	Revenue ...	15 per cent. *ad valorem.*	...	...	...
12	SEEDS, all sorts not otherwise specified.	Revenue ...	25 per cent. *ad valorem.*	...	...	...
12 (1)	OILSEEDS imported into British India by sea from the territories of any Prince or Chief in India.	...	Free	...	...	...
12 (2)	OILSEEDS, non-essential, all sorts not otherwise specified, including copra or cocoanut kernel.	Preferential revenue.	30 per cent. *ad valorem.*	...	20 per cent. *ad valorem.*	...
12 (3)	RUBBER SEEDS ...	...	Free	...	...	...
12 (4)	HOPS	...	Free	...	...	...
12 (5)	FODDER, BRAN and POLLARDS.	Revenue ...	2½ per cent. *ad valorem,*	...	...	...
13	DYEING and TANNING SUBSTANCES, all sorts not otherwise specified.	Revenue ...	25 per cent. *ad valorem.*	...	...	...
13 (1)	BARKS for tanning ...	Revenue ...	3 per cent. *ad valorem.*	...	...	...
13 (2)	CUTCH and GAMBIER, all sorts.	Preferential revenue.	30 per cent. *ad valorem.*	...	20 per cent. *ad valorem.*	...
13 (3)	GUMS, RESINS and LAC, all sorts not otherwise specified.	Revenue ...	25 per cent. *ad valorem.*	...	...	...

Item No.	Name of article.	Nature of duty.	Standard rate of duty.	Preferential rate of duty if the article is the produce or manufacture of		Duration of protective rates of duty.
				The United Kingdom.	A British Colony.	
13 (4)	GUMS, Arabic Benjamin (ras and cowrie) and DAMMER (including unrefined batu) and rosin.	Preferential revenue.	30 per cent. *ad valorem.*	...	20 per cent. *ad valorem.*	...
13 (5)	STICK or SEED LAC ...	...	Free	...	...	...
13 (6)	OPIUM	Revenue ...	Rs. 30 per seer of 80 tolas or 18¾ per cent. *ad valorem*, whichever is higher.	...	...	...
13 (7)	CINCHONA BARK ...	...	Free	...	...	...
14	CANES and RATTANS ...	Revenue ...	25 per cent. *ad valorem.*	...	...	...

SECTION III.

FATTY SUBSTANCES, GREASES, OILS AND PRODUCTS OF THEIR DECOMPOSITION; PREPARED ALIMENTARY FATS; WAXES OF ANIMAL OR VEGETABLE ORIGIN.

15	All sorts of STEARINE, Wax, GREASE and ANIMAL FAT not otherwise specified.	Revenue ...	25 per cent. *ad valorem.*	...	...	...
15 (1)	LARD, not canned or bottled.	Revenue ...	25 per cent. *ad valorem.*	...	...	...
15 (2)	BEESWAX	Revenue.	25 per cent. *ad valorem.*	...	...	...
15 (3)	TALLOW	...	Free... ...	...	...	...
15 (4)	FISH OIL including whale oil not otherwise specified.	Revenue.	25 per cent. *ad valorem.*	...	...	...
15 (5)	FISH OIL and whale oil, hardened or hydrogenated.	Revenue .	Rs. 10 per cwt. .	...	...	...
15 (6)	VEGETABLE NON-ESSENTIAL OILS not otherwise specified.	Preferential revenue.	35 per cent. *ad valorem.*	...	25 per cent. *ad valorem.*	...
15 (7)	The following VEGETABLE NON-ESSENTIAL OILS, namely, cocoanut, groundnut and linseed.	Preferential revenue.	35 per cent. *ad valorem.*	...	25 per cent. *ad valorem.*	...
15 (8)	All sorts of ANIMAL OILS not otherwise specified.	Revenue .	25 per cent. *ad valorem.*	...	...	...

SECTION IV.

PRODUCTS OF THE FOOD-PREPARING INDUSTRIES; BEVERAGES, ALCOHOLIC LIQUORS AND VINEGARS; TOBACCO.

16	Canned or bottled BACON, HAM and LARD.	Revenue .	25 per cent. *ad valorem.*	...	...	...
16 (1)	FISH, canned . .	Revenue. .	25 per cent. *ad valorem.*	...	...	...
16 (2)	ISINGLASS, canned or bottled.	Revenue .	25 per cent. *ad valorem.*	...	...	...
17	SUGAR excluding confectionery.	Protective .	The rate at which excise duty is for the time being leviable on sugar, other than *khandsari* or palmyra sugar, produced in British India *plus* Rs. 6-12 per cwt.	...	...	March 31st, 1949.

Item No.	Name of article.	Nature of duty.	Standard rate of duty.	Preferential rate of duty if the article is the produce or manufacture of		Duration of protective rates of duty.
				The United Kingdom.	A British Colony.	
17 (1)	MOLASSES . .	Revenue .	31¼ per cent. *ad valorem.*	...	...	...
17 (2)	CONFECTIONERY. .	Revenue .	50 per cent. *ad valorem.*	...	...	...
17 (3)	SUGAR-CANDY . .	Revenue .	Rs. 10-8 per cwt.	...	...	...
18	COCOA and CHOCOLATE other than confectionery.	Protective .	25 per cent. *ad valorem.*	...	...	March 31st, 1950.
19	BISCUITS, CAKES, and farinaceous and patent foods, canned or bottled.	Revenue .	25 per cent. *ad valorem.*	...	...	...
20	VEGETABLE PRODUCT, pickles, chutnies, sauses, ketchups and condiments, canned or bottled.	Revenue .	25 per cent. *ad valorem.*	...	...	...
20 (1)	FRUIT JUICES, squashes, cordials and syrups—					
	(*a*) Manufactured in a British Colony.	Protective .	27 per cent. *ad valorem.*	...	...	December 31st, 1948.
	(*b*) Not manufactured in a British Colony.	Protective .	40 per cent. *ad valorem.*	...	...	December 31st, 1948.
20 (2)	VEGETABLES, canned or bottled.	Preferential Revenue.	30 per cent. *ad valorem.*	...	20 per cent. *ad valorem.*	...
20 (3)	FRUITS, canned or bottled.					
	(*a*) Manufactured in a British Colony.	Protective .	40 per cent. *ad valorem.*	...	...	December 31st, 1948.
	(*b*) Not manufactured in a British Colony.	Protective .	60 per cent. *ad valorem.*	...	...	December 31st, 1948.
20 (4)	JAMS, JELLIES and MARMALADES, canned or bottled.	Protective .	80 per cent. *ad valorem.*	...	...	December 31st, 1948.
21	CANNED or BOTTLED PROVISIONS not otherwise specified.	Revenue .	25 per cent. *ad valorem.*	...	...	...
21 (1)	PROVISIONS and OILMAN'S STORES AND GROCERIES, all sorts not otherwise specified.	Revenue .	25 per cent. *ad valorem.*	...	...	...
21 (2)	All sorts of FOOD not otherwise specified.	Revenue .	25 per cent. *ad valorem.*	...	...	...
22	All sorts of DRINK not otherwise specified.	Revenue .	25 per cent. *ad valorem.*	...	...	...
*	* * *	*	* *	*	*	*
22 (2)	ALE, BEER, PORTER, CIDER and other FERMENTED LIQUORS—					
	(*a*) In barrels or other containers containing 27 oz. or more.	Revenue .	Fifteen annas per Imperial gallon.	...	...	...
	(*b*) In bottles containing less than 27 oz. but not less than 20 oz.	Revenue .	Two annas and six pies per bottle.	...	...	...
	(*c*) In bottles containing less than 13½ oz. but not less than 10 oz.	Revenue .	One anna and three pies per bottle.	...	...	...
	(*d*) In bottles containing less than 6¾ oz. but not less than 5 oz.	Revenue .	Seven and half pies per bottle.	...	...	...
	(*e*) In other containers.	Revenue .	Re. 1-4 per Imperial gallon.	...	...	...

Item No.	Name of article.	Nature of duty.	Standard rate of duty.	Preferential rate of duty if the article is the produce or manufacture of		Duration of protective rates of duty.
				The United Kingdom.	A British Colony.	
22 (3)	WINES, not containing more than 42 per cent. of proof spirit—					
	(*a*) Champagne and other sparkling wines.	Revenue .	Rs. 13-2 per Imperial gallon.	...	...	...
	(*b*) Other sorts. .	Revenue .	Rs. 7-8 per Imperial gallon.	...	...	...
22 (4)	SPIRITS (other than denatured spirit—					
	(*a*) Brandy, gin, whisky and other sorts of spirits not otherwise specified, including wines containing more than 42 per cent. of proof spirit.	Revenue .	Rs. 37-8 per Imperial gallon of the strength of London proof.	...	...	...
	(*b*) Liquours, cordials: mixtures and other preparations containing spirit not otherwise specified—					
	(i) entered in such a manner as to indicate that the strength is not to be tested.	Revenue .	Rs. 50 per Imperial gallon.	...	...	...
	(ii) not so entered.	Revenue .	Rs. 37-8 per Imperial gallon of the strength of London proof.	...	...	...
	Provided that—					
	(*a*) the duty on any article included in this item shall in no case be less than the duty which would be charged if the article were liable to a duty of 25 per cent., *ad valorem* ;					
	(*b*) where the unit of assessment is the Imperial gallon of the strength of London proof, the duty shall be increased or reduced in proportion as the strength is greater or less than London proof.					
22 (5)	SPIRITS—					
	(*a*) Bitters—					
	(i) entered in such a manner as to indicate that the strength is not to be tested.	Preferential revenue.	Rs. 50 per Imperial gallon.	...	Rs. 45 per Imperial gallon.	...
	(ii) not so entered.	Preferential revenue.	Rs. 37-8 per Imperial gallon of the strength of London proof.	...	Rs. 33-12 per Imperial gallon of the strength of London proof.	...

Item No.	Name of article.	Nature of duty.	Standard rate of duty.	Preferential rate of duty if the article is the produce or manufacture of		Duration of protective rates of duty.
				The United Kingdom.	A British Colony.	
22 (5) *(contd.)*	*(b)* Drugs and medicines containing spirit—					
	(i) entered in such a manner as to indicate that the strength is not to be tested.	Preferential revenue.	Rs. 40 per Imperial gallon.	Rs. 36 per Imperial gallon.	Rs. 36 per Imperial gallon.	...
	(ii) not so entered.	Preferential revenue.	Rs. 29 per Imperial gallon of the strength of London proof.	Rs. 26 per Imperial gallon of the strength of London proof.	Rs. 26 per Imperial gallon of the strength of London proof.	...
	(c) Perfumed spirits.	Revenue.	Rs. 60 per Imperial gallon or 25 per cent *ad valorem* which ever is higher.	...	...	...
	(d) Rum ...	Preferential revenue.	Rs. 37-8 per Imperial gallon of the strength of London proof.	...	Rs. 33-12 per Imperial gallon of the strength of London proof.	...
	Provided that— *(a)* on any article chargeable under this item with the lower rate of duty the duty levied shall in no case be less than 20 per cent. *ad valorem*, and on any article chargeable under this item with the higher rate of duty, the duty levied shall in no case be less than 30 per cent. *ad valorem*; *(b)* where the unit of assessment is the Imperial gallon of the strength of London proof, the duty shall be increased or reduced in proportion as the strength is greater or less than London proof.					
22 (6)	DENATURED SPIRIT .	Revenue .	9⅜ per cent. *ad valorem*.	...	...	...
22 (7)	VINEGAR in casks .	Revenue .	2½ per cent. *ad valorem*.	...	...	...
23	OILCAKES . . .	Revenue .	25 per cent. *ad valorem*.	...	...	...
24	TOBACCO, manufactured, not otherwise specified.	Revenue .	Rs. 13 per lb.	...	...	...
24 (1)	CIGARS . .	Revenue .	The rate at which duty is for the time being leviable on articles included in Item No. 87 of	...	...	...

Item No.	Name of article.	Nature of duty.	Standard rate of duty.	Preferential rate of duty if the article is the produce or manufacture of		Duration of protective rates of duty
				The United Kingdom.	A British Colony.	
24 (1) *(contd.)*			this Schedule under this Act read with any other enactment in force plus Rs. 12-8 per lb.			
24 (2)	CIGARETTES . .	Revenue .	The rate at which duty is for the time being leviable on articles included in Item No. 87 of this Schedule under this Act read with any other enactment in force plus Rs. 31-4 per thousand or Rs. 12-8 per lb. whichever is higher.	...	...	...
24 (3)	TOBACCO, unmanufactured.	Preferential revenue.	Rs. 7-8 per lb. .	...	Rs. 7 per lb.	...
	SECTION V.					
	MINERAL PRODUCTS.					
25	CHINA CLAY . .	...	Free . .	...	...	...
25 (1)	SALT, excluding salt exempted under Item No. 25 (2).	Revenue .	The rate at which excise duty is for the time being leviable on salt manufactured in the place where the import takes place.	...	...	...
25 (2)	SALT imported into British India and issued, in accordance with rules made with the previous sanction of the Central Government, for use in any process of manufacture; also salt imported into the port of Calcutta and issued with the sanction of the Central Government to manufacturers of glazed stoneware; also salt imported into any port in the Provinces of Bengal and Bihar and Orissa and issued, in accordance with rules made with the previous sanction of the Central Government, for use in curing fish in those Provinces.	...	Free . .	...	...	...

Item No.	Name of article.	Nature of duty.	Standard rate of duty.	Preferential rate of duty if the article is the produce or manufacture of		Duration of protective rates of duty
				The United Kingdom	A British Colony.	
25 (3)	The following BUILDING and ENGINEERING MATERIALS namely, chalk, lime and clay.	Revenue .	25 per cent. *ad valorem.*	...	...	...
25 (4)	CEMENT not otherwise specified.	Preferential revenue.	30 per cent *ad valorem.*	20 per cent. *ad valorem.*	...	...
25 (5)	PORTLAND CEMENT excluding white Portland cement.	Revenue .	Rs. 13-12 per ton.	...	...	...
25 (6)	STONE prepared as for road metalling.	...	Free . .	...	...	...
25 (7)	MARBLE and STONE not otherwise specified.	Revenue .	25 per cent. *ad valorem.*	...	...	...
26	METALLIC ORES, all sorts except ochres and other pigment ores.	...	Free . .	...	...	...
27	COAL, COKE and PATENT FUEL.	Revenue .	Ten annas per ton.	...	...	...
27 (1)	ASPHALT . . .	Preferential Revenue.	25 per cent. *ad valorem.*	...	15 per rent. *ad valorem.*	...
27 (2)	PITCH and TAR . .	Revenue .	25 per cent. *ad valorem.*	...	...	...
27 (3)	All sorts of MINERAL OILS not otherwise specified.	Revenue .	25 per cent. *ad valorem.*	...	...	...
27 (4)	KEROSENE; also any MINERAL OIL other than kerosene and motor spirit which has its flashing point below one hundred degrees of Fahrenheit's thermometer by Abel's close test.	Revenue .	Three annas per Imperial gallon.	...	...	...
27 (5)	MINERAL OIL, not included in Item No. 27 (4) or Item No. 27 (6) which is suitable for use as an illuminant in wick lamps.	Revenue .	Three annas per Imperial gallon.	...	...	...
27 (6)	MOTOR SPIRIT . .	Revenue .	The rate at which excise duty is for the time being leviable on motor spirit.	...	...	...
27 (7)	MINERAL OIL —					
	(a) which has its flashing point at or above two hundred degrees of Fahrenheit's thermometer, and is ordinarily used for the batching of jute or other fibre;	Revenue .	Rs. 15-10 per ton.	...	...	...
	(b) which has its flashing point at or above one hundred and fifty degrees of Fahrenheit's thermometer, is not suitable for use as an illuminant in wick lamps, and is such as is not ordinarily used except as fuel or for some sanitary or hygienic purposes.	Revenue .	12½ per cent. *ad valorem.*	...	...	...

Item No.	Name of article.	Nature of duty.	Standard rate of duty.	Preferential rate of duty if the article is the produce or manufacture of		Duration of protective rates of duty.
				The United Kingdom.	A British Colony.	
27 (8)	LUBRICATING OIL, that is, oil such as is not ordinarily used for any other purpose than lubrication, excluding any mineral oil which has its flashing point below two hundred degrees of the Fahrenheit thermometer by Abel's close test.	Revenue .	Two annas and one pie per Imperial gallon.	...	...	...
	SECTION VI.					
	CHEMICAL AND PHARMACEUTICAL PRODUCTS; COLOURS AND VARNISHES; PERFUMERY; SOAP; CANDLES AND THE LIKE; GLUES AND GELATINES; EXPLOSIVES; FERTILISERS.					
28	CHEMICALS, DRUGS and MEDICINES, all sorts not otherwise specified.	Preferential revenue.	30 per cent. *ad valorem*.	20 per cent. *ad valorem*.	20 per cent. *ad valorem*.	...
28 (1)	BLEACHING PASTE and bleaching powder.	...	Free . .	...	...	...
28 (2)	COPPERAS, green (ferrous sulphate).	Revenue .	2½ per cent. *ad valorem*.	...	...	...
28 (3)	SULPHUR . . .	...	Free . .	...	...	...
28 (4)	SODA ASH, including calcined natural soda and manufactured sesquicarbonates.	Preferential revenue.	25 per cent. *ad valorem*.	...	15 per cent. *ad valorem*.	...
28 (5)	HEAVY CHEMICALS, the following, namely :—					
	Magnesium chloride .	Protective .	Twelve annas per cwt. or 25 per cent. *ad valorem*, whichever is higher.	...	...	March 31st 1949.
28 (6)	The following CHEMICALS, namely :—					
	(a) Alum (ammonia alum, potash alum and soda alum).	Revenue .	25 per cent. *ad valorem* or Re. 1-6 per cwt., whichever is higher.	...	...	...
	(b) Magnesium sulphate or hydrated magnesium sulphate.	Revenue .	25 per cent. *ad valorem* or Re. 1-4 per cwt., whichever is higher.	...	...	...
28 (7)	The following CHEMICALS, namely, cadmium sulphide, cobalt oxide, liquid gold for glass-making, selenium and uranium oxide.	Revenue .	25 per cent. *ad valorem*.	...	...	...
28 (8)	The following CHEMICALS, DRUGS and MEDICINES, namely, acetic, carbolic, citric, hydrochloric, nitric, oxalic, sulphuric, tartaric and other acids, anhydrous ammonia, naphthalene, potassium chlorate, potassium cyanide and other potassium	Revenue .	25 per cent. *ad valorem*.	...	...	...

Item No.	Name of article.	Nature of duty.	Standard rate of duty.	Preferential rate of duty if the article is the produce or manufacture of		Duration of protective rates of duty
				The United Kingdom.	A British Colony.	
28 (8) *(contd.)*	compounds, bicarbonate of soda borax, sodium cyanide, sodium silicate, arsenic, calcium carbide, glycerine, lead magnesium and zinc compounds not otherwise specified, aloes, asafoetida, cocaine, sarsaparilla and storax.					
28 (9)	SACCHARINE (except in tablets) and such other substances as the Central Government may, by notification in the Official Gazette declare to be of a like nature or use to saccharine.	Revenue .	Rs. 6 4 per lb. .	...	...	...
28 (10)	SACCHARINE TABLETS	Revenue .	18¾ per cent. *ad valorem* or Rs. 6-4 per pound of saccharine contents, whichever is higher.	...	...	...
28 (11)	ALKALOIDS OF OPIUM and their derivatives.	Revenue .	Rs. 30 per seer of 80 tolas or 18¾ per cent. *ad valorem* whichever is higher.	...	...	...
28 (12)	ALKALOIDS extracted from CINCHONA BARK including Quinine and alkaloids derived from other sources which are chemically identical with alkaloids extracted from cinchona bark.	...	Free . .	...	...	...
28 (13)	ANTI-PLAGUE SERUM .	...	Free . .	...	...	...
28 (14)	TOILET REQUISITES not otherwise specified.	Revenue .	25 per cent. *ad valorem*.	...	...	...
28 (15)	CALCIUM CHLORIDE —					
	(a) of British manufacture.	Protective	Rs. 3-4 per cwt.	...	...	March 31st, 1949.
	(b) not of British manufacture :	Protective	Rs. 4-14 per cwt.	...	...	March 31st, 1949.
	Provided that calcium chloride manufactured in a British Colony shall be deemed to be of British manufacture.					
28 (16)	PHOSPHORIC ACID.	Protective	Rs. 23 per cwt.	...	...	March 31st, 1949.
28 (17)	POTASSIUM BICHROMATE. SODIUM BICHROMATE and all CHROME compounds.	Protective	30 per cent. *ad valorem*.	...	...	March 31st, 1949.
28 (18)	The following SODIUM compounds, namley :—					
	(a) Sodium phosphates—					
	(i) of British manufacture	Protective	Rs. 7-6 per cwt.	...	...	March 31st, 1949.
	(ii) not of British manufacture.	Protective	Rs. 11 per cwt.	...	...	March 31st, 1949.

Item No.	Name of article.	Nature of duty.	Standard rate of duty.	Preferential rate of duty if the article is the produce or manufacture of		Duration of protective rates of duty.
				The United Kingdom.	A British Colony.	
28 (18) *(contd.)*	*(b)* Sodium sulphite and sodium bisulphite —					
	(i) of British manufacture	Protective	Rs. 8 per cwt.	...	...	March 31st, 1950.
	(ii) not of British manufacture.	Protective	Rs. 12 per cwt.	...	...	March 31st, 1950.
	(c) Sodium thiosulphate —					
	(i) of British manufacture	Protective	Rs. 5 per cwt.	...	...	March 31st, 1950.
	(ii) not of British manufacture :	Protective	Rs. 7-8 per cwt.	...	...	March 31st, 1950.
	Provided that the articles dutiable under this Item manufactured in a British Colony shall be deemed to be of British manufacture.					
29	CINEMATOGRAPH FILMS, not exposed.	Revenue .	Three pies per linear foot.	...	...	...
29 (1)	CINEMATOGRAPH FILMS, exposed.	Revenue .	Four annas per linear foot.	...	...	...
30	PAINTS, COLOURS and PAINTERS' MATERIALS all sorts, not otherwise specified, including paints, solutions and compositions containing dangerous petroleum within the meaning of the Indian Petroleum Act, 1899.	Preferential revenue.	30 per cent *ad valorem*.	20 per cent. *ad valorem*.	...	...
30 (1)	DYES derived from coal-tar, and coal-tar derivatives, used in any dyeing process.	Revenue .	10 per cent. *ad valorem*.	...	...	...
30 (2)	PAINTS, COLOURS and PAINTERS' MATERIALS, the following, namely:—					
	(a) Red lead, genuine dry, genuine moist and reduced moist.	Preferential revenue.	30 per cent. *ad valorem* or Rs. 4-12 per cwt., whichever is higher.	20 per cent. *ad valorem*.	...	...
	(b) White lead, genuine dry.	Preferential revenue.	30 per cent. *ad valorem* or Rs. 5-12 per cwt, whichever is higher.	20 per cent. *ad valorem*.	...	...
	(c) Zinc white, genuine dry.	Preferential revenue.	30 per cent. *ad valorem* or Rs. 6 per cwt., whichever is higher.	20 per cent. *ad valorem*	...	...
	(d) Paints, other sorts, coloured, moist—					
	(i) in packing of 1 lb. or over.	Preferential revenue.	30 per cent. *ad valorem* or Rs. 8-8 per cwt., whichever is higher.	20 per cent. *ad valorem*.	...	...

Item No	Name of article	Nature of duty	Standard rate of duty.	Preferential rate of duty if the article is the produce or manufacture of		Duration of protective rates of duty
				The United Kingdom.	A British Colony.	
30 (2) *(contd.)*	(ii) in packing of ¼ lb. and over but less than 1 lb.	Preferential revenue.	30 per cent *ad valorem* or Rs. 11-4 per cwt., whichever is higher.	20 per cent. *ad valorem.*	...	...
	(iii) in packing of ¼ lb. and over but less than ½ lb.	Preferential revenue.	30 per cent *ad valorem* or Rs. 17 per cwt., whichever is higher.	20 per cent. *ad valorem.*	...	...
	(iv) in packing of less than ¼ lb.	Preferential revenue.	30 per cent. *ad valorem* or Rs. 24 per cwt., whichever is higher.	20 per cent. *ad valorem.*	...	...
30 (3)	PAINTS, COLOURS and PAINTERS' MATERIALS, the following, namely:—					
	(a) Red lead, reduced dry	Revenue .	25 per cent. *ad valorem* or Rs. 4-12 per cwt., whichever is higher.	...	...	...
	(b) White lead, genuine moist and reduced dry or moist.	Revenue .	25 per cent. *ad valorem* or Rs. 5-12 per cwt, whichever is higher.	...	...	..
	(c) Zinc white, genuine moist.	Revenue .	25 per cent. *ad valorem* or Rs. 6 per cwt, whichever is higher.	...	...	...
	(d) Zinc white, reduced dry or moist	Revenue .	25 per cent. *ad valorem* or Rs. 4-4 per cwt., whichever is higher.	...	...	...
30 (4)	The following PAINTS, COLOURS and PAINTERS' MATERIALS, namely, barytes, turpentine, turpentine substitute, and varnish not containing dangerous petroleum within the meaning of the Indian Petroleum Act, 1899.	Revenue .	25 per cent *ad valorem*	...	...	...
30 (5)	PLUMBAGO and GRAPHITE.	Preferential revenue.	30 per cent. *ad valorem.*	...	20 per cent. *ad valorem.*	...
30 (6)	PAINTERS' INK . .	Revenue .	10 per cent. *ad valorem.*	...	...	...
30 (7)	LEAD PENCILS . .	Revenue .	25 per cent. *ad valorem* or one anna per dozen, whichever is higher.	...	...	...

Item No.	Name of article.	Nature of duty.	Standard rate of duty.	Preferential rate of duty if the article is the produce or manufacture of		Duration of protective rates of duty.
				The United Kingdom.	A British Colony.	
30 (8)	SLATE PENCILS . .	Revenue .	25 per cent. *ad valorem*.	...	...	...
30 (9)	ABRASIVE PAPERS and rolls, coils, discs, belts, shapes, and tapes, made of abrasive paper, when imported as stores apart from machinery—					
	(a) of British manufacture.	Protective .	24 per cent. *ad valorem*.	...	...	March 31st, 1949.
	(b) not of British manufacture.	Protective .	36 per cent. *ad valorem*.	...	...	March 31st, 1949.
30 (10)	EMERY CLOTH and abrasive rolls, coils, discs, belts, shapes and tapes, made of emery cloth or a combination of emery cloth and paper, when imported as stores apart from machinery.	Protective .	30 per cent. *ad valorem*.	...	...	March 31st, 1949.
31	NATURAL ESSENTIAL OILS, all sorts not otherwise specified.	Revenue. .	25 per cent. *ad valorem*.	...	...	...
31 (1)	The following NATURAL ESSENTIAL OILS, namely, citronella, cinnamon, and cinnamon leaf.	Preferential revenue.	30 per cent. *ad valorem*.	...	20 per cent. *ad valorem*.	...
31 (2)	The following NATURAL ESSANTIAL OILS, namely, almond, bergamot, gajupatti, camphor, cloves, eucalyptus, lavender, lemon, otto rose and peppermint.	Revenue .	25 per cent. *ad valorem*.	...	...	...
31 (3)	ESSENTIAL OILS, synthetic.	Revenue .	25 per cent. *ad valorem*.	...	...	...
31 (4)	CAMPHOR . . .	Revenue .	50 per cent. *ad valorem*.	...	...	...
31 (5)	PERFUMERY not otherwise specified.	Revenue .	25 per cent. *ad valorem*.	...	...	...
32	SOAP not otherwise specified.	Revenue .	25 per cent. *ad valorem*.	...	...	...
32 (1)	SOAP, TOILET . .	Revenue .	25 per cent. *ad valorem* or Rs. 20 per cwt., whichever is higher.	...	...	...
32 (2)	SOAP, HOUSEHOLD and LAUNDRY—					
	(a) in plain bars of not less than one pound in weight.	Revenue .	Rs. 4 per cwt. .	...	...	...
	(b) other sorts . .	Revenue .	Rs. 6-8 per cwt.	...	...	...
32 (3)	POLISHES and compositions.	Revenue .	25 per cent. *ad valorem*.			
32 (4)	CANDLES . . .	Revenue .	25 per cent. *ad valorem*.	...	...	...
33	GLUE, not otherwise specified.	Revenue .	30 per cent. *ad valorem*.	...	...	...
33 (1)	GLUE, clarified, liquid .	Revenue .	10 per cent. *ad valorem*.	...	...	...

Item No.	Name of article	Nature of duty.	Standard rate of duty.	Preferential rate of duty if the article is the produce or manufacture of		Duration of protective rates of duty
				The United Kingdom.	A British Colony.	
34	GUNPOWDER for cannons, rifles, guns, pistols and sporting purposes.	Revenue .	50 per cent. *ad valorem*.	...	...	...
34 (1)	EXPLOSIVES namely, blasting gunpowder, blasting gelatine, blasting dynamite, blasting roburite, blasting tonite, and all other sorts, including detonators and blasting fuze.	Revenue .	25 per cent. *ad valorem*.	...	...	...
34 (2)	FIREWORKS specially prepared as danger or distress lights for the use of ships.	Revenue .	25 per cent. *ad valorem*.	...	...	...
34 (3)	FIREWORKS, not otherwise specified.	Revenue .	50 per cent *ad valorem*.	...	...	...
34 (4)	MATCHES, undipped splints and veneers—					
	(a) Matches—					
	(1) In boxes or booklets containing on an average not more than 40 matches.	Protective .	The rate at which excise duty is for the time being leviable on such matches manufactured in British India *plus* ten annas per gross of boxes of booklets.	...	...	...
	(2) In boxes or booklets containing on an average more than 40 but not more than 60 matches.	Protective .	The rate at which excise duty is for the time being leviable on such matches manufactured in British India *plus* fifteen annas per gross of boxes or booklets.	...	...	...
	(3) In boxes or booklets containing on an average more than 60 but not more than 80 matches.	Protective .	The rate at which excise duty is for the time being leviable on such matches manufactured in British India *plus* Re. 1-4 per gross of boxes or booklets.	...	...	...
	(4) All other matches.	Protective .	The rate at which excise duty is for the time being leviable on such matches manufactured in British India *plus* one pie for every 48 matches or fraction thereof.	...	...	...

Item No.	Name of article	Nature of duty.	Standard rate of duty.	Preferential rate of duty if the article is the produce or manufacture of		Duration of protective rates of duty.
				The United Kingdom.	A British Colony.	
34 (4) *(contd.)*	*(b)* Undipped splints such as are ordinarily used for match-making.	Protective .	Five annas and seven and a half pies per lb.	...	...	...
	(c) Veneers such as are ordinarily used for making boxes, including boxes and parts of boxes made of such veneers	Protective .	Seven annas and six pies per lb.	...	...	...
35	MANURES, all sorts, including animal bones and the following chemical manures:—Basic slag, nitrate of ammonia, nitrate of soda, muriate of potash, sulphate of ammonia, sulphate of potash, kainit salts, carbo lime, urea, nitrate of lime, calcium cyanamide, ammonium phosphates, mineral phosphates and mineral super-phosphates.	...	Free .	...	...	...

SECTION VII.

HIDES, SKINS, LEATHER, FUR SKINS, AND MANUFACTURES OF THESE MATERIALS.

33	HIDES and SKINS not otherwise specified.	Revenue .	25 per cent *ad valorem*.	...	...	...
36 (1)	HIDES and SKINS, RAW or SALTED.	...	Free . . .	...	...	...
36 (2)	SKINS (other than FUR SKINS), TANNED or DRESSED, and unwrought leather	Revenue .	25 per cent. *ad valorem*.	...	...	...
37	The following LEATHER MANUFACTURES, namely, saddlery, harness, trunks and bags.	Revenue .	25 per cent. *ad valorem*.	...	...	...
37 (1)	LEATHER CLOTH including artificial leather, and other manufactures of leather not otherwise specified.	Revenue .	25 per cent *ad valorem*.	...	...	...
38	FUR SKINS DRESSED .	Revenue .	25 per cent. *ad valorem*.	...	...	...

SECTION VIII.

RUBBER AND ARTICLES MADE OF RUBBER.

39	RUBBER, raw . . .	...	Free . . .	...	...	...
39 (1)	RUBBER TYRES and TUBES and other manufactures of rubber, not otherwise specified, excluding apparel and boots and shoes.	Revenue .	25 per cent. *ad valorem*.	...	...	...

Item No.	Name of article.	Nature of duty.	Standard rate of duty.	Preferential rate of duty if the article is the produce or manufacture of		Duration of protective rates of duty.
				The United Kingdom.	A British Colony.	
	SECTION IX.					
	WOOD AND CORK AND WARES OF THESE MATERIALS; GOODS MADE OF PLAITING MATERIALS.					
40	WOOD and TIMBER, all sorts, not otherwise specified, including all sorts of ornamental wood.	Revenue	25 per cent. *ad valorem*.	...	...	...
40 (1)	FIREWOOD	Revenue ...	2½ per cent. *ad valorem*.	...	...	...
40 (2)	FURNITURE and CABINETWARE, not otherwise specified, excluding mouldings.	Revenue ...	25 per cent. *ad valorem*	...	...	...
40 (3)	TEA CHESTS and parts and fittings thereof.	Revenue ...	25 per cent. *ad valorem*.	...	...	...
41	CORK MANUFACTURES not otherwise specified.	Revenue ...	25 per cent. *ad valorem*.	...	...	...
42	FURNITURE OF WICKER WORK or bamboo.	Revenue ...	25 per cent. *ad valorem*.	...	...	...
	SECTION X.					
	PAPER AND ITS APPLICATIONS.					
43	WOOD PULP	Revenue ...	18 per cent. *ad valorem*.	...	...	...
44	PAPER, all sorts, not otherwise specified.	Revenue ...	30 per cent. *ad valorem*.	...	...	...
*	* * *	*	* *	*	*	*
44 (4)	PASTE BOARD, MILLBOARD, CARDBOARD AND STRAWBOARD, all sorts.	Revenue ...	25 per cent. *ad valorem*.	...	...	...
44 (5)	TRADE CATALOGUES and ADVERTISING CIRCULARS, imported by packet, book or parcel post	Free ...	... ...	...	...	...
44 (6)	PAPER MONEY	Free ...	... ...	...	...	...
44 (7)	NEWSPAPERS old, in bales and bags.	Revenue ...	25 per cent. *ad valorem*.	...	...	...
45	Articles made of PAPER and PAPER MACHE; STATIONERY including drawing and copy books, labels, advertising circulars, sheet or card almanacs and calendars, Christmas, Easter and other cards, including cards in booklet forms; including also waste paper.	Revenue ...	25 per cent. *ad valorem*.	...	...	...
45 (1)	BOOKS PRINTED including covers for printed books, maps, charts and plans, proofs, music manuscripts, and illustrations specially made for binding in books.	Free ...	... ...	...	...	...

Item No.	Name of article.	Nature of duty.	Standard rate of duty	Preferential rate of duty if the article is the produce or manufacture of		Duration of protective rates of duty.
				The United Kingdom.	A British Colony	
45 (2)	PRINTS, ENGRAVINGS and PICTURES (including photographs and picture post-cards) on paper or cardboard.	Revenue ...	50 per cent *ad valorem*.	...		
		SECTION XI.				
		TEXTILE MATERIALS AND TEXTILE GOODS.				
46	SILK, RAW (excluding silk waste and noils), and silk cocoons.	Protective ...	25 per cent. *ad valorem plus* 14 annas per lb.	...	...	March 31st, 1949.
46 (1)	SILK, WASTE and NOILS	Protective ...	25 per cent. *ad valorem*.	...	...	March 31st, 1949.
46 (2)	WOOL, RAW, and wool-tops.	...	Free	...	...	...
46 (3)	COTTON, RAW ...	Revenue ...	Two annas per lb.	...	...	...
46 (4)	TEXTILE MATERIALS, the following :—					
	Raw flax, hemp, jute and all other unmanufactured textile materials not otherwise specified.	Revenue ...	Raw hemp—18¾ per cent. *ad valorem*; all others—25 per cent. *ad valorem*.	...	...	...
46 (5)	SISAL and ALOE FIBRE	Preferential revenue.	30 per cent. *ad valorem*.	...	20 per cent. *ad valorem*.	...
47	SILK YARN including thrown silk warps and yarn spun from silk waste or noils, but excluding sewing thread.	Protective ...	25 per cent. *ad valorem plus* 14 annas per lb.	...	...	March 31st, 1949.
47 (1)	SILK SEWING THREAD.	Protective ...	25 per cent. *ad valorem*.	...	...	March 31st, 1949.
47 (2)	ARTIFICIAL SILK YARN and THREAD.	Revenue.	25 per cent. *ad valorem* or 5 annas per lb., whichever is higher.	...	...	...
47 (3)	WOOLLEN YARN not otherwise specified.	Revenue.	25 per cent. *ad valorem*.	...	...	...
47 (4)	WOOLLEN YARN for weaving and knitting wool.	Revenue.	25 per cent. *ad valorem*.	...	...	...
47 (5)	COTTON THREAD other than sewing or darning thread.	Revenue.	25 per cent. *ad valorem*.	...	...	...
47 (6)	COTTON TWIST and YARN, and cotton sewing or darning thread—					
	(*a*) of counts above 50's—					
	(i) of British manufacture.	Revenue.	5 per cent. *ad valorem*.	...	...	...
	(ii) not of British manufacture.	Revenue.	6¼ per cent. *ad valorem*.	...	...	...
	(*b*) of counts 50's and below—					
	(i) of British manufacture.	Revenue.	5 per cent *ad valorem* or 1¼ annas per lb., whichever is higher.	...	...	...
	(ii) not of British manufacture.	Revenue.	6¼ per cent. *ad valorem* or 1½ annas per lb., whichever is higher.	...	...	...

Item No.	Name of article.	Nature of duty.	Standard rate of duty.	Preferential rate of duty if the article is the produce or manufacture of		Duration of protective rates of duty.
				The United Kingdom.	A British Colony.	
47 (7)	TWIST and YARN of FLAX or JUTE.	Revenue.	25 per cent. *ad valorem*.	...	...	...
47 (8)	YARN (excluding cotton yarn) such as is ordinarily used for the manufacture of belting for machinery.	Revenue.	6¼ per cent *ad valorem*.	...	...	..
48	FABRICS not otherwise specified, containing more than 90 per cent. of silk, including such fabrics embroidered with artificial silk—					
	(*a*) Pongee . .	Protective.	50 per cent. *ad valorem plus* Re. 1 per lb.	...	...	March 31st, 1949.
	(*b*) Fuji, Boseki and corded (excluding white cord).	Protective.	50 per cent. *ad valorem plus* Re. 1-8 per lb.	...	...	March 31st, 1949.
	(*c*) Other sorts ...	Protective.	50 per cent *ad valorem plus* Rs. 2 per lb.	...	....	March 31st 1949.
48 (1)	FABRICS, not otherwise specified, containing more than 90 per cent of artificial silk—					
	(*a*) of British manufacture.	Protective.	30 per cent. *ad valorem* or 2½ annas per square yard, whichever is higher.	...	...	March 31st, 1949.
	(*b*) not of British manufacture.	Protective.	50 per cent. *ad valorem* or 4 annas per square yard, whichever is higher.	...	...	March 31st 1949.
48 (2)	WOOLLEN FABRICS, not otherwise specified, containing more than 90 per cent. of wool, excluding felt and fabrics made of shoddy or waste wool.	Revenue.	25 per cent. *ad valorem* or Re. 1-2 per lb., whichever is higher.	...	...	
48 (3)	COTTON FABRICS not otherwise specified, containing more than 90 per cent. of cotton—					
	(*a*) Grey piecegoods (excluding bordered grey chadars, dhoties, saris and scarves)—					
	(i) of British manufacture.	Revenue.	15 per cent. *ad valorem* or 2⅝ annas per lb., whichever is higher.	...	...	...
	(ii) not of British manufacture.	Revenue.	50 per cent. *ad valorem* or 5¼ annas per lb., whichever is higher.	...	...	...
	(*b*) Printed piece goods and printed fabrics.					
	(i) of British manufacture.	Revenue.	17½ per cent. *ad valorem*	...	...	...

Item No.	Name of article.	Nature of duty.	Standard rate of duty.	Preferential rate of duty if the article is the produce or manufacture of		Duration of protective rates of duty.
				The United Kingdom.	A British Colony.	
48 (3) *(contd.)*	(ii) not of British manufacture.	Revenue.	50 per cent. *ad valorem*.	...	...	...
	(c) Cotton piecegoods and fabrics not otherwise specified—					
	(i) of British manufacture.	Revenue.	15 per cent. *ad valorem*.	...	...	...
	(ii) not of British manufacture.	Revenue.	50 per cent. *ad valorem*.	...	...	...
48 (4)	FABRICS not otherwise specified, containing more than 10 per cent. and not more than 90 per cent. silk—					
	(a) containing more than 50 per cent. of silk or artificial silk or of both.	Protective.	50 per cent *ad valorem plus* Rs. 2 per lb	...	...	March 31st, 1949.
	(b) containing not more than 50 per cent. of silk or artificial silk or of both—					
	(i) Containing more than 10 per cent. of artificial silk.	Protective.	50 per cent. *ad valorem* or Re. 1-8 per lb., whichever is higher.	...	..	March 31st, 1949.
	(ii) containing no artificial silk not more than 10 per cent. artificial silk.	Protective.	50 per cent. *ad valorem*.	...	...	March 31st, 1949.
48 (5)	FABRICS, not otherwise specified containing not more than 10 per cent. silk but more than 10 per cent. and not more than 90 per cent. artificial silk—					
	(a) containing 50 per cent. or more cotton—					
	(i) of British manufacture.	Protective.	30 per cent. *ad valorem* or 2 annas per square yard, whichever is higher.	...	...	March 31st. 1949.
	(ii) not of British manufacture.	Protective.	50 per cent. *ad valorem* or $3\frac{1}{2}$ annas per square yard, whichever is higher.	...	...	March 31st, 1949.
	(b) containing no cotton or containing less than 50 per cent. cotton—					
	(i) of British manufacture.	Protective.	30 per cent. *ad valorem* or $2\frac{1}{2}$ annas per square yard, whichever is higher.	...	...	March 31st, 1949.
	(ii) not of British manufacture.	Protective.	50 per cent. *ad valorem* or 4 annas per square yard, whichever is higher.	...	...	March 31st, 1949.

Item No.	Name of article	Nature of duty	Standard rate of duty	Preferential rate of duty if the article is the produce or manufacture of		Duration of protective rates of duty.
				The United Kingdom.	A British Colony.	
48 (6)	FABRICS, not otherwise specified, containing not more than 10 per cent. silk or 10 per cent. artificial silk, but containing more than 10 per cent. but not more than 90 per cent. wool.	Revenue.	25 per cent. *ad valorem*.	...	...	
48 (7)	FABRICS, not otherwise specified, containing not more than 10 per cent. silk or 10 per cent. artificial silk or 10 per cent. wool, but containing more than 50 per cent. cotton and not more than 90 per cent. cotton—					
	(a) of British manufacture.	Protective.	25 per cent *ad valorem*.	...	...	March 31st, 1949.
	(b) not of British manufacture.	Protective.	50 per cent. *ad valorem*.	...	...	March 31st, 1949
48 (8)	FABRICS, not otherwise specified, containing not more than 10 per cent. silk or 10 per cent. artificial silk or 10 per cent. wool or 50 per cent cotton	Revenue.	25 per cent. *ad valorem*.	...	...	...
48 (9)	The following COTTON FABRICS, namely, Sateens including italians of Sateen weave, velvets and velveteens and embroidered all-overs—					
	(a) Printed fabrics.					
	(i) of British manufacture.	Revenue.	17½ per cent. *ad valorem*.	...	...	...
	(ii) not of British manufacture.	Revenue.	35 per cent. *ad valorem*.	....	...	..
	(b) Other fabrics.					
	(i) of British manufacture.	Revenue.	15 per cent. *ad valorem*.	...	...	...
	(ii) not of British manufacture.	Revenue.	35 per cent. *ad valorem*.	...	...	...
48 (10)	FABRICS containing gold or silver thread,	Protective.	50 per cent. *ad valorem*.	...	...	March 31st, 1949
49.	TEXTILE MANUFACTURES, the following articles when made wholly or mainly of any of the fabrics specified in—					
	(a) Item No. 48, 48 (1), 48 (4), 48 (5), 48 (7) or 48 (10) ;	Protective.	The *ad valorem* rates of duty applicable to the fabric of which the article is wholly or mainly made.	...	...	The duration applicable to the fabric of which the article is wholly or mainly made.
	(b) Item No. 48 (3) or 48 (9) : — Bed sheets. Bed spreads. Bolster cases. Counterpanes. Clothes, table.	Revenue.	The *ad valorem* rates of duty applicable to the fabric of which the article is wholly or mainly made.	...	...	...

Item No.	Name of article.	Nature of duty.	Standard rate of duty	Preferential rate of duty if the article is the produce or manufacture of		Duration of protective rates of duty
				The United Kingdom.	A British Colony.	
49 (*contd.*)	Cloths, tay. Covers, bed Covers, table. Dusters. Glass-cloths. Handkerchiefs. Napkins. Pillow cases. Pillow slips. Scarves Shirts. Shawls. Sacks (cotton). Towels. Umbrella coverings.					
49 (1)	PENTS being *bona fide* remnants of piecegoods or other fabrics—					
	(a) of materials liable to duty under Item 48 (3), not exceeding 4 yards in length.	Preferential revenue.	35 per cent. *ad valorem.*	25 per cent. *ad valorem.*	...	...
	(b) of materials liable to duty under Item 48, 48 (1), 48 (4) or 48 (5), not exceeding 2½ yards in length.	Preferential revenue.	35 per cent. *ad valorem.*	25 per cent. *ad valorem.*	...	...
	(c) of other materials, not exceeding 4 yards in length.	Preferential revenue.	35 per cent. *ad valorem.*	25 per cent. *ad valorem.*	...	...
49 (2)	Ribbons . . .	Revenue.	50 per cent. *ad valorem.*	...	...	...
49 (3)	BLANKETS and RUGS (other than floor rugs), excluding blankets and rugs made wholly or mainly from artificial silk	Revenue.	25 per cent. *ad valorem.*	...	...	...
49 (4)	WOOLLEN CARPETS, FLOOR RUGS, SHAWLS and other manufactures of wool, not otherwise specified, including felt.	Preferential revenue.	35 per cent. *ad valorem.*	25 per cent. *ad valorem.*	...	...
49 (5)	COTTON BRAIDS or CORDS, the following, namely:—					
	Ghoonsis and Muktakesis.	Revenue.	6½ annas per lb.	...	...	...
50	JUTE MANUFACTURES not otherwise specified.	Revenue.	25 per cent. *ad valorem.*	...	...	...
50 (1)	Second hand or used GUNNY BAGS or cloth made of jute.	...	Free . . .	...	...	...
50 (2)	HEMP MANUFACTURES.	Revenue.	25 per cent. *ad valorem.*	...	...	...
50 (3)	COTTON HAIR, and CANVAS PLY BELTING for machinery.	Revenue.	6½ per cent. *ad valorem.*	...	...	...
50 (4)	ROPES, COTTON . .	...	Free . . .	...	...	...
50 (5)	OIL CLOTH and FLOOR CLOTH.	Revenue.	25 per cent. *ad valorem.*	...	...	...

Item No.	Name of article	Nature of duty.	Standard rate of duty	Preferential rate of duty if the article is the produce or manufacture of		Duration of protective rates of duty.
				The United Kingdom.	A British Colony.	
50 (6)	CORDAGE, ROPE and TWINE of vegetable fibre other than jute and cotton, not otherwise specified.	Revenue	25 per cent. *ad valorem*.	...	..	...
50 (7)	MATS and MATTINGS, not otherwise specified.	Revenue.	25 per cent. *ad valorem*.	...	...	...
50 (8)	COIR FIBRE, COIR YARN and COIR MATS and matting.	Preferential revenue.	30 per cent. *ad valorem*.	...	20 per cent. *ad valorem*.	...
51	SOCKS and STOCKINGS made wholly or mainly from silk or artificial silk.	Revenue.	50 per cent. *ad valorem*.		...	...
51 (1)	WOOLLEN HOSIERY and woollen knitted apparel, that is to say, all hosiery and knitted apparel containing not less than 15 per cent. of wool by weight.	Revenue.	25 per cent. *ad valorem* or Re. 1-2 per lb, whichever is higher.		..	...
51 (2)	COTTON KNITTED APPAREL, including apparel made of cotton interlocking material, cotton undervests, knitted or woven, and cotton socks and stockings—					
	(a) of a weight not exceeding 4 lbs per dozen.	Revenue.	25 per cent. *ad valorem* or 12 annas per lb., whichever is higher.	...	...	...
	(b) of a weight exceeding 4 lbs. per dozen.	Revenue.	25 per cent. *ad valorem* or 10 annas per lb., whichever is higher.	...	..	...
51 (3)	COTTON KNITTED FABRIC.	Revenue.	50 per cent. *ad valorem* or 12 annas per lb., whichever is higher.	...	...	...
52	APPAREL, HOSIERY, HABERDASHERY, MILLINERY and DRAPERY, not otherwise specified.	Revenue.	25 per cent. *ad valorem*.			
52 (1)	SILK or ARTIFICIAL SILK GOODS used or required for medical purposes, namely :—silk or artificial silk ligatures ; elastic silk or artificial silk hosiery, elbow pieces, thigh pieces, knee caps, leggings, socks, anklets stockings, suspensory bandages, silk or artificial silk abdominal belts, silk or artificial silk web catheter tubes, and oiled silk or artificial silk.	Revenue.	25 per cent. *ad valorem*.	...	...	...

Item No.	Name of article	Nature of duty	Standard rate of duty.	Preferential rate of duty if the article is the produce or manufacture of		Duration of protective rates of duty
				The United Kingdom.	A British Colony.	
52 (2)	UNIFORMS and Accoutrements appertaining thereto imported by a public servant for his personal use	...	Free . . .	...	...	...
52 (3)	INSIGNIA and BADGES of official British and Foreign Orders.	...	Free . . .	...	...	...
53	TEXTILE MANUFACTURES, not otherwise specified.	Revenue ...	25 per cent. *ad valorem.*	...	...	...
53 (1)	RAGS and other paper making materials excluding wood pulp.	...	Free ...	...	...	...
	SECTION XII.					
	FOOTWEAR, HATS, UMBRELLAS AND PARASOLS; ARTICLES OF FASHION.					
54	BOOTS and SHOES ...	Revenue ...	25 per cent. *ad valorem* or 6 annas per pair, whichever is higher.	...	...	...
*	* * * *	* *	* *	* *	* *	* *
54 (2)	UPPERS FOR BOOTS AND SHOES unless entirely made of leather.	Revenue ...	25 per cent. *ad valorem* or 3 annas per pair, whichever is higher.	...	...	...
55	HATS, CAPS, BONNETS and HATTERS' WARE, not otherwise specified.	Revenue ...	25 per cent. *ad valorem.*	...	...	...
56	PARASOLS and SUNSHADES and fittings for umbrellas, parasols and sunshades.	Revenue ...	25 per cent. *ad valorem.*	...	...	...
56 (1)	UMBRELLAS ...	Revenue ...	25 per cent. *ad valorem* or eight annas each, whichever is higher.	...	...	...
57	...	...	...	...	...	...
	SECTION XIII.					
	WARES OF STONE AND OF OTHER MINERAL MATERIALS, CERAMIC PRODUCTS, GLASS AND GLASSWARE.					
58	Articles made of STONE or MARBLE.	Revenue ...	25 per cent *ad valorem.*	...	...	...
58 (1)	ASBESTOS MANUFACTURES, not otherwise specified.	Revenue ...	25 per cent. *ad valorem.*	...	...	...
58 (2)	PACKING — Engine and Boiler — all sorts not otherwise specified	Revenue ...	25 per cent. *ad valorem.*	...	...	...
59	BUILDING AND ENGINEERING MATERIALS, all sorts not of iron steel or wood not otherwise specified, including tiles other than glass, earthenware or porcelain tiles, and fire-bricks not being component parts of any articles included in Item No. 72 or No. 74 (2).	Revenue ...	25 per cent. *ad valorem.*	...	...	...

Item No.	Name of article.	Nature of duty.	Standard rate of duty.	Preferential rate of duty if the article is the produce or manufacture of		Duration of protective rates of duty
				The United Kingdom.	A British Colony	
59 (1)	BUILDING and ENGINEERING BRICKS.	Revenue ...	25 per cent. *ad valorem*.	...	...	...
59 (2)	EARTHENWARE, CHINA and PORCELAIN, all sorts not otherwise specified.	Revenue ...	25 per cent. *ad valorem*.	...	...	...
59 (3)	EARTHENWARE PIPES and SANITARY WARE.	Revenue ...	25 per cent. *ad valorem*.	...	...	...
59 (4)	TILES OF EARTHENWARE and PORCELAIN.	Revenue ...	25 per cent. *ad valorem* or two annas per square foot, whichever is higher.	...	...	...
59 (5)	DOMESTIC EARTHENWARE, CHINA and PORCELAIN, the following namely :—					
	(a) Tea cups and coffee cups—					
	(i) having a capacity of more than $7\frac{1}{2}$ ozs.	Revenue ...	25 per cent. *ad valorem* or ten annas per dozen, whichever is higher.	...	...	...
	(ii) having a capacity of not more than $7\frac{1}{2}$ ozs	Revenue ...	25 per cent. *ad valorem* or four annas per dozen, whichever is higher.	...	...	...
	(b) Saucers—					
	(i) for use with tea cups or coffee cups having a capacity of more than $7\frac{1}{2}$ ozs.	Revenue	25 per cent. *ad valorem* or five annas per dozen, whichever is higher.	...	...	...
	(ii) for use with tea cups or coffee cups having a capacity of not more than $7\frac{1}{2}$ ozs.	Revenue ...	25 per cent. *ad valorem* or two annas per dozen, whichever is higher.	...	...	...
	(c) Tea-pots—					
	(i) having a capacity of more than 20 ozs.	Revenue ...	25 per cent. *ad valorem* or Rs. 3 per dozen, whichever is higher.	...	...	...
	(ii) having a capacity of more than 10 ozs. and not more than 20 ozs.	Revenue ...	25 per cent. *ad valorem* or Re. 1-8 per dozen, whichever is higher.	...	...	...
	(iii) having a capacity of not more than 10 ozs.	Revenue ...	25 per cent. *ad valorem* or twelve annas per dozen, whichever is higher.	...	...	...
	(d) Sugar-bowls ...	Revenue ...	25 per cent. *ad valorem* or Re. 1-8 per dozen, whichever is higher.	...	...	...

Item No.	Name of article	Nature of duty	Standard rate of duty.	Preferential rate of duty if the article is the produce or manufacture of		Duration of protective rates of duty.
				The United Kingdom.	A British Colony.	
59 (5) *(contd.)*	*(e)* Jugs having a capacity of over 10 ozs.	Revenue ...	25 per cent. *ad valorem* or twelve annas per dozen, whichever is higher	...	...	...
	(f) Plates over 5½ inches in diameter—					
	(i) over 8½ inches in diameter.	Revenue	25 per cent. *ad valorem* or Re. 1 per dozen, whichever is higher.		...	...
	(ii) not over 8½ inches in diameter.	Revenue .	25 per cent. *ad valorem* or ten annas per dozen, whichever is higher.		...	...
59 (6)	COVERED CRUCIBLES for glass-making.	Revenue .	25 per cent. *ad valorem*.		...	...
60	GLASS and GLASSWARE not otherwise specified, and lacquered ware.	Revenue	25 per cent. *ad valorem*.	...	...	...
60 (1)	GLASS GLOBES and CHIMNEYS for lamps and lanterns—					
	(a) Globes for hurricane lanterns.	Revenue .	25 per cent. *ad valorem* or four annas and six pies per dozen, whichever is higher.	...	...	...
	(b) Other globes and chimneys having an external base diameter of over one inch.	Revenue .	25 per cent *ad valorem* or three annas per dozen, whichever is higher.	...	...	...
60 (2)	ELECTRIC LIGHTING BULBS	Revenue .	50 per cent. *ad valorem*		...	...
60 (3)	GLASS BANGLES, GLASS BEADS and false pearls.	Revenue .	50 per cent. *ad valorem*.	...	...	...

Section XIV.

REAL PEARLS, PRECIOUS STONES, PRECIOUS METALS AND WARES OF THOSE MATERIALS; COIN (SPECIE).

61	PRECIOUS STONES, unset and imported uncut, and Pearls, unset.	...	Free . . .	...	...	...
61 (1)	PRECIOUS STONES, unset and imported cut.	Revenue .	25 per cent *ad valorem*.	...	...	...
61 (2)	SILVER BULLION and SILVER SHEETS and PLATES which have undergone no process of manufacture subsequent to rolling.	Revenue .	Eight annas per ounce.	...	...	...

Item No.	Name of article.	Nature of duty.	Standard rate of duty.	Preferential rate of duty if the article is the produce or manufacture of		Duration of protective rates of duty
				The United Kingdom.	A British Colony.	
61 (3)	GOLD BULLION and SILVER SHEETS and PLATES which have undergone no process of manufacture subsequent to rolling.	Revenue .	Rs. 25 per tola of 180 grains fine	...	...	...
61 (4)	SILVER PLATES and SILVER MANUFACTURES, all sorts not otherwise specified.	Revenue .	50 per cent. *ad valorem*	...	...	...
61 (5)	SILVER THREAD AND WIRE (including so-called gold thread and wire mainly made of silver) and silver leaf including also imitation gold and silver thread and wire, lametta and metallic spangles and articles of a like nature, of whatever metal made.	Protective .	62½ per cent. *ad valorem*.	...	...	March 31st, 1949.
61 (6)	GOLD PLATE, GOLD PLATE and GOLD MANUFACTURES, all sorts not otherwise specified.	Revenue .	50 per cent. *ad valorem*.	...	...	...
61 (7)	GOLD or GOLD-PLATED PEN NIBS.	Revenue .	50 per cent. *ad valorem*.	...	...	...
61 (8)	ARTICLES other than cutlery and surgical instruments, PLATED WITH GOLD or SILVER.	Revenue .	50 per cent. *ad valorem*.	...	...	...
61 (9)	CUTLERY PLATED WITH GOLD or SILVER.	Revenue .	50 per cent. *ad valorem*.	...	...	...
61 (10)	JEWELLERY AND and JEWELS	Revenue .	50 per cent. *ad valorem*.	...	...	...
62	CURRENT COIN of the Central Government.	. .	Free . . .	...	...	...
62 (1)	SILVER COIN, not otherwise specified.	Revenue .	Eight annas per ounce.	...	...	...
62 (2)	GOLD COIN . .	Revenue .	Rs. 25 per tola of 180 grains fine.	...	...	...
	SECTION XV.					
	BASE METALS AND ARTICLES MADE THEREFROM.					
63	IRON or STEEL, OLD .	Revenue .	15§ per cent *ad valorem*.	...	...	...
63 (1)	IRON ALLOYS, *viz.*, ferro-manganese, ferro-silicon, ferro-chrome, spiegeleisen and the like as commonly used for steel making.	Revenue .	15§ per cent *ad valorem*.	...	...	...
63 (2)	IRON or STEEL angle, channel, tee, flat [other than alloy, tool or special Steel specified in item No. 63 (30)]. beam, zed, trough and piling— *(a)* not fabricated— (i) of British manufacture—					

Item No.	Name of article.	Nature of duty.	Standard rate of duty.	Preferential rate of duty if the article is the produce or manufacture of		Duration of protective rates of duty.
				The United Kingdom.	A British Colony.	
63 (2) *(contd.)*						
	not coated with other metals.	Revenue	1⅓ times the excise duty leviable for the time being on steel ingots produced in British India; or 10 per cent. *ad valorem*, whichever is higher.	...	...	...
	coated with other metals.	Revenue.	1⅓ times the excise duty leviable for the time being on steel ingots produced in British India; or 10 per cent, *ad valorem*, whichever is higher.	...	...	...
	(ii) not of British manufacture.	Revenue.	1⅓ times the excise duty leviable for the time being on steel ingots producedin British India *plus* Rs. 43 per ton.	...	...	...
	(b) fabricated—					
	(i) of British manufacture.	Revenue.	1 1/2 times the excise duty leviable for the time being on steel ingots produced in British India *plus* Rs. 40 per ton.	...	...	...
	(ii) not of British manufacture.	Revenue.	1 1/2 times the excise duty leviable for the time being on steel ingots produced in British India *plus* Rs. 40 per ton.	...	...	...
63 (3)	IRON or STEEL (other than alloy, tool or special steel) BAR and ROD—					
	(i) of British manufacture.	Revenue.	1⅓ times the excise duty leviable for the time being on steel ingots produced in British India *plus* Rs. 10 per ton; or 10 per cent. *ad valorem*, whichever is higher.	...	...	...

Item No.	Name of article.	Nature of duty.	Standard rate of duty.	Preferential rate of duty if the article is the produce or manufacture of		Duration of protective rates of duty
				The United Kingdom.	A British Colony.	
63 (3) *contd.)*	(ii) not of British manufacture.	Revenue.	1⅓ times the excise duty leviable for the time being on steel ingots produced in British India *plus* Rs. 39 per ton; or 20 per cent. *ad valorem*, whichever is higher.	...	...	...
63 (4)	IRON, pig	Revenue.	15⅝ per cent. *ad valorem*.	...	...	...
63 (5)	IRON RISE BOWLS	Revenue.	15⅝ per cent. *ad valorem*.	...	...	...
63 (6)	CAST IRON PIPES and TUBES: also cast iron fittings therefor, that is to say, bends, boots, elbows, tees, sockets, flanges, plugs, valves, cocks and the like—					
	(i) of British manufacture.	Revenue.	10 per cent. *ad valorem*.	...	...	...
	(ii) not of British manufacture.	Revenue.	Rs. 57-8-0 per ton.	...	...	...
63 (7)	CAST IRON PLATES .	Revenue.	15⅝ per cent. *ad valorem*.	...	...	...
63 (8)	STEEL INGOTS . . IRON or STEEL blooms, billets and slabs, provided that no piece less than 1 1/2 inches square or thick shall be included in this item.	Revenue.	The excise duty leviable for the time being on steel ingots produced in British India; or 15⅝ per cent. *ad valorem*, whichever is higher.	...	...	...
63 (9)	IRON or STEEL STRUCTURES, fabricated partially or wholly, not otherwise specified, if made mainly or wholly of iron or steel bars, sections, plates or sheets, for the construction of buildings, bridges, tanks, well curbs, trestles, towers and similar structures or for parts thereof, but not including builders' hardware or any of the articles specified in Item No. 72, 72 (3), 74(1), 75 (3), 75 (4) or 76 (1)—					
	(*a*) of British manufacture.	Revenue.	1½ times the excise duty leviable for the time being on steel ingots produced in British India *plus* Rs. 40 per ton.	...	...	...

Item No.	Name of article.	Nature of duty.	Standard rate of duty.	Preferential rate of duty if the article is the produce or manufacture of		Duration of protective rates of duty.
				The United Kingdom.	A British Colony.	
63 (9) *(contd.)*	(b) not of British manufacture.	Revenue.	1½ times the excise duty leviable for the time being on steel ingots produced in British India *plus* Rs. 40 per ton.	...	...	...
63 (10)	STEEL, tinplates and tinned sheets, including tin taggers, and cuttings of such plates, sheets or taggers—					
	(i) of British manufacture.	Revenue.	1½ times the excise duty leviable for the time being on steel ingots produced in British India *plus* Rs. 38 per ton.	...	...	...
	(ii) not of British manufacture.	Revenue.	1½ times the excise duty leviable for the time being on steel ingots produced in British India *plus* Rs. 59 per ton.	...	...	...
63 (11)	IRON or STEEL ANCHORS and CABLES.	Revenue.	15⅝ per cent. *ad valorem*.	...	...	...
63 (12)	A. IRON or STEEL BOLTS and NUTS, including hook-bolts and nuts for roofing but excluding fish bolts and nuts—					
	(i) of British manufacture.	Revenue	1½ times the excise duty leviable for the time being on steel ingots produced in British India; or 10 per cent. *ad valorem*, whichever is higher.	...	...	...
	(ii) not of British manufacture.	Revenue.	1 1/2 times the excise duty leviable for the time being on steel ingots produced in British India *plus* Rs.1-9 0per cwt.	...	...	...
	B. IRON or STEEL FISH BOLTS and NUTS—					
	(i) of British manufacture.	Revenue.	1 1/2 times the excise duty leviable for the time being on steel ingots produced in British India; or 10 per cent. *ad valorem*, whichever is higher.	...	...	...

Item No.	Name of article.	Nature of duty.	Standard rate of duty.	Preferential rate of duty if the article is the produce or manufacture of		Duration of protective rates of duty
				The United Kingdom.	A British Colony.	
63 (12) *(contd.)*	(ii) not of British manufacture.	Revenue.	1½ times the excise duty leviable for the time being on steel ingots produced in British India *plus* Rs. 4-5-0- per cwt.	...	...	...
63 (13)	IRON or STEEL EXPANDED METAL.	Revenue.	15⅝ per cent. *ad valorem.*	...	...	...
63 (14)	IRON or STEEL HOOPS and STRIPS.	Preferential revenue.	20 per cent. *ad valorem.*	10 per cent. *ad valorem.*	...	...
63 (15)	IRON or STEEL RIVETS—					
	(i) of British manufacture.	Revenue.	1½ times the excise duty leviable for the time being on steel ingots produced in British India; or 10 per cent. *ad valorem*, whichever is higher.	...	...	...
	(ii) not of British manufacture.	Revenue.	1½ times the excise duty leviable for the time being on steel ingots produced in British India *plus* Rs. 1-14-0 per cwt.	...	...	...
63 (16)	IRON or STEEL NAILS and WASHERS, all sorts not otherwise specified.	Revenue.	15⅝ per cent. *ad valorem.*	...	...	...
63 (17)	IRON or STEEL PIPES and TUBES and fittings therefor, if riveted or otherwise built up of plates or sheets—					
	(i) of British manufacture.	Revenue.	1 1/2 times the excise duty leviable for the time being on steel ingots produced in British India *plus* Rs. 12 per ton; or 10 per cent. *ad valorem*, whichever is higher.	...	...	...
	(ii) not of British manufacture.	Revenue.	1 1/2 times the excise duty leviable for the time being on steel ingots produced in British India *plus* Rs. 35 per ton.	...	...	...

Item No.	Name of article.	Nature of duty.	Standard rate of duty.	Preferential rate of duty if the article is the produce or manufacture of		Duration of protective rates of duty.
				The United Kingdom.	A British Colony.	
63 (18)	IRON or STEEL PIPES and TUBES; also fittings therefor, that is to say, bends, boots, elbows, tees, sockets, flanges, plugs, valves, cocks, and the like, excluding pipes, tubes and fittings therefor otherwise specified.	Revenue.	15$\frac{5}{8}$ per cent. *ad valorem*.	...	...	...
63 (19)	IRON or STEEL plates excluding cast iron plates—					
	(a) not fabricated—					
	(i) of British manufacture—					
	not coated with other metals.	Revenue	1$\frac{1}{3}$ times the excise duty leviable for the time being on steel ingots produced in British India; or 10 per cent. *ad valorem*, whichever is higher.	...	...	...
	coated with other metals.	Revenue	1$\frac{1}{3}$ times the excise duty leviable for the time being on steel ingots produced in British India; or 10 per cent. *ad valorem*, whichever is higher.	...	...	...
	(ii) not of British manufacture.	Revenue	1$\frac{1}{3}$ times the excise duty leviable for the time being on steel ingots produced in British India *plus* Rs. 25 per ton.	...	...	...
	(b) fabricated—					
	(i) of British manufacture.	Revenue	1 1/2 times the excise duty leviable for the time being on steel ingots produced in British India *plus* Rs. 40 per ton.	...	...	...
	(ii) not of British manufacture.	Revenue	1 1/2 times the excise duty leviable for the time being on steel ingots produced in British India *plus* Rs. 40 per ton.	...	...	...

Item No.	Name of article.	Nature of duty.	Standard rate of duty.	Preferential rate of duty if the article is the produce or manufacture of		Duration of protective rates of duty.
				The United Kingdom.	A British Colony.	
63 (20)	IRON or STEEL SHEETS OTHER THAN HIGH SILICON ELECTRICAL STEEL SHEETS—					
	(a) not fabricated—					
	(1) not galvanized—					
	(i) of British manufacture	Revenue	1⅓ times the excise duty leviable for the time being on steel ingots produced in British India *plus* Rs. 11 per ton; or 10 per cent. *ad valorem* whichever is higher.	...	...	...
	(ii) not of British manufacture.	Revenue.	1⅓ times the excise duty leviable for the time being on steel ingots produced in British India *plus* Rs. 32 per ton.	...	...	...
	(2) galvanized—					
	(i) of British manufacture.	Revenue.	1⅓ times the excise duty leviable for the time being on steel ingots produced in British India *plus* Rs. 10 per ton; or 10 per cent. *ad valorem*, whichever is higher.	...	...	...
	(ii) not of British manufacture.	Revenue.	1⅓ times the excise duty leviable for the time being on steel ingots produced in British India *plus* Rs. 40 per ton.	...	...	...
	(b) fabricated—					
	(1) not galvanized—					
	(i) of British manufacture.	Revenue.	1 1/2 times the excise duty leviable for the time being on steel ingots produced in British India *plus* Rs. 12 per ton; or 10 per cent. *ad valorem*, whichever is higher.	...	...	...

Item No.	Name of article.	Nature of duty.	Standard rate of duty.	Preferential rate of duty if the article is the produce or manufacture of		Duration of protective rate of duty
				The United Kingdom.	A British Colony.	
63 (20) (*contd.*)	(ii) not of British manufacture.	Revenue.	1 1/2 times the excise duty leviable for the time being on steel ingots produced in British India *plus* Rs. 35 per ton.	...	...	...
	(2) galvanized —					
	(i) of British manufacture.	Revenue.	1 1/2 times the excise duty leviable for the time being on steel ingots produced in British India *plus* Rs. 11 per ton; or 10 per cent *ad valorem*, whichever is higher	...	...	...
	(ii) not of British manufacture.	Revenue.	1 1/2 times the excise duty leviable for the time being on steel ingots produced in British India *plus* Rs. 44 per ton.	...	...	...
63 (21)	IRON OR STEEL RAILWAY TRACK MATERIAL—					
	A. Rails (including tramway rails the heads of which are not grooved—					
	(a) 30 lbs. per yard and over, and fish-plates therefor—					
	(i) of British manufacture.	Revenue	1⅓ times the excise duty leviable for the time being on steel ingots produced in British India; or 10 per cent. *ad valorem*, whichever is higher.	...	...	...
	(ii) not of British manufacture.	Revenue.	1⅓ times the excise duty leviable for the time being on steel ingots produced in British India; or 20 per cent. *ad valorem*, whichever is higher.	...	...	...

Item No.	Name of article.	Nature of duty.	Standard rate of duty.	Preferential rate of duty if the article is the produce or manufacture of		Duration of protective rates of duty
				The United Kingdom.	A British Colony.	
63 (21) *(contd.)*	*(b)* under 30 lbs. per yard and fish-plates therefor—					
	(i) of British manufacture.	Revenue.	1½ times the excise duty leviable for the time being on steel ingots produced in British India *plus* Rs. 10 per ton; or 10 per cent. *ad valorem*, whichever is higher.	...	...	...
	(ii) not of British manufacture.	Revenue.	1½ times the excise duty leviable for the time being on steel ingots produced in British India *plus* Rs. 39 per ton.	...	...	...
	B. Switches and crossings including stretcher bars and other component parts, and switches and crossings including stretcher bars and other component parts for tramway rails the heads of which are not grooved —					
	(a) for rails 30 lbs. per yard and over —					
	(i) of British manufacture.	Revenue.	1 1/2 times the excise duty leviable for the time being on steel ingots produced in British India; or 10 per cent. *ad valorem*, whichever is higher.	...	...	...
	(ii) not of British manufacture.	Revenue.	1 1/2 times the excise duty leviable for the time being on steel ingots produced in British India; or 20 per cent. *ad valorem*, whichever is higher.	...	...	...
	(b) for rails under 30 lbs. per yard —					
	(i) of British manufacture.	Revenue.	1 1/2 times the excise duty leviable for the time being on steel ingots produced in British India *plus* Rs. 11 per ton; or 10 per cent. *ad valorem*, whichever is higher.	...	...	...

Item No.	Name of article	Nature of duty	Standard rate of duty.	Preferential rate of duty if the article is the produce or manufacture of		Duration of protective rates of duty.
				The United Kingdom.	A British Colony.	
63 (21) (*cont'd.*)	(ii) not of British manufacture.	Revenue.	1 1/2 times the excise duty leviable for the time being on steel ingots produced in British India *plus* Rs. 43 per ton.	...	...	...
	C. Sleepers, and sleeper bars, other than cast iron —					
	(i) of British manufacture.	Revenue.	1½ times the excise duty leviable for the time being on steel ingots produced in British India; or 10 per cent *ad valorem*, whichever is higher.	...	...	...
	(ii) not of British manufacture.	Revenue	1½ times the excise duty leviable for the time being on steel ingots produced in British India; or 20 per cent. *ad valorem*, whichever is higher.	...	...	...
	D. Spikes (other than dogspikes) and tiebars—					
	(i) of British manufacture.	Revenue.	1½ times the excise duty leviable for the time being on steel ingots produced in British India *plus* Rs. 10 per ton ; or 10 per cent. *ad valorem*, whichever is higher.	...	...	...
	(ii) not of British manufacture.	Revenue.	1½ times the excise duty leviable for the time being on steel ingots produced in British India *plus* Rs. 39 per ton.	...	...	...
	E. Dogspikes—					
	(i) of British manufacture.	Revenue.	1 1/2 times the excise duty leviable for the time being on steel ingots produced in British India *plus* 7 annas per cwt ; or 10 per cent. *ad valorem*, whichever is higher.	...	...	...

Item No.	Name of article.	Nature of duty.	Standard rate of duty.	Preferential rate of duty if the article is the produce or manufacture of		Duration of protective rates of duty.
				The United Kingdom.	A British Colony.	
63 (21) *(contd.)*	(ii) not of British manufacture.	Revenue.	1 1/2 times the excise duty leviable for the time being on steel ingots produced in British India *plus* Rs. 2-15-0 per cwt.	...	...	...
	F. Gibs, cotters, keys (including tapered key-bars), distance pieces and other fastenings for use with iron or steel sleepers—					
	(i) of British manufacture	Revenue.	1 1/2 times the excise duty leviable for the time being on steel ingots produced in British India *plus* 7 annas per cwt; or 10 per cent. *ad valorem*, whichever is higher	...	...	...
	(ii) not of British manufacture	Revenue.	1 1/2 times the excise duty leviable for the time being on steel ingots produced in British India *plus* Rs. 2-15-0 per cwt.	...	...	...
63 (22)	IRON or STEEL RAILWAY TRACK MATERIALS not otherwise specified, including bearing plates, cast iron sleepers and lever boxes.	Revenue.	$15\frac{5}{8}$ per cent. *ad valorem*	...	...	...
63 (23)	IRON or STEEL TRAMWAY TRACK MATERIALS not otherwise specified, including rails, fishplates tiebars, switches, crossings and the like materials of shapes and sizes specially adapted for tramway tracks.	Revenue.	$15\frac{5}{8}$ per cent. *ad valorem*.	...	...	...
63 (24)	IRON or STEEL BARBED or STRANDED WIRE and wire rope.	Preferential revenue.	20 per cent. *ad valorem*.	10 per cent. *ad valorem*	...	...
63 (25)	IRON or STEEL WIRE, other than high carbon or spring steel wire, barbed or stranded wire, wire rope or wire netting; and iron or steel wire nails—					
	(i) of British manufacture.	Revenue.	1 1/2 times the excise duty leviable for the time being on steel ingots produced in British India *plus* Rs. 25 per ton.	...	...	...

Item No.	Name of article.	Nature of duty.	Standard rate of duty.	Preferential rate of duty if the article is the produce or manufacture of		Duration of protective rates of duty
				The United Kingdom.	A British Colony.	
63 (25) *(contd.)*	(ii) not of British manufacture.	Revenue.	1½ times the excise duty leviable for the time being on steel ingots produced in British India *plus* Rs. 60 per ton.	...	...	...
63 (26)	IRON or STEEL (other than bar or rod) specially designed for the reinforcement of concrete.	Revenue.	15½ per cent. *ad valorem*	...	...	...
63 (27)	IRON or STEEL, the original material (but not including machinery) of any ship or other vessel intended for inland or harbour navigation which has been assembled abroad, taken to pieces and shipped for reassembly in India—					
	(i) of British manufacture.	Revenue.	1½ times the excise duty leviable for the time being on steel ingots produced in British India; or 10 per cent. *ad valorem*, whichever is higher.	...	...	...
	(ii) not of British manufacture.	Revenue.	1½ times the excise duty leviable for the time being on steel ingots produced in British India *plus* Rs. 27-8-0 per ton; or 20 per cent. *ad valorem*, whichever is higher.	...	...	...
	Provided that articles dutiable under this item shall not be deemed to be dutiable under any other item.					
63 (28)	All sorts of IRON and STEEL and manufactures thereof not otherwise specified.	Revenue.	25 per cent. *ad valorem*.	...	...	...
63 (29)	ENAMELLED IRONWARE, the following, namely :—					
	(a) Signboards	Revenue.	25 per cent. *ad valorem* or four and a half annas per square foot, whichever is higher.	...	...	...

Item No	Name of article.	Nature of duty.	Standard rate of duty.	Preferential rate of duty if the article is the produce or manufacture of		Duration of protective rates of duty.
				The United Kingdom.	A British Colony.	
63 (29) *(contd.)*	(*b*) Domestic hollowware, the following, namely, basins, bowls, dishes, plates and thalas, including rice-cups, rice-bowls and rice-plates—					
	(i) having no diameter exceeding 19 centimetres.	Revenue.	25 per cent. *ad valorem* or per dozen four annas *plus* one anna for every two centimetres or part thereof by which any diameter exceeds 11 centimetres, whichever is higher.	...	...	...
	(ii) having any diameter exceeding 19 centimetres.	Revenue.	25 per cent *ad-valorem* or per dozen eight annas *plus* two annas for every two centimetres or part thereof by which any diameter exceeds 19 centimetres, whichever is higher.	...	...	...
63 (30)	RODS or BARS of ALLOY, TOOL or SPECIAL STEEL of the following categories, but excluding precision ground and polished bars, bright drawn bars, blue reeled bars and silver steel finished bars :—					
	(1) High speed steel containing more than 13 per cent. tungsten,					
	(2) Stainless and heat resisting steel containing more than 11 per-cent chromium,					
	(3) Other alloy steels not included in category (1) or (2) containing any of the following :—					
	(i) 0·40 per cent. or more of chromium or nickel ;					
	(ii) 0 10 per cent. or more of molybdenum, tungsten or vanadium ; or					
	(iii) 10·00 per cent. or more of manganese.					
	(*a*) of British manufacture.	Protective.	30% *ad valorem*.	...	...	March 31st, 1949.
	(*b*) not of British manufacture.	Protective.	42% *ad valorem*.	...	...	March 31st, 1949.

Item No.	Name of article.	Nature of duty.	Standard rate of duty.	Preferential rate of duty if the article is the produce or manufacture of		Duration of protective rates of duty
				The United Kingdom.	A British Colony.	
63 (31)	HIGH SILICON ELECTRICAL STEEL SHEETS—					
	(*a*) of British manufacture.	Protective.	1⅓ times the excise duty leviable for the time being on steel ingots produced in British India, *plus* Rs. 11 per ton, or 10 per cent. *ad valorem*, whichever is higher, *plus* one-fifth of such higher amount.	...	...	March 31st, 1948.
	(*b*) not of British manufacture.	Protective.	1⅓ times the excise duty leviable for the time being on steel ingots produced in British India, *plus* Rs. 32 per ton, *plus* one-fifth of the total of such amounts.	...	...	March 31st, 1948.
63 (32)	HIGH CARBON or SPRING STEEL WIRE—					
	(*a*) of British manufacture.	Protective.	1⅓ times the excise duty leviable for the time being on steel ingots produced in British India, *plus* Rs. 25 per ton, *plus* one-fifth of the total of such amounts.	...	...	March 31st, 1948.
	(*b*) not of British manufacture.	Protective.	1⅓ times the excise duty leviable for the time being on steel ingots produced in British India, *plus* Rs. 60 per ton, *plus* one-fifth of the total of such amounts.	...	...	March 31st, 1948.
63 (33)	IRON or STEEL WOOD-SCREWS.	Protective.	30 per cent. *ad valorem*.	...	...	March 31st, 1950.
64	COPPER, WROUGHT, and manufactures of copper, all sorts not otherwise specified.	Preferential revenue.	30 per cent. *ad valorem*.	20 per cent. *ad valorem*.	...	...
64 (1)	COPPER, SCRAP.	Revenue.	25 per cent. *ad valorem*.	...	...	...

Item No.	Name of article.	Nature of duty.	Standard rate of duty.	Preferential rate of duty if the article is the produce or manufacture of		Duration of protective rates of duty.
				The United Kingdom.	A British Colony.	
65	GERMAN SILVER including nickel silver.	Revenue.	25 per cent. *ad valorem.*	...	...	...
66	ALUMINIUM — circles, sheets and other manufactures not otherwise specified.	Revenue.	25 per cent. *ad valorem.*	...	...	...
66 (1)	UNWROUGHT INGOTS, blocks and bars of ALUMINIUM.	Revenue.	25 per cent. *ad valorem.*	...	...	...
67	LEAD, WROUGHT — the following articles, namely, pipes and tubes and sheets other than sheets for tea chests.	Revenue.	25 per cent. *ad valorem.*	...	...	...
67 (1)	LEAD SHEETS for tea chests.	Revenue.	25 per cent. *ad valorem.*	...	...	...
68	ZINC or SPELTER, wrought or manufactured, not otherwise specified.	Revenue.	25 per cent. *ad valorem.*	...	...	...
68 (1)	ZINC, UNWROUGHT, including cakes, ingots, tiles (other than boiler tiles), hard or soft slabs and plates, dust, dross and ashes; and broken zinc.	...	Free . . .	...	...	...
69	TIN, BLOCK . .	Revenue .	Rs. 312-8 per ton	...	...	...
70	BRASS, BRONZE and similar alloys, wrought, and manufactures thereof not otherwise specified.	Revenue .	25 per cent. *ad valorem.*	...	...	...
70 (1)	All sorts of metals other than iron and steel, and manufactures thereof, not otherwise specified.	Revenue .	25 per cent. *ad valorem.*	...	...	.
70 (2)	CRUDE ANTIMONY.	Protective .	20 per cent. *ad valorem.*	...	...	March 31st, 1949.
70 (3)	ANTIMONY, other than crude antimony.	Protective .	30 per cent. *ad valorem.*	...	...	March 31st, 1949.
71	HARDWARE, IRONMONGERY and TOOLS, all sorts not otherwise specified, including incandescent mantles but excluding machine tools and agricultural implements.	Revenue .	25 per cent. *ad valorem.*	...	...	...
71 (1)	The following HARDWARE, IRONMONGERY and TOOLS, namely, agricultural implements not otherwise specified, buckets of tinned or galvanized iron, and pruning-knives.	Revenue .	25 per cent. *ad valorem*	...	...	...
71 (2)	CUTLERY, all sorts not otherwise specified.	Revenue .	25 per cent. *ad valorem.*	...	...	...
71 (3)	METAL FURNITURE and CABINETWARE.	Revenue .	25 per cent. *ad valorem.*	...	...	...
71 (4)	PRINTING TYPE . .	Revenue .	One anna and three pies per lb.	...	...	...

Item No.	Name of article.	Nature of duty.	Standard rate of duty	Preferential rate of duty if the article is the produce or manufacture of		Duration of protective rates of duty.
				The United Kingdom.	A British Colony.	
71 (5)	The following PRINTING MATERIALS, namely, leads, brass rules, wooden and metal quoins, shooting sticks and galleys and metal furniture.	Revenue .	2 1/2 per cent. *ad valorem*.	...	...	...
71 (6)	RACKS for the withering of tea leaf.	Revenue .	2 1/2 per cent. *ad valorem*.	...	...	...
71 (7)	HURRICANE LANTERNS.	Protective .	30 per cent. *ad valorem*.	..	...	March 31st 1949.
71 (8)	GRINDING WHEELS and SEGMENTS.	Protective .	50 per cent *ad valorem*.	...	...	December 31st, 1950.

SECTION XVI.

MACHINERY AND APPARATUS; ELECTRICAL MATERIAL.

72	MACHINERY, namely, such of the following articles as are not otherwise specified :— *(a)* prime-movers, boilers, locomotive engines and tenders for the same, portable engines (including power-driven road rollers, fire engines and tractors), and other machines in which the prime-mover is not separable from the operative parts ; *(b)* machines and sets of machines to be worked by electric, steam, water, fire or other power, not being manual or animal labour, or which before being brought into use require to be fixed with reference to other moving parts ; *(c)* apparatus and appliances, not to be operated by manual or animal labour, which are designed for use in an industrial system as parts indispensable for its operation and have been given for that purpose some special shape or quality which would not be essential for their use for any other purpose ; *(d)* controlgear, self-acting or otherwise, and transmission-gear designed for use with any machinery above specified, including belting of all materials (other than cotton, hair and canvas ply) and driving chains, but excluding driving ropes not made of cotton ;	Revenue .	10 per cent. *ad valorem*.	...	...	...

Item No.	Name of article.	Nature of duty.	Standard rate of duty.	Preferential rate of duty if the article is the produce or manufacture of		Duration of protective rates of duty.
				The United Kingdom.	A British Colony.	
72 *(contd.)*	*(e)* bare hard-drawn electrolytic copper wires and cables and other electrical wires and cables, insulated or not, and poles, troughs, conduits and insulators designed as parts of a transmission system, and the fittings thereof. NOTE.—The term 'industrial system' used in sub-item *(c)* means an installation designed to be employed directly in the performance of any process or series of processes necessary for the manufacture, production or extraction of any commodity.					
72 (1)	The following TEXTILE MACHINERY and APPARATUS by whatever power operated, namely, healds ; heald cords and heald knitting needles ; reeds and shuttles ; warp and weft preparation machinery and looms ; bobbins and pirns , dobbies; Jacquard machines; Jacquard harness linen cords ; Jacquard cards ; punching plates for Jacquard cards; warping mills, multiple box sleys ; solid border sleys; tape sleys ; swivel sleys ; tape looms; wool carding machines ; wool spinning machines; hosiery machinery ; coir mat shearing machines ; coir fibre willowing machines; heald knitting machines; dobby cards ; lattices and lags for dobbies; wooden winders; silk looms; silk throwing and reeling machines ; cotton yarn reeling machines; sizing machines ; doubling machines ; silk twisting machines; cone winding machines ; piano card cutting machines ; harness building frames; card lacing frames; drawing and denting hooks; sewing thread balls making machines ; cumbli finishing machinery ;	Revenue .	10 per cent. *ad valorem*.	...	...	...

Item No.	Name of article.	Nature of duty.	Standard rate of duty.	Preferential rate of duty if the article is the produce or manufacture of		Duration of protective rates of duty.
				The United Kingdom	A British Colony.	
72 (1) —*contd.*	hank boilers; cotton carding and spinning machines; mail eyes, lingoes, comber boards and comber board frames; takeup motions, temples and pickers; picking bands; picking sticks; printing machines, roller cloth; clearer cloth; sizing flannel; and roller skins.					
72 (2)	PRINTING AND LITHOGRAPHIC MATERIAL, namely, presses, lithographic plates, composing sticks, chases, imposing tables, lithographic stones, stereo-blocks, wood blocks, half-tone blocks, electro-type blocks, process blocks and highly polished copper or zinc sheets specially prepared for making process blocks, roller moulds, roller frames and stocks, roller composition, lithographic nap rollers, standing screw and hot presses, perforating machines, gold blocking presses, gally presses, proof presses, arming presses, copper plate printing presses, rolling presses, ruling machines, ruling pen-making machines, lead-cutters, rule cutters, slug cutters, type casting machines, type setting and casting machines, paper in rolls with side perforations to be used after further perforation for type-casting, rule bending machines, rule mitreing machines, bronzing machines, stereotyping apparatus, paper folding machines, paging machines but excluding ink and paper.	Revenue .	10 per cent. *ad valorem*.	...	...	...
72 (3)	COMPONENT PARTS OF MACHINERY (excluding GRINDING WHEELS AND SEGMENTS) as defined in items Nos. 72, 72 (1) and 72 (2), namely, such parts only as are essential for the working of the machine or appa-	Revenue .	10 per cent. *ad valorem*.	...	...	...

Item No.	Name of article.	Nature of duty.	Standard rate of duty.	Preferential rate of duty if the article is the produce or manufacture of		Duration of protective rates of duty.
				The United Kingdom.	A British Colony.	
72 (3) —*contd.*	ratus and have been given for that purpose some special shape or quality which would not be essential for their use for any other purpose : Provided that articles which do not satisfy this condition shall also be deemed to be component parts of the machine to which they belong if they are essential to its operation and are imported with it in such quantities as may appear to the Collector of Customs to be reasonable.					
72 (4)	PASSENGER LIFTS and component parts and accessories thereof.	Revenue .	25 per cent. *ad valorem.*	—	...	...
72 (5)	DOMESTIC REFRIGERATORS.	Preferential revenue.	30 per cent. *ad valorem.*	20 per cent. *ad valorem.*	...	...
72 (6)	MACHINERY and component parts thereof, meaning machines or parts of machines to be worked by manual or animal labour, not otherwise specified, and any machines (except such as are designed to be used exclusively in industrial processes) which require for their operation less than one quarter of one brake horse-power.	Revenue .	25 per cent. *ad valorem.*			
72 (7)	WATER-LIFTS, SUGAR-MILLS, sugar centrifuges, sugar pugmills, oil-presses, and parts thereof, when constructed so that they can be worked by manual or animal power and pans for boiling sugar cane juice.	...	Free . . .	...	...	...
72 (8)	The following AGRICULTURAL IMPLEMENTS, namely, winnowers, threshers, mowing and reaping machines, binding machines, elevators, seed and corn crushers, chaff-cutters, root-cutters, ensilage-cutters,	...	Free . . .	...	...	...

Item No.	Name of article.	Nature of duty.	Standard rate of duty.	Preferential rate of duty if the article is the produce or manufacture of		Duration of protective rates of duty.
				The United Kingdom.	A British Colony.	
72 (8)—*contd.*	horse and bullock gear, ploughs, cultivators, scarifiers, harrows, clod-crushers seed-drills, hay tedders, hay presses, potato diggers, latex spouts, spraying machines, powder-blowers, white-ant exterminating machines, beet pullers, broadcast seeders, corn-pickers, corn shellers, cultipackers, drag scrapers, stalk cutters, huskers and shredders, potato planters, lime sowers, manure spreaders, listers, soil graders, and rakes; also agricultural tractors, also component parts of these implements, machines or tractors, provided that they can be readily fitted into their proper places in the implements, machines or tractors for which they are imported, and that they cannot ordinarily be used for purposes unconnected with agriculture.					
72 (9)	The following DAIRY AND POULTRY FARMING APPLIANCES, namely, cream separators, milking machines, milk-sterilizing or pasteurizing plant, milk aerating and cooling apparatus, churns, butter dryers, butter workers, milk-bottle fillers and cappers, apparatus specially designed for testing milk and other dairy produce, and incubators; also component parts of these appliances, provided that they can be readily fitted into their proper places in the appliances for which they are imported, and that they cannot ordinarily be used for other than dairy and poultry farming purposes.	...	Free . . .	...	...	...
72 (10)	KNITTING MACHINES (and parts thereof) to be worked by manual labour or which require for	Preferential revenue.	30 per cent. *ad valorem.*	20 per cent. *ad valorem*	...	...

Item No.	Name of article	Nature of duty.	Standard rate of duty.	Preferential rate of duty if the article is the produce or manufacture of		Duration of protective rates of duty.
				The United Kingdom.	A British Colony.	
72 (10)—*contd.*	their operation less than one quarter of one brake-horse-power.					
72 (11)	SEWING MACHINES (and parts thereof) to be worked by manual labour or which require for their operation less than one quarter of one brake-horse-power—					
	(a) of British manufacture,	Protective.	24 per cent. *ad valorem.*	...	...	March 31st, 1949.
	(b) not of British manufacture.	Protective.	36 per cent. *ad valorem.*	...	...	March 31st, 1949.
73	ELECTRICAL INSTRUMENTS, apparatus and appliances, not otherwise specified, excluding telegraphic and telephonic.	Preferential revenue.	30 per cent. *ad valorem.*	20 per cent. *ad valorem.*	...	...
73 (1)	The following ELECTRICAL INSTRUMENTS, APPARATUS AND APPLIANCES, namely :— Electrical Control Gear and Transmission Gear, namely, switches (excluding switch-boards) fuses and current-breaking devices of all sorts and descriptions, designed for use in circuits of less than ten amperes and at pressure not exceeding 250 volts ; and regulators for use with motors designed to consume less than 187 watts ; bare or insulated copper wires and cables, any one core of which, not being one specially designed as a pilot core, has a sectional area of less than one-eightieth part of a square inch, and wires and cables of other metals of not more than equivalent conductivity ; and line insulators, including also cleats, connectors, leading-in tubes and the like of types and sizes such as are ordinarily used in connection with the transmission of power for other than industrial purposes, and the fittings thereof but excluding electrical earthenware and porcelain otherwise specified.	Preferential revenue.	30 per cent. *ad valorem.*	20 per cent. *ad valorem.*	...	...

Item No.	Name of article	Nature of duty.	Standard rate of duty.	Preferential rate of duty if the article is the produce or manufacture of		Duration of protective rates of duty.
				The United Kingdom.	A British Colony.	
73 (2)	The following ELECTRICAL INSTRUMENTS, APPARATUS AND APPLIANCES, namely, telegraphic and telephonic instruments, apparatus and appliances not otherwise specified, flash lights, carbons, condensors, and bell apparatus, and switch-boards designed for use in circuits of less than ten amperes and at a pressure not exceeding 250 volts, also accumulators, batteries and electro-medical apparatus.	Revenue .	25 per cent. *ad valorem*.	...	...	...
73 (3)	TELEGRAPHIC INSTRUMENTS AND APPARATUS and parts thereof imported by, or under the orders of, a Railway Administration.	Revenue .	15$\frac{5}{8}$ per cent. *ad valorem*.	...	...	...
73 (4)	WIRELESS RECEPTION INSTRUMENTS AND APPARATUS and component parts thereof, including all electric valves, amplifiers and loud speakers which are not specially designed for purposes other than wireless reception or are not original parts of and imported along with instruments or apparatus so designed.	Preferential revenue.	50 per cent. *ad valorem*.	40 per cent. *ad valorem*.	...	...
73 (5)	ELECTRICAL EARTHENWARE AND PORCELAIN, the following, namely :—					
	(a) Insulators, Shackle, Sinclair, Cordeaux or Pintype, not otherwise specified —					
	(i) fitted . .	Revenue .	25 per cent. *ad valorem* or Re. 1-2 per dozen, whichever is higher.	...	...	...
	(ii) not fitted .	Revenue .	25 per cent. *ad valorem* or fourteen annas per dozen, whichever is higher.	...	...	...
	(b) Two-way cleats .	Revenue .	25 per cent. *ad valorem* or four annas per gross of pairs, whichever is higher.	...	...	...

Item No.	Name of article.	Nature of duty	Standard rate of duty.	Preferential rate of duty if the article is the produce or manufacture of		Duration of protective rates of duty
				The United Kingdom.	A British Colony.	
73 (5) —*contd.*	*(c)* Spacing insulators	Revenue .	25 per cent. *ad valorem* or two annas per gross, whichever is higher.	...	...	...
	(d) Ceiling roses — (i) fitted . .	Revenue .	25 per cent. *ad valorem* or ten annas per dozen, whichever is higher.	...	...	...
	(ii) not fitted .	Revenue .	25 per cent. *ad valorem* or eight annas per dozen, whichever is higher.	...	...	...
	(e) Joint-box cutouts — (i) fitted . .	Revenue .	25 per cent. *ad valorem* or eight annas per dozen, whichever is higher.	...	...	...
	(ii) not fitted .	Revenue .	25 per cent. *ad valorem* or six annas per dozen, whichever is higher.	...	...	...
73 (6)	RUBBER-INSULATED COPPER WIRES AND CABLES, no core of which, other than one specially designed as a pilot core, has a sectional area of less than one-eightieth part of a square inch, whether made with any additional insulating or covering material or not.	Revenue .	6¼ per cent *ad valorem*.	...	...	...
	SECTION XVII. TRANSPORT MATERIAL.					
74	COAL TUBS, tipping wagons and the like conveyances designed for use on light rail track, if adapted to be worked by manual or animal labour and if made mainly of iron or steel; and component parts thereof made of iron or steel — *(a)* of British manufacture.	Revenue .	1½ time the excise duty leviable for the time being on steel ingots produced in British India; or 10 per cent. *ad valorem*, whichever is higher.	...	...	...

Item No.	Name of article.	Nature of duty.	Standard rate of duty.	Preferential rate of duty if the article is the produce or manufacture of		Duration of protective rates of duty.
				The United Kingdom	A British Colony.	
74 —*contd.*	*(b)* not of British manufacture.	Revenue .	1½ times the excise duty leviable for the time being on steel ingots produced in British India *plus* Rs. 40 per ton ; or 20 per cent. *ad valorem*, whichever is higher.	...	...	...
74 (1)	TRAMCARS and component parts and accessories thereof.	Revenue	25 per cent *ad valorem*.	...	...	...
74 (2)	RAILWAY MATERIALS for permanent-way and rolling-stock, namely, sleepers, other than iron and steel, and fastenings therefor, bearing plates, chairs, interlocking apparatus, brake-gear, shunting skids, couplings and springs, signals, turntables, weigh bridges, carriages, wagons, traversers, rail removers, scooters, trollies, trucks; also cranes, water cranes and water-tanks when imported by or under the orders of a railway administration : Provided that for the purpose of this entry 'railway' means a line of railway subject to the provisions of the Indian Railways Act, 1890, and includes a railway constructed in a State in India and also such tramways as the Central Government may, by notification in the Official Gazette, specifically include therein : Provided also that articles of machinery as defined in Item No. 72 or No. 72 (3) shall not be deemed to be included hereunder.	Revenue .	15⅝ per cent *ad valorem*.	...	...	...
74 (3)	Component parts of Railway Materials, as defined in Item No. 74 (2), namely, such parts only as are essential for the working of railways and have been given for that purpose some special shape or quality which would not be essential for their use for any other purpose:					

Item No.	Name of article.	Nature of duty.	Standard rate of duty.	Preferential rate of duty if the article is the produce or manufacture of		Duration of protective rates of duty.
				The United Kingdom	A British Colony.	
74 (3) —*contd.*	Provided that articles which do not satisfy this condition shall also be deemed to be component parts of the railway material to which they belong, if they are essential to its operation and are imported with it in such quantities as may appear to the Collector of Customs to be reasonable.	Revenue .	15⅝ per cent. *ad valorem.*	...	...	...
75	CONVEYANCES not otherwise specified and component parts and accessories thereof ; also MOTOR VANS and MOTOR LORRIES imported complete.	Revenue.	25 per cent. *ad valorem.*	...	...	...
75 (1)	MOTOR CARS including taxicabs and articles (other than rubber tyres and tubes) adapted for use as parts and accessories thereof, provided that such articles as are ordinarily also used for other purposes than as parts and accessories of motor vehicles included in this Item or in Items Nos. 75 (2) and 75 (3) shall be dutiable at the rate of duty specified for such articles.	Preferential revenue.	50 per cent. *ad valorem.*	42½ per cent *ad valorem.*	...	...
75 (2)	MOTOR CYCLES and MOTOR SCOOTERS and articles (other than rubber tyres and tubes) adapted for use as parts and accessories thereof except such articles as are also adapted for use as parts and accessories of motor cars.	Preferential revenue.	37½ per cent. *ad valorem.*	30 per cent. *ad valorem.*	...	...
75 (3)	MOTOR OMNIBUSES ; chassis of motor omnibuses, motor vans and motor lorries ; and parts of mechanically propelled vehicles and accessories not otherwise specified, excluding rubber tyres and tubes and such parts and accessories of motor vehicles included in this item as are also adapted for use as parts and accessories of motor cars.	Preferential revenue.	25 per cent. *ad valorem.*	17½ per cent. *ad valorem.*	...	...
75 (4)	CARRIAGES and CARTS which are not mechanically propelled, not other-	Revenue.	25 per cent. *ad valorem.*	...	...	...

Item No.	Name of article.	Nature of duty.	Standard rate of duty.	Preferential rate of duty if the article is the produce or manufacture of		Duration of protective rates of duty.
				The United Kingdom	A British Colony.	
75 (4) —*contd.*	wise specified, and parts and accessories thereof; excluding rubber tyres and tubes.					
75 (5)	CYCLES (other than motor cycles) imported entire or in sections—					
	(a) of British manufacture,	Protective	24 per cent. *ad valorem.*	...	...	March 31st, 1949.
	(b) not of British manufacture.	Protective	36 per cent. *ad valorem.*	...	...	March 31st, 1949.
75 (6)	FRAMES for cycles (other than motor cycles)—					
	(a) of British manufacture,	Protective	24 per cent. *ad valorem.*	...	...	March 31st, 1949.
	(b) not of British manufacture.	Protective	36 per cent. *ad valorem.*	...	...	March 31st, 1949.
75 (7)	HANDLEBARS for cycles (other than motor cycles)—					
	(a) of British manufacture,	Protective	24 per cent *ad valorem.*	...	...	March 31st, 1949.
	(b) not of British manufacture.	Protective	36 per cent. *ad valorem.*	...	...	March 31st, 1949.
75 (8)	All other parts and accessories of CYCLES (other than motor cycles) not otherwie specified (excluding rubber tyres and tubes)—					
	(a) of British manufacture,	Protective	24 per cent. *ad valorem.*	...	...	March 31st, 1949.
	(b) not of British manufacture.	Protective	36 per cent. *ad valorem.*	...	...	March 31st, 1949.
76	AEROPLANES, aeroplane parts, aeroplane engines, aeroplane engine parts and rubber tyres and tubes used exclusively for aeroplanes.	Revenue.	2½ per cent. *ad valorem.*	...	...	...
76 (1)	SHIPS and other vessels for inland and harbour navigation, including steamers, launches, boats and barges imported entire or in sections: Provided that articles of machinery as defined in Item No. 72 or No. 72 (3) shall, when separately imported, not be deemed to be included hereunder.	Revenue.	15% per cent. *ad valorem.*	...	...	...
76 (2)	LIGHT SHIPS ...	...	Free ...	...	...	...
76 (3)	FURNITURE TACKLE and APPAREL, not otherwise described, for steam-sailing, rowing and other vessels.	Revenue.	25 per cent. *ad valorem.*	...	...	...

Item No.	Name of article.	Nature of duty.	Standard rate of duty.	Preferential rate of duty if the article is the produce or manufacture of		Duration of protective rates of duty.
				The United Kingdom.	A British Colony	
			SECTION XVIII.			
			SCIENTIFIC AND PRECISION INSTRUMENTS AND APPARATUS : WATCHMAKERS' AND CLOCKMAKERS' WARES ; MUSICAL INSTRUMENTS.			
77	INSTRUMENTS APPARATUS and APPLIANCES other than electrical, all sorts not otherwise specified, including photographic.	Preferential revenue.	30 per cent. *ad valorem*.	20 per cent. *ad valorem*.	...	...
77 (1)	INSTRUMENTS, APPARATUS and APPLIANCES, imported by a passenger as part of his personal baggage and in actual use by him in the exercise of his profession or calling.	...	Free ...	...	...	...
77 (2)	OPTICAL, SCIENTIFIC, PHILOSOPHICAL and SURGICAL INSTRUMENTS, APPARATUS and APPLIANCES.	Revenue	25 per cent. *ad valorem*.	...	...	...
77 (3)	ARTIFICIAL TEETH	Preferential revenue.	25 per cent. *ad valorem*.	...	15 per cent. *ad valorem*.	...
78	CLOCKS and WATCHES and parts thereof.	Revenue	50 per cent. *ad valorem*.	...	...	...
79	MUSICAL INSTRUMENTS and parts thereof, all sorts and records for talking machines.	Revenue	50 per cent. *ad valorem*.	...	...	...
*	* * *	*	* *	*	*	*
			SECTION XIX.			
			ARMS AND AMMUNITION.			
80	Save where otherwise specified, all articles which are arms or parts of arms within the meaning of the Indian Arms Act, 1878 (excluding springs used for air guns), all tools used for cleaning or putting together the same, all machines for making, loading, closing or capping cartridges for arms other than rifled arms and all other sorts of ammunition and military stores, and any articles which the Central Government may, by notification in the official Gazette, declare to be ammunition or military stores for the purposes of this Act.	Revenue.	50 per cent. *ad valorem*.	...	...	...

Item No.	Name of article.	Nature of duty.	Standard rate of duty.	Preferential rate of duty if the article is the produce or manufacture of		Duration of protective rates of duty.
				The United Kingdom.	A British Colony.	
80 (1)	Subject to the exemptions specified in Item No. 80 (3)—Firearms, including gas and air guns, gas and air rifles and gas and air pistols, not otherwise specified, but excluding parts and accessories thereof.	Revenue.	Rs. 18-12 each or 37½ per cent. *ad valorem*, whichever is higher, plus 12½ per cent. *ad valorem*.	...	...	...
80 (2)	Subject to the exemptions specified in Item No. 80 (3)—					
	(a) Barrels, whether single or double for firearms, including gas and air guns, gas and air rifles, and gas and air pistols, not otherwise specified.	Revenue.	Rs. 18-12 each.	...	...	...
	(b) Main springs and magazine springs for firearms, including gas guns, gas rifles and gas pistols.	Revenue.	Rs. 6-4 each.	...	...	...
	(c) Gun stocks and breech blocks.	Revenue.	Rs. 3-12 each.	...	...	...
	(d) Revolver cylinders, for each cartridge they will carry.	Revenue.	Rs. 2-8 each.	...	...	...
	(e) Actions (including skeleton and waster), breech bolts and their heads, cocking pieces, and locks for muzzle loading arms.	Revenue.	Re. 1-4 each.	...	...	...
			or 37 1/2 per cent. *ad valorem*, whichever is higher, *plus* 12 1/2 per cent. *ad valorem*.			
	(f) Machines for making, loading or closing cartridges for rifled arms.	Revenue.	50 per cent. *ad valorem*.	...	...	...
	(g) Machines for capping cartridges for rifled arms.	Revenue.	50 per cent. *ad valorem*.	...	...	...
80 (3)	The following ARMS AMMUNITION and MILITARY STORES:— *(a)* Arms forming part of the regular equipment of a commissioned or gazetted officer in His Majesty's service entitled to wear diplomatic, military, naval, Royal Air Force or police uniform. *(b)* A revolver and an automatic pistol and ammunition for such revolver and pistol up to a maximum of 100 rounds per revolver or pistol, *(i)* when accom-	...	Free . . .	...	...	...

Item No.	Name of article.	Nature of duty.	Standard rate of duty.	Preferential rate of duty if the article is the produce or manufacture of		Duration of protective rates of duty.
				The United Kingdom.	A British Colony.	
80 (3) —*contd.*	panying a commissioned officer of His Majesty's regular forces, or of the Indian Auxiliary Force or the Indian Territorial Force or a gazetted police officer, or *(ii)* certified by the commandant of the corps to which such officer belongs, or, in the case of an officer not attached to any corps, by the officer commanding the station or district in which such officer is serving or, in the case of a police officer, by an Inspector-General or Commissioner of police, to be imported by the officer for the purpose of his equipment. *(c)* Swords for presentation as army or volunteer prizes. *(d)* Arms, ammunition and military stores imported with the sanction of the [Central Government] for the use of any portion of the military forces of a State in India being a unit notified in pursuance of the First Schedule to the Indian Extradition Act, 1903. *(e)* Morris tubes and patent ammunition imported by officers commanding British and Indian regiments or volunteer corps for the instruction of their men.					
80 (4)	ORNAMENTAL ARMS of an obsolete pattern possessing only an antiquarian value; masonic and theatrical and fancy dress swords, provided they are virtually useless for offensive or defensive purposes; and *dahs* intended exclusively for domestic agricultural and Industrial purposes.	Revenue .	25 per cent. *ad valorem*.	...	...	...
81	CARTRIDGE CASES, filled and empty.	Revenue .	50 per cent. *ad valorem*.	...	...	...

Item No.	Name of article.	Nature of duty.	Standard rate of duty.	Preferential rate of duty if the article is the produce or manufacture of		Duration of protective rates of duty.
				The United Kingdom.	A British Colony.	
	SECTION XX.					
	MISCELLANEOUS GOODS AND PRODUCTS NOT ELSEWHERE INCLUDED.					
82	CORAL, prepared	Revenue .	25 per cent. *ad valorem.*	...	...	...
82 (1)	IVORY, manufactured, not otherwise specified.	Revenue .	50 per cent. *ad valorem.*	...	...	...
82 (2)	BANGLES and BEADS, not otherwise specified.	Revenue .	50 per cent, *ad valorem.*	...	...	...
83	BRUSHES, all sorts .	Revenue .	25 per cent. *ad valorem.*	...	...	...
84	TOYS, GAMES, PLAYING CARDS and requisites for games and sports, bird shot, toy cannons, air guns and air pistols for the time being excluded in any part of British India from the operation of all the prohibitions and directions contained in the Indian Arms Act, 1878, and bows and arrows.	Revenue .	50 per cent. *ad valorem.*	...	...	...
85	BUTTONS, METAL .	Revenue .	25 per cent. *ad valorem.*	...	...	...
85 (1)	SMOKERS' REQUISITES excluding tobacco and matches : Provided that mechanical lighters as defined in the Mechanical Lighters (Excise Duty) Act, 1934, shall be liable in addition to a duty equal to the amount of the excise duty imposed by that Act on mechanical lighters manufactured in Britith India.	Revenue .	50 per cent. *ad valorem.*	...	...	...
	SECTION XXI.					
	WORKS OF ART AND ARTICLES FOR COLLECTIONS.					
86	PRINTS, ENGRAVINGS and PICTURES (including photographs and picture post cards), not otherwis specified.	Revenue .	50 per cent. *ad valorem.*	...	...	...
86 (1)	ART, WORKS OF, not otherwise specified.	Revenue .	25 per cent. *ad valorem.*	...	...	...
86 (2)	ART, the following WORKS OF :—(1) statuary and pictures intended to be put up for the public benefit in a public place, and (2) memorials of a public character intended to be put up in a public place, including the materials used, or to be used in their construction, whether worked or not.	...	Free	...	...	...

Item No.	Name of article.	Nature of duty.	Standard rate of duty.	Preferential rate of duty if the article is the produce or manufacture of		Duration of protective rates of duty.
				The United Kingdom.	A British Colony.	
86 (3)	SPECIMENS, MODELS and WALL DIAGRAMS illustrative of natural science, and medals and antique coins.	...	Free	...	...	...
86 (4)	POSTAGE STAMPS, whether used or unused.	...	Free	...	...	...
	SECTION XXII. ARTICLES NOT OTHERWISE SPECIFIED.					
87	All other articles not otherwise specified, including articles imported by post.	Revenue .	25 per cent. *ad valorem*.	...	...	...

[a][THE] SECOND SCHEDULE.

EXPORT TARIFF.

Item No.	Name of article.	Rate of duty.
1	RAW JUTE (other than Bimlipatam jute) –	
	(1) Cuttings	Rs. 4-8 per bale of 400 lbs.
	(2) ALL other descriptions	Rs. 15 per bale of 400 lbs.
2	JUTE MANUFACTURES (other than of Bimlipatam jute), when not in actual use as coverings, receptacles or bindings for other goods—	
	(1) Sacking (cloth, bags, twist, yarn rope and twine)	Rs. 50 per ton.
	(2) Hessians and all other descriptions of jute manufactures not otherwise specified	Rs. 80 per ton.
3	RAW COTTON	At such rate not exceeding Rs. 75 per bale of 400 lbs. as the Central Government by notification in the Official Gazette may from time to time determine.
4	RICE, with or without husk, including rice-flower but excluding rice bran and rice dust, which are free.	Two annas and three pies per Standard maund.
5	TEA	Four annas per lb.]
b[6	Cloth of any description manufactured either wholly from cotton or partly from cotton and partly from any other substance and containing not less than ten per centum of cotton by weight, but excluding cloth of handloom manufacture	25 per cent. *ad valorem*.
7	Manganese ore	25 per cent. *ad valorem*.
8	Oil seeds	Rs. 80 per ton.
9	Vegetable oils	Rs. 160 per ton.]

[a] The Second Schedule (containing items 1 to 5) was *substituted* for the original Second Schedule, by the Indian Finance Act, 1947 (XX [20] of 1947), S. 5. [31-3-1947.] [b] Items 6 to 9 were *inserted* by the Indian Finance Act, 1948, S. 6. [31-3-1948.]

THE THIRD SCHEDULE. — [Acts repealed.] *Repealed by the Repealing and Amending Act, 1937 (XX [20] of 1937), S. 3, and Sch. II.*

[THE] TAXATION ON INCOME (INVESTIGATION COMMISSION) ACT, 1947

(ACT XXX OF 1947).

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10. Power to make rules.

STATEMENT OF OBJECTS AND REASONS

"It is notorious that recently businesses and properties have changed hands for very large sums of money. Government are anxious to know how in spite of very high rates of taxation –Income tax, super-tax and excess profits tax – the large fortunes which these transactions imply have been accumulated. The Bill therefore proposes to appoint and empower a Special Commission to investigate both the actual incidence of taxation with particular reference to individual cases and the extent to which the existing law is adequate to prevent evasion . . ."

— Gazette of India, 1947, Part V, page 215

ACT HOW AFFECTED BY SUBSEQUENT LEGISLATION.

— Amended by Acts 23 of 1948 and 49 of 1948.

[THE] TAXATION ON INCOME (INVESTIGATION COMMISSION) ACT, 1947.

(ACT XXX OF 1947)[a]

[18th April, 1947.]

An Act to provide for an investigation into matters relating to taxation on income.

WHEREAS it is expedient, for the purpose of ascertaining whether the actual incidence of taxation on income is and has been in recent years in accordance with the provisions of law, and the extent to which the existing law and procedure for the assessment and recovery of such taxation is adequate to prevent the evasion thereof, to make provision for an investigation to be made into such matters;

It is hereby enacted as follows :

[a] For Statement of Objects and Reasons, *see* Gazette of India, 1947, Part V, page 215; and for Report of the Select Committee, *see ibid*, page 373.

Short title, extent and commencement.

1. *(1)* This Act may be called the Taxation on Income (Investigation Commission) Act, 1947.

(2) It extends to the whole of British India.[a]

(3) It shall come into force on such date as the Central Government may, by notification in the official Gazette, appoint.[b]

[a] The expression "the whole of British India" in its application to the Dominion of India, means "all the Provinces of India"—*see* I. O, Art. 4 (2); and, in its application to the Dominion of Pakistan, means "all the Provinces of Pakistan" — *see* P. O, Art. 4 (2); [15-8-1947]. [b] The Act came into force on 1st May 1947—*see* Gazette of India, 1947, Part I, page 578.

Interpretation.

2. In this Act, "taxation on income" means any tax chargeable under the Indian Income-tax Act, 1922 or the Excess Profits Tax Act, 1940.

Constitution and functions of Commission.

3. The Central Government may constitute a Commission to be called the Income-tax Investigation Commission (hereinafter referred to as the Commission) whose duties it shall be—

(a) to investigate and report to the Central Government on all matters relating to taxation on income, with particular reference to the extent to which the existing law relating to, and procedure for, the assessment and collection of such taxation is adequate to prevent the evasion thereof;

(b) to investigate in accordance with the provisions of this Act any case referred to it under section 5 and report thereon to the Central Government.

Composition of Commission.

4. *(1)* The Commission shall consist of a Chairman (being a person who is or has been a Judge of a High Court) and two other Commissioners, appointed by the Central Government.

(2) On the occurrence from any cause of a vacancy among the Commissioners, the Central Government may, if it thinks fit, appoint a person to fill the vacancy.

[a][*(3)* The Commission shall be appointed to act, in the first instance, up to the 31st day of March, 1950, but the Central Government may extend its term of appointment for any period up to the 31st day of March, 1951.

(4) The Central Government may appoint a Secretary to the Commission and such other staff as may be necessary.]

[a] Sub-sections (3) and (4) were *added* by the Taxation on Income (Investigation Commission) (Amendment) Act, 1948 (XXIII [23] of 1948), S. 2 [12-4-1948].

Power of Central Government to refer cases for investigation.

[a][**5.** *(1)* The Central Government may, at any time before the [b][1st day of September, 1948] refer to the Commission for investigation and report any case or points in a case which the Central Government has *prima facie* reasons for believing that a person has to a substantial extent evaded payment of taxation on income, together with such material as may be available in support of such belief, and may at any time before the [b][1st day of September, 1948] apply to the Commission for the withdrawal of any case or points in a case thus referred, and if the Commission approves of the withdrawal, no further proceedings shall thereafter be taken by or before the Commission in respect of the case or points so withdrawn.

(2) The Commission may, after examining the material submitted by the Central Government with reference to any case or points in a case and making such investigation as it considers necessary, report to the Central Government that in its opinion further investigation is not likely to reveal any substantial evasion of taxation on income and on such report being made the investigation shall be deemed to be closed.

(3) No reference made by the Central Government under sub-section (1), at any time before the [b][1st day of September, 1948] shall be called in question, nor shall the sufficiency of the material on which such a reference has been made be investigated in any manner by any Court.

(4) If in the course of investigation into any case or points in a case referred to it under sub-section (1), the Commission has reason to believe—

(a) that some person other than the person whose case is being investigated has evaded payment of taxation on income, or

(b) that some points other than those referred to it by the Central Government in respect of any case also require investigation,

it may make a report to the Central Government stating its reasons for such belief and, on receipt of such report, the Central Government shall, notwithstanding anything contained in sub-section (1), forthwith refer to the Commission for investigation the case of such other person or such additional points as may be indicated in that report.]

[a] *Substituted* for the original section by the Taxation on Income (Investigation Commission) (Amendment) Act, 1948 (XXIII [23] of 1948), S. 3 [12-4-1948]. For Statement of Objects and Reasons of this amending Act, *see* Gazette of India, 1948, Part V, page 113. [b] *Substituted* by Act 49 [XLIX] of 1948.

Powers of Commission.

[a][**6.** *(1)* The Commission shall have power to require any person to prepare and furnish by a specified date written statements of accounts and affairs verified on oath and, if so required, also duly certified by a qualified auditor, giving information on such points and matters as may be specified; and any person so required shall notwithstanding anything in any law to the contrary be bound to comply with the requirements of the Commission.

(2) The Commission shall also have power to administer oaths, and shall have all the powers of a civil Court under the Code of Civil Procedure, 1908 (v of 1908), for the purposes of taking evidence on oath, enforcing the attendance of witnesses and of persons whose cases are being investigated, compelling the production of documents and issuing commissions for the examination of witnesses.

(3) If in the course of any investigation it appears to the commission to be necessary to examine any accounts or documents or to interrogate any person or obtain any statements from any person, the Commission may authorise any income-tax authority not below the rank of an Income-tax Officer (hereinafter referred to as the "authorised official") in that behalf, subject to such directions as may be issued by the Commission from time to time, and the authorised official shall examine the accounts or documents, interrogate the person or obtain the statements from the person :

Provided that the authorised official shall in the discharge of his duties be entitled to employ such ministerial and subordinate executive staff as he may consider necessary.

(4) The authorised official shall subject to the direction of the Commission have the same powers as the Commission under sub-sections (1) and (2), and any person having charge or custody of accounts or documents required to be examined shall notwithstanding anything in any law to the contrary be bound to produce them to the authorised official and to give to such official any information in respect thereof which he may require ; and any person interrogated by the authorised official or called upon by him to make or prepare a statement or furnish information shall notwithstanding anything in any law to the contrary be bound to comply with his directions and answer all questions relating to the case put to him by such official.

(5) If any person whose case or the points in whose case is or are being investigated by the Commission refuses or fails to attend in person in compliance with a notice in that behalf duly served upon him or to give any evidence or to answer questions or to produce documents or to prepare and furnish statements when called upon to do so, the Commission may, if satisfied that the refusal or failure was wilful, close the investigation of the case and proceed to draw up its report on the case or on the points to the best of its judgment and may in its discretion also direct that such sum as it may specify in the direction shall be recovered from the person by way of penalty for the refusal or failure, without prejudice to any penalty under the Indian Income-tax Act, 1922, and thereupon the sum so specified shall be recoverable as if the direction were given under sub-section (1) of section 46 of the Indian Income-tax Act, 1922, by the Income-tax Officer having jurisdiction to assess the person.

(6) If in any proceedings before an authorised official any person whose case or the points in whose case is or are being investigated refuses or fails to attend in person or to produce or cause to be produced accounts or documents or to answer questions or to prepare statements or to furnish information when called upon to do so, the authorised official shall report such refusal or failure to the Commission, and thereupon the provisions of sub-section (5) shall apply as if the refusal or failure took place in the course of the investigation by the Commission itself.

(7) The Commission and, subject to the direction of the Commission, any authorised official may make such enquiries in such manner as it or he may deem fit and obtain statements on oath from any person who is considered likely to be in possession of any information or document relevant to the case or points in the case referred to the Commission or is in the opinion of the Commission likely to be reported by it to the Central Government for reference under the provisions of sub-section (4) of section 5; and for the purposes of these enquiries, the Commission and the authorised official shall have all the powers conferred on them by sub-sections (1), (2), (3) and (4).

(8) All materials gathered by the Commission or the authorised official and materials accompanying the reference under sub-section (1) of section 5 may be brought on record at such stage as the Commission may think fit.

(9) Subject to any rules made in this behalf under the Act any authorised official shall at all reasonable times have full and free access to all books, documents and other papers which in his opinion are relevant to the proceedings in any case or cases under this Act, and if specially authorised in this behalf by the Commission, to any buildings and places where he may have reason to believe that such books, documents or papers may be found; and he shall have power to place identification marks on such books, documents or papers and to make extracts or copies therefrom or, if he considers it necessary, to take possession of or seize such books, documents or papers.

(10) The Commissioners and all authorised officials shall be deemed to be public servants within the meaning of section 21 of the Indian Penal Code, and the Commission shall be deemed to be a civil Court for the purposes of section 195 and Chapter XXXV of the Code of Criminal Procedure, 1898, references in the said Chapter to the presiding officer of a Court being deemed to include the Chairman of the Commission.]

[a] *Substituted* for the original section by the Taxation on Income (Investigation Commission) (Amendment) Act, 1948 (XXIII [23] of 1948), S. 4. 12-4-1948.

Objects and Reasons.

". . . . The Commission's nominee has to be an official of the Income-tax Department with a view to secure the necessary measure of disciplinary control and to ensure that there may be no complaint from the assessees that there accounts are being divulged to outsiders.

The power to make *ex parte* enquiries and collect evidence is subject to the condition (*vide* section 7 (2)) that before the result of the enquiries is acted upon, the person concerned is given an adequate opportunity to rebut the evidence gathered from these enquiries."—S. O. R. of Act XXIII of 1948, Gazette of India, 1948, Part V, page 114.

Procedure of Commission.

[a][7. *(1)* The Commission shall, subject to the provisions of this Act, have power to regulate its own procedure (including the fixing of places and times of its sittings and deciding whether to sit in public or in private) and may act notwithstanding a vacancy in the number of the Commissioners; and the powers of the Commission under sub-sections *(1)*, *(2)*, *(3)*, *(7)* and *(8)* of section 6 and sub-sections *(2)*, *(4)* and *(6)* of this section may be exercised by any member thereof authorised by the Commission in this behalf.

(2) In making an investigation under clause (b) of section 3, the Commission shall act in accordance with the principles of natural justice, shall follow as far as practicable the principles of the Indian Evidence Act, 1872, and shall give the person whose case is being investigated a reasonable opportunity of rebutting any evidence adduced against him; and the power of the Commission to compel production of documents shall not be subject to the limitation imposed by section 130 of the Indian Evidence Act, 1872, and the Commission shall be deemed to be a Court and its proceedings legal proceedings for the purpose of sections 5 and 6 of the Bankers' Books Evidence Act, 1891.

(3) Any person whose case is being investigated by the Commission may be represented by a pleader, a registered accountant or an employee duly authorised to act on his behalf, provided that no person shall be entitled to be present or to be represented in the course of an enquiry under sub-sections *(3)* and *(7)* of section 6.

(4) No person shall be entitled to inspect, call for, or obtain copies of, any documents, statement or papers or materials furnished to, obtained by or produced before the Commission or any authorised official in any proceedings under this Act; but the Commission, and after the Commission has ceased to exist such authority as the Central Government may in this behalf appoint, may, in its discretion, allow such inspection and furnish such copies to any person:

Provided that, for the purpose of enabling the person whose case or points in whose case is or are being investigated to rebut any evidence brought on the record against him, he shall, on application made in this behalf and on payment of such fees as may be prescribed by Rules made under this Act, be furnished with certified copies of documents, statements, papers and materials brought on the record by the Commission.

(5) Save in cases in which the Commission may exercise its powers under section 195 and Chapter XXXV of the Code of Criminal Procedure, 1898,—

(a) no suit, prosecution or other legal proceeding shall be instituted against any person in any civil or criminal Court for any evidence given or produced by him in any proceedings before the Commission, and

(b) no evidence so given or produced shall be admissible in evidence against such person in any suit, prosecution or other proceeding before such Court,

except with the previous sanction of the Central Government.

(6) In any proceedings under this Act, the Commission may, in its discretion, admit in evidence and act upon any document notwithstanding that it is not duly stamped or registered.

(7) Nothing in sub-section *(1)* of section 54 of the Indian Income-tax Act, 1922, or of that section as applied to excess profits tax by section 21 of the Excess Profits Tax Act, 1940, shall apply to the disclosure of any of the particulars referred to therein in any proceeding before the Commission or in any report made by the Commission to the Central Government or in any report made to the Commission by an authorised official.]

[a] *Substituted* for the original section by the Taxation on Income (Investigation Commission) (Amendment) Act, 1948 (XXIII [23] of 1948), S. 5. [12-4-1948.]

Power to direct re-opening of assessment proceedings.

[a][8. *(1)* Save as otherwise provided in this Act, the material brought on record shall be considered by all the three members of the Commission sitting together and the report of the Commission shall be in accordance with the opinion of the majority.

(2) After considering the report, the Central Government shall by order in writing direct that such proceedings as it thinks fit under the Indian Income-tax Act, 1922, the Excess Profits Tax Act, 1940, or any other law, shall be taken against the person to whose case the report relates in respect of the income of any period commencing after the 31st day of December, 1938; and, upon such a direction being given, such proceedings may be taken and completed under the appropriate law notwithstanding the restrictions contained in section 34 of the Indian Income-tax Act, 1922, or section 15 of the Excess Profits Tax Act, 1940, or any other law and notwithstanding any lapse of time or any decision to a different effect given in the case by any Income-tax authority or Income-tax Appellate Tribunal.

(3) On a direction being given under sub-section *(2)*, and not otherwise, a copy of the report of the Commission, so far as it relates to the case of the person concerned, shall be furnished to him.

(4) In all assessment or re-assessment proceedings taken in pursuance of a direction under sub-section *(2)*, the findings recorded by the Commission on the case or on the points referred to it shall, subject to the provisions of sub-sections *(5)* and *(6)*, be final; but no proceedings taken in pursuance of such direction shall be a bar to the initiation of proceedings under section 34 of the Indian Income-tax Act, 1922.

(5) In respect of any order made in the course of proceedings taken in pursuance of a direction issued under sub-section *(2)*, the provisions of sections 30, 31, 33 and 33A of the Indian Income tax Act, 1922, and the corresponding provisions of the Excess Profits Tax Act, 1940, shall not apply so far as matters declared final by sub-section (4) are concerned; but the person concerned may, within 60 days of the date upon which he is served with a copy of such order, by application in the prescribed form accompanied by a fee of Rs. 100, require the appropriate Commissioner of Income-tax to refer to the High Court any question of law arising out of such order, and thereupon the provisions of sections 66 and 66A of the Indian Income-tax Act, 1922, shall, as far as may be, apply, with the modification that the reference shall be heard by a Bench of not less than three Judges of the High Court.

(6) Notwithstanding anything contained in this section, the Commission shall have power, either of its own motion or on the application of the person concerned or of the Central Government, to correct clerical or arithmetical mistakes in its report or errors therein arising from any accidental slip or omission; and after the Commission has ceased to exist, the Commissioner of Income-tax having jurisdiction over the case may exercise the powers conferred upon him by section 35 of the Indian Income-tax Act, 1922, as if the Commission's report was an order passed by him.

(7) Notwithstanding anything to the contrary contained in this Act or in any other law for the time being in force, any evidence in the case admitted before the commission or an authorised official shall be admissible in evidence in any proceedings directed to be taken under sub-section *(2)*.

(8) Save as otherwise provided in this Act, the provisions of section 54 of the Indian Income-tax Act, 1922, shall apply to all statements, returns, accounts, documents, evidence, affidavits, depositions or record made, given, produced or obtained in connection with or in the course of the proceedings of the Commission or of any authorised official]

[a] *Substituted* for the original section by the Taxation on Income (Investigation Commission) (Amendment) Act, 1948 (XXIII [23] of 1948), S. 6. [12-4-1948.]

Bar of jurisdiction.

9. No act or proceeding of the Commission or [a][any authorised official] shall be called in question in any manner by any Court, and no suit, prosecution or other legal proceeding shall lie against the Crown or any Commissioner or any other person for anything in good faith done or intended to be done under this Act.

[a] *Substituted* for "any person authorised by it under sub-section (2) of section 6" by the Taxation on Income (Investigation Commission) (Amendment) Act, 1948 (23 [XXIII] of 1948), S. 7. [12 4-1948].

Power to make Rules.

10. The Central Government may, by notification in the official Gazette, make rules[a] for carrying out the purposes of this Act.

[a] For the Taxation on Income (Investigation Commission) Rules, 1948, *see* Gazette of India, 1948, Extra., p. 651.

[THE INDIAN] TEA CESS ACT, 1903.

(ACT IX of 1903)

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8. *[Repealed.]*
9. Time during which sections 2 to 7 are to remain in force.
10. Disposal of surplus proceeds of tea cess.

Statement of Objects and Reasons.

"The object of this Bill is to provide for the levy of a small cess on Indian tea exported from British India, with the object of creating a fund for pushing the sale and increasing the consumption of such tea. It is proposed to entrust the administration of the fund to a special Committee, consisting of members representing the tea interest and recommended by local mercantile bodies. Those interested in the tea industry are practically unanimous in recommending that the proposed legislation should be undertaken.

2. The opportunity afforded by the present Bill has been taken to make an amendment in section 5 of the Indian Tariff Act, 1894 (8 [VIII] of 1894), which will have the effect of extending the proposed tea cess to exports to foreign territory by land."

—Gazette of India, 1903, Pt. V, p. 6.

Act how affected by subsequent legislation.

—Amended by Acts 1 of 1921; 3 of 1935; 13 of 1936; 13 of 1937, 23 of 1938; 27 of 1939.
—Adapted by A. O.
—Repealed in part by Act 32 of 1934.

[THE INDIAN] TEA CESS ACT, 1903.

(ACT IX OF 1903)[a].

[20th March, 1903.]

An Act to provide for the levy of customs-duty on Indian tea exported from British India [b][* * *].

WHEREAS it is expedient to provide for the creation of a fund to be expended for the promotion of the interest of the tea industry in India by a [c][Board] specially constituted in this behalf;

And whereas for this purpose it is expedient to levy customs-duty on tea produced in India and exported from British India [b][* * *];

It is hereby enacted as follows:—

[a] For Statement of Objects and Reasons, *see* Gazette of India, 1903, Pt. V, p. 6, for Report of the Select Committee, *see ibid.*, p. 123; for Proceedings in Council, *see ibid.*, Pt. VI, pp. 3, 15 and 56. [b] The words "and to amend section 5 of the Indian Tariff Act, 1894" were *repealed* by the Indian Tariff Act, 1934 (32 [XXXII] of 1934), S. 13 and Sch. III. [c] *Substituted* by the Indian Tea Cess (Amendment) Act, 1936 (13 [XIII] of 1936), S. 9, for "Committee".

Short title and extent.

1. *(1)* This Act may be called the Indian Tea Cess Act, 1903; and

(2) It extends to the whole of British India[a] [* * *][b].

[a] The expression "the whole of British India," in its application to the Dominion of India means 'all the Provinces of India' — *See* I. O., Art. 4 (2); and, in its application to the Dominion of Pakistan, means 'all the Provinces of Pakistan'—*See* P. O., Art. 4 (2); [15-8-1947]. [b] The words "except Aden and Burma" were *repealed* by A. O. The words "and Burma" had been *inserted* by the Indian Tea Cess (Amendment) Act, 1937 (13 [XIII] of 1937), S. 2.

Definitions.

2. In this Act,—

(a) "Collector" means, in reference to tea exported by sea, a Customs-collector as defined in clause *(c)* of section 3 of the Sea Customs Act, 1878, and, in reference to tea passing out of British India by land, [a][a Collector of Land Customs as defined in clause *(c)* of section 2 of the Land Customs Act, 1924];

(b) "tea cess" means the customs-duty imposed [b][by or under] section 3 of this Act [c][* * *]; and

[d][*(c)* "the Board" means the Indian Tea Market Expansion Board constituted under section 4.]

[a] *Substituted* by the Indian Tea Cess (Amendment) Act, 1936 (13 [XIII] of 1936), S. 2, for "the Collector of the district." [b] *Substituted, ibid.*, for "by." [c] The words "and by section 5 of the Indian Tariff Act, 1894, as amended by this Act" were *repealed* by the Indian Tariff Act, 1934 (32 [XXXII] of 1934), S. 13 and Sch. III. [d] *Substituted* by Act 13 [XIII] of 1936, S. 2, for clause *(c)*, defining "Tea Cess Committee."

Imposition of duty on exports of Indian tea.

[a][3. *(1)*] On and from the first day of April, 1903, a customs-duty shall be levied and collected on all tea produced in India and exported from any customs-port to any port beyond the limits of British India [b][* * *] at [c][such rate not exceeding one rupee and eight annas per hundred pounds as the [d][Central Government] may, on the recommendation of the Board], prescribe by notification in the [e][Official Gazette].

[f][*(2)* The [d][Central Government] may, by notification in the [e][Official Gazette], direct that a customs-duty at the like rate shall be levied and collected on all tea produced in India and taken by land from British India to any place beyond the limits of British India.]

[a] *Substituted* by the Indian Tea Cess (Amendment) Act, 1936 (13 [XIII] of 1936), S. 3, for "3." [b] The words "or to Aden", were *repealed* by A. O. [c] *Substituted, ibid.*, for "the rate of twelve annas per hundred pounds or at such lower rate as the Governor-General in Council may, on the recommendation of the Tea Cess Committee." [d] *Substituted* by A. O. for "Governor-General in Council." [e] *Substituted* by A. O. for "Gazette of India." [f] *Inserted* by Act 13 [XIII] of 1936, S. 3.

Constitution of the Indian Tea Market Expansion Board.

4. *(1)* The [a][Central Government] shall constitute [b][a body to be called the Indian Tea Market Expansion Board] to receive and expend the proceeds of the tea cess.

(2) The [c][Board] shall in the first instance consist of [d][twenty-eight] members, who shall be appointed by the [a][Central Government] on the recommendation of the following bodies and authorities, namely :—

[e][*(a)* two on the recommendation of the Bengal Chamber of Commerce, one on the recommendation of the Bengal National Chamber of Commerce, one on the recommendation of the Madras Chamber of Commerce and one on the recommendation of the Associated Chamber of Commerce and one on the recommendation of the Federation of Indian Chambers of Commerce and Industry and one on the recommendation of the South Indian Chamber of Commerce;

(b) five on the recommendation of the Indian Tea Association, Calcutta, two on the recommendation of the Assam Branch of the Indian Tea Association and two on the recommendation of the Surma Valley Branch of the Indian Tea Association;

(c) two on the recommendation of the United Planters' Association of Southern India, two on the recommendation of the Dooars Planters' Association, one on the joint recommendation of the Darjeeling Planters' Association and the Terai Planters' Association and one on the recommendation of the Indian Tea Planters' Association, Jalpaiguri ; [f][*]

(d) [g][one on the recommendation of the Terai Indian Planters' Association, one on the recommendation of the Government of Bengal] to represent the Tea Planters of Tripura and Chittagong who are Indians, one on the recommendation of the Assam Valley Indian Tea Planters' Associations, one on the recommendation of the Surma Valley Indian Planters' Associations and one on the recommendation of the Government of Madras to represent Tea Planters in Southern India who are Indians ;]

[h][*(e)* one on the recommendation of the Travancore Government to represent the tea planters of Travancore:]

Provided that if, within the period prescribed in this behalf by rules made under this Act, any of the said bodies or authorities fails to make any recommendation, or to make the full number of recommendations which it is entitled to make, the [a][Central Government] may appoint the required number of members of the [c][Board] of [i][its] own motion without such recommendation.

[j][*(2A)* The Executive Committee of the Board shall consist of nine members of whom not less than three shall be Indians.]

(3) Whenever any member appointed either on the recommendation of any body or authority referred to in sub-section *(2)*, or in default of such recommendation, dies, resigns, ceases to reside in British India or becomes incapable of acting as a member of the [c][Board], the [a][Central Government] may, in [i][its] discretion, on the recommendation of such body or authority, or in default of such recommendation, appoint another person to be a member in his stead.

(4) No act done by the [k][Board] shall be questioned on the ground merely of the existence of any vacancy in, or any defect in the constitution of the [c][Board]

[a] *Substituted* by A. O. for "Governor-General in Council." [b] *Substituted* by the Indian Tea Cess (Amendment) Act, 1936 (13 [XIII] of 1936), S. 4, for "a Committee." [c] *Substituted, ibid.*, S. 9, for "Committee." [d] *Substituted, ibid.*, 1938 (23 [XXIII] of 1938), S. 2, for "twenty-seven" which had been *substituted, ibid.*, 1936 (13 [XIII] of 1936), S. 4, for "twenty." [e] *Substituted* by Act 13 [XIII] of 1936, S. 4, for clauses *(a)*, *(b)* and *(c)*. [f] The word "and," was *omitted* by the Indian Tea Cess (Amendment) Act, 1938 (23 [XXIII] of 1938), S. 2. [g] *Substituted, ibid.*, 1939 (27 [XXVII] of 1939), S. 2. [h] *Inserted* by Act 23 [XXIII] of 1938, S. 2. [i] *Substituted* by A. O. for "his". [j] *Inserted* by Act 13 [XIII] of 1936, S. 5. [k] *Substituted, ibid.*, S. 9, for "Tea Cess Committee."

Application of proceeds of tea cess.

5. *(1)* At the close of each month, or as soon thereafter as may be convenient, the Collector shall pay the proceeds of the tea cess, after deducting the expenses of collection (if any), to the [a][Board.]

(2) The said proceeds and any other moneys received by the [b][Board] in this behalf shall be applied by the [b][Board] towards meeting the cost of such measures as the [b][Board] may consider it advisable to take for promoting the sale and increasing the consumption in India and elsewhere of [c][tea generally and especially Indian tea.]

[d][*(3)* The Board may, subject to the provisions of any rules made under section 7, borrow on the security of the tea cess for any purpose for which it is authorised under sub-section *(2)* to expend its funds:

Provided that the total amount borrowed shall not at any time exceed five lakhs of rupees and that no loan shall be taken which is repayable later than six months from the date of the loan]

[a] *Substituted* for 'Tea Cess Committee' by the Indian Tea Cess (Amendment) Act, 1936 (13 [XIII] of 1936), S. 9. [b] *Substituted* for 'Committee,' *ibid.* [c] *Substituted* for 'teas produced in India,' *ibid.* [d] *Inserted, ibid.*

Keeping and auditing of accounts.

6. *(1)* The [a][Board] shall keep accounts of all money received and expended under section 5.

(2) Such accounts shall be examined and audited annually by auditors appointed in this behalf by the [b][Central Government]; and such auditors may disallow any item which has, in their opinion, been expended out of any money so received otherwise than as directed by or under this Act.

(3) If any item is disallowed, an appeal shall lie to the [b][Central Government], whose decision shall be final.

[a] *Substituted* by the Indian Tea Cess (Amendment) Act, 1936 (13 [XIII] of 1936), S. 9 for "Tea Cess Committee". [b] *Substituted* by A. O. for "Governor-General in Council".

Power to make rules.

7. *(1)* The [a][Central Government], after consulting the [b][Board] and after previous publication, may make rules[c] to carry out the purposes of this Act.

(2) In particular and without prejudice to the generality of the foregoing power, such rules may provide for—

(a) the nomination, [d][election, recommendation,] [e][*] appointment [d][and retirement] of members of the [f][Board], and the procedure of the [f][Board];

(b) the levy and payment of the cess; [*][e]

(c) the form of accounts to be kept and the publication of an abstract of such accounts with the report of the auditors thereon;

[d][*(d)* the conditions subject to which the Board may incur expenditure outside India for the promotion of the interests of the Indian tea industry; and

(e) the conditions subject to which the Board may exercise its borrowing powers.]

(3) All such rules shall be published in the [g][Official Gazette].

[a] *Substituted* by A. O., for 'Governor General in Council". [b] *Substituted* by the Indian Tea Cess (Amendment) Act, 1936 (13 [XIII] of 1936), S 9 for "Tea Cess Committee". [c] For rules, *see* Gazette of India, 1937, Pt I, p. 1405. [d] *Inserted* by Act 13 [XIII] of 1936, S. 7. [e] The word "and" was *repealed, ibid.* [f] *Substituted, ibid.*, S. 9 for "Committee". [g] *Substituted* by A. O. for "Gazette of India".

8. [Amendment of Act VIII of 1894, section 5.] *Repealed by the Indian Tariff Act, 1934 [32 [XXXII] of 1934), S. 13 and Sch. III.*

Time during which sections 2 to 7 are to remain in force.

9. Sections 2 to 7 shall remain in force only until the thirty-first day of March [a][1938] :

Provided that the [b][Central Government] may, on the recommendation of the [c][Board], declare, by notification in the [d][Official Gazette], that the said sections shall continue in force for any further period specified in such notification [e]

[a] *Substituted* by the Indian Tea Cess (Amendment) Act, 1936 (13 [XIII] of 1936), S. 8, for "1908". [b] *Substituted* by A. O., for 'Governor-General in Council". [c] *Substituted* by Act 13 [XIII] of 1936, S. 9, for "Tea Cess Committee". [d] *Substituted* by A. O., for 'Gazette of India". [e] By virtue of the latest notification in this respect, Ss. 2 to 7 shall continue to be in force for a period of one year from the first day of April 1948 — *See* Notification No. 309 (2) —Tr. (I. E. R)/47 dated 20-3-1948, Gazette of India, 1948, Part I, page 357.

Disposal of surplus proceeds of tea cess.

10. If any proceeds of the tea cess or any moneys so received as aforesaid remain unexpended when sections 2 to 7 cease to be in force, they shall vest in His Majesty.

[THE INDIAN] TEA CONTROL ACT, 1938.

(Act VIII of 1938).

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THE SCHEDULE.

Statement of Objects and Reasons.

"The existing International scheme for regulation of the export of tea and for the control of extension of tea cultivation expires on 31st March 1938 The Indian Tea Control Act, 1933, which was passed to give effect to the scheme in British India, will also expire on the same date.

Representatives of the tea industry in India, Ceylon and the Netherlands Indies have executed an agreement providing for the renewal of the scheme for a further period of five years from 1st April 1938, After careful consultation with the various interests affected and the Provincial Governments as well as the Indian States concerned the Central Government have decided to give official recognition to the renewal of tea control scheme. The specific consent of the Provincial Governments has also been obtained to legislation being undertaken in the Central Legislature regarding the control of extension of tea cultivation which subject falls within the Provincial legislative list under the new constitution.

There has been unanimity of opinion that the control scheme has been beneficial to the tea industry in India and the proposals for legislation have the support of 99 per cent. of industry. The draft bill is designed to give legislative sanction to the operation of the renewal scheme for a period of five years from 1st April 1938. It may be mentioned that the other parties concerned, namely, the Governments of Ceylon and the Netherlands Indies, have already agreed to adhere to the renewal scheme."

—Gazette of India, 1937, Part V, page 306.

Act how affected by subsequent legislation.

—Amended by Acts 34 of 1939; 12 of 1943; 29 of 1943; 1 of 1945; 19 of 1948.
—Amended by Ordinances 7 of 1940; 47 of 1942.
—Amended temporarily by Act 35 of 1939.

[THE INDIAN] TEA CONTROL ACT, 1938.

(ACT VIII OF 1938)[a] *[28th March, 1938.]*

An Act to provide for the control of export of tea from and for the control of the extension of the cultivation of tea in British India.

WHEREAS it is expedient, for the purpose of implementing the agreement which the Central Government has entered into with the Governments of Ceylon and the Netherlands India to give

effect to the provisions of the International Agreement made between associations representing the tea growers of India, Ceylon and the Netherlands India, to provide for the control of the export of tea from, and for the control of the extension of the cultivation of tea in, British India; it is hereby enacted as follows :

[a] For the Statement of Objects and Reasons, *see* Gazette of India, 1937, Pt. V, p. 306; for the Report of the Select Committee, *see ibid*, 1938, Pt. V, p. 1.

The Act has been *applied* to :

The district of Ranchi, *see* Notification No. 1371-11C-68-Com., dated 23rd June 1938, Bihar Gazette, 1938, Pt. II, p. 700.

British Baluchistan, *see* Notification No 200-F., dated 10th August 1938, Gazette of India, 1938, Pt. I, p. 1371;

Jaunsar-Bawar pargana of Dehra Dun district, U. P. Government Notification No. 4011/XVIII-265, dated 17th August 1938 ;

The Chittagong hill tracts with effect from 1st April 1938 by Bengal Government Notifications Nos. 20802-E.A., dated 27th September 1938 and 11709 E.A , dated 9th November 1939 ;

The Darjeeling district with effect from 1st April 1938, by Bengal Government Notifications Nos. 739 Com. dated 8th March 1939 and 328-Com.. dated 1st November 1939.

The Act has been *extended* to the excluded and partially excluded areas in Assam, *see* Notification No. 3443 G.S., dated 8th August 1938, Assam Gazette, 1938, Pt. II. p. 1134.

Short title, extent, commencement and duration.

1. *(1)* This Act may be called the Indian Tea Control Act, 1938.

(2) It extends to the whole of British India.

(3) It shall come into force on the 1st day of April 1938.

[a][*(4)* It shall remain in force up to the 31st day of March 1950]

[a] *Substituted* by the Indian Tea Control (Amendment) Act, 1948 (19 [XIX] of 1948), S. 2. [1-4-1948].

Definitions.

2. In this Act, unless there is anything repugnant in the subject or context,—

(a) "Committee" means the Indian Tea Licensing Committee constituted under this Act ;

(b) "Customs-collector" means a Customs-collector as defined in clause (c) of section 3 of the Sea Customs Act, 1878, for the purposes of that Act, or of that Act, as applied to the import and export of goods by air, or a Collector of Land Customs as defined in clause (c) of section 2 of the Land Customs Act, 1924, as the case may be ;

(c) "Export" means to take out of British India by land, sea or air to any place outside India other than the French and Portuguese Settlements bounded by India or a country notified in this behalf by the Central Government by notification in the official Gazette :

(d) "Indian export allotment" means the total quantity of tea which may be exported during any one financial year ;

(e) "owner" includes any agent of an owner ;

(f) "prescribed" means prescribed by rules made under this Act ;

[a][*(g)* "standard export figure" means such quantity as the Central Government may by notification in the official Gazette specify;]

(h) "tea" means —

(i) in Chapter III and Chapter IV [b][and in the Schedule], the plant [c][*Thea sinensis*] and

(ii) elsewhere, the commodity known as tea made from the leaves of the plant [c][*Thea sinensis*] including green tea but excluding tea waste ; and

(i) "tea seed" includes seeds, roots, stumps, cuttings, buds, and any living portion of the plant [c][*Thea sinensis*] which may be used to propagate that plant.

[a] *Substituted* for original clause *(g)* by the Indian Tea Control (Amendment) Act, 1948 (19 [XIX] of 1948), S. 3. [1-4-1948]. [b] *Inserted* by the Indian Tea Control (Amendment) Act, 1943 (12 [XII] of 1943), S. 3. [29-3-1943]. [c] *Substituted* for "*Camellia Thea* (Linn)" by Act 19 [XIX] of 1948, S. 3. [1-4-1948].

CHAPTER I.

THE INDIAN TEA LICENSING COMMITTEE.

Constitution of the Indian Tea Licensing Committee.

3. *(1)* The Central Government shall constitute a Committee, to be called the Indian Tea Licensing Committee, consisting of the following members :—

(a) one member to be nominated by each of the following bodies, namely :—

(i) the Indian Tea Association, Calcutta,

(ii) the Assam Branch of that Association,

(iii) the Surma Valley Branch of that Association,

(iv) the Dooars Planters Association,

(v) the Indian Tea Planters Association, Jalpaiguri, and the Terai Indian Planters Association, Terai acting together, and

(vi) the Darjeeling Planters Association and the Terai Planters Association, acting together;

(b) two members to be elected in the prescribed manner by and from among Indian owners of tea estates to which export quotas were allotted under the Indian Tea Control Act, 1933, for the financial year beginning on the 1st day of April, 1937, one to represent the Indian Tea Planters of the Assam Valley and one to represent the Indian Tea Planters of the Surma Valley, the Indian State of Tripura, the Chittagong Hill Tracts and the District of Chittagong;

(c) three members to be nominated by the United Planters Association of Southern India, one to represent tea estates in British India, and one to represent tea estate in Indian States;

(d) one member to be nominated by the Government of the Indian State of Travancore to represent the tea estates in that State;

(e) one member to be elected in the prescribed manner by and from among Indian owners of tea estates to represent tea estates in Southern India excluding Travancore owned by Indians; and

(f) one member to be elected by owners of tea gardens of Kangra, Dehra Dun, Kumaon, Behar and other unrepresented Tea Estates.

[a][*(2)* Members nominated or elected under sub-section *(1)* shall hold office for the duration of this Act.

(3) The Committee shall be a body corporate by the name of the Indian Tea Licensing Committee, having perpetual succession and a common seal, with power to acquire and hold property and to contract, and shall by the said name sue and be sued.]

[a] *Substituted* by the Indian Tea Control (Amendment) Act, 1943 (12 [XII] of 1943), S. 4. [29-3-1943].

Vacancies.

4. *(1)* If any authority or body fails to make within two months any nomination or election which it is entitled to make under section 3, the Central Government may itself nominate a member to fill the vacancy.

(2) Where a member of the Committee dies, resigns, ceases to reside in India or becomes incapable of acting, the Central Government may, [a][in the case of an elected member, nominate a successor chosen to represent the body entitled to make the first election under section 3, and in the case of a nominated member, nominate a successor on the recommendation of the authority or body entitled to make the first nomination under section 3, or, if such recommendation is not made within two months, without such recommendation.]

(3) No act done by the Committee shall be questioned on the ground merely of the existence of any vacancy in or any defect in the constitution of the Committee.

[a] *Substituted* by the Indian Tea Control (Amendment) Act, 1943 (12 [XII] of 1943), S. 5. [29-3-1943].

Sub-committees and executive officers.

5. The Committee shall elect a chairman from amongst its members, and may appoint such sub-committees and executive officers as may be necessary for the efficient performance of the duties imposed upon it by this Act.

Power of Central Government to appoint additional member of Committee to act as chairman.

[**5-A.** Notwithstanding anything elsewhere contained in this Act, the Central Government may appoint any person to be an additional member of, and to act as chairman of, the Committee, and on such appointment being made the chairman of the Committee elected under section 5 shall cease to exercise the functions of chairman.]

[a] *Inserted* by the Indian Tea Control (Amendment) Act, 1943 (12 [XII] of 1943), S. 6. [29-3-1943].

Power to make by-laws.

6. *(1)* The Committee may make by-laws consistent with this Act and with the rules made thereunder for all or any of the following matters, namely :—

(a) the regulation of the procedure to be followed at meetings of the Committee;

(b) the appointment of sub-committees;

(c) the delegation to sub-committees, members or officers of the Committee of any of the powers of the Committee under this Act;

(d) the determination of the travelling allowances of the members or officers of the Committee or of the members of a sub-committee;

(e) the appointment, promotion and dismissal of officers, assessors and servants of the Committee, and the creation and abolition of appointments of such officers, assessors and servants;

(f) the regulation of the grant of pay and leave to such officers, assessors and servants; and

(g) any other matter in respect of which by-laws may be made under this Act or the rules made thereunder.

(2) All by-laws made under this section shall be subject to the previous sanction of the Central Government.

Central Government's power of control.

7. *(1)* Save in respect of proceedings and orders under sections 28, 29 and 30, all acts of the Committee shall be subject to the control of the Central Government which may cancel, suspend or modify as it thinks fit any such act.

(2) Without prejudice to the generality of the foregoing provision, any person aggrieved by any order of the Committee under section 14 may appeal to either the Central Government or the High Court of the Province within which the tea estate is situated within sixty days from the date of such order :

Provided that an appeal preferred to the Central Government or the High Court shall bar an appeal against the same order to the other.

(3) The records of the Committee shall be open to inspection at all reasonable times by any officer authorised in this behalf by the Central Government.

(4) Subject to rules framed under the Act every owner of a tea estate to whom a quota is allotted shall be entitled to inspect the records of the Committee and on payment of the prescribed fee shall also be entitled to obtain copies of any proceedings or orders of the Committee.

Keeping and auditing of accounts.

8. *(1)* The Committee shall publish an annual report and shall keep accounts of all fees received by it under this Act and of the manner in which they are expended and shall also publish a summary of the accounts along with the annual report.

(2) Such accounts shall be examined and audited annually by auditors appointed in this behalf by the Central Government, and such auditors shall have power to disallow any item which has been, in their opinion, expended otherwise than in pursuance of the purposes of this Act.

(3) If any item is disallowed under sub-section *(2)*, an appeal shall lie to the Central Government whose decision shall be final.

Dissolution of the Committee.

9. *(1)* The Central Government may, by notification in the official Gazette, declare the Committee to be dissolved, and on the date of the publication of any such notification the Committee shall stand dissolved and this Act shall be deemed to be repealed.

(2) When the Committee is dissolved either under this section or by the expiry of this Act, the unexpended balance of fees received by the Committee under this Act shall lapse to the Central Government.

Power to make rules.

10. The Central Government may, by notification in the official Gazette, make rules—

(a) providing for the conduct of the elections referred to in clauses *(b)* and *(e)* of sub-section *(1)* of section 3;

(b) providing for the establishment and maintenance of offices by the Committee;

(c) providing for the conduct of business by the Committee and determining the number of members which shall form a quorum at meetings;

(d) providing for the maintenance by the Committee of a record of all business transacted and for submission of copies thereof to the Central Government;

(e) regulating the preparation of annual estimates of receipts and expenditure;

Section 7 — Note 1.

[1] An estate aggrieved by an order under S. 14 by the Committee can appeal either to the High Court or the Central Government. But once an appeal is preferred to one it will be a bar to an appeal to the other. (Vol 28) 1941 Lah 120 (121): ILR (1940) Lah 745 (DB).

[2] The Tea Licensing Committee or the Central Government is not a necessary party to an appeal. But the Court may issue notice to the Committee to appear and support its decisions or permit the Committee on an application to be heard and lead evidence to justify its order. Where a question of principle is involved the Court may permit the Government also to be heard (Vol 28) 1941 Lah 120 (123) : I L R (1940) Lah 745 (DB)

[3] Joint controller cannot engage or instruct counsel on behalf of Tea Licensing Committee in absence of any rule or resolution of the Committee authorising him to do so (Vol 28) 1941 Lah 120 (123): ILR (1940) Lah 745 (DB).

(*f*) regulating the keeping of accounts of receipts and expenditure;

(*g*) determining the custody in which the current account of the Committee shall be kept, and the bank or banks at which surplus money at the credit of the Committee may be deposited at interest;

(*h*) regulating [a][* * * *] the circumstances in which and the authority by which members [b][of the Committee] may be removed; and

(*i*) generally, to carry out the provisions of this Chapter.

[a] The words 'the term of office of members of the Committee and" were *omitted* by the Indian Tea Control (Amendment) Act, 1943 (12 [XII] of 1943), S. 7. [29 3-1943]. [b] *Inserted, ibid.*

CHAPTER II.

CONTROL OVER THE EXPORT OF TEA.

Limitation of application of Chapter.

11. Nothing in this Chapter shall apply to tea—

(*a*) proved to the satisfaction of the Customs-collector to have been imported into British India from any port outside India, or

(*b*) shipped as stores on board any vessel [a][or aircraft] in such quantity as the Customs-collector considers reasonable having regard to the number of the crew and passengers; and the length of the voyage on which the vessel [a][or aircraft] is about to depart, or

(*c*) exported by post in packages not exceeding one pound *avoirdupois* in weight, [b][or]

[c][(*d*) exported with the previous sanction of the Central Government, within the limits prescribed in this behalf, by a Red Cross Society or by any organisation for providing amenities for troops overseas,] [d][or

(*e*) taken as part of the personal baggage of a passenger]

[a] *Inserted* by the Indian Tea Control (Amendment) Act 1943 (12 [XII] of 1943), S 8. [29-3-1943]. [b] *Added, ibid.* [c] *Substituted, ibid.* (Second Amendment) Act 1943 (29 [XXIX] of 1943), S. 2. [27 11-1943] [d] The word 'or' and clause (e) were *added* by the Indian Tea Control (Amendment) Act, 1948 (19 [XIX] of 1948), S. 4. [1-4-1948].

Control of export of tea and tea seed.

12 (*1*) No tea shall be exported unless covered by a licence issued by or on behalf of the Committee.

(*2*) No tea [a][or tea seed] shall be taken by land, sea or air out of British India to any of the French or Portuguese Settlements bounded by India unless covered by a permit issued by or on behalf of the Committee.

(*3*) No tea seed shall be exported unless covered by a permit issued by or on behalf of the Central Government.

[b][* * * *].

[a] *Inserted* by the Indian Tea Control (Amendment) Act, 1943 (12 [XII] of 1943), S. 9. [29-3-1943]. [b] Sub section (4) added by Act 12 [XII] of 1943, S. 9, was *omitted* by the Indian Tea Control (Amendment) Act, 1948 (19 [XIX] of 1948), S. 5. [1-4-1948].

Indian export allotment.

13 The Indian export allotment for each financial year during the operation of this Act shall be declared by the Central Government by notification in the official Gazette after consulting the Committee and paying due regard to all interests concerned and shall be expressed as a number of pounds *avoirdupois* equivalent to a stated percentage of the standard export figure:

[a][Provided that the Central Government may, by subsequent notification issued at any time during the financial year, alter the Indian export allotment as so declared, and thereupon the Indian export allotment as so altered shall be the Indian export allotment for that year]

[a] *Added* by the Indian Tea Control (Amendment) Ordinance, 1940 (7 [VII] of 1940), S. 2.

Export quotas and crop basis.

14. (*1*) Any tea estate or any sub-division of a tea estate to which an export quota was allotted [a][before the 1st day of April, 1948] and any tea estate which the Central Government may [b][on application made within six months from the said date] authorise to apply for the allotment of an export quota under this Act, shall on application made [c][within the prescribed time and accompanied by the prescribed particulars] to the Committee for the allotment to the estate of an export quota have the right, subject to the provisions of this Act, to receive an export quota.

(*2*) The export quota of a tea estate, that is, the total quantity of tea which may be exported by the owner of the tea estate during the financial year, shall be an amount bearing to the crop basis of the estate as determined by the Committee in accordance with the principle set forth in the schedule [c][or as revised by the Central Government under section 14A] the same proportion as the

Indian export allotment for the financial year in question bears to the total of the crop basis of all tea estates in India for that year [d][and, when such allotment is altered under the proviso to section 13 during the financial year, shall be deemed to be altered accordingly :

Provided that when the export quota of a tea estate has been reduced in consequence of an alteration or alterations during the financial year of the Indian export allotment, any tea exported by the owner of the estate in accordance with the export quota as subsisting for the time being which is in excess of the amount permitted to be exported in accordance with that export quota as finally revised for the year shall be excluded from the computation of the total quantity of tea which may be exported by that owner during the financial year, and shall be a permissible export notwithstanding that the Indian export allotment for the financial year may be thereby exceeded].

(3) The crop basis of a tea estate may be redetermined by the Committee if—

(a) application is made by the owner of the estate in this behalf before the 30th day of September, [e][1943] and

(b) the Committee is satisfied that there exist grounds of special hardship arising out of circumstances not under the control of the owner or of any previous owner of the estate and relating to conditions existing prior to the 1st day of April, 1933.

(4) The total of all export quotas allotted to tea estates [f][at any time during any financial year] shall not exceed the Indian export allotment [g][for the time being] for that year.

[a] *Substituted* for "under the Indian Tea Control Act, 1933" by the Indian Tea Control (Amendment) Act, 1948 (19 [XIX] of 1948), S. 6. [1-4-1948] [b] *Substituted* for "within one year from the commencement of this Act," *ibid.* [c] *Inserted* by the Indian Tea Control (Amendment) Act, 1943 (12 [XII] of 1943), S. 10. [29-3-1943.] [d] *Added* by the Indian Tea Control (Amendment) Ordinance, 1940 (Ord. 7 [VII] of 1940), S. 3. [e] *Substituted* by Act 12 [XII] of 1943, S. 10, for "1938". [f] *Substituted* by Ord. 7 of 1940, S. 3, for "any financial year". [g] *Inserted, ibid.*

Power of Central Government to revise crop basis.

[a][14A. The crop basis of a tea estate as determined or re-determined by the Committee may be revised by the Central Government if the Central Government is satisfied that the Committee in determining or redetermining it acted upon information which was either incorrect or deceptive.]

[a] *Inserted* by the Indian Tea Control (Amendment) Act, 1943 (12 [XII] of 1943), S. 11. [29-3-1943.]

Right to export licences.

15. *(1)* The owner of a tea estate to which an export quota has been allotted for any financial year shall have a right to obtain at any time during that year export licences to cover the export of tea up to the amount of the unexhausted balance of the quota, that is, up to the amount of the quota less the amount for which export licences have already been issued against it :

[a][Provided that for the purpose of restricting in any year the amount of tea exported from British India the Central Government may direct that the quota shall, for the purposes of this sub-section, be deemed to be reduced by such proportion as is necessary to effect the desired restriction.]

(2) The right of the owner of a tea estate under this section may be transferred in whole or in part, and, subject to proof of the transfer to the satisfaction of the Committee and to the completion of the prescribed documents to enable the Committee to give effect to the transfer, the transferee shall have a right to obtain export licences up to the amount covered by the transfer or up to the amount of the unexhausted balance of the quota, whichever may be less :

[b][Provided that if in consequence of an alteration under the proviso to section 13 of the Indian export allotment for the financial year the export quota allotted to the owner of the tea estate is reduced, any transfer of a right to obtain export licences already made by such owner shall be void in so far as it relates to the future export of tea in excess of his export quota as so reduced, and the transferee shall be entitled to obtain from the transferor a refund of the amount paid in respect of such excess.]

(3) Subject to the conditions specified in sub-section *(2)*, any transferee referred to in that sub-section may again transfer the whole or any part of his rights to the owner of a tea estate, but not to any other person.

(4) Nothing in sub-section *(3)* shall operate to restrict the issue of licences for the export of tea expressed to be sold with export rights.

[a] *Added* by the Indian Tea Control (Amendment) Act, 1943 (XII [12] of 1943), S. 12. [29-3-1943.] [b] *Added, ibid*, Ordinance, 1940 (Ord. VII [7] of 1940), S. 4.

Section 15 — Note 1.

[1] The export quota rights obtained from the Tea Licensing Committee are assignable and are of value. (Vol 27) 1940 P C 1 (2) : 66 Ind App 293 : ILR (1940) 1 Cal 250 : ILR (1940) Kar (P C) 11 (PC). (Under Tea Control Act of 1933 repealed by Act 32 of 1940.)

Grant of export licences.

16. *(1)* The owner of any tea estate to which an export quota has been allotted or any person to whom he has transferred his rights may at any time before the 21st day of March of the financial year to which the quota relates apply in writing to the Committee for an export licence covering a stated quantity of tea.

(2) If the unexhausted balance of the quota [a][or of the quota as deemed to be reduced in accordance with any direction made under the proviso to sub-section *(1)* of section 15], is sufficient to cover the stated quantity, the Committee shall on receipt of the requisite fee issue an export licence covering the stated quantity :

[b][Provided that, if the Central Government has at any time decided that it is desirable to restrict exports of tea from British India, the Committee may, with the general or special previous sanction of the Central Government, refuse to issue export licences.]

(3) Every licence shall be in duplicate in the prescribed form, shall bear the date of its issue and shall be valid up to the end of the financial year in which it is issued :

Provided that save as provided in section 17 the Committee shall not date or issue any export licence after the end of the financial year in which the application for it was made.

[a] *Inserted* by the Indian Tea Control (Amendment) Act, 1943 (XII [12] of 1943), S. 13. [29-3-1943]. [b] *Added, ibid.*

Special export licences.

17. *(1)* Where the tea covered by an export licence issued under the Indian Tea Control Act, 1933, has not been exported before the 31st day of March 1938, the person to whom the licence was granted may, before the 14th day of April 1938, forward the licence to the Committee and submit therewith an application for a special export licence covering the same quantity of tea, and the Committee shall, on receipt of the requisite fee, if any, issue a special export licence accordingly.

(2) Where tea, in respect of which an export licence has been or could have been granted under this Act [a][or in respect of which an export licence would, but for the operation of a direction made under the proviso to sub-section *(1)* of section 15, have been obtainable], has not been exported before the end of the financial year in which the licence was or could have been issued, the person to whom the licence was or could have been granted may, before the 14th day of April of the following financial year, forward an application to the Committee for a special export licence covering the same quantity of tea, and the Committee shall, on receipt of the requisite fee, if any, issue a special export licence accordingly.

[b][*(2A)* Where, in pursuance of sub-section *(1)* or sub-section *(2)* of section 7, the owner of a tea estate receives a right to obtain export licences for a further quantity of tea, [c][he may apply to the Committee for a special export licence covering that further quantity, and the Committee, unless prevented by the operation of any other provision of this Act, shall,] on receipt of the requisite fee, if any, issue a special licence accordingly.

(2B) A person, to whom a special export licence has been issued under sub-section *(2)* or sub-section *(2A)*, may transfer the special export licence with all the rights conferred thereby [d][* * *] to a person or persons nominated by him, but a licence once so transferred shall not be further transferable.]

(3) A special export licence shall be in duplicate in the prescribed form, shall bear the date of its issue, and shall be valid [e][* * *] up to the 31st day of [f][[g][May] of the financial year] in which it was issued :

[h][Provided that a special export licence issued before the 1st day of April 1947, shall be valid up to the 31st day of March 1947.]

(4) The quantity of tea covered by a special export licence shall be accounted for against the export quota of the year in which the original licence was or could have been issued under this Act [i][* * *].

[j][*(5)* Notwithstanding anything contained in the foregoing sub-sections, the Committee may [k][with the general or special previous sanction of the Central Government refuse to issue a special export licence or] postpone for so long as the Central Government may require the issue of any special export licence.]

[a] *Inserted* by the Indian Tea Control (Amendmend) Act, 1943 (XII [12] of 1943), S. 14. [31-3-1943]. [b] *Substituted* by S. 2, *ibid.*, for sub-section (2A) which had been inserted by Ordinance No. 47 of 1942. [c] *Substituted* for "he may within one month from the date of the order whereby he receives such right, apply to the Committee for a special export licence covering that further quantity and the Committee shall" by the Indian Tea Control (Amendment) Act, 1946 (XXIX [29] of 1946), S. 2. [22-11-1946]. [d] The words "with-

in a period of six months from the date on which it was granted" were *omitted*, *ibid*. [e] The words "in the case of a special export licence issued in the year 1938 up to the 30th day of June of that year and in the case of a special export licence issued in any subsequent year" were *omitted* by Act XII [12] of 1943, S. 14. [f] *Substituted* for 'May of the year', *ibid* [g] *Substituted* for 'March' by Act XXIX [29] of 1946, S. 2 [h] *Added*, *ibid*. [i] The words "or under the Indian Tea Control Act, 1938, as the case may be" were *omitted* by Act XII [12] of 1943, S. 14. [j] *Added*, *ibid*. [k] *Inserted* by the Indian Tea Control (Second Amendment) Act, 1943 (XXIX [29] of 1943), S. 3 [27-11-1943].

Committee to maintain accounts of quotas.

18. *(1)* The Committee shall maintain an account of every export quota showing, in addition to such other particulars as the Committee may think fit, the licences issued against it and the unexhausted balance.

(2) Any owner of a tea estate shall be entitled, on payment of the requisite fee, to a copy of the account relating to his quota, certified in the manner laid down in the by-laws.

Tea for export to be covered by licence or permit.

19. *(1)* No consignment of tea or tea seed shall be shipped or waterborne to be shipped for export or shall be exported until the owner has delivered to the Customs-collector a valid export licence or special export licence in duplicate or a permit issued by or on behalf of the Central Government covering the quantity to be shipped.

(2) No consignment of tea or tea seed shall be shipped or waterborne to be shipped for carriage [a][or shall be taken by land] to any of the French or Portuguese Settlements bounded by India until the owner has delivered to the Customs-collector a permit issued by or on behalf of the Committee or issued by or on behalf of the Central Government, as the case may be, covernig the quantity to be shipped.

(3) No permit for the passage of any tea [a][or tea seed] by land into any of the French or Portuguese Settlements bounded by India shall be granted under sub-section *(1)* of section 5 of the Land Customs Act, 1924, unless the application for such permit is accompanied by a permit granted in this behalf by the Committee covering the quantity to be passed.

[a] *Inserted* by the Indian Tea Control (Amendment) Act, 1943 (XII [12] of 1943), S. 15, [29-3-1943.]

Power of Committee to call for returns.

20. *(1)* The Committee may serve by post a notice upon the owner of any tea estate or upon his manager, requiring him to furnish, within such period not being less than thirty days as it may specify in the notice, such returns relating to the production, sale and export of tea produced on the estate, or to any other matter as it may deem necessary [a][* * * *.]

(2) Where any return required under sub-section *(1)* in respect af any tea estate is not furnished within the period specified in the notice, the Committee may refuse to allot a quota to that estate under section 14, or, where a quota has already been allotted, may cancel the unexhausted balance of that quota and refuse to issue any further export licences under section 16 against that quota or to recognise or give effect to any transfer under section 15.

[a] The words "to enable it to discharge its duties under this Chapter" were *omitted* by the Indian Tea Control (Amendment) Act, 1943 (12 [XII] of 1943), S. 16. [29-3-1943.]

Power of Committee to require evidence of ownership.

21. *(1)* The Committee may serve by post a notice upon any person claiming to be the owner of any tea estate or upon his agent or manager or upon any person claiming to be the agent or the manager of the owner of any tea estate requiring him to furnish, within such period as may be specified in the notice or within such extended period as the Committee may allow, such documentary or other evidence as may be required to prove to the satisfaction of the Committee that such person is the owner of such tea estate or is the agent or manager of the owner of a tea estate, as the case may be.

(2) Where any person fails to comply with the requirements of a notice served on him under sub-section *(1)* or where the evidence furnished by such person is insufficient to prove to the satisfaction of the Committee that such person is the owner of the tea estate of which he claims to be the owner or is the agent or manager of the owner of a tea estate, as the case may be, the Committee may refuse to issue to such person or to his agent or manager any export licences against the quota allotted to such tea estate.

Fees.

22. *(1)* The Committee may charge and collect the following fees, namely :

(a) a licence fee for every export licence or special export licence or permit issued by it, at such rates, not exceeding one rupee per thousand pounds of tea or part thereof covered

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Section 20 — Note 1.

[1] A committee appointed under the Tea Licensing Resolution prior to the coming into operation of the Tea Control Act of 1933, was not bound to accept without question the figures submitted by the tea estates concerned as a basis for calculating the export quota to which they were entitled. ('41) ILR (1941) 1 Cal 101 (116).

by the licence or permit, as the Central Government may, on the recommendation of the Committee by notification in the official Gazette, fix in this behalf ;

(b) a fee, not to exceed eight annas per acre of the area concerned, on any application under sub section *(3)* of section 14 for re-determination of crop basis; and

(c) copying fees for certified copies of accounts of quotas, at the rate of one rupee per copy :

Provided that the owner of any tea estate to which a quota has been allotted under section 14 may make, or the Committee may require him to make, a consolidated payment of export licence fees at the rate fixed under clause *(a)* to cover the whole of the quota.

(2) The Committee shall apply the fees collected by it under this section to the meeting of expenses incurred by it in pursuance of the purposes of this Act, and, with the previous sanction of the Central Government, to the payment of a contribution towards the maintenance of any international committee established in furtherance of the said purposes in or by tea producing countries generally.

Power to make rules.

23. The Central Government may, by notification in the official Gazette, make rules —

(a) prescribing all matters requiring to be prescribed for the purposes of the Schedule;

(b) regulating the grant of permits for the carriage of tea [a][or tea seed] to the French and Portuguese Settlements;

[a][*(ba)* prescribing limits for the purposes of clause *(d)* of section 11 ;

(bb) prescribing the time and the particulars referred to in sub-section *(1)* of section 14 ;]

(c) prescribing the documents referred to in sub-section *(2)* of section 15;

(d) prescribing the form of export licences and special export licences and permits; and

(e) generally to carry out the the purposes of this Chapter.

[a] *Inserted* by the Indian Tea Control (Amendment) Act, 1943 ([12] XII of 1943), S. 17. [29-3-1943].

Bar of jurisdiction.

24. No quota fixed, no order granting or refusing to grant any licence or permit, and no other act done by the Committee under this Chapter shall be called in question in any Court except the High Court under the provisions of sub-section *(2)* of section 7 of this Act.

Export of tea produced in Indian States.

25. Where legislation enacted in any Indian State has made provision in pursuance of the agreement implemented by and in consonance with the provisions contained in this Act for the control of the export of tea from and for the control of the extension of the cultivation of tea in the State, the Committee shall issue export licences, special export licences and permits for the export or carriage out of British India of tea produced in any such State in the same manner and subject to the same incidents as such licences or permits are issued in respect of tea produced in British India.

Power of Central Government to make orders.

[a][**25A.** If in pursuance of any scheme for the control of import of Indian tea into the United Kingdom or any other country, the Central Government considers it necessary or expedient so to do, it may by order direct the Committee to apportion the requirement of the United Kingdom or such other country among the tea estates in accordance with such principles and in such manner as may be laid down in the order and to grant such export licences or special export licenses as may be necessary for giving effect to the arrangements made under such scheme, and the Committee shall comply with any such order.]

[a] *Inserted* by the Indian Tea Control (Amendment) Act, 1943 (12 [XII] of 1943), S. 18. [29-3-1943.]

CHAPTER III.

CONTROL OVER THE EXTENSION OF TEA CULTIVATION.

Method of control of extension of tea cultivation.

26. So long as this Act remains in force, no one shall plant tea in any land which was not planted with tea on the 31st day of March, [a][1948], save in pursuance of a written permission granted by or on behalf of the Committee :

[b][Provided that this section shall apply to the replacing of tea areas by planting new areas, but nothing in this section shall prohibit—

(a) the infilling or supplying of vacancies on land planted with tea on or before the 31st day of March, 1948, or the replanting of tea upon—

(i) land planted with tea on or before the 31st day of March, 1948, from which the original bushes have been uprooted; or

(ii) land planted with tea on or before the 31st day of March, 1946, from which the original bushes have been uprooted; or

(b) the replacing of tea areas which are worn out on or before the 31st day of March, 1948, by planting tea on area not planted with tea to the same extent but not exceeding five per cent. in each year of the total permissible acreage of the tea estate as on or before the 31st day of March, 1948, subject to such replacement being accompanied by simultaneous uprooting of the tea bushes in the area so replaced.]

[a] *Substituted* for '1943' by the Indian Tea Control (Amendment) Act, 1948 (19 [XIX] of 1948), S. 7. [1-4-1948] [b] *Substituted* for the original proviso, *ibid.*

Limitations to the extension of tea cultivation.

27. *(1)* Subject to the provisions of section 29 and section 30, the total area of land in British India, in respect of which the permissions referred to in section 26 may be granted, shall not exceed [a][such area as will bring the total area of the land planted with tea in British India [b][up to four per cent.] over the total area of the land which would have been planted with tea in British India on the 31st day of March, [c][1948] [d][ ].]

(2) Subject to the provisions of section 29 and section 30, the total area of land in any Province, in respect of which such permissions may be granted, shall be determined by the Committee and shall be as near as may be [e][such area as will bring the total area of the land planted with tea in the Province [b][up to four per cent.] over the total area of the land which would have been planted with tea in the Province on the 31st day of March, [c][1948] [d][* * *].]

[f][Provided that the Committee may vary the total area so determined for any Province in order to increase or diminish for another Province the area in respect of which such permissions may be granted by an amount corresponding to the extent to which the area in the first mentioned Province has been diminished or increased.]

(3) The Committee shall publish the total areas so determined for the various Provinces by notification in the official Gazette of the Central Government as soon as may be [g][after the commencement[h] of the Indian Tea Control (Amendment) Act, [i][1948],] [j][and shall in like manner publish any subsequent variation of such total areas].

[k][* * * * * *]

[a] *Substituted* for "one half of one per cent. of the total area of the land planted with tea in British India on the 31st day of March, 1938" by the Indian Tea Control (Amendment) Act, 1943 (12 [XII] of 1943), S. 20. [29-3-1943]. [b] *Substituted* for "up to one half of one per cent", by the Indian Tea Control (Amendment) Act, 1948 (19 [XIX] of 1948), S. 8. [1-4 1948]. [c] *Substituted* for '1943', *ibid.* [d] Certain words were *omitted*, *ibid.* [e] *Substituted* for "one-half of one per cent. of the total area in the Province which was planted with tea on the 31st day of March, 1938" by Act XII of 1943, S. 20. [29-3-1943]. [f] Proviso was *added*, *ibid.* [g] *Substituted* for "after the commencement of this Act", *ibid.* [h] That is, 1-4-1948. [i] *Substituted* for '1943' by Act XIX of 1948, S. 8. [1-4-1948]. [j] *Added* by Act XII of 1943, S. 20. [k] Sub-section (4) was *omitted*, *ibid.*

Grant of permission to plant tea.

28. *(1)* Applications for permission to plant tea on any land not planted with tea on the 31st day of March, [a][1948], shall be made to the Committee not later than six months from the commencement of [b][the Indian Tea Control (Amendment) Act, [a][1948],] and shall contain a clear statement of all special circumstances justifying the application.

[c][*(1A)* The Committee may require an applicant to supply such information as it thinks necessary to enable the Committee to deal with the application.]

(2) Subject to the limits laid down in section 27, [c][and to any rules made in this behalf by the Committee] the Committee may grant or refuse the permission applied for or may grant it in part only, or may call for further information from the applicant:

[c][Provided that permission shall not be granted in the case of any tea estate owned by a limited liability company if the area planted with tea in the estate exceeds three hundred acres, or in the case of any tea estate owned by an individual proprietor or proprietors if the area planted with tea in the estate exceeds one hundred and fifty acres:

Provided further that the Committee may, despite the limits laid down in section 27, grant such permission to the Tocklai and Nellakotta experimental stations.]

(3) No order by the Committee under sub-section *(2)* shall be called in question by any Court.

[a] *Substituted* by the Indian Tea Control (Amendment) Act, 1948 (19 [XIX] of 1948), S. 9. [1-4-1948]. [b] *Substituted* for "this Act". *ibid*, 1943 (12 [XII] of 1943), S. 21. [29-3-1943]. [c] *Inserted*, *ibid.*

Grant of permission to plant tea in special circumstances.

29. *(1)* [a][Where any land which was at the 31st day of March, 1933, planted with tea (including land planted with tea at the 31st day of March, 1931, from which the original bushes had been uprooted and which

had not been replanted with tea at the said 31st day of March 1933), or where any land planted with tea after the 31st day of March, 1933]—

(a) has since become wholly incapable of carrying tea through [b][circumstances due to existing war conditions or through] subsidence, flood, erosion, earthquake or other irresistible superhuman cause, or

(b) has since been compulsorily acquired under the provisions of the Land Acquisition Act, 1894, or of any other law for the time being in force and no longer carries tea, [bb][or

(c) has since been resumed by the lessor under the terms of any lease and no longer carries tea,] the owner of the tea estate in which such land was situated may apply to the Committee for permission to plant tea on land not planted with tea.

[c][*Explanation.*—Land taken for purposes connected with the prosecution of war on which tea bushes have been allowed to remain for protective purposes though no longer cultivated shall be deemed for the purposes of this sub-section to be incapable of carrying or no longer to carry tea.]

(2) Upon such application being made and upon proof to the satisfaction of the Committee that the applicant is entitled to the benefit of sub-section *(1)*, the Committee may grant permission to plant tea on land not planted with tea:

Provided that the area of land, in respect of which such permission is granted, shall be within the [d][same or an adjacent district and shall belong to the same or an adjacent tea estate] and shall not exceed in extent the area of the land incapable of carrying tea or compulsorily acquired, as the case may be.

(3) All areas of land in respect of which permission to plant tea is granted under this section shall be excluded when computing for the purposes of section 27 the total area of land in respect of which the permissions referred to in section 26 may be granted.

[c][*(4)* If any land falling within the *Explanation* to sub section *(1)* is subsequently restored to the tea estate from which it was subtracted, the owner of the estate shall either uproot the tea planted thereon, or uproot any tea planted by him in pursuance of a permission granted under sub-section *(2)*.]

[a] *Substituted* by the Indian Tea Control (Second Amendment) Act, 1943 (29 [XXIX] of 1943), S. 4, for "Where any land which was on the 31st day of March, 1943, planted with tea". [27-11-1943], wherein '1943' had been *substituted* by Act 12 of 1943, S. 22, for '1933". [29-3-1943.] [b] *Inserted* by the Indian Tea Control (Amendment) Act, 1943 (12 [XII] of 1943), S 22. [bb] The word 'or' and clause (c) were *added* by the Indian Tea Control (Amendment) Act, 1948 (19 [XIX] of 1948), S. 10. [1-4-1948.] [c] *Added, ibid.* [d] *Substituted, ibid.*, for "area of the same tea estate".

Tea nurseries.

30. *(1)* Subject to the provisions of sub-section *(4)*, the owner of a tea estate may establish nurseries on land not previously planted with tea for the growing of plants intended for in-filling or supplying vacancies or for replanting land planted with tea within the area of the estate or for any other purpose approved by the Committee :

[a][* * * * * * * *]

(2) All areas of land utilised for nurseries in accordance with this section shall be excluded when computing for the purposes of section 27 the total area of land in respect of which the permissions referred to in section 26 may be granted.

(3) The Committee may at any time serve by post a notice upon the owner of any tea estate or upon his manager requiring him to furnish within such period not being less than thirty days as may be specified in the notice such returns relating to the area of the land utilised for nurseries as it may deem necessary.

(4) If any return required under sub-section *(3)* is not furnished to the Committee within the period specified in the notice or if in the opinion of the Committee the total area of the land utilised for nurseries is excessive, the Committee may make such restrictive or other order as it deems necessary and in particular may order the uprooting of any bushes planted on any such land.

[a] Proviso to sub-section *(1)* was *omitted* by the Indian Tea Control (Amendment) Act, 1948 (19 [XIX] of 1948), S. 11. [1-4-1948.]

Appeal to Provincial Government.

31. *(1)* Any applicant aggrieved by an order of the Committee under section 28, section 29 or section 30 may appeal to the Provincial Government within sixty days from the date thereof and the Provincial Government may cancel, modify or suspend any such order.

(2) The records of the Committee relating to proceedings under this Chapter shall be open to inspection at all reasonable times by any officer authorised in this behalf by the Provincial Government.

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Power of the Committee to call for returns and to inspect.

32. *(1)* The Committee may at any time serve by post a notice upon the owner of any tea estate or upon his manager requiring him to furnish within such period not being less than thirty days as may be specified in the notice such returns relating to the cultivation of tea on the estate as it may deem necessary.

(2) Any member of the Committee and any officer of the Committee or person authorised by it in this behalf may at any reasonable time enter upon and inspect the lands of any tea estate and may require the owner of the estate to produce for inspection any records of the estate in his control or custody relating to the cultivation of tea on the estate.

(3) Where any return required under sub-section *(1)* in respect of any tea estate is not furnished to the Committee within the period specified in the notice, the Committee may refuse to grant any permission under section 28 to plant tea on that estate.

CHAPTER IV.

PENALTIES AND PROCEDURE.

Penalty for illicit export.

33. A breach of the provisions of [a][* * *] sub-section *(1)* or sub-section *(2)* of section 19 shall be punishable as if it were an offence under Item No. 8 of section 167 of the Sea Customs Act, 1878, and the provisions of section 168 and of Chapter XVII of that Act shall apply accordingly.

[a] Words, brackets and figures "sub-section *(4)* of section 12 or" *inserted* by the Indian Tea Control (Second Amendment) Act, 1943, were *omitted* by the Indian Tea Control (Amendment) Act, 1948 (19 [XIX] of 1948), S. 12. [1-4-1948.]

Penalty for making false return.

34. Any owner of a tea estate, or his agent or manager who has furnished any return under sub-section *(1)* of section 20, or under sub-section *(3)* of section 30, or under sub-section *(1)* of section 32, containing any particular which is false and which he knew to be false or did not believe to be true, shall be punishable with fine which may extend to one thousand rupees.

Penalty for obstructing inspection of tea estate.

35. Whoever obstructs any member or officer of the Committee or any person authorised by the Committee, while such member, officer or person is entering upon or inspecting the lands of any tea estate under sub-section *(2)* of section 32, and whoever, having control over or custody of any records of a tea estate relating to the cultivation of tea on that estate, refuses or fails to produce such records when required by a member or officer of the Committee or by a person authorised by the Committee under that sub-section, shall be punishable with fine which may extend to one thousand rupees.

Penalty for illicit cultivation.

36. *(1)* Whoever knowingly plants tea or causes tea to be planted in any land in contravention of section 26 shall be punishable with fine which may extend to one thousand rupees for the first offence, and with fine which may extend to five thousand rupees for any subsequent offence.

(2) Whoever uses any land in contravention of any order made by the Committee under section 30, or fails to comply with any order made by the Committee under sub-section *(4)* of section 30, shall be punishable with fine which may extend to one thousand rupees.

Removal of tea planted without permission.

37. Where any person has been convicted of any offence under section 36, the convicting Court may direct that the tea in respect of which the offence was committed shall be removed from the land within a specified time, and, in the event of the order not being duly complied with, may cause the tea to be removed and may recover the cost from the person convicted as if it were arrears of land revenue due on the tea estate on which the offence was committed.

Trial of offences under sections 34, 35 and 36.

38. *(1)* No Magistrate other than a Magistrate of the first class shall take cognisance of an offence under section 34, section 35 or section 36, and such Magistrate may take cognisance of an offence only upon complaint made by a person authorised by the Committee and with the previous sanction of the Central Government, where the offence is that of furnishing a false return under sub-section *(1)* of section 20, and of the Provincial Government in any other case.

(2) The Committee shall be responsible for the conduct of all prosecutions of offences under section 34, section 35 and section 36.

CHAPTER V.

SAVINGS.

Savings.

39. Notwithstanding the expiry of the Indian Tea Control Act, 1933, and notwithstanding the provisions of sub-section (2) of section (9) of that Act—

(a) the unexpended balance of fees received by the Indian Tea Licensing Committee constituted under that Act shall not lapse to Government but shall be transferred to the Indian Tea Licensing Committee as constituted under section 3 of this Act;

(b) until provision is otherwise made under the corresponding provisions of this Act, all fees fixed, all licences and permits issued and all quotas allotted under the Indian Tea Control Act, 1933, shall, unless inconsistent with the provisions of this Act, be deemed to have been fixed, issued or allotted under this Act; and

(c) any offence punishable under the Indian Tea Control Act, 1933, shall be punishable and may be dealt with as if it were an offence punishable under the corresponding provision of this Act,

and anything done before the 31st day of March, 1938, by the Indian Tea Licensing Committee constituted under the Indian Tea Control Act, 1933, with a view to the allotment to tea estates of export quotas under and in accordance with this Act, shall, so long as it is not inconsistent with any of the provisions of this Act, be as valid as if it had been done after this Act came into force.

[a][CHAPTER VI.

SUSPENSION OF OPERATION OF ACT.

Suspension of operation of Act.

40. *(1)* If the Central Government is satisfied that an emergency has arisen rendering it necessary for the security of India that certain of the restrictions imposed by this Act should cease to be imposed [b][or if it considers it necessary so to do for any other reason], the Central Government may, by notification in the official Gazette, suspend or relax to a specified extent either indefinitely or for such period as may be specified in the notification the operation of all or any of the provisions of this Act.

(2) Where the operation of certain provisions of this Act has under sub-section *(1)* been suspended or relaxed indefinitely, such suspension or relaxation may at any time while this Act remains in force be removed by the Central Government by notification in the official Gazette.]

[a] *Inserted* by the Indian Tea Control (Amedment) Act, 1943 (XII [12] of 1943), S. 24, [29-3-1943.] [b] *Inserted* by the Indian Tea Control (Amendment) Act, 1948 (XIX [19] of 1948), S. 13. [1-4-1948.]

[a][THE SCHEDULE.

[*See* Section 14 *(2)*.]

Principles to be followed in determining the Crop Basis of a Tea Estate.

1. Where a tea estate has before the 1st day of April, 1943, received an export quota under this Act, the crop basis of the estate for the financial year beginning on that date or, for any subsequent financial year shall be the highest crop basis assigned to the estate under this Act for any of the financial years beginning on the 1st day of April 1940, 1941 or 1942 (herein referred to as the cardinal crop basis) increased by any admissible allowance of either of the following kinds, namely:—

(a) An allowance for young areas, that is, areas planted with tea on or after the 1st day of January, 1926, determined in the prescribed manner in accordance with the prescribed rules:

[b][Provided that any allowance made in respect of young areas which has already been included in determining the cardinal crop basis of the estate shall be deducted;]

Schedule — Note 1

[1] The initial figure to be taken for the purpose of calculating the crop basis is the higher of the two figures, one ascertained for the financial year 1937-38 and the other the higher crop basis figure fixed for any previous year after investigation by the committee. ('41) ILR (1941) 1 Cal 101 (110). (Case decided under the schedule as it stood before substitution by the present schedule.). (Vol 26) 1939 Cal 508 (513) : ILR (1939) 2 Cal 210. (The concluding words of cl. (1) of the Schedule govern the whole clause and not merely the second alternative case under the schedule as it stood before substitution.)

[2] The crop basis ascertained in the year 1937-38 referred to in cl. 1 of the Schedule to the Tea Control Act of 1938 means the crop basis as defined in R. 1 of the Rules of 1933, and it does not include hardship allowance granted under R. 4 of the said rules. (Vol 30) 1943 Cal 156 (159) : I L R (1943) 1 Cal 43 (DB). (Case decided under the Schedule as it stood before its substitution by the present Schedule.)

[3] The Licensing Committee has power to investigate acreage of plantation to recalculate the crop basis. ('41) ILR (1941) 1 Cal 101 (110). (Case decided under the Schedule as it stood before substitution by the present Schedule.)

[4] "Investigation" under cl. (1) should be an investigation by the Committee constituted under the Act of 1938. ('41) ILR (1941) 1 Cal 101 (114). (Investigation by committee constituted prior to the Act is not an

(b) An allowance for low producing areas determined in the prescribed manner :

b[Provided that any allowance made in respect of low producing areas which has already been included in determining the cardinal crop basis of the estate shall be deducted.]

2. Where the area of a tea estate for which a crop basis has been determined is reduced or increased by the transfer to or acquisition from another tea estate of land planted with tea, the crop basis of the estate shall be reduced by an amount representing as nearly as possible the contribution made by the area transferred or acquired to the crop basis of the estate of which it previously formed a part.

3. Where a tea estate for which a crop basis has been determined subsequently becomes two or more separate estates the crop basis of each such separate estate shall be determined so as to represent as nearly as possible the contribution made by the area comprised in it to the total crop basis of the original estate]

[a] *Substituted* by the Indian Tea Control (Amendment) Act, 1943 (XII [12] of 1943), S. 25. [29-3-1943.] [b] *Substituted, ibid*, 1945 (I [1] of 1945), S. 2. [27 3 1945.]

[THE] TEA DISTRICTS EMIGRANT LABOUR ACT, 1932.

(ACT XXII of 1932)

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30. Cancellation of garden-sardar's certificate.
31. Penalty for illicit recruitment.

Schedule — Note 1 *(contd.)*

investigation under the clause. (Case decided under the schedule as it stood before substitution by the present Schedule.)

[5] 'Young areas' mean young clearings planted or replanted with tea after 1st January 1926. (Vol 27) 1940 Cal 406 (415). (Case decided under the schedule as it stood before substitution by the present Schedule.)

[6] The onus will lie upon the owner of the tea estate concerned to show that the young areas had actually been planted by him within the material period mentioned in cl. (2) of the schedule. ('41) ILR (1941) 1 Cal 101 (110). (Case decided under the Schedule as it stood before substitution by the present Schedule.)

[7] Central Government have an unfettered discretion in fixing the scales of allowances in respect of young areas and regulating the scales in any just and equitable manner provided the scales fixed do not reduce the initial figures calcalated under cl. (1) of Schedule to Act of 1933. (Vol 27) 1940 Cal 406 (412). (Case decided under the Schedule as it stood before substitution by the present Schedule.)

CHAPTER V.

SUPPLEMENTAL.

SECTIONS
32. Prohibition of the recruitment of children.
33. Power to detain and return sick persons.
34. Power to return person improperly recruited.
35. Power to enforce the provisions of sections 33 and 34.
36. Magistrates and medical officers who may exercise the powers of the Controller.
SECTIONS
37. Power of Central Government to make rules.
38. Powers to extend the scope of this Act.
39. Saving for acts done in good faith under the Act.
40. Bar of jurisdiction of Civil Courts.
41. *[Repealed.]*

THE SCHEDULE—*[Repealed.]*

Statement of Objects and Reasons.

"The Assam Labour and Emigration Act, 1901, which regulates emigration to the tea districts of Assam, was designed, like its predecessors, mainly to regulate the recruitment and engagement of indentured labour. It has not been possible for some years for any worker in Assam to be subjected to a penal contract and, in consequence of this and other changes, the law is entirely unsuited to present conditions. Attempts were made by amending Acts in 1908, 1915 and 1927 to adapt the Act to meet altering conditions; substantial parts of it have been repealed and large numbers of rules have been framed in the endeavour to use the Act to regulate the recruitment of emigrants who are subject to no indenture. These changes have proved inadequate and they have made the law extremely confused. Large parts of the surviving provisions of the Act have become completely ineffective and those provisions which are operative are open to weighty criticisms.

In 1926, the Government of India addressed the Local Governments mainly concerned suggesting that the time might have come for the abolition of all control over recruitment and that, if this was inadvisable considerable changes should be made in the law. The replies received agreed in regarding some restrictions on recruiting as still essential and the existing restrictions as unsatisfactory. The Government of India accordingly drafted an Assam Recruitment Bill, which was sent to the Local Governments in December 1928. By the time criticisms of it had been received, the Royal Commission of Labour had been appointed and a decision was deferred until they had reported. They collected a large amount of evidence on the subject and devoted Chapter XX of their Report to a discussion of it. As a result, they recommended the replacement of the existing legislation by a new enactment. The Bill follows the scheme prepared by the Commission, whose recommendations have been varied in respect of minor details and supplemented where necessary.

The first object of the Bill is to make it possible, on the one hand, to exercise all the control over the recruitment and forwarding of assisted emigrants to the Assam tea gardens as may be justified and required by the interests of emigrants and potential emigrants and, on the other hand, to ensure that no restrictions are imposed which are not so justified. The ideal, now as in the past, is the reduction of restrictions to a minimum and the establishment of such conditions as will make it possible to dispense with all control. This ideal has recently been endorsed by both the Royal Commission on Agriculture and the Royal Commission on Labour. It is desirable, therefore, that the provisions relating to control should be sufficiently elastic to allow of their complete or partial relaxation as and where this is required, and sufficiently wide to deal with any possible recrudescence of recruiting abuses.

The Bill proposes that Local Governments should be able, subject to the control of the Government of India, to impose control over the forwarding of assisted emigrants (cl. 16 and Chap. III generally) or over both their recruitment and their forwarding (cls. 16 and 26 and Chaps III and IV generally) as occasion may dictate. Under the former system, assisted emigrants will ordinarily be forwarded through licensed local agents in the recruiting districts (cls. 17, 18) by prescribed routes (cl. 19) on which provision for food, shelter, etc., must be made by employers and medical supervision can be exercised [Ss. 20, 33, 35 and 36 (4).] Only employers who make satisfactory provision will be able to secure and retain licenses for local agents [cl. 17 (3)], and the operations of local agents and others engaged in forwarding will be subject to inspection and scrutiny (cls. 4 and 22). Under the latter system, employers will, in addition, be prevented from recruiting otherwise than by means of certificated persons employed in the gardens (*garden sardars*), or recruiters licensed in the recruiting provinces (cls. 27 and 28). But the ordinary provisions relating to either system may be relaxed to such extent as seems desirable in any area to which the system is applicable [proviso to cls. 16 (*1*) and 26 (*1*)]

In addition, the Bill seeks to secure for all those who are to emigrate under it the right to be repatriated from Assam (Chap II) with their dependants (cl. 9) at the employer's expense (cl. 12). Ordinarily this right will accrue after three years from the date of entry into Assam (cl. (7). It will also be possible to claim repatriation within three years in the event of the emigrant (*a*) being dismissed otherwise than for wilful misconduct (cl. 8), (*b*) failing in health, (*c*) not being provided with suitable work, or (*d*) having his wages unjustly withheld (cl. 10) Repatriation within one year of entry to Assam will also be possible where there has been fraud or misrepresentation or other irregularities in recruiting (cls. 10 and 35). Further, repatriation can be ordered at any time by a criminal Court in the case of a labourer who has been assaulted by the employer or his agent (cl. 11). It is believed that the offer of these rights of repatriation to emigrants will benefit not merely emigrants but the industry as a whole by removing a serious obstacle to the flow of suitable labour, and that the existence of an adequate supply of such labour will go far to remove the conditions which make it undesirable at present to dispense with control over emigration.

For the general administration of the system which the Bill seeks to establish, it is proposed to appoint a Controller of Emigrant Labour with some staff and possibly a Deputy Controller (cl. 3) The charges will be met by the tea industry through a cess of somewhat similar character to that raised under the present Act for the Assam Labour Board (cl. 5). The Controller is

intended to be an officer subject to the Government of India and responsible for

(*a*) enforcing the law relating to repatriation in Assam (cls. 4, 8—10, 12—15), collateral powers being given to District Magistrates. [S. 36];

(*b*) supervising the forwarding routes (cls. 4, 33—35);

(*c*) supervising conditions in the recruiting provinces, where his powers will be limited to inspection and advice [cls. 4, 17 (*3*)], executive action being entrusted to the local authorities (Chaps. III and IV).

He should thus be able to secure the proper co-ordination of the whole system, and to advise regarding possible relaxations of control or the imposition of further restrictions under the Act, if required. It is intended that, with the appointment of the Controller, the Assam Labour Board, which has since 1915 exercised some supervision, without executive authority, in the recruiting provinces, should be abolished.

Apart from the main changes proposed in the law and explained above, the Bill involves a number of minor alterations in the present position.

(*a*) The Bill is not limited in its initial application to certain provinces [cl. 1 (*2*)]. So to limit it would involve the limitation of repatriation rights to emigrants from these provinces, while its general extension does not render obligatory the extension of control to areas at present uncontrolled.

(*b*) It will no longer be possible to restrict the recruitment of labour within Assam itself, *cf.* Report of the Royal Commission on Labour, page 373 [cl. 2 (*c*).]

(*c*) Unassisted emigration will be entirely free; control can only be exercised where material assistance is given [clause 2 (*f*).]

(*d*) The engagement and forwarding of emigrants who are merely returning to Assam after leaving it as adults will be uncontrolled [clauses 2 (*f*) and 2 (*g*).]

(*e*) It will no longer be possible to prohibit recruitment for Assam; with the complete abolition of penal contracts, the prohibition of recruitment for certain districts of India cannot be justified in the interests of labour, *cf.* Reports of the Royal Commission on Agriculture, page 581, and of the Royal Commission on Labour, page 363.

(*f*) Managers and other supervising officers on tea estates will be able to receive certificates to conduct recruiting in restricted recruiting areas (clause 29).

(*g*) It is proposed that in all areas, controlled or uncontrolled, it should be unlawful to assist persons under 16 to emigrate unless they are accompanied by their parent or guardian: [S. 32].

(*h*) It is proposed that it should be possible to detain and return at the employer's expense sick persons emigrating from any province. [S 33].

(*i*) The provisions of the Bill are intended to apply only to emigration for work on tea plantations in the first instance; but power is retained to extend its application to other industries in Assam and to other districts than the eight tea districts. This power could be used if labourers are imported to other forms of industry with a view to their transference to tea estates, or if the tea industry develops in other parts of Assam [S. 38]."—Gazette of India, 1932, Part V, page 133.

Act how affected by subsequent legislation.

—Adapted by A. O.
—Repealed in part by Act 20 of 1937.

Cognate Acts and Provisions.

1. Indian Emigration Act, VII of 1922.

[THE] TEA DISTRICTS EMIGRANT LABOUR ACT, 1932.

(ACT XXII OF 1932.)[a]

[8th October, 1932.]

An Act to amend the law relating to emigrant labourers in the tea districts of Assam.

WHEREAS it is expedient to amend the law relating to emigrant labourers in the tea districts of Assam; It is hereby enacted as follows :—

[a] For S. O. R., *see* Gazette of India, 1932, Pt. V, p. 133; for S. C. R, *see ibid*, p. 179.

CHAPTER I.

PRELIMINARY.

Short title, extent and commencement.

1. *(1)* This Act may be called the Tea Districts Emigrant Labour Act, 1932.

(2) It extends[a] to the whole of British India,[b] including the Sonthal Parganas.

(3) It shall come into force on such date[c] as the [d][Central Government] may, by notification in the [e][Official Gazette], appoint.

[a] To the Khondmals District, *see* the Khondmals Laws Regulation, 1936 (4 [IV] of 1936), S. 3 and Sch. and to the Angul District, *see* the Angul Laws Regulation, 1936 (5 [V] of 1936), S. 3 and Sch. [b] The expression "the whole of British India," in its application to the Dominion of India, means 'all the Provinces of India' — *see* I. O., Art. 4 (2); and, in its application to the Dominion of Pakistan, means 'all the Provinces of Pakistan' — *See* P. O., Art. 4 (2); 15-8-1947. [c] 1-10-1933; *see* Gazette of India, 1933, Pt. I, p. 903. [d] *Substituted* by A. O., for "Governor-General in Council." [e] *Substituted* by A. O., for "Gazette of India."

Definitions.

2. In this Act, unless there is anything repugnant in the subject or context,—

(*a*) "tea district" means any of the following districts in the Province of Assam, namely,—Lakhimpur, Sibsagar, Nowgong, Darrang, Kamrup, Goalpara, Cachar and Sylhet, and the Balipara Frontier Tract;

(*b*) "tea estate" means an estate, situated in the tea districts, any part of which is used or is intended to be used for the cultivation or manufacture of tea or for any purpose connected therewith;

(*c*) "recruiting Province" means any Province other than Assam;

(*d*) "adult" means a person who has completed his sixteenth year, and "child" means a person who is not an adult;

(*e*) a "labourer" means an adult working on wages not exceeding fifty rupees a month, but does not include a clerk or domestic servant, or a mechanic, carpenter, mason, bricklayer or other artisan;

(*f*) an "assisted emigrant" means an adult who, after the commencement of this Act, has left his home in any recruiting Province or in any Indian State, is proceeding through any part of British India to any place in Assam to work as a labourer on a tea estate, and has received assistance from any person,

but does not include any person who at any time within the two preceding years has worked as a labourer on a tea estate;

(*g*) "assistance" means the gift or offer of any money, goods or ticket entitling to conveyance to any person as an inducement to such person to proceed to Assam to work as a labourer on a tea estate, and "assisted" and "with assistance" when used with reference to any person mean that such person has received assistance;

(*h*) an "emigrant labourer" means a person who has last entered Assam as an assisted emigrant and is employed on a tea estate,

and includes any person who, having accompanied an assisted emigrant to Assam as a child dependent on him, has become an adult and is so employed,

but does not include any person who, at any time after his last entry into Assam and after he has become an adult has taken employment not on a tea estate;

(*i*) the "family" of any person includes the following, if living with him, namely,—

(*i*) in the case of a male,—his wife and any child and aged or incapacitated relative dependent on him,

(*ii*) in the case of a married woman,—her husband and any child and aged or incapacitated relative dependent on her or on her husband, and

(*iii*) in the case of any other woman,—any child and aged or incapacitated relative dependent on her,

and in the case of an emigrant labourer, includes any person who, having accompanied him to Assam as a child dependent on him, has become an adult and is living with him ;

(*j*) " employing interest " means any employer of labourers, or any group or association of such employers ; and

(*k*) " prescribed " means prescribed by rules made by the [a][Central Government].

[a] *Substituted* by A. O., for "Governor-General in Council."

Appointment and status of Controller and Deputy Controllers.

3. (*1*) The [a][Central Government] may appoint a person to be Controller of Emigrant Labour, to exercise the powers and discharge the duties conferred and imposed upon the Controller by or under this Act.

(*2*) The [a][Central Government] may also appoint one or more Deputy Controllers of Emigrant Labour, who shall exercise such of the powers and discharge such of the duties of the Controller as the [a][Central Government] may determine.

(*3*) The Controller may, from time to time and subject to the control of the [a][Central Government], make a distribution of work as between himself and the Deputy Controllers.

(*4*) The Controller and Deputy Controllers shall be deemed to be public servants within the meaning of the Indian Penal Code.

[a] *Substituted* by A. O., for "Governor-General in Council."

Powers of the Controller.

4. The Controller shall have power—

(*a*) to enter

(*i*) all open places on a tea estate,

(*ii*) any enclosed place on a tea estate where he knows or has reason to believe emigrant labourers are working or are accommodated,

(*iii*) any office of a tea estate,

(iv) any office or depot maintained by a labour recruiting agency, in Assam or in a recruiting Province.

(v) any train, vessel or vehicle which he knows or has reason to believe is being used for the conveyance of assisted emigrants;

(b) to inspect, in any office or depot mentioned in sub-clauses *(iii)* and *(iv)* of clause *(a)*, any register or other document required to be kept under this Act;

(c) to carry out in any place mentioned in clause *(a)* any inquiry which he may deem to be expedient for carrying out the purposes of this Act; and

(d) to do any other reasonable act which may be expedient in the discharge of his duties.

Emigrant Labour Cess.

5. *(1)* In order to meet expenditure incurred in connection with the Controller, the Deputy Controllers and their staff, or under this Act, an annual cess shall be levied to be called the Emigrant Labour Cess.

(2) It shall be paid in respect of the entry into Assam of each assisted emigrant and shall be payable by the employing interest on whose behalf he was recruited.

(3) It shall be levied at such rate, not exceeding nine rupees, for each such emigrant as the [a][Central Government] may by notification in the [b][Official Gazette], determine for the year of levy.

(4) The proceeds of the cess shall be credited to a fund to be called the Emigrant Labour Fund, to be administered by the [a][Central Government].

[a] *Substituted* by A. O. for "Governor General in Council". [b] *Substituted, ibid.*, for "Gazette of India".

Power to make rules for the collection of the Emigrant Labour Cess.

6. *(1)* The [a][Central Government] may, by notification in the [b][Official Gazette], make rules[c]—

(a) prescribing the agency which shall collect the Emigrant Labour Cess;

(b) prescribing the returns to be submitted to such agency by employers of emigrant labourers, and by persons who recruit or forward emigrant labourers, and the form and date of such returns;

(c) regulating the procedure of the collecting agency;

(d) prescribing the mode of payment of the cess;

(e) determining the date when any sum payable as cess shall be an arrear;

(f) declaring that an arrear of cess may be recovered as an arrear of land-revenue and prescribing the procedure to be followed to secure such recovery; and

(g) generally, to secure the equitable collection of the cess.

[a] *Substituted* by A. O for "Governor General in Council". [b] *Substituted* by A. O. for "Gazette of India".

[c] *See* the Tea Districts Emigrant Labour Rules, 1933 Ch. III, *See* Gazette of India, 1933, Pt. I, p. 777 *et seq*, and also as subsequently amended, in the Tea Districts Emigrant Labour Manual.

CHAPTER II.

REPATRIATION.

General right of repatriation after three years in Assam.

7. Every emigrant labourer, on the expiry of three years from the date of his entry into Assam, shall have the right of repatriation as against the employer employing him at such expiry.

Right to repatriation on dismissal.

8. *(1)* Any emigrant labourer who, before the expiry of three years from his entry into Assam, is dismissed by his employer, otherwise than for wilful and serious misconduct, shall have the right of repatriation against such employer.

(2) Where any emigrant labourer is dismissed by his employer before the expiry of three years from his entry into Assam, and his employer refuses or fails to repatriate him, the labourer may apply to the Controller, and the Controller, after such inquiry as he may think fit and after giving the employer an opportunity to be heard, may declare that the labourer has the right of repatriation against such employer

Rights of repatriation of family of deceased emigrant labourer.

9. *(1)* Where an emigrant labourer other than a married woman living with her husband and having no child living with her dies within three years of his entry into Assam, the family of such labourer shall be entitled to be repatriated by the employer last employing him.

(2) Where such deceased labourer leaves a widow, she shall be deemed to be an emigrant labourer in whom a right of repatriation has arisen.

(3) Where there is no such widow, the Controller shall have all powers necessary to enforce the rights of the family under this section, and may take such action as he may deem to be expedient in their interests.

Right to apply for repatriation in certain circumstances.

10. *(1)* An emigrant labourer may, before the expiry of three years from his entry into Assam, apply to the Controller for a declaration of his right to repatriation on any of the following grounds, namely,—

(a) that his state of health makes it imperative that he should leave Assam, or

(b) that his employer has failed to provide him with work suited to his capacity, at the normal rate of wages for that class of work, or

(c) that his employer has unjustly withheld any portion of any wages due to him, or

(d) any other sufficient cause.

(2) An emigrant labourer may, before the expiry of one year from his entry into Assam, apply to the Controller for a declaration of his right to repatriation on any of the following grounds namely,—

(a) that he was recruited by coercion, undue influence, fraud or misrepresentation, or

(b) that he was recruited otherwise than in accordance with the provisions of this Act and the rules made thereunder.

(3) The Controller, after such inquiry as he may think fit and after giving the employer an opportunity to be heard, may declare that an emigrant labourer applying under this section has a right of repatriation against his employer :

Provided that a declaration in pursuance of clause *(d)* of sub-section *(1)* may be made by the Controller only and not by any other officer exercising the powers of the Controller by or under this Act.

Objects and Reasons.

Section 10 (1) (d). — "We consider that it is not possible to provide specifically for all the grounds which might warrant repatriation and that cases of serious hardship may arise which do not satisfy the criteria given in the original Bill. We have therefore provided that the Controller should have power to order repatriation for a cause not specifically provided for in sub-clauses (a), (b) and (c), if in his opinion it is sufficient cause. As a safeguard in the exercise of this very wide power we have provided that it shall only be exercised by the Controller himself and not by another officer exercising the powers of a Controller by or under the Act."—S. C. R.

Power of criminal Courts to order repatriation.

11. Where any employer of an emigrant labourer, or any agent of such employer in authority over such labourer, is convicted of any offence committed against such labourer and punishable under Chapter XVI of the Indian Penal Code with imprisonment for one year or upwards, the convicting Court or the appellate Court or the High Court when exercising its powers of revision may declare that such labourer has a right of repatriation against such employer.

Incidents of the right of repatriation.

12. *(1)* When an emigrant labourer has a right of repatriation against any employer, the employer or his agent shall defray the cost of the return journey of the emigrant labourer and his family from the station nearest the employer's tea estate to the home of the labourer and shall provide subsistence allowances on the prescribed scale for such labourer and his family for the time requisite for him and his family to travel from such estate to his home :

Provided that where the emigrant labourer is a married woman living with her husband who is also an emigrant labourer, her right of repatriation arising under section 7 shall extend only to herself and any children dependent on her :

Provided further that a married woman living with her husband is entitled to be treated as a member of his family notwithstanding that she is herself an emigrant labourer.

(2) In the event of any dispute regarding the cost of the return journey or subsistence allowances, the question shall be referred for decision to the Controller.

The discharge of an employer's duty to repatriate.

13. *(1)* Within fifteen days from the date on which a right of repatriation arises to an emigrant labourer, or within such shorter period as the authority declaring such right may determine, the employer concerned shall, subject to any agreement under section 14, make all necessary arrangements for the homeward journey of the labourer and his family, and shall despatch them on their journey :

Provided that an employer shall not be required to make such arrangements for or any payment in respect of any adult person who does not wish to leave Assam.

(2) Where an employer fails to comply with the provisions of sub-section *(1)*, the right of repatriation of the emigrant labourer concerned shall not be affected, but the employer shall be liable to pay to the labourer one rupee for each day on which he is in default:

Provided that on application made to him by either party the Controller may direct that the labourer shall be paid at a lower rate than one rupee a day or at a higher rate not exceeding two rupees a day, and may also determine the number of days, being a reasonable number regard being had to all the circumstances of the case, for which the payment shall be made.

Postponement, waiver and forfeiture of the right.

14. *(1)* An emigrant labourer may, by agreement with his employer, postpone his exercise of the right of repatriation, or may waive it conditionally or unconditionally, but no such agreement shall be valid unless it is in writing and in the prescribed form and has been made not more than one month before the right of repatriation arises :

Provided that the [a][Central Government] may, by notification in the [b][Official Gazette], make rules requiring that in any area such agreement shall be made in the prescribed manner before a prescribed authority and that the prescribed authority, if satisfied that the labourer understands the terms of his agreement, and his rights in regard to repatriation, shall ratify the agreement :

Provided further that after such rules come into force no such agreement shall be valid unless it is so made and ratified.

(2) Where an emigrant labourer having a right to repatriation fails without reasonable cause to proceed on his homeward journey at the time arranged by his employer, the employer may notify the Controller of such failure, and the Controller, after such inquiry as he may think fit and after giving the labourer an opportunity to be heard, may declare that the labourer has forfeited his right of repatriation, and such labourer shall not be entitled to repatriation again as against any employer, save by an order of the Court under section 11.

[a] *Substituted* by A. O. for "Governor-General in Council". [b] *Substituted* by A. O. for "Gazette of India".

Objects and Reasons

"We consider it desirable to restrict the power of contracting out of the right of repatriation to avoid the possibility of an emigrant labourer so contracting at the time of his first arrival in Assam or long before the right arises. We have also expanded the proviso in the interests of the labourer who should, we consider, be in a position to understand exactly what he is foregoing when waiving his right of repatriation."—S. C. R.

Power of the Controller to enforce the provisions of this Chapter.

15. *(1)* Where the Controller, on information obtained from any source and after such inquiry as he may think fit and after giving the employer concerned an opportunity to be heard, is of opinion that an emigrant labourer is entitled to repatriation under any of the provisions of this Chapter, or is entitled to the payment of any sum of money under the provisions of sub section *(2)* of section 13, the Controller may direct the employer concerned to despatch such labourer and his family or to pay him the sum of money within such period as the Controller may fix.

(2) If the employer fails to comply with such direction, the Controller may repatriate the labourer and his family or pay him the sum of money out of any funds at the Controller's disposal and shall recover the costs incurred from the employer.

(3) For the purposes of such recovery the Controller may certify the costs to be recovered to the Collector, who shall recover the amount and may recover it as an arrear of land-revenue.

(4) The Controller shall have similar powers in regard to any person in Assam who he knows or has reason to believe is a member of the family of a repatriated emigrant labourer who should have been repatriated along with such labourer.

CHAPTER III.

CONTROLLED EMIGRATION AREAS.

Power to declare controlled emigration areas.

16. [a][(1) The Central Government may, by notification in the Official Gazette, declare any area within a recruiting Province to be a controlled emigration area and thereupon the provisions of this Chapter shall apply to that area :

Provided that the Central Government may by the same or any subsequent notification declare that any of the provisions of this Chapter shall not apply in that area, or shall apply subject to such general or special relaxations as may be specified.]

(2) A notification under sub-section *(1)* shall be expressed to take effect from a date not earlier than two months from the date of its publication, and during the said two months licences

may be granted under section 17 and such licences shall be dated as being granted on the date on which the notification takes effect and shall not be valid until that date.

[a] *Substituted* by A. O.

Power to grant licences to local forwarding agents.

17. *(1)* The [a][Central Government], or any District Magistrate empowered by it in this behalf, may grant a licence to any person to act as local forwarding agent in any part of a controlled emigration area, on behalf of an employer or employers of labourers.

(2) Such licences shall be granted only on the application of an employing interest.

(3) No such application shall be entertained unless the Controller has certified that the employing interest making the application has made proper provision, in accordance with section 20 and rules made under section 21, for the forwarding, accommodation and feeding of assisted emigrants on their journey to the tea estates on which they are to be employed.

(4) A local forwarding agent may be granted separate licences on applications by separate employing interests.

[a] *Substituted* by A. O. for "Local Government".

Recruits in controlled emigration areas to be sent to forwarding agents' depots.

18. *(1)* Whoever arranges with any person in a controlled emigration area that such person shall proceed to Assam with assistance, shall take or send such person, along with the members of his family who are to accompany him to Assam, to the depot of a local forwarding agent licensed for the area in which the arrangement was made, unless the arrangement was made at such a depot.

(2) Whoever arranges with any person in an Indian State that such person shall proceed to Assam with assistance and brings or sends such person and any of the members of his family into any controlled emigration area, shall take or send such person and members to the depot of a local forwarding agent licensed for that area.

(3) At every such depot proper arrangements shall be made for the accommodation and feeding of assisted emigrants and their families.

Assisted emigrants to be forwarded to Assam by local forwarding agents by prescribed routes.

19. An assisted emigrant and his family shall be forwarded to Assam from the depot of a local forwarding agent by such agent and only by such routes and in such manner as may be prescribed by rules made under section 37, and shall be accompanied on their journey by a competent person deputed by the local forwarding agent.

Maintenance of depots along prescribed routes.

20. Every employing interest which recruits labour in a controlled emigration area shall maintain or have the right to use depots at reasonable intervals on the prescribed routes by which it forwards assisted emigrants to Assam, for the accommodation and feeding of assisted emigrants and their families.

Power of Central Government to make rules.

21. *(1)* The [a][Central Government] may, by notification in the [b][Official Gazette], make rules[c]—

(a) prescribing the form and particulars of licences to be granted to local forwarding agents, and the annual fees, not exceeding ten rupees, which may be levied from persons holding such licences;

(b) prescribing returns relating to assisted emigrants and their families which shall be made by local forwarding agents and the registers and the form thereof which shall be maintained by such agents;

Section 18— Note 1

[1] The provisions of S. 18 (1) relate only to taking the recruit to the depot; it has no bearing on any inquiry which may be necessary before the recruiter makes the arrangement with the recruit. (Vol 22) 1935 Pat 411 (414).

[2] A person knowingly assisting a married woman, living with her husband, to emigrate as a labourer to a tea garden without the consent of her husband, and despatching her to the tea garden with his name as recruiter comes, not only within the description of S. 18 (1), but also within the description of recruiter in respect of such woman under the provision of S. 32. (Vol 22) 1935 Pat 411 (413).

Section 21 — Note 1

[1] Rule making power is expressed very widely in S. 21 (1) and under it, R. 30 is validly made so far as a woman unaccompanied by her husband is concerned. It makes no difference that the local forwarding agent also incurs liabilities under Rr. 19 and 20 read with R. 32 in respect of "women unaccompanied by their husbands." (Vol 22) 1935 Pat 411 (414).

[2] Case under R. 33 for contravening provisions of R. 30 of the Rules framed by the Local Government under the powers conferred by S. 21 of the Act—Magistrate ought not to proceed upon the minimum number of witnesses with the result that the superior Court may find it necessary to remand the case for further evidence. (Vol 22) 1935 Pat 411 (413).

(c) prescribing the scales of diet which shall be provided for assisted emigrants and their families at depots ;

(d) prescribing the accommodation which shall be provided for assisted emigrants and their families at depots, and the sanitary and medical arrangements at such depots ;

(e) providing for the detention, for a period not exceeding three days, at depots of local forwarding agents of women unaccompanied by their husbands who propose to proceed to Assam as assisted emigrants, and for investigation into their circumstances;

(f) prescribing the information which shall be supplied by local forwarding agents to assisted emigrants regarding the conditions of life and work on tea estates, and the methods in which it shall be supplied ;

(g) providing for any other matter which in the opinion of the [a][Central Government] may be required to give effect to the provisions of this Chapter.

(2) In making rules under clause (b), clause (e), clause (f) or clause (g) of sub-section (1), the [a][Central Government] may provide that a contravention thereof shall be punishable with fine which may extend to one hundred rupees.

[a] *Substituted* by A. O., for "Local Government". [b] *Substituted, ibid,* for "Local Official Gazette". [c] For rules by the various Provinces before 1-4-1937, *see* the Tea Districts Emigrant Labour Manual.

Inspection of depots, vessels and vehicles.

22. (1) The Civil Surgeon, the District Magistrate or the Sub-Divisional Magistrate, or any Magistrate or police officer not below the rank of Inspector, deputed by the District Magistrate or the Sub-Divisional Magistrate, may enter a local forwarding agent's depot, or any depot maintained by an employing interest on a prescribed route to Assam, and inspect the accommodation, feeding arrangements, and sanitary arrangements provided for assisted emigrants and their families and all registers and other documents required to be maintained or kept by or under this Act and shall record the results of such inspection in a book to be kept in such depot for the purpose.

(2) The Civil Surgeon or such Magistrate or person deputed may also enter and inspect any vessel, train or vehicle on which assisted emigrants are travelling, or on which he has reason to believe that any assisted emigrant is travelling, whether along a prescribed route or not.

Action where proper arrangements not made for assisted emigrants.

23. If the [a][Central Government] is satisfied that an employing interest recruiting assisted emigrants in a controlled area is not making proper provision for the forwarding, accommodation or feeding of such emigrants and their families on their journey to Assam, [b][the Central Government may] direct all District Magistrates concerned to cancel or suspend all licences under section 17 held by local forwarding agents on behalf of such employing interest :

Provided that the [a][Central Government] shall not [c][direct the cancellation of any] licences under this section until [d][it] has given the employing interest concerned an opportunity to submit its explanation.

[a] *Substituted* by A. O. for "Governor-General in Council". [b] *Substituted* by A. O. for "he may require the Local Government to". [c] *Substituted* by A. O., for "make any requisition for the cancellation of". [d] *Substituted* by A. O. for "he".

Cancellation of licences.

24 (1) The [a][Central Government] may cancel wholly or in part any licence granted to a local forwarding agent, and a District Magistrate may cancel wholly or in part any licence granted by him to a local forwarding agent,—

(a) if, in the opinion of the [a][Central Government] or of the District Magistrate, as the case may be, such agent has been guilty of misconduct or wilful default or negligence in the discharge of the duties imposed upon him by or under this Act, or

(b) if the employing interest, on whose application the licence was granted, has applied to the [a][Central Government] or to the District Magistrate, as the case may be, for the cancellation of the licence, or

(c) if in the opinion of the [a][Central Government] or of the District Magistrate, as the case may be, an employer on whose behalf the agent is licensed to act has been guilty of misconduct, or wilful default or negligence in the discharge of the duties imposed upon him by or under this Act :

Provided that no licence shall be cancelled under clause (a) until the holder thereof has or under clause (c) until the holder thereof and the employer concerned have had an opportunity to show cause against the cancellation :

Provided further that a cancellation under clause *(c)* shall, where the agent is licensed to act on behalf of more than one employer, operate only to prevent the agent from acting on behalf of the employer held guilty.

(2) A local forwarding agent whose licence has been cancelled by a District Magistrate under clause *(a)* of sub section *(1)*, or any employing interest on whose behalf he acts, may, within three months from the date of the District Magistrate's order, appeal to the [a][Central Government], whose decision shall be final.

[a] *Substituted* by A. O. for "Local Government".

Penalty for illicit abetment of emigration.

25. Where any person who is required to be taken or sent to a local forwarding agent's depot in any district under section 18 leaves that district on his journey to Assam without being so taken or sent, or, being an assisted emigrant, proceeds to Assam otherwise than in accordance with section 19, or by any route other than a route prescribed under section 37, any person who abets him in so leaving the district or in so proceeding to Assam shall be punishable with imprisonment which may extend to six months, or with fine which may extend to five hundred rupees, or with both.

CHAPTER IV

RESTRICTED RECRUITING AREAS.

Power to declare restricted recruiting areas.

26. [a][*(1)* The Central Government may, by notification in the Official Gazette, declare any controlled emigration area or any part of a controlled emigration area within a recruiting Province to be a restricted recruiting area and thereupon the provisions of this Chapter shall apply to that area :

Provided that the Central Government may, by the same or any subsequent notification, declare that any of the provisions of this Chapter shall not apply in relation to that area, or shall apply subject to such general or special relaxations as may be specified.]

(2) A notification under sub-section *(1)* shall be expressed to take effect from a date not earlier than two months from the date of its publication, and during the said two months licences may be granted under section 27 or certificates may be granted and endorsements made under section 28, and such licences, certificates and endorsements shall be dated as being granted or made on the date on which the notification takes effect and shall not be valid until that date.

[a] *Substituted* by A. O.

Grant of licences to recruiters.

27. *(1)* Subject to rules made under sub-section *(2)* and sub-section *(3)*, the District Magistrate may grant a licence to any person to act as recruiter in the whole or any part of his district.

(2) The [a][Central Government] may, by notification in the [b][Official Gazette], make rules prescribing the qualifications for persons who may be granted licences under this section.

(3) [c][The Central Government] may, by notification in the [d][Official Gazette], make rules [e][as respects any restricted recruiting area]—

(a) regulating the procedure of the District Magistrate in granting such licences,

(b) prescribing the form and particulars of such licences, and the fees, not exceeding ten rupees, to be paid therefor.

[a] *Substituted* by A. O. for "Governor-General in Council". [b] *Substituted, ibid.*, for "Gazette of India". [c] *Substituted, ibid.*, for "The Local Government having jurisdiction over any restricted recruiting area". [d] *Substituted, ibid*, for "Local Official Gazette". [e] *Inserted, ibid.*

Grant of certificates to garden-sardars.

28. *(1)* Subject to rules made under sub-section *(2)*, the owner or manager of a tea estate may grant a certificate to any person employed on such estate as a labourer or in a position of supervision or management empowering him to recruit labour for such estate in the whole or any part of a restricted recruiting area, and such person shall thereupon be entitled to recruit labour for such estate as a garden-sardar in the area specified :

Provided that [a][the Central Government] may, by notification in the [b][Official Gazette], make rules [c][as respects any restricted recruiting area] directing that certificates of garden-sardars or of specified classes of garden-sardars shall not be valid in any district in any such area until they have been endorsed as valid for that district by the District Magistrate or a Magistrate authorised by the District Magistrate in this behalf.

(2) The [d][Central Government] may make rules [c][for Assam]—

(a) regulating the procedure of owners and managers in granting and withdrawing such certificates,

(b) prescribing the form and particulars of such certificates.

[a] *Substituted* by A. O. for "the Local Government having jurisdiction over any restricted recruiting area". [b] *Substituted, ibid.*, for "Local Official Gazette". [c] *Inserted, ibid.* [d] *Substituted, ibid.*, for "Local Government of Assam".

Cancellation and suspension of recruiter's licence.

29. The District Magistrate may, for reasons to be recorded by him, cancel or suspend the licence of a recruiter on the ground of his misconduct or wilful neglect or default in the discharge of the duties imposed on him by or under this Act :

Provided that no licence shall be cancelled under this section until the holder thereof has had an opportunity of showing cause against the cancellation.

Cancellation of garden-sardar's certificate.

30. *(1)* The District Magistrate of any district in respect of any part of which a garden-sardar holds a certificate may cancel the certificate if he is satisfied that the garden-sardar has contravened any of the provisions of this Act or of the rules made thereunder.

(2) A District Magistrate cancelling a certificate under sub-section *(1)* shall record his reasons, and shall send intimation of his action to the District Magistrate of every other district in respect of any part of which the certificate was valid and to the person who granted the certificate.

Penalty for illicit recruitment.

31. Whoever, not being a licensed recruiter holding a licence under section 27, or a garden-sardar holding a valid certificate under section 28, or a local forwarding agent holding a licence under section 17, in any part of a restricted recruiting area gives or offers any money or goods to any person, or defrays or offers to defray any travelling expenses of any person, as an inducement to such person to proceed to Assam as an assisted emigrant, shall be punishable with imprisonment which may extend to six months, or with fine which may extend to five hundred rupees, or with both.

CHAPTER V.

SUPPLEMENTAL.

Prohibition of the recruitment of children.

32. *(1)* No person shall in any way assist a child to proceed from any recruiting Province to Assam, to work in any capacity on a tea estate, unless such child is accompanied by a parent or other adult relative on whom he is dependent and no person shall so assist a married woman who is living with her husband unless she is so proceeding with the consent of her husband.

(2) Any person who knowingly contravenes the provisions of this section shall be punishable with imprisonment which may extend to six months, or with fine which may extend to five hundred rupees, or with both.

Power to detain and return sick persons.

33. *(1)* Where it appears to the Controller that any person proceeding to a tea garden with assistance, or any member of the family of such person, is suffering from an infectious or contagious disease, or is not in a fit state of health to proceed on his journey, the Controller may—

(a) detain such person and his family,

(b) send the sufferer for medical treatment to a hospital or dispensary or other suitable place, and

(c) cause all necessary arrangements to be made for the accommodation and feeding of the other members of the party so detained,

and all arrangements for such detention and treatment shall be made by and at the cost of the employing interest on whose behalf such person was recruited.

(2) Where it appears that a sufferer detained under sub-section *(1)* is not likely to be in a fit state of health to proceed on his journey within a reasonable time, the Controller may direct that he and the other members of his party detained with him shall be returned to the home of the person proceeding with assistance by and at the cost of the employing interest on whose behalf such person was recruited.

Power to return person improperly recruited.

34. Where it appears to the Controller after such inquiry as he thinks fit to make that any person proceeding to a tea estate with assistance—

(a) has been recruited by coercion, undue influence, fraud or misrepresentations, or

(b) has been recruited or forwarded otherwise than in accordance with the provisions of this Act and the rules made thereunder,

the Controller may direct that such person and his family shall if such person so desires be returned to his home by and at the the cost of the employing interest on whose behalf he was recruited.

Power to enforce the provisions of sections 33 and 34.

35. *(1)* If an employing interest fails to make arrangements to the satisfaction of the Controller for the detention or treatment of any person detained under sub-section *(1)* of section 33, the Controller may himself make such arrangements and defray the cost out of any funds at his disposal.

(2) In making a direction under sub-section *(2)* of section 33 or under section 34 the Controller may fix a period within which such person and family shall be forwarded by the employing interest concerned, and shall send a copy of his direction to the employing interest concerned, and to the nearest agent, if any, of such employing interest in the Province where such person then is.

(3) If the employing interest fails to comply with the direction within the time fixed, the Controller may cause such person and his family to be returned to his home and defray the cost out of any funds at the Controller's disposal.

(4) The Controller shall recover any costs incurred by him under this section from the employing interest concerned, and for the purposes of such recovery may certify the costs to be recovered to the Collector of any district in which a tea estate belonging to the employing interest concerned, or to any member thereof, is situated, and the Collector shall recover the amount and may recover it as an arrear of land-revenue.

(5) Any costs so certified may, where the employing interest concerned is a group or association of employers, be recovered from any one of such employers.

Magistrates and medical officers who may exercise the powers of the Controller.

36. *(1)* Subject to the provisions of sub-section *(3)* of section 10, any District Magistrate in Assam may exercise in respect of his district any power which the Controller by or under this Act could exercise in such district.

(2) The Controller may transfer any proceeding under Chapter II pending before him to the District Magistrate having jurisdiction under sub-section *(1)* to dispose of it.

(3) [a][The Central Government may invest a District Magistrate or a Sub-Divisional Magistrate in any recruiting Province and a Sub-Divisional Magistrate in Assam] with any of the powers of the Controller under section 4 or section 33 or section 34 or section 35 in respect of his district or sub-division, as the case may be.

(4) The [b][Central Government] may invest any medical officer not below the rank of Assistant Surgeon with any of the powers of the Controller under section 33 and section 35.

[a] *Substituted* by A. O. for "The Local Government of a recruiting province may invest a District Magistrate or a Sub-Divisional Magistrate and the Local Government of Assam may invest a Sub-Disvisional Magistrate."

[b] *Substituted, ibid,* for "Local Government."

Power of Central Government to make rules.

37. *(1)* The [a][Central Government] may, by notification in the [b][Official Gazette], make rules[c]—

(a) regulating the procedure of the Controller and of persons exercising the powers of the Controller in the exercise of their powers under this Act;

(b) where there are more authorities than one exercising any of the powers of the Controller in the same area, regulating the exercise of their powers by such authorities;

(c) prescribing scales of subsistence allowances for the purposes of section 12;

(d) prescribing the form of agreements under section 14;

(e) prescribing the routes by which assisted emigrants may be forwarded from districts in controlled emigration areas to tea districts;

(f) prescribing the manner in which assisted emigrants and their families shall be forwarded to Assam from the depots of local forwarding agents;

(g) prescribing the action to be taken by local forwarding agents and by persons in charge of depots on prescibed routes where an assisted emigrant or a member of his family appears to be suffering from infectious or contagious disease or where an assisted emigrant appears to have been recruited by coercion, undue influence, fraud or misrepresentation,

or to have been recruited or forwarded otherwise than in accordance with the provisions of this Act and the rules made thereunder ;

(*h*) directing that employers of emigrant labourers shall keep registers of such labourers and their families, and prescribing the form of such registers ;

(*i*) directing that employing interests which recruit emigrant labourers shall keep registers of such labourers and their families, and of their journeys to and from Assam, and prescribing the form of such registers ;

(*j*) requiring employers of emigrant labourers and employing interests which recruit emigrant labourers to submit such return in respect of such labourers as the [a][Central Government] may think expedient for carrying out the purposes of this Act ; and

(*k*) generally, to carry out the purposes of this Act.

(*2*) The [d][Central Government] may, by notification in the [e][Official Gazette], make rules [f][for Assam] requiring employers of labourers on tea estates to submit returns of wages and earnings of labourers employed by them.

(*3*) [g][Rules made under this section] may provide that a contravention thereof shall be punishable with fine which may extend to five hundred rupees.

[a] *Substituted* by A. O. for "Governor-General in Council." [b] *Substituted, ibid,* for "Gazette of India". [c] *See* the Tea Districts Emigrant Labour Rules, 1933, in Gazette of India, 1933, Pt I, p. 771 *et. seq.*, as subsequently amended. [d] *Substituted* by A. O., for "Local Government of Assam." [e] *Substituted* by A. O. for "Local Official Gazette". [f] *Inserted, ibid* [g] *Substituted, ibid,* for "In making rules under sub-section (*1*), the Governor-General in Council, and in making rules under sub-section (*2*), the Local Government."

Powers to extend the scope of this Act.

38. (*1*) The [a][Central Government] may, by notification in the [b][Official Gazette], declare that the provisions of this Act shall apply in respect of any lands and premises in Assam other than tea estates, and thereupon the provisions of this Act shall apply in all respects to such lands and premises as if they were tea estates.

(*2*) [c][The Central Government] may, by notification in the [d][Official Gazette], declare that the provisions of this Act shall apply in any area in Assam other than the districts specified in clause (*a*) of section 2, and thereupon the provisions of this Act shall apply in all respects to such area as if it were a tea district.

[a] *Substituted* by A. O for 'Governor-General in Council". [b] *Substituted* by A. O. for "Gazette of India". [c] *Substituted* by A. O. for " Subject to the control of the Governor General in Council, the Local Government of Assam"· [d] *Substituted* by A. O. for "Local Official Gazette".

Saving for acts done in good faith under the Act.

39. No suit, prosecution or other legal proceeding shall lie against any person for anything which is in good faith done or intended to be done under this Act.

Bar of jurisdiction of Civil Courts.

40. No Civil Court shall have jurisdiction —

(*a*) to deal with or decide any question which the Controller is, by or under this Act, empowered to deal with or to decide, or

(*b*) to enforce any liability incurred under this Act.

41. [Repeal of Act VI of 1901 and certain consequences.] *Repealed by the Repealing and Amending Act, 1937 (20 [XX] of 1937), S. 3 and Sch. II.*

THE SCHEDULE.—Repealed by the Repealing and Amending Act, 1937 (20 [XX] of 1937), S. 3 and Sch. II.

[THE INDIAN] TELEGRAPH ACT, 1885

(ACT XIII OF 1885)

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Statement of Objects and Reasons.

"The main object of this Bill is to give power to the Government, and to any company or person licensed under section 4 of the Indian Telegraph Act, 1876, and specially empowered in this behalf, to place telegraph lines under or over property belonging whether to private persons or to public bodies.

The attention of the Government has recently been directed to the fact that, as the law now stands, the Governor-General in Council and his licensees have no power to place telegraph lines upon the land of municipal or other similar bodies or of private persons. In England the requisite powers are conferred on the Postmaster-General, who works and maintains the telegraphs in that country, by 26 and 27 Vic., cap. 112, as amended by 41 and 42 Vic., cap. 76; and as it seems desirable that the Government in which the exclusive privilege of establishing telegraphs in this country is vested should possess somewhat similar powers, the present Bill has been prepared.

Section 3 empowers the Government or any company or person licensed under section 4 of the Indian Telegraph Act, 1876, and specially authorized by a Government officer to place and maintain telegraph lines and posts under, over, along, across, in or upon the property of any "person", which term includes a body corporate. It is considered that licensees should have

these powers, because the licenses granted always strictly limit the area of the operations of the licensees, and it would be somewhat anomalous for local bodies and private persons to have the power to neutralize the licenses granted by the Governor General in Council by objecting to the licensees' operations, or by hampering them by the exaction of fees for permission to work under their licenses. The powers thus given are, however, to be exercised so as to do as little damage as possible, and their exercise is moreover made subject to important restrictions and conditions.

When the property belongs to a municipal board or other local authority, the powers conferred by the Act cannot be exercised over it without the consent of that authority; and that consent may be given subject to conditions. Among other conditions which can be imposed is one requiring that any expenses to which the local authority may be put by the exercise of the power shall be made good ; but it will be observed that no provision is made for the payment of compensation on any other account to a local authority whose property is made use of for this purpose, it being considered that, as the construction of telegraphs is a matter in which the public are interested, no charge should be made for accommodation of this sort when it can be granted without inconvenience to the public or expense to the local authority concerned.

It may sometimes happen that, though at the time when a telegraph authority desires to exercise its powers over some property of a local authority there may be no reasonable ground for objecting, and the local authority may thus find itself compelled to consent, a state of things may subsequently arise under which the continued exercise of the powers would be felt as a grave public inconvenience or a cause of serious loss. Land, e. g., which was waste at the time the telegraph line was constructed over it might afterwards be required for some important public object or might acquire great value for building purposes, and, as no compensation (except for actual expenses out of pocket) would have been paid to the local authority at the time the line was constructed, it is but just that provision should be made for the removal or alteration of the line in such an event. This accordingly is done by section 5 of the Bill, which empowers the local authority to call upon the telegraph authority to remove or alter its telegraph or post, and, in the event of the telegraph authority refusing or neglecting to do so, gives an appeal to the Local Government.

In the event, which it is believed will be rare, of a local authority arbitrarily refusing its consent to the exercise by a telegraph authority of the powers conferred by the Bill or clogging its consent with unreasonable conditions, it will (section 7) be open to the telegraph authority to appeal to the Local Government, whose decision will be final.

Turning now to the case in which it may be desired to exercise the powers given by the Bill over the property of private persons, it will be seen that here provision is made for the payment of full compensation, the amount of which in the event of dispute will (section 9) be determined by the Civil Court, and that, in the event of a person upon whose property a telegraph line or post has been placed desiring subsequently to deal with the property in such a way as would make it necessary or convenient that the line or post should be removed to another part of it or to a higher or lower level or altered in form, he can (section 10) tender the cost of the work and call upon the telegraph authority to remove or alter the line or post, and, if that authority refuses to do so, can appeal to the Civil Court.

It may be observed, however, that in practice in this country the power of taking telegraph lines through private property is not likely to be exercised either by the Government or by its licensees except on rare occasions, and then as a rule only to the extent of crossing with the wire, a post being scarcely ever erected on private land. Private property has hitherto been always avoided as much as possible, and it is likely to be still more carefully avoided in future if it is made clear, as it is proposed to do by this Bill, that full compensation will have to be paid for exercising the power over private and not for exercising it over public property.

The present opportunity has been taken to make three amendments of the Indian Telegraph Act, 1876, which experience has shown to be desirable. The first has for its object the emendation of the definition of "telegraph" so as to bring it into more exact conformity with the construction put upon the definitions in the English Acts by a recent decision of the High Court of Justice in England.

The second is intended to provide for the regulation of telegraph lines constructed by the Government but leased to companies or individuals by whom they are worked. The position of such lines under the Act as it at present stands is far from clear, and the object of the amendment proposed in section 12 of the Bill is to put them on much the same footing as licensed lines.

The object of the third amendment, which is made by section 13 of the Bill, is to prescribe penalties for the breach of the rules made under section 8 of the Act for the conduct of telegraphs worked under license or lease. In such cases, as the Act now stands, the only remedy is to revoke the license or lease, but this course would in most cases cause such great public inconvenience that it is impracticable. The result is that at present there is virtually no penalty for the infringement of the rules made under section 8 of the Act. To remedy this state of things, the Bill adds a clause to that section empowering the Governor-General in Council to prescribe by the rules moderate fines for the breach of them."

—*Gazette of India, 1884, Part V, P. 483.*

Extract from Select Committee Report.

"We are of opinion that it would be for the convenience of the Telegraph Department and the public that Act I of 1876 should be repealed and re-enacted with most of the modifications and additions proposed by the Bill as introduced. We have accordingly re-drawn the Bill as a consolidating measure."

—*Gazette of India, 1885, Part IV, page 192.*

Act how affected by subsequent legislation.

—Amended by Acts 11 of 1888; 7 of 1914; 14 of 1914; 27 of 1930.
—Adapted by A. O.
—*Repealed* in part by Act 1 of 1938.

Cognate Acts and Provisions.

1. INDIAN WIRELESS TELEGRAPHY ACT, XVII OF 1933.

[THE INDIAN] TELEGRAPH ACT, 1885.

(ACT XIII OF 1885)[a]

[22nd July, 1885.]

An Act to amend the law relating to Telegraphs in India.

WHEREAS it is expedient to amend the law relating to telegraphs in India; It is hereby enacted as follows:—

[a] For Statement of Objects and Reasons, *see* Gazette of India, 1884, Pt. V, p. 481; for Report of the Select Committee, *see ibid.*, 1885, Pt. IV, p. 192.

The Act was *declared* in force in the Sonthal Parganas by the Sonthal Parganas Settlement Regulation (3 of 1872), S. 3; in British Baluchistan by the British Baluchistan Laws Regulation, 1913 (2 of 1913), S. 3 and Sch.; in the Khondmals District by the Khondmals Laws Regulation, 1936 (4 of 1936), S. 3 and Sch.; and in Angul District by the Angul Laws Regulation, 1936 (5 of 1936), S. 3 and Sch.

PART I: PRELIMINARY.

Short title, local extent and commencement.

1. *(1)* This Act may be called the Indian Telegraph Act, 1885.

[a][*(2)* It extends to the whole of British India, including the Sonthal Parganas and the Pargana of Spiti, and it applies also to—

(a) all native Indian subjects of His Majesty in any place without and beyond British India,

(b) all other British subjects within the territories of any [b][Indian State], and

(c) all servants of the King, whether British subjects or not within the territories of [b][Indian State].]

(3) It shall come into force on the first day of October, 1885.

[a] *Substituted* by the Indian Telegraph (Amendment) Act, 1914 (VII [7] of 1914), S. 2. [b] *Substituted* by A. O. for "Native State in India".

2. [Repeal and savings.] *Repealed by the Repealing Act, 1938 (1 [I] of 1938), S. 2 and Sch.*

Definitions.

3. In this Act, unless there is something repugnant in the subject or context,—

(1) "telegraph" means an electric, galvanic or magnetic telegraph, and includes appliances and apparatus for [a][making, transmitting or receiving] telegraphic, telephonic or other communications by means of electricity, galvanism or magnetism:

(2) "telegraph officer" means any person employed either permanently or temporarily in connection with a telegraph established, maintained or worked by [b][the Central Government] or by a person licensed under this Act:

(3) "message" means any communication sent by telegraph, or given to a telegraph officer to be sent by telegraph or to be delivered:

(4) "telegraph line" means a wire or wires used for the purpose of a telegraph, with any casing, coating, tube or pipe enclosing the same, and any appliances and apparatus connected therewith for the purpose of fixing or insulating the same:

(5) "post" means a post, pole, standard, stay, strut or other above-ground contrivance for carrying, suspending or supporting a telegraph line:

(6) "telegraph authority" means the Director General of [c][Posts and Telegraphs,] and includes any officer empowered by him to perform all or any of the functions of the telegraph authority under this Act:

(7) "local authority" means any municipal committee, district board, body of port commissioners or other authority legally entitled to, or entrusted by [b][the Central or any Provincial Government] with, the control or management of any municipal or local fund.

[a] *Substituted* by the Indian Telegraph (Amendment) Act, 1914 (VII [7] of 1914), S. 3, for "transmitting or making". [b] *Substituted* by A. O. for "the Government". [c] *Substituted* by the Indian Post Office and Telegraph (Amendment) Act, 1914 (XIV [14] of 1914), S. 2, for "Telegraphs",

PART II.

PRIVILEGES AND POWERS OF THE GOVERNMENT.

Exclusive privilege in respect of telegraphs, and power to grant licenses.

4. [a][*(1)*] Within British India, the [b][Central Government] shall have the exclusive privilege of establishing, maintaining and working telegraphs:

Section 3 — Note 1

[1] "Telegraph" includes radio. (Vol 30) 1943 Nag 143 (144): I L R (1943) Nag 344: 44 Cri L Jour 402 (DB). [See however (Vol 25) 1938 Mad 821 (821): 39 Cri. L Jour 991. (Section 4 could not have been intended to include wireless sets used ordinarily to receive broadcast programmes.)]

Provided that the [b][Central Government] may grant a license, on such conditions and in consideration of such payments as [c][it] thinks fit, to any person to establish, maintain or work a telegraph within any part of British India:

[a][Provided further that the [b][Central Government] may, by rules made under this Act and published in the [d][Official Gazette], permit, subject to such restrictions and conditions as [c][it] thinks fit, the establishment, maintenance and working—

(a) of wireless telegraphs on ships within Indian territorial waters [e][and on aircraft within or above British India, or Indian territorial waters], and

(b) of telegraphs other than wireless telegraphs within any part of British India.

(2) The [b][Central Government] may, by notification in the [d][Official Gazette], delegate to the telegraph authority all or any of [f][its] powers under the first proviso to sub-section *(1)*.

The exercise by the telegraph authority of any power so delegated shall be subject to such restrictions and conditions as the [a][Central Government] may, by the notification, think fit to impose.]

[a] *Inserted* by the Indian Telegraph (Amendment) Act, 1914 (7 [VII] of 1914), S. 4. [b] *Substituted* by A. O. for "Governor-General in Council." [c] *Substituted* by A. O. for "he." [d] *Substituted* by A. O. for "Gazette of India." [e] *Inserted* by the Indian Telegraph (Amendment) Act, 1930 (27 [XXVII] of 1930). [f] *Substituted* by A. O. for "his."

Power for Government to take possession of licensed telegraphs and to order interception of messages.

5. *(1)* On the occurrence of any public emergency, or in the interest of the public safety, the [a][Central Government] or a [b][Provincial Government], or any officer specially authorized in this behalf [c][by the Central or a Provincial Government], may—

(a) take temporary possession of any telegraph established, maintained or worked by any person licensed under this Act; or

(b) order that any message or class of messages to or from any person or class of persons or relating to any particular subject brought for transmission by, or transmitted or received by, any telegraph, shall not be transmitted, or shall be intercepted or detained, or shall be disclosed to [d][the Government making the order] or an officer thereof mentioned in the order.

(2) If any doubt arises as to the existence of a public emergency, or whether any act done under sub-section *(1)* was in the interest of the public safety, [e][a certificate of the Central or, as the case may be, the Provincial Government] shall be conclusive proof on the point

[a] *Substituted* by A. O. for "Governor-General in Council." [b] *Substituted* by A. O. for "Local Government." [c] *Substituted* by A. O. for the "Governor-General in Council." [d] *Substituted* by A. O. for "the Government." [e] *Substituted* by A. O. for "a certificate signed by a Secretary to the Government of India or to the Local Government."

Power to establish telegraph on land of Railway Company.

6. Any Railway Company, on being required so to do by the [a][Central Government], shall permit the Government to establish and maintain a telegraph upon any part of the land of the Company, and shall give every reasonable facility for working the same.

[a] *Substituted* by A. O. for "Governor-General in Council."

Power to make rules for the conduct of telegraphs.

7. *(1)* The [a][Central Government] may, from time to time, by notification in the [b][Official Gazette], make rules[c] consistent with this Act for the conduct of all or any telegraphs established, maintained or worked by the Government or by persons licensed under this Act.

(2) Rules under this section may provide for all or any of the following, among other matters, that is to say:—

(a) the rates at which, and the other conditions and restrictions subject to which, messages shall be transmitted;

(b) the precautions to be taken for preventing the improper interception or disclosure of messages;

(c) the period for which, and the conditions subject to which, telegrams and other documents belonging to, or being in the custody of, telegraph officers shall be preserved; and

(d) the fees to be charged for searching for telegrams or other documents in the custody of any telegraph officer.

(3) When making rules for the conduct of any telegraph established, maintained or worked by any person licensed under this Act, the [a][Central Government] may, by the rules, prescribe fines for any breach of the same:

Provided that the fines so prescribed shall not exceed the following limits, namely :—

(i) when the person licensed under this Act is punishable for the breach, one thousand rupees, and in the case of a continuing breach a further fine of two hundred rupees for every day after the first during the whole or any part of which the breach continues;

(ii) when a servant of the person so licensed, or any other person, is punishable for the breach, one fourth of the amounts specified in clause (i).

[a] *Substituted* by A. O. for "Governor-General in Council." [b] *Substituted* by A. O. for "Gazette of India." [c] *See* the Indian Telegraph Rules, 1932 in the Gazette of India, 1932, Part I, page 331.

Revocation of licenses.

8. The [a][Central Government] may, at any time, revoke any license granted under section 4, on the breach of any of the conditions therein contained, or in default of payment of any consideration payable thereunder.

[a] *Substituted* by A. O. for "Governor-General in-Council."

Crown not responsible for loss or damage.

9. The [a][Crown] shall not be responsible for any loss or damage which may occur in consequence of any telegraph officer failing in his duty with respect to the receipt, transmission or delivery of any message; and no such officer shall be responsible for any such loss or damage unless he causes the same negligently, maliciously or fraudulently.

[a] *Substituted* by A. O. for "Secretary of State for India in Council".

PART III.

POWERS TO PLACE TELEGRAPH LINES AND POSTS.

Power for telegraph authority to place and maintain telegraph lines and posts.

10. The telegraph authority may, from time to time, place and maintain a telegraph line under, over, along or across, and posts in or upon, any immoveable property:

Provided that—

(a) the telegraph authority shall not exercise the powers conferred by this section except for the purposes of a telegraph established or maintained by the [a][Central Government], or to be so established or maintained;

(b) the [a][Central Government] shall not acquire any right other than that of user only in the property under, over, along, across, in or upon which the telegraph authority places any telegraph line or post; and

(c) except as hereinafter provided, the telegraph authority shall not exercise those powers in respect of any property vested in or under the control or management of any local authority, without the permission of that authority; and

(d) in the exercise of the powers conferred by this section, the telegraph authority shall do as little damage as possible, and, when it has exercised those powers in respect of any property other than that referred to in clause (*c*), shall pay full compensation to all persons interested for any damage sustained by them by reason of the exercise of those powers.

[a] *Substituted* by A. O. for "Government."

Power to enter on property in order to repair or remove telegraph lines or posts.

11. The telegraph authority may, at any time, for the purpose of examining, repairing, altering or removing any telegraph line or post, enter on the property under, over, along, across, in or upon which the line or post has been placed.

Provisions applicable to Property vested in or under the Control or Management of Local Authorities.

Power for local authority to give permission under section 10, clause *(c)*, subject to conditions.

12. Any permission given by a local authority under section 10, clause *(c)*, may be given subject to such reasonable conditions as that authority thinks fit to impose, as to the payment of any expenses to which the authority will necessarily be put in consequence of the exercise of the powers conferred by that section, or as to the time or mode of execution of any

Section 10 — Note 1

[1] Section 10 (d) gives the telegraph authority power to lay a telegraph line upon any immovable property and to do the necessary damage for the proper laying of the lines. It is authorised to pay full compensation to all persons interested for any damages sustained by them by reason of the exercise of those powers. (Vol 27) 1947 Mad 900 (900).

work, or as to any other thing connected with or relative to any work undertaken by the telegraph authority under those powers.

Power for local authority to require removal or alteration of telegraph line or post.

13. When, under the foregoing provisions of this Act, a telegraph line or post has been placed by the telegraph authority under, over, along, across, in or upon any property vested in or under the control or management of a local authority, and the local authority, having regard to circumstances which have arisen since the telegraph line or post was so placed, considers it expedient that it should be removed or that its position should be altered, the local authority may require the telegraph authority to move it or alter its position, as the case may be.

Power to alter position of gas or water pipes or drains.

14. The telegraph authority may, for the purpose of exercising the power conferred upon it by this Act in respect of any property vested in or under the control or management of a local authority, alter the position thereunder on any pipe (not being a main) for the supply of gas or water, or of any drain (not being a main drain) :

Provided that—

(a) when the telegraph authority desires to alter the position of any such pipe or drain, it shall give reasonable notice of its intention to do so, specifying the time at which it will begin to do so, to the local authority, and, when the pipe or drain is not under the control of the local authority, to the person under whose control the pipe or drain is;

(b) a local authority or person receiving notice under clause *(a)* may send a person to superintend the work, and the telegraph authority shall execute the work to the reasonable satisfaction of the person so sent.

Disputes between telegraph authority and local authority.

15. *(1)* If any dispute arises between the telegraph authority and a local authority in consequence of the local authority refusing the permission referred to in section 10, clause *(c)*, or prescribing any condition under section 12, or in consequence of the telegraph authority omitting to comply with a requisition made under section 13, or otherwise in respect of the exercise of the powers conferred by this Act, it shall be determined by such officer as the [a][Central Government] may appoint either generally or specially in this behalf.

(2) An appeal from the determination of the officer so appointed shall lie to the [a][Central Government]; and the order of the [a][Central Government] shall be final.

[a] *Substituted* by A. O. for "Local Government."

Provisions applicable to other Property.

Exercise of powers conferred by section 10, and disputes as to compensation in case of property other than that of a local authority.

16. *(1)* If the exercise of the powers mentioned in section 10 in respect of property referred to in clause (*d*) of that section is resisted or obstructed, the District Magistrate may, in his discretion, order that the telegraph authority shall be permitted to exercise them,

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Section 16 — Note 1

[1] A claim for compensation should be promptly settled. If the owner of land chooses to sleep over his rights so as to make it difficult for the Court to decide as to what amount of compensation should have been offered in the first instance, the application may become liable to dismissal on this ground. (Vol 29) 1942 Lah 186 (190): I L R (1943) Lah 677 (DB).

[2] Hydro-Electric Department erecting aerial line span over petitioner's land and refusing compensation — Application under S. 16 to the District Judge — Refusal of application on the ground that the petitioner should have applied to the District Magistrate for the removal of line first before approaching Court on the question of compensation : *Held* that S. 17 referred only to re-payment of compensation already paid and not to payment of compensation to the owner and that it was not necessary for the owner to apply for removal of line before asking Court for compensation. (Vol 22) 1935 Lah 982 (983) : 17 Lah 391.

[3] Article 181 of the Limitation Act, does not apply to applications under S. 16 of this Act. They cannot therefore be rejected as time-barred under any of the provisions of the Limitation Act. (Vol 29) 1942 Lah 186 (189) : ILR (1943) Lah 677 (DB).

[4] The District Judge acts as a civil Court in dealing with applications for compensation under S. 16 (3) (Vol 29) 1942 Lah 186 (187):ILR (1943) Lah 677 (DB).

[5] Section 16 does not refer to the sufficiency of the compensation actually paid but to the sufficiency of the compensation to be paid under S 10. If damage is actually caused and Government proposes to pay nothing, while the other party insists that substantial damage has been done, then there is clearly a dispute with regard to the sufficiency of the compensation to be paid under S. 10, and the District Judge has jurisdiction to entertain an application for compensation by the party aggrieved. (Vol 29) 1942 Lah 186 (188) : ILR (1943) Lah 677 (DB).

[6] The Act does not refer to damage to property. It refers to damage sustained by any person interested through exercise of special powers vested in Department, and a depreciation in the value of land would be damage sustained by the owner. (Vol 22) 1935 Lah 982 (983) : 17 Lah 391.

[7] High Court has power to entertain petition for revision of order passed by District Judge under S. 16. (Vol 29) 1942 Lah 186 (187) : I L R (1943) Lah 677 (DB).

(2) If, after the making of an order under sub-section *(1)*, any person resists the exercise of those powers, or, having control over the property, does not give all facilities for their being exercised, he shall be deemed to have committed an offence under section 188 of the Indian Penal Code.

(3) If any dispute arises concerning the sufficiency of the compensation to be paid under section 10, clause *(d)*, it shall on application for that purpose be either of the disputing parties to the District Judge within whose jurisdiction the property is situate, be determined by him.

(4) If any dispute arises as to the persons entitled to receive compensation or as to the proportions in which the persons interested are entitled to share in it, the telegraph authority may pay into the Court of the District Judge such amount as he deems sufficient, or, where all the disputing parties have in writing admitted the amount tendered to be sufficient or the amount has been determined under sub-section *(3)*, that amount; and the District Judge, after giving notice to the parties and hearing such of them as desire to be heard, shall determine the persons entitled to receive the compensation or, as the case may be, the proportions in which the persons interested are entitled to share in it.

(5) Every determination of a dispute by a District Judge under sub-section *(3)* or sub-section *(4)* shall be final :

Provided that nothing in this sub-section shall affect the right of any person to recover by suit the whole or any part of any compensation paid by the telegraph authority from the person who has received the same.

Removal or alteration of telegraph line or post on property other than that of a local authority.

17. *(1)* When, under the foregoing provisions of this Act, a telegraph line or post has been placed by the telegraph authority under, over, along, across, in or upon any property, not being property vested in or under the control or management of a local authority, and any person entitled to do so desires to deal with that property in such a manner as to render it necessary or convenient that the telegraph line or post should be removed to another part thereof or to a higher or lower level or altered in form, he may require the telegraph authority to remove or alter the line or post accordingly :

Provided that, if compensation has been paid under section 10, clause *(d)*, he shall, when making the requisition, tender to the telegraph authority the amount requisite to defray the expense of the removal or alteration, or half of the amount paid as compensation, whichever may be the smaller sum.

(2) If the telegraph authority omits to comply with the requisition, the person making it may apply to the District Magistrate within whose jurisdiction the property is situate to order the removal or alteration.

(3) A District Magistrate receiving an application under sub-section *(2)* may, in his discretion, reject the same or make an order absolutely or subject to conditions, for the removal of the telegraph line or post to any other part of the property or to a higher or lower level, or for the alteration of its form; and the order so made shall be final.

Provisions applicable to all Property.

Removal of trees interrupting telegraphic communication.

18. *(1)* If any tree standing or lying near a telegraph line interrupts, or is likely to interrupt telegraphic communication, a Magistrate of the first or second class may on the application of the telegraph authority, cause the tree to be removed or dealt with in such other way as he deems fit.

(2) When disposing of an application under sub-section *(1)*, the Magistrate shall, in the case of any tree in existence before the telegraph line was placed, award to the persons interested in the tree such compensation as he thinks reasonable, and the award shall be final.

Section 17 — Note 1

[1] The proceedings under S. 17 are governed by Art. 181, Limitation Act. (Vol 22) 1935 Lah 982 (983): 17 Lah 391.

Section 18 — Note 1

[1] Section 18 does not authorise direct action on the part of the telegraph authorities. Where a line is laid across a tope it may be necessary first of all to cut down certain trees in order that the line might be laid. Then it may be desirable to cut down certain more trees because of their proximity to the line so as to constitute potential danger to it. In such cake the engineer should apply to the Magistrate who would have to use his discretion as to what trees the owner is bound to clear away. (Vol 27) 1940 Mad 900 (900). (Where engineer directly acts he must award compensation.)

Telegraph lines and posts placed before the passing of this Act.

19. Every telegraph line or post placed before the passing of this Act under, over, along across, in or upon any property, for the purposes of a telegraph established or maintained by the [a][Central Government], shall be deemed to have been placed in exercise of the powers conferred by, and after observance of all the requirements of, this Act.

[a] *Substituted* by A. O. for "Government".

Person exercising legal right likely to damage telegraph or interfere with telegraphic communication to give notice.

[a][**19A.** *(1)* Any person desiring to deal in the legal exercise of a right with any property in such a manner as is likely to cause damage to a telegraph line or post which has been duly placed in accordance with the provisions of this Act, or to interrupt or interfere with telegraphic communication, shall give not less than one month's notice in writing of the intended exercise of such right to the telegraph authority, or any telegraph officer whom the telegraph authority may empower in this behalf.

(2) If any such person without having complied with the provisions of sub-section *(1)* deals with any property in such a manner as is likely to cause damage to any telegraph line or post, or to interrupt or interfere with telegraphic communication, a Magistrate of the first or second class may, on the application of the telegraph authority, order such person to abstain from dealing with such property in such manner for a period not exceeding one month from the date of his order and forthwith to take such action with regard to such property as may be in the opinion of the Magistrate necessary to remedy or prevent such damage, interruption or interference during such period.

(3) A person dealing with any property in the manner referred to in sub-section *(1)* with the *bona fide* intention of averting imminent danger of personal injury to himself or any other human being shall be deemed to have complied with the provisions of the said sub section if he gives such notice of the intended exercise of the right as is in the circumstances possible, or where no such previous notice can be given without incurring the imminent danger referred to above, if he forthwith gives notice of the actual exercise of such right to the authority or officer specified in the said sub-section.]

[a] *Inserted* by the Indian Telegraph (Amendment) Act, 1914 (7 [VII] of 1914), S. 5.

Power to confer upon licensee powers of telegraph authority under this Part.

[a][**19B.** The [b][Central Government] may, by notification in the [c][Official Gazette], confer upon any licensee under section 4, in respect of the extent of his license and subject to any conditions and restrictions which the [b][Central Government] may think fit to impose and to the provisions of this Part, all or any of the powers which the telegraph authority possesses under this Part with regard to a telegraph established or maintained by the Government or to be so established or maintained :

Provided that the notice prescribed in section 19A shall always be given to the telegraph authority or officer empowered to receive notice under section 19A *(1)*.]

[a] *Inserted* by the Indian Telegraph (Amendment) Act, 1914 (7 [VII] of 1914), S. 5. [b] *Substituted* by A. O. for "Governor-General in Council". [c] *Substituted* by A. O. for "Gazette of India".

PART IV.

PENALTIES.

Establishing, maintaining or working unauthorized telegraph.

[a][**20.** *(1)* If any person establishes, maintains or works a telegraph within British India in contravention of the provisions of section 4 or otherwise than as permitted by rules made under that section, he shall be punished, if the telegraph is a wireless telegraph, with imprisonment which may extend to three years, or with fine, or with both, and, in any other case, with a fine which may extend to one thousand rupees.

(2) Notwithstanding anything contained in the Code of Criminal Procedure, 1898, offences under this section in respect of a wireless telegraph shall, for the purposes of the said Code, be bailable and non-cognizable.

Section 20 — Note 1

[1] Person convicted and sentenced under Ss. 3 and 6 of Wireless Telegraphic Act, 1933, cannot be convicted and sentenced separately under this section in respect of the same wireless receiving set. (Vol 25) 1938 Mad 821 (822) : 39 Cr. L Jour 991.

[2] Subsequent issue of licence to take effect from an earlier date does not legalise possession of wireless set before date of issue. (Vol 25) 1938 Mad 821 (822) : 39 Cr. L Jour 991.

(3) When any person is convicted of an offence punishable under this section, the Court before which he is convicted may direct that the telegraph in respect of which the offence has been committed, or any part of such telegraph, be forfeited to His Majesty.

[a] *Substituted* by the Indian Telegraph (Amendment) Act, 1914 (VII [7] of 1914), S. 6.

Breach of condition of license.

[a][**20A.** If the holder of a license granted under section 4 contravenes any condition contained in his license, he shall be punished with fine which may extend to one thousand rupees, and with a further fine which may extend to five hundred rupees for every week during which the breach of the condition continues.]

[a] *Inserted* by the Indian Telegraph (Amendment) Act, 1914 (7 [VII] of 1914), S. 7.

Using unauthorized telegraph.

21. If any person, knowing or having reason to believe that a telegraph has been established or is maintained or worked, in contravention of this Act, transmits or receives any message by such telegraph, or performs any service incidental thereto, or delivers any message for transmission by such telegraph, or accepts delivery of any message sent thereby, he shall be punished with fine which may extend to fifty rupees.

Opposing establishment of telegraphs on railway land.

22. If a railway Company or an officer of a Railway Company neglects or refuses to comply with the provisions of section 6, it or he shall be punished with fine which may extend to one thousand rupees for every day during which the neglect or refusal continues.

Intrusion into signal-room, trespass in telegraph office or obstruction.

23. If any person—

(a) without permission of competent authority, enters the signal-room of a telegraph office of the Government, or of a person licensed under this Act, or

(b) enters a fenced enclosure round such a telegraph office in contravention of any rule or notice not to do so, or

(c) refuses to quit such room or enclosure on being requested to do so by any officer or servant employed therein, or

(d) wilfully obstructs or impedes any such officer or servant in the performance of his duty,

he shall be punished with fine which may extend to five hundred rupees.

Unlawfully attempting to learn contents of messages.

24. If any person does any of the acts mentioned in section 23 with the intention of unlawfully learning the contents of any message, or of committing any offence punishable under this Act, he may (in addition to the fine with which he is punishable under section 23) be punished with imprisonment for a term which may extend to one year.

Intentionally damaging or tampering with telegraphs.

25. If any person, intending—

(a) to prevent or obstruct the transmission or delivery of any message, or

(b) to intercept or to acquaint himself with the contents of any message, or

(c) to commit mischief.

damages, removes, tampers with or touches any battery, machinery, telegraph line, post or other thing whatever, being part of or used in or about any telegraph or in the working thereof,

he shall be punished with imprisonment for a term which may extend to three years, or with fine, or with both.

Injury to or interference with a telegraph line or post.

[a][**25A.** If, in any case not provided for by section 25, any person deals with any property and thereby wilfully or negligently damages any telegraph line or post duly placed on such property in accordance with the provisions of this Act, he shall be liable to pay the telegraph authority such expenses (if any) as may be incurred in making good such damage, and shall also, if the telegraphic communication is by reason of the damage so caused interrupted, be punishable with a fine which may extend to one thousand rupees :

Provided that the provisions of this section shall not apply where such damage or interruption is caused by a person dealing with any property in the legal exercise of a right if he has complied with the provisions of section 19A *(1)*.]

[a] *Inserted* by the Indian Telegraph (Amendment) Act, 1914 (VII [7] of 1914), S. 8.

Section 20A—Note 1

[1] Licence under S. 4 of the Act for rádio set for private room residence—Set installed in room in shop premises — Prosecution for violation of condition — Evidence of mere situation of set is not sufficient — Evidence of use to attract or amuse public whether customers or otherwise is necessary. (Vol 30) 1943 Nag 143 (144, 145):I L R (1943) Nag 344 : 44 Cri. L Jour 402 (DB).

Telegraph officer or other official making away with or altering or unlawfully intercepting or disclosing messages, or divulging purport of signals.

26. If any telegraph officer, or any person, not being a telegraph officer but having official duties connected with any office which is used as a telegraph office—

(*a*) wilfully secretes, makes away with or alters any message which he has received for transmission or delivery, or

(*b*) wilfully and otherwise than in obedience to an order of the [a][Central Government] or of a [b][Provincial Government], or an officer specially authorized [c][by the Central or a Provincial Government] to make the order, omits to transmit, or intercepts or detains, any message or any part thereof, or otherwise than in pursuance of his official duty or in obedience to the direction of a competent Court, discloses the contents or any part of the contents of any message, to any person not entitled to receive the same, or

(*c*) divulges the purport of any telegraphic signal to any person not entitled to become acquainted with the same,

he shall be punished with imprisonment for a term which may extend to three years or with fine, or with both.

[a] *Substituted* by A. O. for "Governor-General in Council." [b] *Substituted* by A. O. for "Local Government." [c] *Substituted* by A. O for "by the Governor-General in Council."

Telegraph officer fraudulently sending messages without payment.

27. If any telegraph officer transmits by telegraph any message on which the charge prescribed by the [a][Central Government], or by a person licensed under this Act, as the case may be, has not been paid, intending thereby to defraud the [a][Central Government] or that person, he shall be punished with imprisonment for a term which may extend to three years, or with fine, or with both.

[a] *Substituted* by A. O. for "Government."

Misconduct.

28. If any telegraph officer, or any person not being a telegraph officer but having official duties connected with any office which is used as a telegraph office, is guilty of any act of drunkenness, carelessness or other misconduct whereby the correct transmission or the delivery of any message is impeded or delayed, or if any telegraph officer loiters or delays in the transmission or delivery of any message, he shall be punished with imprisonment for a term which may extend to three months, or with fine which may extend to one hundred rupees or with both.

Sending fabricated message.

29. If any person transmits or causes to be transmitted by telegraph a message which he knows to be false or fabricated, he shall be punished with imprisonment for a term which may extend to three years, or with fine, or with both.

Penalty.

[a][**29A.** If any person, without due authority,—

(*a*) makes or issues any document of a nature reasonably calculated to cause it to be believed that the document has been issued by, or under the authority of, the Director General of [b][Posts and Telegraphs], or

(*b*) makes on any document any mark in imitation of, or similar to, or purporting to be, any stamp or mark of any telegraph office under the Director General of [b][Posts and Telegraphs], or a mark of a nature reasonably calculated to cause it to be believed that the document so marked has been issued by, or under the authority of, the Director General of [b][Posts and Telegraphs],

he shall be punished with fine which may extend to fifty rupees.]

[a] *Inserted* by the Indian Telegraph (Amendment) Act, 1914 (VII [7] of 1914), S. 9. [b] *Substituted* by the Indian Post Office and Telegraph (Amendment) Act, 1914 (14 [XIV] of 1914), S. 2 for "Telegraphs".

Retaining a message delivered by mistake.

30. If any person fraudulently retains, or wilfully secretes, makes away with or detains a message which ought to have been delivered to some other person, or, being required by a telegraph officer to deliver up any such message, neglects or refuses to do so, he shall be punished with imprisonment for a term which may extend to two years, or with fine, or with both.

Bribery.

31. A telegraph officer shall be deemed a public servant within the meaning of sections 161, 162, 163, 164 and 165 of the Indian Penal Code ; and in the definition of

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Section 27—Note 1

[1] Under S. 27, charge prescribed for the transmission of message, must be recoverable in advance. Where operator transmitted certain phone messages not intending to defraud Government, but the charges for transmission were not payable in advance by owner of telephone, it was held that no offence was committed under S. 27. (Vol 25) 1938 Lah 251 (251) : I L R (1938) Lah 236 : 39 Cri L Jour 551 (DB).

"legal remuneration" contained in the said section 161, the word "Government" shall, for the purposes of this Act, be deemed to include a person licensed under this Act.

Attempts to commit offences.

32. Whoever attempts to commit any offence punishable under this Act shall be punished with the punishment herein provided for the offence.

PART V.

SUPPLEMENTAL PROVISIONS.

Power to employ additional police in places where mischief to telegraphs is repeatedly committed.

33. *(1)* Whenever it appears to the [a][Provincial Government] that any act causing or likely to cause wrongful damage to any telegraph is repeatedly and maliciously committed in any place, and that the employment of an additional police-force in that place is thereby rendered necessary, the [a][Provincial Government] may send such additional police force as it thinks fit to the place, and employ the same therein so long as, in the opinion of that Government, the necessity of doing so continues.

(2) The inhabitants of the place shall be charged with the cost of the additional police-force, and the District Magistrate shall, subject to the orders of the [a][Provincial Government], assess the proportion in which the cost shall be paid by the inhabitants according to his judgment of their respective means.

(3) All moneys payable under sub-section *(2)* shall be recoverable either under the warrant of a Magistrate by distress and sale of the moveable property of the defaulter within the local limits of his jurisdiction, or by suit in any competent Court.

(4) The [a][Provincial Government] may, by order in writing, define the limits of any place for the purposes of this section.

[a] *Substituted* by A. O. for "Local Government".

Application of Act to Presidency-towns.

[a][**34.** *(1)* This Act, in its application to the Presidency-towns, shall be read as if for the words "District Magistrate" in section 16, sub-section *(1)*, and section 17 sub-sections *(2)* and *(3)*, for the words "Magistrate of the first or second class" in section 18, sub-section *(1)* [b][and section 19A, sub section *(2)*] and for the word "Magistrate" in section 18, sub-section *(2)*, there had been enacted the words "Commissioner of Police," and for the words "District Judge," in section 16, sub-sections *(3)*, *(4)* and *(5)*, the words "Chief Judge of the Court of Small Causes."

[c][* * * * * * * *]

(3) The fee in respect of an application to the Chief Judge of a Presidency Court of Small Causes under sub-section *(3)* of section 16 shall be the same as would be payable under the Court-fees Act, 1870, in respect of such an application to a District Judge beyond the limits of a Presidency-town, and fees for summonses and other processes in proceedings before the Chief Judge under sub-section *(3)* or sub section *(4)* of that section shall be payable according to the scale set forth in the fourth schedule to the Presidency Small Cause Courts Act, 1882]

[a] *Inserted* by the Indian Telegraphs (Presidency-towns) Act, 1888 (11 [XI] of 1888). [b] *Inserted* by the Indian Telegraph (Amendment) Act, 1914 (7 [VII] of 1914), S. 10. [c] Sub-section *(2)* was *repealed* by A.O.

[THE] TERRITORIAL WATERS JURISDICTION ACT, 1878.

(41 & 42 Vict., c. 73)

An Act to regulate the Law relating to the Trial of Offences committed on the Sea within a certain distance of the Coasts of Her Majesty's Dominions.

[16th August, 1878.]

WHEREAS the rightful jurisdiction of Her Majesty, her heirs and successors, extends and has always extended over the open seas adjacent to the coasts of the United Kingdom and of all other parts of Her Majesty's dominions to such a distance as is necessary for the defence and security of such dominions:

And whereas it is expedient that all offences committed on the open sea within a certain distance of the coasts of the United Kingdom and of all other parts of Her Majesty's dominions, by whomsoever committed, should be dealt with according to law:

Be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the lords Spiritual and Temporal, and commons, in this present Parliament assembled, and by the authority of the same, as follows:

Short title.

1. This Act may be cited as the Territorial Waters Jurisdiction Act, 1878.

Amendment of the law as to the jurisdiction of the Admiral.

2. An offence committed by a person, whether he is or is not a subject of Her Majesty, on the open sea within the territorial waters of Her Majesty's dominions, is an offence within the jurisdiction of the admiral, although it may have been committed on board or by means of a foreign ship, and the person who committed such offence may be arrested, tried, and punished accordingly.

Restriction on institution of proceedings for punishment of offence.

3. Proceedings for the trial and punishment of a person who is not a subject of Her Majesty, and who is charged with any such offence as is declared by this Act to be within the jurisdiction of the Admiral, shall not be instituted in any Court of the United Kingdom, except with the consent of one of Her Majesty's Principal Secretaries of State, and on his certificate that the institution of such proceedings is in his opinion expedient, and shall not be instituted in any of the dominions of Her Majesty out of the United Kingdom except with the leave of the Governor of the part of dominions in which such proceedings are proposed to be instituted, and on his certificate that it is expedient that such proceedings should be instituted.

Provisions as to procedure.

4. On the trial of any person who is not a subject of Her Majesty for an offence declared by this Act to be within the jurisdiction of the Admiral, it shall not be necessary to aver in any indictment or information on such trial that such consent or certificate of the Secretary of State or Governor as is required by this Act has been given, and the fact of the same having been given shall be presumed unless disputed by the defendant at the trial; and the production of a document purporting to be signed by one of Her Majesty's Principal Secretaries of State as respects the United Kingdom, and by the Governor as respects any other part of Her Majesty's dominions, and containing such consent and certificate, shall be sufficient evidence for all the purposes of this Act of the consent and certificate required by this Act.

Proceedings before a justice of the peace or other magistrate previous to the committal of an offender for trial or to the determination of the justice or magistrate that the offender is to be put upon his trial shall not be deemed proceedings for the trial of the offence committed by such offender for the purposes of the said consent and certificate under this Act.

Saving as to jurisdiction.

5. Nothing in this Act contained shall be construed to be in derogation of any rightful jurisdiction of Her Majesty, her heirs or successors, under the law of nations, or to affect or prejudice any jurisdiction conferred by Act of Parliament or now by law existing in relation to foreign ships or in relation to persons on board such ships.

Saving as to piracy.

6. This Act shall not prejudice or affect the trial in manner heretofore in use of any act of piracy as defined by the law of nations, or affect or prejudice any law relating thereto ; and where any act of piracy as defined by the law of nations is also any such offence as is declared by this Act to be within the jurisdiction of the Admiral, such offence may be tried in pursuance of this Act, or pursuance of any other Act of Parliament, law, or custom relating thereto.

Definitions.

7. In this Act, unless there is something inconsistent in the context, the following expressions shall respectively have the meanings hereinafter assigned to them; that is to say,

"Jurisdiction of the Admiral."

"The jurisdiction of the Admiral" as used in this Act includes the jurisdiction of the Admiralty of England and Ireland, or either of such jurisdictions as used in any Act of Parliament; and for the purpose of arresting any person charged with an offence declared by this Act to be within the jurisdiction of the Admiral, the territorial waters adjacent to the United Kingdom or any other part of Her Majesty's dominions, shall be deemed to be within the jurisdiction of any judge, magistrate, or officer having power within such United Kingdom, or other part of Her Majesty's dominions, to issue warrants for arresting or to arrest persons charged with offences committed within the jurisdiction of such judge, magistrate or officer :

"United Kingdom."

"United Kingdom" includes the Isle of Man, the Channel Islands, and other adjacent islands :

"Territorial waters of Her Majesty's dominions."

"The territorial waters of Her Majesty's dominions" in reference to the sea, means such parts of the sea adjacent to the coast of the United

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Sections 2 and 3 — Note 1

[1] Where an offence under Ss. 4 and 304, Penal Code is alleged to have been committed on a British ship and not on or by means of a foreign ship, the Territorial Waters Jurisdiction Act, 1878 (41 & 42 Vict. c. 73) does not apply and no sanction of the Governor-General is necessary for trial of the offence. (Vol 23) 1936 Sind 3 (4, 5) : 29 Sind L R 281 : 37 Cri. L Jour 314 (DB).

Kingdom, or the coast of some other part of Her Majesty's dominions, as is deemed by international law to be within the territorial sovereignty of Her Majesty; and for the purpose of any offence declared by this Act to be within the jurisdiction of the Admiral, any part of the open sea within one marine league of the coast measured from low-water mark shall be deemed to be open sea within the territorial waters of Her Majesty's dominions:

"Governor," as respects India, means the Governor General [a][and as respects a British pos-
"Governor." session which] consists of several constituent colonies, means the Governor-General of the whole possession or the Governor of any of the constituent colonies; and as respects any other British possession, means the officer for the time being administering the Government of such possession; also any person acting for or in the capacity of Governor shall be included under term "Governor."

[a] *Substituted* by A. O. (P).

"Offence" as used in this Act means an act, neglect or default of such a description as would,
"Offence." if committed within the body of a country in England, be punishable on indictment according to the law of England for the time being in force:

"Ship." "Ship" includes every description of ship, boat, or other floating craft:

"Foreign ship." "Foreign ship" means any ship which is not a British ship.

[THE INDIAN] TOLLS ACT, 1851.

(ACT VIII of 1851)

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SECTIONS.

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7. Exhibition of table of tolls, and statement of penalties.
8. Application of proceeds of tolls.

SCHEDULE.—*[Repealed.]*

Act how affected by subsequent legislation.

—Short title given by Act 14 of 1897.
—Amended by Act 15 of 1864.
—Adapted by A. O.
—Supplemented by Acts 15 of 1864, 8 of 1888 and 8 of 1892.
—Amended in its application to,
Assam — by Assam Acts 3 of 1931 and 1 of 1932.
C. P. — by C. P. Act 8 of 1932.
Madras—by Mad. Acts 6 of 1938 and 14 of 1942.
—Repealed in the Presidency of Bombay by Bom. Act 3 of 1875.
—Repealed in part and amended by Act 8 of 1888.
—Repealed in part by Acts 14 of 1870; 12 of 1876; 2 of 1901 and 38 of 1920.

[a][THE INDIAN] TOLLS ACT, 1851.

(ACT VIII OF 1851.)

[4th July, 1851.]

An Act for enabling Government to levy Tolls on Public Roads and Bridges.

WHEREAS it is expedient to enable Government to levy tolls upon roads and bridges; It is
Preamble. enacted as follows:—

[a] Short title given by the Indian Short Titles Act, 1897 (14 [XIV] of 1897).

This Act should be read with the Indian Tolls Act, 1864 (15 [XV] of 1864), and the Indian Tolls Act, 1888 (8 [VIII] of 1888).

In its application to the Central Provinces, this Act has been supplemented by the Indian Tolls (Central Provinces Amendment) Act, 1932 (C. P. Act 8 [VIII] of 1932). Section 5 of that Act is as follows: "This Act shall be construed with, and deemed to be part of, the Indian Tolls Act, 1851, as subsequently amended."

1. *[Repeal of Acts.]* Repealed by the Repealing Act, 1870 (14 [XIV] of 1870).

[a][**1-A.** This Act extends to the territories administered on the fourth of July, eighteen hundred
Extent. and fifty-one, by the Governor of the Presidency of Fort William in Bengal, the

Lieutenant-Governor of North-Western Provinces of Bengal and the Governor of the Presidency of Fort St. George in Council.]

[a] *Inserted* by the A. O. under S. 1 of Act 8 of 1888. This Act is deemed to be in force throughout the territories administered by the Lieutenant-Governor of the Punjab on the 5th September 1888 and to have been in force, from the 21st August 1857, in the territories for the time being administered as part of the Punjab.

It has been extended under S. 3 of Act 15 of 1864 to Ajmer and Merwara: *see* Gazette of India, 1889, Part II, p. 562.

It has been declared in force in the C. P. by the C. P. Laws Act, 1875 (20 of 1875), S. 3; in the Santhal Parganas by the Santhal Parganas Settlement Regulations (3 of 1872), S. 3.

It has been declared, by notification under S. 3 (*a*) of the Scheduled Districts Act, 1874 (14 of 1874), to be in force in the following Scheduled Districts, namely:—

The Districts of Hazaribagh, Lohardaga (now the Ranchi District, *see* Calcutta Gazette, 1899, Pt. I, p. 44), and Manbhum, and Pargana Dhalbhum and Kolhan in the District of Singbhum	*See* Gazette of India, 1881, Pt. I, p. 504.
The Districts of Hazara, Peshawar, Kohat, Bannu, Dera Ismail Khan and Dera Ghazi Khan. [*Portions of the Districts of Hazara, Bannu, Dera Ismail Khan and Dera Ghazi Khan and the Districts of Peshawar and Kohat now form the N.-W.F.P.*, see *Gazette of India, 1901, Pt. I, p. 857, and* ibid, *1902, Pt. I, p. 575; but its application has been barred in that part of the Hazara District known as Upper Tanawal, by the Hazara (Upper Tanawal) Regulation, 1900 (2 of 1900), S. 3*] . .	*See* Gazette of India, 1886, Pt. I, p. 48.
The District of Lahaul	Ditto 1886, Pt. I, p. 301.

It has been extended by notification under S. 5 of the last-mentioned Act, to the Scheduled District of Coorg, *see* Gazette of India, 1878, Pt. I, p. 45; to the Scheduled District in Ganjam and Vizagapatam, *see ibid*, 1898, Pt. I, p. 720; to the Ducharti and Guditeru Muttahs Yellavaram taluk, East Godavari Agency, *see* Notification No. 110, dated 22nd April 1927, Fort St. George Gazette, 1927, Pt. I, p. 661, and to the District of Darjeeling, *see* Calcutta Gazette, 1934, Pt. I, p. 179.

It has been repealed in the Presidency of Bombay, to which it originally applied, by the Bombay Tolls Act 1875 (Bom. Act 3 of 1875), S. 1.

Power to cause levy of tolls on roads and bridges within certain rates, and to appoint collectors. Collectors' responsibilities.

2. [a][The Provincial Government] may cause such rates of toll[b] * * * as [c][it thinks fit], to be levied upon any road or bridge which has been, or shall hereafter be, made or repaired [d][at the expense of the Central or any Provincial Government]; and may place the collection of such tolls under the management of such persons as may appear to [e][it] proper: and all persons employed in the management and collection of such tolls shall be liable to the same responsibilities as would belong to them if employed in the collection of the land-revenue.

[a] *Substituted* by A. O. for "The Governor of the Presidency of Fort William in Bengal, the Lieutenant-Governor of the North-Western Provinces of Bengal and the Governor of the Presidency of Fort St. George in Council". The words "and the Governor of the Presidency of Bombay in Council" had been repealed by the Indian Tolls Act, 1888 (8 of 1888), S. 5.

The authority of the Provincial Government in any part of British India not specified in S. 1-A to which this Act and the Indian Tolls Act, 1864 (15 of 1864), may be or have been extended, is to be the same as if it had been originally specified in S. 2. *See* the Indian Tolls Act, 1888 (8 of 1888), S. 2 (*1*).

[b]. The words "not exceeding the rates mentioned in the schedule annexed to this Act" were *repealed* by S. 2 and Schedule I of the Devolution Act, 1920 (38 of 1920). [c] *Substituted* by A. O. for "as they respectively think fit": *see* paragraph 5 (2). [d] *Substituted* by A. O. for "at the expense of the Govt." [e] *Substituted* by A. O. for "them".

PROVINCIAL AMENDMENTS

CENTRAL PROVINCES

Sections 2 and 3 of the Indian Tolls Central Provinces (Amendment) Act, 1932 (C. P. Act VIII of 1932) run as follows:

Power of Local Government to lease levy of tolls.

"*2.* It shall be lawful for the Local Government to lease the levy of tolls at the rates prescribed under S. 2 of the Indian Tolls Act, 1851, as subsequently amended, upon any public road or bridge by public auction or private contract from year to year or for a longer period not exceeding three years on such terms and conditions as the Local Government may deem fit:

Provided that the lessee shall give security for the due fulfilment of such conditions, and that sums payable under the terms and conditions of the lease shall be recoverable as if they were arrears of land revenue.

Acts of lessee or his agent.

3. When the right to collect tolls on any public road or bridge has been duly leased, the lessee and every person employed by the lessee as his agent for collecting the tolls shall be

deemed to be persons appointed to collect tolls under this Act, and shall exercise all the powers and be subject to all the responsibilities attaching to persons so appointed."

MADRAS

For section 2, the following section shall be *substituted* namely:—

Power of Provincial Government to levy tolls on roads and bridges.

"2. (1) The Provincial Government may levy tolls in respect of —

(a) any road or bridge made, improved or repaired at their expense after the 1st April, 1931, and

(b) any bridge made improved or repaired after the 1st April, 1931, partly at the expense of the Provincial Government and partly at the expense of a local body or bodies or solely at the expense of a local body or bodies, provided that the total expense incurred on the bridge shall not be below such limit, if any, as the Provincial Government may, by rules, determine.

(2) The tolls shall be levied only at such rates and for such period as the Provincial Government may by notification in the Official Gazette declare to be necessary—

(a) in the case of tolls levied under clause (a) of sub section (1), for the recovery of the amount expended upon the road or bridge or such portion of such amount as the Provincial Government may determine, together with interest thereon at such rate as they may fix; and

(b) in the case of tolls levied under clause (b) of sub-section (1), for the recovery of the amounts expended upon the bridge—

(i) by the Provincial Government; and

(ii) by the local body or bodies otherwise than from its or their ordinary revenues,

or such portions of such amounts as the Provincial Government may determine, together with interest on such amounts or such portions, as the case may be, at such rate or rates as they may fix.

(3) Where tolls are levied in respect of any bridge under clause (b) of sub-section (1) the receipts from the tolls after deducting the expenses on account of the collection thereof, shall—

(i) in case the bridge is made, improved or repaired solely at the expense of a local body, be paid to that local body, and

(ii) in other cases, be distributed between the local body or bodies concerned and the Provincial Government in proportion to the expenditure respectively incurred by the local bodies otherwise than from their ordinary revenues and by the Government.

(4) All sums payable to local bodies under sub-section (3) shall be charged on the revenues of the Province.

(5) (a) The Provincial Government may place the collection of the tolls levied under sub-section (1) under the management of such persons as may appear to them proper; and all persons employed in the management and collection of such tolls shall be liable to the same responsibilities as would belong to them if employed in the collection of land revenue.

(b) The Provincial Government may farm out the collection of the tolls levied under sub-section (1) and in such a case the farmer and his agents and servants shall be deemed to be persons appointed to collect tolls under this Act."

——Madras Tolls and Motor Vehicles Taxation (Amendment) Act, 1938 (Mad. Act 6 [VI] of 1938), S. 2. [19-4-1938] and the Indian Tolls (Madras Amendment) Act, 1942 (14 [XIV] of 1942), S. 2. [19-4-1938.]

3. In case of non-payment of any such toll on demand, the officers appointed to collect the same may seize any of the carriages or animals on which it is chargeable, or any part of their burden of sufficient value to defray the toll; and, if any toll remains undischarged for twenty-four hours, with the cost arising from such seizure, the case shall be brought before the officer appointed to superintend the collection of the said toll, who may sell the propery seized for discharge of the toll, and all expenses occasioned by such non-payment, seizure and sale, and cause any balance that may remain to be returned, on demand, to the owner of the property; and the said officer, on receipt of the property, shall forthwith issue a notice that, at noon of the next day, exclusive of Sunday, or any closed holiday, he will sell the property by auction:

Their powers for recovery of toll.

Provided that, if, at any time before the sale has actually begun, the person whose property has been seized shall tender the amount of all the expenses incurred, and of double the toll payable by him, the said officer shall forthwith release the property seized.

Release of seized property on tender of dues.

Provincial Amendment.

Madras.

For the words "officers appointed to collect the same" the words "officers and persons appointed to collect the same" shall be *substituted*. —Indian Tolls (Madras Amendment) Act, 1942 (Madras Act XIV [14] of 1942), S. 3. [19-4-1938.]

4. No tolls shall be paid for the passage [a][* * * *] of Police-officers on duty, or of any person or property in their custody, but no other exemption from payment of the toll levied under this Act shall be allowed.

Exemptions from payment of toll.

[a] The words "of troops and military stores and equipages on their march or" were *repealed* by S. 8 of the Indian Tolls (Army and Airforce) Act, 1901 (II [2] of 1901). *See* now S. 3 of that Act.

Provincial Amendments.

Assam.

This section has been *amended* in Assam by the Indian Tolls (Amendment) Act, 1931 (Assam Act III [3] of 1931).

Central Provinces,

For the words "but no other exemption from payment of the toll levied under this Act shall be allowed," the words "or of any person or property exempted by order of the Provincial Government from payment of tolls" shall be *substituted*. —Indian Tolls Central Provinces (Amendment) Act 1932 (C. P. Act VIII [8] of 1932), S. 4. [15-10-1932.]

Assistance of collectors by police-officers.

5. All police-officers shall be bound to assist the toll-collectors, when required, in the execution of this Act; and, for that purpose, shall have the same power which they have in the exercise of their common police-duties.

Penalty for offences under Act.

Compensation to person aggrieved.

Saving of his right to sue.

6. Every person, other than the persons appointed to collect the tolls under this Act, who shall levy or demand any toll on any public road or bridge, or for passing through any bazar situated thereon, and also every person who shall unlawfully and extortionately demand or take any other or higher toll than the lawful toll, or, under colour of this Act, seize or sell any property, knowing such seizure or sale to be unlawful, or in any manner unlawfully extort money or any valuable thing from any person under colour of this Act, shall be liable, on conviction before a Magistrate to imprisonment for any term not exceeding six calendar months, or to fine not exceeding two hundred rupees, any part of which fine may be awarded by the Magistrate to the person aggrieved; but this remedy shall not be deemed to bar or affect his right to have redress by suit in the civil Court [a][* * *].

[a] The words of the "Zillah" were *repealed* by the Repealing Act 1876 (XII [12] of 1876).

Exhibition of table of tolls, and statement of penalties.

7. A table of the tolls authorised to be taken at any toll gate or station shall be put in a conspicuous place near such gate or station legibly written or printed in English words and figures, and also in those of the vernacular language of the district, to which shall be annexed, written or printed in like manner, a statement of the penalties for refusing to pay the tolls and for taking any unlawful toll.

Provincial Amendment.

Assam.

After section 7, new sections 7A and 7B were *inserted* in Assam by the Indian Tolls (Amendment) Act, 1932 (Ass. Act 1 [I] of 1932).

Application of proceeds of tolls.

8. The tolls levied under this Act shall be deemed public revenue. [a][* * * * * *]

[a] The words "but the net proceeds thereof shall be applied wholly to the construction, repair and maintenance of roads and bridges within the Presidency in which they are levied", were *repealed* by the A. O. The word "presidency" is to be deemed to have meant the territories under the administration of any Local Government—*See* the Indian Tolls Act, 1888 (8 [VIII] of 1888), S. 2 (2), since *repealed*. *See also*, in this connexion, paragraph 4 (b) of the India and Burma (Transitory Provisions) Order, 1937.

Section 9.

Provincial Amendment.

Madras.

After section 8, the following section shall be *added*, namely:—

Power of Provincial Gorernment to make rules.

"9. The Provincial Government shall have power to make rules regarding the method of collection of the tolls, including the terms and conditions of the farming out thereof, the manner of distribution of the receipts therefrom, and generally for carrying out the purposes of this Act."

—Madras Tolls and Motor Vehicles Taxation (Amendment) Act, 1938 (Mad. Act 6 [VI] of 1938), S. 3. [19-4-1938] and the Indian Tolls (Madras Amendment) Act, 1942 (Mad. Act 14 [XIV] of 1942), S. 4. [19-4-1938].

[SCHEDULE.] *Repealed by the Devolution Act, 1920 (38 [XXXVIII] of 1920), S. 2 and Sch. I.*

[THE INDIAN] TOLLS ACT, 1864.

(Act XV of 1864)

Statement of Objects and Reasons.

"The object of this Bill is to amend the Schedule annexed to Act VIII of 1851, which regulates the rates of Toll to be levied on Public Roads and Bridges throughout India.

The Schedule in question has been found to be defective in some respects. The maximum rates are many of them too low, and certain provisions, — such as one which enacts that Toll is to be levied on carts and hackeries according to the diameter of the wheels—are oppressive, and open a door to extortion on the part of the Toll Collectors. Altogether it is desirable that the Schedule should be revised and modified.

In the Schedule which is annexed to the present Bill, the maximum rates which may be levied have been on the average somewhat increased; and such other modifications as experience has proved to be necessary have been introduced."

—*Gazette of India, 1864, page 120.*

Act how affected by subsequent legislation.

—Short title given by Act 14 of 1897.
—Adapted by A. O.
—Supplemented by Act 8 of 1888.
—Repealed in part and amended by Act 38 of 1920.

[THE INDIAN] TOLLS ACT, 1864.[a]

(ACT XV OF 1864).

[24th March, 1864.]

An Act to amend Act VIII of 1851 (for enabling Government to levy Tolls on Public Roads and Bridges).

Preamble. WHEREAS by Act VIII of 1851 *(for enabling Government to levy Tolls on Public Roads and Bridges)* authority was given for the levy of certain rates of toll[b] * * * * *; It is enacted as follows:—

[a] Short title given by the Indian Short Titles Act, 1897 (14 of 1897).

This Act has been declared in force in the Santhal Parganas by the Santhal Parganas Settlement Regulation, 1872 (3 of 1872), S. 3, in the C. P. and the Sambalpur District by the C. P. Laws Act, 1875 (20 of 1875).

It has been declared, by notification under S. 3 *(a)* of the Scheduled Districts Act, 1874 (14 of 1874), to be in force in the following Scheduled Districts, namely:—The Districts of Hazaribagh, Lohardaga (now the Ranchi District, *see* Calcutta Gazette, 1899, Pt. I, p 44), and Manbhum, and Pargana Dhalbhum and the Kolhan in the District of Singbhum. *See* Gazette of India, 1881, Pt. I p. 504. The Districts of Hazara, Peshawar, Kohat, Bannu, Dera Ismail Khan and Dera Ghazi Khan *[Portions of the District of Hazara, Bannu Dera Ismail Khan and Dera Ghazi Khan and the Districts of Peshawar and Kohat now form the N. W. F. P.*, see *Gazette of India, 1901, Pt. I, p. 857, and* ibid *1902, Pt. I. p. 575; but its application has been barred to that portion of the Hazara District known as Upper Tanawal by the Hazara (Upper Tanawal) Regulation, 1900 (2 of 1900)]*, *ibid*, 1886, Pt. I, p. 48. The District of Lahaul, *ibid*, 1886. Pt. I, p, 301.

It has been extended, by notification under S. 5 of the last-mentioned Act, to the Scheduled District of Coorg. *See* Gazette of India, 1878, Pt. I, p. 45.

The Act has been extended to Ajmer-Merwara along with Act 8 of 1851, *see* Gazette of India, 1889, Pt. II, p. 562; to the Scheduled Districts in Vizagapatam and Ganjam, *see* Fort St. George Gazette, 1899, Pt. I, p. 1486, and *ibid*, 1900 Pt. I, p. 1101, respectively, and to the District of Darjeeling, *see* Calcutta Gazette, 1934, Pt. I, p. 179.

The Act is to be deemed to be and to have been in force in the Punjab, from the 24th March 1864, *see* the Indian Tolls Act, 1888 (8 of 1888), S. 1, and tolls levied or purporting to have been levied under the Act before the passing of Act 8 of 1888, are to be deemed to have been lawfully levied—*see* S. 3, *ibid*.

[b] The words "not exceeding the rates mentioned in the Schedule annexed to that Act; and whereas it is expedient to make certain alterations in respect to the rates in the said Schedule mentioned" were *repealed* by the Devolution Act, 1920 (38 [XXXVIII] of 1920), S. 2 and Sch. I.

1. *[Schedule of Act VIII of 1851 repealed and another schedule substituted.] Repealed by the Devolution Act, 1920 (38 [XXXVIII] of 1920), S. 2 and Sch. I.*

Collectors of tolls may compound for tolls leviable under Act VIII of 1851 or this Act.

2. Any person entrusted with the management of the collection of tolls under [a]Act VIII of 1851 may in his discretion compound for any period not exceeding one year with any person for a certain sum to be paid by such person for himself or for any vehicle or animal kept by him, in lieu of the rates of toll [b][authorized to be levied under the said Act VIII of 1851].

[a.] The Indian Tolls Act, 1851. [b.] *Substituted* for "specified in the schedule to the said Act VIII of 1851 or in the schedule to this Act" by the Devolution Act, 1920 (38 [XXXVIII] of 1920), S. 2 and Sch. I.

Power to extend Act.

3. The [a][Provincial Government] may extend this [b]Act to any place in which the said Act VIII of 1851 is in force; and the [a][Provincial Government] of any place in which the said Act VIII of 1851 is not in force may extend the said Act VIII of 1851 and this Act to such place.[c]

[a.] *Substituted* by A. O. for "Local Government." [b.] The Act now regulating tolls in the Presidency of Bombay is the Tolls on Roads and Bridges Act, 1875 (Bom. 3 of 1875). That Act repealed Act 8 of 1851 in the Bombay Presidency, *see* S. 1, and declared that Act 15 of 1864 should be deemed to have been extended thereto as from the 30th July 1864; *see* S. 2. [c.] Both Acts have been extended to Oudh (*see* Gazette of India, 1865, Pt. I, p. 777), the C. P. (*ibid*, Pt. I, 1871, p. 611) and to the District of Lakhimpur (*see* Assam Gazette, 1935, Pt. II, p. 1025). As to the authority of the Provincial Government in any part of British India not specified in S. 2 of the Indian Tolls Act, 1851 (8 of 1851), to which that Act and the Indian Tolls Act, 1864 (15 of 1864), may be or have been extended, *see* the Indian Tolls Act, 1888 (8 of 1888), S. 2 *(1)*.

4. *[Interpretation clause. Local Government.] Repealed by the A. O. [Schedule.] Repealed by the Devolution Act, 1920 (38 [XXXVIII] of 1920), S. 2 and Sch. I*

(ACT VIII of 1888).

Statement of Objects and Reasons.

"The object of this Bill is to remove doubts as to the operation of Acts VIII of 1851 and XV of 1864 in the Punjab, and to validate the levy of tolls in that Province under those Acts. The introduction of a Bill being expedient for those purposes, the opportunity has been taken to confer in express terms on the Lieutenant Governor of the Punjab and the Chief Commissioners of Burma, the Central Provinces and Coorg, and on the Local Government of any other province in which the Acts may for the time being be in force, the authority which is conferred on the Governor of Fort St. George in Council and the Lieutenant Governors of Bengal and the North-Western Provinces by S. 2 of the Act of 1851, and to declare the word "Presidency" in S. 8 of the Act to mean the territories under the administration of a Local Government."

— *Gazette of India, 1888, Part V, page 43.*

[THE INDIAN] TOLLS ACT, 1888,[a]

(ACT VIII OF 1888)

[5th September, 1888.]

An Act to remove doubts as to the legality of the levy of certain Tolls.

WHEREAS doubts have been raised as to the operation of the Acts of the Governor General in Council, No. VIII of 1851 (*an Act for enabling Government to levy Tolls on Public Roads and Bridges*) and No. XV of 1864 (*an Act to amend Act VIII of 1851*); It is hereby enacted as follows :—

[a] Short title given by the Indian Short Titles Act, 1897 (14 [XIV] of 1897).

Enforcement of Acts VIII of 1851 and XV of 1864 in the Punjab.

1. Acts VIII of 1851 and XV of 1864[a] shall be deemed to be in force throughout the territories now administered by the Lieutenant Governor of the Punjab, and from the twenty-first day of August, 1857, and the twenty-fourth day of March, 1864, respectively, to have been in force in the territories for the time being administered as part of the Punjab.

[a] *See* the Indian Tolls Act, 1851, and the Indian Tolls Act, 1864, respectively printed *ante*.

Operation of the Act in the Punjab and certain other parts of British India.

2. *(1)* In any part of British India beyond the limits of the territories administered by the Governor of Fort St. George in Council, and the Lieutenant-Governors of Bengal and the North-Western Provinces, to or in which Acts VIII of 1851 and XV of 1864 may be or have been extended, or may be or have been declared to be in force, under the latter of those Acts or by this Act or by or under any other enactment, the [a][Provincial Government] shall be deemed to have and, where the Acts have been in force before the passing of this Act, to have had the same authority as if it had been included among the [b][Provincial Governments] specified in section 2 of Act VIII of 1851.

[c][* * * * * *]

[a] *Substituted* by A. O. for "Local Government". [b] *Substituted, ibid,* for "Local Governments". [c] Sub-section (*2*) was *repealed, ibid.*

Validation of past levy of tolls.

3. All tolls levied, or purporting to have been levied, under Acts VIII of 1851 and XV of 1864, or either of those Acts, before the passing of this Act, shall be deemed to have been lawfully levied.

Saving.

4. Nothing in the foregoing sections shall affect any proceedings commenced in any Civil Court before the first day of July, 1888.

5. [Amendment of section 2, Act VIII of 1851.] *Repealed by A. O.*

[THE INDIAN] TOLLS (ARMY AND AIR FORCE) ACT, 1901.

(ACT II OF 1901)

CONTENTS.

1. Short title, extent and commencement.
2. Definitions.
3. Exemptions from tolls.
4. Tolls on vessels transporting troops and baggage, etc., of troops embarked or disembarked.
5. Penalty.
6. Compensation.
7. Rules.
8. *[Repealed.]*

The Schedule *[Repealed.]*

Statement of Objects and Reasons.

"Section 143 of the Army Act (44 & 45 Vict, C. 58) exempts certain officers, soldiers and other persons, and certain animals, baggage and carriages belonging or attached to the Army, from the payment of certain tolls, and the provision is applicable to India in common with the rest of Her Majesty's dominions. In the Indian Statute-book, however, there are several enactments on the same subject; and these, while they provide for exemption from the payment of tolls of the classes referred to in the Army Act, do so in favour of persons more or less different from those indicated in that Act. Moreover, there are some Acts of the Indian legislatures which authorize the levy of tolls of the same classes as those described in the English Statute, but which either contain no exempting clauses at all or merely contain clauses empowering the Executive to allow exemptions.

In these circumstances, it has been decided to legislate. In the case of those Indian enactments which contain lists of exempted persons and property, legislation is necessary in order to remove the conflict which at present exists between them and the Army Act. The latter would of course prevail if the conflict were brought to the notice of the Courts but, so long as the Indian enactments remain as they now are, it is probable that full effect may not always in practice be given to the Army Act. In the case, too, of the remaining enactments of the Indian Legislatures above mentioned, it is not unlikely that the provisions of S. 143, Army Act, may be overlooked, tolls being levied under the local law in cases in which their levy is in reality prohibited by Parliament.

The present Bill reproduces S. 143, Army Act, except sub-section (2), which does not apply to India and amplifies its provisions so as to cover certain additional exemptions, all inconsistent provisions to be found in the Indian Statute book being at the same time repealed. Section 22, Indian Councils Act, 1861 (24 & 25 Vict., C. 67), prevents the repeal of S. 113, Army Act by the Governor General's Legislative Council, but it is believed that there is nothing to prevent that Council from re-enacting the section, and, in doing so, extending the list of persons and property to be exempted from payment of tolls. The list now given in the Bills is a provisional one only. It requires careful consideration, and attention is, therefore, specially invited to its details. . .."—*Gazette of India, 1899, Part V, p. 175.*

Act how affected by subsequent legislation.
—Amended by Acts 10 of 1927; 14 of 1932; 14 of 1942.
—Adapted by A. O.
—Repealed in part by Acts 11 of 1901; 10 of 1914.

[THE INDIAN] TOLLS (ARMY AND AIR FORCE) ACT, 1901.

(ACT II OF 1901[a])

[22nd February, 1901.]

An Act to amend the law relating to the exemption from tolls of persons and property belonging to the Army [b]*[or Air Force].*

WHEREAS certain officers, soldiers, [b][airmen] and other persons, and certain animals, baggage and carriages belonging or attached to the Army [b][or to the Air Force], are exempted by section 143 of the [c]Army Act [b][or by section 143 of the Air Force Act[d]] from payment of certain duties or tolls ;

And whereas similar exemptions are made by various enactments of the Indian legislatures, but these exemptions are not co-extensive with those made by the said [c]Army Act ;

And whereas it is expedient to remove the inconsistency now existing between the said [c]Army Act and the said enactments, and to exempt certain other persons and property belonging to the Army [b][or Air Force] from payment of certian tolls ;

And whereas it is declared by section 169 of the said [c]Army Act [b][and by section 169 of the said Air Force Act[d]] that "it shall be lawful for the Governor General of India . . . . to provide by law for reducing any fine directed by this Act to be recovered on summary conviction to such amount as may appear to the Governor General . . . . to be better adapted to the pecuniary means of the inhabitants ; and also to declare the amount of the local currency which is to be deemed for the purposes of this Act to be equivalent to any sum of British currency mentioned in this Act," and it is expedient to alter in the manner hereinafter appearing the fine imposed by section 143 of the said [c]Army Act [b][and by section 143 of the said Air Force Act[d]] ; it is hereby enacted as follows:—

[a] For Statement of Objects and Reasons, *see* Gazette of India, 1899, Pt. V, p. 175; for Report of the Select Committee, *see* ibid 1901, Pt. V, p. 7. [b] *Inserted* by the Repealing and Amending Act, 1927 (10 [X] of 1927), S. 2 and Sch. I. [c] (1881) 44 & 45 Vict., C. 58. [d] This is the Army Act, 1881, modified in accordance with the provisions of the Air Force (Constitution) Act, 1917 (7 & 8 Geo. V, C. 51), *see* Collection of Statutes relating to India, Vol. III.

Short title, extent and commencement.

1. *(1)* This Act may be called the Indian Tolls [a][(Army and Air Force)] Act, 1901.

(2) It extends to the whole of British India, inclusive of British Baluchistan, the Santhal Parganas and the Pargana of Spiti ; and

(3) It shall come into force on the first day of April, 1901.

[a] *Substituted* for '(Army)' by the Indian Tolls (Army) Amendment Act, 1942 (14 [XIV] of 1942) S. 2. [30-3-1942.]

Definitions. [a][2. In this Act, unless there is anything repugnant in the subject or context,—

(a) the expression "authorised followers" means persons other than officers, soldiers or airmen, who are employed by, or are in the service of, the Forces or Corps concerned or are in the service of any officer, soldier or airman of such Forces or Corps;

[a] Section 2 was *substituted* by the Indian Tolls (Army) Amendment Act, 1942 (14 [XIV] of 1942), S. 3. [30-3-1942.]

(b) "carriage" means a vehicle for carriage or haulage other than one specially constructed for use on rails;

(c) "ferry" includes every bridge and other thing which is a ferry within the meaning of any enactment authorising the levy of tolls on ferries, but does not include any ferry or other thing which is included in the definition of "railway" in section 3 of the Indian Railways Act, 1890;

(d) the expression "His Majesty's Regular Forces" has the meaning assigned to it by section 190, clause *(8)*, of the [a]Army Act, and includes His Majesty's Regular Air Force as defined by section 190, clause *(8)*, of the Air Force Act,[b] the Indian Air Force, and also the Indian Reserve Forces when subject to military or air force law, as the case may be;

[a] (1881) 44 & 45 Vict., c. 58. [b] *See* Preamble, Legislative Note (d).

(e) "horse" includes a mule and any beast of whatever description which is used for burden or draught or for carrying persons;

(f) the expression "Irregular Corps" means any force [other than the Auxiliary Force (India) or the Indian Territorial Force] raised and maintained in India under the authority of the Central Government or of the Crown Representative, or any other force which may be notified in this behalf by order published in the official Gazette ;

(g) the expression "Indian Reserve Forces" means the forces constituted by the Indian Reserve Forces Act, 1888, and includes officers belonging to the Army in India Reserve of Officers or to the Indian Regular Reserve of Officers and members of the Royal Air Force Volunteer Reserve and the Indian Air Force Volunteer Reserve when subject to military or air force law, as the case may be;

(h) "landing place" includes a pier, wharf, quay, jetty and a stage, whether fixed or floating.

(i) "public authority" means the Central Government or the Federal Railway Authority or a Provincial Government or a local authority; and, so far as regards tolls levied by a railway company under section 4 of the Indian Guaranteed Railways Act, 1879,[a] or section 51 of the Indian Railways Act, 1890, includes such a railway company; and

[a] (1879) 42 & 43 Vict., c. 41.

(j) "tolls" includes duties, dues, rates, rents, fees and charges, but does not include customs duties levied under the Indian Tariff Act, 1934, octroi duties or town duties on the import of goods, or fares paid for the conveyance of passengers on a tramway.]

Exemptions from tolls. 3. The following persons and property, namely :—

[a][*(a)* all officers, soldiers and airmen of—

(i) His Majesty's Regular Forces,

(ii) any Irregular Corps, or

(iii) Indian State Forces, when on duty or on the march,

(b) all members of the Auxiliary Force (India) or of the Indian Territorial Force when on duty or when proceeding to or returning from duty,

(c) all officers, soldiers and airmen of the Indian Reserve Forces when proceeding from their place of residence on being called out for service, training, or muster or when proceeding back to their place of residence after such service, training or muster,

(d) all authorised followers of—

(i) His Majesty's Regular Forces,

(ii) the Auxiliary Force (India) or the Indian Territorial Force,

(iii) any Irregular Corps, or

(iv) Indian State Forces,

when they accompany any body of such Forces or Corps on the march, or when they are otherwise moving under the orders of military or air force authority.

(e) all members of the families of officers, soldiers, airmen or authorised followers of—

(i) His Majesty's Regular Forces, or

(ii) any Irregular Corps,

when accompanying any body of troops, or any officer, soldier, airman or authorised follower thereof on duty or on the march.

(f) all prisoners under military or air force escort,

(g) the carriages, horses, and baggage, and the persons (if any) employed in driving the carriages or in carrying the baggage, of any persons exempted under any of the foregoing clauses, when such carriages, horses, baggage, or persons accompany the persons so exempted under the circumstances mentioned in those clauses respectively],

[b][*(h)*] all carriages and horses belonging to His Majesty or employed in His Majesty's military [c][or air-force] service and all persons in charge of or accompanying the same, when conveying any such persons as hereinbefore in this section mentioned, or when conveying baggage or stores, or when returning unladen from conveying such persons, baggage or stores,

[b][*(i)*] all carriages and horses, when moving under the orders of military [c][or air-force] authority for the purpose of being employed in His Majesty's military [c][or air-force] service,

[b][*(j)*] all animals accompanying any body of troops which are intended to be slaughtered for food or kept for any purpose connected with the provisioning of such troops, and

[b][*(k)*] all persons in charge of any carriage, horse or animal exempted under any of the foregoing clauses when accompanying the same under the circumstances mentioned in those clauses respectively,

shall be exempted from payment of any tolls—

(i) on embarking or disembarking, or on being shipped or landed, from or upon any landing-place, or

(ii) in passing along or over any turnpike or other road or bridge, or

(iii) on being carried by means of any ferry,

otherwise demandable by virtue of any Act, Ordinance, Regulation, order or direction of any legislature or other public authority in British India :

Provided that nothing in this section shall exempt any boats, barges or other vessels employed in conveying the said persons or property along any canal from payment of tolls in like manner as other boats, barges and vessels.

[d][*Explanation.*—The persons or property exempted under clauses *(d)*, *(e)*, *(g)* and *(j)* shall be deemed to accompany the Forces, troops, persons or property concerned when the move of the former is the direct result of, or is connected with the move of the latter, irrespective of the interval of space and time between the two moves.]

[a] *Substituted* by the Indian Tolls (Army) Amendment Act, 1942 (14 [XIV] of 1942), S. 4, for cls. (a) to (h). [30-3-1942.] [b] *Substituted, ibid.*, for "(*i*)" "(*j*)" "(*k*)" "(*l*)" respectively. [c] *Inserted* by the Repealing and Amending Act, 1927 (10 [X] of 1927), S. 2 and Sch. I. [d] *Added* by Act XIV of 1942, S. 4.

Tolls on vessels transporting troops and baggage, etc., of troops embarked or disembarked.

4. *(1)* No tolls shall be leviable by any local authority in respect of—

(a) any vessel employed by [a][the Central Government] solely for the transport of troops, or

(b) the horses, baggage or other effects of any troops embarking or disembarking at any port, or

(c) carriages belonging to His Majesty or employed in His Majesty's military [b][or air-force] service embarking or disembarking at any port.

(2) In respect of all such vessels or troops, their families, their horses, baggage and their effects, or any such carriages as aforesaid, the local authority concerned shall, in addition to its duties in the embarking and disembarking of the same, perform and supply all such reasonable services and acccommodation as may, from time to time, be required by [a][the Central Government], and shall receive payment for all such services and accommodation on such terms and for such periods as may, from time to time, be determined by [a][the Central Government] in consultation with such local authority.

[a] *Substituted* by A. O. for "the Government". [b] *Inserted* by the Repealing and Amending Act, 1927 (10 [X] of 1927), S. 2 and Sch. I.

Penalty.

5. Any person who demands and receives any toll in contravention of the provisions of section 3 or section 4 shall be punishable with fine which may extend to fifty rupees

Compensation.

6. *(1)* If any owner or lessee, or any Company, railway administration or local authority claims compensation for any loss alleged to have been incurred owing to the operation of this Act, the claim shall be submitted to the [a][Central Government].

(2) On receiving any such claim, the [a][Central Government] [b][* * *] shall pass such order thereon as justice requires, and shall give all necessary directions for the purpose of ascertaining the facts of the case and of assessing the compensation, if any, to be paid.

[a] *Substituted* by A. O. for "Local Government". [b] The words "subject to the control of the Governor General in Council" were *repealed* by A. O.

Rules.

7. *(1)* The [a][Central Government] [b][* * *] may make rules to carry out the purposes and objects of this Act.

(2) In particular and without prejudice to the generality of the foregoing powers, the [a][Central Government] [c][* * *] may make rules[d] providing for the form of passes to be given to persons or bodies of persons or in respect of property entitled to exemption from the payment of tolls under this Act.

(3) The power to make rules under this section is subject to the condition of the rules being made after previous publication.

(4) All rules made under this section shall be published in the [e][Official Gazette] [f][* * *] and, on such publication, shall have effect as if enacted by this Act.

[a] *Substituted* by A. O. for "Governor-General in Council." [b] The words "and the Local Government with the previous sanction of the Governor-General in Council" were *repealed* by A. O. [c] The words "or the Local Government, with the previous sanction of the Governor General in Council" were *repealed* by A. O. [d] *See* General Statutory Rules and Orders, Vol. III, pp. 365-367. [e] *Substituted* by A. O. for "Gazette of India." [f] The words "or in the Local Official Gazette" were *repealed* by A. O.

8. *[Repeals.] Repealed by the Repealing and Amending Act, 1914 (10 [X] of 1914), S. 3 and Sch. II.*

[THE SCHEDULE] Repealed by the Repealing and Amending Act, 1914 (10 [X] of 1914), S. 3 and Sch. II.

[THE] TRADE MARKS ACT, 1940.

(Act V of 1940).

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Statement of Objects and Reasons.

"In May 1879 the Government of India introduced a Bill in The Imperial Legislative Council for the registration of trade marks in India, but legislation was not proceeded with owing to lack of support from commercial bodies. Since then the question of undertaking legislation has been considered by the Government of India on several occasions. Until 1928 commercial opinion in India was found, either unanimously or on the balance, to be against the proposal. The demand for legislation has, however, strengthened during the last 10 years with growth of industry and trade in India and the increasing realisation that without a system of statutory registration trade marks cannot enjoy adequate protection either at home or abroad.

The proposals in the Bill are generally based on the United Kingdom Trade Marks Act, 1938 (1 & 2 Geo. VI Ch. 22) . . . ."

— *Gazette of India, 1939, Part V, page 249.*

Act how affected by subsequent legislation.
—Amended by Acts 27 of 1941; 12 of 1946.
—Repealed in part and amended by Act 15 of 1948.

Cognate Acts and Provisions.

1. Geneva Convention Implementing Act, XIV of 1936.
2. Khaddar (Name Protection) Act, VIII of 1934.
3. Merchandise Marks Act, IV of 1889.

[THE] TRADE MARKS ACT, 1940.

(ACT V OF 1940.)[a]

[11th March, 1940.]

An Act to provide for the registration and more effective protection of Trade Marks.

WHEREAS it is expedient to provide for the registration and more effective protection of trade marks;

It is hereby enacted as follows:—

[a] For the Statement of Objects and Reasons, *see* Gazette of India, 1939, Part V, page 249; for the Report of the Select Committee, *see ibid*, 1940, Part V, page 51.
The Act has been *applied* to British Baluchistan, *see* Notification No. 168-N., dated 17th October, 1940 Gazette of India, 1940 Part I, p. 1478.

CHAPTER I.

PRELIMINARY.

Short title, extent and commencement.

1. *(1)* This Act may be called the Trade Marks Act, 1940.

(2) It extends to the whole of British India.

(3) This section and section 85 shall come into force at once; the remaining provisions of the Act shall come into force on such date[a] as the Central Government may, by notification in the official Gazette, appoint in this behalf.

[a] The remaining provisions of the Act came into force on 1st June 1942—*See* Gazette of India, 1942, Extraordinary, page 684.

PREAMBLE—SYNOPSIS
1. Applicability of English law.
2. Protection of trade marks.

1. Applicability of English law. — [1] In India prior to passing of this Act, rights and liabilities in connection with trade marks were determined by reference to principles of Common law of England. (Vol 2) 1915 Cal 520 (522) : 42 Cal 262 (DB) ✠ (Vol 27) 1940 P C 86 (87) : I L R (1940) Kar (PC) 171 : 67 Ind App 212 : ILR (1940) All 446 (PC). (Conditions pecu-

Definitions. **2.** *(1)* In this Act, unless there is anything repugnant in the subject or context,—

(a) "associated trade marks" means trade marks deemed to be, or required to be registered as, associated trade marks under this Act;

(b) "certification trade mark" means a mark adapted in relation to any goods to distinguish in the course of trade goods certified by any person in respect of origin, material, mode of manufacture, quality, accuracy or other characteristic, from goods not so certified and registrable as such under the provisions of chapter VIII in respect of those goods in the name, as proprietor of the certification trade mark, of that person;

Preamble—Note 1 *(contd.)*

liar to India must be borne in mind in applying any doctrine of English law and English decisions turning or partly turning on questions of fact. (Cases of common law trade marks and passing off can only be applied with care and circumspection.) ✠ (Vol 22) 1935 All 7 (23) : 57 All 510 (DB). (Cases have to be decided according to rules of justice, equity and good conscience prior to passing of Act—English law may be applied with modification.) ✠(Vol 11) 1924 P C 187 (191) : 51 Ind App 269 : 51 Cal 892 (PC). (Though Trade Marks Act (English) is not in force in India, its principles may be applied)✠('11) 38 Cal 110 (117) (DB).

[2] Decision of High Court in India not conflicting with ordinary principles of jurisprudence and those forbidding passing off of goods will not be disturbed by Privy Council. (Vol 11) 1924 P C 187 (191) : 51 Ind App 269 : 51 Cal 892 (PC).

2. Protection of trade marks.—[1] A registered trade mark as such is not protected. The owner has to prove by evidence that the trade mark or name is associated in the mind of the public with the goods manufactured by him. (Vol 21) 1934 Cal 600 (601).

[2] Protection cannot be granted unless it is established that the particular mark indicates not merely a certain quality of goods but also that they are the goods of a particular manufacture. (Vol 22) 1935 Bom 101 (106) : 59 Bom 373 ✠(Vol 29) 1942 Mad 179 (179, 180). (Fact that plaintiff did not deal in article which defendant put upon market in plaintiff's name is no defence)

[3] Where a name has acquired a secondary significance as exclusively denoting goods of a particular trader, mere dissimilarity in get up is immaterial and affords no protection. (Vol 27) 1940 Mad 145 (148).

[4] Importer, who by advertising and pushing the sale of goods under a particular mark secures a wide popularity for mark in relation to goods sold by him, is entitled to protection of Court for that mark in the country of importation even against producer of goods. ('11) 35 Bom 425 (432). (('85) 8 Mad 149 (154) (DB), *Relied on.*)✠(Vol 26) 1939 Rang 381 (383).

[*See* (Vol 11) 1924 Cal 216 (221) : 50 Cal 762 (DB). (Trade mark—Plaintiff selling goods as belonging to a certain manufacturer—Defendant also selling them as of the same manufacturer — Plaintiff's reputation as importers not established — Defendant not liable in damages.)]

[*See also* ('37) 1937 Mad W N 271 (275, 276). (Goods imported—Importer can acquire proprietary rights in trade mark by user—Manufacturer abroad when can acquire trade mark in goods imported stated.)]

[5] There must be something beyond a mere adjective describing quality of article for a trade mark to gain protection of public. (Vol 17) 1930 Lah 999 (1001, 1003) : 12 Lah 224 (DB). (If a foreign word or a word in dead language not known to people in general is used, that word itself may become a trade mark)✠ (1874) 17 E Q 29 (36, 45), *Ragget* v. *Findlater.*

[6] Trade-mark — Descriptive name and fancy name—No one is allowed to appropriate the fancy name of article. (Vol 13) 1926 Cal 837 (840).

[7] There is no monopoly in use of trade mark. Hence a manufacturer of cigarettes under a particular trade-mark cannot object to use of identical mark on, say, hats or soaps. (Vol 27) 1940 P C 86 (87, 88) : 67 Ind App 212 : ILR (1940) Kar (PC) 171 : ILR (1940) All 446 (PC) ✠ (Vol 22) 1935 All 7 (23) : 57 All 510 (DB). (No trader has a right to use a trade mark so nearly resembling that of another trader as to be calculated to mislead unconscious purchasers and the use of such trade-mark may be restrained by injunction)

[*See also* ('07) 34 Cal 495 (508) (FB).]

[8] If the mark or design is a distinctive one, trader who adopts it is entitled to protection directly. When the article, having assumed a vendible character, is launched on the market, all that is necessary for plaintiff to prove is that mark used by defendant is likely to deceive purchasers of the class who buy goods bearing plaintiff's mark; it is not necessary to prove actual deception. (Vol 26) 1939 Rang 343 (345) : 1939 Rang L R 488 (FB). ((Vol 22) 1935 All 7 : 57 All 510 (DB), *Relied on.*)

[9] For purpose of trade-marks, cigarettes and biris are of the same class. (Vol 24) 1937 Nag 158 (159) : ILR (1939) Nag 569.

SECTION 2 — SYNOPSIS

1. Clause (f).
2. Clause (l).

1. Clause (f). — [1] Definitions of "mark" and "trade mark" in cls. (f) and (l) respectively in S. 2 do no more than recognise statutorily what is understood by 'mark' and 'trade mark' at Common law. It is not necessary for consumer to know identity of person who claims trade mark in particular mark. (Vol 33) 1946 Sind 70 (72).

2. Clause (l). — A trade mark must be some visible concrete device or design affixed to goods to indicate that they are the manufacture of the person whose property the trade mark is; it might consist of name impressed in some distinctive way. When manufacturer has no exclusive right to manufacture a certain article or even articles of a particular kind, all he could claim is that no other manufacturer should so mark articles, as to pass them off as former's when they are not. ('13) 14 Cri L Jour 68 (69) : 40 Cal 281 (DB). (Distinction between trade mark and name pointed out.)

[2] Whatever be the particular mode adopted by him if the trade mark is a work or device never in use before and meaningless, except as indicating by whom the goods in connection with which it is used were made, there could be no conceivable legitimate use of it by another. (Vol 17) 1930 Cal 678 (679, 680). (In such cases mere proof that trade mark of one manufacturer had been appropriated by another would be enough to entitle person aggrieved to an injunction to restrain its use.)

[3] Combination of numerals can form a trade mark if distinctive. (Vol 22) 1935 Bom 101 (105):59 Bom 373.

[4] The sole right to restrain anybody from using any name that he likes in the course of any business he chooses to carry on, is a right in the nature of a trade mark. (Vol 10) 1923 Bom 119 (124). ((1879) 10 Ch D 436, *Levy* v. *Walker*, *Foll.*)

(c) "District Court" has the meaning assigned to it in the Code of Civil Procedure, 1908;

(d) "High Court" means a High Court as defined in sub-section (1) of section 219 of the Government of India Act, 1935;

(e) "limitations" (with its grammatical variations) means any limitations of the exclusive right to the use of a trade mark given by the registration of a person as proprietor thereof, including limitations of that right as to mode of use, as to use in relation to goods to be sold or otherwise traded in within British India, or as to use in relation to goods to be exported to any market outside British India:

(f) "mark" includes a device, brand, heading, label, ticket, name, signature, word, letter or numeral or any combination thereof;

(g) "permitted use" means the use of a trade mark by a registered user thereof in relation to goods with which he is connected in the course of trade and in respect of which for the time being the trade mark remains registered and he is registered as a registered user, being use such as to comply with any conditions or restrictions to which his registration is subject;

(h) "prescribed" means prescribed by rules made, in relation to proceedings before a High Court, by such High Court, and in other cases, by the Central Government;

(i) "registered" (with its grammatical variations) means registered under this Act;

(j) "registered trade mark" means a trade mark which is actually on the register;

(k) "registered user" means a person who is for the time being registered as such under section 41;

(l) "trade mark" means a mark used or proposed to be used in relation to goods for the purpose of indicating or so as to indicate a connection in the course of trade between the goods and some person having the right, either as proprietor or as registered user, to use the mark whether with or without any indication of the identity of that person;

(m) "transmission" means transmission by operation of law, devolution on the personal representative of a deceased person and any other mode of transfer, not being assignment;

(n) "tribunal" means the Registrar or, as the case may be, the Court before which the proceeding concerned is pending.

(2) References in this Act to the use of a mark shall be construed as references to the use of a printed or other visual representation of the mark, and references herein to the use of a mark in relation to goods shall be construed as references to the use thereof upon, or in any other relation whatsoever to, such goods.

Application of other laws not barred.

3. The provisions of this Act shall be in addition to, and not in derogation of the provisions of any other law for the time being in force.

CHAPTER II.

THE REGISTER AND CONDITIONS FOR REGISTRATION.

The register of trade marks.

4. (1) For the purposes of this Act there shall be established [a][at Bombay] a [b][Trade Marks Registry] and a record called the Register of Trade Marks (in this Act referred to as the register) shall be kept thereat wherein shall be entered all

Section 2—Note 2 *(contd.)*

[5] Name primarily descriptive of a particular kind of goods may lose its ordinary meaning and by long user acquire secondary meaning as to entitle person who acquired such trade name to its exclusive use. (Vol 30) 1943 Lah 196 (199, 200):ILR (1943) Lah 427 (DB).

[6] Affixing of a name to goods can be a valid trade mark; it is not necessary for a mark on goods to be a trade mark that the goods should be in the market with the mark affixed for any definite or considerable time. (Vol 6) 1919 Sind 93 (96) : 12 Sind L R 129 : 20 Cri L Jour 277 (DB).

[7] The fact that a person using a word or mark always uses it in conjunction with his own name is not conclusive to show that the word or mark cannot be claimed as a trade mark, or that he has waived his rights in it as a trade mark. ('11) 35 Bom 425 (433).

[8] The mere name of maker will be deemed to be indicative rather of a business, in whosoever hands it may be, than of an individual proprietor of it. ('13) 40 Cal 814 (828).

[9] As right to a trade mark might be acquired so it might be abandoned and no length of time is required to constitute an abandonment. ('13) 40 Cal 814 (830) *(Vol 26) 1939 Rang 98 (106):1939 Rang L R 18 (DB).

[10] The question of abandonment is one of intention to be inferred from the facts of each case. ('11) 35 Bom 425 (433).

[11] Trade mark — Acquisition — Right acquired in British territory is a right to industrial property and if suspended during war is revived after war by peace treaty. (Vol 13) 1926 Bom 200 (207) : 50 Bom 402.

Section 4 — Note 1

[1] The guiding principle of determining property in trade mark has always been its long and continued user establishing reputation of a manufacturer before passing of Act in India. ('40) 188 Ind Cas 462 (463)

registered trade marks [c][ ] with the names, addresses and descriptions of their proprietors, notifications of assignments and transmissions, the names, addresses and descriptions of registered users, disclaimers, conditions, limitations, and such other matters relating to registered trade marks as may be prescribed, but there shall not be entered in the register any notice of any trust express, implied or constructive, nor shall any such notice be receivable by the Registrar.

(2) Subject to the superintendence and direction of the Central Government, the register shall be kept under the control and management of [d][an officer appointed by the Central Government], who shall [e][ ] be called the Registrar of Trade Marks and is in this Act referred to as the Registrar.

[f][*(2A)* The Central Government shall appoint two or more Deputy Registrars of Trade Marks to discharge under the superintendence and direction of the Registrar such functions of the Registrar under this Act as he may from time to time authorise them to discharge; and any reference in this Act to the Registrar shall include a reference to any Deputy Registrar when so discharging any such function.

(2B) The Central Government may by notification in the official Gazette authorise the Registrar to delegate any particular functions of the Registrar to officers other than the Deputy Registrars of Trade Marks.]

(3) The register shall at all convenient times be open to the inspection of the public, subject to such conditions and restrictions as may be prescribed.

[g][*(4)* There shall be a seal for the Trade Marks Registry.]

[a] *Substituted* by the Trade Marks (Amendment) Act 1943 (15 [XV] of 1943), S. 2, for "at the Patent Office". [5-6-1943.] [b] *Substituted, ibid*, 1941 (27 [XXVII] of 1941), S. 2, for "Trade Mark Registry". [26-11-1941] [c] The words "except those entered in the Bombay Register under Chap. IX" *inserted, ibid.*, were *omitted* by Act 15 [XV] of 1943, S. 2. [d] *Substituted, ibid.*, for "the Controller of Patents and Designs". [e] The words "for the purposes of this Act" were *omitted, ibid.* [f] *Substituted, ibid.*, 1946 (12 [XII] of 1946): S. 2 [18 4-1946] for sub-s. (2A) *inserted* by Act 15 [XV] of 1943, S. 2, which ran "*(2A)* The Central Government may appoint a Deputy Registrar of Trade Marks to discharge under the superintendence and direction of the Registrar any function which under this Act, may be discharged by the Registrar and any reference in this Act to the Registrar shall include a reference to the Deputy Registrar when so discharging any such function." [g] *Added* by Act 15 [XV] of 1943, S. 2.

Branch of trade marks registry

[a][**4A.** *(1)* There shall be established at Calcutta for the purpose of facilitating the registration of trade mark a branch of the Trade Marks Registry.

(2) There shall be kept at the said branch a copy of the Register and the Refused Textile Marks List, and the said copies shall at all convenient times be open to the inspection of the public in the same manner as the originals thereof.]

[a] *Inserted* by the Trade Marks (Amendment) Act, 1943 (15 [XV] of 1943), S. 2A. [5-6-1943.]

Registration to be in respect of particular goods.

5. *(1)* A trade mark may be registered only in respect of particular goods or classes of goods.

Section 4—Note 1 *(contd.)*

(Bhopal) ✠ (Vol 29) 1942 Bom 241 (244, 245) (DB). (Prior use of particular name for film confers no right) ✠ (Vol 25) 1938 Cal 216 (217):I L R (1938) 1 Cal 665 : 39 Cri L Jour 537. (Registration of declaration of ownership regarding particular design under Registration Act is not equivalent to registration under Trade Marks Act — Declaration of ownership represents nothing more than opinion and claim of declarant.) ✠ (Vol 16) 1929 Rang 322 (323) ✠ (Vol 14) 1927 All 81 (84) : 49 All 92 (DB).

[2] Mere registration does not confer on anybody a right to use a trade mark. It does not go beyond establishing the time a particular trade mark is being used since. ('40) 188 Ind Cas 462 (463) (Bhopal).

[3] Registration Act has nothing to do with registration of trade marks. (Vol 14) 1927 All 81 (83) : 49 All 92 (DB).

[4] Difference between a suit for infringement of trade mark registered under Act and that of trade mark not so registered is that trade mark registered under Act of 1875 in England gives an immediate property in the registered mark, whereas that property has got to be acquired by user in a country where there is no registration. (Vol 21) 1934 Mad 211 (214) : 57 Mad 600 (DB). ((Vol 18) 1931 Mad 461 (462) (DB), *Rel. on.*)

[5] Rights acquired by parties in England in respect of trade marks and names have no effect on rights of parties in India. (Vol 13) 1926 Bom 200 (201) : 50 Bom 402.

[6] Registration of name of a film by a film company confers no right whatever upon the company. (Vol 29) 1942 Bom 241 (247).

[7] By registering its name company gains monopoly of use of that name, even if company is unregistered—Court will restrain registration under Act of a projected new company which was intended to carry on the same as unregistered company and to bear similar name calculated to deceive public. (Vol 29) 1942 Bom 241 (244) (DB).

[8] Though there was no Trade Marks Act in India, a declaration of description of a trade mark served the useful purpose of being some evidence of genuineness of mark which was subject-matter of it. (Vol 17) 1930 Cal 678 (679).

Section 5 — Note 1

[1] There can be no property in trade mark in gross apart from goods of which it has become the symbol. ('11) 35 Bom 425 (433) ✠ (Vol 24) 1937 Lah 186 (189) (DB)✠(Vol 22) 1935 Bom 101 (109) : 59 Bom 373.

[2] Trade mark must be applied to goods offered for sale and not to goods which are neither manufactured

(2) Any question arising as to the class within which any goods fall shall be determined by the Registrar whose decision in the matter shall be final.

Distinctiveness requisition for registration.

6. *(1)* A trade mark shall not be registered unless it contains or consists of at least one of the following essential particulars, namely :—

(a) the name of a company, individual, or firm, represented in a special or particular manner ;

(b) the signature of the applicant for registration or some predecessor in his business ;

(c) one or more invented words ;

(d) one or more words having no direct reference to the character or quality of the goods, and not being, according to its ordinary signification, a geographical name or surname or the name of a sect, caste or tribe in India ;

(e) any other distinctive mark, provided that a name, signature, or any word, other than such as fall within the descriptions in the above clauses, shall not be registrable except upon evidence of its distinctiveness.

(2) For the purposes of this section, the expression "distinctive" means adapted, in relation to the goods in respect of which a trade mark is proposed to be registered, to distinguish goods with which the proprietor of the trade mark is or may be connected in the course of trade from goods in the case of which no such connection subsists, either generally or, where the trade mark is proposed to be registered subject to limitations, in relation to use within the extent of the registration.

(3) In determining whether a trade mark is adapted to distinguish as aforesaid, the tribunal may have regard to the extent to which—

(a) the trade mark is inherently so adapted to distinguish, and

(b) by reason of the use of the trade mark or of any other circumstances, the trade mark is in fact so adapted to distinguish :

Section 5—Note 1 *(contd.)*

nor sold at date of suit (Vol 22) 1935 Bom 101 (108) : 59 Bom 373.

[3] Right to use particular trade mark is confined in India, unlike England, to the article to which it is affixed ; but it is open to plaintiff to establish by proper and sufficient evidence, that the particular trade mark has been so identified and associated with plaintiff's products that the name would suggest itself to a purchaser on seeing it or any other product which plaintiff alleges is a product allied to or of the same description. (Vol 22) 1935 Bom 101 (104) : 59 Bom 373 ✠ (Vol 24) 1937 Lah 186 (189) (DB).

[4] The fact that user of a word or mark always uses it in conjunction with his own name is not conclusive to show that the word or mark cannot be claimed as trade mark or that the user has waived his rights in it as a trade mark. ('11) 35 Bom 425 (433).

[5] Trade name—Hotel means business and not premises—Lessee building hotel and carrying on business under certain name — Lessor getting back site with building does not get goodwill i. e., right to use name given by lessee. (Vol 18) 1931 Lah 650 (651)

SECTION 6 — SYNOPSIS

1. Distinctiveness.
2. Section 6 (3), Proviso.

1. Distinctiveness. — [1] Registrable trade mark — Essentials stated. (Vol 20) 1933 Nag 344 (346) : 30 Nag L R 45 : 35 Cri L Jour 373.

[2] Words merely descriptive of patented product cannot be registered as trade mark. Descriptive words may have acquired secondary meaning. In order to ascertain whether words have acquired secondary meaning, it should be seen how the manufacturer used them, whether as a trade name or common law trade mark for indicating the origin of the goods, or merely descriptively. (Vol 25) 1938 P C 143 (146) (PC).

[3] The mark must be distinctive in the sense of being adapted to distinguish goods of proprietor of trade mark from those of other persons — Mark commonly used in market to denote goods of a particular kind is not distinctive mark ; surname is not suitable for trade mark. (Vol 25) 1938 Cal 216 (217) : I L R (1938) 1 Cal 665 : 39 Cri L Jour 537. (*Cadbury Brothers' Application*, (1915) 1 Ch 331, *Rel. on.*)

[4] Where a mark or phrase merely describes the quality or origin of an article as "Custard powder," "Malted Milk" or "Gripe Water," it is not capable of distinguishing goods of one from other ; but a mark is distinctive where it points to the goods of a particular person as "Lifebuoy" soap, "Wincarnis" or "Three Nuns" tobacco. (Vol 26) 1939 Rang 343 (344, 345) : 1939 Rang L R 488 (FB).

[5] Trade mark — Registration—Words merely descriptive of patented product cannot be registered as trade mark — Descriptive words may however have acquired secondary meaning indicative of origin—Where words in addition to their being descriptive of goods are also the name of product of which those goods are composed and are also in common use, it is difficult to conceive that they could acquire a secondary meaning. (Vol 25) 1938 P C 143 (146, 147) (PC).

2. Section 6 (3), Proviso. — [1] The proviso to S. 6 (3) does not mean that evidence of mere user of an old trade mark would entitle it to be registered. The words "acquired distinctiveness" in the proviso cannot be interpreted as though they were equivalent to "user." ('45) 49 Cal W N 425 (430).

[2] Section 6 (3) proviso is confined to user, and empowers Registrar to take evidence to find out if the mark has acquired distinctiveness so as to entitle it to registration and forbids refusal of registration on sole ground that mark is not distinctive. ('45) 49 Cal W N 425 (429, 430) (Registrar of trade mark has discretion to refuse registration if it is not adapted to distinguish even though mark may have been used from date prior to 25-2-37 and his discretion should not be lightly interfered with.)

[3] Mark "India" can never acquire distinctiveness and proviso to S. 6 does not deprive Registrar of his discretion. ('45) 49 Cal W N 425 (429).

Provided that in the case of a trade mark which has been continuously used (either by the applicant for registration or by some predecessor in his business, and either in its original form or with additions or alterations not substantially affecting its identity) in relation to the same goods as those in relation to which registration is applied for, during a period from a date prior to the 25th day of February, 1937, to the date of application for registration, the Registrar shall not refuse registration by reason only of the fact that the trade mark is not adapted to distinguish as aforesaid, and may accept evidence of acquired distinctiveness as entitling the trade mark to registration.

Limitation as to colour.

7. *(1)* A trade mark may be limited wholly or in part to one or more specified colours, and any such limitation shall be taken into consideration by any tribunal having to decide on the distinctive character of the trade mark.

(2) So far as a trade mark is registered without limitation of colour it shall be deemed to be registered for all colours.

Prohibition of registration of certain matter.

8. No trade mark nor part of a trade mark shall be registered which consists of, or contains, any scandalous design, or any matter the use of which would—

(a) by reason of its being likely to deceive or to cause confusion or otherwise, be disentitled to protection in a Court of justice ; or

(b) be likely to hurt the religious susceptibilities of any class of His Majesty's subjects ; or

(c) be contrary to any law for the time being in force or to morality.

[*Cf.* 1 & 2 Geo. VI., C. 22—S. 11.]

Use of names of chemical elements barred.

9. No word which is the commonly used and accepted name of any single chemical element or single chemical compound (as distinguished from a mixture) shall be registered as a trade mark in respect of a chemical substance or preparation, and any such registration shall, notwithstanding anything in section 24, be deemed for the purposes of section 46 to be an entry made in the register without sufficient cause or an entry wrongly remaining on the register, as the circumstances may require :

Provided that this section shall not apply to a word which is used to denote only a brand or make of the element or compound as made by the proprietor or a registered user of the trade mark, as distinguished from the element or compound as made by others, and in association with a suitable name or description open to the public use.

Prohibition of registration of identical or similar trade mark.

10. *(1)* Save as provided in sub section *(2)*, no trade mark shall be registered in respect of any goods or description of goods which is identical with a trade mark belonging to a different proprietor and [a][either already on the register or already registered in any Indian State to which section 82A for the time being applies] in respect of the same goods or description of goods, or which so nearly resembles such trade mark as to be likely to deceive or cause confusion.

(2) In case of honest concurrent use or of other special circumstances which, in the opinion of the Registrar, make it proper so to do he may permit the registration by more than one proprietor of trade marks which are identical or nearly resemble each other in respect of the same goods or description of goods, subject to such conditions and limitations, if any, as the Registrar may think fit to impose.

(3) Where separate applications are made by different persons to be registered as proprietors respectively of trade marks which are identical or nearly resemble each other, in respect of the same goods or description of goods, the Registrar may refuse to register any of them until their rights have been determined by a competent Court.

[a] *Substituted* by the Trade Marks (Amendment) Act, 1946 (12 [XII] of 1946), S. 3, for "already on the register." [18-4-1946.]

Objects and Reasons.

This section prohibits the registration of identical or similar trade marks under certain conditions. This restriction will not only protect owners of registered trade marks but will also safeguard the interest of the public.

—S. O. R.

Registration of parts of trade marks and of trade marks as a series.

11. *(1)* Where the proprietor of a trade mark claims to be entitled to the exclusive use of any part thereof separately, he may apply to register the whole and the part as separate trade marks.

Section 9 — Note 1

[1] Where article can be denoted by a proper descriptive name, but person inventing or discovering it chooses to describe the article by a fancy name, and manufactures and sells the same under that fancy name, no one is allowed to appropriate that name, and manufacture and sell the article under that fancy name. (Vol 13) 1926 Cal 837 (840). ("Urea Stibamine" is not descriptive name of article at all and has no chemical meaning, but it is a fancy name.)

(2) Each such separate trade mark shall satisfy all the conditions applying to, and have all the incidents of, an independent trade mark.

(3) Where a person claiming to be the proprietor of several trade marks in respect of the same goods or description of goods which, while resembling each other in the material particulars thereof, yet differ in respect of—

(a) statements of the goods in relation to which they are respectively used or proposed to be used ; or

(b) statements of number, price, quality, or names of places ; or

(c) other matter of a non-distinctive character which does not substantially affect the identity of the trade mark ; or

(d) colour ;

seeks to register those trade marks, they may be registered as a series in one registration.

Objects and Reasons.

The registration as a series in one registration of marks which resemble each other in material respects is designed to secure that in the event of the assignment or transmission of such marks there will be no deception or confusion resulting from separate ownership. Such marks are deemed to be associated marks and are assignable or transmissible only as a whole and separately—S. O. R.

Associated trade marks.

12. *(1)* Where a trade mark which is registered, or is the subject of an application for registration, in respect of any goods is identical with another trade mark which is registered, or is the subject of an application for registration, in the name of the same proprietor in respect of the same goods or description of goods, or so nearly resembles it as to be likely to deceive or cause confusion if used by a person other than the proprietor, the Registrar may at any time require that the trade marks shall be entered on the register as associated trade marks.

(2) Where a trade mark and any part thereof are, in accordance with the provisions of sub-section *(1)* of section 11, registered as separate trade marks in the name of the same proprietor, they shall be deemed to be, and shall be registered as, associated trade marks.

(3) All trade marks registered in accordance with the provisions of sub-section *(3)* of section 11 as a series in one registration shall be deemed to be, and shall be registered as, associated trade marks.

(4) On application made in the prescribed manner by the registered proprietor of two or more trade marks registered as associated trade marks, the Registrar may dissolve the association as respects any of them if he is satisfied that there would be no likelihood of deception or confusion being caused if that trade mark were used by any other person in relation to any of the goods in respect of which it is registered, and may amend the register accordingly.

Registration subject to disclaimer.

13. If a trade mark contains —

(a) any part not separately registered as a trade mark in the name of the proprietor, or for the separate registration of which no application has been made, or

(b) any matter common to the trade, or otherwise of a non-distinctive character,

the tribunal, in deciding whether the trade mark shall be entered or shall remain on the register, may require, as a condition of its being on the register, that the proprietor shall either disclaim any right to the exclusive use of such part or of all or any portion of such matter, as the case may be, to the exclusive use of which the tribunal holds him not to be entitled, or make such other disclaimer as the tribunal may consider necessary for the purpose of defining the rights of the proprietor under the registration :

Provided that no disclaimer shall affect any rights of the proprietor of a trade mark except such as arise out of the registration of the trade mark in respect of which the disclaimer is made.

Objects and Reasons.

The object of this section is to prevent the creation of a monopoly in non-distinctive parts of a registered trade mark—S. O. R.

CHAPTER III.

PROCEDURE FOR, AND DURATION OF, REGISTRATION.

Application for registration.

14. *(1)* Any person claiming to be the proprietor of a trade mark used or proposed to be used by him who is desirous of registering it shall apply in writing to the Registrar in the prescribed manner, and subject to the provisions of this Act, the

Registrar may refuse the application or may accept it absolutely or subject to such amendments, modifications, conditions or limitations, if any, as he may think fit.

(2) In the case of a refusal or conditional acceptance the Registrar shall, if required by the applicant, state in writing the grounds of his decision and the materials used by him in arriving thereat.

(3) The tribunal may at any time, whether before or after acceptance, correct any error in or in connection with the application, or may permit the applicant to amend his application upon such terms as it may think fit."

Opposition to registration.

15. *(1)* When an application for registration of a trade mark has been accepted, whether absolutely or subject to conditions or limitations, the Registrar shall, as soon as may be after acceptance, cause the application as accepted, together with the conditions and limitations, if any, subject to which it has been accepted, to be advertised in the prescribed manner :

Provided that the Registrar may cause an application to be advertised before acceptance if it relates to a trade mark to which clause *(e)* of sub-section *(1)* of section 6 applies, or in any other case where it appears to him that it is expedient by reason of any exceptional circumstances so to do, and where an application has been so advertised the Registrar may, if he thinks fit, advertise it again when it has been accepted, but shall not be bound so to do.

(2) Any person may, within the prescribed time from the date of the advertisement of an application, give notice in writing in the prescribed manner to the Registrar of opposition to the registration.

(3) The Registrar shall serve in the prescribed manner a copy of the notice on the applicant, and within the prescribed time the applicant shall send to the Registrar, in the prescribed manner, a counter-statement of the grounds on which he relies for his application, and, if he does not do so, he shall be deemed to have abandoned his application.

(4) If the applicant sends such counter-statement, the Registrar shall serve in the prescribed manner a copy thereof on the persons giving notice of opposition, and shall, after hearing the parties, if so required, and considering the evidence, decide whether, and subject to what conditions or limitations, if any, registration is to be permitted.

(5) If a person giving notice of opposition or an applicant sending a counter-statement after receipt of a copy of such notice, or an appellant against any order of the Registrar under section 14 or this section, neither resides nor carries on business in British India, the tribunal may require him to give security for costs of the proceedings before it, and in default of such security being duly given may treat the opposition or application or appeal, as the case may be, as abandoned.

Registration.

16. *(1)* When an application for registration of a trade mark has been accepted and either has not been opposed and the time for notice of opposition has expired, or having been opposed, has been decided in favour of the applicant, the Registrar shall, unless the application has been accepted in error, or unless the Central Government otherwise directs, register the said trade mark, and the trade mark, when registered, shall be registered, as of the date of the making of the said application, and that date shall, subject to any directions made under section 82 applicable to such trade mark, be deemed for the purposes of this Act to be the date of registration.

(2) On the registration of a trade mark the Registrar shall issue to the applicant a certificate in the prescribed form of the registration thereof sealed with the seal of the [a][Trade Marks Registry].

(3) Where registration of a trade mark is not completed within twelve months from the date of the application by reason of default on the part of the applicant, the Registrar may, after giving notice to the applicant in the prescribed manner, treat the application as abandoned unless it is completed within the time specified in that behalf in the notice.

[a] *Substituted* by the Trade Marks (Amendment) Act, 1943 (XV [15] of 1943), S. 3, for "Patent Office". [5-6-1943.]

Jointly owned trade marks.

17. *(1)* Save as provided in sub-section *(2)*, nothing in this Act shall authorise the registration of two or more persons who use a trade mark independently, or propose so to use it, as joint proprietors thereof.

(2) Where the relations between two or more persons interested in a trade mark are such that no one of them is entitled as between himself and the other or others of them to use it except—

(a) on behalf of both or all of them, or

(b) in relation to an article with which both or all of them are connected in the course of trade,

those persons may be registered as joint proprietors of the trade mark, and this Act shall have effect in relation to any rights to the use of the trade mark vested in those persons as if those rights had been vested in a single person.

Duration and renewal of registration.

18. *(1)* The registration of a trade mark shall be for a period of seven years, but may be renewed from time to time in accordance with the provisions of this section.

(2) The Registrar shall, on application made by the registered proprietor of a trade mark in the prescribed manner and within the prescribed period, renew the registration of the trade mark for a period of fifteen years from the date of expiration of the original registration or of the last renewal of registration, as the case may be (which date is in this section referred to as "the expiration of the last registration.")

(3) At the prescribed time before the expiration of the last registration of a trade mark, the Registrar shall send notice in the prescribed manner to the registered proprietor of the date of expiration and the conditions as to payment of fees and otherwise upon which a renewal of registration may be obtained, and if at the expiration of the time prescribed in that behalf those conditions have not been duly complied with the Registrar may remove the trade mark from the register, subject to such conditions (if any) as to its restoration to the register as may be prescribed.

Effect of removal from register for failure to pay fee for renewal.

19. Where a trade mark has been removed from the register [a][under this Act, or from the register of trade marks in any Indian State to which section 82A for the time being applies,] for failure to pay the fee for renewal, it shall nevertheless, for the purpose of any application for the registration of another trade mark during one year next after the date of the removal, be deemed to be a trade mark already on the register, unless the tribunal is satisfied either—

(a) that there has been no *bona fide* trade use of the trade mark which has been removed during the two years immediately preceding its removal; or

(b) that no deception or confusion would be likely to arise from the use of the trade mark which is the subject of the application for registration by reason of any previous use of the trade mark which has been removed.

[a] *Inserted* by the Trade Marks (Amendment) Act, 1946 (12 [XII] of 1946), S. 4. [18-4-1946.]

CHAPTER IV.

EFFECT OF REGISTRATION.

No action for infringement of unregistered trade mark.

20. *(1)* No person shall be entitled to institute any proceeding to prevent, or to recover damages for, the infringement of an unregistered trade mark unless such trade mark has been continuously in use since before the 25th day of February 1937, by such person or by a predecessor in title of his and unless an application for its registration, made within five years from the commencement of this Act, has been refused; and the Registrar shall, on application in the prescribed manner, grant a certificate that such application has been refused.

(2) Nothing in this Act shall be deemed to affect rights of action against any person for passing off goods as the goods of another person or the remedies in respect thereof.

SECTION 20—SYNOPSIS

1. Para 1.
2. Para 2.—Passing off action.
3. Remedies.

1. Para. 1. — [1] In Burma there is no statutory provision for registration of trade marks and no action can be brought for infringement of trade mark, but Courts entertain passing off suits. (Vol 26) 1939 Rang 343 (344): 1939 Rang L R 488 (F B).

[2] In India before the passing of this Act, only right of action a trader or manufacturer had was common law right of action entitling him to an injunction restraining use of trade mark belonging to him if such use was calculated to pass off the defendant's goods as goods of plaintiff. (Vol 13) 1926 Bom 200 (202): 50 Bom 402.

[3] In the absence of a Trade Marks Act in Bhopal State, Courts have jurisdiction to protect a trade mark and stop its infringement under existing law; Courts in British India have fully recognised this principle. ('40) 188 Ind Cas 462 (464) (Bhopal). ((Vol 13) 1926 Bom 200; 50 Bom 402; (Vol 14) 1927 All 81: 49 All 92 (D B) and (Vol 17) 1930 Cal 678, *Rel. on.*)

[4] Difference between rights arising out of infringement of registered and unregistered trade marks pointed out. (Vol 21) 1934 Mad 211 (214): 57 Mad 600 (DB).

[5] Person believing in good faith that he is free to use a certain trade mark but unwilling to run the risk may have the pretended right of any other person examined in a Court of law in order to ascertain his own position. (Vol 20) 1933 All 495 (497): 55 All 702 (D B).

[6] Declaration of right to use a trade mark cannot be granted unless the person seeking it proves that the right to the use of the trade mark is the "exclusive right of property" which he has acquired to the exclusion of every one else. (Vol 20) 1933 All 495 (496): 55 All 702 (D B).

Section 20 — Note 1 *(contd.)*

[7] *A* filing a complaint against *B* for infringement of his trade mark—*B* filing a suit subsequently for declaration of his right to use the trade mark — Suit not maintainable—Even if maintainable, Court would not grant relief. (Vol 15) 1928 Rang 256 (258): 6 Rang 291.

2 Para 2.—Passing off action.—[1] The gist of a passing off action is deceit, for passing off is one of the ways by which the purchaser may be deceived into thinking that the goods of one trader are the goods of another. (Vol 22) 1935 Bom 101 (110): 59 Bom 373.

[2] Condition precedent to action for infringement is registration. But in a 'passing off' action, it is not a question of title, but false representation. (Vol 21) 1934 Rang 297 (299): 12 Rang 534 ✠(Vol 30) 1943 Lah 196 (206): I L R (1943) Lah 427 (DB) (Evidence of actual deception — Absence of is a material consideration though not conclusive.) ✠(Vol 29) 1942 Bom 241 (247) (DB). (Foundation of action is deception or possibility of deception but it is not action of deceit; difference in nature, essentials, and burden of proof in action of deceit and passing off action stated and explained). ✠(Vol 27) 1940 Mad 145 (145).

[3] Fundamental rule is that one man has no right to put off his goods for sale as goods of a rival trader, and he cannot be allowed to use names, marks, letters or other indicia by which he may induce purchasers to believe that goods which he is selling are the manufacture of another person. ('96) 1896 App Cas 199 (209), *Frank Reddaway and Frank Reddaway Co., Ltd.* v. *George Benham & George Benham Co.* ✠(Vol 17) 1930 Lah 999 (1002): 12 Lah 224 (D B).

[4] Passing off suit is in essence a suit in defence of plaintiff's right of property in particular name, make or get-up he claims and in the good-will he attributes thereto ('35) 157 Ind Cas 902 (906) (Rang.)

[5] In a "passing off" action, fraud is not a necessary element of the right of action. (Vol 15) 1928 Mad 759 (759) ✠ (Vol 23) 1936 Bom 418 (419): I L R (1937) Bom 85. (In a passing off action, likelihood of public being deceived is sufficient. The presumption that man intends the natural and ordinary consequences of his act is applicable to passing off action).

[6] Plaintiff must establish that he has acquired for himself or his goods a sufficient reputation under the mark or name by which in consequence of use of that mark, his goods have come to be known to entitle him to treat it as his own and to be protected. ('35) 157 Ind Cas 902 (906) (Rang) ✠(Vol 31) 1944 Pat 64 (65 and 66): 22 Pat 702 (D B) ✠(Vol 29) 1942 Bom 241 (248) (D B) ✠ (Vol 25) 1938 Cal 594 (597). (Copyright —Passing off — Title and get-up must be shown to be such that public recognise it as that of a particular person.)

[*See also* (Vol 21) 1934 Rang 297 (299): 12 Rang. 534. (In a passing off action, the question whether the person has acquired right of property in mark is immaterial. He has to prove that the rival trader 'passes off' his goods for his own)]

[But see (Vol 25) 1938 Mad 1 (2): I L R(1938) Mad 466 (D B). (In a passing off action, relief can be granted only on ground of the rival doing something calculated to deceive: Essentials to be shown in such action stated.)]

[7] Rival manufacturer manufacturing goods similar in appearance as patented goods, (the patent of which has expired) and adopting to them descriptive name by which patented goods had been known, is not guilty of passing off. (Vol 25) 1938 P C 143 (152) (P C).

[8] Where a particular mark is associated with the importer and not with the supplier, the importer is entitled to institute an action for "passing off". (Vol 21) 1934 Rang 297 (300): 12 Rang 534.

[9] Court has to consider not merely similarity of name but similarity in make up and subject-matter and other surrounding circumstances. (Vol 29) 1942 Bom 241 (246) (DB).

[10] Passing off action — Name of film — Whether use by defendant of name used by plaintiff is calculated to deceive is a question of fact. (Vol 29) 1942 Bom 241 (246) (DB).

[11] Passing off action—Matters to be considered by Court—Court entitled to inquire not only whether such deception is likely to arise from initiative of purchasers themselves but also whether temptation is likely to be offered to unscrupulous traders — Principle underlying protection given by Court stated. ('35) 157 Ind Cas 902 (909) (Rang)

3. Remedies.—[1] A trader having acquired in any language the exclusive right to the use of certain particular marks not merely as descriptive of but as distinctive of the goods, has the right to restrain another trader from copying those words for a similar class of goods in any other language in India. (Vol 28) 1941 Bom 3 (7).

[2] Where *B* encased a medicine in such a way that it could be readily passed off so as to deceive the ordinary village customer into the belief that it is *A's*, *A* is entitled to an injunction restraining *B* from selling it in that way. (Vol 9) 1922 All 178 (180): 44 All 608 (DB).

[3] Trade name—Passing off—Rights in respect of name of business are different from those of trade mark. Name common to trade likely to deceive public—Injunction should be granted restraining defendant from using name likely to deceive public. (Vol 22) 1935 Cal 109 (113): 61 Cal 571.

[4] Plaintiff in a passing off action can make his choice of either an account and payment to him of the profits which the defendant has wrongfully gained or an enquiry as to, and payment of, damages occasioned to him. (Vol 28) 1941 Bom 3 (10) ✠ (Vol 28) 1941 Lah 293 (296) (DB). (But in the latter case, the ordinary rule is to ascertain the actual losses).

[5] Where in a passing off action a plea of acquiescence or abandonment succeeds, especially where the rival trader has taken the trade mark of another in ignorance and has used it in the mistaken belief, but sincerely entertained, that he is acting within law, it will be wrong to deprive him of his costs. (Vol 28) 1941 Mad 31 (36): I L R (1941) Mad 300 (DB).

[6] If there is *prima facie* case of deliberate intent to pass off, interlocutory injunction should be granted, even though on critical examination of the two goods side by side, purchasar is not likely to be deceived. (Vol 21) 1934 Mad 226 (226) (DB).

[7] Where there is no evidence that *B's* goods were sold to persons desiring to purchase *A's* goods or that illiterate persons were misled by *B's* design into thinking that they were buying *A's* goods, *A* is not entitled to interlocutory injunction. (Vol 25) 1938 Cal 458 (458).

[8] Similarity in the sound between the words 'Ideal' and 'cordial' and similarity of labels are sufficient grounds for granting interim injunction, for they may be intended for the purpose of getting the customers to mistake one brand for the other. (Vol 26) 1939 Cal 466 (467).

[9] In a suit by *A* for injunction prohibiting use of firm name by another person, *A* should prove (1) that the names of the firms are alike or equivalent and (2) that his firm has acquired a secondary meaning, i. e., that the word when applied to goods means that the goods are the goods of *A* and of no one else. (Vol 18) 1931 P C 15 (17) (P C) ✠ (Vol 29) 1942 Bom 241 (248) (DB) ✠ (Vol 27) 1940 Lah 39 (40) (Trade name — Trade name of particular individual or firm gaining reputa-

21. [a][*(1)*] Subject to the provisions of sections 22, 25 and 26, the registration of a person in the register as proprietor of a trade mark in respect of any goods shall [b][*, *] give to that person the exclusive right to the use of the trade mark in relation to those goods and, without prejudice to the generality of the foregoing provision, that right shall be deemed to be infringed by any person who, not being the proprietor of the trade mark or a registered user thereof using by way of the permitted use, uses a mark identical with it or so nearly resembling it as to be likely to deceive or cause confusion, in the course of trade, in relation to any goods in respect of which it is registered, and in such manner as to render the use of the mark likely to be taken either—

Right conferred by registration.

(a) as being use as a trade mark; or

(b) to import a reference to some person having the right either as a proprietor or as registered user to use the trade mark or to goods with which such a person as aforesaid is connected in the course of trade.

[a][*(2)* A person registered in any Indian State to which section 82A for the time being applies, as proprietor of a trade mark shall have the same rights in respect thereof as are conferred by this section on a person registered under this Act as proprietor of a trade mark]

[a] *Inserted* by the Trade Marks (Amendment) Act, 1946 (12 [XII] of 1946), S. 5 [18-4-1946]. [b] The words "if valid" were *omitted*, *ibid.*

Section 20 — Note 3 *(contd.)*

tion and publicity in connection with particular class of goods. Second person entering trade under a name similar or some name causing confusion and irreparable harm—Court can restrain him from trading under such name by injunction) ✠ (Vol 26) 1939 Mad 555 (560). (It must also be shown that there is a reasonable probability that the use of the name would result in defendant appropriating material advantage of plaintiff's business) ✠ (Vol 23) 1936 Mad 8 (10) ✠ ('97) 24 Cal 364 (379). (There must be a reasonable probability of purchasers being deceived, not merely a possibility of deception).

[10] Suit for injunction — Before Court can grant injunction a very high standard of affirmative proof is required to establish plaintiff's case or that similarity of names is of itself sufficient. (Vol 26) 1939 Mad 555 (556).

[11] *A* importing matches with certain star labels and claiming exclusive use of star or stars—*B* importing matches also with star labels but with a different number — *B* restrained from using *A's* labels—*A* not entitled to restrain all from using a design of any number of stars. (Vol 15) 1928 Rang 210 (215) : 6 Rang 221 (DB).

[12] In a suit for injunction on the ground of similarity in names, the question is to see whether ordinary public will mistake one name for another. Fraudulent intention need not be proved. It is enough to prove injury to the rights. (Vol 10) 1923 Bom 119 (120).

[13] Trade name—Injunction — Company — Joint stock Company—Similarity of names—"Oriental Government Security Life Assurance Company"—"Oriental Assurance Company" — Latter Company held not entitled to be called "oriental" because doing business in the orient, without regard to others' rights. ('13) 40 Cal 570 (579, 580).

[14] Trader's name acquiring secondary significance in locality—Another trader of similar name using his name in combination with other words and not representing truth taken as a whole and doing other things intending deliberately to pass his goods as those of former — Injunction should be granted. (Vol 27) 1940 Mad 145 (146, 147, 148).

[15] Other person's goods likely to be palmed off as that of *A*—Injunction should be granted—Mere difference in emblem, if get up is the same, would make no difference. (Vol 16) 1929 P C 11 (12) : 56 Ind App 1 : 51 All 182 (P C).

[16] General get-up so similar as to enables dealer to pass off *B's* flour as *A's* and mislead ordinary customers — *A* is entitled to injunction. (Vol 24) 1937 Cal 528 (531).

[17] The fact that in a particular place by its universal use the trade-name had acquired a secondary meaning will not entitle the owner to have an injunction in every part of the country. (Vol 19) 1932 Mad 705 (708) : 55 Mad 966 (DB).

[18] Passing off action — Rule as to damages — Damages should be awarded on difference between usual goods earnings and actual earnings with a lump sum for expected profit by increase of business. (Vol 22) 1935 Cal 109 (115) : 61 Cal 571.

SECTION 21 — SYNOPSIS

1. Exclusive right to use trade-mark—Cases before the Act.
2. Infringement of trade mark.
3. Action for infringement.
4. Similarity and deception—Criterion and Rules.
5. Function of Court.
6. Injunction and damages.
7. Onus of proof.
8. Acquiescence and delay.
9. Criminal remedy.

1. Exclusive right to use trade-mark — Cases before the Act.— [1] A registered trade-mark as such is not protected and the owner has to prove by evidence that he has acquired a right thereto in the sense that the trade-mark or the trade name is associated in the mind of the public with his goods. (Vol 21) 1934 Cal 600 (601).

[2] To show that a particular trade-mark has a reputation in market is not sufficient to establish right of exclusive user of the mark. There must be such an association between the mark and firm's name as to indicate in the understanding of public that goods bearing that mark come from that particular firm. ('10) 33 Mad 402 (404) (DB) ✠ (Vol 19) 1932 Sind 84 (85) : 26 Sind L R 51. (Trade-mark in respect of words "Gaoo" (cow) can be claimed if Court is satisfied that goods are identified with that device.) ✠ (Vol 17) 1930 Lah 999 (1003) : 12 Lah 224 (DB). (Common words may on their association with particular goods, acquire secondary meaning and right to their exclusive user established).

[3] Number stamped on one trader's goods becoming symbol of goods of plaintiff's manufacture—Goods even of a different and inferior class may benefit from

Section 21 — Note 1 *(contd.)*
goodwill and reputation of plaintiff. (Vol 26) 1939 Bom 118 (120) (DB).

[4] Fraudulent user cannot give right in trade-mark — Persons imitating trade-mark of others and causing his goods to be passed off as those of others cannot prevent another person equally guilty like himself from so doing, even if he was first in market with imitation. (Vol 25) 1938 Sind 38 (41, 42).

[5] Where goods have acquired by a particular fancy description, combination or device, a reputation in the market, it is immaterial that the customers do not know who the maker is. (Vol 3) 1916 Bom 183 (187) : 41 Bom 49 (DB) ✠ (Vol 25) 1938 Mad 1 (3) : I L R (1938) Mad 466 (DB). (It is immaterial whether goods are made for him in his country or abroad. Supplier's acquiring reputation in other country does not affect such merchant).

[6] A trade-mark or name may become *publici juris* but Court will require very strong evidence to show conclusively that the mark had become so public that nobody could be deceived and induced from the use of it to believe that he was buying the goods of the original trader. (Vol 13) 1926 Bom 200 (202, 203) : 50 Bom 402.

2. Infringement of trade-mark.—[1] If goods of a manufacturer, from the mark or device he has used, have become known in the market by a particular name the adoption by a rival trader of any mark which will cause his goods to bear the same name in the market may be as much an invasion of right of that rival as the actual copy of his device. (Vol 14) 1927 All 81 (88) : 49 All 92 (DB) ✠ (Vol 16) 1929 Rang 322 (325) ✠ (Vol 15) 1928 Bom 227 (229) : 52 Bom 228 (DB). (The use of such a trade- mark may be restricted by injunction although no purchaser has actually been misled) ✠ (Vol 4) 1917 Low Bur 149 (150, 151) : 9 Low Bur Rule 31 : 17 Cr L Jour 488. (In such cases the dissimilarity of the rival marks cannot be relied upon as a complete defence.) ✠ ('33) 6 Mad 108 (111). (No trader importing goods can lawfully adopt trade-mark calculated to cause his goods to bear in the market the same name as those of a rival trader.) ✠ ('35) 157 I C 902 (905) (Rang) (Do.).

[2] Where the number stamped on trader's dhoties has acquired reputation as goods of his manufacture, another trader cannot stamp the number on his dhoties although differing in quality and size. (Vol 26) 1939 Bom 118 (120) (DB) ✠ (Vol 3) 1916 Bom 183 (187): 41 Bom 49 (DB). (The adoption of a different drawing or picture by the infringer along with the number makes no difference).

[3] Where article can be denoted by a proper descriptive name, but the inventor or discoverer chooses to describe it by a fancy name, no one is allowed to appropriate that name and sell the article under that fancy name. (Vol 13) 1926 Cal 837 (840).

[4] Trade-mark applied to his shirts by a shirt maker may constitute an infringement of a trade-mark applied by another trader to his twill. (Vol 4) 1917 Low Bur 149 (151) : 9 Low Bur Rul 31 : 17 Cr L Jour 342.

[5] Trade-mark can be infringed by means of advertisement. (Vol 2) 1915 All 262 (262) : 37 All 446 (DB).

[6] Even though the device may not be actually copied, still it is infringement, if name adopted is such as to be capable of being passed off as the goods of the rival. (Vol 14) 1927 Rang 49 (52) : 4 Rang 381.

[7] It is not infringement where a trader competes with manufacturer in selling same goods even in a place where hitherto manufacturer or his agent has been the sole importer, unless the trader has covenanted not to sell them in the particular place. (Vol 11) 1924 P C 187 (191) : 51 I A 269 : 51 Cal 892 (P C).

3. Action for infringement. — [1] Plaintiff must prove property in trade mark either as originator of it or as purchaser or by showing that even though he has copied it from another that other has abandoned it and that he has independently built up a trade and reputation on the merits of his goods. (Vol 27) 1940 Sind 83 (83, 84) : ILR (1940) Kar 380 (DB).

[2] Plaintiff has to prove that his goods are known to public by some distinct name, mark, badge and that defendant's use or imitation is likely to mislead public. (Vol 22) 1935 Bom 101 (104, 106) : 59 Bom 373 ✠ (Vol 19) 1932 Rang 114 (115) : 10 Rang 134 (D B) ✠ (Vol 19) 1932 Mad 705 (707) : 55 Mad 966 (DB). (The mere fact that *A's* goods of that name had acquired a considerable reputation is not enough).

[3] *A* suing for infringement need not in all cases affirmatively establish that he has not copied his trade mark (Vol 26) 1939 Rang 98 (106) : 1939 Rang L R 18 (DB).

[4] In an action for infringement of trade mark which is in substance a *quia timet* action, in the absence of evidence of actual confusion, a strong case must be made to justify a conclusion that confusion will result by the act sought to be restrained. (Vol 21) 1934 P C 167 (170) (PC) ✠ (Vol 24) 1937 Nag 158 (159, 160) : ILR (1939) Nag 569.

[5] The questions for determination in a case of alleged infringement are (1) whether the rival has pirated the dominant device of the trader and (2) whether the rival's conduct is such as to deceive ultimate purchasers. (Vol 3) 1916 Bom 183 (187) : 41 Bom 49 (DB).

[6] It is sufficient to justify the grant of relief if Court is satisfied that defendant is putting into the hands of middlemen a means whereby ultimate purchasers are likely to be defrauded. (Vol 3) 1916 Bom 183 (187) : 41 Bom 49 (DB) ✠ (Vol 26) 1939 Bom 118 (120) (DB).

[7] In considering whether similarity in sound of name used by defendant with that of name used by plaintiff constitutes infringement of plaintiff's trade mark, it is not possibility of confusion but that the resemblance is such that there is a reasonable probability of deception is to be considered; evidence of apprehended confusion is of no use. (Vol 30) 1943 Lah 196 (202) : ILR (1943) Lah 427 (DB).

[8] The question does not turn on honesty of defendant, if use of plaintiff's name by defendant is calculated to deceive; plaintiff is entitled to protection. (Vol 21) 1934 Cal 600 (602).

[9] Item 29 of Schedules to Rules framed under the Act includes, besides edible oils and fats various other articles of food and therefore, the inclusion of edible oils, whether liquid or hydrogenated in item 29 is not a safe guide for regarding them as of the same description for purposes of infringement of trade marks. (Vol 30) 1943 Lah 196 (202) : ILR (1943) Lah 427 (DB).

[10] That labels or containers of rival trade are very different from those of trade mark owner is no answer to claim of trade mark owner; difference in get up forms only an element in considering question of probability of deception (Vol 27) 1940 P C 86 (88) : I L R (1940) Kar (PC) 171 : ILR (1940) All 446 : 67 Ind App 212 (PC).

[11] Mere damage is insufficient to support an action; damage must be attributable to the passing off of other goods as plaintiff's goods. (Vol 25) 1938 Sind 38 (43).

[12] When the only question to decide is whether the mark used by *B* infringes *A's* registered mark, the questions as to whether *B* had acquired the goodwill of any business, and whether he was properly on the re-

Section 21—Note 3 *(contd.)*
gister of a mark slightly different from the mark in actual use are irrelevant. (Vol 29) 1942 PC 40 (41) (PC).

[13] Rival traders, who have brought goods into the market with the same mark are not entitled to set up a defence that in some quarter of the globe some other trader had been using the mark for a period longer than the infringed trader. (Vol 11) 1924 Rang 333 (335, 336) : 2 Rang 275.

[14] There is no distinction between a case in which the name, of the use of which the complaint is made, is the name of the person carrying on the business and a case in which it is not. (Vol 18) 1931 Mad 461 (464) (DB).

[15] Where the labels used by *B* are distinct from and incapable of being mistaken for or confused with the labels of *A*, *A* will, in an action for infringement of trade marks, succeed only when he establishes by evidence that his goods are known by some name or description of such a nature that the use of *B's* labels will mislead people into thinking that the goods are *A's*. (Vol 18) 1931 P C 272 (276) (PC).

[16] *A* having reputation for his goods through certain trade mark can restrain *B* from using it not only for the same goods as *A's*, but also to cognate classes of goods. Similarity of marks, commercial connection between *A's* and *B's* goods and surrounding circumstances must be taken into consideration. Inference from above should not be speculative but must be probable. (Vol 22) 1935 All 7 (24, 25) : 57 All 510 (DB).

4. Similarity and deception — Criterion and Rules.—[1] True test to see whether two goods are of same species is whether the two sets of goods are so commonly dealt in by same trader that his customers knowing his mark in connection with one set and seeing it upon the other would be likely to suppose that it was used upon them also to indicate that they were his goods. (Vol 24) 1937 Lah 186 (192) (DB).

[2] Actual physical resemblance not sole consideration : (Vol 16) 1929 Rang 322 (324) ✠ (Vol 18) 1931 Rang 213 (215) (DB). (Absolute identity of article imitated is not necessary. Unwary purchasers should be misled).

[3] No general rule can be laid down as to what is or is not a mere colourable imitation—Standards differ and education is one of the factors — Resemblance deceiving an ordinary purchaser is to be ascertained. (Vol 14) 1927 All 81 (84, 85) : 49 All 92 (DB).

[4] The question for decision as to whether an alleged colourable imitation has or has not deceived anybody is to be decided with reference to ultimate purchaser and not evidence of experts. (Vol 25) 1938 Sind 38 (44) (DB).

[5] It is a question of fact in every case whether defendant's mark is or is not a colourable imitation of plaintiff's mark ; surrounding circumstances of each case will have to be considered it is necessary to compare two marks as a whole and come to a decision. (Vol 25) 1938 Sind 38 (43) (DB) ✠ (Vol 27) 1940 P C 86 (87, 88) : 67 Ind App 212 : I L R (1940) Kar (P C) 171 : I L R (1940) All 446 (PC). (Manufacturer of smoking tobacco selling his goods under certain trade mark—Manufacturer of chewing tobacco using similar mark whether is likely to deceive public that they are purchasing chewing tobacco manufactured by former is a question of fact.)

[6] In deciding whether one get up is similar to another or is calculated to deceive purchasers into believing that they are purchasing that article of the other, one must remember the class of persons who are purchasers of the article in question. (Vol 13) 1926 Cal 837 (841) ✠ (Vol 17) 1930 Cal 678 (680).

[7] Test of comparison side by side is not sound. (Vol 31) 1944 Pat 64 (66) : 22 Pat 702 (DB) ✠ (Vol 27) 1940 P C 86 (88) : I L R (1940) Kar (P C) 171 : 67 Ind App 212 : I L R (1940) All 446 (P C).

[8] Whether *B's* goods are imitations of *A's* goods should be decided from the points of similarity and not from the points of difference between the two. (Vol 9) 1922 All 178 (180) : 44 All 608 (DB).

[9] Slight similarity is of no consequence — Label alleged to have infringed plaintiff's trade mark has to be taken as a whole (Vol 30) 1943 Lah 196 (200) : ILR (1943) Lah. 427 (DB) ✠ (Vol 4) 1917 Low Bur 174 (176) : 8 Low Bur Rul 561 (DB).

[10] Fraud is presumed where the similarity is close and remains unexplained ; an intention to deceive may be inferred from circumstances of case and though no actual deception is proved. (Vol 25) 1938 Sind 38 (43) (DB).

[11] The persons who have to be considered in this connection are the persons, sometimes called the unwary or the ignorant ultimate buyers, who belong to lower classes of people and nearly all of whom are illiterate. Where both parties deal in the same manufacture, mere fact that dealers in those manufactures are not deceived does not conclude case. (Vol 17) 1930 Cal 678 (680) ✠ (Vol 30) 1943 Lah 196 (202) : I L R (1943) Lah 427 (DB) ✠ (Vol 28) 1941 Lah 262 (264) (DB) ✠ (Vol 22) 1935 All 7 (25) : 57 All 510 ✠ (The standard is neither that of person who is devoid of all sense of discrimination nor of persons who are very careful observers of things around them.) ✠ (Vol 24) 1937 Nag 158 (159) : I L R (1939) Nag. 569 ✠ (Vol 17) 1930 Cal 274 (275) : 57 Cal 1153 : 31 Cr L Jour 1227 ✠ (Vol 10) 1923 Bom. 119 (120 124). (Question is not whether intelligent section of public is likely to be deceived but whether public at large is likely to be deceived.) ✠ (Vol 4) 1917 Low Bur 174 (175, 176) : 8 Low Bur Rul 561 (DB). (Whether there is a reasonable probability of deception).

[12] Actual deception of purchaser is not required. The mark of the rival trader should have such resemblance as to be calculated to mislead uncautious purchaser (Vol 18) 1931 Mad 461 (463) (DB) ✠ (Vol 28) 1941 Bom 3 (9) (Especially when another sold his goods not openly in shops but in a hole and corner manner.) ✠ (Vol 22) 1935 Bom 101 (104) : 59 Bom 373 (There must be reasonable probability and not mere possibility of deception) ✠ (Vol 21) 1934 Mad 211 (215) : 57 Mad 600 (DB) ✠ (Vol 13) 1926 Cal 837 (841). (If Court is otherwise satisfied of probability of deception.) ✠ (Vol 26) 1939 Bom 118 (120) : 55 Bom 525 (DB) ✠ (Vol 3) 1916 Bom 183 (187) : 41 Bom. 49 (DB) ✠ (Vol 25) 1938 Rang. 99 (102).

[13] Test for determination is dishonest purpose. Whether the get-up of a particular article is calculated to deceive depends upon the circumstances prevailing in respect of the article in question. (Vol 17) 1930 Rang 326 (328, 329) (DB).

[14] *A's* mark consisting of nine serpents arranged in circular design in his sheetings *B's* mark consisting of nine mongooses arranged in similar circular design — *A* acquiring reputation and starting his business earlier than *B* — *B's* design held colourable imitation of *A's* mark. (Vol 26) 1939 Rang 98 (108) : 1939 Rang L R 18 (DB).

5 Function of Court.—[1] Court will not strain its jurisdiction to protect fools and idiots and it will not require such minuteness of imitation as to deceive persons of unusual sagacity and information. (Vol 4) 1917 Low Bur 174 (176) : 8 Low Bur Rul 561 (DB).

Section 21—Note 5 *(contd.)*

[2] In case of infringement it is the function of the Judge to say whether two designs are similar and not for a witness to express an opinion on the point. (Vol 14) 1927 All 81 (86) : 49 All 92 (DB).

[3] Trade-mark—Court can act on its own comparison of exhibits before it. (Vol 21) 1934 Mad 211 (213) : 57 Mad 600 (DB).

[4] Court must exercise judgment from impressions obtained by looking at the two products. (Vol 25) 1938 Rang 99 (102).

[5] It is for the Court to decide whether there is a possibility of deception. (Vol 28) 1941 Lah 262 (264) (DB). (Expert opinion of persons well acquainted with the trade as to whether resemblance between contrasted marks is likely to deceive unwary purchasers is inadmissible).

[6] While Judge must not surrender his own independent judgment to any witness whatsoever, he must, in order to arrive at a proper conclusion, not disregard the evidence adduced in the particular case before him. (Vol 13) 1926 Cal 837 (842) ✠ (Vol 23) 1936 Pat 579 (580) : 38 Cr. L Jour 35. (Court deciding whether one trade mark is colourable imitation of another must place itself in position of unwary customer. It is sufficient if the similarity is such between the two as unwary or illiterate customer will not be able to distinguish between them.) ✠ (Vol 12) 1925 Cal 220 (222). (Resemblance between two designs must be decided by the Judge, but not by ignoring evidence. Resemblance of names and get up in short something peculiar to *A* when imitated by *B* sufficient to deceive the purchaser justifies injunction.) ✠ ('07) 34 Cal 495 (508) (FB). (In order to arrive at a conclusion whether a trade mark is a colourable imitation of another or not, the Court may look at the two marks in question with its own powers of forming an opinion, accompanied by the evidence given in the case. It has to consider whether the mark is calculated to deceive incautious, ignorant or unwary purchaser.)

[6a] Question whether one mark is similar to the other — No evidence of confusion actual or probable—Must be answered by the Court unaided by outside evidence by asking itself whether a person possessing an average memory would mistake one for the other. (Vol 29) 1942 P C 40 (42) (PC).

[7] If the Court is satisfied that a trade-mark is a colourable imitation of another trade-mark the fact that no witnesses are called for to prove deception is not of importance. (Vol 19) 1932 Rang 114 (116) : 10 Rang 133 (DB).

6. Injunction and damages.—[1] Trade-mark—Injunction—Suit for injunction—Principles relating to infringement enunciated (Vol 25) 1938 Lah 803 (806, 809) : ILR (1939) Lah 131.

[2] *P* having monopoly of selling certain grey shirting — *D* purchasing them from *P* and cutting off face laps containing *P's* trade-mark and putting his own mark similar to *P's*—Object was to deceive unwary purchasers—*D* can be restrained by injunction. (Vol 19) 1932 Sind 222 (224): 26 Sind L R 287.

[3] Innocent infringement of design — Suit for injunction and damages — Offender's admission of infringement at the early stage of suit—Undertaking not to infringe in future and offering to pay profits made by infringement — Proprietor electing to continue suit —Decreed only in terms of offer — Proprietor liable to pay offender's costs incurred after date of offer. (Vol 26) 1939 Bom 198 (202).

[4] Trade-mark—Trader using his name with mark — Waiver or abandonment not established — Right to injunction. ('11) 35 Bom 425 (433).

[5] Where it was proved that the trade-mark on the goods imported by *A* was not his own trade-mark but that of the manufacturer and that *A* was merely an importer and seller of the goods under a contract for exclusive supply in India, *A* is not entitled to an injunction. ('01) 25 Bom 433 (454). (The point of primary importance is that *A* should show that the value of trade which he carries is due to the reputation acquired by, and attaching to, the trade mark as guarantee of importation by him, and not merely as a guarantee of manufacture by somebody else.)

[6] Suit for injunction for infringement of trade-mark — Balance of convenience decides if temporary injunction should be granted. (Vol 20) 1933 Lah 1046 (1047) (DB).

[7] Suit for injunction — Court can grant relief in the alternative by way of damages — Plaintiff need not allege loss or damages (Vol 29) 1942 Bom 241 (243) (DB).

[8] An injunction and nominal damages may be granted on proof of infringement of trade-mark and reasonable probability of damage to the trade (Vol 26) 1939 Bom 118 (123) (DB). (Substantial damages can only be awarded on proof of actual damage. The criterion is falling off in sales. (Vol 16) 1929 P C 11 : 56 Ind App 1 : 51 All 182 (PC). *Rel. on.*) ✠ (Vol 3) 1916 Bom 183 (187) : 41 Bom 49 (DB). (Injunction should cover all possible channels of approach to ultimate buyers and damages should be awarded on the result of an inquiry as to profits made by the defendant by the unlawful use of the plaintiff's mark.)

[9] There is no cut and dried rule for estimation of damages for infringement of trade-mark. The safer basis is to calculate on the falling off in the trade of the infringed rather than to make a speculative assumption of sales of the infringer by trusting to his own goods without the misleading trade mark. (Vol 16) 1929 P C 11 (12) : 56 Ind App 1 : 51 All 182 (P C) ✠ ('40) 188 Ind Cas 462 (464) (Bhopal) (Damages depends on reduction in sale of plaintiff's goods and consequent reduction in his profits) ✠ (Vol 24) 1937 Cal 528 (532). (If *A* can establish that his sales decreased after *B* started to use his trade mark, *A* is entitled to the loss of profits resulting there from. If he can show that the average increase of the trade did not continue after that date, he is entitled to the loss of profits on such average increase of sales.) ✠ (Vol 14) 1927 All 81 (88, 89): 49 All 92 (DB). (Profits made by the rival no true criterion—Damages are proportioned to injury done.)

[But see (Vol 19) 1932 Rang 56 (57, 58) : 10 Rang 85 (DB). (The person getting injunction is either entitled to get damages sustained by him or to claim profit which the rival has made. Computation how to be made discussed.)]

[10] Assessment of damages is to be made on the presumptions which can be drawn against the party guilty of evasion or deceit; these presumptions must be in accordance with known facts. (Vol 28) 1941 Lah 293 (296) (DB).

[11] Exemplary or penal damages are not usually awarded. The plea for imposition of penalty must be taken at the earliest opportunity and when it has not been raised in the trial Court it is too late to allow it to be raised in appeal. (Vol 28) 1941 Lah 293 (296) (DB).

[12] The fact that the loss has been limited by the owner's own efforts to detect the fraud through his own agents can be taken into account in determining the actual loss. (Vol 28) 1941 Lah 293 (296) (DB).

7. Onus of proof.—[1] Trade mark—Suit to set aside order of Registrar refusing to register particular name and suit to restrain infringement and passing off

22. *(1)* The right to the use of a trade mark given under section 21 by registration shall be subject to any conditions or limitations entered on the register, and shall not be deemed to be infringed by the use of any such mark as aforesaid in any mode, in relation to goods to be sold or otherwise traded in, in any place, or in relation to goods to be exported to any market, or in any other circumstances, to which having regard to any such limitations the registration does not extend.

No infringement in certain circumstances.

(2) The said right to the use of a trade mark shall not be deemed to be infringed by the use of any such mark as aforesaid by any person—

(a) in relation to goods connected in the course of trade with the proprietor or a registered user of the trade mark if, as to those goods or a bulk of which they form part, the proprietor or the registered user conforming to the permitted use has applied the trade mark and has not subsequently removed or obliterated it, or has at any time expressly or impliedly consented to the use of the trade mark ; or

(b) in relation to goods adapted to form part of, or to be accessory to, other goods in relation to which the trade mark has been used without infringement of the right given as aforesaid or might for the time being be so used, if the use of the mark is reasonably necessary in order to indicate that the goods are so adapted and neither the purpose nor

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Section 21 -Note 7 *(contd.)*

— Distinction in onus stated. (Vol 30) 1943 Lah 196 (202, 203) : I L R (1943) Lah 427 (DB).

[2] Where *B* has used an identical number, the burden is upon him to disprove the probability of deception. (Vol 22) 1935 Bom 101 (110) : 59 Bom 373.

[3] Burden of proof that unwary purchasers might be deceived is on him who alleges it. (Vol 23) 1936 Rang 193 (196) (DB).

[4] When plaintiffs prove that mark is a colourable imitation, onus of showing how they came to adopt it is on defendants. (Vol 21) 1934 Mad 211 (213): 57 Mad 600 (DB).

[5] Where there is a deliberate imitation of a trade mark burden of proof is on imitator. (Vol 26) 1939 Bom 118 (120) (DB). ((Vol 14) 1927 All 81 : 49 All 92 (DB), *Rel. on*).

8. Acquiescence and delay. — [1] No hard and fast rule can be laid down for deciding when a person has, as the result of inaction, lost the right of stopping another using his mark. Each case must depend upon its own circumstances, though a person cannot be allowed to stand by indefinitely without suffering the consequences. (Vol 28) 1941 Mad 31 (34) : I L R (1941) Mad 300 (DB)

[2] To support a plea of acquiescence in a trade mark case it must be shown that the owner has stood by for a substantial period and thus encouraged another to expend money in building up business associated with the mark even though delay simpliciter is no defence to a suit for infringement. (Vol 28) 1941 Mad 31 (34) : I L R (1941) Mad 300 (DB) ✠ (Vol 26) 1939 Rang 98 (107) : 1939 Rang L R 383 (DB) ✠ (Vol 21) 1934 Rang 297 (298) : 12 Rang 534.

[But see (Vol 19) 1932 Rang 114 (117) : 10 Rang 133 (DB) (It is not necessary for trader who becomes aware of infringement to bring a suit immediately to vindicate his right. But it may sometimes give room to set up defence of his acquiescence.) ✠ (Vol 17) 1930 Cal 678 (682) (Trade mark — Infringement — Refraining from taking steps against infringer who has undertaken not to violate right in future does not weaken right of owner of trade mark to sue for infringement.)]

[3] Exclusive right of a person to use a particular get up to his goods may become *publici juris* by his submitting or allowing other persons to use it. (Vol 24) 1937 Rang 490 (493) ✠ (Vol 13) 1926 Bom 200 (202, 203) : 50 Bom 402. (Strong evidence is necessary that the mark had come to be so public that nobody could be deceived into the belief by the use of it and could be induced that he was buying goods of original trader.)

[4] In case of fraudulent infringement, doctrine of acquiescence does not operate in favour of the rival trader. (Vol 19) 1932 Rang 114 (118) : 10 Rang 133 (DB).

[5] In an action for infringement of property mark, delay does not disentitle the grant of injunction. (Vol 18) 1931 Mad 461 (464) (DB).

[But see (Vol 26) 1939 Rang 98 (107) ; 1939 Rang L R 18 (DB). (Delay will in itself be a bar to a suit, but only if such delay has caused a change in the subject-matter of the action or brought about state of things where justice cannot be done.) ✠ (Vol 20) 1933 Sind 26 (26) : 26 Sind L R 335. (Improper delay though not amounting to acquiescence deprives the right to an interlocutory injunction.)]

[6] Owner cannot start prosecution after great delay. (Vol 4) 1917 Low Bur 149 (150) : 9 Low Bur Rul 31 : 17 Cr L Jour 488.

9. Criminal remedy. — [1] Aggrieved party has remedy both in Civil and Criminal Courts and not only in Civil. (Vol 15) 1928 Lah 186 (187) : 9 Lah 491 : 29 Cri L Jour 425 (DB).

[2] Although a Criminal Court has discretion to stay its own hands and direct aggrieved party to establish his right in Civil Court, aggrieved party cannot be compelled to seek his remedy in Civil Court. (Vol 17) 1930 Oudh 360 (361) : 6 Luck 183 : 31 Cri L Jour 1176.

[3] In a prosecution for counterfeiting trade-mark, if the Magistrate is of opinion that there is a *bona fide* dispute between the parties as to the right of user of that mark, he should not deal with the matter criminally but leave it to the complainant to establish his right in a civil Court. ('05) 32 Cal 431 (436) (DB).

[4] Offering goods of another as one's own is no offence—Appropriation is not of trade mark but of goods. (Vol 6) 1919 Sind 93 (97) : 12 Sind L R 129 : 20 Cri L Jour 277 (DB).

[5] Deliberate and dishonest imitation of a trade mark used by a firm as distinctive mark for over ten years in which the firm has acquired property constitutes an offence under S. 482, Penal Code. (Vol 17) 1930 Oudh 360 (361) : 6 Luck 183 : 31 Cri L Jour 1176 (DB).

[6] Mere imitation is no offence unless there is an attempt to pass off goods as of another by false description or there is an infringement of a patent or copyright. (Vol 20) 1933 Nag 344 (345).

the effect of the use of the mark is to indicate otherwise than in accordance with the fact a connection in the course of trade between any person and the goods.

(3) The use of a registered trade mark, being one of [a][two or more trade marks registered under this Act or in any Indian State to which S 82A for the time being applies] which are identical or nearly resemble each other, in exercise of the right to the use of that trade mark given by registration as aforesaid, shall not be deemed to be an infringement of the right so given to the use of any other of those trade marks.

[a] *Substituted* by the Trade Marks (Amendment) Act, 1946 (12 [XII] of 1946), S. 6, for " two or more registered trade marks." [18-4-1946].

Registration to be *prima facie* evidence of validity.

23. In all legal proceedings relating to a [a][trade mark registered under this Act or in any Indian State to which section 82A for the time being applies] the fact that a person is registered as proprietor thereof shall be *prima facie* evidence of the validity of the original registration of the trade mark and of all subsequent assignments and transmissions thereof.

[a.] *Substituted* by the Trade Marks (Amendment) Act, 1946 (12 [XII] of 1946), S. 7, for "registered trade mark." [18-4-1946].

Registration to be conclusive as to validity after seven years.

24 In all legal proceedings relating to a registered trade mark, the original registration of the trade mark shall after the expiration of seven years from the date of such original registration be taken to be valid in all respects unless such registration was obtained by fraud, or unless the trade mark offends against the provisions of section 8.

Saving for vested rights.

25. Nothing in this Act shall entitle the proprietor or a registered user of a registered trade mark to interfere with or restrain the use by any person of a trade mark identical with or nearly resembling it in relation to goods in relation to which that person or a predecessor in title of his has continuously used that trade mark from a date prior—

(a) to the use of the first mentioned trade mark in relation to those goods by the proprietor or a predecessor in title of his, or

(b) to the registration of the first mentioned trade mark in respect of those goods in the name of the proprietor or a predecessor in title of his.

whichever is the earlier, or to object (on such use being proved) to registration of that identical or nearly resembling trade mark in respect of those goods under sub-section *(2)* of section 10.

Saving for use of name, address, or description of goods.

26. No registration of a trade mark shall interfere with any *bona fide* use by a person of his own name or that of his place of business, or of the name, or of the name of the place of business, of any of his predecessors in business, or the use by any person of any *bona fide* description of the character or quality of his goods, not being a description that would be likely to be taken as importing any such reference as is mentioned in clause *(b)* of section 21 or in clause *(b)* of section 57.

Words used as name or description of an article or substance.

27. *(1)* The registration of a trade mark shall not be deemed to have become invalid by reason only of any use after the date of the registration of any words which the trade mark contains or of which it consists as the name or description of an article or substance :

Provided that, if it is proved either—

(a) that there is a well-known and established use of the said words as the name or description of the article or substance by a person or persons carrying on a trade therein, not being use in relation to goods connected in the course of trade with the proprietor or a registered user of the trade mark or (in the case of a certification trade mark) goods certified by the proprietor; or

(b) that the article or substance has been manufactured under a patent in force at or granted after the commencement of this section, that a period of two years or more after the cesser of the patent has elapsed, and that the said words are the only practicable name or description of the article or substance,—

the provisions of sub section *(2)* shall apply.

Section 26 — Note 1

[1] Use of trade name resulting in goods being taken to be goods of another—Such continued use is fraudulent. (Vol 18) 1931 P C 15 (17) (PC).

(2) Where the facts mentioned in clause *(a)* or clause *(b)* of the proviso to sub-section *(1)* are proved with respect to any words, then—

(a) for the purposes of any proceedings under section 46—

(i) if the trade mark consists solely of such words, the registration of the trade mark, so far as regards registration in respect of the article or substance in question or of any goods of the same description, shall be deemed to be an entry wrongly remaining on the register;

(ii) if the trade mark contains such words and other matter, the tribunal, in deciding whether the trade mark shall remain on the register, so far as regards registration in respect of the article or substance in question and of any goods of the same description, may, in case of a decision in favour of its remaining on the register, require as a condition thereof that the proprietor shall disclaim any right to the exclusive use in relation to that article or substance and any goods of the same description, of such words, provided that no disclaimer shall affect any rights of the proprietor of a trade mark except such as arise out of the registration of the trade mark in respect of which the disclaimer is made;

(b) for the purposes of any other legal proceedings relating to the trade mark,—

(i) if the trade mark consists solely of such words, all rights of the proprietor under this Act or any other law to the exclusive use of the trade mark in relation to the article or substance in question or to any goods of the same description; or

(ii) if the trade mark contains such words and other matter, all such rights of the proprietor to the exclusive use of such words in such relation as aforesaid,

shall be deemed to have ceased on the date at which the use mentioned in clause *(a)* of the proviso to sub-section *(1)* first became well-known and established, or at the expiration of the period of two years mentioned in clause *(b)* of the said proviso.

Objects and Reasons.

The provisions of this section are designed to safeguard the legitimate interests of ex-patentees and others without permitting the creation of an exclusive monopoly in words which the trade mark contains or of which it consists as the name or description of an article or substance.—S. O. R.

CHAPTER V.

ASSIGNMENT AND TRANSMISSION.

Power of registered proprietor to assign and give receipts.

28. The person for the time being entered in the register as proprietor of a trade mark shall, subject to the provisions of this Act and to any rights appearing from the register to be vested in any other person, have power to assign the trade mark, and to give effectual receipts for any consideration for such assignment.

Assignability of registered trade marks.

29. Notwithstanding anything in any other law to the contrary, a registered trade mark shall, subject to the provisions of this Chapter, be assignable and transmissible whether in connection with the goodwill of a business or not, and in respect either of all of the goods in respect of which it is registered or of some only of those goods.

Section 28 — Note 1

[1] An originator of a trade mark of a natural product, who certifies to their good quality is entitled to it and has a right to alienate it. And successors in business have been allowed to use their predecessors' trade marks, where representation still continues to be substantially true. (Vol 2) 1915 Cal 520 (522) : 42 Cal 262 (DB).

[2] Trade mark is generally transmitted in connection with goodwill of a business and can only be assigned in writing. (Vol 22) 1935 Bom 101 (103) : 59 Bom 373

[3] Transferee of goodwill can use the name in which business was carried on and to represent himself as carrying on that business. (Vol 2) 1915 Cal 520 (523) : 42 Cal 262 (DB).

[4] Business taken possession of by state custodian and sold out—Purchaser can use trade mark or name of original business but he cannot represent that his goods are those of original business itself. (Vol 15) 1928 P. C. 83 (85, 86) (PC).

Section 29 — Note 1

[1] A trade mark cannot be transferred in gross; no trade mark can be assigned except in connection with goodwill of business in which it has been used which business must be co-extensive with the goods or classes of goods in respect of which trade mark is registered. ('11) 38 Cal 110 (120) (DB)=(Vol 2) 1915 Cal 520 (522) : 42 Cal 262 (DB).

[2] Employment of personal skill — Goods made after certain formula—Usage of trade—Assignability of trade mark stated and explained. ('13)40 Cal 814 (828).

Assignability of unregistered trade marks.

30 An unregistered trade mark shall be assignable and transmissible whether in connection with the goodwill of a business or not :

Provided that, except in connection with the goodwill of a business, assignment or transmission shall be permissible only if—

(a) at the time of assignment or transmission of the unregistered trade mark it is used in the same business as a registered trade mark, and

(b) the registered trade mark is assigned or transmitted at the same time and to the same person as the unregistered trade mark, and

(c) the unregistered trade mark relates to goods in respect of which the registered trade mark is assigned or transmitted.

Restrictions on assignment or transmission where multiple exclusive rights would be created.

31. *(1)* Notwithstanding anything in sections 29 and 30, a trade mark shall not be assignable or transmissible in a case in which as a result of the assignment or transmission there would in the circumstances subsist, whether under this Act or any other law, exclusive rights in more than one of the persons concerned to the use, in relation to the same goods or description of goods, of trade marks nearly resembling each other or of identical trade marks, if, having regard to the similarity of the goods and of the trade marks, the use of the trade marks in exercise of those rights would be likely to deceive or cause confusion :

Provided that an assignment or transmission shall not be deemed to be invalid under this sub-section if the exclusive rights subsisting as a result thereof in the persons concerned respectively are, having regard to limitations imposed thereon, such as not to be exercisable by two or more of those persons in relation to goods to be sold, or otherwise traded in, within British India (otherwise than for export therefrom), or in relation to goods to be exported to the same market outside British India.

(2) The proprietor of a registered trade mark who proposes to assign it may submit to the Registrar in the prescribed manner a statement of case setting out the circumstances and the Registrar may issue to him a certificate stating whether, having regard to the similarity of the goods and of the trade marks referred to in the case, the proposed assignment would or would not be invalid under sub-section *(1)*, and a certificate so issued shall, subject to appeal and unless it is shown that the certificate was obtained by fraud or misrepresentation, be conclusive as to the validity or invalidity under sub-section *(1)* of the assignment in so far as such validity or invalidity depends upon the facts set out in the case, but, as regards a certificate in favour of validity, only if application for the registration under section 35 of the title of the person becoming entitled is made within six months from the date on which the certificate is issued.

Restrictions on assignment or transmission when exclusive rights would be created in different parts of British India.

32 Notwithstanding anything in sections 29 and 30, a trade mark shall not be assignable or transmissible in a case in which as a result of the assignment or transmission there would in the circumstances subsist whether under this Act or any other law an exclusive right in one of the persons concerned to the use of the trade mark limited to use in relation to goods to be sold, or otherwise traded in, in any place in British India and an exclusive right in another of these persons to the use of a trade mark nearly resembling the first-mentioned trade mark or of an identical trade mark in relation to the same goods or description of goods limited to use in relation to goods to be sold, or otherwise traded in, in any other place in British India :

Provided that in any such case, on application in the prescribed manner by the proprietor of a trade mark who proposes to assign it, or by a person who claims that a registered trade mark has been transmitted to him or to a predecessor in title of his since the commencement of this Act, the Registrar, if he is satisfied that in all the circumstances the use of the trade mark in exercise of the said rights would not be contrary to the public interest, may approve the assignment or transmission, and an assignment or transmission so approved shall not, unless it is shown that the approval was obtained by fraud or misrepresentation, be deemed to be invalid under this section or section 31 if application for the registration under section 35 of the title of the person becoming entitled is made within six months from the date on which the approval is given or, in the case of a transmission, was made before that date.

Conditions for assignment otherwise than in connection with the goodwill of a business.

33. Where an assignment in respect of any goods of a trade mark which is at the time of the assignment used in a business in those goods, is made after the commencement of this Act otherwise than in connection with the goodwill of that business, the assignment shall not take effect

unless the assignee, not later than the expiration of six months from the date on which the assignment is made or within such extended period, if any, as the Registrar may allow, applies to the Registrar for directions with respect to the advertisement of the assignment, and advertises it in such form and manner and within such period as the Registrar may direct.

Conditions for assignment and transmission of certification trade marks and associated trade marks.

34. *(1)* A certification trade mark shall not be assignable or transmissible otherwise than with the consent of the Central Government, for which application shall be made in writing in the prescribed manner through the Registrar.

(2) Associated trade marks shall be assignable and transmissible only as a whole and not separately.

Registration of assignments and transmissions.

35. *(1)* Where a person becomes entitled by assignment or transmission to a registered trade mark, he shall apply in the prescribed manner to the Registrar to register his title, and the Registrar shall on receipt of the application and on proof of title to his satisfaction, register him as the proprietor of the trade mark in respect of the goods in respect of which the assignment or transmission has effect, and shall cause particulars of the assignment or transmission to be entered on the register.

(2) Except for the purposes of an appeal against a decision of the Registrar under sub-section *(1)* or of an application under section 46, a document or instrument in respect of which no entry has been made in the register in accordance with sub-section *(1)* shall not be admitted in evidence before any tribunal in proof of the title to a trade mark unless the tribunal otherwise directs.

CHAPTER VI.

USE OF TRADE MARKS AND REGISTERED USERS.

Proposed use of trade mark by company to be formed.

36. *(1)* No application for the registration of a trade mark in respect of any goods shall be refused, nor shall permission for such registration be withheld, on the ground only that it appears that the applicant does not use or propose to use the trade mark, if the Registrar is satisfied that a company is about to be formed and registered under the Indian Companies Act, 1913, and that the applicant intends to assign the trade mark to that company with a view to the use thereof in relation to those goods by the company.

(2) The tribunal may, in a case to which sub-section *(1)* applies, require the applicant to give security for the costs of any proceedings relative to any opposition or appeal, and in default of such security being duly given may treat the application as abandoned.

(3) Where in a case to which sub-section *(1)* applies a trade mark in respect of any goods is registered in the name of an applicant who relies on intention to assign to a company, then, unless within such period as may be prescribed, or within such further period not exceeding six months as the Registrar may, on application being made to him in the prescribed manner, allow, the company has been registered as the proprietor of the trade mark in respect of those goods, the registration shall cease to have effect in respect thereof at the expiration of that period, and the Registrar shall amend the register accordingly.

Removal from register and imposition of limitations on ground of non-use.

37. *(1)* Subject to the provisions of section 38, a registered trade mark may be taken off the register in respect of any of the goods in respect of which it is registered on application in the prescribed manner by any person aggrieved to a High Court or to the Registrar, on the ground either—

(a) that the trade mark was registered without any *bona fide* intention on the part of the applicant for registration that it should be used in relation to those goods by him or, in

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Section 37 — Note 1

[1] Plaintiff's trade mark proved to be a copy of japanese mark — He must show that owners have abandoned it. (Vol 27) 1940 Sind 83 (84) : ILR (1940) Kar 380 (DB). (Essentials of trade mark stated)

[2] Fraudulent user cannot give right to trade mark—Person imitating trade mark of others and causing his goods to pass off as those of others cannot prevent another person equally guilty like himself from doing so even if he was first in market with imitation. (Vol 25) 1938 Sind 38 (41, 42).

[3] If a trader drops out and another gains reputation in trade for goods made under particular name and his name is associated with his mark and his mark with his name, original position of competitor using same mark practically disappears. (Vol 26) 1939 Rang 98 (106) : 1939 Rang L R 18 (DB). (In case of infringement, all he has to prove is that he had adopted a certain mark and he had sole right to use it.)

a case to which the provisions of section 36 apply, by the company concerned, and that there has in fact been no *bona fide* use of the trade mark in relation to those goods by any proprietor thereof for the time being up to a date one month before the date of the application; or

(b) that up to a date one month before the date of the application, a continuous period of five years or longer elapsed during which the trade mark was registered and during which there was no *bona fide* use thereof in relation to those goods by any proprietor thereof for the time being:

Provided that, except where the applicant has been permitted under sub section *(2)* of section 10 to register an identical or nearly resembling trade mark in respect of the goods in question or where the tribunal is of opinion that he might properly be permitted so to register such a trade mark, the tribunal may refuse an application made under clause *(a)* or clause *(b)* in relation to any goods, if it is shown that there has been, before the relevant date or during the relevant period, as the case may be, *bona fide* use of the trade mark by any proprietor thereof for the time being in relation to goods of the same description, being goods in respect of which the trade mark is registered.

(2) Where in relation to any goods in respect of which a trade mark is registered—

(a) the circumstances referred to in clause *(b)* of sub section *(1)* are shown to exist so far as regards non-use of the trade mark in relation to goods to be sold or otherwise traded in, in a particular place in British India (otherwise than for export from British India), or in relation to goods to be exported to a particular market outside British India, and

(b) a person has been permitted under sub-section *(2)* of section 10 to register an identical or nearly resembling trade mark in respect of those goods under a registration extending to use in relation to goods to be so sold, or otherwise traded in, or in relation to goods to be so exported, or the tribunal is of opinion that he might properly be permitted so to register such a trade mark,

on application by that person in the prescribed manner to a High Court or to the Registrar, the tribunal may impose on the registration of the first-mentioned trade mark such limitations as it thinks proper for securing that that registration shall cease to extend to such use.

(3) An applicant shall not be entitled to rely for the purpose of clause *(b)* of sub-section *(1)* or of sub-section *(2)* on any non-use of a trade mark which is shown to have been due to special circumstances in the trade and not to any intention to abandon or not to use the trade mark in relation to the goods to which the application relates.

Defensive registration of well-known trade marks.

38. *(1)* Where a trade mark consisting of any invented word has become so well known as respects any goods in relation to which it is registered and has been used, that the use thereof in relation to other goods would be likely to be taken as indicating a connection in the course of trade between those goods and a person entitled to use the trade mark in relation to the first mentioned goods, then, notwithstanding that the proprietor registered in respect of the first-mentioned goods does not use or propose to use the trade mark in relation to those other goods and notwithstanding anything in section 37, the trade mark may on application in the prescribed manner by such proprietor be registered in his name in respect of those other goods as a defensive trade mark and, while so registered, shall not be liable to be taken off the register in respect of those goods under the said section.

(2) The registered proprietor of a trade mark may apply for the registration thereof in respect of any goods as a defensive trade mark notwithstanding that it is already registered in his name in respect of those goods otherwise than as a defensive trade mark, or may apply for the registration thereof in respect of any goods otherwise than as a defensive trade mark notwithstanding that it is already registered in his name in respect of those goods as a defensive trade mark, in lieu in each case of the existing registration.

(3) A trade mark registered as a defensive trade mark and that trade mark as otherwise registered in the name of the same proprietor shall, notwithstanding that the respective registrations are in respect of different goods, be deemed to be, and shall be registered as, associated trade marks.

(4) On application in the prescribed manner by any person aggrieved to a High Court or to the Registrar, the registration of a trade mark as a defensive trade mark may be cancelled on the ground that the requirements of sub-section *(1)* are no longer satisfied in respect of any goods in

relation to which the trade mark is registered in the name of the same proprietor otherwise than as a defensive trade mark, or may be cancelled as respects any goods in relation to which it is registered as a defensive trade mark on the ground that there is no longer any likelihood that the use of the trade mark in relation to those goods would be taken as giving the indication mentioned in sub-section *(1)*.

(5) The Registrar may at any time cancel the registration as a defensive trade mark of a trade mark of which there is no longer any registration in the name of the same proprietor otherwise than as a defensive trade mark.

(6) Except as otherwise expressly provided in this section, the provisions of this Act shall apply in respect of the registration of trade marks as defensive trade marks and of trade marks so registered as they apply in other cases.

Registered users.

39. *(1)* A person other than the proprietor of a trade mark may be registered as a registered user thereof in respect of all or any of the goods in respect of which it is registered (otherwise than as a defensive trade mark) and either with or without conditions or restrictions.

(2) The permitted use of a trade mark shall be deemed to be use by the proprietor thereof, and shall be deemed not to be use by a person other than the proprietor, for any purpose for which such use is material under this Act or any other law.

Power of registered user to take proceedings against infringement.

40 *(1)* Subject to any agreement subsisting between the parties, a registered user of a trade mark shall be entitled to call upon the proprietor thereof to take proceedings to prevent infringement thereof, and if the proprietor refuses or neglects to do so within three months after being so called upon, the registered user may institute proceedings for infringement in his own name as if he were the proprietor, making the proprietor a defendant.

(2) Notwithstanding anything contained in any other law, a proprietor so added as defendant shall not be liable for any costs unless he enters an appearance and takes part in the proceedings.

Application for registration as registered user.

41. *(1)* Where it is proposed that a person should be registered as a registered user of a trade mark, the proprietor and the proposed registered user shall make application in writing to the Registrar in the prescribed manner accompanied by an affidavit made by the proprietor, or by some person authorised to the satisfaction of the Registrar to act on his behalf, —

(a) giving particulars of the relationship, existing or proposed, between the proprietor and the proposed registered user, including particulars showing the degree of control by the proprietor over the permitted use which their relationship will confer and whether it is a term of their relationship that the proposed registered user shall be the sole registered user or that there shall be any other restriction as to persons for whose registration as registered users application may be made;

(b) stating the goods in respect of which registration is proposed;

(c) stating any conditions or restrictions proposed with respect to the characteristics of the goods, to the mode or place of permitted use, or to any other matter;

(d) stating whether the permitted use is to be for a period or without limit of period, and, if for a period, the duration thereof;

and by such further documents, information or evidence as may be required by the Registrar or as may be prescribed.

(2) When the requirements of sub-section *(1)* have been complied with, if the Registrar is satisfied that in all the circumstances the use of the trade mark in respect of the proposed goods or any of them by the proposed registered user subject to any conditions or restrictions which the Registrar may think proper, would not be contrary to the public interest, the Registrar may register, subject as aforesaid the proposed registered user as a registered user in respect of the goods as to which he is so satisfied.

(3) The Registrar shall refuse an application under this section if it appears to him that the grant thereof would tend to facilitate trafficking in a trade mark.

(4) The Registrar shall, if so requested by an applicant, take steps for securing that information given for the purposes of an application under this section (other than matter entered in the register) is not disclosed to rivals in trade.

(5) The Registrar shall issue notice in the prescribed manner —

(a) of the registration of a person as a registered user, to any other registered user of the trade mark;

(b) of an application under section 42, to the registered proprietor, and each registered user (not being the applicant) of the trade mark.

Power to Registrar to vary or cancel registration as registered user.

42. Without prejudice to the provisions of section 46, the registration of a person as a registered user —

(a) may be varied by the Registrar as regards the goods in respect of which, or any conditions or restrictions subject to which, it has effect, on the application in writing in the prescribed manner of the registered proprietor of the trade mark.

(b) may be cancelled by the Registrar on the application in writing in the prescribed manner of the registered proprietor or of the registered user or of any other registered user of the trade mark;

(c) may be cancelled by the Registrar on the application in writing in the prescribed manner of any person on any of the following grounds, namely:—

(i) that the registered user has used the trade mark otherwise than by way of the permitted use, or in such a way as to cause or to be likely to cause, deception or confusion;

(ii) that the proprietor or the registered user misrepresented, or failed to disclose, some fact material to the application for the registration, or that the circumstances have materially changed since the date of the registration;

(iii) that the registration ought not to have been effected having regard to rights vested in the applicant by virtue of a contract in the performance of which he is interested;

(d) may be cancelled by the Registrar in respect of any goods in relation to which the trade mark is no longer registered.

Registered user not to have right of assignment or transmission.

43. Nothing in this Act shall confer on a registered user of a trade mark any assignable or transmissible right to the use thereof.

Use of one of associated or substantially identical trade marks equivalent to use of another.

44. (1) Where under the provisions of this Act use of a registered trade mark is required to be proved for any purpose, the tribunal may, if and so far as it shall think right, accept use of a registered associated trade mark, or of the trade mark with additions or alterations not substantially affecting its identity, as an equivalent for the use required to be proved.

(2) The use of the whole of a registered trade mark shall for the purposes of this Act be deemed to be also a use of any trade mark being a part thereof and registered in accordance with sub-section (1) of section 11 in the name of the same proprietor.

Use of trade mark for export trade, and use when form of trade connection changes.

45. (1) The application in British India of a trade mark to goods to be exported from British India, and any other act done in British India in relation to goods to be so exported which, if done in relation to goods to be sold or otherwise traded in within British India would constitute use of a trade mark therein, shall be deemed to constitute use of the trade mark in relation to those goods for any purpose for which such use is material under this Act or any other law.

(2) The use of a registered trade mark in relation to goods between which and the person using the mark any form of connection in the course of trade subsists shall not be deemed to be likely to cause deception or confusion on the ground only that the mark has been or is used in relation to goods between which and the person using the mark or any predecessor in his business different form of connection in the course of trade subsisted or subsists.

CHAPTER VII.

RECTIFICATION AND CORRECTION OF THE REGISTER.

Power to cancel or vary registration and to rectify the register.

46. (1) On application in the prescribed manner by any person aggrieved to a High Court or to the Registrar, the tribunal may make such order as it may think fit for cancelling or varying the registration of a trade mark on the ground of any contravention of, or failure to observe a condition entered on the register in relation thereto.

(2) Any person aggrieved by the absence or omission from the register of any entry, or by any entry made in the register without sufficient cause, or by any entry wrongly remaining on the register, or by any error or defect in any entry in the register, may apply in the prescribed manner to a High Court or to the Registrar, and the tribunal may make such order for making, expunging or varying the entry as it may think fit.

[a][*Explanation.*—For the purposes of sub-section *(1)* and this sub-section, a person who has registered a trade mark in any Indian State to which section 82A for the time being applies, may be a 'person aggrieved.']

(3) The tribunal may in any proceeding under this section decide any question that it may be necessary or expedient to decide in connection with the rectification of the register.

(4) A High Court or the Registrar, of its or his own motion, may, after giving notice in the prescribed manner to the parties concerned and after giving them an opportunity of being heard, make any order referred to in sub-section *(1)* or sub section *(2)*.

(5) Any order of the Court rectifying the register shall direct that notice of the rectification shall be served upon the Registrar in the prescribed manner who shall upon receipt of such notice rectify the register accordingly.

[a] *Added* by the Trade Marks (Amendment) Act, 1946 (12 [XII] of 1946), S. 8. [18-4-1946]

Correction of register.

47. *(1)* The Registrar may, on application made in the prescribed manner by the registered proprietor,—

(a) correct any error in the name, address or description of the registered proprietor of a trade mark ;

(b) enter any change in the name, address or description of the person who is registered as proprietor of a trade mark ;

(c) cancel the entry of a trade mark on the register ;

(d) strike out any goods or classes of goods from those in respect of which a trade mark is registered ;

(e) enter a disclaimer or memorandum relating to a trade mark which does not in any way extend the rights given by the existing registration of the trade mark.

(2) The Registrar may, on application made in the prescribed manner by a registered user of a trade mark, correct any error, or enter any change, in the name, address or description of the registered user.

Alteration of registered trade mark.

48. *(1)* The registered proprietor of a trade mark may apply in the prescribed manner to the Registrar for leave to add to or after the trade mark in any manner not substantially affecting the identity thereof, and the Registrar may refuse leave or may grant it on such terms and subject to such limitations as he may think fit.

(2) The Registrar may cause an application under this section to be advertised in the prescribed manner in any case where it appears to him that it is expedient so to do, and where he does so, if within the prescribed time from the date of the advertisement any person gives notice to the Registrar in the prescribed manner of opposition to the application, the Registrar shall, after hearing the parties if so required, decide the matter.

(3) Where leave is granted under this section, the trade mark as altered shall be advertised in the prescribed manner, unless the application has already been advertised under sub-section *(2)*.

Adaptation of entries in register to amended or substituted classification of goods.

49. *(1)* The Registrar shall not, in exercise of any power conferred on him under clause *(a)* of sub-section *(2)* of section 84, make any amendment of the register which would have the effect of adding any goods or classes of goods to those in respect of which a trade mark is registered (whether in one or more classes) immediately before the amendment is to be made or of antedating the registration of a trade mark in respect of any goods :

Provided that this sub-section shall not apply when the Registrar is satisfied that compliance therewith would involve undue complexity and that the addition or antedating, as the case may be, would not affect any substantial quantity of goods and would not substantially prejudice the rights of any person.

(2) A proposal so to amend the register shall be notified to the registered proprietor of the trade mark affected and advertised in the prescribed manner and may be opposed before the Registrar by any person aggrieved on the ground that the proposed amendment contravenes the provisions of sub-section *(1)*.

CHAPTER VIII.

CERTIFICATION TRADE MARKS.

Provisions of this Act applicable to certification trade marks.

50. Subject to the provisions of this Chapter, the other provisions of this Act except sections 6, 21, 22, 31, 32, 33, 36, 37, 38, 39, 40, 41, 42 and 43 and sub-section *(2)* of section 45 shall apply to certification trade marks as they apply to trade marks.

Certification trade mark not to be registered in name of person trading in goods certified thereby.

51. A mark shall not be registrable as a certification trade mark in the name of a person who carries on a trade in goods of the kind certified.

Determination whether a mark is a certification trade mark.

52. In determining whether a mark is adapted to distinguish in accordance with the provisions of clause *(b)* of sub-section *(1)* of section 2, the tribunal may have regard to the extent to which—

(a) the mark is inherently so adapted to distinguish in relation to the goods in question ; and

(b) by reason of the use of the mark or of any other circumstances, the mark is in fact so adapted to distinguish in relation to the goods in question.

Application for registration.

53. *(1)* An application for the registration of a mark as a certification trade mark shall be made to the Registrar [a][* * * *] in writing in the prescribed manner by the person proposed to be registered as the proprietor thereof, and accompanied by a draft of the regulations to be deposited under section 56.

(2) The provisions of section 14 shall have effect in relation to an application under this section as they have effect in relation to an application under the said section, except that for references therein to acceptance of an application there shall be substituted references to authorisation to proceed with the application.

(3) In dealing under the said provisions with an application under this section, the tribunal shall have regard to the like considerations, so far as relevant, as if the application were an application under section 14 and to any other considerations (not being matters within the competence of the Central Government under section 54) relevant to applications under this section, including the desirability of securing that a certification trade mark shall comprise some indication that it is a certification trade mark.

[a] The words "or the Bombay Registrar, as the case may be" were *omitted* by the Trade Marks (Amendment) Act 1943 (15 [XV] of 1943), S. 4. [5-6-1943].

These words had been *inserted* by the Trade Marks (Amendment) Act, 1941 (27 [XXVII] of 1941), S. 3. [26-11-1941].

Consideration of application for registration by Central Government.

54. When authorisation to proceed with an application under section 53 has been given, the Registrar shall forward the application to the Central Government who shall consider the application with regard to the following matters namely :—

(a) whether the applicant is competent to certify the goods in respect of which the mark is to be registered ;

(b) whether the draft of the regulations to be deposited under section 56 is satisfactory ;

(c) whether in all the circumstances the registration applied for would be to the public advantage ;

and may either—

(i) direct that the application shall not be accepted ; or

(ii) direct the Registrar to accept the application and approve the said draft of the regulations either without modification and unconditionally or subject to any conditions or limitations, or to any amendments or modification of the application or of the regulations which it thinks requisite having regard to any of the said matters ;

but, except in the case of a direction for acceptance and approval without modification and unconditionally, the Central Government shall not decide the matter without giving to the applicant an opportunity of being heard :

Provided that the Central Government may, at the request of the applicant made with the concurrence of the Registrar, consider the application with regard to any of the said matters before authorisation to proceed with the application has been given, so however that the Central Government shall be at liberty to reconsider any matter on which it has given, a decision under this proviso if any amendment or modification is thereafter made in the application or in the draft of the regulations.

Opposition to registration.

55. *(1)* When an application has been accepted, the Registrar shall, as soon as may be thereafter, cause the application as accepted to be advertised in the prescribed manner, and the provisions of section 15 shall have effect in relation to the registration of the mark as if the application had been an application under section 14 :

Provided that, in deciding under the said provisions the tribunal shall have regard only to the considerations referred to in sub section *(3)* of section 53, and a decision under the said provisions in favour of the applicant shall be conditional on the determination in his favour by the Central Government under sub-section *(2)* of this section of any opposition relating to any of the matters referred to in section 54.

(2) When notice of opposition is given relating to any of the matters referred to in section 54, the Central Government shall, after hearing the parties, if so required, and considering any evidence, decide whether, and subject to what conditions or limitations or amendments or modifications, if any, of the application or of the regulations to be deposited under section 56, registration is, having regard to those matters, to be permitted.

Deposit of regulations governing the use of a certification trade mark.

56. *(1)* There shall be deposited at the [a][Trade Marks Registry] in respect of every mark registered as a certification trade mark regulations approved by the Central Government for governing the use thereof, which shall include provisions as to the cases in which the proprietor is to certify goods and to authorise the use of the certification trade mark, and may contain any other provisions which the Central Government may by general or special order require or permit to be inserted therein (including provisions conferring a right of appeal to the Registrar against any refusal of the proprietor to certify goods or to authorise the use of the certification trade mark in accordance with the regulations); and regulations so deposited shall be open to inspection in like manner as the register.

(2) The regulations so deposited may on the application of the registered proprietor be altered by the Registrar with the consent of the Central Government.

(3) The Central Government may cause such application to be advertised in any case where it appears to it expedient so to do, and where it does so, if within the time specified in the advertisement any person gives notice of opposition to the application, the Central Government shall not decide the matter without giving the parties an opportunity of being heard.

[a] *Substituted* by the Trade Marks (Amendment) Act, 1943 (15 [XV] of 1943), S. 5, for "Patent Office." [5-6-1943.]

Right conferred by registration.

57. [a][*(1)*] Subject to the provisions of sections 25, 26 and 58, the registration of a person as proprietor of a certification trade mark in respect of any goods shall, [b][* *] give to that person the exclusive right to the use of the certification trade mark in relation to those goods, and, without prejudice to the generality of the foregoing provision, that right shall be deemed to be infringed by any person who, not being the proprietor of the mark or a person authorised by him in that behalf under the regulations deposited under section 56, using it in accordance therewith, uses a mark identical with it or so nearly resembling it as to be likely to deceive or cause confusion, in the course of trade, in relation to any goods in respect of which it is registered, and in such manner as to render the use of the mark likely to be taken either—

(a) as being use as a certification trade mark; or

(b) to import a reference to some person having the right either as proprietor, or by his authorisation under the said regulations, to use the mark, or to goods certified by the proprietor.

[a][*(2)* A person registered in any Indian State to which section 82A for the time being applies, as proprietor of a certification trade mark shall have the same rights in respect thereof as are conferred by this section on a person registered under this Act as proprietor of a certification trade mark.]

[a] *Inserted* by the Trade Marks (Amendment) Act, 1946 (12 [XII] of 1946), S. 9 [18-4-1946]. [b] The words "if valid" were *omitted, ibid.*

No infringement in certain circumstances.

58. *(1)* The right to the use of a certification trade mark given under section 57 by registration shall be subject to any conditions or limitations entered on the register, and shall not be deemed to be infringed by the use of any such mark as aforesaid in any mode, in relation to goods to be sold or otherwise traded in in any place, in relation to goods to be exported to any market, or in any other circumstances, to which, having regard to any such limitations, the registration does not extend.

(2) The said right to the use of a certification trade mark shall not be deemed to be infringed by the use of any such mark as aforesaid by any person—

(a) in relation to goods certified by the proprietor of the mark if, as to those goods or a bulk of which they form part the proprietor or another in accordance with his authorisation under the relevant regulations has applied the mark and has not subsequently removed or obliterated it, or the proprietor has at any time expressly or impliedly consented to the use of the mark, or

(b) in relation to goods adapted to form part of, or to be accessory to other goods in relation to which the mark has been used without infringement of the right given as aforesaid or might for the time being be so used, if the use of the mark is reasonably necessary in order to indicate that the goods are so adapted and neither the purpose nor the effect of the use of the mark is to indicate otherwise than in accordance with the fact that the goods are certified by the proprietor :

Provided that clause *(a)* shall not apply to the case of use consisting of the application of any such mark as aforesaid to any goods, notwithstanding that they are such goods as are mentioned in that clause if such application is contrary to the said regulations.

(3) Where a certification trade mark is one of two or more [a][certification trade marks registered under this Act or in any Indian State to which section 82A for the time being applies] which are identical or nearly resemble each other, the use of any of those marks in exercise of the right to the use of that mark given by registration, shall not be deemed to be an infringement of the right so given to the use of any other of those marks.

[a] *Substituted* by the Trade Marks (Amendment) Act, 1946 (12 [XII] of 1946), S. 10 [18-4-1946] for "registered certification trade marks."

Cancellation or varying of registration.

59. *(1)* The Central Government may, on the application in the prescribed manner of any person aggrieved or on the recommendation of the Registrar, and after giving the proprietor an opportunity of opposing the application or recommendation, make such order as it thinks fit for expunging or varying any entry in the register relating to a certification trade mark, or for varying the deposited regulations, on any of the following grounds, namely : —

(a) that the proprietor is no longer competent, in the case of any of the goods in respect of which the mark is registered, to certify those goods ;

(b) that the proprietor has failed to observe any provision of the deposited regulations to be observed on his part ;

(c) that it is no longer to the public advantage that the mark should be registered ;

(d) that it is requisite for the public advantage that, if the mark remains registered, the regulations should be varied ;

and neither a High Court nor the Registrar shall have any jurisdiction to make an order under section 46 on any of those grounds.

(2) The Registrar shall rectify the register and the deposited regulations in such manner as may be requisite for giving effect to an order made under sub-section *(1)*.

Costs not to be awarded in certain cases.

60. The Registrar shall have no power to award costs to or against any party on an appeal to him against a refusal of the proprietor of a certification trade mark to certify goods or to authorise the use of the mark.

Decisions of Central Government to be final.

61. Save as otherwise expressly provided in this Chapter, every decision of the Central Government under this Chapter shall be final.

CHAPTER IX.

SPECIAL PROVISIONS FOR TEXTILE GOODS.

Textile goods.

62. The Central Government shall prescribe classes of goods (in this Chapter referred to as textile goods) to the trade marks used in relation to which the provisions of this Chapter shall apply ; and subject to the said provisions, the other provisions of this Act shall apply to such trade marks as they apply to trade marks used in relation to other classes of goods.

63. [a][Separate Trade Marks Registry at Bombay.] *[Repealed by the Trade Marks (Amendment) Act, 1943 (15 [XV] of 1943), S. 6 [5-6-1943].*

[a] Sections 63 and 63A were *substituted* for the original section 63 by the Trade Marks (Amendment) Act 1941 (27 [XXVII] of 1941).

63A. [Jurisdiction of Bombay Registrar and Registrar in respect of trade marks used in relation to textile goods.] *[Repealed by the Trade Marks (Amendment) Act, 1943 (15 [XV] of 1943), S. 6 [5-6-1943].*

Restrictions on registration of textile goods.

[a][64 *(1)* In respect of textile goods being piecegoods —

(a) No mark consisting of a line heading alone shall be registrable as a trade mark,

(b) a line heading shall not be deemed to be adapted to distinguish;

(c) the registration of a trade mark shall not give any exclusive right to the use of a line heading.

(2) In respect of any textile goods, the registration of letters or numerals, or any combination thereof, shall be subject to such conditions and restrictions as may be prescribed]

[a] *Substituted* for the original section by the Trade Marks (Amendment) Act, 1943 (15 [XV] of 1943), S. 7 [5-6-1943].

Refused Textile marks List.

[a][65. Trade marks in respect of textile goods of which registration has been refused shall be entered by the Registrar in a list called the Refused Textile Marks List, and the said list shall at all convenient times be open to the inspection of the public subject to such conditions and restrictions as may be prescribed.]

[a] *Substituted* by the Trade Marks (Amendment) Act, 1943 (15 [XV] of 1943), S. 8 [5-6-1943].

Advisory Committees.

66. *(1)* The Central Government may in the prescribed manner constitute one or more Advisory Committees of persons versed in the usages of the textile trade for the purpose of this section.

(2) The Registrar [a][* * *] shall consult any such Committee with respect to any circumstances peculiar to the textile trade arising on an application to register a trade mark in respect of textile goods.

(3) The place of meeting and the conduct of business of such Committees shall be determined by rules made under this Act

[a] The words "and the Bombay Registrar," were *omitted* by the Trade Marks (Amendment) Act, 1943 (15 [XV] of 1943), S. 9 [5-6-1943]. The words "and the Bombay" had been *substituted ibid*, 1941 (27 [XXVII] of 1941), S. 6 for "or the Deputy." [27-11-1941].

CHAPTER X.

OFFENCES AND RESTRAINT OF USE OF ROYAL ARMS AND STATE EMBLEMS.

Penalty for falsification of entries in register.

67. If any person makes, or causes to be made a false entry in the register, or a writing falsely purporting to be a copy of an entry in the register, or produces or tenders, or causes to be produced or tendered, in evidence any such writing, knowing the entry or writing to be false, he shall be punishable with imprisonment for a term which may extend to two years, or with fine, or with both.

Penalty for falsely representing trade mark as registered.

68. *(1)* [a][On and after the 1st day of January, 1947], no person shall make any representation —

(a) with respect to a mark not being a registered trade mark, to the effect that it is a registered trade mark; or

(b) with respect to a part of a registered trade mark not being a part separately registered as a trade mark, to the effect that it is separately registered as a trade mark; or

(c) to the effect that a registered trade mark is registered in respect of any goods in respect of which it is not in fact registered; or

(d) to the effect that the registration of a trade mark gives an exclusive right to the use thereof in any circumstances in which, having regard to limitations entered on the register, the registration does not in fact give that right.

(2) If any person contravenes any of the provisions of sub-section *(1)*, he shall be punishable with imprisonment for a term which may extend to six months, or with fine which may extend to five hundred rupees, or with both.

(3) For the purposes of this section, the use in British India in relation to a trade mark of the word "registered", or of any other expression referring whether expressly or impliedly to registration, shall be deemed to import a reference to registration in the register, except —

(a) where that word or other expression is used in direct association with other words delineated in characters at least as large as those in which that word or other expression is delineated and indicating that the reference is to registration as a trade mark under the law of a country outside British India, being a country under the law of which the registration referred to is in fact in force; or

(b) where that other expression is of itself such as to indicate that the reference is to such registration as is mentioned in clause *(a)*; or

(c) where that word is used in relation to a mark registered as a trade mark under the law of a country outside British India and in relation solely to goods to be exported to that country.

[b][*(4)* Nothing in this section shall —

(a) apply to a trade mark, application for the registration of which has been made before the 1st day of January 1947, until such application has been disposed of;

(b) affect the use of the word "registered" in respect of a trade mark registered in any Indian State to which section 82 A for the time being applies, or until the application has been disposed of, in respect of a trade mark, application for the registration of which has been made in any such Indian State before the aforesaid date.]

[a] *Substituted* by the Trade Marks (Amendment) Act, 1946 (12 [XII] of 1946), S. 11, for "From such date, not being earlier than one year from the commencement of this Act, as the Central Government may by notification in the Official Gazette, appoint in this behalf." [b] *Inserted, ibid.*

Restraint of use of Royal Arms and State emblems.

69. If a person, without due authority, uses in connection with any trade, business, calling or profession —

(a) the Royal Arms (or arms so closely resembling the same as to be calculated to deceive) in such manner as to be calculated to lead to the belief that he is duly authorised so to use the Royal Arms, or

(b) any device, emblem or title in such manner as to be calculated to lead to the belief that he is employed by, or supplies goods to, or is connected with, His Majesty's Government or the Central Government or any Provincial Government or any department of any such Government,

he may, at the suit of any person who is authorised to use such Arms or such device, emblem or title or of the Registrar [a][* * * *] be restrained by injunction from continuing so to use the same.

[b][Provided that nothing in this section shall be construed as affecting the right, if any, of the proprietor of a trade mark containing any such Arms, device, emblem or title to continue to use such trade mark.]

[a] The words "or the Bombay Registrar", *inserted* by Act 27 of 1941, S. 7, were *omitted* by the Trade Marks Amendment Act, 1943 (15 [XV] of 1943), S. 10. [5-6-1943]. [b] *Inserted* by Act XV of 1943, S. 10.

CHAPTER XI.

MISCELLANEOUS.

Procedure before the Registrar.

70. In all proceedings under this Act before the Registrar—

(a) the Registrar shall have all the powers of a Civil Court for the purposes of receiving evidence, administering oaths enforcing the attendance of witnesses compelling the discovery and production of documents and issuing commissions for the examination of witnesses;

(b) evidence shall be given by affidavit, provided that the Registrar may, if he thinks fit, take oral evidence in lieu of, or in addition to, such evidence by affidavit;

(c) the Registrar shall not exercise any power vested in him by this Act or the rules made thereunder adversely to any party duly appearing before him without (if required in writing within the prescribed time so to do) giving such party an opportunity of being heard;

d) the Registrar may save as otherwise expressly provided in this Act, and subject to any rules made in this behalf under section 81 make such orders as to costs as he considers reasonable and any such order shall be executable as a decree of a Civil Court.

Procedure before Central Government.

71. In all proceedings under this Act before the Central Government, evidence shall be given by affidavit provided that the Central Government may, if it thinks fit take oral evidence in lieu of, or in addition to, such evidence by affidavit and shall for that purpose have all the powers of a Civil Court referred to in clause *(a)* of section 70.

Procedure in certain cases of option to apply to a High Court or the Registrar.

72. Where under this Act an applicant has the option of making an application either to a High Court or to the Registrar,—

(a) if any suit or other proceedings concerning the trade mark in question is pending before a High Court or a District Court the application shall be made to that High Court or, as the case may be, to the High Court within whose jurisdiction that District Court is situated;

(b) in any other case the application is made to the Registrar, the Registrar may, if he thinks fit refer the application at any stage of the proceedings to a High Court.

Suits for infringement to be instituted before District Court.

73. No suit for the infringement of a trade mark or otherwise relating to any right in a trade mark shall be instituted in any Court inferior to a District Court having jurisdiction to try the suit.

Appearance of Registrar in proceedings involving rectification of register.

74. *(1)* In any suit or other legal proceeding in which the relief sought includes alteration or rectification of the register, the Registrar shall have the right to appear and be heard, and shall appear if so directed by the tribunal.

(2) Unless the tribunal otherwise directs, the Registrar may, in lieu of appearing, submit a statement in writing signed by him giving such particulars as he thinks proper of the proceedings before him relating to the matter in issue or of the grounds of any decision given by him affecting it, or of the practice of the [a][Trade Marks Registry] in like cases or of other matters relevant to the issues and within his knowledge as Registrar, and such statement shall be evidence in the suit or other proceeding.

[b][* * * * * * * * *]

[a] *Substituted* by the Trade Marks (Amendment) Act, 1943 (15 [XV] of 1943), S. 11, for "Patent Office' [5 6 1943]. [b] Sub-section *(3)* was *omitted*, *ibid.*

Costs of Registrar in proceedings before High Court

[a] **74A.** In all proceedings under this Act before a High Court the costs of the Registrar shall be in the discretion of the High Court, but the Registrar shall not be ordered to pay the costs of any of the parties].

[a] *Inserted* by the Trade Marks (Amendment) Act, 1943 (15 [XV] of 1943) S. 12 [5-6-1943].

Evidence of entries in register and things done by Registrar.

75. *(1)* A printed or written copy of any entry in the register, purporting to be certified by the Registrar and sealed with the seal of the [a][Trade Marks Registry], shall be admitted in evidence in all Courts in British India and in all proceedings without further proof [b][or] production of the original.

(2) A certificate purporting to be under the hand of the Registrar as to any entry, matter or thing that he is authorised by this Act or the rules to make or do shall be *prima facie* evidence of the entry having been made, and of the contents thereof, or of the matter or thing having been done or not done

[*Cf*: 1 & 2 Geo. VI, c. 22 — Ss. 57 and 58]

[a] *Substituted* by the Trade Marks (Amendment) Act, 1943 (15 [XV] of 1943), S. 13, for "Patent Office' [5 6-1943] [b] *Substituted*, *ibid.*, 1941 (27 [XXVII] of 1941), S. 8, for "of" [26 11-1941].

Appeals.

76. *(1)* Save as otherwise expressly provided in this Act, an appeal shall lie, within the period prescribed by the Central Government from any decision of the Registrar [a][* * * *] under this Act or the rules made thereunder to the High Court having jurisdiction :

Section 76 — Note 1

[1] In the absence of establishment of any other offices in British India, all applications for registration of trade marks, barring those which can be made in Calcutta, must be made to Registrar at Bombay and once they are decided by him, High Court of Bombay alone would be competent to hear appeals against this decision. (Vol 34) 1947 Lah 171 (172).

Provided that if any suit or other proceeding concerning the trade mark in question is pending before a High Court or a District Court, the appeal shall be made to that High Court or as the case may be, to the High Court within whose jurisdiction that District Court is situated.

(2) In an appeal by an applicant for registration against a decision of the Registrar under section 13 or section 14 or section 15, it shall not be open, save with the express permission of the Court to the Registrar or any party opposing the appeal to advance grounds other than those recorded in the said decision or advanced by the party in the proceedings before the Registrar, as the case may be, and where any such additional grounds are advanced the applicant for registration may, on giving notice in the prescribed manner, withdraw his application without being liable to pay the costs of the Registrar or the parties opposing his application.

(3) Subject to the provisions of this Act and of rules made thereunder, the provisions of the Code of Civil Procedure, 1908 shall apply to appeals before a High Court under this Act.

[a] The words "or the Bombay Registrar" *substituted* for "or Deputy Registrar" by Act 27 of 1941, S. 9 were *omitted* by the Trade Marks (Amendment) Act, 1943 (15 [XV] of 1943), S. 14. [5-6 1943].

Power to High Courts to make rules.

77. A High Court may make rules consistent with this Act as to the conduct and procedure of all proceedings under this Act before it.

Certificate of validity.

78. If in any legal proceeding in which the validity of the registration of a trade mark comes into question, a decision is given in favour of the proprietor of the trade mark, the tribunal may grant a certificate to that effect, and if such a certificate is granted, then in any subsequent legal proceeding in which the said validity comes into question, the said proprietor on obtaining a final order or judgment in his favour shall, unless the said final order or judgment for sufficient reason directs otherwise, be entitled to his full costs, charges and expenses as between legal practitioner and client.

Trade usage, etc., to be taken into consideration.

79. In any suit or other proceeding relating to a trade mark, the tribunal shall admit evidence of the usages of the trade concerned and of any relevant trade mark or get up legitimately used by other persons.

Agents.

80. Where by or under this Act any act, other than the making of an affidavit, is required to be done by any person the act may, subject to prescribed conditions or in special cases with the consent of the Central Government, be done in lieu of by that person himself by a duly authorised agent, being either a legal practitioner or a person registered in the prescribed manner as a trade marks agent.

Fees.

81. There shall be paid in respect of applications and registration and other matters under this Act such fees as may be prescribed by the Central Government.

Crown to be bound.

82 The provisions of this Act shall be binding on the Crown.

Power to make reciprocal arrangements with Indian States.

[a][**82A.** *(1)* The Central Government may enter into reciprocal arrangements with any Indian State whereby trade marks and certification trade marks registered under this Act shall have in that State protection as if registered in that State and where such arrangements have been entered into with any Indian State, the Central Government shall by notification in the official Gazette declare that this section shall apply to that State.

(2) Where any such arrangements as aforesaid with any Indian State are terminated, the Central Government shall by a further like notification cancel the notification under sub-section *(1)* relating to that State.]

[a] *Inserted* by the Trade Marks (Amendment) Act, 1946 (12 [XII] of 1946), S. 12 [18-4-1946].

Power to make reciprocal arrangements with other Governments.

83. If at any time after the expiry of six months from the commencement of this section it is made to appear to the Central Government that any Government outside [a][k] India has made satisfactory provision for the protection within its territories of trade marks in respect of which an application for registration has been made in British India, the Central Government may by notification in the official Gazette, make provision with regard to trade marks in respect of which an application for registration has been made within the territories of that Government to enable any person

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Section 76 — Note 1 *(contd.)*

[2] Act does not provide for further appeal from decision of single Judge in appeal under S 76 — Such appeal also cannot be founded on rules made by Calcutta High Court under S. 77. Registrar of Trade Marks is not Court subject to High Court's superintendence — His refusal to register trade mark is not decree of Court subject to superintendence of High Court. (Vol 34) 1947 Cal 49 (52, 57) (DB) (The Trade Mark Act is not an amendment within Cl. 44, Letters Patent)

who has applied within such territories for registration of a trade mark or his legal representative or assignee to obtain registration of the trade mark in British India under this Act on his making an application for registration in British India within such period as may be fixed in this behalf by the notification as if an application for registration under this Act had been made in respect of that trade mark at the date at which the application for registration was made within the territories of that Government.

[a] The word "British" was *omitted* by the Trade Marks (Amendment) Act, 1946 (12 [XII] of 1946), S. 13 [18-4-1946].

Power of Central Government to make rules.

84. *(1)* The Central Government may, subject to the condition of previous publication by notification in the official Gazette, make rules* to carry out the purposes of this Act.

(2) In particular and without prejudice to the generality of the foregoing power, such rules may—

(a) prescribe the classification of goods for the purpose of the registration of trade marks and empower the Registrar to amend the register so far as may be necessary for the purpose of adapting the entries therein to any amended or substituted classification which may be prescribed;

(b) require the making of duplicates of trade marks and other documents connected therewith;

(c) provide for securing and regulating the publication, sale or distribution of copies of trade marks and other documents connected therewith;

(d) prescribe additional matters to be entered in the register;

(e) prescribe the conditions and restrictions subject to which the register, [c][* * * *] and the Refused Textile Marks [b][List] may be inspected;

(f) prescribe the form of certificates of registration;

(g) prescribe the conditions under which a trade mark removed from the register may be restored under sub-section *(3)* of section 18;

(h) prescribe the further documents, information or evidence to accompany an application under sub-section *(1)* of section 41;

(i) prescribe classes of goods as textile goods for the purposes of Chapter IX;

(j) provide for the constitution of Advisory Committees referred to in section 66, and prescribe the places of meeting, and conduct of business at meetings, of such Committees;

(k) regulate the awarding of costs by the Registrar under section 70;

(l) prescribe the conditions subject to which an agent referred to in section 80 may act;

[c][*(ll)* make such supplementary provision as may be necessary or expedient to give effect to reciprocal arrangements entered into with Indian States under section 82A.]

(m) prescribe the fees to be paid under this Act;

(n) provide for the establishment of branches of the Trade Marks Registry when expedient for facilitating the working of this Act, and authorise the preparation of copies of the register to be kept at such branch offices:

(o) prescribe the manner in which, in proceedings under this Act before the Central Government or the Registrar, applications shall be made, notices given and matters advertised;

(p) prescribe times or periods required by this Act to be prescribed;

(q) provide, generally, for regulating the business of the Trade Marks Registry and of branches established under clause *(n)* [d][* * * *] and for regulating all things by this Act placed under the direction or control of the Central Government or the Registrar.

[e][* * * * * * *]

*See the Trade Marks Rules, 1942.

[a] The words "the Textile Marks Records," wherein "Records" had been *substituted* by Act 27 of 1941 S. 10, for "Record" were *omitted* by the Trade Marks (Amendment) Act, 1943 (XV [15] of 1943), S. 15 [5-6-1943] [b] *Substituted* by Act 15 of 1943, S. 15, for "Lists" *substituted* by Act 27 of 1941, S. 10, for "List." [c] *Inserted* by the Trade Marks (Amendment) Act, 1946 (XII [12] of 1946), S 14, [18-4-1946.] [d] The words "or under section 63" were *omitted* by Act 27 of 1941, S. 10. [e] The Cl. *(r)*, *added* by Act 27 of 1941, S. 10, was *omitted* by Act 15 of 1943, S. 15 [5-6-1943].

Power to Central Government to make provision for applications for registration before the coming into force of the remaining provisions of Act.

85. The Central Government may, by notification in the official Gazette, provide such procedure as it considers expedient to enable intending applicants to deposit trade marks at the Patent Office before the coming into force of the remaining provisions of this Act:

Provided that the deposit of a trade mark under this section shall not affect any right, existing or accruing, in the trade mark.

Proceedings at Patent Office and the Bombay Registry to be deemed to have been taken at Trade Marks Registry.

[a][86. On the commencement of the Trade Marks (Amendment) Act, 1943, all applications made and all acts done under this Act before that time at the Patent Office or the Bombay Registry shall be deemed to have been made and done at the Trade Marks Registry, Bombay, and shall have effect as if made or done under this Act as amended by the Trade Marks (Amendment) Act, 1943.]

[a] *Added* by the Trade Marks (Amendment) Act, 1943 (XV [15] of 1943), S. 16 [5-6-1943].

[THE INDIAN] TRADE UNIONS ACT, 1926.

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Statement of Objects and Reasons.

"This Bill has been prepared in response to the following Resolution which was adopted by the Legislative Assembly on 1st March 1924: "This Assembly recommends to the Governor-General in Council that he should take steps to introduce, as soon as practicable, in the Indian Legislature such legislation as may be necessary for the registration of Trade Unions and for the protection of Trade Unions".

The question was examined in detail by the Government of India and Local Governments were consulted: full opportunity was given for the expression of views by associations of employers and employees, and by the public generally. In the light of opinions received a draft Bill was prepared and published in September 1924. The Government of India after considering the criticisms received on that Bill, see no ground for modifying the general principles underlying the Bill, and, except for minor alterations, the present Bill is a reproduction of the Bill previously published

The general scheme of the Bill may be briefly explained. A Trade Union making the necessary application will, on compliance with certain stated conditions designed to ensure that the Union is a *bona fide* Trade Union, and that adequate safeguards are provided for the rights of its members, be entitled to registration The Union and its members will thereupon receive protection in certain cases in respect both of civil and criminal liability. No restriction is placed upon the objects which a registered Trade Union may pursue, but the expenditure of its funds must be limited to specified Trade Union purposes. The legal position of Trade Unions which do not register will be unaffected by the Bill."

— Gazette of India, 1925, Part V, page 8

Act how affected by subsequent legislation.

— Amended by Acts 15 of 1928; 45 of 1947.
— Adapted by A. O.
— Repealed in part by Act 25 of 1942.

Cognate Acts and Provisions.

1. INDUSTRIAL DISPUTES ACT, XIV OF 1947.
2. INDUSTRIAL EMPLOYMENT (STANDING ORDERS) ACT, XX OF 1946.

[THE INDIAN] TRADE UNIONS ACT, 1926.

(ACT XVI OF 1926.)[a]

[25th March, 1926.]

An Act to provide for the registration [b]*[and recognition] of Trade Unions and in certain respects to define the law relating to* [c]*[registered and recognised Trade Unions and to certain unfair practices in industrial or trade employment.]*

WHEREAS it is expedient to provide for the registration [b][and recognition] of Trade Unions and in certain respects to define the law relating to [c][registered and recognised Trade Unions and to certain unfair practices in industrial or trade employment.] It is hereby enacted as follows:—

[a] For Statement of Objects and Reasons, see Gazette of India, 1925, Pt. V, p 8, and for Report of Select Committee, *see ibid*, p 197. [b] *Inserted* by the Indian Trade Unions (Amendment) Act, 1947 (45 [XLV] of 1947, S. 2. [c] *Substituted* for "registered Trade Unions in British India", *ibid.*

CHAPTER I.

Preliminary.

Short title, extent and commencement.

1. *(1)* This Act may be called the Indian Trade Unions Act, 1926.

(2) It extends to the whole of British India, including British Baluchistan and the Sonthal Parganas.

(3) It shall come into force on such date[a] as the [b][Central Government] may, by notification in the [c][Official Gazette], appoint.

[a] 1st June, 1927; *see* Gazette of India, 1927, Pt. I, p. 467. [b] *Substituted* by A. O. for "Governor-General in Council". [c] *Substituted* by A. O. for "Gazette of India".

Definitions

2. [a][In this Act, unless there is anything repugnant in the subject or context,—

(a) "appropriate Government" means, in relation to Trade Unions whose objects are not confined to one Province, the Central Government and in relation to other Trade Unions but subject to the provisions of section 28A, the Provincial Government;

Section 2 — Note 1

[1] Combination of various businesses *inter se* to keep up prices and to benefit members—Constituents to do nothing more than observe certain restrictions contained in the agreement and pay into the pool a particular amount of money—Payment out of the accumulations of certain shares to the constituents also provided for—Agreement also containing clauses for action to be taken in case of breach of contract by members including arbitration clause — All kinds of restrictive clauses to operate in case of emergency created by a break down of the machinery also inserted in the agreement — *Held* it was not a partnership but being a combination fell within the definition of Trade Union. (Vol 27) 1940 Nag 228 (229):ILR (1941) Nag 702 (DB).

(b) "employer" means—

(i) in relation to an industry carried on by or under the authority of any department of the Central Government or a Provincial Government, the authority prescribed in this behalf, or where no authority is prescribed, the head of the department,

(ii) in relation to an industry carried on by or on behalf of a local authority, the chief executive officer of that authority,

and includes an association of employers ;

(c) "executive" means the body, by whatever name called, to which the management of the affairs of a Trade Union is entrusted ;

(d) "industry" means any business, trade, undertaking, manufacture or calling of employers and includes any calling, service, employment, handicraft, or industrial occupation or avocation of workmen ;

(e) "Labour Court" means, in relation to a Trade Union, a Labour Court appointed by the appropriate Government under sub-section (1) of section 28D ;]

[b][(f)] "officer", in the case of a Trade Union, includes any member of the executive thereof but does not include an auditor ;

[b][(g)] "prescribed" means prescribed by regulations made under this Act :

[c][(h)] "recognised Trade Union" means a Trade Union recognised under this Act] ;

[d][(i)] "registered office" means that office of a Trade Union which is registered under this Act as the head office thereof ;

[d][(j)] "Registered Trade Union" means a Trade Union registered under this Act ;

[d][(k)] "Registrar" means a Registrar of Trade Unions appointed by the [e][appropriate Government] under section 3, and "the Registrar", in relation to any Trade Union, means the Registrar appointed for the Province in which the head or registered office, as the case may be, of the Trade Union is situated ;

[f][(l)] 'strike" has the meaning assigned to it in the Industrial Disputes Act, 1947, "illegal strike" means a strike which by virtue of any law for the time being in force is illegal, and "irregular strike" means an illegal strike or a strike declared by a Trade Union in contravention of its rules referred to in clause (d) of section 28D ;]

[g][(m)] "trade dispute" means any dispute between employers and workmen or between workmen and workmen, or between employers and employers which is connected with the employment or non-employment, or the terms of employment or the conditions of labour, of any person, and "workmen" means all persons employed in trade or industry whether or not in the employment of the employer with whom the trade dispute arises ; and

[g][(n)] "Trade Union" means any combination, whether temporary or permanent, formed primarily for the purpose of regulating the relations between workmen and employers or between workmen and workmen or between employers and employers, or for imposing restrictive conditions on the conduct of any trade or business, and includes any federation of two or more Trade Unions :

Provided that this Act shall not affect—

(i) any agreement between partners as to their own business ;

(ii) any agreement between an employer and those employed by him as to such employment ; or

(iii) any agreement in consideration of the sale of the good will of a business or of instruction in any profession, trade, or handicraft.

[a] *Substituted* for the opening paragraph and clause *(a)* by the Indian Trade Unions (Amendment) Act, 1947 (45 [XLV] of 1947), S 3. [b] *Relettered* for *(b)* and *(c)*, respectively, *ibid.* [c] Clause *(h)* was *inserted*, *ibid* [d] *Relettered* for *(d)*, *(e)* and *(f)* respectively, *ibid.* [e] *Substituted* for 'Local Government' by A. O. [f] Clause *(l)* was *inserted* by Act XLV of 1947, S. 3. [g] *Relettered* for *(g)* and *(h)* respectively, *ibid.*

CHAPTER II

Registration of Trade Unions

Appointment of Registrars.

3. [a][The appropriate Government] shall appoint a person to be the Registrar of Trade Unions for [b][each Province].

[a] *Substituted* by A. O. for "Each Local Government". [b] *Substituted* by A. O. for "the province."

Mode of registration.

4 Any seven or more members of a Trade Union may, by subscribing their names to the rules of the Trade Union and by otherwise complying with the provisions of this Act with respect to registration, apply for registration of the Trade Union under this Act.

Application for registration.

5. *(1)* Every application for registration of a Trade Union shall be made to the Registrar, and shall be accompanied by a copy of the rules of the Trade Union and a statement of the following particulars, namely :—

(a) the names, occupations and addresses of the members making the application ;

(b) the name of the Trade Union and the address of its head office ; and

(c) the titles, names, ages, addresses and occupations of the officers of the Trade Union.

(2) Where a Trade Union has been in existence for more than one year before the making of an application for its registration, there shall be delivered to the Registrar, together with the application, a general statement of the assets and liabilities of the Trade Union prepared in such form and containing such particulars as may be prescribed.

Provisions to be contained in the rules of a Trade Union.

6. A Trade Union shall not be entitled to registration under this Act, unless the executive thereof is constituted in accordance with the provisions of this Act, and the rules thereof provide for the following matters, namely :—

(a) the name of the Trade Union ;

(b) the whole of the objects for which the Trade Union has been established ;

(c) the whole of the purposes for which the general funds of the Trade Union shall be applicable, all of which purposes shall be purposes to which such funds are lawfully applicable under this Act ;

(d) the maintenance of a list of the members of the Trade Union and adequate facilities for the inspection thereof by the officers and members of the Trade Union ;

(e) the admission of ordinary members who shall be persons actually engaged or employed in an industry with which the Trade Union is connected, and also the admission of the number of honorary or temporary members as officers required under section 22 to form the executive of the Trade Union ;

(f) the conditions under which any member shall be entitled to any benefit assured by the rules and under which any fine or forfeiture may be imposed on the members ;

(g) the manner in which the rules shall be amended, varied or rescinded ;

(h) the manner in which the members of the executive and the other officers of the Trade Union shall be appointed and removed ;

(i) the safe custody of the funds of the Trade Union, an annual audit, in such manner as may be prescribed, of the accounts thereof, and adequate facilities for the inspection of the account books by the officers and members of the Trade Union ; and

(j) the manner in which the Trade Union may be dissolved.

Power to call for further particulars and to require alteration of name.

7. *(1)* The Registrar may call for further information for the purpose of satisfying himself that any application complies with the provisions of section 5, or that the Trade Union is entitled to registration under section 6, and may refuse to register the Trade Union until such information is supplied.

(2) If the name under which a Trade Union is proposed to be registered is identical with that by which any other existing Trade Union has been registered or, in the opinion of the Registrar, so nearly resembles such name as to be likely to deceive the public or the members of either Trade Union, the Registrar shall require the persons applying for registration to alter the name of the Trade Union stated in the application, and shall refuse to register the Union until such alteration has been made.

Registration.

8. The Registrar, on being satisfied that the Trade Union has complied with all the requirements of this Act in regard to registration, shall register the Trade Union by entering in a register, to be maintained in such form as may be prescribed, the particulars relating to the Trade Union contained in the statement accompanying the application for registration.

Certificate of registration.

9. The Registrar, on registering a Trade Union under section 8 shall issue a certificate of registration in the prescribed form which shall be conclusive evidence that the Trade Union has been duly registered under this Act.

Cancellation of registration.

10. A certificate of registration of a Trade Union may be withdrawn or cancelled by the Registrar—

(a) on the application of the Trade Union to be verified in such manner as may be prescribed, or

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Section 8 — Note 1

[1] Application for registration of union—Registrar's function is limited to seeing that requirements of Act are complied with — Registrar cannot rely on letter written by Union Secretary to Bengal Government for lifting ban and refuse to register. (Vol 23) 1936 Cal 57 (60, 61) : 63 Cal 565 (DB).

(b) if the Registrar is satisfied that the certificate has been obtained by fraud or mistake, or that the Trade Union has ceased to exist or has wilfully and after notice from the Registrar contravened any provision of this Act or allowed any rule to continue in force which is inconsistent with any such provision, or has rescinded any rule providing for any matter provision for which is required by section 6:

Provided that not less than two months' previous notice in writing specifying the ground on which it is proposed to withdraw or cancel the certificate shall be given by the Registrar to the Trade Union before the certificate is withdrawn or cancelled otherwise than on the application of the Trade Union.

Appeal.

[a][11. *(1)* Any person aggrieved by any refusal of the Registrar to register a Trade Union or by the withdrawal or cancellation of a certificate of registration may, within such period as may be prescribed, appeal—

(a) where the head office of the Trade Union is situated within the limits of a Presidency-town [b][* * *] to the High Court, or

(b) where the head office is situated in any other area, to such Court, not inferior to the Court of an additional or assistant Judge of a principal civil Court of original jurisdiction, as the [c][appropriate Government] may appoint in this behalf for that area.

(2) The appellate Court may dismiss the appeal, or pass an order directing the Registrar to register the Union and to issue a certificate of registration under the provisions of section 9 or setting aside the order for withdrawal or cancellation of the certificate, as the case may be, and the Registrar shall comply with such order.

(3) For the purpose of an appeal under sub-section *(1)* an appellate Court shall, so far as may be, follow the same procedure and have the same powers as it follows and has when trying a suit under the Code of Civil Procedure, 1908, and may direct by whom the whole or any part of the costs of the appeal shall be paid, and such costs shall be recovered as if they had been awarded in a suit under the said Code.

(4) In the event of the dismissal of an appeal by any Court appointed under clause *(b)* of sub section *(1)*, the person aggrieved shall have a right of appeal to the High Court, and the High Court shall, for the purpose of such appeal, have all the powers of an appellate Court under sub-sections *(2)* and *(3)*, and the provisions of those sub-sections shall apply accordingly.]

[a] *Substituted* by the Indian Trade Unions (Amendment) Act, 1928 (15 [XV] of 1928), S. 2. [b] The words "or of Rangoon" were *repealed* by A. O. [c] *Substituted* by A. O. for "Local Government".

Registered office.

12. All communications and notices to a registered Trade Union may be addressed to its registered office. Notice of any change in the address of the head office shall be given within fourteen days of such change to the Registrar in writing, and the changed address shall be recorded in the register referred to in section 8.

Incorporation of registered Trade Unions.

13. Every registered Trade Union shall be a body corporate by the name under which it is registered, and shall have perpetual succession and a common seal with power to acquire and hold both moveable and immoveable property and to contract, and shall by the said name sue and be sued.

Certain Acts not to apply to registered Trade Unions.

14. The following Acts, namely :—

(a) The Societies Registration Act, 1860,

(b) The Co-operative Societies Act, 1912,

(c) [a][* * * *]

(d) [a][* * * *]

(e) The Indian Companies Act, 1913,

shall not apply to any registered Trade Union, and the registration of any such Trade Union under any such Act shall be void.

[a] Clauses (c) and (*d*) were *repealed* by the Repealing and Amending Act, 1942 (25 [XXV] of 1942), S. 2 and Sch. I [1-10-1942].

Section 11—Note 1

[1] When there is an appeal to the High Court, it should come before a Judge sitting on the original side who is to deal with the matter in the same way as if he were trying a suit under the provisions of the Code of Civil Procedure. (Vol 23) 1936 Cal. 57 (61) : 63 Cal. 565 (D B).

Section 13—Note 1

[1] Suit by a registered Trade Union — Vice Presidents of the Union are not proper plaintiffs. (Vol 20) 1933 Lah. 203 (206) : 14 Lah. 330.

[2] In the case of an unregistered Trade Union a suit by one member against another not in a representative capacity but as a contracting party to the combination is maintainable (Vol 27) 1940 Nag. 228 (230) : I L R (1941) Nag. 702 (D B). (Suit in tort against a member in a representative capacity is not maintainable).

CHAPTER III.

Rights and Liabilities of registered Trade Unions.

Objects on which general funds may be spent.

15. The general funds of a registered Trade Union shall not be spent on any other objects than the following, namely :—

(a) the payment of salaries, allowances and expenses to officers of the Trade Union ;

(b) the payment of expenses for the administration of the Trade Union, including audit of the accounts of the general funds of the Trade Union ;

(c) the prosecution or defence of any legal proceeding to which the Trade Union or any member thereof is a party, when such prosecution or defence is undertaken for the purpose of securing or protecting any rights of the Trade Union as such or any rights arising out of the relations of any member with his employer or with a person whom the member employs ;

(d) the conduct of trade disputes on behalf of the Trade Union or any member thereof ;

(e) the compensation of members for loss arising out of trade disputes ;

(f) allowances to members or their dependants on account of death, old age, sickness, accidents or unemployment of such members ;

(g) the issue of, or the undertaking of liability under, policies of assurance on the lives of members, or under policies insuring members against sickness, accident or unemployment ;

(h) the provision of educational, social or religious benefits for members (including the payment of the expenses of funeral or religious ceremonies for deceased members) or for the dependants of members ;

(i) the upkeep of a periodical published mainly for the purpose of discussing questions affecting employers or workmen as such ;

(j) the payment, in furtherance of any of the objects on which the general funds of the Trade Union may be spent, of contributions to any cause intended to benefit workmen in general, provided that the expenditure in respect of such contributions in any financial year shall not at any time during that year be in excess of one-fourth of the combined total of the gross income which has up to that time accrued to the general funds of the Trade Union during that year and of the balance at the credit of those funds at the commencement of that year ; and

(k) subject to any conditions contained in the notification, any other object notified by the [a][appropriate Government] in the [b][Official Gazette].

[a] *Substituted* by A. O. for "Governor-General in Council." [b] *Substituted* by A. O. for "Gazette of India".

OBJECTS AND REASONS

"The object on which the funds may be spent have been limited to objects generally recognised as legitimate trade union objects. As, however the clause may not prove sufficiently elastic in practice, it is proposed to empower the Government of India to add to the list of objects. This will make it possible to provide for the extension of the scope of registered trade unions if the development of the trade union movement renders that desirable."

— S. O. R.

Constitution of a separate fund for political purposes.

16. *(1)* A registered Trade Union may constitute a separate fund, from contributions separately levied for or made to that fund, from which payments may be made, for the promotion of the civic and political interests of its members, in furtherance of any of the objects specified in sub-section *(2)*.

(2) The objects referred to in sub-section *(1)* are :—

(a) the payment of any expenses incurred, either directly or indirectly, by a candidate or prospective candidate for election as a member of any legislative body constituted under the Government of India Act [a][or the Government of India Act, 1935] or of any local authority before, during, or after the election in connection with his candidature or election ; or

(b) the holding of any meeting or the distribution of any literature or documents in support of any such candidate or prospective candidate ; or

(c) the maintenance of any person who is a member of any legislative body constituted under the Government of India Act [a][or the Government of India Act, 1935] or of any local authority ; or

(d) the registration of electors or the selection of a candidate for any legislative body constituted under the Government of India Act [a][or the Government of India Act, 1935] or for any local authority; or

(e) the holding of political meetings of any kind, or the distribution of political literature or political documents of any kind.

(3) No member shall be compelled to contribute to the fund constituted under sub section (1); and a member who does not contribute to the said fund shall not be excluded from any benefits of the Trade Union, or placed in any respect either directly or indirectly under any disability or at any disadvantage as compared with other members of the Trade Union (except in relation to the control or management of the said fund) by reason of his not contributing to the said fund; and contribution to the said fund shall not be made a condition for admission to the Trade Union.

[a] *Inserted* by A. O. and the Act in 26 Geo V, c. 2.

OBJECTS AND REASONS

"The question of the expenditure of Trade Union funds on political objects was found to be one of considerable difficulty. We are by a majority of opinion that such expenditure should be allowed; the majority are also of opinion that such expenditure should be met not from the general funds, but from a special fund, contributions to which shall be optional. We have included provisions taken from the English law to prevent unfair discrimination against a non-contributing member. In prescribing the political objects also, on which expenditure may be incurred, we have followed the provisions of the English law" —S. C. R.

Criminal conspiracy in trade disputes.

17. No officer or member of a registered Trade Union shall be liable to punishment under sub-section (2) of section 120B of the Indian Penal Code, in respect of any agreement made between the members for the purpose of furthering any such object of the Trade Union as is specified in section 15, unless the agreement is an agreement to commit an offence.

OBJECTS AND REASONS.

"Under the existing criminal law an agreement to do an illegal act is itself a criminal offence. "Illegal act" includes all acts which provide grounds for civil actions. Thus, for example, two men who agree to persuade workmen to break their contracts with their employers are guilty of criminal conspiracy. The clause, which is similar in its effect to the corresponding provisions of the English law protects trade unionists from prosecutions for criminal conspiracy where the agreement into which they have entered is not an agreement to commit an offence."

—S. O. R.

Immunity from civil suit in certain cases.

18. (1) No suit or other legal proceeding shall be maintainable in any Civil Court against any registered Trade Union or any officer or member thereof in respect of any act done in contemplation or furtherance of a trade dispute to which a member of the Trade Union is a party on the ground only that such act induces some other person to break a contract of employment or that it is in interference with the trade, business or employment of some other person or with the right of some other person to dispose of his capital or of his labour as he wills.

(2) A registered Trade Union shall not be liable in any suit or other legal proceeding in any Civil Court in respect of any tortious act done in contemplation or furtherance of a trade dispute by an agent of the Trade Union if it is proved that such person acted without the knowledge of, or contrary to express instructions given by, the executive of the Trade Union.

OBJECTS AND REASONS.

"The first part of this clause corresponds to sections 1 and 3 of the British Trade Disputes Act, 1906, and protects trade unions and their officers and members from certain civil actions. An important type of action which this clause will prevent is a suit arising out of the persuasion exercised on trade union members and others to join in a strike, where that strike (as is frequently the case) involves breach of contract on the part of workmen. The second part of the clause gives trade unions a large measure of immunity from liabilities arising out of acts of their agents, and is in accordance with a recommendation made by the majority of the Royal Commission on Trade Disputes and Trade Combinations in England in 1906."—S.O.R.

Section 17—Note 1

[1] No conflict exists between this Act and S. 7 of the Criminal Law Amendment Act of 1932. Apart from the immunity from civil liability and liability for criminal conspiracy, either in respect of any declaration of strike that the trade union may make or any acts done in furtherance of the trade dispute, the trade unions do not enjoy immunity from any criminal offence. (Vol 22) 1935 Nag. 149 (152): 31 Nag. L R 318: 36 Cr. L. Jour. 1153. (Agreement to commit offence — Trade union would be liable under S. 17 for criminal conspiracy).

Section 18—Note 1

[1] Section 18 does not afford immunity to trade union or officer thereof for act of deliberate trespass (Vol 26) 1939 Sind 256 (258).

Enforceability of agreements.

19. Notwithstanding anything contained in any other law for the time being in force, an agreement between the members of a registered Trade Union shall not be void or voidable merely by reason of the fact that any of the objects of the agreement are in restraint of trade :

Provided that nothing in this section shall enable any Civil Court to entertain any legal proceeding instituted for the express purpose of enforcing or recovering damages for the breach of any agreement concerning the conditions on which any members of a Trade Union shall or shall not sell their goods, transact business, work, employ or be employed.

Right to inspect books of Trade Union.

20. The account books of a registered Trade Union and the list of members thereof shall be open to inspection by an officer or member of the Trade Union at such times as may be provided for in the rules of the Trade Union.

Rights of minors to membership of Trade Unions.

21. Any person who has attained the age of fifteen years may be a member of a registered Trade Union subject to any rules of the Trade Union to the contrary, and may, subject as aforesaid, enjoy all the rights of a member and execute all instruments and give all acquittances necessary to be executed or given under the rules :

Provided that no person who has not attained the age of eighteen years shall be an officer of any such Trade Union.

Proportion of officers to be connected with the industry.

22. Not less than one-half of the total number of the officers of every registered Trade Union shall be persons actually engaged or employed in an industry with which the Trade Union is connected :

Provided that the [a][appropriate Government] may, by special or general order, declare that the provisions of this section shall not apply to any Trade Union or class of Trade Unions specified in the order.

[a] *Substituted* by A. O. for "Local Government."

Change of name.

23. Any registered Trade Union may, with the consent of not less than two-thirds of the total number of its members and subject to the provisions of section 25, change its name.

Amalgamation of Trade Unions.

24. Any two or more registered Trade Unions may become amalgamated together as one Trade Union with or without dissolution or division of the funds of such Trade Unions or either or any of them, provided that the votes of at least one-half of the members of each or every such Trade Union entitled to vote are recorded, and that at least sixty per cent. of the votes recorded are in favour of the proposal.

Notice of change of name or amalgamation.

25. *(1)* Notice in writing of every change of name and of every amalgamation, signed, in the case of a change of name, by the Secretary and by seven members of the Trade Union changing its name, and, in the case of an amalgamation, by the Secretary and by seven members of each and every Trade Union which is a party thereto, shall be sent to the Registrar, and where the head office of the amalgamated Trade Union is situated in a different Province, to the Registrar of such Province.

(2) If the proposed name is identical with that by which any other existing Trade Union has been registered or, in the opinion of the Registrar, so nearly resembles such name as to be likely to deceive the public or the members of either Trade Union, the Registrar shall refuse to register the change of name.

(3) Save as provided in sub-section *(2)*, the Registrar shall, if he is satisfied that the provisions of this Act in respect of change of name have been complied with, register the change of name in the register referred to in section 8, and the change of name shall have effect from the date of such registration.

(4) The Registrar of the Province in which the head office of the amalgamated Trade Union is situated shall, if he is satisfied that the provisions of this Act in respect of amalgamation have been complied with and that the Trade Union formed thereby is entitled to registration under section 6, register the Trade Union in the manner provided in section 8, and the amalgamation shall have effect from the date of such registration.

Effects of change of name and of amalgamation.

26. *(1)* The change in the name of a registered Trade Union shall not affect any rights or obligations of the Trade Union or render defective any legal proceeding by or against the Trade Union, and any legal proceeding which might have been continued or commenced by or against it by its former name may be continued or commenced by or against it by its new name.

(2) An amalgamation of two or more registered Trade Unions shall not prejudice any right of any of such Trade Unions or any right of a creditor of any of them.

Dissolution.

27. *(1)* When a registered Trade Union is dissolved, notice of the dissolution signed by seven members and by the Secretary of the Trade Union shall, within fourteen days of the dissolution, be sent to the Registrar, and shall be registered by him if he is satisfied that the dissolution has been effected in accordance with the rules of the Trade Union, and the dissolution shall have effect from the date of such registration.

(2) Where the dissolution of a registered Trade Union has been registered and the rules of the Trade Union do not provide for the distribution of funds of the Trade Union on dissolution, the Registrar shall divide the funds amongst the members in such manner as may be prescribed.

Returns.

28. *(1)* There shall be sent annually to the Registrar, on or before such date as may be prescribed, a general statement, audited in the prescribed manner, of all receipts and expenditure of every registered Trade Union during the year ending on the 31st day of March next preceding such prescribed date, and of the assets and liabilities of the Trade Union existing on such 31st day of March. The statement shall be prepared in such form and shall comprise such particulars as may be prescribed.

(2) Together with the general statement there shall be sent to the Registrar a statement showing all changes of officers made by the Trade Union during the year to which the general statement refers, together also with a copy of the rules of the Trade Union corrected up to the date of the despatch thereof to the Registrar.

(3) A copy of every alteration made in the rules of a registered Trade Union shall be sent to the Registrar within fifteen days of the making of the alteration.

CHAPTER IIIA[a]

Recognition of Trade Unions

Modification of the definition of "appropriate Government" for certain purposes.

28A. Notwithstanding anything to the contrary in the definition of "the appropriate Government" in section 2, the Central Government shall be deemed to be the appropriate Government for the purposes of this Chapter in respect of Trade Unions consisting of workmen employed by the Central Government or by a Federal Railway or in a major port, mine or oilfield.

Explanation.—In this section and for the purposes of this Chapter, a Trade Union of which not less than fifty per cent. of the members are workmen employed by the Central Government or by a Federal Railway or in a major port, mine or oilfield shall be deemed to be a Trade Union consisting of workmen employed by the Central Government or by a Federal Railway or in a major port, mine or oilfield as the case may be.

[a] Chapter IIIA was *inserted* by the Indian Trade Unions (Amendment) Act, 1947 (45 [XLV] of 1947), S. 4. For Statement of Objects and Reasons of this amending Act, *see* Gazette of India, 1946, Part V, page 127 ; and for Report of Select Committee, *see ibid*, 1947, Part V, page 319.

Appointment, constitution, powers and procedure of Labour Courts.

28B. *(1)* For the purposes of this Chapter, the appropriate Government shall appoint such number of Labour Courts as it considers necessary, consisting of one or more persons each of whom—

(a) is, or has been, a Judge of a High Court or a District Judge, or

(b) is qualified for appointment as a Judge of a High Court :

Provided that the appointment to a Labour Court of any person not qualified under clause *(a)* shall be made in consultation with the High Court of the Province in which the Labour Court has or is intended to have, its usual place of sitting.

(2) Every Labour Court shall have all the powers of a Civil Court for the purposes of receiving evidence, administering oaths, enforcing the attendance of witnesses, and compelling the discovery and production of documents, and shall be deemed to be a Civil Court within the meaning of sections 480 and 482 of the Code of Criminal Procedure, 1898.

(3) The proceedings of Labour Courts shall be regulated and conducted in such manner as may be prescribed.

Recognition by Agreement.

28C. *(1)* Where an employer agrees to recognize a Trade Union, a memorandum of agreement signed by the employer and the officers of the Trade Union, or their authorised representatives may be presented to the Registrar who shall record the memorandum in a register in the prescribed manner.

(2) Such an agreement may be revoked by either party thereto on application made to the Registrar in the prescribed manner.

(3) While such an agreement is in force, the Trade Union shall, in its relations with the employer with whom the agreement is made, have all the rights of a recognized Trade Union under this Act, and shall for all other purposes be deemed to be a recognized Trade Union

Conditions for recognition by order of a Labour Court.

28D. A Trade Union shall not be entitled to recognition by order of a Labour Court under section 28E unless it fulfils the following conditions, namely :—

(a) that all its ordinary members are workmen employed in the same industry or in industries closely allied to or connected with one another ;

(b) that it is representative of all the workmen employed by the employer in that industry or those industries ;

(c) that its rules do not provide for the exclusion from membership of any class of the workmen referred to in clause (b) ;

(d) that its rules provide for the procedure for declaring a strike :

(e) that its rules provide that a meeting of its executive shall be held at least once in every six months ;

(f) that it is a registered Trade Union, and that it has complied with all the provisions of this Act :

Provided that the reference in clause (b) to "the employer" shall as respects recognition by an association of employers, be construed as a reference to all the employers who are members of the association.

Application to, and grant of recognition by, Labour Courts.

28E. (1) Where a registered Trade Union having applied for recognition to an employer has failed to obtain recognition within a period of three months from the date of making such application, it may apply in writing setting out such particulars as may be prescribed, to the Labour Court for recognition by that employer.

(2) A single application may be made under sub-section (1) for recogniton—

(a) by more than one employer, or

(b) by an association of employers as well as one or more members thereof.

(3) The Labour Court may call for further information for the purpose of ascertaining whether the Trade Union is entitled to recognition by the employer under this section, and if the Trade Union fails to supply the required information within the time granted, the Labour Court may dismiss the application.

(4) The Labour Court shall, after serving notice in the prescribed manner on the employer, investigate whether the Trade Union fulfils the conditions for recognition set out in section 28D, and in deciding whether the condition set out in clause (b) thereof is fulfilled, the Labour Court shall have regard to, but shall not be bound by the fact whether the proportion which the number of the workmen referred to in the said clause who are members of the Trade Union and are not in arrears of their subscription for any period exceeding three months bears to the total number of such workmen is less, or not less, than such percentage, if any, as may be prescribed in this behalf either generally, or in respect of any particular locality or any particular employer or class of employers, or any particular industry or class of industries

(5) If the Labour Court is satisfied that the Trade Union is fit to be recognized by the employer, it shall make an order directing such recognition and may, where the recognition is to be by an association of employers, further direct, by the same or a subsequent order, recognition by every member of the association in relation to whom the Trade Union fulfils the condition set out in clause (b) of section 28D.

(6) Every order made under sub section (5) shall be forwarded to the appropriate Government which shall notify it in the official Gazette, and while a recognition directed by such order is in force the Trade Union shall, in its relations with the employer concerned, have all the rights of a recognized Trade Union under this Act and shall for all other purposes be deemed to be a recognized Trade Union.

Rights of recognized Trade Unions.

28F. (1) The executive of a recognized Trade Union shall be entitled to negotiate with employers in respect of matters connected with the employment or non-employment or the terms of employment or the conditions of labour of all or any of its members, and the employer shall receive and send replies to letters sent by the executive on and grant interviews to that body regarding, such matters.

(2) Nothing in sub section (1) shall be construed as requiring an employer to send replies to letters on, or grant interviews regarding matters on which as a result of previous discussion with the executive of the Trade Union, the employer has arrived at a conclusion, whether in agreement with the executive or not unless a period of at least three months has elapsed since the said conclusion was intimated to the executive, or unless there has been a change in circumstances.

(3) Any dispute between the employer and the executive of a recognized Trade Union as to whether a conclusion has been arrived at, or whether there has been a change in circumstances, within the meaning of sub-section (2), shall be referred to the Registrar whose decision shall be final.

(4) The executive of a recognized Trade Union shall be entitled to display notices of the Trade Union in any premises where its members are employed, and the employer shall afford the executive reasonable facilities for that purpose.

Withdrawal of recognition.

28G. (1) Where the recognition of a Trade Union has been directed under section 28E, the Registrar or the employer may apply in writing to the Labour Court for withdrawal of the recognition on any of the following grounds, namely :—

(a) that the executive or the members of the Trade Union have committed any unfair practice set out in section 28J within three months prior to the date of the application ;

(b) that the Trade Union has failed to submit any return referred to in section 28I ;

(c) that the Trade Union has ceased to be representative of the workmen referred to in clause (b) of section 28D.

(2) On receipt of an application under sub-section (1) the Labour Court shall, unless it thinks fit to dismiss the application summarily, serve notice in the prescribed manner on the Trade Union to show cause why its recognition should not be withdrawn.

(3) If after giving a reasonable opportunity to the Trade Union to show cause the Labour Court is satisfied that the Trade Union is no longer fit to be recognized, it shall make an order declaring that the recognition of the Trade Union has been withdrawn, and forward a copy of the order to the appropriate Government which shall notify it in the official Gazette.

Application for fresh recognition.

28H. On the expiry of not less than six months from the date of withdrawal of recognition of a Trade Union under sub-section (3) of section 28G, the Trade Union, if it continues to be a registered Trade Union, may again apply for recognition, and the procedure laid down in this Act shall apply in respect of such application as if it were an original application for recognition.

Recognized Trade Unions to submit prescribed returns.

28I. Every Trade Union recognized under section 28E shall submit to the Registrar at the prescribed time and in the prescribed manner such returns, in addition to those referred to in section 28, as may be prescribed.

CHAPTER IIIB[a]

Unfair practices.

Unfair practices by recognized Trade Unions.

28J. The following shall be deemed to be unfair practices on the part of a recognized Trade Union, namely :—

(a) for a majority of the members of the Trade Union to take part in an irregular strike;

(b) for the executive of the Trade Union to advise or actively to support or to instigate an irregular strike;

(c) for an officer of the Trade Union to submit any return required by or under this Act containing false statements.

[a] Chapter IIIB was *inserted* by the Indian Trade Unions (Amendment) Act, 1947 (45 [XLV] of 1947), S. 4.

Unfair practices by employers.

28K. The following shall be deemed to be unfair practices on the part of an employer, namely :—

(a) to interfere with, restrain, or coerce his workmen in the exercise of their rights to organise, form, join or assist a Trade Union and to engage in concerted activities for the purpose of mutual aid or protection;

(*b*) to interfere with the formation or administration of any Trade Union or to contribute financial or other support to it;

(*c*) to discharge, or otherwise discriminate against, any officer of a recognized Trade Union because of his being such officer;

(*d*) to discharge or otherwise discriminate against any workman because he has made allegations or given evidence in an inquiry or proceeding relating to any matter such as is referred to in sub-section (*1*) of section 28F;

(*e*) to fail to comply with the provisions of section 28F:

Provided that the refusal of an employer to permit his workmen to engage in Trade Union activities during their hours of work shall not be deemed to be an unfair practice on his part.

CHAPTER IV.

Regulations.

Power to make regulations.

29. (*1*) [a][* * *] The [b][appropriate Government] may make regulations for the purpose of carrying into effect the provisions of this Act.

[c][Provided that the making of regulations under this section for the purpose of carrying into effect the provisions of Chapter IIIA should be deemed to be a purpose of that Chapter within the meaning of section 28A.]

(*2*) In particular and without prejudice to the generality of the foregoing power, such regulations may provide for all or any of the following matters, namely:—

(*a*) the manner in which Trade Unions and the rules of Trade Unions shall be registered and the fees payable on registration;

(*b*) the transfer of registration in the case of any registered Trade Union which has changed its head office from one Province to another;

(*c*) the manner in which, and the qualifications of persons by whom, the accounts of registered Trade Unions or of any class of such Unions shall be audited;

(*d*) the conditions subject to which inspection of documents kept by Registrars shall be allowed and the fees which shall be chargeable in respect of such inspections; and

(*e*) any matter which is to be or may be prescribed.

[d][(*3*) The Central Government may give directions to a Provincial Government as to the regulations to be made under this section for prescribing the percentages referred clear[e] to in sub-section (*4*) of section 28E.]

[a] The words 'Subject to the control of the Governor-General in Council' were *repealed* by A. O. [b] *Substituted* for 'Local Government' by A. O. [c] Proviso was *added* by the Indian Trade Unions (Amendment) Act, 1947 (45 [XLV] of 1947), S. 5. [d] Sub-section (*3*) was *added*, *ibid*. [e] It is so printed in the text of Act 45 [XLV] of 1947 as published in the Gazette of India. It is to be noted that the word 'clear' does not appear in the Bill as amended by the Select Committee—*See* Gazette of India, 1947, Part V, page 329.

Publication of regulations.

30. (*1*) The power to make regulations conferred by section 29 is subject to the condition of the regulations being made after previous publication.

(*2*) The date to be specified in accordance with clause (*3*) of section 23 of the General Clauses Act, 1897, as that after which a draft of regulations proposed to be made will be taken into consideration shall not be less than three months from the date on which the draft of the proposed regulations was published for general information.

(*3*) Regulations so made shall be published in the [a][Official Gazette], and on such publication shall have effect as if enacted in this Act.

[a] *Substituted* by A. O. for "local official Gazette".

CHAPTER V.

Penalties and Procedure.

Failure to submit returns.

31. (*1*) If default is made on the part of any registered [a][or recognised] Trade Union in giving any notice or sending any statement [a][, return] or other document as required by or under any provision of this Act, every officer or other

person bound by the rules of the Trade Union to give or send the same, or, if there is no such officer or person, every member of the executive of the Trade Union, shall be punishable with fine which may extend to five rupees and, in the case of a continuing default, with an additional fine which may extend to five rupees for each week after the first during which the default continues :

Provided that the aggregate fine shall not exceed fifty rupees.

(2) Any person who wilfully makes, or causes to be made, any false entry in, or any omission from, the general statement required by section 28, or in or from any copy of rules or of alterations of rules sent to the Registrar under that section [a][or in or from any return referred to in section 28I] shall be punishable with fine which may extend to five hundred rupees.

[a] *Inserted* by the Indian Trade Unions (Amendment) Act, 1947 (45 [XLV] of 1947), S. 6.

Supplying false information regarding Trade Unions.

32. Any person who, with intent to deceive, gives to any member of a registered Trade Union or to any person intending or applying to become a member of such Trade Union any document purporting to be a copy of the rules of the Trade Union or of any alterations to the same which he knows, or has reason to believe, is not a correct copy of such rules or alterations as are for the time being in force, or any person who, with the like intent, gives a copy of any rules of an unregistered Trade Union to any person on the pretence that such rules are the rules of a registered Trade Union, shall be punishable with fine which may extend to two hundred rupees.

Penalty for unfair practices.

[a][**32A.** *(1)* Any employer who commits any unfair practice set out in section 28K shall be punishable with fine which may extend to one thousand rupees.

(2) Where a Criminal Court imposes a fine, or confirms in appeal, revision or otherwise a sentence of fine imposed, on an employer for committing an unfair practice set out in clause *(c)* or clause *(d)* of section 28K, it may, when passing judgment, order the whole or any part of the fine to be applied in the payment to any person of compensation for loss or injury caused by the unfair practice.]

[a] *Inserted* by the Indian Trade Unions (Amendment) Act, 1947 (45 [XLV] of 1947), S. 7.

Cognizance of offences.

33. *(1)* No Court inferior to that of a Presidency Magistrate or a Magistrate of the first class shall try any offence under this Act.

(2) No Court shall take cognizance of any offence under this Act, unless complaint thereof has been made by, or with the previous sanction of, the Registrar or, in the case of an offence under section 32, by the person to whom the copy was given, within six months of the date on which the offence is alleged to have been committed.

[THE] TRADING WITH THE ENEMY (CONTINUANCE OF EMERGENCY PROVISIONS) ACT, 1947.

(Act XVI of 1947.)

CONTENTS.

1. Short title, extent and commencement.
2. Continuance of certain emergency provisions.
3. Effect of rules, etc., inconsistent with other enactments.
4. Delegations.
5. Savings as to orders.
6. Protection of action taken under rules.

THE SCHEDULE.

STATEMENT OF OBJECTS AND REASONS.

"The Bill seeks to provide for the continuance of the special powers enjoyed by the Government of India up to the 30th September 1946 under Parts XV and XVI of the Defence of India Rules and thereafter continued for a period of six months by means of the Emergency Powers (Continuance) Ordinance, 1946. Although hostilities ceased long ago, it will continue to be obligatory on the Government of India to maintain the general prohibition against trading with enemies until Peace Treaties are signed. Similarly, it will be their responsibility to continue to look after the property of the 'enemy' firms vested in the Custodian of the Enemy Property until it is liquidated or released. For these purposes it is sought to keep alive most of the provisions of the Defence of India Rules relating to the ban on trade with 'enemies,' the control over 'enemy' firms and the custody of 'enemy' property."

—*Gazette of India, 1947, Part V, page 179.*

[THE] TRADING WITH THE ENEMY (CONTINUANCE OF EMERGENCY PROVISIONS) ACT, 1947.

(ACT XVI OF 1947.)

[20th March, 1947.]

An Act to provide for the continuance of certain provisions of the Defence of India Rules relating to the control of trading with States, and persons and firms belonging to States at war with His Majesty, and the custody of the property belonging to them.

WHEREAS it is expedient to provide for the continuance of certain provisions of the Defence of India Rules relating to the control of trading with States, and persons and firms belonging to States at war with His Majesty and the custody of the property belonging to them;

It is hereby enacted as follows:—

Short title, extent and commencement.

1. *(1)* This Act may be called the Trading with the Enemy (Continuance of Emergency Provisions) Act, 1947.

(2) It extends to the whole of British India,[a] and applies also to British subjects and servants of the Crown in any part of India, and to British subjects who are domiciled in any part of India, wherever they may be.

(3) It shall come into force on the 25th day of March 1947.

[a] The expression "the whole of British India" in its application to the Dominion of India, means 'all the Provinces of India'—*See* I. O., Art. 4 (2); and, in its application to the Dominion of Pakistan, means 'all the Provinces of Pakistan'—*See* P. O., Art. 4 (2). [15-8-1947.]

Continuance of certain emergency provisions.

2. *(1)* Notwithstanding the expiry of the Defence of India Act, 1939, and the Emergency Provisions (Continuance) Ordinance, 1946—

(a) the provisions of the Defence of India Rules mentioned in the first column of the Schedule to this Act shall continue in force, and shall have effect subject to the modifications specified in the second column thereof;

(b) any order or other instrument made or deemed to be made under or in pursuance of any of the said provisions and in force immediately before the commencement of this Act shall continue in force so far as consistent with the provisions as continued in force by this section and be deemed to be made under or in pursuance of the provisions so continued in force.

(2) The references in sub-section *(1)* to the Defence of India Rules shall be construed as references to those Rules as modified and continued in force by the Emergency Provisions (Continuance) Ordinance, 1946.

Effect of rules, etc., inconsistent with other enactments.

3. The provisions of the Defence of India Rules as continued in force by section 2 and all orders made or deemed to be made under such provisions shall have effect notwithstanding anything inconsistent therewith contained in any enactment other than this Act or in any instrument having effect by virtue of any enactment other than this Act.

Delegations.

4. *(1)* The Central Government may by order direct that any power or duty which by or under any of the provisions as continued in force by section 2 is conferred or imposed upon the Central Government, shall, in such circumstances and under such conditions, if any, as may be specified in the direction, be exercised or discharged by any officer or authority subordinate to that Government or by any other authority.

(2) All orders delegating any power or duty conferred or imposed by any of the provisions continued in force by section 2 made by the Central Government before the commencement of this Act and in force immediately before such commencement, shall continue in force and be deemed to be made by the Central Government under this section.

Savings as to orders.

5. *(1)* No order made or deemed to be made in exercise of any power conferred by or under any of the provisions continued in force by section 2 shall be called in question in any Court.

(2) Where an order purports to have been made and signed by any authority in exercise of any power conferred by or under any of the aforesaid provisions, a Court shall, within the meaning of the Indian Evidence Act, 1872, presume that such order was so made by that authority.

Protection of action taken under rules.

6. *(1)* No suit, prosecution or other legal proceeding shall lie against any person for anything which is in good faith done or intended to be done in pursuance of any of the provisions continued in force by section 2 or any order made or deemed to be made thereunder.

(2) No suit or other legal proceeding shall lie against the Crown for any damage caused or likely to be caused by anything in good faith done or intended to be done in pursuance of any of the provisions continued in force by section 2 or any order made or deemed to be made thereunder.

THE SCHEDULE

(See section 2)

Provisions of the Defence of India Rules continued in force.

Number and title of Rule.	Modification.	Number and title of Rule.	Modification.
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2.—Definitions.	Clause 1 shall be omitted.	108.—Penalty for failure to comply with orders of Controllers, etc.	...
3.—Interpretation.	Sub-rule (3) shall be omitted.	110.—Contracts with enemy firms.	...
4.—Saving.	...	111.—Transfer of Property to or by enemy firms.	...
5.—Non-compliance with these rules or orders made thereunder.	...	113A.—Power to carry on business of enemy firms.	...
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98.—Prohibition of trading with the enemy.	...	114A.—Power to control and wind up certain business.	...
99.—Control of rights, etc., in respect of trading with the enemy.	...	117.—False statements.	...
100.—Power to appoint Controllers, etc., of Enemy Trading.	...	117A.—Power to require production of books, etc.	...
100A.—Powers of Controllers, etc., of Enemy Trading.	...	121.—Attempts, etc., to contravene rules.	...
101A.—Penalty for failure to comply with orders of Controllers, etc.	...	122.—Offences by corporations.	...
103.—Definitions.	...	123A.—Burden of proof in certain cases	...
104.—Prohibition of trade with enemy firms and purchase of enemy currency.	...	130.—Cognizance of contraventions of the rules, etc.	Sub-rules (3) and (4) shall be omitted.
105.—Power to appoint Controllers, etc., of enemy firms.	...		

[THE INDIAN] TRAMWAYS ACT, 1886.

(Act XI of 1886)

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STATEMENT OF OBJECTS AND REASONS

"The introduction of this Bill has been rendered necessary by the projected construction of tramways in parts of India beyond the reach of a local legislature. In 1883 a special Act was passed by the Governor-General in Council to authorise the making, and regulate the working, of tramways in Rangoon. Since that year application has been made for special Acts for tramways in Lahore and Amritsar, and legislation would probably be found to be necessary to regulate the use of tramways in other large towns in which their construction has been approved by, or is under the consideration of, the local authorities.

The Bill has been drawn on the lines of the Tramways Act, 1870 (33 and 34 Vic., c. 78), and of the provisional orders and rules made by the Board of Trade under that statute. These orders and rules, and the fullest discussion on almost all points connected with the subject of tramways, will be found in Mr. Sutton's 'Tramways Act of the United Kingdom'."

* * * * *

— Gazette of India, 1885, Part V, p. 308.

Act how affected by subsequent legislation.

—Amended by Act 5 of 1911.
—Adapted by A. O.
—Repealed in part by Act 9 of 1890.

[THE INDIAN] TRAMWAYS ACT, 1886.

(ACT XI OF 1886).[a]

[12th March, 1886.]

An Act to facilitate the construction and to regulate the working of Tramways.

WHEREAS it is expedient to facilitate the construction and to regulate the working of tramways; It is hereby enacted as follows:—

[a] For Statement of Objects and Reasons, *see* Gazette of India, 1885, Pt. V, p. 308; for Report of the Select Committee, *see ibid.*, 1886, Pt. IV, p. 131.

Preliminary.

Short title and commencement.

1. *(1)* This Act may be called the Indian Tramways Act, 1886; and

(2) It shall come into force at once.

Local extent.

2. *(1)* It extends in the first instance to the whole of British India[a] except the territories administered by the Governor of Fort Saint George in Council, the Governor of Bombay in Council and the Lieutenant-Governor of Bengal.

[b][*(2)* This Act may by notification in the Official Gazette be extended to the whole or any part of the said territories by the Provincial Government concerned.]

[a] The expression "the whole of British India," in its application to the Dominion of India, means 'all the Provinces of India'—*see* I. O, Art 4 (2); and, in its application to the Dominion of Pakistan, means 'all the Provinces of Pakistan'—*see* P. O, Art. 4 (2); [15-8-1947]. [b] *Substituted* by A. O

The Act has been *extended* to the whole of the Bombay Presidency except the city of Bombay, and the town of Karachi and its suburbs, *see* Bombay Gazette, 1887, Pt. I, p. 899; and to the city of Madras, *see* Fort St. George Gazette, 1886, Pt. I, p. 750.

For separate Acts on the subject of tramways in—

Bengal, *see* the Bengal Tramways Act 1883 (Ben. 3 of 1883),

Calcutta, *see* the Calcutta Tramways (Electric Traction) Act, 1900 (Ben. 4 of 1900), and the Calcutta Tramways Act, 1880 (Ben. 1 of 1880)

Bombay, *see* the Bombay Tramways Act, 1874 (Bom. 1 of 1874);

Karachi, *see* the Karachi Tramways Act, 1883 (Bom 2 of 1883).

Definitions.

3. In this Act, unless there is something repugnant in the subject or context,—

(1) "local authority" means a municipal committee, district board, body of port commissioners or other authority legally entitled to, or entrusted by [a][the Central Government or any Provincial Government] with the control or management of a municipal or local fund :

[a] *Substituted* by A. O. for "the Government."

(2) "road" means the way of a road, street, thoroughfare, passage or place along or across which a tramway authorized under this Act is, or is intended to be, laid, and includes the surface-soil and subsoil of a road, and the footway berms, drains and ditches of a road, and any bridge, culvert or causeway forming part of a road :

(3) "road authority" in relation to a road means—

(a) if a local authority maintains and repairs the road, then that authority ;

(b) if a local authority does not maintain and repair the road, and the road is neither vested in Her Majesty nor maintained and repaired by [a][the Central Government or any Provincial Government], then the person in whom the road is vested; and

(c) if a local authority does not maintain and repair the road, and the road is vested in Her Majesty or maintained and repaired by [a][the Central Government or any Provincial Government], then [b] the Government for whose purposes a road is so vested or by which the road is maintained and repaired, as the case may be] :

[a] *Substituted* by A O for 'the Government". [b] *Substituted* by A O. for "the Local Government".

(4) "circle," in relation to a local authority or road-authority, means the area within the control of that authority :

[a][*(5)* 'tramway' means a tramway having one, two or more rails and includes—

(a) any part of a tramway, or any siding, turnout, connection, line or track belonging to a tramway;

(b) any electrical equipment of a tramway; and

(c) any electric supply-line transmitting power from a generating station or sub-station to a tramway or from a generating station to a sub-station from which power is transmitted to a tramway]

[a] *Substituted* by the Indian Tramways (Amendment) Act, 1911 (5 [V] of 1911), S. 2.

(6) "order" means an order authorizing the construction of a tramway under this Act, and includes a further order substituted for, or amending, extending or varying, that order :

(7) "promoter" means a local authority or person in whose favour an order has been made, and includes a local authority or person on whom the rights and liabilities conferred and imposed on the promoter by this Act and by the order and any rules made under this Act as to the construction, maintenance and use of the tramway, have devolved :

(8) "undertaking" includes all moveable and immoveable property of the promoter suitable to and used by him for the purposes of the tramway :

(9) "carriage," in the case of a tramway on which steam-power or any other mechanical power [a][or electrical power] is used, includes an engine worked on the tramway for the purpose of producing [a][or utilizing] that power :

[a] *Inserted* by the Indian Tramways (Amendment) Act, 1911 (5 [V] of 1911), S. 3.

(10) "toll" includes any charge leviable in respect of the use of a tramway :

(11) "lessee" means a person to whom a lease has been granted of the right of user of a tramway and of demanding and taking the authorized tolls :

(12) "District Magistrate" includes an officer empowered by the [a][Government] by name or by virtue of his office to discharge within any local area all or any of the functions of a District Magistrate under this Act :

[a] *Substituted* by A. O. for "Local Government".

(13) "District Court" means a principal Civil Court of original jurisdiction, and includes a High Court having ordinary original civil jurisdiction :

(14) "Collector" means the chief officer in charge of the revenue-administration of a district, and includes an officer empowered by the [a][Government] by name or by virtue of his office to discharge within any local area the functions of a Collector under this Act : [* *][b]

[a] *Substituted* by A. O. for "Local Government". [b] The word "and ' was *repealed, ibid.*

(15) "prescribed" means prescribed by rules made by the [a][Government] under this Act ; [and][b]

[a] *Substituted* by A. O. for "Local Government". [b] *Inserted* by A. O.

[a][*(16)* "Government", in relation to any tramway which is, or when completed will be, a federal railway, as defined in sub-section *(2)* of section 311 of the Government of India Act, 1935, means the [b][Central Government], and, in relation to any other tramway, means the Provincial Government].

[a] *Inserted* by A. O. [b] *Substituted* for "Federal Railways Authority" by the Indian Independence (Adaptation of Central Acts and Ordinances) Order, 1948.

Orders authorizing the Construction of Tramways.

Application for and consent necessary to making of order.

4. *(1)* The [a][Government] may make an order authorizing the construction of a tramway in a circle on application made : —

(a) by the local authority of the circle with the consent of the road-authority of any road or part of a road which is to be traversed by the tramway and of which the local authority is not itself the road authority; or

(b) by any person with the consent of the local authority of the circle, and of the road-authority of any road or part of a road which is to be traversed by the tramway and of which the local authority is not the road-authority :

[b][* * * * * *]

(2) A local authority shall not make an application for an order or be deemed to consent to an application being made by any person for an order, unless the making of the application or the giving of the consent has been approved by the local authority in manner prescribed.

[a] *Substituted* by A. O. for "Local Government". [b] The proviso to sub-section (1) was *repealed* by A. O.

Consent of local or road authority not necessary in certain cases.

5. When it is proposed to lay a tramway in two or more circles, and a local authority or road-authority having control in either or any of the circles does not consent thereto, or attaches conditions to its consent, the [a][Government] may, nevertheless, make an order authorizing the construction of the tramway in the circle, or by the order impose on the promoter any conditions which it deems fit, if, after considering the reasons of the authority for withholding its consent or attaching the conditions thereto, it is satisfied that the construction of the tramway in the circle is expedient, or, as the case may be, that the conditions attached by the authority to its consent ought not to be imposed.

[a] *Substituted* by A. O. for "Local Government".

Procedure for making order.

6. *(1)* The [a][Government] on receiving an application shall consider it, and, if satisfied as to the propriety of proceeding thereon, publish in the Official Gazette, and in such other manner as it deems sufficient for giving information to persons interested a draft of a proposed order authorizing the construction of the tramway.

(2) A notice shall be published with the draft stating that any objection or suggestion which any person may desire to make with respect to the proposed order will, if submitted to the [a][Government] on or before a date to be specified in the notice, be received and considered.

(3) If, after considering any objections or suggestions which may have been made with respect to the draft on or before the date so specified, the [a][Government] is of opinion that the application should be granted with or without addition or modification, or subject or not to any restriction or condition, it may make an order accordingly.

(4) Every order authorizing the construction of a tramway shall be published in the Official Gazette in English, and in the other prescribed language or languages, if any; and that publication shall be conclusive proof that the order has been made as required by this section.

[a] *Substituted* by A. O. for "Local Government".

Contents of order.

7. *(1)* An order made under section 6 shall empower the promoter therein specified to construct and maintain the tramway therein described in the manner therein provided, and shall specify the time within which the tramway shall be commenced and the time within which it shall be completed and opened for public traffic.

(2) The order may also provide, in manner consistent with this Act, for all or any of the following, among other matters, that is to say:—

(a) a period before the expiration of which the tramway shall not be commenced, and the conditions subject to which the local authority, when it is not itself the promoter, may, within that period elect to be substituted in the place of the promoter in respect of the undertaking or of so much thereof as is within its circle; and the limits of time within which, and the terms upon which, the local authority may, after the tramway has been constructed, require the promoter to sell to it the undertaking or so much thereof as is within its circle;

(b) the acquisition by the promoter of land for the purposes of the tramway, and the disposal by him of land which has been acquired but is no longer required for those purposes;

(c) the conditions subject to which roads may be opened and broken up for the purposes of the construction or maintenance of the tramway or any part thereof, and the method of, and materials to be used in, the reinstating of the roads, and the approval of the method and materials by the [a][Government] or the road-authority before the commencement of the work;

(d) the conditions on which the tramway may be constructed over a bridge or across a railway or tramway when the carriage way over the bridge is to form part of the tramway or when the tramway is to cross a railway or another tramway on the level;

[b][*(e)* the space which shall ordinarily intervene between the outside of the carriage way on either side of a road whereon the tramway is to be constructed, and—

(i) in the case of a tramway having one rail, the rail of the tramway, or

(ii) in the case of a tramway having two or more rails, the nearest rail of the tramway,

and the conditions on which a smaller space may be permitted;]

(f) the gauge of the tramway, the rails to be used, and the mode in which, and the level at which, they shall be laid and maintained; and the adoption and application by the promoter of such improvements in the rails, and in their situation, and in the sub-structure upon which they rest, as the [a][Government] may from time to time require;

(g) the portion of the road or roads traversed by the tramway to be kept in repair by the promoter, the maintenance by the promoter to the satisfaction of the [a][Government] or the road authority, or both, of that portion of the road or roads; and the liability of the promoter, on the requisition of the [a][Government], from time to time to adopt and apply such improvements in the tramway as the [a][Government] may consider necessary or desirable for the safety or convenience of the public and to alter the position or level of the tramway to suit future alterations in the road or roads;

(h) the application of material excavated by the promoter in the construction or maintenance of the tramway;

Section 7 — Note 1

[1] Section 287, City Municipality Act prohibiting the casting or breaking or hammering of iron or the beating of metal in a workshop within municipal limits without license—Madras Tramway Company maintaining a workshop where these acts were done — Order passed under Tramways Act by the Local Government authorising the workshop. *Held* that workshops were not within the scope of the Act and that the order was ineffective as one going beyond the Act itself — *Held* also that the words 'other works' in S. 7 (2) (i) did not include workshops. (Vol 18) 1931 Mad 152 (155) : 54 Mad 364 (DB).

[2] Dehra Dun Mussoorie Tramway Orders (1921)—Transfer of undertaking without previous sanction of Government prohibited : *Held* that both under the Tramways Act and the Order the transfer without sanction was void and that it could not be subsequently ratified to make it valid. (Vol 19) 1932 All 141 (147) : 53 All 1009 (DB).

(*i*) the provision of such crossings, passing places, sidings, junctions and other works, in addition to those specified in or authorized by the order, as may from time to time be necessary or convenient to the efficient working of the tramway;

(*j*) the powers which may from time to time be exercised by the [a][Government], the local authority, the road authority or any person in respect of sewers, drains, telegraph-lines, gas-pipes, water-pipes or other things in or on land occupied by the tramway; the notice (if any) to be given of the intended exercise of those powers; the manner in which the powers shall be exercised; and the extent to which the tramway and the traffic thereon may be interfered with in the exercise thereof;

(*k*) the conditions subject to which the promoter may from time to time interfere with, or alter or require the alteration of the position of, drains (not being sewers or main drains), telegraph-lines, gas-pipes, water-pipes or other things as aforesaid;

(*l*) the provision of a temporary tramway in place of a part of a tramway which has been removed or of which the use has been discontinued by reason of the execution of any work affecting a road along which the part of the tramway was laid, or by reason of the use of the road being interrupted by floods or other cause;

(*m*) the motive power to be used on the tramway, and the conditions on which steam-power or any other mechanical power [c][or electrical power] may be used;

(*n*) the nature, dimensions, fittings, appliances and apparatus of the carriages to be used on the tramway, and the inspection and examination thereof by officers of the [a][Government] or the local authority, and the liability of the promoter or lessee, on the requisition of the [a][Government], from time to time, to adopt and apply such improvements in the carriages, and in the fittings, appliances and apparatus, as the [a][Government] may consider necessary or desirable for the safety or convenience of the public;

(*o*) the traffic which may be carried on the tramway, the traffic which the promoter or lessee shall be bound to carry, and the traffic which he may refuse to carry; the tolls to be leviable by the promoter or lessee, and the periodical revision thereof by the [a][Government]; and the regulation of the traffic and of the levy of the tolls;

(*p*) the use of the tramway free of toll by the local authority, with its own carriages, for specified purposes, during specified hours, with power to the local authority to make such sidings and other works as may be necessary for communication between its premises and the tramway;

(*q*) the conditions subject to which the promoter may transfer the undertaking, or any part thereof, by sale, mortgage, lease, exchange or otherwise; and the conditions subject to which the local authority may be the transferee;

(*r*) the performance by the [a][Government] or by the local authority or road authority of any work required by the Act or the order to be done by the promoter; and

(*s*) the penalty to be incurred by the promoter or lessee for failure to observe any condition or direction contained in the order, and the application of the penalty when recovered.

(*3*) The [a][Government] may, in providing in the order for the acquisition of land for the purposes of a tramway of which the promoter is not a company, direct that land may be acquired for the promoter under the provisions of the Land Acquisition Act, 1870,[d] in the same manner and on the same conditions as it might be acquired for the purposes of the tramway if a company were the promoter.

(*4*) The order shall imply the condition —

(*a*) in the case of a tramway of which a local authority is the promoter, that a lease thereof shall be granted only in manner by this Act provided; and

(*b*) in the case of a tramway of which a local authority is not the promoter, that a lease thereof shall be only of the right of user and of demanding and taking the authorized tolls, and shall not confer or impose on the lessee any of the powers or duties of the promoter in respect of the construction or maintenance of the tramway.

[a] *Substituted* by A. O. for "Local Government" [b] *Substituted* by the Indian Tramways (Amendment) Act, 1911 (5 [V] of 1911), S. 4. [c] *Inserted ibid*, S. 5. [d] *See* now the Land Acquisition Act, 1894 (1 [I] of 1894).

8. (*1*) The [a][Government] may, on the application of the promoter, revoke, amend, extend or vary the order by a further order.

Further order.

(*2*) An application for a further order shall be made in the same manner and subject to the same conditions as an application for an order.

(3) The [a][Government] may, in its discretion, either grant or reject the application.

(4) If it grants the application, it shall make the further order in the same manner as an order, except that no addition to, or modification of, the rights, powers and authorities asked for in the application, or restriction or condition with respect thereto, shall be made or imposed by the further order without the consent in writing of the promoter.

[a] *Substituted* by A. O. for "Local Government".

Power to authorize joint work by local authorities.

9. (1) Subject to, and in accordance with, the provisions of this Act, the [a][Government] may, on a joint application, or on two or more separate applications, make an order empowering two or more local authorities, respectively, jointly to construct the whole, or separately to construct parts, of a tramway, and jointly or separately to own the whole or parts thereof.

(2) All the provisions of this Act which relate to the construction of tramways shall extend and apply to the construction of the whole and the separate parts of the tramway, and the form of the order may be adapted to the circumstances of the case.

[a] *Substituted* by A. O. for "Local Government".

Cessation of powers given by an order.

10. (1) If a promoter authorized by an order to construct a tramway—

(a) does not within the time specified in the order substantially commence the construction of the tramway, or

(b) having commenced the construction suspends it without a reason sufficient in the opinion of the [a][Government] to warrant the suspension, or

(c) does not within the time specified in the order complete the tramway and open it for public traffic,

the following consequences shall ensue :—

(i) the powers given by the order to the promoter for constructing the tramway and otherwise in relation thereto shall, unless the [a][Government], by special direction in writing, prolongs the time or condones the suspension, cease to be exercised except as to so much of the tramway as is then completed ;

(ii) as to so much of the tramway as is then completed, the [a][Government] may either permit, or refuse to permit, the powers given by the order to continue ;

(iii) if the [a][Government] refuses to permit the powers to continue, then so much of the tramway as is then completed may be dealt with, under the provisions of this Act relating to the discontinuance of tramways as a tramway of the working whereof the discontinuance has been proved to the satisfaction of the [a][Government].

(2) A notification published by the [a][Government] in the Official Gazette to the effect that on a date specified in the notification the construction of a tramway had not been substantially commenced or a tramway had not been completed and open for public traffic, or that the construction of a tramway had been suspended without sufficient reason, shall, for the purposes of this section, be conclusive proof of the matter stated therein.

[a] *Substituted* by A. O. for "Local Government".

Construction and Maintenance of Tramways.

Mode of formation of tramway.

11. A tramway shall be constructed and maintained in the manner provided by the order.

Inspection of tramway before opening.

12. A tramway, or portion or extension of, or addition to, a tramway shall not be opened for public traffic [a][until it has been inspected and certified to be fit for such traffic by an engineer appointed —

[b][(a) if the tramway is a railway by the Central Government ;

(b) if the tramway is not a railway, by the Provincial Government].

[a] *Substituted* by A. O. for 'until an engineer appointed in this behalf by the Local Government has inspected it and certified it to be fit for such traffic". [b] Clause (a) was *substituted* by the Indian Independence (Adaptation of Central Acts and Ordinances) Order, 1948. [23-3-1948.]

Agreement between road authority and promoter as to repair of roadway.

13. Subject to the provisions of any order for the time being in force with respect to the matters mentioned in section 7, sub-section (2), clause (g), the road-authority and the promoter may from time to time enter into agreements as to the keeping in repair of the whole or a part of a road traversed by a

tramway, and as to the proportion to be paid by either of them of the expense of keeping the road or part in repair.

Traffic on Tramways.

Rights of promoter and the public over tramways.

14. *(1)* The promoter of a tramway shall, subject to the provisions of sub-section *(2)* and to the other provisions of this Act and of the order, have the exclusive use of the tramway for carriages with flange-wheels or other wheels suitable to run on the rail described in the order as the rail to be used on the tramway :

Provided that nothing in this Act or in the order or any rule made under this Act shall affect the right of any person authorized to use a tramway or railway to pass across a tramway constructed under this Act with carriages having wheels suitable to run on the rail thereof.

(2) The public shall have a right to pass along or across any part of a road along or across which a tramway is constructed, whether on or off the tramway, with carriages not having flange-wheels or other wheels suitable to run on the rail of the tramway :

Provided —

(a) that this sub-section shall not apply where the tramway is constructed on land the right to the exclusive possession of which has been acquired by the promoter ; and

(b) that the [a][Government] may by an order authorize the construction of a tramway on any part of a road with rails raised above the surface of the road, if it is satisfied that the convenience of the public will not be injuriously affected thereby.

[a] *Substituted* by A. O. for "Local Government".

Tolls leviable by promoter or lessee.

15. *(1)* The promoter or lessee may demand and take, in respect of the tramway, tolls not exceeding the limits specified in or determinable under the order, or, if the order contains no provision in this behalf, then such sums as may from time to time be fixed by the promoter or lessee with the previous sanction of the [a][Government].

(2) A list of all the tolls authorized to be levied shall be exhibited, in such languages as the District Magistrate may direct, in a conspicuous place inside and outside each of the carriages used upon the tramway.

[a] *Substituted* by A. O. for "Local Government".

Carriage of dangerous or offensive goods.

16. *(1)* A person shall not be entitled to carry or to require to be carried on a tramway constructed under this Act, any goods of a dangerous or offensive nature.

(2) A person taking such goods with him on the tramway shall, before entering the carriage, give notice of their nature to the servant of the promoter or lessee in charge of the carriage.

(3) A person sending such goods by the tramway shall distinctly mark their nature on the outside of the package containing them or otherwise give notice thereof in writing to the servant of the promoter or lessee with whom he leaves them for the purpose of their being sent by the tramway.

(4) Any servant of the promoter or lessee may refuse to carry upon the tramway a parcel which he suspects to contain goods of a dangerous or offensive nature, and, if any such parcel has been received for the purpose of being carried upon the tramway, may stop the transit thereof until he is satisfied as to the nature of its contents.

(5) Where a servant of the promoter or lessee refuses under sub-section *(4)* to carry a parcel which has been received for the purpose of being carried upon the tramway, he shall, as soon as may be give notice of his refusal to the consignor or consignee if he refuses at a time when neither of them is present.

Licenses to use Tramways.

Grant to third parties of licenses to use tramway in certain events.

17. If, at any time after a tramway or part of a tramway has been for three years opened for public traffic in a circle, the local authority of the circle represents in writing to the [a][Government] that the public is deprived of the full benefit of the tramway or of the part thereof, the [a][Government] may, if after considering any statement which the promoter or lessee or both may desire to make, and after such further enquiry as it deems necessary, it is satisfied as to the truth of the representation, grant a license to any person to use the tramway conformably to this Act and to the order and the rules made under this Act, subject to the following provisions, namely :—

(a) the license shall be for a period not less than one year or more than three years from the date of the license, but the [a][Government] may in its discretion renew it ;

(*b*) the license shall be to use the whole of the tramway for the time being opened for public traffic, or such part or parts of the tramway as the [a][Government], having regard to the cause for granting the license thinks fit ;

(*c*) the license shall specify the number of carriages which the licensee shall run upon the tramway, the mode in which, and times at which, the carriages shall be run, the tolls to be paid to the promoter or lessee by the licensee for the use of the tramway, and the tolls, being those for the time being leviable by the promoter or lessee, which the licensee may demand and take for the use of his carriages ;

(*d*) the licensee and his officers and servants shall permit one person, duly authorized for that purpose by the promoter or lessee, to travel free of toll in or upon each carriage of the licensee run upon the tramway for the whole or any part of a journey ;

(*e*) any provision of this Act, or of the order or rules made under this Act, relating to the functions of a servant of a promoter or lessee shall be construed, so far as may be as referring to a servant of the licensee ; and

(*f*) the [a][Government] may revoke, alter or modify the license for any cause sufficient in its opinion to warrant the revocation, alteration or modification thereof.

[a] *Substituted*, by A. O. for "Local Government".

Licensee to give to promoter or lessee an account of traffic.

18. A licensee shall, on demand, give to an officer or servant authorized in that behalf by the promoter or lessee an exact account in writing, signed by the licensee, of the number of passengers or number or quantity of goods, conveyed by any and every carriage used by him on the tramway.

Discontinuance of Tramways.

Cessation of powers of promoter and lessee on discontinuance of tramway.

19. If it is proved to the satisfaction of the [a][Government], at any time after the opening of a tramway for public traffic, that the working of the tramway or any part thereof, has been practically discontinued, for the space of three months, without a reason sufficient, in the opinion of the [a][Government], to warrant the discontinuance, the [a][Government], if it thinks fit, may, by notification in the Official Gazette, declare that the powers of the promoter and of the lessee, if any, in respect of the tramway, or the part thereof of which the working has been so discontinued, shall, from the date of the notification, be at an end ; and thereupon the said powers shall cease and determine, except in so far as they may be purchased by a local authority in manner by this Act provided.

[a] *Substituted* by A. O. for "Local Government".

Powers of road-authority on cessation of powers of promoter.

20. *(1)* Where a notification has been published under section 19, the road-authority may, at any time after the expiration of two months from the date of the notification, remove the tramway or part of the tramway of which the working has been so discontinued, and use the materials thereof in reinstating the road.

(2) The promoter shall pay to the road-authority the cost incurred by that authority in removing the tramway or the part thereof and in reinstating the road.

(3) The cost shall be certified by an officer of the road-authority, and his certificate, countersigned by the District Magistrate, shall be conclusive proof as to the cost incurred.

(4) If the promoter does not pay the amount so certified within one month after the delivery to him of the certificate or of a copy thereof, the road-authority may, without any previous notice to the promoter and without prejudice to any other remedy which it may have for the recovery of the amount, sell and dispose of such materials of the tramway or part thereof removed as it has not used in reinstating the road, either by public auction or by private sale, and for such sum or sums, and to such person or persons, as it thinks fit, and may, out of the proceeds of the sale, pay and reimburse itself the amount of the cost aforesaid and of the expenses of the sale, and shall pay over the residue (if any) of the proceeds of the sale to the promoter.

Insolvency of Promoter.

Proceedings in case of insolvency of promoter.

21. *(1)* If, at any time after the opening of a tramway in a circle for public traffic, it appears to the road-authority or local authority of the circle that the promoter of the tramway is insolvent, so that he is unable to maintain the tramway, or to work it with advantage to the public, and either of those authorities makes a representation to that effect to the [a][Government], the [a][Government] may, if after considering any statement which the promoter may desire to make, and after such further enquiry as it deems

necessary, it is satisfied as to the truth of the representation, declare, by notification in the Official Gazette, that the powers of the promoter shall, at the expiration of six months from the publication of the notification, be at an end; and the powers of the promoter shall cease and determine at the expiration of that period, except in so far as they may be purchased by a local authority in manner by this Act provided

(2) Where a notification has been published under sub-section *(1)*, the road-authority may, at any time after the expiration of six months from the date thereof, remove the tramway in the same manner, and subject to the same provisions as to the payment of the cost of the removal and to the same remedy for recovery of the cost, in every respect as in cases of removal under section 20.

[a] *Substituted* by A. O. for "Local Government".

Purchase of Tramways.

Future purchase of undertaking by local authority.

22. *(1)* Where the promoter of a tramway in a circle is not the local authority, the local authority, with the previous sanction of the [a][Government], may—

(a) within such limits of time as may be specified in this behalf in the order, or

(b) if a time was not specified in the order, then within six months after the expiration of a period of twenty-one years from the date of the order, and within six months after the expiration of every subsequent period of seven years, or

(c) within two months after the publication of a notification under section 19 or within six months after the publication of a notification under section 21,

by notice in writing, require the promoter to sell to the local authority his undertaking or the part thereof which is within the circle of the local authority; and thereupon the promoter shall sell the same upon the terms specified in the order, or, if the terms were not specified in the order, then upon the terms of paying the then value of the undertaking or of the part thereof, exclusive of any allowance for past or future profits of the undertaking or any compensation for compulsory sale or other consideration whatsoever.

(2) A requisition shall not be made under sub-section *(1)* unless the making thereof has been approved by the local authority in manner prescribed.

(3) When a sale has been made under this section, all the rights, powers and authorities of the promoter in respect of the undertaking or part thereof sold, or, where a notification has been published under section 19 or section 21, all the rights, powers and authorities of the promoter previous to the publication of the notification in respect of the undertaking or part thereof sold, shall be transferred to the authority to whom the undertaking or part has been sold, and shall vest in, and may be exercised by, that authority in the same manner as if the tramway had been constructed by it under an order made under this Act.

(4) Subject to, and in accordance with, the preceding provisions of this section, two or more local authorities may jointly purchase an undertaking or so much thereof as is within their circles.

[a] *Substituted* by A. O. for "Local Government".

Working of Tramways owned by Local Authorities.

Lease of, or working of, tramway by local authority.

23. *(1)* When a local authority has under the authority of an order completed a tramway or has under the provisions of this Act or of an order acquired possession of a tramway, it may, by a lease to be approved by the [a][Government], let to any person the right of user of the tramway and of demanding and taking the authorized tolls.

(2) On the determination of a lease the local authority may from time to time let the right for such further term and on such conditions as the [a][Government] may approve.

(3) Every lease made under this section shall imply a condition of re-entry if at any time after the making thereof it is proved to the satisfaction of the [a][Government] that the lessee has practically discontinued the working of the tramway leased or of any part thereof, for the space of one month without a reason sufficient, in the opinion of the [a][Government], to warrant the discontinuance.

(4) Notice of the intention of the local authority to make a lease shall be given in manner prescribed.

(5) If the local authority cannot by means of a lease obtain what it deems to be a fair rent for the tramway, it may itself, with the previous sanction of the [a][Government] and for such term

as the [a][Government] directs, place and run carriages upon the tramway, and demand and take the authorized tolls in respect of the use of the carriages.

[a] *Substituted* by A. O. for "Local Government".

Rules.

Power to make rules.

24. *(1)* In addition to any other power to make rules expressly or by implication conferred by this Act, the [a][Government] may make rules consistent with this Act—

(a) as to the form in which an application for an order shall be made:

(b) as to the costs to be paid by an applicant in respect of an order, and the time when, and the place where, those costs shall be paid;

(c) as to the payment of money or lodgment of securities, by way of deposit, by the applicant for an order before the order is published under section 6, sub-section *(4)*, or a further order is made under section 8; the investment of money so paid; the disposal of interest or dividends from time to time accruing due on money or securities so paid, lodged or invested; the application of the money or securities or the produce thereof to the discharge of any liability incurred by the promoter, and the forfeiture, repayment or return of the money or securities;

(d) as to the plans and sections of any works to be deposited by applicants for orders or by promoters;

(e) for regulating the use of steam-power or any other mechanical power [b][or electrical power] on a tramway;

(f) as to any matter specified in section 7, sub-section *(2)*, clauses *(c)*, *(d)*, *(e)*, *(j)* and *(k)*, as a matter which may be provided for in an order, when that matter has not been so provided for, or has not, in the opinion of the [a][Government] been effectually so provided for;

(g) as to the periodical submission, by promoters, lessees and licensees, of accounts of traffic and receipts to the [a][Government] or as that Government directs, and as to the forms in which those accounts are to be submitted;

(h) as to the accidents of which report is to be made to the [a][Government] or as that Government directs;

(i) as to any matter respecting which rules may be made under this section by a local authority or a promoter or lessee; and

(j) generally, as to any other matter or thing in respect of which it may seem to the [a][Government] to be expedient to make rules for carrying out the purposes of this Act.

(2) A local authority may, from time to time, with the previous sanction of the [a][Government], make rules consistent with this Act and with the order and any rules made by the [a][Government] under this Act, for regulating—

(a) the rate of speed to be observed in travelling upon a tramway within the circle of the local authority;

(b) the use of animal power on the tramway;

(c) the distances at which carriages using the tramway are to be allowed to follow one after the other;

(d) the stopping of carriages using the tramway, and the notice to be given to the public of their approach;

(e) the manner in which carriages using the tramway after sunset and before sunrise are to be lighted;

(f) the traffic on roads along or across which the tramway is laid;

(g) the number of passengers which may be carried in any carriage;

(h) the licensing and control of drivers, conductors and other persons having charge of the carriages of the promoter or lessee or a licensee; and,

(i) generally, the mode of use of the tramway:

[c][Provided that, if the tramway is a railway, the sanction required by this sub-section shall, in such cases as the Central Government may determine, be the sanction of that Government.]

(3) The promoter or lessee of a tramway may, from time to time, with the previous sanction of the [a][Government], make rules[d] consistent with this Act and with the order and any rules made under this Act—

(a) for preventing the commission of any nuisance in or upon any carriage, or in or against any premises, belonging to him; and

(b) for regulating the travelling in any carriage belonging to him.

(4) The [a][Government] may cancel any rule made by a local authority or by a pormoter or lessee under this section.

[a] *Substituted* by A. O. for "Local Government". [b] *Inserted* by the Indian Tramways (Amendment) Act, 1911 (5 [V] of 1911), S. 6. [c] *Inserted* by A. O. *Cf.* the Government of India Act, 1935 (26 Geo. V, c. 2), S. 181 *(3)* and definition of "railway" in S. 311 *(2)*. [d] For an instance, *see* Madras Rules and Orders.

Power to impose penalty by rule.

25. The authority making any rule under section 24 may direct that a breach of it shall be punishable with fine which may extend,—

(a) if the authority making the rule is the [a][Government], to two hundred rupees, and,

(b) if that authority is a local authority or a promoter or lessee, to twenty rupees;

and, when the breach is a continuing breach, with a further fine which may extend,—

(c) if the authority making the rule is the [a][Government], to fifty rupees, and,

(d) if that authority is a local authority or a promoter or lessee, to five rupees,

for every day after the first during which the breach continues.

[a] *Substituted* by A. O. for "Local Government".

Procedure for making, and publication of, rules.

26. *(1)* Every authority having power to make rules under any section of this Act shall, before making the rules, publish a draft of the proposed rules for the information of persons likely to be affected thereby.

(2) The publication shall be made, in the case of rules made by the [a][Government], in such manner as may in its opinion be sufficient for giving information to persons interested, and, in the case of rules made by a local authority or by a promoter or lessee, in manner prescribed.

(3) There shall be published with the draft a notice specifying a date, not earlier than the expiration of one month after the date of publication, at or after which the draft will be taken into consideration.

(4) The authority shall receive and consider any objection or suggestion which may be made by any person with respect to the draft before the date so specified.

(5) The publication in the Official Gazette of a rule purporting to be made under this Act shall be conclusive proof that it has been duly made.

[a] *Substituted* by A. O., for "Local Government".

Offences.

Penalty for failure of promoter, lessee or licensee to comply with act or order.

27. If a promoter —

(a) constructs or maintains a tramway otherwise than in accordance with the order, or

(b) opens the tramway for traffic, or permits it to be so opened, before it has been inspected and certified in manner required by section 12, or

(c) fails to observe any requirement or condition of the order for neglect or breach whereof no penalty has been expressly provided in the order,

or if a promoter, lessee or licensee runs a carriage on a tramway otherwise than in accordance with the order,

he shall (without prejudice to the enforcement or specific performance of the requirements of this Act or of the order, or to any other remedy which may be obtained against him in a Court of Civil Judicature), on complaint made by the [a][Government] or by the local authority or road-authority or by the District Magistrate or, with the previous sanction of the District Magistrate, by any person injuriously affected by the act or omission, be punished with fine which may extend to two hundred rupees, and in the case of a continuing offence to a further fine which may extend to fifty rupees for every day after the first during which the offence continues to be committed.

[a] *Substituted* by A. O. for "Local Government".

Penalty for obstructing promoter in exercise of his powers.

28. If any person without lawful excuse, the burden of proving which shall lie upon him, wilfully obstructs any person acting under the authority of the promoter in the lawful exercise of his powers in constructing or maintaining a tramway, or injures or destroys any mark made for the purpose of setting out the line of the tramway, he shall be punished with fine which may extend to fifty rupees.

Penalty for interfering with tramway.

29. If any person without lawful excuse, the burden of proving which shall lie upon him, wilfully does any of the following things, namely :—

(a) interferes with, removes or alters any part of a tramway constructed under this Act, or of the works connected therewith, or

(*b*) places or throws upon or across any such tramway any wood, stone, refuse or other thing, or

(*c*) does anything in such a manner as to obstruct any carriage using any such tramway, or

(*d*) abets within the meaning of the Indian Penal Code the doing of, or attempts to do, anything mentioned in clause (*a*), clause (*b*) or clause (*c*),

he shall (without prejudice to any other remedy which may be obtained against him in a Court of Civil Judicature) be punished with fine which may extend to one hundred rupees.

Penalty for using tramway with carriage having flange-wheels.

30. If any person, except under a lease from, or by agreement with, the promoter, or under license from the [a][Government] granted under this Act, uses on a tramway, otherwise than as permitted by section 14, a carriage having flange wheels or other wheels suitable to run on the rail of the tramway, he shall be punished with fine which may extend to two hundred rupees.

[a] *Substituted* by A. O. for "Local Government".

Penalty for evading payment of proper toll.

31. *(1)* If any person travelling or having travelled in a carriage of the promoter or lessee or of a licensee evades or attempts to evade payment of toll, or if any person having paid toll for a certain distance wilfully proceeds in any such carriage beyond that distance and does not pay the additional toll for the additional distance or attempts to evade payment thereof or if any person wilfully refuses or neglects on arriving at the point to which he has paid toll to quit the carriage, he shall be punished with fine which may extend to ten rupees.

(2) When a person commits an offence under this section and refuses on demand of a servant of the promoter, lessee or licensee to give his name and residence, or gives a name or residence which the servant has reason to believe to be false, he may be arrested and taken to the nearest police-station by the servant or any person whom the servant may call to his aid.

(3) When the person is taken to the police-station he shall with the least possible delay be forwarded to the nearest Magistrate, unless his true name and residence are ascertained, in which case he shall be released on his executing a bond for his appearance before a Magistrate if so required.

Penalty for taking or sending dangerous or offensive goods without giving notice.

32. If any person takes or sends by a tramway any goods of a dangerous or offensive nature without giving the notice required by section 16, he shall be punished with fine which may extend to fifty rupees.

Penalty for licensee not giving to promoter or lessee an account of traffic or giving false account.

33. *(1)* If a licensee fails on demand to give the account mentioned in section 18, or, with intent to evade the payment of tolls gives a false account when he is called upon to give an account under that section, he shall be punished with fine which may extend to fifty rupees

(2) The fine shall be in addition to any tolls payable by the licensee to the promoter or lessee in respect of the passengers or goods conveyed by the carriage or carriages used by the licensee on the tramway.

Saving of prosecutions under other laws.

34. Nothing in this Act shall prevent a person from being prosecuted under any other law for an act or omission which constitutes an offence against this Act or the rules made under it, or from being liable under that other law to any other or higher punishment or penalty than that provided by this Act or the rules made under it:

Provided that a person shall not be punished twice for the same offence.

Settlement of Differences.

Differences between promoters or lessees and authorities.

35. *(1)* If any difference arises between the promoter or lessee on the one hand and the [a][Government], or the local authority, or the road-authority, or a person having the charge of any sewers, drains, telegraph lines, gas-pipes, water-pipes or other things in or on land occupied by the tramway, on the

Section 31 — Note 1

[1] A bye-law provided that tram-car ticket was available only for the car and the journey for which it was issued. Accused got down at an intermediate place and then got into another car going to the same destination. *Held*, that contract of carriage was determined by his own act, and that he was rightly convicted of travelling without ticket. ('13) 14 Cri. L Jour 564 (565): 7 Low Bur Rul 53.

other hand, with respect to any interference or control exercised or claimed to be exercised by, or on behalf of, either party by virtue of this or any other Act, or of the order or the rules made under this Act, or with respect to the propriety of, or the mode of, the execution of any work, or with respect to any compensation to be made by or to the promoter or lessee, or on the question whether any work is such as ought reasonably to satisfy the [a][Government] or the road authority or both, or with respect to any other subject or thing regulated by, or comprised in, this Act or the order or the rules made under this Act, and not otherwise expressly provided for therein, the matter in difference shall, except where the parties elect to proceed under section 523 of the Code of Civil Procedure,[b] be settled, on the application of either party, by a referee.

(2) Where the difference is—

(a) between the promoter or lessee on the one hand and the [a][Government], either as such or as the road-authority, on the other, or

(b) between the promoter on the one hand and the local authority on the other, with respect to the sum to be paid by the local authority for an undertaking or part of an undertaking which that authority has required the promoter to sell under section 22,

the referee shall be the District Court within the jurisdiction of which the tramway is situate, or, where the tramway is within the jurisdiction of more than one District Court, the District Court within the jurisdiction of which the greater part of the tramway is situate.

(3) In other cases the referee shall be appointed by the [a][Government].

(4) Except where the referee is the District Court, the powers and procedure of the referee may be prescribed.

(5) In the case of a difference between a promoter on the one hand and a local authority on the other, with respect to the sum to be paid by the local authority for an undertaking or part of an undertaking which that authority has required the promoter to sell under section 22, an appeal shall lie to the High Court from the award of the referee as from an original decree of the District Court.

(6) In the case of every other difference the award of the referee shall be final.

[a] *Substituted* by A. O. for "Local Government". [b] Act 14 of 1882; *See* now the Arbitration Act, 1940 (Act 10 [X] of 1940).

Recovery of Tolls.

Recovery of moneys due from promoters and, in certain cases, from lessees.

36. Any of the following moneys, namely, any rent due to a local authority from a lessee, any penalty recoverable from a promoter or lessee under an order, any sum payable by a promoter or lessee under an award of a referee the cost of the performance under this Act by the [a][Government] or by a local authority or road-authority of any work required by this Act or by an order to be done by a promoter, and the cost incurred by a road-authority in removing a tramway and reinstating a road under this Act, may, without prejudice to any other remedy that the authority to which the money is due may have by suit or otherwise, be recovered by that authority, on application made in this behalf to the Collector, as if the sum due were an arrear of land revenue due by the promoter or lessee or his surety (if any):

Provided that nothing in this section shall authorize the arrest of the promoter or lessee or his surety in execution of any process issued by the Collector.

[a] *Substituted* by A. O. for "Local Government".

Recovery of tolls from licensees.

37. *(1)* If a licensee fails to pay on demand the tolls due for the use of a tramway, the promoter or lessee to whom the tolls are due may, without prejudice to the remedy which he may have by suit, apply to a Magistrate to recover the amount of the tolls, and the Magistrate may, after giving notice to the licensee, if possible, and allowing him an opportunity of being heard, proceed to recover the amount by distress and sale of any carriages or other movable property of the licensee which may be found on the tramway or on premises connected therewith.

(2) When a licensee has failed to pay on demand the tolls due from him, the promoter or lessee to whom the tolls are due may seize any carriage or other moveable property of the licensee on the tramway or on premises connected therewith, and detain the same for forty-eight hours unless the tolls are sooner paid.

(3) When application is made to a Magistrate under sub-section *(1)*, he may make an interim order of distraint pending his final decision.

Recovery of tolls from passengers.

38. Any tolls due to a promoter, lessee or licensee from a passenger may be recovered either by suit or, on application to a Magistrate having jurisdiction within any local area in which any part of the tramway is laid, by distress and sale of any moveable property belonging to the passenger within the local limits of the jurisdiction of the Magistrate.

Savings.

Promoter to have right of user only.

39. *(1)* Notwithstanding anything contained in this Act, or in an order or any rule made under this Act, a promoter shall not acquire any right other than that of user only over a road along or across which he lays a tramway, nor shall anything contained in this Act, or in an order or any rule made under this Act, exempt the promoter of a tramway, or any other person using the tramway, from the payment of such charges as may lawfully be levied in respect of the use of a road or bridge along or across which the tramway is laid.

(2) The [a][Provincial Government] may, if it thinks fit, fix rates at which a promoter, lessee or licensee may compound for the charges payable in respect of the use of a road or bridge.

[a] *Substituted* by A. O. for "Local Government".

Saving of power over roads traversed by tramways.

40. *(1)* Nothing in this Act, or in an order or any rule made under this Act, shall take away or abridge any power which a road-authority, local authority or other person has by law to break up, widen, alter, divert or improve a road, railroad or tramway along or across which a tramway is laid.

(2) The road-authority, local authority or other person executing any work referred to in sub-section *(1)* shall not be liable to pay to a promoter, lessee or licensee any compensation for injury done to a tramway by the execution of the work or for loss of traffic occasioned by the reasonable use of any power lawfully exercised for the execution thereof.

Saving of power of local authority and police to regulate traffic on roads.

41. Nothing in this Act, or in an order or any rule made under this Act, shall affect the powers of a local authority or of a Magistrate or police-officer to regulate the passage of traffic along or across a road along or across which a tramway is laid; and the authority, Magistrate or officer aforesaid may exercise its or his powers as well on as off the tramway and with respect as well to the traffic of a promoter, lessee or licensee as to the traffic of other persons.

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Promoters, lessees and licensees to be responsible for all injuries.

42. A promoter, lessee or licensee shall be answerable for all injuries happening through his act or default or through the act or default of any person in his employment, by reason or in consequence of any of his carriages or works, and shall save harmless all authorities and persons collectively and individually, and their officers and servants, from all damages and costs in respect of injuries so happening.

Want of funds not a sufficient reason for default.

43. For the purposes of this Act want of funds shall not be deemed to be a sufficient reason for the suspension of the construction, or the discontinuance of the working, of a tramway by a promoter or lessee.

Power to exempt from municipal taxation.

44. When a tramway is constructed under this Act within the limits of a municipality, the [a][Provincial Government] may exempt the animals, plant, rolling-stock, yards, workshops, engine-sheds, [b][electrical generating stations or sub-stations] and depots of the promoter, lessee or licensee, for such period as it thinks fit, from all or any municipal taxes leviable within those limits.

[a] *Substituted* by A. O. for "Local Government". [b] *Inserted* by the Indian Tramways (Amendment) Act, 1911 (5 [V] of 1911), S. 7.

Application by local authorities of local funds to tramways.

45. *(1)* The fund to or with the control or management of which the local authority of a municipality, cantonment or district is entitled or entrusted shall, notwithstanding anything in any enactment respecting the purposes to which that fund may be applied, be applicable, subject to the control of the [a][appropriate Government], to the payment of expenses incidental to the exercise of the powers and functions which may be vested in, or exercised by, a local authority under this Act.

(2) The fund shall also be applicable, with the previous sanction of the [a][appropriate Government], to a guarantee of the payment of interest on money to be applied, with the concurrence in

writing of the local authority, within the limits of the local area under its control, to any of the purposes to which the fund might be applied by the local authority under sub-section *(1)*.

[b][*(3)* In this section 'the appropriate Government' means the Government, Central or Provincial, whose executive authority extends over the local authority in question.]

[a] *Substituted* by A. O. for "Local Government". [b] *Inserted* by A. O.

Extension of Act to existing tramways.

46. The [a][Government] may, with the consent of the local authority and road authority and of the promoter and his lessee (if any), extend any part of this Act, or any rules made under this Act either with or without modification, to the whole or any part of a tramway constructed, or authorized by the [a][Government] to be constructed, before the passing of this Act, and may withdraw any part of the Act or any rules so extended.

[a] *Substituted* by A. O. for "Local Government".

Prohibition of construction of tramways except under this Act.

47. *(1)* A tramway of which the construction has not been authorized by the [a][Government] before the passing of this Act shall not, after the passing of this Act, be constructed for public traffic in any place to which this Act extends, except in pursuance of an order made under this Act.

(2) A person constructing a tramway in contravention of sub-section *(1)* of this section,

or after the passing of this Act maintaining or using for public traffic, otherwise than in pursuance of an order made under this Act, a tramway which was not constructed, or authorized by the [a][Government] to be constructed, before the passing of this Act,

shall be liable, on the complaint of the [a][Government] or local authority, to double the penalty to which a promoter acting otherwise than in accordance with an order is liable under section 27.

[a] *Substituted* by A. O. for "Local Government".

Transfer of control on exclusion of local area from circle of local authority.

48. If at any time a local area comprising a tramway to which this Act or any part thereof or any rule thereunder applies ceases to be included in the circle of a local authority, the functions of that authority under this Act, or the part thereof or the rule thereunder, and under the order (if any), shall, in respect of that local area, devolve on the [a][Government] or, if that Government so directs, on the local authority of the circle in which the tramway has been included.

[a] *Substituted* by A. O. for "Local Government".

49. [Explanation and amendment of section 54 of Railway Act.] *Repealed by the Indian Railways Act, 1890 (9 [IX] of 1890), S. 2 and Sch. 1.*

Powers of Government exercisable from time to time.

50. All powers conferred by this Act on [a][any Government] may be exercised from time to time as occasion requires.

[a] *Substituted* by A. O. for "Local Government".

[THE INDIAN] TRAMWAYS ACT, 1902
(Act IV of 1902.)

STATEMENT OF OBJECTS AND REASONS.

"By the Indian Railway Companies Act, 1895 (X of 1895) it is provided that Railway Companies registered under the Indian Companies Act, 1882 (VI of 1882), may under certain conditions, pay interest on their paid-up share capital out of capital during construction, and it is proposed by this Bill to take power for the Governor-General in Council to apply the same provisions to companies formed for the construction of tramways not differing in structure and working from light railways. It is believed that legislation to this end will remove what is recognised as a tangible obstacle to the consideration in London of many remunerative light railway projects in India which, for administrative reasons, it is desired to control in this country under the provisions, not of the Railways, but of the Tramways, Act"

— *Gazette of India, 1901, Part V, page 105.*

[THE INDIAN] TRAMWAYS ACT, 1902.
(ACT IV OF 1902)[a]

[14th February, 1902.]

An Act to apply the provisions of the Indian Railway Companies Act, 1895, to certain Tramway Companies.

WHEREAS by the Indian Railway Companies Act, 1895, the Railway Companies therein mentioned are authorised to pay interest on their paid-up share capital out of capital in the manner and on the conditions prescribed by the said Act;

AND WHEREAS it is expedient to apply the provisions of the said Act to Companies formed for the construction of tramways not differing in structure and working from light railways ;

It is hereby enacted as follows : —

[a] For Statement of Objects and Reasons, *see* Gazette of India, 1901, Pt. V, p. 105; for Report of the Select Committee, *see ibid.*, 1902, Pt. V, p. 27.

Short title and extent.

1. *(1)* This Act may be called the Indian Tramways Act, 1902 ; and

(2) It extends to the whole of British India.[a]

[a] The expression 'the whole of British India," in its application to the Dominion of India, means 'all the Provinces of India'—*see* I O., Art. 4 (2) ; and in its application to the Dominion of Pakistan, means 'all the Provinces of Pakistan' —*see* P. O , Art. 4 (2). [15-8-1947]

Application of Act X 1895 to Tramway Companies.

2. The [a][Central Government] may, by notification in the [b][Official Gazette], direct that the provisions of the Indian Railway Companies Act, 1895, in so far as the same are applicable, shall apply to any Company formed for the construction of a tramway under the Bengal Tramways Act, 1883, or the Indian Tramways Act, 1886, and thereupon it shall be lawful for the Tramway Company mentioned in the notification to pay interest upon its paid-up share capital out of capital in the manner and subject to the conditions prescribed by the said Indian Railway Companies Act, 1895.

[a] *Substituted* by A. O. for "Governor General in Council". [b] *Substituted* by A. O for "Gazette of India ".

OBJECTS AND REASONS.

" In accordance with the suggestion made by the Government of Bengal, we have inserted in clause 2 a reference to the Bengal Tramways Act 1883 (Beng. Act III of 1883), so as to cover companies formed for the construction of tramways under that Act. There are in the Statute book several other enactments authorising the construction and regulating the working of tramways but each of these—see, for example, the Bombay Tramways Act, 1874 (Bom. Act I of 1874)—deals entirely with a special concession granted to certain individuals, the Bengal enactment being the only local Act drawn on general lines like the Imperial Act of 1886 The Bengal case, therefore, alone requires to be provided for."—S. C. R.

[THE] TRANSFER OF PROPERTY ACT, 1882.

(Act IV of 1882)

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—Amended by Acts 3 of 1885; 6 of 1904; 11 of 1915; 38 of 1925; 27 of 1926; 10 of 1927, 20 of 1929; 5 of 1930; 35 of 1934; 4 of 1938; 6 of 1944.
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(a) Bombay by Bom. Act 14 of 1939;
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[THE] TRANSFER OF PROPERTY ACT, 1882

(ACT IV OF 1882)[a]

[17th February, 1882.]

An Act to amend the law relating to the Transfer of Property by Act of Parties.

Preamble.

WHEREAS it is expedient to define and amend certain parts of the law relating to the transfer of property by act of parties; It is hereby enacted as follows : —

[a] For Statement of Objects and Reasons, *see* Gazette of India, 1877, Pt. V, p. 171; for the Preliminary Report of the Select Committee, *see ibid.*, 1878, Pt. V, p. 48; for the further Report of the Select Committee, *see ibid*, 1879 Pt V, p. 106 ; for the third Report of the Select Committee, *see ibid* , 1881, Pt V, p. 395

Preamble — Note 1

[1] Amendments in 1929 if retrospective — Section 63, Transfer of Property (Amendment) Act, XX of 1929, runs as follows :

Saving clause.

"*63.* Nothing in any of the following provisions of this Act, namely. Ss. 3, 4, 9, 10, 15, 18, 19, 27, 30, cl (c) of S. 31, Ss. 32, 33, 34, 35, 46, 52, 55, 57, 58, 59, 61 and 62 shall be deemed in any way to affect:—

(a) the terms or incidents of any transfer of property made or effected before the first day of April 1930,

(b) the validity, invalidity, effect or consequences of anything already done or suffered before the aforesaid date,

(c) any right, title, obligation or liability already acquired, accrued, or incurred before such date, or

(d) any remedy or proceeding in respect of such right, title, obligation or liability, and nothing in any other provision of this Act shall render invalid or in any way affect anything already done before the first day of April 1930, in any proceeding pending in a Court on that date; and any such remedy and any such proceeding as is herein referred to may be enforced, instituted or continued, as the case may be, as if this Act had not been passed."

It is clear that the amendments introduced by the sections mentioned in it will not affect anything done before the 1st of April 1930 in any proceeding pending in a Court on that day. As to whether those amendments are retrospective in operation so as to apply to cases where the act was done before the 1st of April 1930, but the suit was instituted after that date, see Notes under the respective provisions amended.

[2] This Act does not contain the whole law on the subject of transfer of property. (Vol 29) 1942 Mad 558 (561) (DB) ✠ (Vol 27) 1940 Nag 163 (166): I L R (1941) Nag 513 (DB). (Act is not exhaustive of all charges.) ✠ (Vol 9) 1922 All 59 (60) (DB) ✠ (Vol 11) 1924 Sind 23 (24): 17 Sind L R 178 (DB) (The Act is not exhaustive on the law of mortgages.) ✠ (Vol 4) 1917 Pat 268 (271): 2 Pat L Jour 293 (DB) ✠ (Vol 20) 1933 Cal 154 (161): 59 Cal 1372 (DB). (Particularly on mortgages.) ✠ ('10) 37 Cal 377 (382) (DB). (Act does not deal with cases of succession.)

[But see (Vol 13) 1926 Mad 55 (56): 48 Mad 821 (DB).]

[3] In cases not covered by the Act, a Court can administer the principles of equity which are not distinctly prohibited by the statute. (Vol 29) 1942 Mad 558 (561) (DB) ✠ (Vol 20) 1933 All 70 (71): 54 All 1041 (DB) ✠ (Vol 13) 1926 Bom 31 (32) (DB) ✠ (Vol 16) 1929 All 12 (14) : 51 All 454 (DB) ✠ (Vol 2) 1915 Mad 402 (404).

[4] English law has been held to apply if its application is found suited to Indian society and circumstances. (Vol 6) 1919 P C 1 (4) : 42 Mad 589 : 46 Ind App 109 (PC) ✠ (Vol 17) 1930 P C 142 (143) : 11 Lah 251 : 57 Ind App 168 (PC).

[5] So long as the necessity of words found in this Act is kept in mind, there is no harm in examining English decisions. (Vol 34) 1947 Nag 210 (218) (DB).

[6] The principle "he who seeks equity must do equity" is applicable to cases which are not distinctly provided for by the enactment. ('05) 15 Mad L Jour 210 (210) (DB) ✠ ('11) 14 Cal L Jour 530 (536) (DB).

[7] No equitable doctrine can be applied so as to override the express provisions of the statute. (Vol 29) 1942 Mad 558 (561) (DB) ✠ (Vol 20) 1933 All 70 (71) : 54 All 1041 (DB).

[8] The English Law incapacitating aliens from holding real property to their own use and transmitting it by descent or devise does not apply in India. (1836) 1 Moo Ind App 175 (286) : 1 Moo P C 175 (PC).

[9] Sections 2 and 3, Crown Grants Act (XV of 1895) provide as follows :

"*Section 2.* Nothing in the Transfer of Property Act, 1882, contained shall apply or be deemed ever to have applied to any grant or other transfer of land or of any interest therein heretofore made or hereafter to be made by or on behalf of the Crown to, or in favour of, any person whomsoever ; but every such grant and transfer shall be construed and take effect as if the said Act had not been passed.

"*Section 3.* All provisions, restrictions, conditions and limitations over contained in any such grant or transfer as aforesaid shall be valid and take effect according to their tenor, any rule of law, statute or enactment of the Legislature to the contrary notwithstanding."

[10] Crown grants are thus exempted from the operation of the Transfer of Property Act. (Vol 26) 1939 All 263 (264) (DB) ✠ (Vol 14) 1927 Pat 319 (322, 323) : 6 Pat 446 (DB). (Lease by Crown.)

[11] The Government is empowered to create an estate descendible by any rule of inheritance other than that laid down by law. ('05) 27 All 634 (653) : 32 Ind App 203 : 8 Oudh Cas 317 (PC).

[12] If there was a condition in the grant restricting the alienation by the grantee of the land granted to him, it would be valid under S. 63, Crown Grants Act,

CHAPTER I.

PRELIMINARY.

Short title. **1.** This Act may be called the Transfer of Property Act, 1882.

Commencement. It shall come into force on the first day of July, 1882.

Extent. It extends in the first instance to the whole of British India[a] except [b][Bombay, East Punjab and Delhi] [* * * *][c].

[d][But this Act or any Part thereof may by notification in the Official Gazette be extended to the whole or any part of the [dd][said Provinces] by the Provincial Government concerned.]

[a] The application of this Act was barred in the Naga Hills District including the Mokokchang Sub-Division, the Dibrugarh Frontier Tract, the North Cachar Hills, the Garo Hills, the Khasia and Jaintia Hills and the Mikir Hills Tract, by notification under the Assam Frontier Tracts Regulation, 1880, (2 [II] of 1880) S 2—*see* Assam Rules and Orders, Vol I, pp 616-618. [b] *Substituted* for the words "the territories exclusively administered by the Governor of Bombay in Council and the Lieutenant Governor of the Punjab" by the Indian Independence (Adaptation of Central Acts and Ordinances) Order, 1948. [23-3-1948.] [c] The words "and the Chief Commissioner of British Burma" were *repealed* by the A. O. [d] *Substituted* by the A. O. for the fourth para. which ran: "But any of the said Local Governments may, from time to time, by notification in the local official Gazette extend this Act [or any part thereof] to the whole or any specified part of the territories under its administration." The words in brackets were *inserted* by the Transfer of Property (Amendment) Act, 1904 (6 [VI] of 1904), S. 2.

Act 4 of 1882 has been *extended* with effect from 1st January, 1893, to the whole of the territories, other than the Scheduled Districts under the administration of the Government of Bombay — *see* Bombay Rules and Orders, Vol. II, p. 191, and with effect from 1st January, 1915, to the province of Sind—*see ibid.*, p 195.

Sections 54, 107 and 123 have been *extended* from 6th May, 1935, to all Municipalities in the Punjab and all notified areas declared and notified under the Punjab Municipal Act, 1911, S. 241 — *see* Punjab Gazette Extraordinary, 1925, p. 27.

The Act has been *declared* to be in force in Panth Piploda by the Panth Piploda Laws Regulation, 1929 (1 [I] of 1929)

The Act has been *repealed* as to Crown Grants by the Crown Grants Act, 1895 (15 [XV of 1895). *See* Notes under Preamble.

The Act has been *repealed* or *modified* to the extent necessary to give effect to the provisions of the Madras City Tenants Protection Act, 1921 (Mad. 3 [III] of 1922), in the City of Madras—*see* that Act, S. 13.

[dd] *Substituted* for "said territories" by the Indian Independence (Adaptation of Central Acts Ordinances) Order, 1948. [23-3-1948.]

Preamble — Note 1 *(contd.)*

notwithstanding the provisions of S. 10 of this Act. ('06) 3 All L Jour 130 (131) (DB).

[*See also* (Vol 13) 1926 Mad 706 (711) : 49 Mad 349 (DB) (Restrictive covenant as to alienation not void.) ✠ (Vol 26) 1939 All 263 (264) (DB).]

[13] Strict rule of construction against the subject and in favour of the Crown applies to Crown grants. (Vol 23) 1936 Sind 108 (113): 29 Sind L R 382 (DB).

[14] The provisions of the T. P. Act have no application to the creation of easements. (Vol 4) 1917 Cal 681 (685, 686) (DB).

[15] The Court must give effect to the Act and must judge the particular transaction according to its provisions unless it is proved that by the law of the land where the property is situated the transaction is not valid. (Vol 19) 1932 Bom 642 (643, 644) : 57 Bom 284.

[16] Where the statute requires that a particular kind of transfer shall be effected by a particular kind of instrument such a provision must be enforced with stringency. (Vol 14) 1927 All 411 (412) (DB).

Section 1 — Note 1

[1] For the definition of "British India", *see* the General Clauses Act, X of 1897, S. 3, cl (7).

[2] The provision empowering the Provincial Governments to extend the operation of the Act to places to which the Act has not been made originally applicable is *intra vires* of the Indian Legislature, *see* ('79) 4 Cal 172 (181) : 5 Ind App 178 (PC).

[3] The Provincial Government cannot extend particular sections of the Act, so as to give those sections a different operation from that which they had in the Act itself, read as a whole. (Vol 14) 1927 P C 22 (23) : 5 Rang 7 : 54 Ind App 23 (P C). (Rule of Mahomedan law requiring gift to be perfected by possession cannot be abrogated.)

[4] The Act does not apply to the North Western Frontier Province (Vol 29) 1942 Pesh 88 (88)

[5] The Act applies to that portion of the Province of Delhi which was taken from the United Provinces of Agra and Oudh. (Vol 17) 1930 Lah 920 (922) : 11 Lah 564 (DB).

[6] This Act has been extended to the Civil and Military station of Bangalore (Vol 18) 1931 P C 239 (240) : 59 Cal 439 : 58 Ind App 333 (PC).

[7] This Act has been extended to Berar in 1907. (Vol 25) 1938 Nag 142 (143) : ILR (1939) Nag 293.

[8] The general principles underlying this Act have been applied to cases to which this Act was inapplicable. (Vol 29) 1942 Pesh 88 (88) ✠ (Vol 29) 1942 Pesh 68 (70) ✠ (Vol 25) 1938 Lah 286 (287). (S. 101.) ✠ (Vol 10) 1923 Nag 88 (89)

[9] In territories in which this Act does not apply the technical rules embodied in it have been held not to be applicable (Vol 23) 1936 Pesh 158 (160) (DB). (Rule laid down in S. 53.) ✠ (Vol 24) 1937 Pesh 5 (6). (Registration.) ✠ (Vol 12) 1925 Lah 575 (575) : 6 Lah 487. (Assignment of debt not in writing.) ✠ (Vol 12) 1925 Lah 92 (93). (Principle of S. 55 (2).) ✠ ('07) 3 Nag L R 72 (75). (Berar — Registration under S 54.) ✠ (Vol 26) 1939 Lah 330 (338) (DB). (Technical provisions of S. 114A.)

[10] In the following cases this Act was not applicable. The relevant principles of the English law differed from the provisions of this Act. The High Court applied the English principles. ('94) 18 Bom 160 (167, 168) (DB) ✠ (Vol 13) 1926 Lah 39 (40).

[11] A subsequent local legislation, such as the C. P. Tenancy Act, enacted for a particular purpose and with reference to a particular locality cannot operate as an implied repeal of the T. P. Act applicable to the whole of India. (Vol 16) 1929 Nag. 246 (249) : 25 Nag L R 19.

[e][And any [f][Provincial Government] may, [g][* * * *] from time to time, by notification in the [h][Official Gazette], exempt,[i] either retrospectively, or prospectively, any part of the territories administered by such [f][Provincial Government] from all or any of the following provisions, namely : —

Sections 54, paragraphs 2 and 3, 59, 107 and 123.]

[j][Notwithstanding anything in the foregoing part of this section, sections 54, paragraphs 2 and 3, 59, 107 and 123 shall not extend or be extended to any district or tract of country for the time being excluded from the operation of the Indian Registration Act, [k][1908], under the power conferred by the first section of that Act or otherwise.]

[e] *Substituted* by the Transfer of Property Act (1882) Amendment Act, 1885 (3 [III] of 1885). S. 1. [f] *Substituted* by A. O. for "Local Government". [g] The words "with the previous sanction of the Governor General in Council" were *repealed* by the Devolution Act, 1920 (38 [XXXVIII] of 1920), S. 2 and Sch. I. [h] *Substituted* by A. O. for "local official Gazette". [i] No such exemption has yet been made. [j] *Inserted* by S. 2 of the Transfer of Property Act (1882) Amendment Act, 1885 (3 [III] of 1885), S. 2; it is to be deemed to have been *added* from the date on which Act 4 of 1882 came into force.

Section 54, paras. 2 and 3, and Ss. 59, 107 and 123 extend to every cantonment in British India—*see* the Cantonments Act, 1924 (2 [II] of 1924), S. 287.

[k] *Substituted* by the Transfer of Property (Amendment) Act, 1929 (20 [XX] of 1929), S. 2 for "1877".

Repeal of Acts.

Saving of certain enactments, incidents, rights, liabilities, etc.

2. In the territories to which this Act extends for the time being the enactments specified in the schedule hereto annexed shall be repealed to the extent therein mentioned. But nothing herein contained shall be deemed to affect—

(a) the provisions of any enactment not hereby expressly repealed :

(b) any terms or incidents of any contract or constitution of property which are consistent with the provisions of this Act, and are allowed by the law for the time being in force :

(c) any right or liability arising out of a legal relation constituted before this Act comes into force, or any relief in respect of any such right or liability : or

d) save as provided by section 57 and Chapter IV of this Act, any transfer by operation of law or by, or in execution of, a decree or order of a Court of competent jurisdiction :

and nothing in the second chapter of this Act shall be deemed to affect any rule of [a][*] Muhammadan [b][*] law.

[a] The word "Hindu" was *repealed* by the Transfer of Property (Amendment) Act, 1929 (20 [XX] of 1929), S. 3. [b] The words "or Buddhist" were *repealed, ibid.*

SECTION 2—SYNOPSIS

1. "Herein."
2. "Affect."
3. Clause (a).
4. Clause (b)—Right to partition.
5. Clause (c).
6. Clause (d).
7. Escheat.
8. Muhammadan law.
9. Hindu and Buddhist laws.

1. "Herein."— [1] "Herein" refers to any of the provisions of this Act. (Vol 1) 1914 Cal 618 (621) (DB). [But see ('11) 9 Ind Cas 840 (840) Cal).]

2. "Affect". — [1] A provision of the Act will apply to Muhammadans also when there is no rule of Muhammadan law inconsistent with such provision. ('07) 30 Mad 197 (198, 199) (DB). (Section 51 applied to Mahomedans)

[2] It was held in ('01) 28 Cal 744 (747) (DB) that the word "affect" means "validate or invalidate the transfer," that S. 111, cl. (d) did not affect the transfer itself but merely stated the result of a transfer when made. This view had not been followed in later cases of the same High Court. *See* ('36) 163 Ind Cas 829 (830) (Cal)✠(Vol 1) 1914 Cal 618 (622) (DB) ✠ (Vol 6) 1919 Cal 642 (643) (DB).

3. Clause (a). — [1] The clause applies so as to save the provisions of existing enactments at the time the Act came into operation. If a subsequent enactment is inconsistent with a provision of this Act the special provision will prevail over the general. ('02) 25 Mad 244 (255) (FB).

4. Clause (b)—Right to partition.—[1] A right to a partition of joint property is an incident of such property. ('79) 4 Cal 55 (59) (DB). (Joint property subject to trust but not dedicated to idol, can be partitioned.)

[2] The right to partition may be exercised independently of the provisions of this Act as to writing being necessary in case of certain transfers. ('98) 25 Cal 210 (213) (DB)✠ ('10) 34 Mad 72 (73) (DB).

5. Clause (c). — [1] "Right or liability" means a substantive right or liability and not a matter of procedure. ('91) 13 All 432 (456) (FB) ✠ ('86) 12 Cal 583 (589) (FB) ✠ ('01) 25 Bom 101 (103) (DB).

[2] The Act is not retrospective in operation in so far as any substantive right or liability created by the legal relation is concerned, but will be retrospective in so far as the provisions relate to procedure. (Vol 6) 1919 P C 1 (3) : 42 Mad 589 : 46 Ind App 109 (PC) ✠ ('87) 14 Cal 636 (640) (FB) ✠ (Vol 22) 1935 All 706 (710) : 58 All 63 (FB) ✠ (Vol 21) 1934 Pesh 30 (31) (DB) ✠ ('89) 11 All 367 (371) (DB) ✠ ('92) 15 Mad 290 (291) (DB).

[3] An oral mortgage, sale or gift before the Act is valid and enforceable after the date of the Act. (Vol 3) 1916 P C 41 (43) : 38 All 494 : 43 Ind App 264 (PC) ✠ ('02) 4 Bom L R 25 (27) (DB) ✠ ('02) 12 Mad L Jour 387 (388) (DB).

[4] A written mortgage executed before the Act is not rendered bad after the Act because it did not comply with the requirements as to attestation. ('11) 39 Cal 227 (230) (DB)✠('95) 17 All 252 (261, 262) (DB).

Interpretation clause.

3. In this Act, unless there is something repugnant in the subject or context,—

"immoveable property" does not include standing timber, growing crops or grass :

Section 2 — Note 5 *(contd.)*

[5] The incident of non-transferability which attached before the Act to ordinary tenancies of agricultural lands and to tenancies of homestead lands and the rights and liabilities flowing from such an incident are not affected by the Act. (Vol 3) 1916 Cal 827 (828) (DB) ✠ (Vol 1) 1914 Cal 665 (666) (DB) ✠ (Vol 15) 1928 Pat 431 (433) : 7 Pat 341 (DB).

[6] The assignment of a mortgage after the date of the Act will be governed by this Act even though the mortgage itself was made prior to the Act. ('86) 12 Cal 505 (508) (DB) ✠ ('88) 11 Mad 56 (60, 61) (DB).

[But see (Vol 1) 1914 Low Bur 207 (207) (DB).]

[7] Even in matters of procedure enacted in some sections of this Act, such provisions cannot operate to revive rights which became extinct, or to take away rights which had been obtained before the Act. ('89) 16 Cal 693 (701) : 16 Ind App 85 (PC) ✠ ('87) 14 Cal 599 (604) (DB) ✠ ('12) 8 Nag L R 136 (137) ✠ (Vol 1) 1914 All 350 (350) (DB) ✠ ('96) 19 Mad 382 (384) (DB) ✠ ('86) 12 Cal 436 (437) (DB) ✠ ('06) 29 Mad 421 (423) (DB) ✠ ('99) 23 Bom 119 (121) (DB).

[8] In so far as there was no enactment governing the particular case, the rights of parties before the date of the Act should be decided according to the Common law, or in its absence according to justice, equity and good conscience. ('15) 22 Cal L Jour 74 (75) ✠ (Vol 19) 1932 P C 158 (161) : 59 Ind App 236 : 7 Luck 257 (PC) ✠ (Vol 22) 1935 Bom 41 (42) : 59 Bom 194 (DB) ✠ ('10) 37 Cal 815 (821) (DB). (Law of fixtures recognised by English law does not find place in Common law of India.)✠(Vol 6) 1919 Cal 529 (531) (DB).

[9] The Courts may also apply the general rules of this Act to cases before this Act. (Vol 6) 1919 P C 1 (3): 42 Mad 589: 46 Ind App 109 (PC)✠('99) 26 Cal 39 (45): 25 Ind App 179 (PC) ✠ ('01) 24 Mad 47 (56) (FB).

6. Clause (d).—[1] Where a party is adjudged an insolvent, a sale by the Official Receiver to a party is governed by this Act. (Vol 29) 1942 Oudh 424 (424, 425): 18 Luck 433 (D B). ((Vol 26) 1939 Oudh 55 : 14 Luck 404, *Overruled*,) ✠ (Vol 14) 1927 Mad 1 (2, 3) : 50 Mad 135 (F B). (S. 43 applied—Krishnan J. dissenting.)

[2] A transfer by the Official Liquidator of a company which has been wound up, is not one either by operation of law, or by or in execution of a decree or order of a Court. (Vol 4) 1917 Bom 151 (152) : 42 Bom 215 (D B).

[3] In some cases a transfer by a court sale has been referred to as a transfer by "operation of law". ('93) 20 Cal 236 (239) (D B) ✠ ('81) 7 Cal 107 (118): 8 Ind App 65 (P C).

[4] A transfer under a compromise sanctioned by the Court is not a transfer "by a decree of Court". (Vol 3) 1916 Cal 644 (645) (D B). (The word "not" appears to have been omitted by clerical mistake.)

[5] Illustrations of transfers to which this Act does not apply:

(a) Purchase of debt at an execution sale is not affected by S. 135 ('92) 15 Mad 382 (383) (D B)✠ ('11) 1 Mad W N 133 (134) (D B).

(b) Assignment by Court of a security bond executed in favour of a Court is a transfer by order of Court and is valid even if made without a registered instrument. (Vol 30) 1943 Pat 218 (223): 22 Pat 114 (DB)✠(Vol 18) 1931 All 389(390): 53 All 786 (FB).

(c) Purchase by legal practitioner at court sale of an actionable claim is not affected by S. 136. (Vol 14) 1927 Cal 691 (692) (D B).

(d) A transferee of the lessor's interest at a court sale cannot claim apportionment of rent under S. 36. ('94) 21 Cal 383 (386) (D B)✠(Vol 3) 1916 Mad 323 (325): 39 Mad 283 (D B).

(e) A transfer in execution of a decree is not governed by S. 51 which occurs in Chap. II. (Vol 18) 1931 All 277 (283, 290,: 53 All 334 (F B).

(f) Sections 2 (d) and 5 prevent S. 53 operating in case of transfer under order or decree of Court. (Vol 29) 1942 Mad 632 (633): I L R (1943) Mad 47 (D B).

[6] The principles underlying the provisions of the Act may be applied to transfers by operation of law or by or in execution of a decree or order of a Court. (Vol 29) 1942 Mad 632 (633, 634): I L R (1943) Mad 47 (D B). (Principle of S. 53 applied)✠(Vol 17) 1930 Rang 132 (133): 7 Rang 734 (D B). (Doctrine of *lis pendens*) ✠ ('01) 28 Cal 744 (747) (D B). (Principle of merger.) ✠ (Vol 16) 1929 All 238 (239) : 51 All 595 (D B). (The principle of Ss. 36 and 53.) ✠ (Vol 22) 1935 Cal 39 (58): 61 Cal 711 (DB). (Section 36.)✠('12) 1912 Mad W N 1235 (1237) (D B). (Principle of S. 132.)✠ (Vol 21) 1934 Lah 460 (462): 15 Lah 849 (D B) (Section 2 (d), T. P. Act, contains a highly technical provision.)✠(1900) 23 All 60 (62, 64) (D B). (Doctrine of *lis pendens* applied.) ✠ (Vol 31) 1944 Mad 568 (568). (Principle of S. 36 applied.) ✠(Vol 12) 1925 Oudh 496 (498): 29 Oudh Cas 37 (D B). (*Lis pendens.*)✠('03) 27 Bom 266 (270) (D B). (Do.) ✠ ('88) 15 Cal 94 (99) (D B) (Do.)

[But see (1900) 3 Oudh Cas 170(171). (Doctrine of *lis pendens* does not apply) ✠ ('71) 15 Suth W R 308 (309) (D B). (The doctrine of *lis pendens* is not applicable.)]

[7] Section 57 and Chap. IV apply to transfers by operation of law or by or in execution of a decree or order. (Vol 30) 1943 All 115 (121, 122) : I L R (1943) All 453 (F B). ((Vol 26) 1939 All 687: I L R (1939) All 885, holding that S. 100 does not apply to auction sales, *overruled*)✠('02) 25 Mad 244 (270) (F B).

7. Escheat.—[1] On the death of a Hindu dying without heirs, his estate escheats to the Crown, by operation of law. (1860) 8 Moo Ind App 500 (523, 524) (P C). (Escheat is subject to the trusts and charges previously affecting estate.)

8. Muhammadan law. — [1] Where there is no rule of Muhammadan law inconsistent with the Act, the Act will apply. (Vol 17) 1930 All 462 (465) : 52 All 710 (D B). (Provisions of S. 53 in no way offend any rule of Muhammadan law.)

[2] The "Muhammadan law" is only the law so far as the laws of India have directed it to be observed and not Muhammadan law in force under Muhammadan Governments. ('70) 4 Beng L R 134 (169) (F B).

[3] Legislature in passing this Act did not intend to alter the Muhammadan law of pre-emption. (Vol 10) 1923 P C 41 (44): 48 Ind App 475: 45 Bom 1056 (P C).

9. Hindu and Buddhist laws. — [1] Under the section prior to the amendment in 1929, the rules of Hindu and Buddhist laws were also saved from the operation of the provisions in the second chapter of the Act.

SECTION 3—SYNOPSIS

1. Interpretation clause.
2. Immovable property.
3. Standing timber.
4. Growing crops.
5. Grass.
6. Attached to the earth.
7. Imbedded in the earth.
8. Attached to what is so imbedded.

"instrument" means a non-testamentary instrument :

[a]["attested", in relation to an instrument, means [b][and shall be deemed always to have meant] attested by two or more witnesses each of whom has seen the executant sign or affix his mark to the instrument, or has seen some other person sign the instrument in the presence and by the direction of the executant, or has received from the executant a personal acknowledgment of his signature or mark, or of the signature of such other person, and each of whom has signed the instrument in the presence of the executant; but it shall not be necessary that more than one of such witnesses shall have been present at the same time, and no particular form of attestation shall be necessary :]

[a] *Inserted* by the Transfer of Property (Amendment) Act, 1926 (27 [XXVII] of 1926), S. 2. [b] *Inserted* by the Repealing and Amending Act, 1927 (10 [X] of 1927), S. 2 and Sch. I.

"registered" means registered in [b][a Province] under the law[a] for the time being in force regulating the registration of documents :

[a] *See* the Indian Registration Act, 1908 (XVI of 1908). [b] *Substituted* for "British India" by the Indian Independence (Adaptation of Central Acts and Ordinances) Order, 1948. [23-3-1948.]

"attached to the earth" means—

(*a*) rooted in the earth, as in the case of trees and shrubs;

(*b*) imbedded in the earth as in the case of walls or buildings; or

(*c*) attached to what is so imbedded for the permanent beneficial enjoyment of that to which it is attached;

[a]["actionable claim" means a claim to any debt, other than a debt secured by mortgage of immoveable property or by hypothecation or pledge of moveable property, or to any beneficial interest in moveable property not in the possession, either actual or constructive, of the claimant, which the Civil Courts recognize as affording grounds for relief, whether such debt or beneficial interest be existent, accruing, conditional or contingent :]

[a] *Inserted* by the Transfer of Property Act, 1900 (2 [II] of 1900), S. 2.

SECTION 3 — SYNOPSIS *(contd.)*

9. "Attested."
10. "Each of whom has seen the executant sign."
11. "Sign."
12. Acknowledgment of signature need not be express.
13. "In the presence of the executant."
14. Onus of proof of attestation.
15. Form of attestation.
16. Party as attestor.
17. Scribe as a witness.
18. Sub-Registrar and persons identifying before Sub-Registrar, as witnesses.
19. Registered.
20. Actionable claim.
21. Debts.
22. Debt ripened into a decree.
23. Beneficial interest in moveable property.
24. Civil Courts.
25. "Accruing"
26. Conditional and contingent debt.
27. Notice.
28. Wilful abstention from enquiry.
29. Gross negligence.
30. Attestation of deed, if notice of contents.
31. Notice of deed.
32. Question of wilful abstention or gross negligence, if one of law or fact.
33. Notice by registration of instrument.
34. "Any person acquiring such property," etc.
35. Proviso to Explanation I.
36. Possession as notice.
37. Explanation III.
38. "Agent."
39. "Whilst acting on his behalf in the course of business to which that fact is material."
40. Effect of agency ceasing after notice.
41. Principal, an infant—Notice to agent.
42. Principal, the Government — Notice to agent.
43. Lis pendens and decree as notice.
44. Fraudulent party cannot plead constructive notice.

1. Interpretation clause. — [1] Definition in the Act may include certain things which the Legislature intends to include, but which may not fall within the ordinary acceptation of the term. (Vol 13) 1926 Sind 58 (61): 25 Sind L R 345 (F B). (Object of interpretation clause is to declare that certain words used in Act shall have meaning given to them by Legislature)✠ ('11) 35 Bom 412 (417) (D B).

[2] Meaning assigned to a word or expression by the interpretation clause is the meaning of the word wherever it occurs in the Act. ('85) 12 Cal 430 (433) (D B) ✠ (Vol 13) 1926 Sind 58 (61) : 25 Sind L R 345 (F B) ✠ ('09) 2 Ind Cas 632 (632) (D B) (All). (Unless there is anything repugnant in subject or context.)

[3] Definition intended to be exhaustive of signification of word—Legislature uses "means" or "means and includes". ('01) 1901 All W N 10 (10) (D B) ✠ ('78) 2 Mad 5 (7) (D B). (Definition not intended to be exhaustive of things denoted by it but merely enumerative — Word "includes" is used.)

[4] Word "includes" is a word of extension and is used to enlarge the meaning of the word. ('06) 4 Cri L Jour 23 (31): 30 Bom 558 (566) (D B).

[5] By including certain things in the definition others are not thereby excluded. ('96) 22 Bom 235 (237, 238) (D B)✠('78) 4 Cal 483 (493) (F B).

[6] Definition given by the General Clauses Act, 1897, would apply to the expression used in this Act except as modified by the definition in this section. (Vol 29) 1942 Pat 120 (125) (D B) ✠ (Vol 16) 1929 All 161 (163) : 51 All 494 (D B) ✠ ('12) 9 All L Jour 776 (777)✠(95) 5 Mad L Jour 27 (28)✠('88) 13 Bom 87 (89) (S B)✠(Vol 27) 1940 Rang 102 (103): 1940 Rang L R 7.

2. Immovable property. — [1] Term "immoveable property" comprehends all that would be real property according to English law, and possibly more. ('74) 1 Ind App 34 (52) (P C).

[a]["a person is said to have notice" of a fact when he actually knows that fact, or when, but for wilful abstention from an inquiry or search which he ought to have made, or gross negligence, he would have known it.

Explanation I. — Where any transaction relating to immoveable property is required by law to be and has been effected by a registered instrument, any person acquiring such property or any part of, or share or interest in, such property shall be deemed to have notice of such instrument as from the date of registration or, [b][where the property is not all situated in one sub-district, or where the registered instrument has been registered under sub-section *(2)* of section 30 of the Indian Registration Act, 1908, from the earliest date on which any memorandum of such registered instrument has been filed by any Sub-Registrar within whose sub-district any part of the property which is being acquired, or of the property wherein a share or interest is being acquired, is situated] :

Provided that—

(1) the instrument has been registered and its registration completed in the manner prescribed by the Indian Registration Act, 1908, and the rules made thereunder,

(2) the instrument [c][or memorandum] has been duly entered or filed, as the case may be, in books kept under section 51 of that Act, and

(3) the particulars regarding the transaction to which the instrument relates have been correctly entered in the indexes kept under section 55 of that Act.

Explanation II.—Any person acquiring any immoveable property or any share or interest in any such property shall be deemed to have notice of the title, if any, of any person who is for the time being in actual possession thereof.

Explanation III. — A person shall be deemed to have had notice of any fact if his agent acquires notice thereof whilst acting on his behalf in the course of business to which that fact is material :

Provided that, if the agent fraudulently conceals the fact, the principal shall not be charged with notice thereof as against any person who was a party to or otherwise cognizant of the fraud.]

[a] *Substituted* by the Transfer of Property (Amendment) Act, 1929 (20 [XX] of 1929), S. 4. [b] *Substituted ibid.*, 1930 (5 [V] of 1930), S. 2. [c] *Inserted, ibid.*

Section 3 — Note 2 *(contd.)*

[2] Definition of the expression "immoveable property" in this section is negative and is neither comprehensive nor exhaustive. (Vol 20) 1933 All 50 (51): 54 All 437.

[3] Interest in immovable property would be immovable property. (Vol 18) 1931 Cal 223 (227) : 58 Cal 136 (D B) ✠ (Vol 21) 1934 Rang 250 (258, 259) : 12 Rang 370 (F B) ✠ (Vol 25) 1938 All 577 (579, 580) : I L R (1938) All 904 (S B)✠(Vol 9) 1922 Mad 344 (345): 44 Mad 965 (D B) ✠ ('04) 28 Bom 181 (186) (D B) ✠ (Vol 8) 1921 Mad 137 (138) : 44 Mad 196 (D B) ✠ (Vol 14) 1927 Lah 373 (375) (D B) ✠ (Vol 8) 1921 Lah 137 (137) : 7 Lah 273 (D B) ✠ (Vol 18) 1931 Cal 223 (225): 58 Cal 136 (D B).

[See however (Vol 25) 1938 Nag 377 (381) : I L R (1939) Nag 432 (D B).]

[4] Question concerning rights of Hindus — Words "immovable property" must be taken to include whatever Hindu law classes as immovable property, although not such in ordinary acceptation of word. ('74) 1 Ind App 34 (50) (P C).

[5] *Tastik* or cash allowance payable to one temple from the property of another is *nibandha* or immovable property. ('10) 34 Bom 349 (352) (D B).

[6] Following have been held to be immovable property :

(a) A *jalkar* right. ('87) 12 Bom 221 (224) (DB) ✠ (Vol 8) 1921 Bom 93 (100)✠('92) 19 Cal 544 (547) (FB) ✠ (Vol 14) 1927 Nag 147 (149) : 23 Nag L R 16✠(Vol 4) 1917 Nag 37 (38, 39) : 14 Nag L R 35.

(b) The equity of redemption. ('97) 21 Bom 226 (228) (DB)✠('94) 22 Cal 33 (41, 42) (DB)✠('93) 18 Bom 739 (745) (DB)✠('06) 3 Nag L R 72 (74).

(c) A right of ferry. ('90) 13 Mad 54 (55) (DB).

(d) Rights and interests of a grove-holder in a grove. (Vol 1) 1914 All 162 (163) (DB).

(e) A right to slag and earth before separation from the soil. (Vol 19) 1932 Mad 734 (735) : 56 Mad 169 (DB).

(f) A right of easement. ('75) 24 Suth W R 300 (300) (DB)✠(Vol 4) 1917 Cal 681 (685) (DB).

(g) A hereditary office under Hindu law. ('82) 6 Bom 512 (514, 515) (FB)✠('72) 9 Bom H C R 99 (113) (FB)✠(Vol 19) 1932 Cal 791 (795, 813) : 60 Cal 452 (FB).

(h) A pension or other periodical payment or allowance granted in permanence. ('82) 6 Bom 546(559)(FB). [But see ('97) 21 Bom 387 (390) (DB).]

(i) A right to *vatan*. ('85) 1885 Bom P J 130 (DB).

(j) A right to *jagir* income ('94) 1894 Pun Re No. 4, page 6 (7) (DB) ✠ (1900) 1900 Pun Re No. 2, page 5 (7) (DB).

(k) A hat. ('95) 22 Cal 752 (755) (DB)✠(Vol 18) 1931 Oudh 110 (112) : 5 Luck 504 (DB).

(l) A toda giras haq. ('73) 21 Suth W R 178(181)(PC).

(m) A right to collect rents and profits of land. (Vol 29) 1942 Pat 120 (125) (DB) ✠ (Vol 27) 1940 Rang 102 (103)✠(Vol 23) 1936 P C 230 (233, 234): 14 Rang 400 : 63 Ind App 340 (PC).

(n) A right to sever and collect leaves of the *tendu* tree. (Vol 25) 1938 Nag 377 (382) : I L R (1939) Nag 432 (DB).
[But see (Vol 24) 1937 Nag 116.]

[7] Following have been held not to constitute immovable property :

(a) A right to sayer compensation. ('92) 19 Cal 8 (12) (DB).

(b) A copyright. (Vol 26) 1939 All 305 (307) : I L R (1939) All 275 (DB).

(c) A royalty payable to the owner of the soil. (Vol 9) 1922 Pat 36 (37) (DB).

Section 3 — Note 2 *(contd.)*

(d) A right to turn of worship. (Vol 6) 1919 Cal 671 (672) : 46 Cal 455 (DB)✠(Vol 14) 1927 Pat 7 (8) : 6 Pat 245 (DB)✠('11) 39 Cal 227 (230) (DB).

(e) A right to parsaipan in the Central Provinces which is similar to *pala* or a turn of worship. (Vol 16) 1929 Nag 81 (81).

(f) A right to obtain the specific performance of an agreement to sell or to lease immovable property. (Vol 16) 1929 Rang 184 (185) : 7 Rang 144 (DB).

(g) The temporary right of a tenant-at-will to reap the produce of the land. (Vol 7) 1920 Lah 310 (311) : 1 Lah 567 (DB).

(h) A decree for sale on a mortgage-debt. ('13) 35 All 524 (526) (DB)✠('02) 6 Cal W N 5 (6) (DB) ✠ ('08) 12 Cal W N 625 (627) (DB).

[But see ('76) 1 Bom 267 (268) (DB).]

(i) A right to recover future maintenance allowance even though charged on immovable property. (Vol 16) 1929 All 281 (285) : 51 All 612 (DB).

[See however ('72) 9 Bom H C R 222 (225, 228) (DB).]

(j) Right of a person to arrears of rent of the land sold to him. ('11) 34 Mad 64 (67) (DB).

[But see (Vol 23) 1936 Nag 217 (217, 218).]

(k) *Brit jajmani* books. (Vol 33) 1946 All 476 (480, 481) (DB). (*Brit jajmani* payable to *Panda* of Muttra is not immovable property.)

3. Standing timber. — [1] Trees rooted in the earth are immovable property. (Vol 25) 1938 Nag. 377 (381) : I L R (1939) Nag 432 (DB)✠('09) 5 Nag L R 21 (23)✠('95) 19 Bom 207 (208) (DB)✠('84) 1884 Pun Re No. 112, p. 320 (320)✠('67) 2 Agra 300 (301)(DB)✠('98) 11 C P L R 89 (90) ✠ (Vol 16) 1929 Rang 200 (203) : 7 Rang 706 (DB) ✠ ('02) 5 Oudh Cas 228 (230) ✠ (Vol 8) 1921 Pat 482 (482).

[2] Where, trees rooted in the earth constitute standing timber, they are excepted, by this section, from the connotation of the term "immovable property." ('11) 9 Ind Cas 478 (478) (All)✠(Vol 25) 1938 All 115 (116) (DB).

[3] Trees, the wood of which is intended to be used for industrial purposes should be regarded as timber. (Vol 3) 1916 Oudh 211 (214) (DB)✠(Vol 15) 1928 Mad 392 (393)✠(Vol 33) 1946 Oudh 106 (107) : 21 Luck 48. (*Babul* tree is timber.)

[4] If the intention is to enjoy the trees or the fruits thereof without cutting them down, they are not standing timber but would be immovable property. (Vol 20) 1933 All 50 (52, 53) : 54 All 437✠(Vol 15) 1928 Pat 652 (653) : 7 Pat 646 (DB)✠(Vol 14) 1927 Pat 1 (2) : 5 Pat 765 (DB).

[5] If the intention is to cut down the trees sooner or later and utilise them for construction or other industrial purposes they are standing timber. (Vol 20) 1933 All 50 (53) : 54 All 437 ✠ (Vol 16) 1929 Oudh 93 (94) (DB) ✠ (Vol 2) 1915 Oudh 75 (76) : 18 Oudh Cas 122 ✠ ('96) 20 Mad 58 (64) (FB) ✠ (Vol 13) 1926 All 350 (351) (DB) ✠ ('06) 31 Bom 183 (197) (DB) ✠ (1900) 24 Bom 31 (33) (DB).

[6] If the intention is to use a tree for enjoying its fruits it would be immovable property. ('12) 10 All L Jour 516 (517).

[7] If the intention is to cut the tree down sooner or later for utilising the wood for building or other industrial purposes it would be timber. (1900) 24 Bom 31 (33) (DB) ✠ (Vol 13) 1926 Oudh 136 (138).

[8] Trees in a grove are not standing timber. (Vol 3) 1916 Oudh 211 (214) (DB) ✠ (Vol 12) 1925 Oudh 108 (108).

[9] Trees intended to be cut and converted into charcoal are standing timber. ('11) 13 Bom L R 874 (877) (DB).

4. Growing crops. — [1] Pan creepers, though they last for three years, are growing crops. ('98) 11 C P L R 87 (88).

[2] A "growing crop" means, a crop which is in existence and which is in process of coming to fruition. (Vol 24) 1937 Nag 289 (290) : I L R (1938) Nag 31.

[3] Mortgage of future crops that may be grown upon a certain plot of land is not governed either by the T. P. Act or by the Contract Act. (Vol 11) 1924 All 833 (833, 834) ✠ ('86) 13 Cal 262 (264) (DB) ✠ (Vol 27) 1940 Mad 929 (930) (DB).

5. Grass.—[1] Agreement for sale and purchase of growing grass, growing timber or underwood or growing fruit not made with a view to their immediate severance and removal from the soil and delivery as chattels to the purchaser, is a contract for the sale of an interest in the land. ('96) 20 Mad 58 (64) (FB).

6. Attached to the earth. — [1] In this country, the maxim *quicquid plantatur solo solo cedit* (whatever affixed to the soil becomes part of the soil) has been held to have only a limited application. (Vol 14) 1927 P C 135 (137) : 54 Ind App 218 : 54 Cal 669 (PC) ✠ (Vol 16) 1929 P C 163 (164) : 56 Ind App 259 : 53 Bom 589 (PC) ✠ (Vol 27) 1940 Mad 527 (528).

[2] Superstructure on land is immovable property even though the land on which it stands belongs to a third person. (Vol 14) 1927 Lah 373 (375) (DB).

[3] A shed resting by its own weight on the foundation prepared for it is not "attached to the earth." ('05) 29 Bom 323 (343) (DB).

7. Imbedded in the earth.—[1] Thing imbedded in the earth is immovable property. (Vol 25) 1938 Nag 377 (381) : I L R (1939) Nag 432 (DB) ✠ (Vol 13) 1926 Mad 343 (344) ✠ ('04) 31 Cal 340 (342) ✠ (Vol 10) 1923 Lah 150 (151).

[2] Sugar cane press imbedded in the ground would be immovable property. (Vol 1) 1914 All 176 (176).

[3] A well is imbedded in the earth and must be considered immovable property. ('88) 1888 Bom P J 125 (DB).

8. Attached to what is so imbedded.—[1] Doors, windows and window-shutters of a building form part of a building to which they are attached. ('85) 11 Cal 164 (166) (DB) ✠ (Vol 3) 1916 Mad 859 (862) : 38 Mad 18 (DB).

[2] Machinery, to shelter and protect which a building has been erected is not immovable property. (Vol 11) 1924 All 365 (368, 369) : 46 All 286 (DB).

[3] Test is, with what intention were the articles put into the building : whether they were put in for the more beneficial enjoyment of the building, or with the object of improving the value thereof by making it more artistic, or whether they were put in for a collateral purpose. (Vol 11) 1924 Mad 187 (188). (Distillery vats placed in building are not immovable property.) ✠ (Vol 27) 1940 Mad 527 (529) ✠ (Vol 31) 1944 Mad 492 (496): I L R (1945) Mad 304 (DB).

9. "Attested."—[1] Definition of "attested" is retrospective. (Vol 26) 1939 P C 117 (119) : I L R (1939) Kar (P C) 222 (PC). (Person signing document who has neither seen executant sign nor received any acknowledgment of his signature from executant is not attesting witness) ✠ (Vol 16) 1929 Mad 1 (2) : 52 Mad 123 (FB).

[2] In order to constitute the signature of a person a valid attestation, it is essential that he must have signed as a witness and not for any other purpose. (Vol 12) 1925 Oudh 737 (738) ✠ (Vol 18) 1931 Oudh 146 (150, 151) : 6 Luck 619 (DB) ✠ (Vol 16) 1929 Cal 123 (125) : 56 Cal 598 (DB).

[3] Where a person puts his signature in order to give approval to the transaction and not as a witness,

Section 3 — Note 9 *(contd.)*

he is not an attesting witness. (Vol 12) 1925 P C 89 (91) (PC).

[4] Person signing as a witness cannot be looked upon as signing in any other capacity. (Vol 25) 1938 Mad 90 (91) (DB).

10. "Each of whom has seen the executant sign." — [1] Deeds executed by pardanashin ladies — It is sufficient if witnesses sitting outside pardah subscribed their names after satisfying themselves as to identity of person executing deed. (Vol 7) 1920 Pat 772 (772) (DB) ✠ (Vol 7) 1920 Nag 164 (164) : 16 Nag L R 196 ✠ (Vol 5) 1918 Pat 356 (358) (DB) ✠ (Vol 3) 1916 Cal 884 (885).

[2] Mortgage deed executed by two pardanashin ladies—Attesting witnesses saw hand of each executant when she signed document seated behind curtain, and though they could not see faces of executants, they heard them speak and recognised their voices — Deed held duly attested. (Vol 2) 1915 P C 21 (22) : 37 All 474 : 42 Ind App 163 (PC).

11. "Sign." — [1] Document may be validly attested by the attesting witness putting a mark as a witness. (Vol 22) 1935 Mad 178 (181) : 58 Mad 220 (DB). ((Vol 19) 1932 Mad 272 (274), *Reversed.*) ✠ (Vol 31) 1944 All 61 (62) : I L R (1944) All 186 ✠ ('98) 2 Cal W N 603 (605) (DB) ✠ (Vol 23) 1936 All 576 (578) : 58 All 1064 (FB) ✠ (Vol 24) 1937 Rang 293 (297) (DB) ✠ ('05) 1 Nag L R 14 (16, 17).

[But see ('85) 11 Cal 429 (432) (DB)✠ ('79) 3 Bom 382 (384) (DB).]

[2] Signature need not be a full signature. (Vol 7) 1920 Oudh 87 (91) (DB) ✠ ('92) 15 Mad 261 (264) (DB).

[3] It is sufficient if the attesting witness gets his signature affixed for him by another with his consent. ('06) 33 Cal 861 (863, 864) (DB) ✠ (Vol 14) 1927 Oudh 510 (511) : 3 Luck 113 (DB) ✠ (Vol 18) 1931 All 101 (102) : 53 All 1 (DB).

12. Acknowledgment of signature need not be express. — [1] Acknowledgment of signature by executant need not be express — It is sufficient if it can be inferred from conduct of executant at time of signing of document by attesting witness. (Vol 24) 1937 All 646 (650) : I L R (1937) All 723 (DB) ✠ ('77) 1 Bom 547 (550).

13. "In the presence of the executant." — [1] For a valid attestation it is necessary that the attestor should have signed in the presence of the executant. (Vol 26) 1939 P C 117 (121) : I L R (1939) Kar (PC) 222 (PC).

[2] Expression "in the presence" means actual visual presence. (Vol 18) 1931 Oudh 146 (151) : 6 Luck 619 (DB).

[3] Question whether an attesting witness signed his name in the presence of the executant is a question requiring full consideration of the whole circumstances and it is not necessary that the executant should actually see the witnesses sign the document but, if their signatures were made under circumstances that the executant, if he was minded to see the witnesses sign, could have done so, it was sufficient. (Vol 23) 1936 P C 207 (210) : 63 Ind App 326 : 11 Luck 346 (PC).

[4] Where the executant is pardanashin and the attestator signs the document when the executant is behind the purdah and cannot see the witnesses, it must be held that the attestor has not signed in the presence of the executant. (Vol 18) 1931 Mad 140 (141, 145) : 54 Mad 163 (DB) ✠ (Vol 18) 1931 Mad 335 (337) (DB) ✠ (Vol 18) 1931 Oudh 146 (151) : 6 Luck 619 (DB).

[5] Fact that the signatures of the witnesses appear to be written with different ink or pens from that used to write the body of the document does not necessarily show that the witnesses were not present when the document was executed. (Vol 12) 1925 Lah 430 (431) (DB).

14. Onus of proof of attestation.—[1] It may be assumed that the executant signed first and the attesting witness afterwards. (Vol 18) 1931 Cal 806 (807) ✠ (Vol 13) 1926 Oudh 209 (209, 210). (It may be assumed that the attesting witness signed document after seeing executant sign after receiving acknowledgment from executant of his signature and that attestation was in presence of executant.)

15. Form of attestation. — [1] Attesting witness need not be formally described as such on the face of the document. (Vol 3) 1916 Bom 123 (124) : 41 Bom 384 (DB).

[2] String of signatures towards the end of an instrument or somewhere on the instrument without any explanation would be quite sufficient to show that the persons put their signatures by way of saying that they had seen the document executed or had received an acknowledgment to that effect. (Vol 16) 1929 Cal 123 (125) : 56 Cal 598 (DB).

[3] If it is proved, that a person signed the document before the executant executed it, he cannot be said to be an attesting witness. (Vol 13) 1926 Cal 637 (638) (DB) ✠ (Vol 10) 1923 Nag 45 (46) ✠ (Vol 3) 1916 Oudh 185 (186) (DB) ✠ ('80) 5 Cal 738 (739) (DB) ✠ ('09) 5 Nag L R 3 (4).

[See however (Vol 7) 1920 Cal 784 (785) (DB).]

16. Party as attestor. — [1] Party to a deed cannot be an attesting witness of that deed. ('10) 14 Cal W N 1046 (1048) ✠ (Vol 18) 1931 Oudh 285 (286, 287): 7 Luck 41 (FB) ✠ ('10) 37 Cal 526 (535) (DB).

[2] Person who signs on behalf of an illiterate executant cannot also sign as attestor. (Vol 19) 1932 Mad 272 (274) ✠ (Vol 6) 1919 Cal 550 (551) : 46 Cal 522 (DB) ✠ (Vol 9) 1922 Cal 163 (169, 170) : 49 Cal 438 (DB) ✠ (Vol 12) 1925 Oudh 737 (737) ✠ (Vol 14) 1927 Sind 118 (120) : 19 Sind L R 322.

[3] Definition of attestation implies that the attesting witness is a person other than the person who executed the document. (Vol 19) 1932 Mad 272 (274) ✠ (Vol 18) 1931 Oudh 285 (287) : 7 Luck 41 (FB) ✠ ('10) 14 Cal W N 1046 (1048).

[4] Deed executed benami — Real owner though he may be considered party to transaction is not party to deed as it stands and can validly attest deed. (Vol 18) 1931 Oudh 285 (287) : 7 Luck 41 (FB).

[5] Executant himself making mark in token of his signature—Scribe of document writing explanatory note to mark which would otherwise be unintelligible, cannot be considered to have signed "on behalf of the executant" and is not precluded from attesting document as witness. (Vol 13) 1926 Oudh 209 (210).

[6] Person who is interested in the money advanced under a deed of mortgage but who is not himself a party to the deed, can validly attest the deed. ('11) 13 Bom L R 944 (946) (DB).

17. Scribe as a witness. — [1] Person signing document describing himself as scribe — No indication that he intended to sign it as witness also—He cannot be deemed to be attesting witness. (Vol 29) 1942 Bom 291 (296) (DB) ✠ (Vol 12) 1925 P C 89 (91) (PC) ✠ (Vol 27) 1940 Rang 134 (135) : 1940 Rang L R 199.

[2] It cannot be said as a matter of law that a scribe cannot be an attesting witness. (Vol 13) 1926 Cal 150 (151) (DB)✠(Vol 27) 1940 Rang 134 (135) : 1940 Rang L R 199 ✠ ('13) 24 Mad L Jour 534 (536) (DB) ✠('97) 1897 All W N 146 (146) (DB).

[3] Circumstances showing that scribe was present and witnessed execution of document and intended to sign also as witness — He would be attesting witness. (Vol 11) 1924 Rang. 139 (140) : 1 Rang 557 ✠ (Vol 4) 1917 Low Bur 139 (140)✠('97) 1897 All W N 146 (146)

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(DB)✠('01) 5 Cal W N 454 (455)✠(Vol 4) 1917 Mad 473 (474) : 39 Mad 1035 (DB)✠(Vol 5) 1918 Mad 491 (491): 41 Mad 535 (DB) ✠ (Vol 8) 1921 Cal 208 (208) : 48 Cal 61 (DB) ✠ (Vol 14) 1927 Sind 118 (120) : 19 Sind L R 322✠(Vol 27) 1940 Rang 134 (135):1940 Rang LR 199.

[But see (Vol 20) 1933 Sind 257 (258) (DB)✠(Vol 16) 1929 Sind 217 (218) : 24 Sind L R 223 (DB)]

[4] Scribe who signs expressly as an attesting witness is an attesting witness. (Vol 3) 1916 Bom 123 (125):41 Bom 384 (DB) ✠ (Vol 15) 1928 Bom 267 (268):52 Bom 219 (DB) ✠ (Vol 17) 1930 Cal 750 (752) (DB).

[5] Mere fact that person is scribe or that he puts word "scribe" after his name will not show that he has not put his signature on document by way of saying that he has seen instrument executed—Such signature often occurs under heading "witness" or at least among host of signatures put down without any explanation but as signatures of witnesses — Such signatures would be those of attesting witnesses. (Vol 16) 1929 Cal 123 (125) : 56 Cal 598 (DB).

18. Sub-Registrar and persons identifying before Sub-Registrar, as witnesses.—[1] Signatures of the registering officer and of the identifying witnesses before him would be valid attestation within the meaning of this Act, if the other essentials necessary under this definition are satisfied. (Vol 16) 1929 Mad 1 (2) : 52 Mad 123 (FB) ✠ (Vol 16) 1929 Cal 123 (126) : 56 Cal 598 (DB) ✠ (Vol 17) 1930 Cal 750 (752) (DB)✠(Vol 23) 1936 Nag 171 (172)✠(Vol 15) 1928 Bom 267 (268) : 52 Bom 219 (DB) ✠ (Vol 21) 1934 Nag 1 (12):30 Nag L R 62 (DB) ✠ (Vol 9) 1922 Pat 402 (404) : 1 Pat 300 (DB) ✠ (Vol 16) 1929 Sind 217 (218):24 Sind L R 223 (DB) ✠ (Vol 15) 1928 Sind 93 (94)

[But see (Vol 19) 1932 All 527 (531, 532, 533) : 54 All 1051 (FB) ((Vol 18) 1931 All 101 : 53 All 1, *Overruled*) ✠ (Vol 23) 1936 Bom. 94 (96) ✠ (Vol 18) 1931 Oudh 146 (150) 6 Luck 619 (DB)✠(Vol 20) 1933 Oudh 365 (367) : 9 Luck 12 (DB) ✠ (Vol 26) 1939 Rang 211 (212, 213) : 1939 Rang L R 388.]

19. Registered.—[1] Document which is required to be registered under the law for the time being in force, but is not so registered, has no operative effect and is not effective for the purpose for which it is created ('83) 5 All 599 (601) (DB) ✠ ('85) 7 All 590 (593, 594 (DB) ✠ ('91) 18 Cal 556 (569) (FB) ✠ ('73) 5 N W P H C R 91 (93) (DB).

[2] Inclusion of property not belonging to mortgagor and not intended to form security — Registration is invalid. (Vol 8) 1921 P C 8 (10) : 48 Cal 509 : 48 Ind App 127 (PC).

[3] Deed presented by attorney after the death of the executant — Registration is invalid (1900) 23 All 233 (240, 242) : 28 Ind App 15 (PC).

[4] Registration in wrong registration office is invalid. (Vol 28) 1941 Oudh 41 (42) : 16 Luck 99 (DB).

20. Actionable claim.—[1] Transfer of a right in immovable property is not a transfer of an actionable claim even though the owner is not in possession ('86) 13 Cal 297 (298, 299) (DB) ✠ (Vol 26) 1939 Oudh 122 (125). (Mere right to sue cannot be subject of transfer by virtue of S 6, cl (e) and cannot be considered as "debt" or beneficial interest in movable property) ✠ (1900) 3 Oudh Cas 215 (228) (DB)

[2] Transfer of a right to movable property is not a transfer of an actionable claim even though the owner is not in possession. ('88) 11 Mad 445 (447) (DB).

21. Debts.—[1] 'Debt" is a sum of money which is now payable or will become payable in future by reason of a present obligation (Vol 24) 1937 Bom 382 (383) ✠ (Vol 22) 1935 Nag 2 (4):31 Nag L R 142✠('09) 36 Cal 936 (938) (FB).

[2] Debt would not include a sum of money the payment of which depends upon a contingency which may or may not happen (Vol 14) 1927 Sind 78 (82) : 22 Sind L R 1 (DB) ✠ (Vol 22) 1935 Nag 2 (4) : 31 Nag L R 142. (If any *ascertained amount* is found to be recoverable as result of breach of contract it will be debt.)✠(1900) 27 Cal 38 (42) (DB).

[3] Debt must be a liquidated sum of money or a certain sum of money. ('42) 1942 Nag L Jour 30 (33)✠ (Vol 19) 1932 P C 32 (33, 34) : 59 Ind App 41 : 11 Pat 266 (PC).

[4] Sum is not the less liquidated because of the mere fact that a calculation will have to be made before determining the exact amount. (Vol 21) 1934 Mad 461 (463) : 57 Mad 1074 (DB).

[5] Following are all debts within the meaning of this Act :

(a) Book-debt. (Vol 8) 1921 Mad 137 (138, 139) : 44 Mad 196 (DB).

(b) A debt separated from the security given therefor. (Vol 18) 1931 P C 245 (247, 248) :58 Ind App 323: 59 Cal 377 (PC).

(c) Arrears of rent or other monies which have become due. (Vol 31) 1944 Pat 129 (134) (DB) ✠ ('13) 40 Cal 650 (651) (FB) ✠ (Vol 12) 1925 Pat 310 (312) : 4 Pat 43 (DB).

(d) Consideration in money left in the hands of vendee to be paid to a third person. (Vol 25) 1938 All 544 (545).

(e) Balance of consideration remaining with the vendee after discharge of the debts quoted. (Vol 21) 1934 Oudh 240 (241) : 10 Luck 26 (DB).

(f) Unpaid consideration on a usufructuary mortgage bond. (Vol 23) 1936 Lah 196 (198) (DB).

(g) Provident fund money in the hands of an employer (Vol 22) 1935 Cal 756 (758) : 63 Cal 578 (DB).

(h) Money to be recovered under an unpaid bill. (Vol 26) 1939 Cal 715 (716) : I L R (1939) 2 Cal 341 (DB).

(i) Arrears of annuity though charged upon immovable property (Vol 22) 1935 P C 165 (166) : 62 Ind App 265 : 63 Cal 1 (PC).

(j) Arrears of rent which are a charge on the tenure or holding of the tenant. (Vol 12) 1925 Pat 310 (312) : 4 Pat 43 (DB).

(k) A claim to money deposited for the due performance of a duty. ('34) 1934 Mad W N 577 (579).

[6] Consideration due on a mere money bond is not a debt. (Vol 17) 1930 Lah 100 (101).

22. Debt ripened into a decree. — [1] Word "debt" would include a decree debt also but such a debt would not be an actionable claim ('86) 12 Cal 610 (612) (DB) ✠ (Vol 15) 1928 Mad 478 (478) : 51 Mad 681 (DB) ✠ (Vol 8) 1921 Mad 113 (114) (DB) ✠ (1900) 24 Bom 502 (503) (DB)

[But see (Vol 26) 1939 Mad 543 (545) (DB) ✠ (1900) 23 Mad 449 (455) (DB)]

[2] Claim which has been put in action will, nevertheless, be an actionable claim until the decree is actually passed (Vol 26) 1939 Cal 715 (716) : I L R (1939) 2 Cal 341 (DB) ✠ (Vol 1) 1914 Mad 512 (525) : 37 Mad 238 (FB).

23. Beneficial interest in moveable property.—[1] Benefit of a contract in respect of moveable property is a beneficial interest in moveable property. (Vol 21) 1934 All 960 (962) ✠ ('07) 9 Bom L R 838 (843) (DB) ✠ ('07) 9 Bom L R 119 (121) ✠ ('06) 33 Cal 702 (708).

[2] *B* contracted with *A* for purchase of goods at fixed price and agreed to pay damages if *A* suffered any loss on account of *B*'s refusing to take delivery at that price — *B*'s right under contract held could not be considered actionable claim. (Vol 23) 1936 Nag 37 (39, 40) : 31 Nag L R Sup 154.

Section 3 — Note 23 *(contd.)*

[3] Partner's right to call upon another partner to furnish an account in respect of the dissolved partnership is a beneficial interest in moveable property not in the possession of the claimant. (Vol 12) 1925 Sind 72 (75).

[4] Copyright is not an actionable claim. (Vol 26) 1939 All 305 (308) : I L R (1939) All 275 (DB).

[5] Claim to mesne profits is not a claim to any beneficial interest in moveable property. (Vol 11) 1924 Pat 551 (553) : 3 Pat 575 (DB).

[6] Contract for the purchase of immovable property is assignable, though not as property or as an actionable claim. (Vol 15) 1928 P C 171 (176) : 55 Ind App 243 : 51 Mad 533 (PC).

[7] Claim to recover back earnest money and part purchase-money which had been given to the proposed vendor under a contract of sale of immovable property, is a beneficial interest in moveable property. (Vol 14) 1927 Sind 78 (82) : 22 Sind L R 1.

24. Civil Courts.—[1] Words "Civil Courts" do not include all Courts exercising jurisdiction of a civil nature and do not include Revenue Courts having exclusive jurisdiction over certain matters. (Vol 21) 1934 All 155 (159) : 56 All 624 (FB).

[2] Rent Court which has exclusive jurisdiction over certain classes of cases arising out of the Bengal Rent Act is a Civil Court. ('83) 9 Cal 295 (300, 301) : 9 Ind App 174 (PC).

25. "Accruing."—[1] Actionable claim is a claim to a 'debt' existent, accruing, conditional or contingent. (Vol 15) 1928 All 193 (193) : 50 All 507 (DB).

[But see (Vol 13) 1926 Mad 1173 (1176) (DB).]

26. Conditional and contingent debt.—[1] Contingent debt is a "debt", the payment of which is dependent upon a contingency. (1826) 108 E R 134 (135) : 4 L J (OS) K B 176, *Clayton* v. *Gosling*.

[2] Debt due from potential customers in the future, who are not yet ascertained or ascertainable, and with whom no present relation exists giving rise to any possibility of any future liability, is not a debt. (Vol 25) 1938 Rang 1 (4).

[3] Claim to the policy monies under a life policy is a debt not payable *in præsenti* but a conditional and contingent debt. ('11) 13 Bom L R 590 (600) (DB).

[4] Right to monies accruing becoming due under a life insurance policy is an actionable claim. ('13) 37 Bom 198 (209) : 40 Ind App 24 (PC).

27. Notice.—[1] Actual notice must be definite information given by a person interested in the thing in respect of which the notice is issued. (Vol 15) 1928 All 159 (161) : 50 All 328 (DB).

[2] Actual notice is not established by proof of casual conversation. (1868) 37 L J Ch 881 (882): L R 3 Ch A 488, *Lloyd* v. *Banks* ✠ (1880) 14 Ch D 406 (419): 49 L J Ch 465, *Saffron Waldon Second Benefit Building Society* v. *Rayner*.

[3] Notification in a newspaper would not be an actual notice to the subscriber of the paper unless his attention is drawn to the said notification. (Vol 16) 1929 Cal 736 (737).

[4] Constructive notice is knowledge which the Courts impute to a party upon a presumption so strong that it cannot be allowed to be rebutted, that the knowledge must have been communicated. (Vol 15) 1928 All 159 (161) : 50 All 328 (DB) ✠ (1859) 44 E R 1380 (1383) : 28 L J Ch 311, *Espin* v. *Pemberton*.

[5] Person who is bound to make an inquiry and fails to do it should be held to have notice of all facts which would have come to his knowledge had he made the inquiry. ('13) 17 Cal L Jour 209 (214) (DB) ✠ (Vol 19) 1932 Mad 305 (308, 309) : 55 Mad 519 (DB). (In dealing with question of constructive notice, English decisions should be applied only where circumstances are really similar.) ✠ (Vol 19) 1932 Mad 115 (118): 55 Mad 320 (DB) ✠ ('05) 7 Bom L R 407 (410) (DB) ✠ ('83) 7 Bom 139 (145) (DE) ✠ (Vol 2) 1915 Cal 478 (481) : 42 Cal 625 (DB) ✠ (Vol 10) 1923 Sind 50 (53): 16 Sind L R 278 (DB) ✠ (Vol 24) 1937 Oudh 301 (308) (DB).

[6] Person not bound to make inquiry — He cannot be charged with constructive notice of facts that might have been ascertained on such enquiry. ('09) 33 Bom 53 (62) (DB).

[7] Where a fact, of which a person has notice, would not put him on inquiry as to the matters in question, it cannot be constructive notice of such matters. ('72) Ind App Suppl. Vol 40 (45) (PC).

28. Wilful abstention from enquiry.—[1] Wilful abstention is a designed or intentional abstention for avoiding the probable consequences of the act abstained from. (1900) 13 C P L R 45 (46) ✠ (Vol 28) 1941 Mad 707 (708) (DB).

[2] Words "wilful abstention from inquiry or search" mean such abstention from inquiry or search as would show want of *bona fides* on the part of the party. ('95) 22 Cal 185 (203) (SB) ✠ (1900) 13 C P L R 43 (46) ✠ (Vol 24) 1937 Oudh 301 (308) (DB).

[3] Person refusing a registered letter addressed to him will under this section be imputed with the notice of its contents. ('71) 16 Suth W R 223 (224) (DB).

[4] Person purchasing property situated within a municipality and assessed to taxes is bound to inquire if any taxes were due, and his omission to do so would be a wilful abstention from an inquiry which he ought to have made. (Vol 30) 1943 All 115 (123): I L R (1943) All 453 (FB). ((Vol 27) 1940 All 456 : I L R (1940) All 669, *Overruled.*) ✠ (Vol 28) 1941 Oudh 305 (308): 16 Luck 607 (DB).

29. Gross negligence. — [1] Negligence is the omission to do something which a reasonable man guided by those considerations which ordinarily regulate the conduct of human affairs would do or doing something which a prudent and reasonable man would not do. (1856) 25 L J Ex 212 (213): 11 Ex 781, *Blyth* v. *Bermingham Waterworks Co.*

[2] Expression "gross negligence" is a negative and not an affirmative word and amounts to nothing more than ordinary negligence with the addition of a vituperative epithet. (1848) 152 E R 737 (739): 12 L J Ex 264, *Wilson* v. *Brett* ✠ (1843) 35 L J C P 321 (330) : L R 1 C P 600, *Grill* v *General Iron Screw Collier Co.* ✠ (1900) 13 C P L R 43 (47).

[3] There are degrees of negligence which though not definable are with some approach to certainty distinguishable. (1869) L R 2 P C 317 (336) : 38 L J P C 25, *Giblin* v. *McMullen*.

[4] Failure to exercise reasonable care, skill and diligence is "gross negligence" (1864) 140 R R 478 (482): 11 L T 184.

30. Attestation of deed, if notice of contents.—[1] Mere attestation of a document by a person is not notice to him of the contents thereof. (Vol 31) 1944 All 42 (55) (DB). (There may be circumstances in which document is attested which will raise presumption of notice of its contents.) ✠ (Vol 9) 1922 P C 20 (22) : 49 Cal 334: 49 Ind App 16: 18 Nag L R 1 (PC). (Do.) ✠ (Vol 3) 1916 Cal 843 (851, 858) (FB) ✠ ('41) 196 Ind Cas 380 (381, 382) (Pat) ✠ (Vol 32) 1945 P C 82 (83) : I L R (1945) Kar (PC) 200 (PC).

[2] Presumption of notice of contents of a document is a rebuttable one. ('13) 19 Ind Cas 255 (256) (All).

[3] Fact that the attestor is a relative of the parties is not a circumstance which will raise a presumption of notice of the contents of the document. ('69) 13 Moo

Section 3—Note 30 *(contd.)*
Ind App 209 (229) (PC) ✠ (Vol 1) 1914 P C 90 (91) : 42 Cal 876 : 42 Ind App 64 (PC).

[4] Attestor having existing interest in property dealt with in document — His attestation would raise *prima facie* presumption that he knew contents of document and acquiesced in disposition of property. ('68) 10 Suth W R Civil Rule 293 (293) (DB)✠('12) 36 Bom 515 (519) (DB) ✠ (Vol 2) 1915 Mad 800 (804) : 38 Mad 396 (DB) ✠ (Vol 11) 1924 Mad 819 (823)✠(Vol 6) 1919 Nag 124 (125).

[But see (Vol 24) 1937 Pesh 69 (70).]

[5] There may be other circumstances which would show that the attestation was intended to convey something more than a mere witnessing of the execution and was meant as involving a consent to the transaction. (Vol 13) 1926 Oudh 131 (132)✠('41) 196 Ind Cas 380 (381 382) (Pat) ✠ ('99) 3 Cal W N 207 (208) (DB) ✠ ('68) 10 Suth W R 293 (293) (DB) ✠ (Vol 21) 1934 Pat 93 (95).

31. Notice of deed. — [1] Notice, to a person dealing with property, of a deed relating to that property is constructive notice to him of its contents; provided that such deed relates to the title or forms part of the chain of the title to such property. ('93) 16 Mad 301 (303) (DB) ✠ (Vol 20) 1933 Mad 715 (720) (DB) ✠ ('10) 7 Ind Cas 218 (224) (DB) (Cal)✠('13) 17 Cal W N 224 (226) (DB) ✠ (Vol 1) 1914 Cal 382 (384) (DB)

[2] Failure of transferee of property to call for and examine the title deeds relating to the property would amount either to a wilful abstention from making an enquiry or search which he ought to have made or gross negligence, with the consequence that he would be deemed to have constructive notice of the transferor's title. (Vol 20) 1933 Cal 321 (322) (DB)✠(Vol 24) 1937 Oudh 301 (308) (DB). (And of all other facts which he could have discovered had he chosen to make proper investigation of title.) ✠ (1905) 1 Ch 632 (639) : 74 L J Ch 249, *Berwick & Co.* v. *Price*✠(1899) 2 Ch 264 (274, 275) : 68 L J Ch 583, *Oliver* v. *Hinton.*

[3] Mortgagee living in Akyab, where he knew that mortgages by deposit of title deeds were legal and usual, failed to ascertain whether or not title deeds were already pledged — His failure to ascertain it, held such abstention from inquiry which he ought to have made, or such negligence as to infer notice. (Vol 10) 1923 P C 211 (216):50 Ind App 283:1 Rang 637:51 Cal 86 (PC).

[4] Notice of a deed is notice of all other deeds referred to in that deed. (1836) 160 E R 383 (388): 2 Y & C 234, *Davies* v. *Thomas.*

[5] Transferee of property cannot be said to be guilty of negligence where he has *bona fide* inquired for the deeds and reasonable excuse has been given for not delivering them to him. (1851) 68 E R 586 (589) : 21 L J Ch 69, *Hewitt* v. *Loosemore.*

[6] Transferee of property cannot be said to be guilty of negligence in not making enquiry for the title deeds of an adjoining property which *prima facie* he has no right to ask his vendor to produce. (Vol 12) 1925 Bom 183 (184, 185) (DB).

[7] Notice to a purchaser by his title papers in one transaction will not be notice to him in an independent subsequent transaction in which the instruments containing the recitals are not necessary to his title. (Vol 8) 1921 Cal 730 (738) (DB).

[8] Mortgagee advancing money on the security of a considerable estate and omitting to investigate the title to a particular portion of it will not be affected with notice of equities affecting the residue of the estate which upon such investigation he might possibly have discovered. (1871) 41 L J Ch 175 (183) : 7 Ch App 75, *Hunter* v. *Walters.*

[9] Mortgagee from an executor was held to have constructive notice of a prior charge, "for had he taken the slightest pains to investigate the title of the mortgagors under the will he must have discovered the charge created by the will." ('09) 33 Bom 1 (21) : 35 Ind App 139 (PC).

[10] Mortgage by executor as executor — Failure of mortgagee to scrutinize will does not amount to constructive notice (Vol 20) 1933 Cal 429 (430):60 Cal 394.

[11] A person purchasing agricultural land, and not examining the Record of Rights has been held guilty of wilful abstention from an inquiry which he ought to have made. (Vol 15) 1928 Bom 427 (429, 430) : 52 Bom 883 (DB).

32. Question of wilful abstention or gross negligence, if one of law or fact.—[1] It is scarcely possible to declare *a priori* what shall be deemed constructive notice because that which would not affect one man may be abundantly sufficient to affect another. (Vol 16) 1929 Cal 83 (86) (DB) ✠ (Vol 26) 1939 Nag 132 (135).

[2] Where a person has all the means of knowledge of a fact he cannot escape responsibility, if, by using all ordinary diligence he could have acquired the knowledge. (1902) 71 L J Ch 363 (367) : 1 Ch 816, *Jacobs* v. *Morris.*

33. Notice by registration of instrument.—[1] Explanation I is not retrospective. (Vol 24) 1937 Oudh 1 (2):12 Luck 563 (DB)✠(Vol 20) 1933 Rang 153 (154)✠ (Vol 18) 1931 Nag 60 (63) : 27 Nag L R 24.

[2] Transfer of Property Act not in force — Notice cannot be imputed from mere fact that document is to be found upon Register of Deeds. (Vol 24) 1937 Pesh 74 (75) (DB) ✠ (Vol 22) 1935 Lah 410 (411) ✠ (Vol 27) 1940 Lah 269 (272).

[3] Transferee not making search in index in Sub-Registrar's Office to ascertain power of transferor to make transfer—He is not entitled to benefit of S. 41.(Vol 34) 1947 Bom 49 (53, 54).

34. "Any person acquiring such property," etc. —[1] A person is not fixed with constructive notice of a document coming into existence subsequent to his title. (Vol 18) 1931 All 275 (276) (DB) ✠ ('10) 12 Bom L R 940 (946) ✠ ('12) 9 All L Jour 759 (762)✠('04) 31 Cal 737 (742, 743) (DB)✠('03) 7 Cal W N 11 (18) (DB)✠ (Vol 8) 1921 Mad 374 (376) (DB)✠(Vol 19) 1932 Mad 115 (118) : 55 Mad 320 (DB).

[2] Will is not compulsorily registrable — Presumption of notice under this section does not apply. (Vol 34) 1947 Lah 147 (150) (FB).

35. Proviso to Explanation I.—[1] Registration may be invalid by reason of the document having been presented by a wrong person. (Vol 1) 1914 P C 16 (18): 37 All 49 : 42 Ind App 22 (P C).

[2] Registration may be invalid by reason of its having been registered at a place where the property is not situate. (Vol 1) 1914 P C 67 (71) : 41 Cal 972 : 41 Ind App 110 (P C).

[3] Fact that clauses (2) and (3) of the proviso have not been observed does not make the registration itself invalid. (Vol. 22) 1935 P C 165 (167) : 63 Cal 1 : 62 Ind App 265 (P C) ✠ ('74) 2 Ind App 210 (216) (P C).

36. Possession as notice.—[1] Tenant in possession—Constructive notice should have reference only to title of tenant and not to that of his lessors (Vol 19) 1932 Mad 71 (72) (DB) ✠ (Vol 11) 1924 Mad 67 (69) (DB)✠('83) 1883 Pun Re No. 102, p 315 ✠ ('89) 16 Cal 414 (417) (DB)✠('88) 12 Bom 569 (572) (DB).

[2] Transfer of Property Act not applying—Possession would be notice not only of title of person in possession but also of any agreement in his favour

Enactments relating to contracts to be taken as part of Contract Act.

4. The chapters and sections of this Act which relate to contracts shall be taken as part of the Indian Contract Act, 1872.

[a][And sections 54, paragraphs 2 and 3, 59, 107 and 123 shall be read as supplemental to the Indian Registration Act, [b][1908].]

[a] *Inserted* by the Transfer of Property Act (1882) Amendment Act, 1885 (3 [III] of 1885), S. 3. [b] *Substituted* by the Transfer of Property (Amendment) Act, 1929 (20 [XX] of 1929), S. 5, for "1877."

Section 3 — Note 36 *(contd.)*

under which he may subsequently obtain further title to such possession. (Vol 25) 1938 Lah 39 (40).

[3] Stacking fodder and tying cattle in an open site in a village where it is usual for neighbours to use open sites not belonging to them for such purposes cannot be said to be such possession as would constitute notice. (Vol 26) 1939 Lah 29 (31) : I L R (1939) Lah 261.

37. Explanation III.—[1] Agent is the alter ego of the principal and is the principal himself who stands precisely in the same position as his agent in the transaction. (1866) L R 2 Eq 134 (142) : 35 L J Ch 627, *Boursot* v. *Savage*✠('98) 26 Cal 381 (392, 393) (SB).

[2] Notice to an agent is notice to the principal in the circumstances stated in the explanation. (Vol 16) 1929 Lah 500 (502) (Whether it is communicated or not by agent to principal.) ✠ ('02) 30 Cal 539 (545) : 30 Ind App 114 (P C) ✠ ('02) 25 All 1 (17) : 29 Ind App 203 (P C).

38. "Agent."—[1] Agent not authorised to receive notice—Notice to him would not be notice to principal if agent is not held out to world as if he had such authority. (1880) 49 L J Ch 465 (467) : 14 Ch D 406, *Saffron Walden Second Benefit Building Society* v. *Rahner*.

[2] Notice to the agent of an agent is notice to the principal. (1744) 26 E R 818 (824) : 3 Atk 26, *Norris* v. *Le Neve*✠(1848) 17 L J Q B 282 (285) : 12 Q B 465, *Pike* v. *Stephens*.

[3] One solicitor employed another for obtaining execution of mortgage deed—Second solicitor not to be solicitor of transferee—Notice to such solicitor held not to be notice to transferee. (1863) 142 R R 180 (180) : 3 De G J & Sm 596, *Wyllie* v. *Pollen*.

[4] Notice to one partner is notice to all the partners. (Vol 18) 1931 Lah 227 (229) : 12 Lah 328 (DB).

[5] Mere fact that the husband of a purdanashin woman has knowledge of a particular fact cannot operate as notice to the woman. (Vol 12) 1925 Oudh 613 (615).

39. "Whilst acting on his behalf in the course of business to which that fact is material." — [1] Agent must have acquired the knowledge during the period when he was actually acting as the agent. ('88) 11 Mad 419 (440) (DB)

[2] Knowledge acquired before a person is appointed agent cannot be regarded as notice to the principal. (1886) 31 Ch D 671 (677) : 55 L J Ch 662, *In re Cousins*✠ (1740) 27 E R 621 (621) : Barn Ch 220, *Steed* v. *Whitaker*.

[3] Agent must have acquired the knowledge in the transaction in which he was employed as agent and the fact about which knowledge is acquired must be material to that transaction. (1848) 9 E R 897 (909) : 1 H L C 605, *Wilde* v. *Gibson*✠(1806) 33 E R 237 (239) : 9 R R 149.

[4] If the knowledge is acquired, not in the matter for which he is appointed agent but in some other matter there is no constructive notice to the principal of such fact. ('07) 31 Bom 566 (581, 582) : 34 Ind App 179 (P C).

[5] Notice to an agent or counsel, who was employed in the thing by another person, or in another business, and at another time, is no notice to his client, who employs him afterwards. (1746) 26 E R 1025 (1026) : 3 Atk 392, *Worsley* v. *Lord Scarborough* ✠ (Vol 18) 1931 Oudh 333 (340) : 7 Luck 131 (DB).

[But see (1817) 36 E R 81 (85) : 3 Mer 210, *Toulmin* v. *Steere* ✠ (1864) 34 L J C P 48 (48) : 11 L T (N S) 111, *Dresser* v. *Norwood*.]

[6] Same person agent of both parties to transaction —Notice to him in transaction in one capacity will be effectual notice to him in both capacities. (1837) 8 L J Ch 235 (236) : 45 R R 344, *Dryden* v. *Frost*✠ (1872) 20 W R (Eng) 795 (795), *Jones* v. *Frost*.

40. Effect of agency ceasing after notice. — [1] Fact that subsequent to the acquisition of notice by the agent, he ceased to be so does not prevent the application of the rule of constructive notice to the principal. (1861) 9 W R (Eng) 880 (882) : 7 Jur N S 1263, *North British Insurance Co.* v. *Hallett*.

41. Principal, an infant — Notice to agent. — [1] Immovable property purchased on behalf of infant through agent employed by trustees acting on behalf of minor — Notice of charge on property to agent will be notice to infant. (1817) 36 E R 81 (85) : 3 Mer 210, *Toulmin* v. *Steere*.

42. Principal, the Government — Notice to agent. —[1] Fact that the principal is the Government does not render the doctrine of constructive notice inapplicable. ('01) 26 Bom 271 (281) (DB).

43. Lis pendens and decree as notice.—[1] Decree is not notice to a purchaser who purchases after the decree where it is merely declaratory and inexecutable. (Vol 27) 1940 Nag 163 (172) : I L R (1941) Nag 513 (DB).

44. Fraudulent party cannot plead constructive notice.—[1] Person who is himself guilty of fraud in transactions with another cannot plead that the other had constructive notice of the facts which he was bound to disclose and which he actively concealed from him. ('88) 11 Mad 419 (439) (DB) ✠ ('88) 12 Bom 678 (682) (DB)✠('96) 20 Bom 290 (292) (DB).

[See however ('93) 22 Bom 686 (692) (DB).]

Section 4 — Note 1

[1] Actionable claim is contractual in its nature, and the chapter dealing with the transfer of such claims must be said to "relate to contracts" within this section. (Vol 20) 1933 Mad 207 (209) : 56 Mad 177 (DB) ✠ (Vol 1) 1914 Bom 290 (292) : 38 Bom 255 (DB).

[2] Consequence of taking the provisions of this Act relating to contracts as part of the Contract Act is to render a sale, mortgage, lease or exchange void or voidable, if the agreement or the contract in pursuance of which the transfer has been made is void or voidable under the provisions of the Contract Act ('96) 22 Bom 176 (181) (DB) ✠ ('11) 11 Ind Cas 4 (4) (DB) (All) ✠ (Vol 17) 1930 All 252 (254) (DB) ✠ ('01) 25 Bom 126 (128) (DB)✠('68) 1 Beng L R A C 95 (98) (DB)✠(Vol 20) 1933 Rang 90 (90)✠(Vol 27) 1940 Lah 505 (508).

[3] Person who had only mere expectancy in certain villages purported to convey villages to another and received certain sum of money towards consideration for conveyance — Purchaser, finding subsequently that his vendor had only expectancy in property conveyed, sued for recovery of money advanced by him — Purchaser held entitled to do so. (Vol 9) 1922 P C 403 (404, 405) : 50 Ind App 69 : 45 All 179 : 26 Oudh Cas 228 (P C).

CHAPTER II.

OF TRANSFERS OF PROPERTY BY ACT OF PARTIES.

(A) Transfer of Property, whether moveable or immoveable.

"Transfer of property" defined.

5. In the following sections "transfer of property" means an act by which a living person conveys property, in present or in future, to one or more other living persons, or to himself, [a][or to himself] and one or more other living persons; and "to transfer property" is to perform such act.

[a][In this section "living person" includes a company or association or body of individuals, whether incorporated or not, but nothing herein contained shall affect any law for the time being in force relating to transfer of property to or by companies, associations or bodies of individuals.]

[a] *Inserted* by the Transfer of Property (Amendment) Act, 1929 (20 [XX] of 1929), S. 6.

Section 4—Note 1 *(contd.)*

[4] Section 24, Contract Act would apply to transfers of property. ('79) 4 Bom 70 (73, 74) (DB)✠(Vol 9) 1922 All 134 (135) : 44 All 486 (DB) ✠ (Vol 8) 1921 All 392 (392) : 43 All 81 (DB).

[But see (Vol 17) 1930 All 1 (2, 3) : 52 All 388 (F B)✠(Vol 22) 1935 Oudh 501 (504, 505) (DB).]

[5] Section 39, Contract Act, applies to transfer of property. ('94) 18 Mad 126 (127) (D B) ✠ ('11) 10 Ind Cas 258 (259) (DB) (Mad)✠('11) 35 Mad 114 (118) (DB)✠('06) 10 Cal W N 932 (933) (DB).

[But see ('12) 34 All 273 (277) (DB)✠(Vol 21) 1934 All 617 (617)✠('03) 5 Bom L R 392 (393) (DB)✠(Vol 4) 1917 Pat 514 (515, 516) : 2 Pat L Jour 168 (DB) ✠ (Vol 6) 1919 Mad 781 (782, 783) : 42 Mad 20 (DB).]

[6] Expression "shall be read as supplemental to the Indian Registration Act" cannot be construed as importing the definitions given in the Registration Act, into this Act. (Vol 10) 1923 Oudh 237 (238) ✠ ('12) 35 Mad 95 (100) (F B) ✠ (Vol 22) 1935 Pat 291 (295) : 14 Pat 672 (FB)✠('10) 5 Ind Cas 562 (563) (Cal).

[7] Rent deed by lessee need not be registered. (Vol 26) 1939 Lah 423 (425) : I L R (1940) Lah 70 (DB).

[8] Kabuliat is not a lease within S. 107. (Vol 22) 1935 Pat 291 (295) : 14 Pat 672 (FB).

[9] Effect of reading S. 107 with the Registration Act is to make all leases of immovable property other than those from year to year or for any term exceeding one year or reserving a yearly rent, if made in writing, compulsorily registrable. ('12) 35 Mad 95 (99) (FB) ✠ (Vol 22) 1935 Pat 291 (294) : 14 Pat 672 (FB)✠(Vol 10) 1923 Oudh 237 (238).

[10] Instrument of lease by the Government need not be registered in order to pass a valid title to the lessee. (Vol 10) 1923 Oudh 114 (115) : 27 Oudh Cas 64.

[11] A charge is compulsorily registrable except where registration is incompatible with the particular charge created. (Vol 26) 1939 Mad 202 (203) : I L R (1939) Mad 199 (DB) ✠ (Vol 27) 1940 Mad 140 (141) : I L R (1940) Mad 306 (DB).

[See however (Vol 20) 1933 Bom 298 (299) (DB). (Observations of Rangnekar J. — Charge created by a decree.)]

SECTION 5—SYNOPSIS.

1. Scope.
2. Act not exhaustive of all kinds of transfers.
3. "Living persons."
4. "Conveys."
5. "Property."
6. Legal and equitable estates.
7. "In present or in future."

1. Scope. — [1] Definition of the expression "transfer of property" given in this section does not apply to the expression used in other Acts. (Vol 10) 1923 Bom 107 (113).

[But see (Vol 20) 1933 Cal 467 (468) : 60 Cal 379 ✠ (Vol 11) 1924 All 508 (508).]

[2] Definition does not exclude properties outside British India. (Vol 19) 1932 Bom 642 (643) : 57 Bom 234.

[3] There is nothing to suggest that the words "transfer of property" are intended to confine the operation of the Act to transfers by contract; the "transfer" may also be of a non-contractual character. ('95) 22 Cal 185 (202).

[4] Transfer of property under various provisions of the Act can be effected only in the way required by law and not in any other way. ('01) 24 Mad 377 (384) : 28 Ind App 46 (P C).

2. Act not exhaustive of all kinds of transfers. — [1] Act is not exhaustive of all modes of transfers. (Vol 14) 1927 Sind 206 (208) (DB)✠(Vol 6) 1919 Mad 1113 (1115) (D B)✠('09) 34 Mad 442 (449) (D B).

[But see (Vol 1) 1914 Mad 489 (492) : 37 Mad 423 (D B).]

3. "Living persons."—[1] Joint Hindu family is a juristic person. (Vol 21) 1934 All 553 (556) (D B).

[2] Hindu math is a juristic person. ('04) 28 Bom 215 (223) (S B).

[3] Dedication in favour of an idol would be governed by the provisions of S. 123, T. P. Act. (Vol 18) 1931 Oudh 14 (14) (D B).

[4] Gift to a deity would be governed by the provisions of the Act other than those in Chapter II of the Act, though the deity may not be a living person, but S. 123 does not in terms apply to such gifts. (Vol 13) 1926 Nag 469 (470).

[5] Gift to God Almighty is a transfer governed by the provisions of the Act. (Vol 16) 1929 All 277 (278) (D B).

[6] Hindu idol is treated as a living being, but the question is not one arising under this section. (Vol 10) 1923 Cal 60 (62) (D B).

[See however ('08) 12 Cal W N 808 (811).]

[7] Juristic person is not necessarily a living person and the fact that for some purposes the law invests non-animate bodies with the rights of persons would not make juristic persons living persons for all purposes. (Vol 14) 1927 Mad 636 (638, 639) . 50 Mad 687 (F B) ✠ (Vol 6) 1919 Mad 809 (811) : 42 Mad 440 (D B) ✠ (Vol 17) 1930 Pat 610 (612) (D B).

[8] Transfer of property to idol — Provisions of this Act do not apply. (Vol 33) 1946 Oudh 256 (257).

[9] Court is not a juridical person. (Vol 6) 1919 P C 55 (59) : 42 All 158 : 46 Ind App 228 : 22 Oudh Cas 212 (P C).

[10] Court sale is not a "transfer of property." (Vol 25) 1938 Oudh 84 (86) : 13 Luck 746 (D B) ✠ (Vol 16) 1929 All 800 (801) (DB).

[11] Expression "transfer" by itself is not altogether appropriate to indicate a sale *in invitum* by the Court. (Vol 15) 1928 Mad 571 (574) (D B).

[12] Auction-purchaser is not a person to whom the judgment-debtor conveys any property. (Vol 26) 1939 All 687 (688) : I L R (1939) All 885 (D B).

Section 5 — Note 3 *(contd.)*

[13] Will is not a "transfer of property." (Vol 31) 1944 Oudh 65 (70) (D B)✠(Vol 11) 1924 All 508 (508) ✠ (Vol 9) 1922 Mad 457 (468) : 46 Mad 190 (F B).

4. "Conveys." — [1] Performance of an act by a person implies that the person conveying is entitled to the property sought to be conveyed, and is conveying it to a person who has no title to such property otherwise. (Vol 16) 1929 Oudh 334 (336) : 4 Luck 243.

[2] It is not necessary to constitute transfer of property that word "convey" should be used — It is sufficient if document shows transfer of ownership. (Vol 23) 1936 Mad 918 (919).

[3] Family arrangement in respect of property "is based on the assumption that there was an antecedent title of some kind in the parties, and the agreement acknowledges and defines what that title is." ('11) 33 All 356 (367) : 38 Ind App 67 (P C)✠('74) 1 Ind App 157 (166) (P C) ✠ (Vol 24) 1937 All 578 (580) : I L R (1937) All 817 (F B) ✠ (Vol 15) 1928 All 641 (643) : 51 All 79 (F B).

[See however (Vol 31) 1944 Oudh 65 (72) : 19 Luck 320 (D B) ✠ (Vol 30) 1943 All 101 (107) : I L R (1943) All 411 (F B).]

[4] Family arrangement by which each party takes a share of the family property is not a conveyance of property from a person who has title to it to a person who has no title to it. (Vol 14) 1927 Oudh 572 (573) : 2 Luck 662 (DB) ✠ (Vol 17) 1930 All 498 (502) (DB).

[5] Family arrangement is not a "transfer of property." (Vol 15) 1928 All 641 (643) : 51 All 79 (FB) ✠ (Vol 24) 1937 All 578 (580): I L R (1937) All 817 (FB)✠ (Vol 1) 1914 P C 44 (45) (PC).

[6] Existence of a dispute *in præsenti* between members of the family or the existence of a doubtful claim is not essential for the validity of a family arrangement. (Vol 31) 1944 Oudh 65 (72): 19 Luck 320 (DB). ((Vol 28) 1941 Oudh 185 and (Vol 24) 1937 Oudh 347, *Not referred to*) ✠ (Vol 30) 1943 All 101 (104, 105) : I L R (1943) All 411 (F B). ((Vol 13) 1926 All 194, *Overruled.*) ✠ ('09) 10 Cal L Jour 503 (510) (DB)✠('06) 4 Cal L Jour 323 (331).

[7] Arrangement merely for the maintenance of peace and harmony and the avoidance of future discord or for the preservation of the family property, is a valid family arrangement. (Vol 31) 1944 Oudh 65 (72) : 19 Luck 320 (DB). (Essential thing is that arrangement should be for consideration other than love and affection.) ✠ (Vol 30) 1943 All 101 (104, 105) : I L R (1943) All 411 (FB). (Do.) ✠ ('09) 10 Cal L Jour 503 (510) (DB) ✠ ('06) 4 Cal L Jour 323 (331) ✠ (Vol 24) 1937 Oudh 189 (190) : 12 Luck 684 (DB).

[8] Object of arrangement to preserve family property, family peace and family honour — Quantum of consideration which moved parties to arrangement is not to be scanned with much nicety. (Vol 31) 1944 Oudh 65 (72) : 19 Luck 320 (DB) ✠ (Vol 30) 1943 All 101 (104, 105) : I L R (1943) All 411 (FB) ✠ ('09) 10 Cal L Jour 503 (510) (DB) ✠ ('06) 4 Cal L Jour 323 (331) (DB).

[But see (Vol 30) 1943 Oudh 196 (200) (DB) ✠ Vol 28) 1941 Oudh 185 (187) ✠ (Vol 25) 1938 Cal 490 (498) ✠ (Vol 19) 1932 Cal 600 (612) : 59 Cal 859 (DB).]

[9] Title of *A* to property *X* undisputed — No question of any claim by *B* to it — Arrangement between *A* and *B* by which *X* is transferred to *B* is not "family arrangement" but will be "transfer of property." (Vol 15) 1928 All 641 (643) : 51 All 79 (FB) ✠ (Vol 25) 1938 Oudh 97 (98) : 14 Luck 9.

[10] It is the substance of the transaction that must be regarded in arriving at a conclusion as to what the transaction really is. (Vol 16) 1929 All 788 (789) (DB)

[11] Settlement of disputed claims between persons who may not be members of the same family, by which the claim of one person is relinquished and the existing rights of the other are acknowledged, is not a "transfer of property." (Vol 16) 1929 All 788 (789) (DB) ✠ ('09) 34 Bom 139 (141) (DB) ✠ ('10) 33 Mad 473 (482) (DB).

[But see (Vol 10) 1923 All 77 (78) : 45 All 162.]

[12] Release or relinquishment of one's rights in favour of another is not a transfer of property. (Vol 11) 1924 Pat 185 (186) ✠ ('06) 33 Cal 967 (984) (DB) ✠ (Vol 2) 1915 Cal 819 (820) (DB).

[But see (Vol 12) 1925 Oudh 73 (73) : 27 Oudh Cas 378.]

[13] Surrender is not a transfer of property. (Vol 20) 1933 Cal 467 (468) : 60 Cal 379 (DB). ((Vol 6) 1919 Pat 120 : 4 Pat L Jour 548, *Dissent.*) ✠ (Vol 27) 1940 Nag 175 (176) : I L R (1940) Nag 177 ✠ (Vol 13) 1926 Oudh 69 (72) (DB) ✠ ('38) 1938 Nag L Jour 123 (124).

[See however (Vol 26) 1939 Bom 496 (501) ✠ (Vol 23) 1936 Nag 166 (167) : I L R (1936) Nag 69.]

[14] Partition is a "transfer of property." (Vol 23) 1936 Lah 220 (222) ✠ (Vol 12) 1925 Mad 492 (493) (DB) ✠ (Vol 10) 1923 Mad 577 (577) (DB).

[But see ('98) 25 Cal 210 (213) (D B) ✠ (Vol 24) 1937 Pat 232 (234) (DB) ✠ (Vol 7) 1920 Mad 20 (24) (DB) ✠ (Vol 6) 1919 All 80 (81) (DB) ✠ (Vol 10) 1923 Mad 297 (299) : 46 Mad 349.]

[15] Partition is a mixture of a surrender and a conveyance of rights in property. (Vol 23) 1936 Bom 10 (12, 13) : 60 Bom 34 (DB).

[16] Covenant for the renewal of a lease after a time is not a transfer of property. (Vol 8) 1921 Mad 541 (541) : 44 Mad 230 (DB).

Creation of a charge.

[17] Creation of a charge on property is not a "transfer of property." (Vol 1) 1914 All 187 (189) : 36 All 201 (DB) ✠ (Vol 11) 1924 Oudh 209 (215) (D B) ✠ (Vol 27) 1940 All 458 (461) : I L R (1940) All 568✠('08) 35 Cal 837 (844) (DB). (It merely secures payment out of certain properties without there being any transfer of interest.)

[18] Dissolution of partnership — Certain partners paid off and in return give up or assign their interests in assets of partnership to other partners—This amounts to transfer. (Vol 26) 1939 Sind 288 (289) : I L R (1939) Kar 344 (DB).

5. "Property."—[1] Word "property" is the most comprehensive of all the terms which can be used (1835) 42 R R 274 (276) : 5 L J Ch 87, *Jones* v. *Skinner* ✠('07) 29 All 385 (396) (FB)✠(Vol 26) 1939 All 415 (425) : I L R (1939) All 607 (FB). (Word 'property' in its narrowest sense includes nothing more than concrete thing which is subject of ownership.)

[2] Property will include :

(a) An actionable claim. ('87) 14 Cal 241 (244) (DB).

(b) An annuity. (1883) 31 W R (Eng) 956 (956) : 52 L J P 71, *Jump* v. *Jump*.

(c) A copyright in a literary composition. (1907) 23 T L R 45 (48) : (1907) 1 Ch 107, *Macmillan & Co.* v. *Dent* ✠ (1769) 98 E R 201 (257) : 4 Burr 2303, *Miller* v. *Taylor*.

(d) All rights relating to physical objects. ('07) 29 All 385 (401, 408, 414). (Dissenting from (1891) 13 All 432 (FB).) ✠ (Vol 34) 1947 Bom 185 (187) ✠ ('91) 18 Cal 164 (176, 177) : 17 Ind App 201 (PC).

(e) Contingent interest (not being a mere possibility). (Vol 17) 1930 P C 17 (18) : 8 Rang 8 : 57 Ind App 10 (PC) ✠ (Vol 8) 1921 P C 138 (144) (PC).

(f) Interest of a person in possession without title. (Vol 14) 1927 All 669 (670) (DB) ✠ ('07) 29 All 52 (60) (DB) ✠ (Vol 11) 1924 Oudh 209 (216) (DB) ✠ ('08) 11 Oudh Cas 337 (339, 340).

6. Property of any kind may be transferred, except as otherwise provided by this Act or by any other law for the time being in force.

What may be transferred.

(a) The chance of an heir-apparent succeeding to an estate, the chance of a relation obtaining a legacy on the death of a kinsman, or any other mere possibility of a like nature, cannot be transferred.

(b) A mere right of re-entry for breach of a condition subsequent cannot be transferred to any one except the owner of the property affected thereby.

(c) An easement cannot be transferred apart from the dominant heritage.

(d) An interest in property restricted in its enjoyment to the owner personally cannot be transferred by him.

[a][*(dd)* A right to future maintenance, in whatsoever manner arising, secured or determined cannot be transferred.]

Section 5 — Note 5 *(contd.)*

[3] To use the word 'future' does not add anything to the meaning of the word 'property'. (1897) 45 W R (Eng) 105 (106) : 1 Ch 15. *In re The Streatham and General Estates Co.*

[4] Person to whom money may become due in the course of business with a Railway Company cannot be said to have "property" with respect to such monies. (1882) 31 W R (Eng) 661 (662) : L R 22 Ch D 782, *Ex parte Nicholls.*

[5] Person entitled to an annuity from out of the future income of certain dedicated properties, cannot be said to have an interest in "property." (Vol 23) 1936 Pat 527 (529).

[6] Uncalled share capital of a company is not "property". (1898) 46 W R (Eng) 514 (515) : 2 Ch 149, *In re Russian Spratt's Patent Ltd.* ✠ (1897) 45 W R (Eng) 105 (106) : 1 Ch 15, *In re Streatham and General Estates Co.*

[7] Right of the Company to call up the uncalled capital is property. (1888) 36 W R (Eng) 801 (804) : 38 Ch D 156, *Howard* v. *Patent Ivory Co.*

[8] Fact that a right is not enforceable or an intererest cannot be transferred does not necessarily mean that such right or interest is not property. (1882) 30 W R (Eng) 878 (879) : 21 Ch D 85, *Re Huggins.*

[9] Power of appointment which a person may have is not property. (1886) 34 W R (Eng) 709 (710) : 17 Q B D 521, *Ex parte Gilchrist; In re Armstrong* ✠ (1927) 96 L J Ch 104 (109): 1 Ch 283, *In re Matheson.*

[10] Alimony payable by a husband to his wife is not in the nature of property. (1884) 33 W R (Eng) 17 (19): 27 Ch D 160, *Re Robinson.*

6. Legal and equitable estates.—[1] Indian law does not recognise legal and equitable estates in property. (Vol 30) 1943 Cal 417 (426) (FB) ✠ (Vol 18) 1931 P C 196 (202) : 58 Ind App 279: 10 Pat 851 (PC).

[2] Person can transfer his beneficial interest under a trust. (Vol 27) 1940 P C 134 (136) : 67 Ind App 309: ILR (1940) Kar (PC) 271 : ILR (1940) 2 Cal 436 (PC).

7. "In present or in future." — [1] Words "in present or in future" must be held to govern the word "conveys" and not the word "property." (Vol 6) 1919 Mad 718 (725) (DB).

[2] This section and S. 21 recognise the principle of a valid mortgage being created on the happening of a condition, where the condition itself is first stipulated and the condition happens afterwards ('11) 21 Mad L Jour 562 (568) (DB) (('87) 14 Cal 687 and ('06) 3 All L Jour 221, *Dissent.*)

[3] Person cannot assign to another what is not in existence. (Vol 18) 1931 P C 203 (206) (PC).

[4] Contract to assign property to come into existence in future — When it comes into existence, contract to assign will become completed assignment ('67) 12 Moo Ind App 275 (306, 308) (PC) ✠ ('72) 18 Suth W R 140 (141) (PC) ✠ (Vol 32) 1945 Cal 355 (358) (DB). (Transfer of property acquired by vendor after the transfer, will be regarded as a contract to transfer.)

[5] Assignment by way of charge on future property is valid in equity which will attach to the property when it comes into existence. (Vol 26) 1939 Cal 715 (716) : ILR (1939) 2 Cal 341 (DB) ✠ (Vol 25) 1938 Cal 606 (608) ✠ (Vol 25) 1938 Rang 426 (427, 428) : 1938 Rang L R 480 (DB) ✠ ('02) 1902 Pun Re No. 57 p. 209 (217) (DB) ✠ ('93) 16 Mad 429 (434) (DB).

[6] A mortgage of future crops is not governed by this Act or by the Contract Act, but is in the nature of an agreement to mortgage property when it comes into existence. (Vol 11) 1924 All 833 (833, 834) ✠ ('88) 10 All 133 (135) (DB) ✠ (Vol 26) 1939 Rang 8 (10) : 1938 Rang L R 542 (DB). (Or of other property that may come into existence.) ✠ (Vol 20) 1933 Cal 154 (159) : 59 Cal 1372 (DB). (Do.) ✠ ('04) 31 Cal 667 (675) (DB). (Do.)

[See however (Vol 18) 1931 Rang 160 (160).]

SECTION 6—SYNOPSIS

1. Scope.
2. "Or by any other law for the time being in force."
3. Transfer, to holder of life-estate, of right to alienate.
4. Clause (a)—General.
   5. "The chance of an heir-apparent succeeding to an estate."
   6. "The chance of a relation obtaining a legacy."
   7. "Any other mere possibility of a like nature.'
   8. Applicability of S 43 to transfers of expectations and possibilities.
9. Clause (b).
10. Clause (c).
11. Clause (d) — Interest restricted in its enjoyment.
    12. Grant of property for maintenance.
    13. Right of pre-emption.
14. Clause (dd).
    15. Clause (dd) is not retrospective.
    16. Transfer of restricted right opposed to public policy.
17. Clause (e)—Mere right to sue.
    18. Rights under a contract.
    19. Right to mesne profits.
    20. Rights under the decree.
    21. Right to impeach prior transactions
    22. Right to sue for accounts.
    23. Right in partnership.
24. Clause (f).
25. Clause (g).
26. Clause (h).
27. Transfer opposed to the nature of interest affected thereby.
    28. Transfer of service tenures.

(e) A mere right to sue [b][* * * *] cannot be transferred.

(f) A public office cannot be transferred, nor can the salary of a public officer, whether before or after it has become payable.

(g) Stipends allowed to military [c][, naval], [d][air-force] and civil pensioners of [e][the Crown] and political pensions cannot be transferred.

(h) No transfer can be made (1) in so far as it is opposed to the nature of the interest affected thereby, or (2) [f][for an unlawful object or consideration within the meaning of section 23 of the Indian Contract Act, 1872,] or (3) to a person legally disqualified to be transferee.

[g][*(i)* Nothing in this section shall be deemed to authorize a tenant having an untransferable right of occupancy, the farmer of an estate in respect of which default has been made in paying revenue, or the lessee of an estate under the management of a Court of Wards, to assign his interest as such tenant, farmer or lessee.]

[a] *Inserted* by the Transfer of Property (Amendment) Act, 1929 (20 [XX] of 1929), S. 7. [b] The words "for compensation for a fraud or for harm illegally caused" were *repealed* by the Transfer of Property Act, 1900 (2 [II] of 1900), S. 3 *(a)*. [c] *Inserted* by the Amending Act, 1934 (35 [XXXV] of 1934), S. 2 and Schedule. [d] *Inserted* by the Repealing and Amending Act, 1927 (10 [X] of 1927), S. 2 and Sch. I. [e] *Substituted* by A. O. for "Government". [f] *Substituted* by the Transfer of Property Act, 1900 (2 [II] of 1900), S. 3 *(a)* for "for an illegal purpose". [g] *Inserted* by the Transfer of Property Act (1882) Amendment Act, 1885 (3 [III] of 1885), S. 4.

SECTION 6—SYNOPSIS *(contd.)*

29. Transfer for unlawful object or consideration—General
30. Consideration and object.
31. Consideration partly unlawful.
32. Forbidden by law.
33. Transfers for immoral objects.
34. Transfers opposed to public policy.
35. Person legally disqualified to be a transferee.
36. Clause (i).
37. Muhammadan law.

1. Scope.—[1] General policy of the law is to promote free alienation and circulation of property. ('12) 15 Oudh Cas 67 (74) (DB).

[2] Transferability of property is the general rule, its non-transferability, an exception. (Vol 14) 1927 Oudh 297 (298, 299). (Burden of proof that particular property is not transferable is on person alleging it.)✠(Vol 23) 1936 Oudh 121 (123) : 11 Luck 588 (DB). (Do.)✠(Vol 9) 1922 Mad 290 (294) (DB). (Do.)✠(Vol 11) 1924 All 795 (796) : 47 All 55 (DB) ✠ (Vol 19) 1932 Lah 518 (519).

[3] There are various kinds of property which can be transferred by private sale, but which cannot be attached and sold in execution of a decree. (Vol 2) 1915 Mad 296 (299) : 38 Mad 867 (DB)✠(Vol 4) 1917 Mad 79 (82) : 40 Mad 302 (DB).

2. 'Or by any other law for the time being in force".—[1] Religious office cannot be transferred by sale under the Hindu law. (Vol 10) 1923 Bom 358 (359) : 47 Bom 529 (DB)✠(Vol 20) 1933 Pat 306 (415) : 12 Pat 359 (DB) ✠ (Vol 25) 1938 Mad 713 (714) (DB)✠ ('81) 4 All 81 (83) (DB) ✠ (Vol 3) 1916 Lah 98 (100) : 1917 Pun Re No. 9✠(Vol 17) 1930 Cal 180 (182) (DB)✠ ('08) 12 Cal W N 98 (102) (DB)✠(Vol 1) 1914 Bom 318 (319) : 39 Bom 26 (DB) ✠ ('12) 5 Sind L R 107 (115) (SB)✠('89) 1889 All W N 169 (169) (DB)✠(Vol 2) 1915 Mad 561 (568) : 38 Mad 850 (DB).

[2] Religious office cannot be transferred by sale under the Mahomedan law. (Vol 29) 1942 Mad 485 (486) (DB) ✠ ('97) 24 Cal 83 (92) (DB) ✠ (Vol 18) 1931 Lah 379 (382) : 12 Lah 590 (DB).

[3] Property dedicated to the maintenance of religious worship and of charities connected with it cannot be transferred under the Hindu law. ('96) 23 Cal 645 (655) (DB).

[4] Property dedicated to the maintenance of religious worship and of charities connected with it cannot be transferred under the Mahomedan law. (1840) 2 Moo Ind App 390 (422) (PC).

[5] Impartible estate, though generally alienable, may be inalienable by custom. (Vol 14) 1927 P C 159 (160, 161) : 54 Ind App 289 : 54 Cal 955 (P C)✠ Vol 2) 1915 P C 30 (33) : 42 Cal 1179 : 42 Ind App 192 (PC)✠ ('09) 36 Cal 481 (482) (FB).

3. Transfer, to holder of life-estate, of right to alienate. — [1] Transfer of the right to alienate in favour of a person to whom a life-estate has been granted, is valid. (Vol 34) 1947 Oudh 71 (74) (DB).

4. Clause (a) — General.—[1] Clause not merely recognises that the things referred to therein are not capable of being transferred, but does not permit such transfer on grounds of public policy. ('07) 30 Mad 255 (263) (DB)✠(Vol 3) 1916 Mad 579 (580, 581) : 39 Mad 554 (DB) ✠ (Vol 18) 1931 All 589 (591) (DB)✠(Vol 11) 1924 Oudh 234 (237) : 26 Oudh Cas 368.

[But see (Vol 7) 1920 Lah 74 (77) (DB) ✠ (Vol 22) 1935 All 244 (246) : 57 All 474 (DB).]

[2] Transfer cannot be regarded as valid contract to transfer property that may come into existence. (Vol 25) 1938 Mad 881 (883).

[3] Doctrine of feeding a grant by estoppel cannot apply to property that may come into existence. ('30) 1930 Mad W N 1054 (1057)✠(Vol 8) 1921 Cal 501 (505, 506) : 48 Cal 536 (DB)✠(Vol 15) 1928 Nag 262 (263).

[4] Doctrine that equity will treat that as done which ought to be done cannot be applied to that which the Legislature has expressly stated ought not to be done. ('07) 31 Bom 165 (172) (DB) ✠ ('08) 11 Oudh Cas 301 (304)✠(Vol 5) 1918 Mad 123 (126) : 41 Mad 418 (FB)✠ (Vol 8) 1921 Cal 501 (505, 507) : 48 Cal 536 (DB)✠('12) 15 Oudh Cas 122 (126).

[5] Transferee of *spes successionis* cannot, in cases to which this section applies, obtain any relief under S. 18, Specific Relief Act, 1877, after the transferor becomes entitled to the property. ('28) 108 Ind Cas 390 (391) (Lah).

[6] It is impossible to admit the common sense of maintaining an enactment which would prevent the purpose of the contract while permitting the contract to stand as a contract. (Vol 10) 1923 P C 189 (193) 50 Ind App 239 : 50 Cal 929 (PC) ✠ (Vol 32) 1945 Cal 355 (358) (DB). (Contract for sale of property to be acquired by purchase by vendor is valid.)

[7] Person can admit by way of settlement of a disputed claim that certain property never formed part of the estate of the person to whose estate he is the expectant heir. (Vol 12) 1925 Mad 1043 (1044) (DB)✠(Vol 6) 1919 All 371 (372) : 41 All 611 (DB)✠(Vol 11) 1924

Section 6—Note 4 *(contd.)*

Pat 736 (752) (DB)✠(Vol 23) 1936 All 573 (575):58 All 884 (DB) ✠ (Vol 13) 1926 Lah 148 (149).

[8] Person can undertake a personal obligation to pay a certain sum of money periodically if he succeeds to the estate to which he is the expectant heir (Vol 31) 1944 All 104 (111, 112) : I L R (1944) All 141 (DB).

[9] Whether the transaction is, a transfer or a contract to transfer the expectancy or is an admission must be decided with reference to the substance of the transaction taken as a whole. (Vol 12) 1925 Mad 1043 (1045) (DB) ✠ (Vol 21) 1934 Mad 552 (554).

5. "The chance of an heir-apparent succeeding to an estate." — [1] Clause (a) is intended to apply to cases of a mere hope or expectation which may be defeated by the act of some person having the present disposal of property. ('06) 30 Bom 304 (316).

[2] Land acquired in 1865, restored by Government to *A*, heir of original owner on his refunding compensation — *A* entitled to only one half of land — Persons entitled to other half selling their interest — Transfer held not transfer of chance of heir apparent. (Vol 19) 1932 Bom 244 (246).

[3] Interest of a Hindu presumptive reversioner expectant on the determination of the interest of a female heir, is a mere *spes successionis*. (Vol 27) 1940 P C 181 (182, 183) : 67 Ind App 386 : I L R (1940) All 719 : I L R (1940) Kar (PC) 366 (PC). (Though for reasons of policy he is recognized by Courts of law as having right to demand that estate be kept free from waste and free from danger during its enjoyment by female heir.)✠(Vol 12) 1925 P C 272 (276):28 Oudh Cas 352: 52 Ind App 398: 47 All 883 (PC). (Do.)✠('97) 1897 Pun Re No. 66, p. 298 (307) (FB).

[4] Transfer or other dealing involving a transfer of a *spes successionis* by a presumptive reversioner is void. (Vol 30) 1943 Oudh 196 (199):19 Luck 37 (DB). (Sale.) ✠ (Vol 29) 1942 Mad 720 (721).

[5] Transaction, which does not involve a transfer of an expectancy, but which is a family arrangement or a settlement of a disputed claim in which the reversioner, for a consideration, gives up his claim, is not bad. (Vol 29) 1942 Lah 138 (142) : I L R (1943) Lah 161 (DB) ✠ (Vol 6) 1919 P C 27 (29) (PC).

[6] Agreement by one reversioner with another to sell his interest in estate or not to claim estate for certain sum to be paid annually — Agreement is unenforceable. (Vol 24) 1937 Pat 280 (282) (DB).

[See however (Vol 26) 1939 All 689 (692) : I L R (1939) All 950 (FB).]

[7] Family arrangement by which each of the parties thereto merely admits and acknowledges the title of the others is not a "transfer" of any property. (Vol 1) 1914 P C 44 (45) (PC)✠('74) 1 Ind App 157 (166) (PC).

[8] Agreement to divide the property in a certain proportion when the estate falls is bad. (Vol 6) 1919 Mad 937 (937) (DB).

[But see (Vol 2) 1915 Mad 1191 (1191) (DB) ✠ ('07) 30 Mad 486 (492) (DB) ✠ ('82) 8 Cal 138 (145) (DB) ✠ ('11) 33 All 457 (462) (DB) ✠ (Vol 20) 1933 Pat 165 (173) (DB).]

[9] Agreement not to divide the *spes successionis* does not contravene the provisions of cl. (a) of this section, but is otherwise not binding on the parties. ('10) 34 Mad 527 (532) (DB).

6. "The chance of a relation obtaining a legacy." — [1] Testator agreed with legatee that he would give him legacy — Breach of agreement may give legatee right to sue for damages, but will not give him any right or interest in property itself so as to be capable of being transferred. ('06) 9 Oudh Cas 55 (62) (DB).

7. "Any other mere possibility of a like nature." — [1] Possibility prohibited by the section must belong to the same category as the chance of an heir-apparent succeeding to an estate or the chance of a relation obtaining a legacy. (Vol 6) 1919 Mad 718 (726) (DB). (Words "of a like nature" are merely express statement of general rule of *ejusdem generis* applicable in interpretation of statutes.)

[2] Not only is a transfer of the expectations of an heir or legatee forbidden, but through the inclusion of the words 'of a like nature' the sub-section prohibits any transfer of a similar kind of possibility. (Vol 26) 1939 Rang S (9, 10) : 1938 Rang L R 542 (DB).

[3] The following have been held to be "mere possibilities of a like nature.'

(a) The chance of a person deriving income in future from scavenging work which he expects to get but which he has no right to insist on getting. (Vol 25) 1938 Mad 881 (882).

(b) The chance which a party to litigation will be liable to pay to the other party if the litigation is decided in a particular way. ('12) 11 Mad L Tim 248 (251) (D B).

(c) The chance of obtaining rent in respect of a future possible lease that may come into existence as a result of a renewal. (Vol 10) 1923 Mad 316 (316).

(d) The chance of inalienable Karnam service inam lands being enfranchised in the name of the transferor. (Vol 12) 1925 Mad 885 (886).

[4] Right which vendor of immovable property has in purchase-money agreed to be paid on execution is, so long as conveyance is not executed, a mere possibility and is not attachable under the Civil P. C. ('81) 3 All 12 (14) (D B).

[5] Right to offerings which future worshippers may give to a temple is not a mere possibility of a like nature to the chances referred to in the clause. (Vol 15) 1928 All 721 (725): 50 All 394 (D B) ✠ (Vol 4) 1917 All 115 (116) : 39 All 196 (D B) ✠ (Vol 14) 1927 Bom 143 (145) (D B)✠(Vol 29) 1942 Lah 284 (285): I L R (1943) Lah 780 (D B) ✠(Vol 24) 1937 Oudh 15 (16) : 12 Luck 358 (D B)✠(Vol 6) 1919 Oudh 126 (127)✠(Vol 16) 1929 Nag 81 (82).

[But see (Vol 3) 1916 Cal 269 (271):43 Cal 28 (DB).]

[6] *Bart jajmani* or the so-called right of *purohits* to receive offerings that may be made to them by *jajmans* is a mere *spes successionis*. (Vol 8) 1921 Lah 138 (138)✠('11) 1911 Pun Re No. 96 (D B).

[7] Property given as security — Charge created on property for amount for which it is given as security— Surety has proprietary interest in surplus amount that may remain after payment of charge and such interest is not prohibited from being transferred by any of clauses of this section. (Vol 17) 1930 All 225 (242) : 52 All 619 (F B).

[8] Interest of a coparcener in joint Hindu family is not within clause (a). (Vol 29) 1942 Mad 97 (99) (D B) ✠(Vol 6) 1919 Pat 482 (484) (D B).

[9] Vested interest in property though not in possession is not within clause (a). (Vol 5) 1918 All 115 (119, 120): 40 All 692 (D B)✠(Vol 16) 1929 Oudh 22 (24) : 4 Luck 185 (D B)✠('69) 11 Suth W R 134 (134) (D B).

8. Applicability of section 43 to transfers of expectations and possibilities.—[1] Section 43 cannot be applied so as to give effect to a transaction which is not permitted by clause (a) of this section. (Vol 5) 1918 Mad 123 (126): 41 Mad 418 (F B)✠('30) 1930 Mad W N 1054(1057)✠(Vol 4)1917 Nag 215(226): 13 Nag L R 130 (FB) ✠ (Vol 16) 1929 Oudh 185 (187):4 Luck 622 (DB).

[2] Transfer purporting to be of *spes successionis* — Section 43 cannot apply. ('30) 1930 Mad W N 1054 (1057)✠('07) 30 Mad 255 (262) (D B)✠('07) 10 Oudh Cas 277 (279) ✠ (Vol 4) 1917 Oudh 230 (231): 20 Oudh Cas 155✠(Vol 25) 1938 Bom 228 (231) : I L R (1938) Bom 155 (DB).

Section 6—Note 8 *(contd.)*

[3] Transfer purporting to be that of present interest in property—Both parties aware that transferor has only *spes successionis* — Section 43 cannot apply. (Vol 12) 1925 Oudh 16 (18) (D B) ✠ (Vol 25) 1938 Bom 228 (231): I L R (1938) Bom 155 (D B)✠(Vol 22) 1935 All 244 (246): 57 All 474 (D B)

[4] Clause (a) applied only where the transfer is intended in substance to be a transfer of a *spes successionis* to the knowledge of both parties, and not where the transfer purports to be one of a present interest in property and the transferee is not aware of the defect of title. (Vol 22) 1935 All 244 (246) : 57 All 474 (D B) ✠ (Vol 25) 1938 Bom 228 (231): I L R (1938) Bom 155 (D B)✠ (Vol 16) 1929 Oudh 185 (187) : 4 Luck 622 (D B)✠(Vol 2) 1915 Mad 972 (974) (D B) ✠ (Vol 18) 1931 Nag 51 (52) : 27 Nag L R 199 ✠ (Vol 7) 1920 All 34 (35): 42 All 596 (D B)✠(Vol 17) 1930 Mad 688 (690): 53 Mad 750 (D B).

[But see (Vol 20) 1933 Mad 795 (797) (D B).]

[5] It is a cardinal rule of interpretation of statutes that the various provisions in an Act must be harmoniously construed and not to make one provision derogate from another. (Vol 22) 1935 All 244 (246) : 57 All 474 (D B)

9. Clause (b). —[1] A party in whom there is no right to the property cannot have the right of re-entry on it. (1832) 149 E R 101 (102) : 2 C & J 232, *Doe d Barney* v. *Adams*✠(1900) 69 L J Q B 856 (859): (1900) 2 Q B 535, *Mathews* v. *Usher* ✠ (1811) 128 E R 235 (235): 4 Taunt 23, *Doe d Barber* v. *Lawrence.*

[2] Condition on breach of which the lessor is entitled to re-enter and which had been broken prior to the transfer, but in respect of which the notice required by S. 111, clause (g) had not been given to the lessee, can be enforced by the transferee by virtue of S. 109 of the Act after giving the necessary notice. (Vol 5) 1918 Bom 79 (80): 43 Bom 28 (D B).

10. Clause (c).—[1] Easement is a right attached to the dominant heritage and runs with it. ('11) 7 Nag L R 1 (1).

[2] From its very nature, easement can be transferred only along with the dominant heritage and not apart from it. (Vol 4) 1917 Low Bur 110 (112): 9 Low Bur Rul 24✠('12) 15 Ind Cas 278 (279) (D B) (Mad).

[3] This clause does not more than express the rule that there cannot be an easement in gross. (Vol 4) 1917 Cal 681 (685) (D B).

[4] Clause contemplates transfer of easement which has already been created — There can be no bar to creation of easement itself. (Vol 16) 1929 Mad 79 (79) ✠ ('09) 31 All 612 (620) (D B).

11. Clause (d)—Interest restricted in its enjoyment. — [1] This clause recognises that an interest in property may be created which is restricted in its enjoyment to the owner of the right personally. (Vol 10) 1923 Bom 276 (277) : 47 Bom 597 (D B).

[2] Statutory non-transferability enacted in this clause is thus based on the impossibility of transfer inherent in the natute of the right sought to be transferred. (Vol 25) 1938 Cal 405 (408).

[3] Question whether an interest in property is restricted in its enjoyment will depend upon the intention of the parties creating such interest as gathered from the language of the instrument creating it and the surrounding circumstances. (Vol 11) 1924 Mad 22 (26) : 46 Mad 659 (F B) ✠ (Vol 17) 1930 All 593 (594) : 52 All 705 (D B) ✠ (Vol 16) 1929 All 281 (285) : 51 All 612 (D B).

[4] Right of residence cannot be alienated under this clause. (1900) 1900 Pun Re No. 8, p. 26 (29) ✠ ('93) 1893 All W N 199 (199) (D B) ✠ ('08) 31 Mad 500 (501) (D B) ✠ (Vol 22) 1935 Mad 848 (848).

[5] Interest possessed by a grove-holder is not inalienable. (Vol 17) 1930 All 377 (378).

[6] Right to *kharch-i-pandan*, even if the payment is a charge on property is inalienable. (Vol 16) 1929 All 281 (286) : 51 All 612 (D B).

[7] Right to *parwarish* granted for the life-time of the grantee is inalienable. (Vol 14) 1927 Oudh 436 (438).

[8] Right to exercise the calling of a broker is assignable. (Vol 1) 1914 Cal 202 (203) (D B).

[9] Right of a *wargdar* to receive *moggu* allowance from *walawargdars* is not a right restricted personally to the *wargdar*. ('11) (1911) 1 Mad W N 233 (234) (D B).

[10] "Jajmani bahis" (books containing names of pilgrims) are not property, the alienation of which is prohibited by this clause. ('07) 4 All L Jour 712 (712) (D B).

12. Grant of property for maintenance. — [1] Mere fact that the grant is for maintenance does not necessarily show that the enjoyment of the properties is restricted to the grantee personally. (Vol 2) 1915 Mad 296 (298) : 38 Mad 867 (D B).

[2] *A*, a Hindu governed by Mitakshara law, and his three sons *B*, *C* and *D* entered into partition by which each got one-fourth share in certain properties—They covenanted that after death of *A*, his share should remain in possession and occupation of his wife during her life-time with life interest, that during her lifetime she would have right to appropriate rents and profits of property without any power of making any mortgage or other transfers of property—Only right restricted in its enjoyment to widow personally held intended to be created by document. (Vol 26) 1939 P C 157 (159) : I L R (1939) Kar (P C) 274 (P C).

[3] Property transferred to Hindu widow for maintenance — Transfer by such widow of property is not prohibited by clause (d). (Vol 3) 1916 Cal 644 (645) (D B) ✠ (Vol 25) 1938 Cal 405 (408) ✠ (Vol 19) 1932 All 662 (663) : 54 All 366 (D B).

[4] Whenever an interest in property is assigned to a person by way of maintenance, such interest is inalienable. ('93) 15 All 371 (372).

13. Right of pre-emption. — [1] Right of pre-emption cannot be transferred. ('11) 36 Bom 139 (143) (D B) ✠ ('94) 1894 Pun Re No. 139, p. 522 (530) (D B) ✠ ('01) 1901 Pun Re No. 95, p. 320 (323, 324).

[2] Decree obtained for pre-emption — Such decree cannot be transferred. (Vol 9) 1922 Lah 300 (301) : 2 Lah 282 (D B) ✠ ('84) 7 All 107 (109) (D B).

[3] Where the pre-emptor transfers his property and along with it a right of pre-emption, such right passes as an incident of the property and can be enforced by the transferee. (Vol 9) 1922 Oudh 289 (296) : 25 Oudh Cas 319 (D B).

14. Clause (dd). — [1] "Right to future maintenance" means the right of a person to receive from another boarding, lodging, clothing and other necessaries of life. (Vol 31) 1944 All 91 (93) : I L R (1944) All 216 (D B) ✠ (Vol 22) 1935 Mad 815 (815).

[2] Words "in whatsoever manner arising" appear to include cases where a right to future maintenance may arise under an agreement of parties independent of any pre-existing right to such maintenance arising under the personal law of the parties. (Vol 31) 1944 All 91 (94) : I L R (1944) All 216 (D B). (Trustees under will directed to pay certain monthly allowance to certain person—Clause does not apply.)

[See however (Vol 26) 1939 Pat 506 (509).]

[3] Word "maintenance" imports only a personal right to be maintained and a personal enjoyment of the right. ('99) 9 Mad L Jour 113 (115) (FB) ✠ (Vol 23) 1936 Oudh 76 (79) (DB) ✠ (Vol 34) 1947 Pat 404 (405),

Section 6 — Note 14 *(contd.)*
406) : 25 Pat 705 (DB). (Heritable khorposh grant in lieu of maintenance — Clause does not apply) ✠ (Vol 22) 1935 Nag 133 (135) : 31 Nag L R 239. (Right to allowance vesting on ownership of property is not unalienable.) ✠ (Vol 24) 1937 Oudh 420 (421): 13 Luck 35 (DB).

[4] Whether right to future maintenance arises under the personal law of the parties, or is created for the first time by agreement of parties or by a decree of Court is immaterial under this clause. (Vol 29) 1942 Cal 241 (243) (DB) ✠ (Vol 29) 1942 Oudh 410 (411) : 18 Luck 147 (DB).

[5] Heritable right to an allowance is not a right to future maintenance. ('10) 7 Ind Cas 80 (85) (DB) (Cal)✠ (Vol 7) 1920 Cal 746 (751) (DB).

[6] Babuana grant of an allowance for the maintenance of the grantee heritable by the grantee's heirs is not inalienable. ('09) 36 Cal 943 (952) : 36 Ind App 176 (PC).

[7] *A* transfering property to *B* — *B* making allowance of annuity to *A*—Allowance is not right to future maintenance. (Vol 29) 1942 Oudh 410 (411) : 18 Luck 147 (DB) ✠ ('99) 9 Mad L Jour 113 (115) (FB)✠(Vol 6) 1919 Cal 822 (823) (DB) ✠ (Vol 6) 1919 Nag 62 (63) ✠ ('84) 10 Cal 521 (522) (DB) ✠ ('01) 23 All 164 (165) (DB).

[8] Settlor reserving allowance to himself for maintenance from trust property — Such allowance does not come under cl. (d) (Vol 25) 1938 P C 123 (126) : 32 Sind L R 448 : I L R (1938) Mad 646 (PC).

[9] Right to arrears of maintenance is not within this clause. ('87) 11 Bom 528 (532) (DB).

[10] Mahomedan widow giving up her share in her husband's property in consideration of monthly allowance—Bequest by widow of allowance due to her at her death — Widow can bequeath right to money already accrued to her. (Vol 31) 1944 All 212 (213) : I L R (1944) All 299 (DB).

15. Clause (dd) is not retrospective. — [1] Clause (dd) is not retrospective in operation. (Vol 23) 1936 Pat 527 (529) ✠ (Vol 34) 1947 Pat 404 (407) : 25 Pat 705 (DB)

[2] Transfer made in 1896 of certain rights to allowances created in 1895 — Validity of transfer must be judged by reference to cl. (d) and not to cl. (dd). (Vol 25) 1938 P C 123 (126): 32 Sind L R 448: I L R (1938) Mad 646 (PC).

16. Transfer of restricted right opposed to public policy. — [1] Clauses (d) and (dd) have been introduced on grounds of public policy. (Vol 13) 1926 Rang 186 (187). (Mortgage of restricted right made — Money decree cannot be given to mortgagee.) ✠ (Vol 4) 1917 Mad 79 (80) : 40 Mad 302 (DB).

[But see (Vol 14) 1927 Rang 157 (158) (DB) ✠ (Vol 25) 1938 Cal 405 (408).]

17. Clause (e)—Mere right to sue.—[1] Prohibition under this clause is based on grounds of public policy. ('08) 35 Cal 420 (426, 427) : 35 Ind App 48 (PC).

[2] Prohibition under this clause is based on the ground that a mere right to sue is not "property, but merely a title to get future property. ('71) 14 Moo Ind App 40 (49) (PC).

[3] Words "to sue" merely mean to make a legal claim or take legal proceeding in a Court of law and not necessarily the institution of a suit by the presentation of a plaint as provided by Civil P. C. ('05) 7 Bom L R 138 (141).

[4] "Mere right to sue" means a right to sue "unconnected with the ownership of any property". (Vol 10) 1923 Bom 403 (403) : 47 Bom 719 (DB) ✠ (Vol 22) 1935 Nag 2 (4) : 31 Nag L R 142 ✠ (Vol 21) 1934 Oudh 240 (244) : 10 Luck 26 (DB) ✠ (Vol 1) 1914 Lah 510 (511) : 1914 Pun Re No. 106 (DB) ✠ (Vol 3) 1916 Mad 595 (596) : 38 Mad 138 (DB) ✠ (Vol 20) 1933 All 642 (647) : 55 All 814 (DB) ✠ (Vol 28) 1941 Mad 389 (390) (DB) ✠ ('09) 36 Cal 345 (352) (FB) ✠ (Vol 34) 1947 Cal 200 (204) : I L R (1944) 2 Cal 542 (DB) ✠ (Vol 14) 1927 All 621 (623) : 50 All 82 (DB) ✠ (Vol 24) 1937 Lah 934 (935) (DB) ✠ (Vol 17) 1930 Oudh 88 (89) : 5 Luck 547 (DB) ✠ (Vol 26) 1939 Nag 97 (98) : I L R (1940) Nag 37 (DB).

[5] Property transferred—Right to sue for possession or other reliefs also transferred — Such transfer cannot be said to be transfer of mere right to sue ('42) 1942 Nag L Jour 30 (32, 33) ✠ ('75) 23 Suth W R 163 (163) (DB) ✠ (Vol 26) 1939 Oudh 196 (202) (DB) ✠ (Vol 30) 1943 Nag 332 (332) : I L R (1943) Nag 762 ✠ (Vol 29) 1942 Mad 209 (210)✠(Vol 13) 1926 Mad 417 (419) (DB).

[But see (Vol 22) 1935 All 342 (343) ✠ ('76) 25 Suth W R 48 (48) (DB) ✠ (Vol 4) 1917 Nag 61 (62).]

[6] Transfer of a right to a sum of money actually due is a transfer of a right to property and not to a mere right to sue. (Vol 19) 1932 P C 32 (33, 34) : 59 Ind App 41 : 11 Pat 266 (PC).

[7] Property transferred and along with it right to sue on covenants attached to such property —It cannot be said that "mere right to sue" has been transferred. (Vol 16) 1929 Pat 245 (247) : 8 Pat 776 (DB).

[8] Property transferred and along with it right for recovery of profits accrued due on such property — It cannot be said that "mere right to sue" has been transferred. ('42) 1942 Nag L Jour 30 (31) ✠ (Vol 20) 1933 Mad 710 (710).

[9] Certain mokhasa inam lands sold along with "all kinds of rights relating to the mokhasa" — Transferee sued for damages agent or tarnsferor for negligence in in management — Right to damages held merely right to sue. (Vol 3) 1916 Mad 595 (596) : 38 Mad 138 (DB).

[10] Owner of property conveying it to vendee — Vendee in consideration of transfer undertaking to conduct litigation in respect of that property at his expense and to pay fifty per cent. of value of property to vendor after successful termination of litigation — Vendor held transferred property itself and not mere right to institute suit. (Vol 34) 1947 All 110 (113, 114) (DB).

18. Rights under a contract.—[1] Beneficial right or interest of a party under a contract and the right to sue to recover the benefits created thereby are assignable provided that (a) the benefit is not coupled with any liability or obligation that the assignor is bound to discharge and (b) the contract has not been induced by personal qualifications or considerations as regards the parties to it. ('07) 9 Bom L R 114 (118) ✠ (Vol 30) 1943 Nag 266 (268) : I L R (1943) Nag 643 ✠ ('94) 17 Mad 168 (174) (DB) ✠ (03) 5 Bom L R 373 (376) ✠ ('06) 29 Mad 307 (309) (DB) ✠ (Vol 5) 1918 Nag 160 (161) ✠ ('90) 17 Cal 115 (121) (DB) ✠ (Vol 25) 1938 Cal 377 (381) : 62 Cal 510 (DB).

[2] Benefit of a contract in respect of moveable property not in possession of the claimant is an actionable claim transferable under S. 130. (Vol 23) 1936 Cal 260 (261) (DB).

[3] Contracts capable of specific performance are assignable. (Vol 4) 1917 Mad 358 (361) (DB).

[4] Right to specific performance of the contract where such can be claimed has been held not be a mere right to sue but one capable of assignment (Vol 16) 1929 Mad 251 (252) (DB) ✠ (Vol 4) 1917 Mad 358 (361) (DB).

[5] Breach of agreement to lend money — Right of promisee is ,only to claim damages and this right cannot be transferred. (Vol 12) 1925 Mad 62 (62) : 47 Mad 698.

Section 6—Note 18 *(contd.)*

[6] Mortgagor under usufructuary mortgage placing mortgagee in possession — Mortgagee failing to discharge consideration — Borrower can compel lender to perform his part of contract and claim of borrower can be assigned. (Vol 23) 1936 Lah 196 198 (DB).

19. Right to mesne profits.—[1] Right to mesne profits independent of any interest in the property in respect of which the profits are claimed, cannot be transferred. ('98) 2 Cal W N 43 (44) (DB)✠(Vol 3) 1916 Mad 974 (975) ✠ (Vol 3) 1916 Mad 473 (473) : 38 Mad 308 (DB) ✠ ('83) 9 Cal 695 (697) (DB).

[2] Right to mesne profits transferred along with the property itself, is not a mere right to sue. (Vol 19) 1932 Bom 478 (480) : 56 Bom 403 ✠ (Vol 16) 1929 Cal 719 (721) (DB) ✠ (Vol 16) 1929 All 63 (63) ✠ (Vol 8) 1921 Mad 56 (57) : 44 Mad 539 (DB). ((Vol 3) 1916 Mad 473 : 38 Mad 308 and (Vol 7) 1920 Pat 538, *Dissent*) ✠(Vol 3) 1916 Mad 517 (519).

[But see (Vol 11) 1924 Pat 551 (553) : 3 Pat 575 (DB) ✠ (Vol 14) 1927 Mad 817 (818) ✠ (Vol 13) 1926 Cal 428 (430) (DB) ✠ (Vol 17) 1930 All 593 (595) : 52 All 705 (DB)✠(Vol 4) 1917 Mad 735 (736) (DB)]

20. Rights under the decree. — [1] Right under a decree can be transferred even though the claim made in the suit was one which could not have been transferred on the ground of its being a mere right to sue. (Vol 22) 1935 Cal 751 (752) (DB) ✠ (Vol 3) 1916 Pat 10 (11) (DB) ✠ (Vol 1) 1914 Cal 60 (63) (DB) ✠ (Vol 8) 1921 Mad 56 (57) : 44 Mad 539 (DB). (Even though actual amount is left to be ascertained in future proceedings in same suit)

21. Right to impeach prior transactions. — [1] Hindu widow entitled to woman's estate under Hindu law sold properties to *X* — After death of widow reversioners sold property to *Y* who sued along with reversioners to recover possession from *X* — Suit held would lie. ('08) 35 Cal 420 (426, 427) : 35 Ind App 48 (PC)

[2] Transfer made of property the subject-matter of litigation — It cannot be said that mere right to sue is transferred. (Vol 20) 1933 Cal 454 (456) (DB)✠(Vol 11) 1924 Oudh 62 (64).

[But see (Vol 9) 1922 Pat 514 (525): 2 Pat 52 (DB).]

[3] Guardian alienating property of minor — Latter after attaining majority purporting to transfer property to *X* — The following views are held as to whether *X* can sue to set aside alienation by guardian:

(a) He cannot. (Vol 26) 1939 Cal 460 (464)✠(Vol 20) 1933 Bom 42 (45) (DB).

(b) He can, provided the transfer had been made within three years of the transferor's attaining majority. (Vol 16) 1929 Mad 313 (314) (DB)

(c) Where the minor did not sue to set aside the sale by the guardian within the time limited by Art. 44, Limitation Act, he cannot thereafter transfer any property to a third person. (Vol 26) 1939 Oudh 122 (125)✠(Vol 16) 1929 Mad 313 (319) (DB).

[4] Manager of a joint Hindu family consisting of himself and his minor brothers alienated family properties — Minor after attaining majority transferred his right in property to *X* who sued to set aside alienation—Transfer by quondam minor held not mere right to sue. (Vol 21) 1934 Bom 234 (239) (DB).

22. Right to sue for accounts. — [1] Right to money which has become due itself transferred, and along with it, right to sue for accounts — Latter right cannot be said to be mere right to sue. (Vol 13) 1926 Nag 396 (398) : 22 Nag L R 108 (DB) ✠ (Vol 14) 1927 Nag 377 (377) ✠ (Vol 5) 1918 Oudh 374 (375) (DB) ✠ (Vol 7) 1920 Oudh 219 (219):23 Oudh Cas 384 (DB)✠(Vol 12) 1925 All 765 (766)✠(Vol 20) 1933 Mad 710 (710).

[But see (Vol 11) 1924 Nag 284 (284).]

[2] Transfer of a right to monies due by an agent to the principal after taking accounts, is not a mere transfer of a right to sue for accounts. (Vol 5) 1918 Cal 445 (445) (DB) ✠ (Vol 20) 1933 Cal 461 (462) ✠ (Vol 21) 1934 Mad 461 (463) : 57 Mad 1074 (DB)✠('13) 24 Mad L Jour 313 (315) (DB).

[But see (Vol 13) 1926 Nag 357 (358).]

23. Right in partnership. — [1] Transferee of partner's interest in partnership gets right to sue for accounts—What transferee gets under his transfer is not mere right to sue. (Vol 11) 1924 Nag 145 (146)✠(Vol 12) 1925 Sind 72 (75) ✠ (Vol 16) 1929 Mad 641 (646) : 52 Mad 563 (FB).

24. Clause (f). — It does not matter whether the person holding the office receives any fee or salary for the performance of public duty or whether he receives a salary or fee from the Crown or otherwise. (1828) 130 E R 995 (1001):1 Bing (NC) 222, *Henly* v. *The Mayor and Burgesses of Lyme*.

[2] Duty must be public duty in strict sense of term —It is not enough that due discharge of duties of office should be for public benefit in secondary and remote sense. (1891) 60 L J Q B 397 (399): (1891) 1 Q B D 594, *In re Mirams*.

[3] Prohibition of a transfer of the salary of a public officer is based on grounds of public policy. (Vol 29) 1942 Mad 391 (392) : I L R (1942) Mad 640 ✠ (Vol 28) 1941 Bom 389 (392) : I L R (1941) Bom 415 (DB) ✠ (1859) 28 L J (NS) Ch 868 (871) : 7 W R (Eng.) 728, *The Corporation of Liverpool* v. *Wright* ✠ (1840) 48 E R 1292 (1294) : 2 Beav 544, *Grenfell* v. *The Dean & Canons of Windsor*.

[4] Right of a person, who has subscribed to a provident fund can be transferred. (Vol 22) 1935 Cal 756 (758) : 63 Cal 578 (DB).

25. Clause (g). — [1] In order to constitute a grant a "pension" it must be a periodical allowance, and it must be a grant, not in respect of any right, privilege, perquisite or office but on political considerations, or on account of past services or present infirmities or as a compassionate allowance. ('82) 4 Bom 432 (436) (FB) ✠ (Vol 16) 1929 All 781 (786) (DB) ✠ ('07) 30 Mad 153 (154, 155) (DB) ✠ (Vol 9) 1922 All 22 (23) : 44 All 354 (DB).

[2] Same meaning of the word "pension" as is given in cl. (g) of S 60, Civil P. C. and the Pensions Act must be given to the expression in this Act also. (Vol 18) 1931 P C 160 (161) : 58 Ind App 215:59 Cal 1 (PC).

[3] Grant of a sum of money is not a pension. ('82) 5 Mad 272 (273) (DB).

[4] Grant of land revenue is not a pension. ('07) 30 Mad 153 (155) (DB) ✠ (Vol 17) 1930 Nag 134 (134) ✠ (Vol 17) 1930 Lah 816 (817) (DB)✠('02) 1902 All W N 161 (162) (DB)✠('78) 1878 Pun Re No. 27, p. 114 (116) ✠(Vol 16) 1929 All 781 (786) (DB).

[See however (Vol 1) 1914 Lah 345 (347):1914 Pun Re No. 86 (DB) ✠ (Vol 17) 1930 Lah 904 (905) (DB).]

[5] Grant of land is not a pension as it is not a periodical allowance. ('11) 33 All 580 (582) (DB) ✠ (Vol 1) 1914 All 475 (476) : 36 All 318 (DB) ✠ (Vol 2) 1915 Oudh 65 (69) : 18 Oudh Cas 168 (DB).

[6] *Tora giras haq* is not a pension. (1859) 8 Moo Ind App 1 (41) (PC) ✠ ('80) 4 Bom 432 (436) (FB).

[7] Grant by the Government of annual sum of money as compensation for resumption of the grantee's land is not a pension. (04) 8 Cal W N 665 (666) (DB)✠ (Vol 13) 1926 All 521 (522) (DB)✠(87) 9 All 213 (218) ✠ ('77) 1877 Bom P J 261 (DB).

[8] Malikana allowance payable from a Government treasury is in the nature of a pension. ('12) 8 All L Jour 1326 (1326) (DB).

[9] Pension granted by Government by virtue of a treaty obligation contracted with another State is a

Section 6—Note 25 *(contd.)*
political pension. ('91) 18 Cal 216 (223) : 17 Ind App 181 (PC).

[10] Pension granted by Government for other reasons of State is a political pension. ('98) 21 Mad 105 (108) (D B)✠('67) 7 Suth W R 169 (169) (DB)✠(Vol 14) 1927 Mad 604 (607) : 50 Mad 711 (DB) ✠ ('98) 1 Oudh Cas 170 (171).

[11] Jaghir may be a political pension. (Vol 1) 1914 Lah 345 (347) : 1914 Pun Re No. 86 (DB).

[12] Political and other Government pensions are incapable of transfer so long as they are in the hands of Government, notwithstanding the fact that the amounts have become due. ('70) 5 Mad H C R 371 (372).

[13] Character of the fund remains unchanged so long as it remains unpaid in the hands of the Government. ('02) 26 Mad 69 (71) (DB).

[14] Once the money is received by the pensioner it becomes capable of transfer. ('77) 1877 Pun Re No. 87, p. 233 (234).

[15] Transfer of pension is prohibited on grounds of public policy — It is founded upon idea of ensuring enjoyment of pension by pensioners in comfort. (Vol 16) 1929 All 781 (787) (DB) ✠ (1886) 56 L J Q B 15 (20) : 18 Q B D 127, *Lucas* v. *Harris*.

26. Clause (h). — [1] First class of this clause deals with things which cannot be the subject of commerce or traffic. (Vol 3) 1916 Cal 269 (270): 43 Cal 28 (D B).

27. Transfer opposed to the nature of interest affected thereby. — [1] If, by the transfer, the nature of the property is injuriously affected, the transfer, in so far as it is so affected, is void. (Vol 30) 1943 Lah 265 (267)✠(Vol 15) 1928 All 721 (724, 726): 50 All 394 (D B)✠('66) 6 Suth W R 129 (129) (D B).

[2] Right to receive sum of money independent of office—There is no bar to its being alienated. (Vol 30) 1943 Lah 265 (267)✠(Vol 29) 1942 Lah 284 (286): I L R (1943) Lah 780 (D B) ✠ (Vol 19) 1932 Bom 257 (259) (D B)✠(Vol 23) 1936 All 131 (133): 58 All 457 (D B).

28. Transfer of service tenures. — [1] Transfer of the land granted under cl. (h) (1) is prohibited. ('85) 8 Mad 249 (259) (F B)✠(Vol 11) 1924 P C 5 (13) : 3 Pat 183 : 51 Ind App 37 (P C)✠(Vol 15) 1928 P C 177 (178): 55 Ind App 249: 7 Pat 744 (P C).

[2] Transfer of the property burdened with service is prohibited by this clause. (Vol 9) 1922 Mad 197 (198): 45 Mad 620 (F B)✠(Vol 28) 1941 Mad 217 (224) (D B).

[3] Transfer by way of lease of land granted for public service — Transfer is not opposed to nature of interest affected by transfer. (Vol 9) 1922 Mad 197 (199): 45 Mad 620 (F B)✠('71) 15 Suth W R 38 (40) (S B).

[4] Alienation of land granted for service if made, will be good for the lifetime of the incumbent of the office. ('05) 15 Mad L Jour 10 (11) (D B) ✠ (Vol 2) 1915 Mad 554 (555) (D B)✠('09) 5 Nag L R 15 (16) ✠ ('82) 6 Bom 596 (597) (D B).

[5] Alienation of land granted for service will be valid by custom. ('88) 15 Cal 471 (482) : 15 Ind App 18 (P C).

[6] Lands granted for performance of services of public nature—Services come to end — There is no bar to land being alienated. (Vol 1) 1914 Bom 181 (183) : 38 Bom 272 (D B).

[7] Lands attached to office — Office put end to — There is no bar to alienability of land. (Vol 12) 1925 Pat 210 (212): 3 Pat 915 ✠ (Vol 12) 1925 Pat 346 (351, 352): 4 Pat 272 (D B).

[8] Service inam for palanquin-bearer service — Alienation not against public policy. (1911) 2 Mad W N 588 (588) (D B).

29. Transfer for unlawful object or consideration—General. — [1] Unlawful object carried out — Transferor cannot get back property. (1873) 21 W R (Eng) 878 (879) : 16 E Q 275, *Ayerst* v. *Jenkins* ✠ (Vol 27) 1940 Pat 573 (576): 19 Pat 424 (D B)✠(Vol 8) 1921 Mad 326 (327): 44 Mad 329 (D B)✠ (Vol 25) 1938 Lah 732 (734) ✠ ('98) 1898 Dom P J 292 (D B) ✠ ('05) 28 Mad 413 (419) (D B)✠(Vol 16) 1929 Rang 225 (225)✠ (Vol 20) 1933 Bom 209 (212) (D B) ✠ (Vol 10) 1923 All 453 (454)✠('95) 19 All 35 (38) (D B).

[2] Unlawful object not carried out, or transferor not as guilty as transferee, or effect of permitting transferee to retain property to defeat provisions of any law — Court will enable transferor to get back property even though he may thereby take advantage of his own wrong. (Vol 10) 1923 Cal 154 (155) (D B)✠(Vol 16) 1929 Bom 147 (151): 53 Bom 321 (D B).

[3] This clause is inapplicable to cases where the object of the transfer is not unlawful but the transfer is ineffective on some other ground. (Vol 17) 1930 All 1 (2): 52 All 338 (F B) ✠ ('11) 14 Oudh Cas 144 (146) ✠ (1900) 24 Bom 622 (625) (D B) ✠ ('10) 5 Ind Cas 581 (582) (D B) (Cal).

30. Consideration and object. — [1] Word "object" means "purpose" or "design". (Vol 20) 1933 Bom 209 (212) (D B)✠('07) 34 Cal 289 (292) (F B).

[2] Both the consideration for and the object of the transfer must be lawful in order that the transfer may be valid. (Vol 9) 1922 Mad 181 (182) : 45 Mad 778 (D B).

31. Consideration partly unlawful. — [1] Consideration for transfer partly legal and partly illegal, and legal part cannot be separated or severed from illegal part—Whole transfer is void. (Vol 29) 1942 Mad 720 (721) ✠ (Vol 12) 1925 Nag 302 (304) : 22 Nag L R 136 (D B)✠('08) 32 Bom 449 (454) (D B).

[2] Legal part can be severed from illegal part — Transfer as to legal part will be valid, but not transfer as to illegal part. (Vol 12) 1925 Nag 302 (304) : 22 Nag L R 136 (D B)✠('07) 31 Bom 552 (557) (D B) ✠('09) 19 Mad L Jour 485 (487) (D B) ✠ (Vol 17) 1930 All 1 (3): 52 All 338 (F B).

[3] Part of consideration void but not unlawful and other part good — Transfer is not bad in any part (Vol 12) 1925 All 474 (476).

32. Forbidden by law. —[1] Transfer prohibited by law is void. (Vol 5) 1918 Mad 123 (126): 41 Mad 418 (F B).

[2] Sub-letting of the licence granted under the Excise laws is void. ('88) 10 All 577 (579) (DB) ✠ (Vol 16) 1929 All 210 (211) : 51 All 506 (DB)✠(Vol 9) 1922 Bom 78 (79) : 46 Bom 651 (DB) ✠ (Vol 9) 1922 Mad 106 (106) (DB)✠('89) 16 Cal 436 (441) (DB)✠('95) 19 Bom 626 (630) (DB)✠(Vol 13) 1926 Mad 218 (221)✠ ('74) 21 Suth W R 289(290)(DB)✠('04) 31 Cal 798(804).

[3] Prohibition of an alienation by order of Court is not a prohibition by law. ('12) 15 Oudh Cas 67(75)(DB).

[4] Sale in contravention of an injunction order is not void. ('87) 9 All 497 (499) (DB)✠('89) 1889 Pun Re No. 144, p. 487 (491)✠('03) 25 All 431 (433) (DB).

[5] Sale in contravention of an attachment order is not void. ('21) 63 Ind Cas 106 (108) (DB) (Lah).

[6] Act which is *ultra vires* is not necessarily prohibited by law and therefore illegal. ('01) 25 Bom 52 (73) (DB)✠(Vol 17) 1930 Mad 512 (513) : 53 Mad 771 (DB).

33. Transfers for immoral objects.—[1] Conveyance executed in consideration of future illicit co-habitation is for an immoral consideration. (Vol 12) 1925 All 437 (439) : 47 All 619 (DB).

[2] Past co-habitation can be a valid consideration for a transfer. ('81) 3 All 787 (788) (DB)✠(Vol 27) 1940 All 385 (385) : I L R (1940) All 371 (DB) ✠ (Vol 25) 1938 Pat 502 (503) : 17 Pat 308 (DB) ✠ (Vol 17) 1930 Mad 956 (960) (DB).

7. Every person competent to contract and entitled to transferable property, or authorized to dispose of transferable property not his own, is competent to transfer such property either wholly or in part, and either absolutely or conditionally in the circumstances, to the extent and in the manner allowed and prescribed by any law for the time being in force.

Persons competent to transfer.

Section 6 — Note 33 *(contd.)*

[But see (Vol 20) 1933 Bom 209 (211) (DB)✠(Vol 7) 1920 Bom 142 (143) : 44 Bom 542 (DB)✠(Vol 34) 1947 Bom 198 (201, 202) (DB). (Gift made in discharge of agreement having past co-habitation as its consideration is void.)]

[3] Money advanced on mortgage to dancing girls for expenses of learning, singing and dancing — Consideration is not immoral. ('89) 13 Bom 150 (153) (DB).

[4] Lease of a house knowingly let to a prostitute who carries on her business there is a void transfer. ('08) 32 Bom 581 (589) ✠ ('09) 31 All 58 (59) (DB) ✠ (Vol 8) 1921 Cal 486 (487) (DB) ✠ ('77) 1877 Pun Re No. 22, p. 52 (52) (SB).

34. Transfers opposed to public policy.— [1] Court cannot invent a new head of public policy beyond what has been well recognised by judicial precedents. (1937) 106 L J K B 641 (651), *Tendon* v. *Muldway* ✠ (Vol 10) 1923 Cal 154 (156) (DB)✠(Vol 4) 1917 All 462 (464)) : 39 All 51 (FB).

[2] Agreements which tend to prevent the course of justice are against public policy. (Vol 27) 1940 Rang 73 (75)✠(Vol 28) 1941 P C 95 (96, 98) : 68 Ind App 144 : ILR (1941) Kar (PC) 141 : I L R (1942) 1 Cal 1 (PC)✠ (Vol 17) 1930 P C 100 (102) : 57 Cal 1302 : 57 Ind App 117 (PC).

[3] Agreements which affect the freedom of marriage or security of marriage are against public policy. ('73) 11 Beng L R 129 (134) (DB) ✠ (1900) 1900 Pun Re No. 15, p. 53 (56).

[4] Marriage brocage contract is not necessarily opposed to public policy. ('94) 17 Mad 9 (11) (DB) ✠ ('90) 13 Mad 83 (85) (DB) ✠ ('05) 1 Cal L Jour 261 (267) ✠ (Vol 13) 1926 Pat 582 (587, 600) : 5 Pat 646 (DB)✠('86) 10 Cal 1054 (1056) (DB).

[But see ('12) 10 All L Jour 159 (161)✠('09) 32 Mad 185 (188) (FB)✠('98) 22 Bom 658 (666) (DB) ✠ ('86) 10 Bom 152 (154) (DB)✠('87) 1887 Pun Re No. 46, p. 97 (98) (FB) ✠ ('89) 1889 Pun Re No. 128, p. 446 (448) (FB)✠('11) 15 Cal W N 447 (452).]

[5] Public servant prohibited by statute or by rules having force of statute from taking transfer of property —Taking of such transfer in contravention of such rules would be void. (Vol 20) 1933 Bom 262 (265) (DB)✠('12) 8 Nag L R 82 (83).

[6] Prohibition only by departmental rules not having force of statute—Taking of transfer by public servant in contravention of rules will not be void as being against public policy. (Vol 4) 1917 All 462 (463) : 39 All 51 (FB) ✠ (Vol 4) 1917 All 447 (447) : 39 All 58 (FB)✠(Vol 10) 1923 Cal 154 (156) (DB)✠(Vol 18) 1931 Bom 269 (271) (DB) ✠ ('97) 7 Mad L Jour 268 (269) (DB).

[But see (Vol 14) 1927 Lah 18(19):7 Lah 463(DB).]

35. Person legally disqualified to be a transferee.—[1] Trustee cannot buy trust property nor can an official appointed to conduct a sale for creditors be himself the purchaser. (Vol 10) 1923 P C 114 (117): 50 Ind App 162 : 4 Lah 284 (PC).

[2] Person who has to obtain official approval for a transfer in his favour under Departmental Government Rules, is not a person disqualified to be transferee. (Vol 15) 1928 Rang 136 (137) : 6 Rang 423 (DB).

[3] Buddhist monk is not a disqualified person (Vol 16) 1929 Rang 354 (360) : 7 Rang 677 (FB).

36. Clause (1). —[1] Clause applies only where the restriction against transfer of the right of occupancy is imposed by law. ('12) 15 Oudh Cas 67 (75) (D B) ✠ ('74) 22 Suth W R 22 (26) (F B).

[2] Clause does not apply where the restriction against transfer of the right of occupancy is imposed by agreement of parties or by a decree of Court. ('12) 15 Oudh Cas 67 (75) (D B) ✠ ('79) 2 All 411 (413, 414) (F B)✠('03) 26 Mad 156 (157).

37. Muhammadan Law. — [1] No transfer can be made by Muhammadans of an expectancy. (Vol 5) 1918 Mad 119 (119): 41 Mad 365 (F B)✠ ('87) 1887 All W N 84 (88) (D B)✠ ('09) 2 Ind Cas 865 (872) (All) ✠('08) 8 Bom L R 252 (257) ✠ ('07) 31 Bom 165 (171) (D B) ✠ (Vol 19) 1932 Sind 67 (70) ✠ (Vol 8) 1921 Sind 177 (187) : 16 Sind L R 25 (D B).

[2] No transfers can be made by Muhammadans of emoluments attached to an office. (Vol 25) 1938 P C 71 (72) : 32 Sind L R 383.

[3] Right of a Muhammadan widow to possession of her husband's property in lieu of dower has been held to be a personal right restricted in its enjoyment to the widow and to be not transferable. ('07) 29 All 640 (646) (D B)✠ ('70) 14 Suth W R 239 (241) (D B) ✠ ('98) 20 All 262 (263) (D B) ✠ (Vol 1) 1914 Oudh 369 (372) : 17 Oudh Cas 157 ✠ (Vol 29) 1942 Pat 210 (212) : 20 Pat 798 (D B).

[4] Widow's right to the security is heritable property and this could be transferred. (Vol 10) 1923 Pat 33 (34) : 2 Pat 84 (D B) ✠ (Vol 14) 1927 Pat 20 (21) (D B) ✠ (Vol 16) 1929 All 326 (327) ✠ (Vol 8) 1921 All 262 (264) : 43 All 127 (D B).

SECTION 7 — SYNOPSIS.

1. "Competent to contract."
2. "Entitled to transferable property."
3. "Authorised to dispose of ..... not his own."
4. "Prescribed by any law ..... in force."
5. Transfer in favour of person not competent to contract.

1. "Competent to contract".—[1] Person who has not attained the age of majority according to the law applicable to him is not competent to contract. (Vol 15) 1928 P C 152 (154, 156) (P C) ✠ (Vol 24) 1937 All 610 (613, 618) : I L R (1937) All 860 (F B) ✠ ('03) 30 Cal 539 (548) : 30 Ind App 114 (P C).

[2] European British subjects not governed by provisions of Indian Majority Act—Age of majority would be 21 years in accordance with English law. ('85) 7 All 490 (500) (F B).

[3] Person of unsound mind cannot transfer property. (Vol 9) 1922 All 449 (453) : 44 All 748 (D B) ✠ (Vol 20) 1933 Mad 624 (625) : 56 Mad 904.

[4] Person whose estate has been taken by any Court of Wards is not a person competent to transfer property. ('84) 1884 Pun Re. No. 18, p. 52 (56) ✠ (Vol 12) 1925 Oudh 545 (546) (D B) ✠ ('04) 17 C P L R 13 (15, 16).

[5] Competency referred to is the personal qualification of the contracting party. (Vol 4) 1917 Nag 215 (222) : 13 Nag L R 130 (F B).

8. Unless a different intention is expressed or necessarily implied, a transfer of property passes forthwith to the transferee all the interest which the transferor is then capable of passing in the property, and in the legal incidents thereof.

Operation of transfer.

Such incidents include, where the property is land, the easements annexed thereto, the rents and profits thereof accruing after the transfer, and all things attached to the earth;

and, where the property is machinery attached to the earth, the moveable parts thereof;

and, where the property is a house, the easements annexed thereto the rent thereof accruing after the transfer, and the locks, keys, bars, doors, windows, and all other things provided for permanent use therewith;

and, where the property is a debt or other actionable claim, the securities therefor (except where they are also for other debts or claims not transferred to the transferee), but not arrears of interest accrued before the transfer;

and, where the property is money or other property yielding income, the interest or income thereof accruing after the transfer takes effect.

Section 7 — Note 1 *(contd.)*

[6] Personal capacity or incapacity of an individual to contract depends upon the law of the place where the contracting party is domiciled. ('95) 19 Bom 697 (699 700) (D B).

[7] Person legally competent to contract— Fact that transfer is inequitable, that he is old man and not justified to effect transfer do not constitute incapacity to contract. ('03) 25 All 358 (365) (D B).

[8] Protection given to a pardanashin lady by law cannot be transmuted into a legal disability. ('13) 36 All 81 (90, 91) : 41 Ind App 23 : 16 Oudh Cas 378 (P C) ✠(Vol 15) 1928 P C 303 (305) (P C).

2. "Entitled to transferable property."—[1] Person not entitled to any transferable property, cannot transfer such property to another. (Vol 28) 1941 Pat 219 (221) (D B).

3. "Authorised to dispose of .... not his own." — [1] A man cannot deal with property which is not his own, unless he shows some right to do so either as agent, or guardian or the owner, or trustee or the like. (Vol 10) 1923 All 563 (564) ✠ (Vol 10) 1923 All 581 (582) : 45 All 497 (D B).

[2] Persons authorised to deal with property not their own may be persons holding power of attorney, an official receiver or official assignee of an insolvent's estate, an executor or administrator of a deceased person and a Court of Wards. (Vol 5) 1918 Mad 889 (890): 40 Mad 871 (D B).

[3] Grant, which purports to be made under the Darkhast Rules by an officer empowered by them to make it, is valid. ('03) 26 Mad 268 (278, 279) (D B).

4. Prescribed by any law ..... in force." — [1] "Any law" includes both the statute law as well as the personal law, such as the Hindu law, Muhammadan law, etc.

[2] A *de jure* guardian of a Muhammadan minor can dispose of the minor's property for necessity, but not a *de facto* guardian (Vol 5) 1918 P C 11 (17, 18) : 45 Cal 878 : 45 Ind App 73 (P C)

[3] One partner cannot create a mortgage upon partnership property without the consent of the other partners ('82) 4 All 437 (459)✠('08) 31 Mad 206 (209) (DB) (Except where he has under arrangement with others sole management of business.)

[4] A judgment-debtor whose property is in the possession of the Collector for the purposes of execution under Sch. III. Civil P. C, is incompetent to mortgage, charge, lease or otherwise alienate such property without the permission of the Collector. (Vol 5) 1918 P C 168 (169) : 14 Nag L R 181 : 45 Ind App 219 : 46 Cal 183 (P C). ((1912) 36 Bom 510, *Overruled.*) ✠ (Vol 4) 1917 Nag 215 (218, 219) : 13 Nag L R 130 (FB).

[5] Alienation of minor's property by Christian mother is not void but voidable at the instance of minor. (Vol 21) 1934 Mad 605 (607) : 57 Mad 1062 (DB).

[6] Alienation by disqualified proprietor, under Chota Nagpur Encumbered Estates Act. VI [6] of 1876, S 124A is void *ab initio*. (Vol 16) 1929 Pat 117 (119) : 8 Pat 549 (DB).

5. Transfer in favour of person not competent to contract. — [1] There is nothing in this section to prevent a person not competent to contract from being the transferee of property. (Vol 9) 1922 Nag 239 (241)✠ (Vol 2) 1915 All 478 (479) : 38 All 62 (DB) ✠ (Vol 2) 1915 Oudh 155 (156 157) : 18 Oudh Cas 115 (DB) ✠ (Vol 4) 1917 Mad 630 (634, 635, 638) : 40 Mad 308 (F B). (('10) 33 Mad 312, *Overruled.*)✠(Vol 5) 1918 Cal 1027 (1028) (DB) ✠ (Vol 23) 1936 Pat 153 (156, 157) (DB) ✠ (Vol 6) 1919 Pat 561 (563) (DB) ✠ (Vol 3) 1916 All 366 (368 369) : 38 All 154 (DB)✠(Vol 4) 1917 Lah 109 (109, 110) ✠ (Vol 11) 1924 Lah 611 (613) : 5 Lah 317 (DB)✠(Vol 3) 1916 Low Bur 91 (92, 93) ✠ ('13) 18 Ind Cas 451 (451) (DB) (Cal).

[2] Transfer involving obligations to be carried out by minor—Transfer in favour of minor will be invalid (Vol 5) 1918 Pat 626 (627) : 3 Pat L Jour 518 (DB).

[3] Transfer in favour of a lunatic is valid. (Vol 12) 1925 Oudh 37 (39) : 27 Oudh Cas 214.

SECTION 8 — SYNOPSIS

1. Scope.
2. Sales in invitum.
3. "Unless a different intention is expressed or necessarily implied."
4. Maintenance grants.
5. Hindu law.
6. Grant for an indefinite period.
7. "Transfer of property."
8. "Which the transferor is then capable of passing."
9. "In the property."
10. Transfer of legal incident only—Effect of.
11. "Easements annexed thereto."
12. Rents and profits of property.
13. "All things attached to the earth."
14. House when passes fixtures.
15. Transfer of debt—Securities when pass.
16. Interest.
17. Other legal incidents.

1. Scope.—[1] Object of the section is to clarify what are the legal incidents of each particular class of property which pass along with the property when it is transferred, and not to lay down any rule as to what words are necessary to effect a transfer of any parti-

Section 8 — Note 1 *(contd.)*
cular kind of property. (Vol 27) 1940 Pat 516 (536) : 19 Pat 433 (DB).

[2] Section does not lay down any canon of construction but is a rule relating to the legal effect of a grant. (Vol 6) 1919 Mad 338 (338, 339) (DB).

[3] Object of the section is "to stabilize title and to remove, from the region of pure speculation, what passed in the mind of the transferor or the transferee at the date of the transfer." (Vol 16) 1929 All 465 (474) (FB).

2. Sales in invitum. — [1] Section does not, in terms, apply to transfers *in invitum*. (Vol 3) 1916 Mad 323 (325) : 39 Mad 283 (DB) ✠ (Vol 26) 1939 All 415 (417) : I L R (1939) All 607 (FB)

[2] Principles underlying the section are of general applicability and will apply even to sales *in invitum*. (Vol 18) 1931 All 62 (64) : 52 All 985 (DB).

[3] Sales in execution of money decrees — Question as to extent of property and interest of judgment-debtor therein sold depends upon what Court intended to sell and purchaser understood he bought ('04) 27 Mad 131 (141, 142) : 31 Ind App 1 (P C)✠('90) 17 Cal 584 (589) : 17 Ind App 10 (P C)

[4] Sale will pass to the purchaser all the legal incidents of the property sold (Vol 6) 1919 Oudh 432 (432) : 21 Oudh Cas 263✠(Vol 10) 1923 Pat 355 (356)✠ (Vol 21) 1934 Cal 610 (614) : 61 Cal 991 (DB)✠(Vol 27) 1940 All 427 (428) : I L R (1940) All 599 (DB) ✠ ('74) 22 Suth W R 522 (522) (DB).

[See however (Vol 26) 1939 All 415 (417) : I L R (1939) All 607 (F B)]

[5] On the failure of the owner to pay Government assessment his estate or interest in the land is forfeited to the Government and what is sold is not the interest of the defaulting owner but the interest of the Crown subject to the payment of the Government assessment. (Vol 14) 1927 P C 135 (137) : 54 Ind App 218 : 54 Cal 669 (P C). (Interest of Crown will not include building put upon land by defaulting proprietor.)✠(Vol 1) 1914 P C 82 (83) (P C).

3. **'Unless a different intention is expressed or necessarily implied."** — [1] It is the intention to the contrary that must be expressed or necessarily implied. ('76) 1 Bom 91 (94) (DB).

[2] Reservation of rights in a transfer cannot be inferred or necessarily implied apart from the terms of the document itself, except where the document is ambiguous, in which case the Court can consider extraneous circumstances. (Vol 4) 1917 Cal 663 (664) (DB).

[3] Words "from generation to generation" in a transfer import the transfer of an absolute estate. ('76) 1 Cal 391 (398) : 3 Ind App 92 (P C)✠('87) 14 Cal 296 (307) : 14 Ind App 7 (P C).

[4] Sanadi grant in inam, saranjam, etc., imports the grant ordinarily of the land revenue and not the grant of the land itself. (Vol 10) 1923 P C 6 (7) : 47 Bom 327 : 50 Ind App 49 (P C).

[See however (Vol 30) 1943 Sind 100 (105) : I L R (1942) Kar 559✠(Vol 12) 1925 Bom 12 (14) : 49 Bom 99 (DB).]

[But see (Vol 23) 1936 Oudh 121 (124) : 11 Luck 588 (DB).]

[5] Grant of a jaghir, saranjam or ghatwally tenure is *prima facie* a personal grant for life of the donee. (Vol 5) 1918 P C 203 (205) : 46 Ind App 88 : 46 Cal 683 (P C) ✠ (Vol 1) 1914 Cal 4 (19) (F B). (Though it may be shown from circumstances to be heritable estate.)✠('91) 15 Bom 222 (228) : 18 Ind App 22 (P C). (Do.)

[6] Words *"istemrari mokerrari"* in a patta do not *per se* convey an estate of inheritance though it may be permanent during the lifetime of the grantee. ('86) 12 Cal 117 (130) : 12 Ind App 205 (P C) ✠ (1900) 27 Cal 156 (165) : 26 Ind App 216 (P C).

[7] Word "kayam patta" or "kayam saswata patta" do not *per se* convey an estate of inheritance though it may be permanent during the life-time of the grantee. ('92) 15 Mad 199 (201, 202) (DB) ✠ (Vol 3) 1916 Mad 500 (500) (DB).

[8] Word "mowrasi" denotes a heritable estate ('03) 30 Cal 883 (892) (DB).

[9] Word "malik" denotes a heritable estate. (Vol 15) 1928 Oudh 67 (72).

[10] Trees standing on land mortgagaged to *A* and subsequently land sold to *B*—No mention in sale deed of mortgage to *A* — Non-mention of mortgage in sale deed held did not amount to contrary implied intention. ('98) 22 Bom 610 (612) (DB).

4. Maintenance grants.—[1] A grant for maintenance is limited to the life of the grantee ('01) 25 Bom 563 (573) : 28 Ind App 198 (P C). (Deed clearly stating that grantee is to have absolute interest. Such interest cannot be controlled by mere fact that motive of grant was maintenance.)✠(Vol 31) 1944 All 17 (21) : I L R (1943) All 892 (DB). (Mere use of words "always", "for ever" or "made owner" (malik) does not *per se* create heritable estate.) ✠ ('01) 23 All 194 (205) : 28 Ind App 1 (P C). (Do.)

[2] Original deed of maintenance not forthcoming— Successive enjoyment of property transferred for several generations held justified presumption that grant though made for maintenance was intended to be absolute. (Vol 31) 1944 Oudh 65 (77) : 19 Luck 320 (DB) ✠ ('06) 4 Cal L Jour 399 (400) ✠ ('82) 4 Mad 371 (372) (DB).

5. **Hindu law.**—[1] **If the donor does not confer upon the donee, who is a Hindu female, express power of alienation, such power may nevertheless be deduced from the terms of the gift if the words used are sufficient to confer upon her absolute ownership, unless the circumstances or the context show that such absolute ownership was not intended.** (Vol 17) 1930 P C 239 (242) : 57 Ind App 282 : 11 Lah 645 (P C) ✠ (Vol 17) 1930 P C 253 (254) : 57 Ind App 291 (P C).

[2] Under Mithila school of Hindu law, a gift by a husband to his wife will convey only a life interest to the wife. This limitation does not apply to transfers for consideration, which have to be construed in the same way as any other transfer (Vol 15) 1928 P C 112 (114) : 55 Ind App 197 : 7 Pat 500 (P C).

[3] The amendment of S 2 of the Act by omitting the word "Hindu" must now be taken to abrogate the said rule of Mithila law.

[4] The principle laid down in S. 8 is not of much practical utility when the interpretation of a transfer by a Hindu in favour of a Hindu female is in question as the words "by necessary implication" in that section do attract the operation of the general notion of a Hindu that a Hindu woman ordinarily gets an estate for life and not an absolute estate. (Vol 22) 1935 All 43 (45) (D B).

6. **Grant for an indefinite period.**—[1] **If a grant** be made to a person for a period but the period is indefinite, it enures, for his life-time and passes no interest to his heirs, unless there are words showing an intention to grant a hereditary interest. ('78) 3 Cal 210 (212) : 4 Ind App 223 (P C). (This rule of construction will not apply if term for which grant is made is fixed or can be definitely ascertained)

7. **"Transfer of property."**—[1] Expression "transfer of property" will, for the purposes of this section, include transfers of interests in property. ('03) 30 Cal 556 (564) : 30 Ind App 71 (P C) ✠ (Vol 32) 1945 Pat 400 (402) : 24 Pat 268 (D B).

Section 8—Note 7 *(contd.)*

[2] Sale certificate issued to the purchaser is not an instrument of transfer of property, but merely evidence of the title of the purchase. (Vol 26) 1939 All 415 (430) : I L R (1939) All 607 (F B).

8. "Which the transferor is then capable of passing."—[1] On a transfer of property it is only the transferor's interest that will pass to the transferee. Vol 14) 1927 All 689 (690) (D B).

[2] Transferee cannot have a better title than what the transferor himself has in the thing transferred. ('09) 33 Bom 1 (22) : 35 Ind App 139 (P C).

[3] If the transferor holds the property only under limitations, the transferee cannot get it free from those limitations. (Vol 2) 1915 Mad 447 (448) (D B).

[4] Rights of third persons cannot be affected by a transfer by *A* to *B*, whether or not the deed contains an exception or reservation of such rights. ('80) 4 Bom 643 (649) (D B) ✠ ('02) 26 Bom 198 (200) (D B).

[5] Whatever a transferor is capable of passing in the property transferred will pass. (Vol 27) 1940 All 157 (458) : I L R (1940) All 667 (D B) ✠ (Vol 26) 1939 Mad 802 (803) (D B) ✠ (Vol 3) 1916 All 251 (252) D B) ✠ (Vol 4) 1917 Mad 61 (62) (D B).

[6] Person entitled to property in more than one capacity transferring "all his estate and interests" in property — Transferee will get all estates and interests vested in transferor, although not vested in character in which he became party to conveyance. ('04) 6 Bom L R 800 (816) ✠ (Vol 2) 1915 Bom 109 (109) : 40 Bom 69.

[7] When a person has power to convey the absolute interest in certain property only under particular circumstances, but only a lesser interest in the absence of such circumstances, a transfer by him in the absence of such circumstances can convey nothing more than the lesser interest. ('96) 18 All 146 (155) : 23 Ind App 1 (P C).

9. "In the property."—[1] Whoever is the owner of the soil, it is his even to the firmament and to the middle of the earth. (1900) 2 Bom L R 688 (689) (D B)✠ (1900) 2 Bom L R 114 (115) (D B). (Rule is not absolute and there are exceptions.)

[2] Lease of land granted by *A* to *B*, whether permanently or temporarily — Corpus of lease does not include "timber" standing thereon. (Vol 10) 1923 Pat 95 (95) : 6 Pat L Jour 127 (D B).

[3] Lease of land granted by *A* to *B*, whether permanently or temporarily — Corpus of lease does not include minerals found in sub-soil in absence of specific words transferring them also. (Vol 30) 1943 Pat 31 (31, 32) (D B). (Lessee will not be entitled to fell or sell timber or to open or excavate mines and utilise minerals.) ✠ (Vol 18) 1931 P C 162 (163, 164) : 59 Cal 80 : 58 Ind App 228 (P C). (Do.) ✠ (Vol 18) 1931 P C 89 (90) : 58 Cal 1187 : 58 Ind App 125 (P C). (Do.)

[4] Lease granted by zamindar to certain persons in perpetuity of 'the entire zamindary including all interests therein"—Expression "including all interests therein" held did not increase corpus of subject of lease. (Vol 15) 1928 P C 234 (237) : 56 Cal 1 : 55 Ind App 320 (P C).

[5] Land leased to tenants for agricultural purposes —Property in shells dug up from land by tenants held did not pass to them. ('02) 25 Mad 669 (671) (D B).

[6] Grantee of land for her maintenance does not get any right to open up new mines on the land. ('05) 2 Cal L Jour 20 (26, 36) ✠ ('05) 1 Cal L Jour 517 (525) (D B).

10. Transfer of legal incident only—Effect of.— [1] Transfer of the rents and profits of a property to a woman for her life does not carry with it a gift of the entire property itself. (Vol 23) 1936 Bom 330 (332) : I L R (1937) Bom 18 (F B).

[2] Gift of the income of a property without any limitation would be a gift of the property itself. (Vol 8) 1921 Mad 563 (566) (D B) ✠ (Vol 13) 1926 Mad 250 (251) (DB).

[3] Transfer of a jungle does not carry with it the transfer of the entire land itself. (Vol 18) 1931 Oudh 177 (229).

11. "Easements annexed thereto."— [1] Transfer of a land or a house will pass to the transferee all easements which it had enjoyed over another property. ('74) 22 Suth W R 522 (522) (DB) ✠ ('85) 1885 Bom P J 20 (21) (D B)✠(Vol 21) 1934 All 447 (448) ✠ ('08) 35 Cal 889 (894).

[2] Phrase 'Easements annexed thereto" will not have reference to an easement which first came into existence as a consequence of the transfer. (Vol 24) 1937 Nag 179 (180) : I L R (1937) Nag 204 ✠ ('93) 15 All 270 (290) (D B)✠(Vol 34) 1947 Pat 122 (123, 124). (Partition between members of family—Common passage left for use of co-sharers— Right to share in passage is not legal incident of shares — Stranger purchaser of share would not automatically become entitled to common passage.)

[3] Easement which first comes into existence as a consequence of the transfer passes to the transferee by virtue of S. 13, Easements Act or of the principles underlying it, and not as "incidents" of the property transferred ('88) 1888 Pun Re No. 60, page 147 (149)✠ ('82) 8 Cal 956 (958, 959) (D B) ✠ (Vol 2) 1915 Mad 795 (796) : 38 Mad 141 (DB) ✠ (Vol 11) 1924 Mad 812 (813) ✠ (Vol 17) 1930 Pat 7 (11) (D B) ✠ ('12) 16 Cal L Jour 417 (420)✠ (Vol 11) 1924 Lah 724 (725) ✠ ('71) 8 Bom H C R 181 (185).

12. Rents and profits of property. — [1] Only the rents and profits or the rent accruing after the date of the transfer and not before that will pass to the transferee. (Vol 16) 1929 Bom 51 (53) (D B) ✠ ('01) 14 C P L R 84 (85)✠(Vol 4) 1917 Nag 61 (61, 62)✠(Vol 7) 1920 Mad 386 (387) (DB).

[2] Right to rents of property accrued before date of transfer may itself be transferred — In such case, this section has no application. (Vol 10) 1923 Mad 177 (178) ✠(Vol 12) 1925 Pat 310 (312) : 4 Pat 43.

[3] Right to mesne profits prior to the date of transfer cannot be transferred. (Vol 14) 1927 Mad 817 (818). ((Vol 8) 1921 Mad 56 : 44 Mad 539, *Not approved.*) ✠ (Vol 13) 1926 Cal 428 (430) (DB)✠(Vol 11) 1924 Pat 551 (553) : 3 Pat 575 (DB) ✠ (Vol 3) 1916 Mad 473 (473) : 38 Mad 308 (DB).

[4] Transfer of rents and profits alone cannot be presumed to carry with it, the right to open mines and remove minerals which are a portion of the soil. ('06) 33 Cal 203 (217) : 32 Ind App 185 (P C).

[5] Mortgaged property came into hands of Receiver appointed by Court — Rents and profits of property in hands of Receiver held formed part of security. (Vol 21) 1934 Rang 321 (322): 12 Rang 437 (DB).

13. "All things attached to the earth."—[1] Standing timber, growing crops and grass will pass on a transfer of property on which they stand, as the legal incidents of such property. (Vol 29) 1942 Pesh 88 (88)✠ (Vol 21) 1934 Cal 610 (614) : 61 Cal 991 (D B) ✠ (Vol 19) 1932 Pat 344 (345) ✠ (Vol 10) 1923 Pat 355 (356) ✠ ('79) 4 Cal 814 (815) (D B) ✠ ('90) 13 Mad 15 (16) ✠ (Vol 10) 1923 Nag 327 (329) ✠ ('01) 15 C P L R 141 (142).

[2] Trees will pass to the transferee of the land as the legal incidents of such property. (Vol 27) 1940 All 427 (428) : I L R (1940) All 599 (D B) ✠ ('03) 13 Mad L Jour 3 (6) (S B)✠(Vol 26) 1939 All 291 (294): I L R (1939) All 518 (F B) ✠ ('67) 11 Moo Ind App 295 (313) (P C).

[3] Building standing on the land will pass to the transferee of the land as the legal incidents of such

9. A transfer of property may be made without writing in every case in which a writing is not expressly required by law.

Oral transfer.

Section 8 — Note 13 *(contd.)*

property. (Vol 20) 1933 Rang 24 (25) ✠ (Vol 12) 1925 All 449 (453) : 47 All 470 (DB)✠(Vol 32) 1945 Pat 400 (402) : 24 Pat 268 (DB).

14. House when passes fixtures. — [1] English law of fixtures with all its technicalities should not be applied to this country as being based on equitable considerations. ('10) 37 Cal 815 (821) (DB) ✠ ('12) 16 Cal W N 1101 (1102) (D B)✠(Vol 11) 1924 Mad 187 (188)✠ (Vol 15) 1928 Oudh 67 (87).

[2] Machinery brought into the house for carrying on business is not a thing provided for the permanent use of the house. (Vol 11) 1924 Mad 187 (188) ✠ (Vol 12) 1925 Rang 250 (251, 252) (DB).

[3] Words "other things provided" do not include a right of access by a staircase when the ownership of the staircase itself is not claimed and the right of way is not an easement of necessity. (Vol 24) 1937 Nag 179 (180) : I L R (1937) Nag 204.

15. Transfer of debt—Securities when pass.—[1] Moveable property hypothecated to *A* as security for repayment of debt due to *A* on promissory note—*A* transferring promissory note to *B*—*B* will be entitled to security also and can enforce payment of his debt by sale of moveable property. (Vol 16) 1929 Bom 471 (473) : 53 Bom 819.

[2] Where a debt transferred is secured by mortgage of immovable property and the transfer of the security is not required to be registered, the transfer of debt will effect transfer of security also. (Vol 2) 1915 Mad 209 (210) : 37 Mad 51 (DB) ✠ (Vol 8) 1921 Mad 137 (138) : 44 Mad 196 (D B) ✠ (Vol 6) 1919 Oudh 132 (133) : 21 Oudh Cas 400 (DB) ✠ ('02) 26 Bom 305 (310) (D B) ✠ ('93) 15 All 134 (135, 136) (DB).

[3] Where *A* in whose favour a simple mortgage has been executed, transfers the debt due to him; to *B* by an unregistered instrument, the security does not pass to *B*. (Vol 1) 1914 Mad 353 (353 354) ✠ (Vol 6) 1919 Mad 547 (548, 549) (D B) (Security passes to transferee by statutory transfer under the section without further act of parties)

[But see (Vol 9) 1922 Mad 344 (345, 347) : 44 Mad 965 (DB) (Vol 18) 1921 Mad 137 : 44 Mad 196, *Not Approved.*) ✠ (Vol 20) 1933 Mad 181 (184) ✠ (Vol 5) 1918 Cal 411 (413) (DB).]

[4] Simple mortgage in favour of *A*—*A* transferring the debt to *B* by an *unregistered* instrument—The debt can be separated from the security and pass to *B* —*B* must sue the debtor in the name of *A* (Vol 18) 1931 P C 245 (247, 248) : 59 Cal 377 : 58 Ind App 323 (P C) (Reversing (Vol 18) 1931 Cal 223 (230) : 58 Cal 136 (DB)) ✠ (Vol 22) 1935 P C 108 (113) : 57 All 314 : 62 Ind App 115 (P C).

[5] Transfer of debt without a registered instrument will pass the charge also under the provisions of S. 8. (Vol 13) 1926 Mad 903 (904).

[6] Charge is "an interest in immovable property" for the purposes of S. 17 of the Registration Act and if the debt is transferred by a written instrument, it will not pass the charge, unless document is registered. (Vol 21) 1934 Mad 713 (714) (DB) ✠ (Vol 18) 1931 Cal 223 (227, 228) : 58 Cal 136 (DB) (Reversed by the Privy Council on another point in (Vol 18) 1931 P C 245 : 59 Cal 377 : 58 Ind App 323 (P C).) ✠ (Vol 21) 1934 Mad 615 (615, 616) (DB).

[7] Money decree obtained in respect of secured debt and then transferred—Securities held did not pass with decree and purchaser held could not claim to enforce security. ('77) 1 All 446 (447) (DB).

[See however ('75) 14 Beng L R 425*n* (432*n*) (DB).]

[8] Indorsee of a promissory note is limited to his remedy on the note unless the endorsement is so worded as to transfer the debt as well and the stamp law is complied with. (Vol 25) 1938 Mad 377 (379) : I L R (1938) Mad 568 (F B) ((Vol 4) 1917 Mad 61, *Overruled*; (Vol 22) 1935 Mad 240, *Rel. on.*)

[9] Transfer of the promissory note by an endorsement is not the transfer of a debt and S. 8 has no application to such cases. (Vol 26) 1939 Mad 846 (847) (DB).

16. Interest. — [1] Interest is always accessory to the principal. (1836) 132 E R 275 (276) : 2 Bing N C 713, *Hollis* v. *Palmer* ✠ ('03) 27 Bom 330 (333) (DB).

[2] Interest accrued on a debt, actionable claim or other money transferred, before the transfer will pass to the transferee, not as a legal incident but as part of debt or actionable claim itself. (Vol 2) 1915 Low Bur 136 (136) ✠ (Vol 6) 1919 Oudh 132 (133) : 21 Oudh Cas 400 (DB).

[3] On a transfer of arrears of rent, the interest on such arrears from before the date of transfer would pass to the transferee as a legal incident of the rent transferred. ('10) 7 Ind Cas 582 (583) (DB) (Cal).

17. Other legal incidents. — [1] Village account books and other papers relating to the management of the village are legal incidents of the village. ('87) 11 Bom 485 (487) (DB).

[2] Principal patti transferred—Interest of transferor in shamilat-patti will also pass as appurtenant to principal patti. (Vol 14) 1927 All 717 (719) : 49 All 606 (DB).

[3] A transfer by a zamindar of a zamindari will pass also the zamindar's interest in the abadi. (Vol 13) 1926 Oudh 358 (359).

[4] Settlement of land carries with it the right of fishery in water standing on the land. (Vol 9) 1922 Pat 9 (11) (DB) ✠ (Vol 17) 1930 Pat 382 (383) : 9 Pat 401 (DB).

[5] Franchise of a ferry is not necessarily appurtenant to land. (Vol 18) 1931 All 587 (588) : 53 All 764 (DB).

[6] In the absence of specific reservation, there is a presumption that khudkast land would pass along with the village share. (Vol 24) 1937 Nag 205 (208) : I L R (1937) Nag 367.

[7] The right of pre-emption is an incident to the ownership of one land and a burden on the ownership of another land. (Vol 9) 1922 Oudh 289 (291) : 25 Oudh Cas 319 (DB).

[8] Where the vendor sold his zamindari rights the full estate of the vendor carrying with it the right of pre-emption vested in the vendee. ('83) 5 All 324 (330) (F B).

SECTION 9 — SYNOPSIS

1. Scope.
2. Transfers expressly required by this Act to be in writing.
3. Other transfers of property.
4. Creation of easements.
5. Gifts to religious and charitable endowments.
6. Partition of property.
7. Family arrangement.
8. Release, relinquishment and surrender.
9. Award.

1. Scope — [1] Test to determine whether a transaction can be made without writing is to see if it is expressly required by law to be in writing. (Vol 24) 1937 Mad 882 (892) : I L R (1937) Mad 638 (F B).

10. Where property is transferred subject to a condition or limitation absolutely restraining the transferee or any person claiming under him from parting with or disposing of his interest in the property the condition or limitation is void, except in the case of a lease where the condition is for the benefit of the lessor or those claiming under him: Provided that property may be transferred to or for the benefit of a woman (not being a Hindu, Muhammadan or Buddhist), so that she shall not have power during her marriage to transfer or charge the same or her beneficial interest therein.

Condition restraining alienation.

Section 9 Note 1 *(contd.)*

(Transaction "transfer of property"—No express provision of law requiring it to be in writing — Section will enable it to be made without writing).

[2] The above principle would also be applicable in provinces in which this Act does not apply. (Vol 28) 1941 Lah 407 (410): I L R (1942) Lah 79 (F B) ✠(Vol 3) 1916 Lah 54 (55): 1916 Pun Re No 32 (D B) ✠(Vol 22) 1935 Lah 821 (823) (D B) ✠(Vol 1) 1914 Low Bur 62 (62) (Partition.)✠('07) 29 All 267 (269, 270) (Mahomedan law—Gift).

2. Transfers expressly required by this Act to be in writing.—[1] In order that title may pass under the transfer there must be not only writing but registration thereof and title to the property cannot pass in any other way. (Vol 20) 1933 Pat 264 (266): 12 Pat 616 (DB) ✠ Vol 28) 1941 Nag 5 (6): I L R (1941) Nag 615 (DB) ✠(Vol 11) 1924 Pat 185 (186).

[But see ('10) 8 Ind Cas 443 (443) (Low Bur).]

3. Other transfers of property.—[1] All transfers of immovable proper y *inter vivos* were intended to be includ d in the one or the other of the transactions coming under the heads "sale", "mortgage", 'lease", "exchange" and "gift" dealt with by this Act (Vol 1) 1914 Mad 489 (491): 37 Mad 423 (D B) ✠('01) 23 All 175 (181) (DB).

[But see (Vol 9) 1922 Mad 311 (313): 45 Mad 612 (FB) ✠('21) 13 Mad L W 230 (245).]

[2] Transfer of land by a husband to his wife to be enjoyed by her during her life-time in discharge of her claim for future maintenance can be effected without writing. (Vol 1)1914 Nag 54(54, 55):10 Nag L R111.

[3] Grant of land by way of guzara unless it amounts to a gift or lease can be effected without writing. (Vol 6) 1919 Oudh 241 (246, 247): 21 Oudh Cas 360 (D B).

[4] Hypothecation of movable property can be effected without writing. (Vol 3) 1916 Bom 77 (80).

[5] Lease of land, not covered by S. 107, T. P. Act can be made orally. (Vol. 23) 1936 Cal 770 (771, 772).

[6] Assignment of equitable mortgage need not be in writing. (Vol 6) 1919 Mad 547 (548, 549) (DB).

[7] Agricultural lease need not be in writing. (Vol 13) 1926 Nag 9 (9).

[8] A sale of right to turn of worship is not a sale of ownership in immovable property and need not be in writing and registered. (Vol 14) 1927 Pat 7 (8): 6 Pat 245 (DB).

4. Creation of easements. — [1] Easement can be created without writing either under the provisions of this section or on general principles of law. (Vol 4) 1917 Cal 681 (685) (D B) ✠('09) 31 All 612 (621, 622) (D B) ✠ (Vol 13) 1926 Mad 543 (544) ✠ (Vol 16) 1929 Mad 79 (80).

5. Gifts to religious and charitable endowments. —[1] Gift to a Hindu idol need not be made in writing (Vol 6) 1919 Mad 809 (811): 42 Mad 440 (DB) ✠(Vol 11) 1924 Nag 254 (255): 20 Nag L R 60 ✠(Vol 17) 1930 Pat 610 (613) (DB)

[2] Muhammadan wakf need not be in writing. (Vol 23) 1936 All 202 (204, 205) (DB).

6. Partition of property. — [1] Partition of property can be made without writing on general principles of law if not under this section. ('09) 31 All 412 (422, 423): 36 Ind App 71 (PC).

7. Family arrangement. — [1] Family arrangement may be made without writing (Vol 30) 1943 All 101 (104, 105): I L R (1943) All 411 (F B) ((Vol 17) 1930 All 498 and (Vol 13) 1926 All 194, *Overruled.*) ✠(Vol 30) 1943 Nag 92 (93, 94): I L R (1944) Nag 835 ✠(Vol 22) 1935 Rang 355 (357).

[2] Transaction amounting not merely to recognition of pre-existing title, but to transfer of clear title from one person to another — Transfer by law expressly required to be in writing — Requirements of law cannot be evaded or displaced by parties choosing to describe transaction as "family arrangements". (Vol 17) 1930 All 498 (502) (DB).

8. Release, relinquishment and surrender.— [1] Release of certain items of mortgaged property from the mortgage claim may be made without writing. ('06) 33 Cal 613 (622) (DB)✠ (Vol 22) 1935 Mad 113 (114 115): 58 Mad 371 (DB) ✠ (Vol 13) 1926 Nag 21 (24): 23 Nag L R 86.

[2] Surrender of the leasehold interest by the lessee in favour of the lessor may be made without writing. (Vol 6) 1919 Cal 694 (695) (DB) ✠ (Vol 5) 1918 Cal 233 (233) (DB).

[3] Surrender by a Hindu widow of her interest in favour of the next reversioners may be made without writing (Vol 14) 1927 Nag 44 (45, 46): 22 N L R 169.

[4] Relinquishment of beneficial interest in property is not transfer of ownership. (Vol 20) 1933 All 854 (856) (DB).

[5] Partition, surrender, release, are not required to be in writing but if they are in writing, the instrument is required to be registered. (Vol 18) 1931 Cal 223 (229): 58 Cal 136 (DB).

[6] Relinquishment by Government ryot to Government of properties included in his patta need not be in writing. ('21) 13 Mad L W 230 (245).

[7] Full owner can only transfer by sale or gift which, under the Act, can be made only by a registered instrument. (Vol 7) 1920 Nag. 265 (266).

9. Award.—[1] Bona fide award affecting immovable property, whether by way of transfer or otherwise need not be in writing. (Vol 14) 1927 Sind 206 (208) (DB) ✠ (Vol 18) 1931 Sind 107 (109): 25 Sind L R 405.

SECTION 10—SYNOPSIS.

1. Scope.
2. Grant under the Crown Grants Act.
3. "Is transferred."
4. Subject to a condition or limitation."
5. Condition, limitation and covenant.
6. "Absolutely restraining."
7. Condition restraining alienation except in favour of a specified person.
8. Restraint on alienation for a particular period.
9. Alienation restricted to a specified class of persons.
10. Condition restraining transfer of company's shares.
11. "From parting with or disposing of his interest."

Section 10 *(contd.)*

12. Condition against alienation in a lease.
13. Condition against alienation in gifts
14. Condition in decrees and awards restraining alienation.
15. Agreements or covenants not to alienate.
16. Covenants against alienation in leases.
17. Agreement by mortgagor not to alienate mortgaged property.

1. Scope.— [1] Absolute restraint on such a legal incident of property as the power of alienation will tend to create perpetuity and this, the law has always regarded with great disfavour as being opposed to public policy. (1798) 4 R R 586 (590, 591) : 101 E R 1264, *Doe d Matchinson* v. *Carter* ✠ ('36) 63 Cal 209 (213) (DB)✠('01) 4 Oudh Cas. 163 (166, 167)✠ ('07) 10 Oudh Cas 136 (138) (DB).

[2] Principle enacted in this section has been recognised by Hindus. ('89) 16 Cal 71 (80) : 15 Ind. App. 149 (P C).

[3] Principle enacted in this section has been recognised by Muhammadans. ('06 28 All 342 (344, 345) (DB) ✠ ('71) 6 Mad H C R 356 359) (DB) ✠ ('12) 13 Ind Cas 689 (689, 690) (Cal) ✠ (Vol 7) 1920 Cal 140 (141) (DB) ✠ ('37) 1937 Oudh W N 423 (426) ✠ (Vol 22) 1935 Rang 318 (321) (DB) ✠ (Vol 12) 1925 Mad 997 (998) (DB) ✠ ('12) 36 Bom 214 (250) ✠ (Vol 9) 1922 All 205 (206) : 44 All 633 (DB).

[4] In territories and in cases to which the Transfer of Property Act may not apply, the principle underlying it will apply. (Vol 11) 1924 Lah 674 (675).

[5] In order that section or general principle on which it is based may apply, it is necessary that alienation restrained must be of property transferred — It does not matter whether such property is estate in fee or life interest or any other lesser estate. (1852) 21 L J Ch 511 (512): 89 R R 539, *Rochford* v. *Hackman* ✠ (1900-04) 14 C P L R 114 (116 117) ✠ (Vol 5) 1918 Pat 469 (475) : 3 Pat L Jour 199 (SB).

[But see ('12) 15 Oudh Cas 345 (350) (DB) ✠ ('88) 1888 Pun Re. No. 131, p. 351 (352)].

[6] Where the property transferred is a particular interest in property and the transferee is restrained from alienating another interest in the property, this section or the principle underlying it does not apply. (Vol 21) 1934 All 358 (359)

[7] Contract of pre-emption in sale deed—Deed executed before this Act applied — Section does not apply. (Vol 34) 1947 Bom 191 (192, 193) (DB) (Contract offends against English Common Law rule against restraints on alienation and perpetuities.)

2. Grant under the Crown Grants Act. — [1] Condition in a Crown grant, restraining the grantee from alienating his property, would not be governed by this section and is not invalid. (Vol 13) 1926 Mad 706 (717) : 49 Mad 349 (DB) ✠ (Vol 24) 1937 All 533 (534) (DB).

[2] Jaghir grant by Government couched in most appropriate mode in English document of conveying absolute estate in fee simple — Introduction of words "as jaghir" held not to be construed as showing intention to control right of alienation inherent in operative terms of transfer. ('85) 9 Bom 561 (568) (DB).

3. "Is transferred." — [1] Validity of restraint on alienation must be decided by reference to general principles of law, and not by principles underlying this Act except in so far as they are in accordance with general principles of law- (Vol 30) 1943 Lah 168 (170)✠(Vol 16) 1929 Oudh 193 (201) : 4 Luck 452 (DB) ✠ (Vol 10) 1923 Bom 276 (279, 280) : 47 Bom 597 (DB).

[2] Partial restraint on alienation in a family settlement would be valid. (Vol 19) 1932 P C 158 (160, 161): 7 Luck 257 : 59 Ind App 236 (PC).

[3] Apart from S. 10 an absolute restraint on alienation in a family settlement would be invalid on general principles of law. (Vol 9) 1922 Oudh 236 (244): 25 Oudh Cas 189 (DB) ✠ (Vol 33) 1946 Pesh 12 (14) ✠ (Vol 12) 1925 P C 272 (280) : 28 Oudh Cas 352 : 47 All 883 : 52 Ind App 398 (PC).

4 'Subject to a condition or limitation."— [1] *A* who is full owner of certain property, retaining life interest in it without power of alienation and transferring remainder to *B*— There is no transfer subject to a condition and this section consequently does not apply (Vol 6) 1919 All 80 (81) (DB) ✠ ('11) 14 Oudh Cas 189 (192).

[2] Words of limitation such as "to you and the generations born of your womb successively" or "to your *putra, pautradi krame*" do not import any restraint on alienation. ('79) 4 Cal 23 (28) : 5 Ind App 138 (PC)✠ ('97) 24 Cal 834 (849) : 24 Ind App 76 (PC).

[3] Creation of an interest in property "restricted in its enjoyment to the owner personally" within the meaning of S. 6, cl (d) cannot be said to be a transfer "subject to a condition against alienation." (Vol 26) 1939 P C 157 (159) : I L R (1939) Kar P C 274 (PC).

5. Condition, limitation and covenant. — [1] Non-performance or the breach of the covenant will not defeat a grant, as in the case of the breach of a condition, though it may give rise to an action in damages. (Vol 25) 1938 Cal 478 (479) (DB) ✠ (Vol 9) 1922 Nag 224 (225) : 18 Nag L R 89 ✠ (Vol 3) 1916 Pat 161 (164) (DB) ✠ (Vol 7) 1920 Mad 1006 (1007, 1010) : 43 Mad 503 (SB) ✠ ('09) 36 Cal 745 (748) (DB).

[2] To *A* until the happening of an event — This is the measure of its limitation. (1876) 3 Ch D 148 (155) : 24 W R (Eng.) 754, *Hatton* v. *May*.

[3] Limitation is ordinarily the definition or circumscription in any conveyance of the interest of the grantee. (1882) 30 W R (Eng.) 887 (888) : 21 Ch D 838, *In re Machu*.

[4] Lease—Condition not to sub-let—No forfeiture or re-entry provided for breach : *Held*, it was covenant against alienation and hence void —Damages for breach are claimable against lessee and not sub-lessee. (Vol 3) 1916 Pat 161 (163, 166) (DB).

6. "Absolutely restraining." — [1] Section does not prohibit a partial restraint on the disposition of property, but renders void an absolute restraint on disposition. (Vol 31) 1944 Nag 187 (187, 188): I L R (1945) Nag 174.

[2] Absolute restraint on disposition is a clog on the ownership. ('99) 1 Bom L R 498 (499) (DB).

[3] Word 'absolutely" must be construed in a reasonable manner. (Vol 22) 1935 Lah 503 (504).

[4] In deciding the question whether the condition or limitation restraining the disposition of property is absolute or partial, the Court has to look at the substance and not so much to the form of the condition or limitation. (Vol 8) 1921 All 97 (98) (DB) ✠ (Vol 22) 1935 All 493 (495) : 57 All 861 (DB). (And see whether disposition of property is prohibited.)

[5] Test is whether the condition takes away the whole power of alienation substantially. (1875) 32 L T 682 (683) : L R 20 Eq 186. *In re Macleay*.

[6] If a condition against alienation is to be valid, it must not really take away all power either by express words or by the indirect effect of the frame of the condition (1875) 23 W R (Eng.) 718 (719) : L R 20 Eq 186, *In re Macleay*

[7] *A* transferring property to *B* but with condition that he should not transfer it to any one—Condition is void. (Vol 6) 1919 Oudh 70 (72) (DB) ✠ (Vol 3) 1916 Cal 644 (644) (DB) ✠ ('12) 16 Cal L Jour 354 (358) (DB) ✠ (Vol 11) 1924 Lah 729 (729) (DB) ✠ (Vol 13) 1926 Mad 648 (650) (DB).

Section 10 — Note 6 *(contd.)*

[8] *A* transferring property to *B* on condition that *B* shall not alienate it without first consulting and obtaining *A*'s consent — Condition is void. ('06) 3 All L Jour 621 (622, 623).

[9] Property given to member absolutely on partition — Provision that he should not alienate it is invalid. (Vol 22) 1935 Mad 33 (34, 35).

[10] *A* executed document whereby he and his two wives were to be joint owners of his property — Neither he nor his wives to have right to transfer property separately unless all combined to make transfer—Condition held void. (Vol 16) 1929 All 492 (492, 493) (DB).

[11] Compromise between *A* and *B* provided that *B* should get life-interest without power of transferring it except in case of necessity and unless his other property is not sufficient: *Held* that this was absolute restraint. (Vol 24) 1937 All 235 (236, 237). ((Vol 19) 1932 P C 158 : 59 Ind App 236 : 7 Luck 257 (PC), *Disting.*)

[12] *A* transferred property to *B* with covenant that *B* should not, if he wished to alienate it do so piecemeal but must do so only as whole — Restraint held partial and not absolute. (Vol 8) 1921 Sind 118 (118, 120) : 17 Sind L R 1 (DB).

[13] *A* transferring property to *B* with condition that, if *B* transfers property *A* shall have a right of pre-emption — Condition is not invalid under this section. (Vol 9) 1922 All 293 (294) ✠ ('11) 9 Ind Cas 171 (173) (DB) (Mad) ✠ (Vol 8) 1921 Sind 118 (120): 17 Sind L R 1 (DB) ✠ ('71) 6 Mad H C R 248 (255, 256) (DB) ✠ (Vol 16) 1929 All 667 (668) (DB).

7. Condition restraining alienation except in favour of a specified person.—[1] Where *A* transfers property to *B* subject to a condition that *B* will not transfer it except to *A* himself, or to some other named person the condition is void. (Vol 16) 1929 All 381 (382) (DB)✠('01) 4 Oudh Cas 163 (166, 167) ✠ (Vol 22) 1935 All 493 (495) : 57 All 861 (DB).

[2] *A* transferred property to *B* on condition that *B* would not sell it to any one except *A* — Condition held valid. (Vol 12) 1925 All 97 (98).

8. Restraint on alienation for a particular period. — [1] Restraint on alienation for a limited period is void. (1868) 37 L J P C 1 (5, 7): L R 2 P C 4, *Renaud* v. *Guillet* ✠ (Vol 20) 1933 Lah 201 (202, 203) : 14 Lah 353 (DB) ✠ (Vol 9) 1922 Oudh 236 (244) : 25 Oudh Cas 189 (DB) ✠('30) 31 Pun L R 53 (54, 55) (DB).

[But see (Vol 22) 1935 Lah 503 (504, 505).]

9. Alienation restricted to a specified class of persons. — [1] Person allowed by way of family arrangement to take property on condition that it should not be alienated to stranger — Condition held not repugnant to law. (Vol 19) 1932 P C 158 (160): 7 Luck 257 : 59 Ind App 236 (PC).

[2] A transfer by *A* to *B* on condition that *B* shall not transfer the property except to *A* and his heirs for fixed sum of money has been held to be an absolute restraint for all practical purposes. (Vol 8) 1921 All 97 (97, 98) (DB) ✠ (Vol 22) 1935 All 493 (494, 495): 57 All 861 (DB) ✠ (Vol 22) 1935 Sind 182 (184) : 29 Sind L R 321 (DB).

[3] Partition deed among father and sons providing that certain property shold be held by them as tenants in common—Sons perpetually restrained from alienating their share to strangers but allowed to sell within family at maximum price, far below real value of property without any obligation to buy — Restriction held void. (Vol 26) 1939 Mad 769 (771, 772) : I L R (1939) Mad 954 (SB).

10. Condition restraining transfer of company's shares. — [1] Restriction precluding the share-holders altogether from transferring the shares may be invalid, but a restriction which does no more than give a right of pre-emtion is valid. (Vol 15) 1928 P C 291 (293) (PC).

11. "From parting with or disposing of his interest." — [1] Condition not to assign a lease is not violated by the mortgage of the lease. (Vol 5) 1918 Mad 373 (376) (DB) ✠ (1903) 72 L J P C 50 (52): 1903 App Cas 190, *Josef* v. *Mulder* ✠ ('12) 14 Ind Cas 293 (294) (DB) (Cal).

[2] General restriction on alienation does not apply to a transfer by operation of law. (Vol 9) 1922 Cal 96 (97) (DB) ✠ (Vol 11) 1924 Nag 222 (224). (('93) 20 Cal 270, *Foll.*) ✠ ('83) 6 Mad 159 (164, 165, 166) (DB) ✠ ('83) 7 Bom 262 (265) (DB) ✠ (Vol 2) 1915 Cal 209 (210) (DB).

[3] Execution sale founded on a mortgage or charge voluntarily made in breach of a condition against alienation is not to be considered as a sale *in invitum* so as to take it out of the operation of the condition. (Vol 9) 1922 Cal 96 (97) (DB) ✠ ('12) 14 Ind Cas 293 (295) (DB) (Cal).

[4] Creation of a charge is not a transfer of property and a condition against alienation will not be broken by the creation of a charge. (Vol 13) 1926 Cal 451 (453) (DB).

12. Condition against alienation in a lease. — [1] Condition against alienation in a lease is valid under this section if it is for the benefit of the lessor. (Vol 6) 1919 Cal 942 (943) : 45 Cal 940 (DB) ✠ (Vol 29) 1942 Oudh 374 (377, 378) : 17 Luck 805 (DB). (Even if lease is permanent one.) ✠ ('83) 7 Bom 256 (260) (DB).

[2] Provision in restraint of alienation by the lessee, is *ipso facto* for the benefit of the lessor. ('03) 26 Mad 157 (160, 161) (DB) ✠ (Vol 2) 1915 Mad 1071 (1072) (DB).

[3] Provision for re-entry by landlord on breach of condition — Condition would be for benefit of lessor. (Vol 29) 1942 Cal 452 (454) (DB) ✠ (Vol 3) 1916 Pat 161 (163) : 1 Pat L Jour 1 (DB).

[See however ('11) 14 Cal L Jour 585 (587) (DB) ✠ ('90) 17 Cal 826 (827, 828) (DB).]

[4] Assignment or alienation made in breach of the condition would be void. (Vol 25) 1938 Cal 478 (479) (DB).

[5] Clause in this section in favour of the validity of a condition in a lease is not inconsistent with the provisions of S. 11, Bengal Tenancy Act and is not affected by it in any way. (Vol 13) 1926 Cal 451 (452, 453) (DB) ✠ ('10) 6 Ind Cas 685 (687) (DB) (Cal).

[6] Grant for maintenance held not lease — Condition providing for cancellation of grant and re-entry by grantor in case property was sold by auction for debts of grantee — Condition held not invalid under this section. (Vol 32) 1945 Pat 162 (166, 168, 176) : 23 Pat 871 (DB). (Exclusion of leases from main provisions of this section is based on definite principles)

[7] Kharposh grant is neither lease nor family arrangement. (Vol 32) 1945 Pat 162 (167, 168) : 23 Pat 871 (DB).

13. Condition against alienation in gifts. — [1] *A* made gift to *B* on condition that land would be liable to be taken back in event of *B* transferring it — Gift held not void. ('07) 4 All L Jour 708 (709) (DB).

[But see (Vol 26) 1939 All 221 (222, 223) : I L R (1939) All 298 (DB).]

[2] At time of gift by *A* to *B*, *B* agreed that gift would be revoked on his transferring or mortgaging property without *A*'s consent — Section 10 held not contravened and case held fell within S. 126. (Vol 16) 1929 Rang 226 (228) : 7 Rang 306.

14. Condition in decrees and awards restraining alienation. — [1] Condition absolutely restraining alienation imposed by a decree of Court is not within this section. ('12) 15 Oudh Cas 67 (74, 75) (DB).

11. Where, on a transfer of property, an interest therein is created absolutely in favour of any person, but the terms of the transfer direct that such interest shall be applied or enjoyed by him in a particular manner, he shall be entitled to receive and dispose of such interest as if there were no such direction.

Restriction repugnant to interest created.

[a][Where any such direction has been made in respect of one piece of immoveable property for the purpose of securing the beneficial enjoyment of another piece of such property, nothing in this section shall be deemed to affect any right which the transferor may have to enforce such direction or any remedy which he may have in respect of a breach thereof.]

[a] *Substituted* by the Transfer of Property (Amendment) Act, 1929 (20 [XX] of 1929), S. 8.

Section 10 — Note 14 *(contd.)*

[2] Condition in an award imposing an absolue restraint on alienation of property would be invalid as opposed to the provisions of this section. (Vol 22) 1935 Sind 235 (242).

15. Agreements or covenants not to alienate.— [1] Agreement for consideration that the parties thereto shall not alienate certain properties for a limited time will be valid. (Vol 12) 1925 P C 272 (279) : 28 Oudh Cas 352 : 52 Ind App 398 : 47 All 883 (PC).

[2] Agreement preventing alienation in perpetuity or for an indefinite period would be opposed to public policy. ('08) 12 Cal W N 793 (798) (DB) ✠ ('36) 63 Cal 209 (213) (DB). (It would however be binding on actual parties to agreement.) ✠ ('69) 4 Mad H C R 345 (348, 349) (DB).

[3] Arbitrator gave award that two daughters of Muhammadan should inherent his estate in equal shares and stated that they should never partition properties — Daughter agreed to abide by award — Son of one of daughters sued, after his mother's death, for partition—Arbitrator held had no power to make property divisible by law indivisible for ever. ('01) 23 All 383 (391, 392) : 28 Ind App 111 (PC).

[4] Agreement between parties for pre-emption is a valid agreement. (Vol 31) 1944 Nag 187 (188) : I L R (1945) Nag 174 ✠ ('96) 1896 Bom P J 717, Reprint 817 (819) (DB).

[5] Agreement for consideration by a transferee of property, undertaking to make the first offer to the transferor in case he chose to sell the property may give rise to a claim for damages on breach of the undertaking, but cannot have the effect of restraining the alienation of the property. (Vol 18) 1931 Mad 799 (800, 801).

[6] A stipulation in a compromise, that certain property transferred thereby should not be saleable in execution of any decree against the transferee has no effect on the rights of a creditor of the transferee to proceed against the property. ('84) 1884 All W N 121 (121) (DB)

16. Covenants against alienation in leases. — [1] If, there is also, along with covenant against alienation, a covenant for re-entry on such breach, the lessor can re-enter on the basis of the latter contract, and put an end to the lease. (Vol 4) 1917 Cal 426 (426) (DB).

[2] Covenant against alienation in a lease is a covenant which runs with the land. (Vol 10) 1923 Cal 679 (680) (DB). (A lease of permanent, heritable and transferable tenancy, contained a covenant to the effect that if the tenant transferred the property he would pay to the landlord, out of the purchase-money in his hands, one-fourth as nazar, and would obtain registration of the name of the transferee, and that if he failed to do so, the transfer would be invalid and the tenant would continue to be liable for the rent: *Held* that having regard to the provisions of Ss. 10 and 12, T. P. Act, the covenant was valid.) ✠ (Vol 3) 1916 Pat 161 (166) : 1 Pat L Jour 1 (DB). (*Per* Atkinson J.) ✠ (1868) 3 Q B 739 (749, 750, 751) : 37 L J Q B 231, *Williams* v. *Earl.* (Lessor can sue an assignee of the lessee for breach of the covenant.) ✠ (1902) 71 L J P C 20 (21) : (1902) App Cas 104. *M. Eacharn* v. *Cotton.*

17. Agreement by mortgagor not to alienate mortgaged property. — [1] Agreement by mortgagor not to alienate mortgaged property will not affect the validity of the alienation made by the mortgagor in contravention of the agreement. ('81) 3 All 369 (381) (F B). (Transferee from mortgagor can redeem mortgage) ✠ (1866) 1866 Agra 7 (13, 14) (FB) ✠ ('81) 6 Cal 317 (318, 319) (DB) ✠ (Vol 5) 1918 Cal 557 (562) (D B).

[2] Transferee from the mortgagor will take the property only subject to the mortgage already created and without prejudice to the rights of the mortgagee as it stood on the date of the mortgage. ('82) 4 All 518 (523, 524, 525) (DB) ✠ ('92) 16 Bom 599 (602) (DB) ✠ ('68) 10 Suth W R 151 (152) (DB) ✠ (Vol 5) 1918 Cal 557 (562) (DB) ✠ ('87) 1887 All W N 231 (231, 232) (D B).

SECTION 11 — SYNOPSIS

1. Scope.
2. Muhammadan law.
3. Crown Grants Act.
4. "Created absolutely."
5. "But the terms of the transfer direct."
6. "Shall be applied or enjoyed by him in a particular manner."
7. "As if there were no such direction."
8. Directions in decrees and awards.
9. Second paragraph.
10. Direction restricting enjoyment in the case of transfers which are not absolute.
11. Contracts restricting enjoyment.

1. Scope. — [1] Main provision in a transfer will be given effect to and the repugnant one disregarded. ('11) 14 Cal L Jour 303 (308) (DB) ✠ (Vol 16) 1929 Pat 349 (350) (DB) ✠ (Vol 26) 1939 Mad 509 (510) (DB) ✠ (Vol 20) 1933 Mad 80 (81) ✠ (Vol 24) 1937 Nag 106 (107) : I L R (1937) Nag 436 ✠ (Vol 15) 1928 Oudh 49 (51, 53) : 3 Luck 19 (FB) ✠ (Vol 8) 1921 Cal 408 (409) (D B) ✠ ('30) 31 Pun L R 53 (54, 55) (DB) ✠ (Vol 20) 1933 Lah 201 (202, 203) : 14 Lah 353 (DB).

[2] Where it is clear that the main object of the transferor was to make an absolute transfer, the inconsistent provision cannot be given effect to. ('01) 28 Cal 720 (733) : 28 Ind App 152 (P C) ✠ (Vol 16) 1929 P C 283 (285, 286) : 56 Ind App 372 : 4 Luck 483 (PC).

[3] Section embodies principles of universal application and are applicable even in provinces and in cases to which the Act may not be applicable. (Vol 16) 1929 Lah 648 (651) (DB) ✠ (Vol 25) 1938 Lah 479 (480).

2. Muhammadan law. — [1] If the intention to give to the donee the entire subject-matter be clear, subsequent conditions derogating from or limiting the extent of the right are null and void. ('12) 34 All 478 (481) (DB) ✠ (Vol 6) 1919 Cal 1075 (1076) (DB) ✠ (Vol 15) 1928 Nag 44 (47) (DB) ✠ (Vol 5) 1918 Oudh 356 (363) (D B).

3. Crown Grants Act.—[1] This section will not render void any restrictions placed by the Crown in the case even of absolute transfers. (Vol 5) 1918 P C 25

12. Where property is transferred subject to a condition or limitation making any interest therein reserved or given to or for the benefit of any person, to cease on his becoming insolvent or endeavouring to transfer or dispose of the same such condition or limitation is void.

Condition making interest determinable on insolvency or attempted alienation.

Nothing in this section applies to a condition in a lease for the benefit of the lessor or those claiming under him

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Section 11 — Note 3 *(contd.)*

(27) : 40 All 470 : 45 Ind App 134 : 21 Oudh Cas 106 (P C).

4 "Created absolutely." — [1] Transfer of an absolute estate passes to the transferee an interest which is unlimited in estate and unfettered in respect of any condition or trust (Vol 21) 1934 Cal 379 (383, 384) : 61 Cal 106 (DB) ✠ (1869) 17 W R (Eng.) 1083 (1085) : 8 Eq 673 *Irvine* v. *Sullivan*

[2] Where *A* who is the full owner of certain property transfers a life estate therein to *B*, it cannot be an absolute transfer within the meaning of this section. (Vol 17) 1930 Cal 731 (732, 734) (DB).

[3] Principle of S. 11 applies as much to mortgages or leases as to gifts or sales. ('86) 8 All 452 (458, 459) (DB).

5. "But the terms of the transfer direct." — [1] Word "direction" would include the imposition of a condition. (Vol 13) 1926 Oudh 431 (440) : 2 Luck 507 : 26 Oudh Cas 176 (DB)

6. "Shall be applied or enjoyed by him in a particular manner"—[1] Absolute restraint added by way of a direction in a transfer which is absolute should be disregarded. (1888) 38 Ch D 176 (182) : 51 L J Ch 634, *In re Dugdale* ✠ (Vol 26) 1939 Mad 509 (510) (D B) ✠ ('82) 4 Mad 200 (202) (DB) ✠ (1797) 30 ER 1034 (1035) : 4 R R 7. *Bradley* v *Peixoto.*

[2] Partial restraint on alienation is not repugnant to the absolute interest created and is valid. (1875) 23 WR (Eng) 718 (719) : LR 20 Eq 186, *In re Macleay* ✠ (Vol 19) 1932 P C 158 (160, 161) : 7 Luck 257 : 59 Ind App 236 (PC).

[3] Condition that the donee of property and his heirs should reside in the property on pain of forfeiture of the gift would be void for repugnancy, if the main intention of the donor was to make an absolute gift. (Vol 7) 1920 Bom 73 (76) : 44 Bom 304 (DB)

[4] Direction in an absolute transfer to several persons jointly that they shall not divide the property at any time or for a limited period would be repugnant and void under this section. (75) 1 Cal 104 (107) : 2 Ind App 256 (PC).

[5] *A* making absolute conveyance of his property to *B* by sale for cash consideration but stipulating for payment by vendee of certain amount per annum from profits of property — Direction is restriction on enjoyment of right created absolutely in vendee and is unenforceable. (Vol 25) 1938 Oudh 17 (18) : 13 Luck 662

7. "As if there were no such direction"—[1] Direction which is invalid under this section does not cut down or defeat the estate created. (Vol 22) 1935 P C 187 (190) (PC)

8. Directions in decrees and awards —[1] Absolute under-proprietary rights conferred on party by compromise decree, which inserted condition restraining alienation of such property — Restraint held void on ground of repugnancy. (Vol 1) 1914 Oudh 213 (215, 216) (DB). (*Affirmed* in (Vol 5) 1918 PC 77 (81) : 21 Oudh Cas 180 (PC).)

9 Second paragraph —[1] Where *A* transfers property X to *B* and the latter agrees or covenants that he will enjoy X in a particular manner the agreement or covenant is valid. (Vol 19) 1932 All 788 (80) : 54 All 17 (DB) ✠ (1873) 21 W R (Eng) 798 (800) : L R 5 P C 327, *Maclean* v. *Mckey* ✠ (1898) 67 L J Ch 205 (205) : (1898) 1 Ch 424, *Hobson* v. *Tulloch.*

[2] Decree-holder of maintenance decree transferring portion of arrears of maintenance but stipulating that transferee shall not bring to sale property charged for decretal amount—Restriction held valid. (Vol 26) 1939 Mad 431 (431) (DB).

10. Direction restricting enjoyment in the case of transfers which are not absolute —[1] Transfers not absolute — Direction restricting enjoyment of property by transferee would seem to be valid and binding on transferee (Vol 17) 1930 Cal 731 (734) (D B). (Recourse to English authorities cannot be taken when there is no legislative omission)

11 Contracts restricting enjoyment.—[1] Where the agreement in effect tends to create perpetuity in property, it would be void. ('86) 8 All 452 (455, 459) (D B).

[2] Agreement between co-owners of property that they should not partition the property for ever or for an indefinite period would be unenforceable. ('09) 31 All 3 (4) (D B) ✠ ('06) 28 All 185 (186) (D B) ✠ ('83) 7 Bom 538 (539 540) (DB) ✠ ('01) 28 Cal 769 (786) (DB) ✠ ('99) 3 Cal W N 126 (128).

[3] Agreement between co-owners not to partition the property during their lifetime or for a limited period, would be valid and enforceable. (Vol 7) 1920 All 341 (344) : 42 All 30 (D B) ✠ ('01) 28 Cal 769 (786) (DB) ✠ ('99) 3 Cal W N 126 (128)

[4] Agreement restricting a person's enjoyment of property for ever or for an indefinite period would be binding on the actual parties to the agreement ('08) 12 Cal W N 793 (798, 799) (DB) ✠ ('81) 6 Cal 106 (115, 116).

[But see (Vol 2) 1915 Mad 1035 (1035) (DB) ✠ (Vol 15) 1928 Oudh 365 (368) (DB) ✠ ('83) 7 Bom 538 (539, 540) (DB)].

Section 12 — Note 1

[1] Indian Succession Act, 1925 treats a clause of defeasance in the event of bankruptcy of the legatee as valid

[2] Bombay Native Share and Stock Broker's Association—Defaulting member can claim no interest in membership card and can pass none to assignee in insolvency — This section does not apply (Vol 19) 1932 P C 186 (191) : 59 Ind App 318 ; 56 Bom 374 (PC).

[3] To constitute an endeavour or an attempt to transfer 'there must be some act which, but for the clause of forfeiture would have the effect of assigning mortgaging or otherwise anticipating' the legacy (1857) 53 E R 152 (153) : 26 L J Ch 395, *Graham* v. *Lee* ✠ (1838) 48 E R 638 (641) : 7 L J (NS) Ch 107. *Jones* v. *Wyse.*

[4] General restriction on alienation does not cover the case of a transfer by operation of law. ('82) 6 Mad 159 (164) (D B) ✠ ('91) 20 Cal 273 (278) (D B) ✠ ('90) 17 Cal 826 (828) (D B) ✠ ('83) 7 Bom 262 (265) (D B).

[5] Voluntary procuring of execution by defaulting tenant against himself in order to bring about alienation desired—Alienation constitutes breach of condition against alienation ('82) 6 Mad 159 (164) (D B) ✠ (1799) 101 E R 1400 (1401) : 8 T R 300, *Doe* v. *Carter* ✠ (Vol 4) 1917 Cal 236 (238) (D B).

[6] Insolvency of the lessee is not a breach of condition against alienation. (1857) 53 E R 152 (153) : 26 L J Ch 395, *Graham* v. *Lee*

13. Where, on a transfer of property, an interest therein is created for the benefit of a person not in existence at the date of the transfer, subject to a prior interest created by the same transfer, the interest created for the benefit of such person shall not take effect, unless it extends to the whole of the remaining interest of the transferor in the property.

Transfer for benefit of unborn person.

Illustration.

A transfers property of which he is the owner to *B* in trust for *A* and his intended wife successively for their lives, and, after the death of the survivor, for the eldest son of the intended marriage for life, and after his death for *A*'s second son. The interest so created for the benefit of the eldest son does not take effect, because it does not extend to the whole of *A*'s remaining interest in the property.

14. No transfer of property can operate to create an interest which is to take effect after the life-time of one or more persons living at the date of such transfer, and the minority of some person who shall be in existence at the expiration of that period, and to whom if he attains full age, the interest created is to belong.

Rule against perpetuity.

Section 12 - Note 1 *(contd.)*

[See however (Vol 20) 1933 Cal 701 (702, 703): 60 Cal 926 ✠ (1852) 68 E R 597 (601): 21 L J Ch 511, *Rochford* v. *Hackman*.]

[7] This section refers to the transferee "becoming insolvent" not "being adjudicated an insolvent" and cannot be restricted to conditions which would take effect only on adjudication. Any condition on transfer whereby the interest transferred would cease on the happening of an event on which the transferee is liable to be adjudicated insolvent is void. (Vol 32) 1945 Pat 162 (170, 177, 178): 23 Pat 871 (D B) (Condition in Kharposh grant, which cannot be regarded as lease to the effect that grant will stand cancelled if property covered by grant be sold in auction for debts of grantee is wholly void under S 12.)

[8] A clause for forfeiture must be construed strictly against the person who is trying to take advantage of it and effect should be given to it only so far as it is rendered absolutely necessary to do so by the wording of the clause. (Vol 22) 1935 Mad 163 (165): 58 Mad 378 (D B) ✠ (Vol 12) 1925 Mad 57 (58) (Clause of forfeiture on alienation by lessee does not come into operation by transfer of only part of lease land.)

[9] Lease contained clause of forfeiture on lessee's bankruptcy and permission to assign lease with consent of lessor— Lessee assigned lease with lessor's consent and became bankrupt— *Held* that there was no forfeiture of lease and that it was not affected by bankruptcy of first tenant. (1891) 60 L J Q B 776 (778): (1891) 2 Q B 394, *Smith* v. *Gronow*.

[10] A clause of forfeiture on alienation by a lessee does not come into operation by the lessee's becoming bankrupt. (1857) 53 E R 152 (153): 26 L J Ch 395 *Graham* v. *Lee*.

Section 13—Note 1.

[1] It is necessary that subsequent interest for the benefit of a person not in existence at the date of transfer should extend to the whole of the interest remaining in the transferor, after the prior interest is created. (Vol 31) 1944 Mad 22 (23) (Section does not mean that only one prior interest can be created before transferring any property to unborn person. ✠ (Vol 21) 1934 Oudh 35 (39): 9 Luck 329 (F B) (Case under S. 16) ✠ (Vol 15) 1928 P C 33 (35): 55 Ind App 74: 52 Bom 176 (P C)

[2] Child in the womb has been regarded by the Hindu law as well as the English law as a person in existence. ('72) Ind App Sup Vol 47 (70) (P C) ✠ (1935) 104 L J Ch 111 (115): 1935 App Cas 209, *Elliot* v. *Joicey*.

[3] Property cannot be transferred to unborn person under Muhammadan law. (Vol 12) 1925 Mad 997 (998) (D B) ✠ ('84) 9 Bom 158 (163) ✠ ('09) 36 Cal 431 (432) ✠ (Vol 14) 1927 Rang 242 (246): 5 Rang 252.

[4] Shia can create vested remainder in favour of an unborn person provided life estates are created in favour of persons in existence. (Vol 34) 1947 Bom 185 (187).

[5] This section is an attempt to import into and adapt for use in India what used before 1926 to be known in England as the "rule against double possibilities". The principle is that a person disposing of property to another shall not fetter the free disposition of that property in the hands of more generations than one. The rule is quite distinct from the rule against perpetuities, though their effects sometimes overlap. (Vol 32) 1945 Bom 395 (396): I L R (1945) Bom 493.

SECTION 14—SYNOPSIS

1. Scope.
2. Applicability to charges.
3. "Property".
4. "Which is to take effect".
5. "One or more persons living".
6. "Who shall be in existence".
7. Minority.
8. Alternative limitations one of which is void under this section.
9. Contracts if governed by rule against perpetuities.
10. Covenant running with the land.
11. Power of appointment.
12. Muhammadan law.

1. Scope.—[1] Law has always regarded, as being against public policy, the creation of perpetuity. ('92) 15 Mad 424 (443, 444) (D B) ✠ ('36) 63 Cal 209 (213) (D B) (Perpetuity may arise by taking away from owner of property power of alienation thereof and by creation of future remote interests.)

[2] Every attempt to create a perpetuity is held void and of no effect. ('92) 15 Mad 448 (468, 470).

[3] The reason of the rule against perpetuity is "the mischief that would arise to the public from estates remaining for ever, or for a long time unalienable, or untransferable from one hand to another, being a damp on industry and prejudice to trade, to which may be added the inconvenience and distress that would be brought on families whose estates are so fettered." (1732) 24 E R 917 (918): 2 P Wms 686, *Stanley* v. *Leigh*.

[4] It is possible that the vesting may be postponed beyond the limits fixed by the section, the disposition will be bad, although the events on which the vesting depended actually happend within the prescribed limits. ('11) 38 Cal 603 (619): 38 Ind App 112 (PC).

2. Applicability to charges. — [1] Rule against perpetuity would not apply to a charge (Vol 5) 1918 P C 156 (157): 42 Mad 581: 46 Ind App 64 (PC). (Appeal from (Vol 2) 1915 Mad 664.) ✠ (Vol 15) 1928 Mad 713 (721, 722) (FB).

Section 14 — Note 2 *(contd.)*

[See however (Vol 28) 1941 All 345 (349) : I L R (1941) All 691 (FB).]

3. "Property."—[1] Rule against perpetuity will apply to all dispositions of property whether moveable or immovable. ('96) 20 Bom 511 (515)✠('05) 7 Bom L R (Jour) 73 (74).

4. "Which is to take effect." — [1] Words "which is to take effect" show that the rule applies only to the creation of future interests and the rule prescribes a time limit beyond which such interest shall not vest (1910) 1 Ch 12 (24, 25) : 79 L J Ch 150, *South Eastern Rly* v. *Associated Portland Cement Manufacturers*✠(Vol 15) 1928 Mad 28 (33) (DB)✠(Vol 18) 1931 Cal 651 (656) : 58 Cal 768.

[2] "My remaining moveable property shall be dealt with by my son *G* according as he may think proper and when the sons of my son *G* shall attain the age of 21 the same shall be divided and duly received by *G* and his sons in equal shares" : *Held* gift to *G's* sons was void. ('95) 20 Bom 450 (463) (DB).

[3] A transfer of property in favour of another, to take effect on the extinction of the transferor's line of male descendants, is against the law of perpetuities and cannot be given effect to. (Vol 13) 1926 All 283 (283) (D B).

[4] Where there is no question of any new interest to be created at a future time, the rule has no application. (Vol 29) 1942 All 254 (256) (DB)✠(Vol 28) 1941 Rang 305 (308) : 1941 Rang L R 410 (DB) ✠ (Vol 15) 1928 Mad 28 (33) (DB).

[5] *A* leased out his property for period of 50 years and while more than 21 years of period had still to run, executed lease of his reversion to *B* — Grant of reversionary lease to commence at period more than 21 years from date of grant held conferred vested interest not void for remoteness. (1918) 87 L J Ch 81 (84):(1918) 1 Ch 202, *Mann, Crossman & Paulin, Ltd.* v. *Land Registrar*✠(1893) 32 L R Ir 347, *Redington* v. *Browne.*

[6] Estate that is to arise within the prescribed period may be so limited as to determine on the happening of an event however remote. (1897) 66 L J Ch 616 (619) : (1897) 2 Ch 255, *Wainwright* v. *Miller.*

5. "One or more persons living." — [1] Transferor can create as many interests as he desires, in favour of persons living at the time of the transfer. (Vol 31) 1944 Oudh 65 (75) : 19 Luck 320 (DB).

[2] A life in being would include a child in the womb. (1903) 51 W R (Eng) 609 (609):72 L J Ch 670, *Moore* v. *Wingfield* ✠ (1907) 76 L J Ch 339 (345) : (1907) 1907 App Cas 139, *Villar* v. *Gilbey.*

6. "Who shall be in existence." — [1] Child adopted after a man's death in pursuance of a power given by him, is in contemplation of law begotten by that man. ('72) Ind App (Supp) 47 (67) (PC).

[2] Transfer of life interest to a person followed by a transfer to his wife and children does not offend the rule against perpetuities. (Vol 29) 1942 All 254 (256) (D B).

7. Minority. — [1] By deed of transfer interest therein created in favour of certain lives in being with remainder to unborn person upon his attaining age of 21 years — Interest held void. (Vol 12) 1925 P C 244 (248) : 48 Mad 906 : 52 Ind App 310 (PC).

8. Alternative limitations one of which is void under this section.—[1] If there be two alternative limitations one of which is bad as being too remote and the other valid the Court will disregard the invalid limitation and give effect to that which is legal. (1938) 107 L J Ch 417 (418):(1938) 1 Ch 952, *In re Carryer's Will Trusts*✠('09) 36 Cal 431 (432)✠(1900) 4 Cal W N 671*n* (677*n*).

[2] Several limitations some of which bad — Court will disregard invalid limitation and give effect to that which is legal. (Vol 24) 1937 P C 4 (7, 8) : I L R (1937) All 3 : 64 Ind App 5 (PC). (If one limitation is ulterior to or expectant upon another limitation which is void for remoteness former is also void although made to person in existence.)

9. Contracts if governed by rule against perpetuities.— [1] Rule against perpetuities has no application to personal contracts which do not create any interest in property. (Vol 30) 1943 Cal 417 (424, 425) : I L R (1943) 2 Cal 605 (FB). (Rule against perpetuities is branch of law of property and not of contract.) ✠(1910) 1 Ch 12 (25) : 79 L J Ch 150, *South Eastern Railway* v. *Associated Portland Cement Manufacturers.*

[2] Contracts for the sale of immovable property are not subject to the rule against perpetuities. (Vol 13) 1926 Bom 497 (501, 504) : 50 Bom 566 (FB) ✠ (Vol 14) 1927 All 170 (172) : 49 All 527 (FB) ✠ (Vol 3) 1916 Mad 298 (300, 301) : 39 Mad 462 (DB) ✠ (Vol 13) 1926 Mad 699 (704) : 49 Mad 387 (DB) ✠ (Vol 30) 1943 Cal 417 (426) : I L R (1943) 2 Cal 605 (FB) ✠ (Vol 15) 1928 Pat 637 (640) : 8 Pat 243. (Covenant for pre-emption.) ✠ (Vol 32) 1945 Pat. 162 (170) : 23 Pat 871 (DB) ✠ (Vol 8) 1921 Sind 118 (120) : 17 Sind L R 1 (DB)✠ (Vol 31) 1944 Nag 187 (187, 188) : I L R (1945) Nag 174. (Agreement at partition.)

[See however (Vol 9) 1922 P C 165 (167) : 6 Pat L Jour 163 : 48 Ind App 376 (P C). (Contract made in 1872 before T P Act)]

[But see (Vol 9) 1922 Bom 84 (88, 89, 94) : 47 Bom 191 (DB) ✠ (Vol 34) 1947 Bom 191 (192, 193) (DB) ✠ (Vol 3) 1916 Mad 856 (857) : 38 Mad 114 (DB)✠ (1882) 20 Ch D 562 (580, 581): 51 L J Ch 193, *London and South Western Railway* v. *Gomm* ✠ (Vol 14) 1927 Pat 412 (412) (DB)]

[3] A covenant to indemnify a transferee for the loss of the land transferred by securing him equivalent land, was held unenforceable as violating the rule against perpetuities. (Vol 15) 1928 Mad 894 (896) : 51 Mad 688.

10. Covenant running with the land.—[1] A covenant which runs with the land is free from any taint of perpetuity. (1901) 70 L J Ch 72 (76) : (1901) 1 Ch 54, *Muller* v. *Trafford* ✠(Vol 8) 1921 Mad 541 (541) : 44 Mad 230 (DB) ✠ (Vol 12) 1925 Mad 732 (733).

11. Power of appointment.— [1] Whatever estates may be created by a person seized in fee may equally be created under general power of appointment. (1885) 54 L J Ch 732 (734) : 29 Ch D 521, *Rous* v. *Jackson.*

[2] In the case of a special power of appointment, the question whether an estate or interest created by appointment under a special power, is too remote depends upon its distance from the creation and not from the exercise of the power. (1906) 75 L J Ch 592 (602) : (1906) 2 Ch 199, *In re Thomson.*

[3] If the interest is to be had under a power of appointment and if the exercise of the power is made contingent upon an event which may by possibility happen beyond the limits of the rule under this section the mere fact that the contingency has happened earlier and has rendered the exercise of the power practicable within the prescribed limits, does not validate the interest created under the power. ('08) 31 Mad 517 (521) (DB).

12. Muhammadan law. — Independently of this section the Muhammadan law does not favour a perpetuity, except in the case of wakf. (Vol 26) 1939 P C 185 (189) (P C).

15. If, on a transfer of property, an interest therein is created for the benefit of a class of persons with regard to some of whom such interest fails by reason of any of the rules contained in sections 13 and 14, such interest fails [a][in regard to those persons only and not in regard to the whole class.]

Transfer to class some of whom come under sections 13 and 14.

[a] *Substituted* by the Transfer of Property (Amendment) Act, 1929 (20 [XX] of 1929), S. 9, for "as regards the whole class."

[a][**16.** Where, by reason of any of the rules contained in sections 13 and 14, an interest created for the benefit of a person or of a class of persons fails in regard to such person or the whole of such class, any interest created in the same transaction and intended to take effect after or upon failure of such prior interest also fails.]

Transfer to take effect on failure of prior interest.

[a] Ss. 16 to 18 were *substituted* by the Transfer of Property (Amendment) Act, 1929 (20 [XX] of 1929), S. 10.

[a][**17.** (1) Where the terms of a transfer of property direct that the income arising from the property shall be accumulated either wholly or in part during a period longer than—

(*a*) the life of the transferor, or

(*b*) a period of eighteen years from the date of the transfer,

such direction shall, save as hereinafter provided, be void to the extent to which the period during

Direction for accumulation.

Section 15—Note 1

[1] Before the amendment of this section in 1929, the interest failed "as regards the whole class."

[2] Transfer to the transferor's "son's son" or "son's daughters ' or to the "widows" of *X*, a Hindu, is a transfer to a class where the number is uncertain at the date of the tranfer. ('98) 22 Bom 533 (538)✠ (1834) 6 Sim 485 (492): 55 E R 676, *Porter* v. *Fox.*

[3] A transfer to the "children of the grandchildren" is a tranfer to several classes of persons, the children of each grandchild forming a separate class. (1865) 34 L J Ch 3 (4) : 146 R R 545, *Knapping* v. *Tomlinson.*

[4] A transfer to all the grandchildren of the transferor "with the exception of one namely . . . ," the exception not being mentioned, is a transfer to a class comprising all the grandchildren. (1851) 9 Hare 37 (39): 68 E R 404, *Illingworth* v. *Cooke.*

[5] Where the transferees are specifically named the transfer cannot be said to be a transfer to a class of persons. (Vol 23) 1936 Sind 158 (159): 29 Sind L R 374 ✠ ('01) 3 Bom L R 785 (789) (DB).

[6] Transfer to an ascertained number of persons as a transfer to ' my grandchildren by my late daughter E. W." is not a transfer to a class. ('92) 15 Mad 448 (466).

[7] Transfer to *X* with his wife and his children or "to my brother for life and his surviving children and my niece", is not a transfer to a class. ('91) 15 Bom 543 (547, 548) (DB) ✠ (1863) 33 Beav 43 (48): 55 E R 282, *Drakeford* v. *Drakeford.*

[8] If a transfer provides that the members of the class of transferees should be ascertained at a specified time or on the happening of a particular event they will be ascertained at that time or on the happening of that event. (1894) 63 L J Ch 544 (547): (1894) 2 Ch 310, *In re Wood*; *Tullett* v. *Colville* ✠ (1863) 33 Beav 43 (48): 55 E R 282, *Drakeford* v. *Drakeford.*

[9] Bequest — No date for ascertaining members of class of transferees provided for—Members of class are to be ascertained at death of testator. (1865) 34 L J Ch 3 (11): 12 W R (Eng.) 784, *Knapping* v. *Tomlinson* ✠(1878) 48 L J Ch 150 (152): 10 Ch D 264, *Picken* v. *Matthews.*

[10] A transfer or bequest to a class does not operate in favour of such members of the class who have died before the time at which the class is to be ascertained, or who have attested the will, or who are incapable of taking otherwise by operation of law. (1876) 46 L J Ch 33 (36) : 4 Ch D 165, *In re Coleman and Jarrom.*

[11] Transfer or bequest to class — Transfer enures for benefit of those member of class who are capable of taking. (Vol 21) 1934 Cal 379 (382): 61 Cal 106 (DB).

[12] Founder herself constituting first shebait and after her death *A* and *B* or their male heirs alive at time of her death and subsequently on death of any shebait his male heirs to be shebaits —This section does not apply. (Vol 32) 1945 Pat 211 (228, 229, 250) : 23 Pat 763 (DB).

Section 16 — Note 1

[1] Where an interest is intended to take effect after a prior interest and the prior interest is void for any reason, the subsequent interest also fails. (Vol 29) 1942 Bom 155 (158): I L R (1942) Bom 441 ✠(1788) 1 R R 467 (472, 473) : 100 E R 131, *Robinson* v. *Hardcastle.*

[2] Taluqdar devised his estate to his wife for life and after her death to his younger son by her—Bequest to wife failed by reason of its being void for want of registration of will as reqired by Oudh Estates Act, I of 1869 — Gift to son held took effect. ('33) 10 Cal 482 (488): 11 Ind App 1 (P C).

[3] *S* gave away property to *R* for life and after her death, if there be any male descendants to them absolutely—If *R* would have only daughters they were to have it without any power of transfer — In absence of any issue male or female property to go to *D* — Gift to *R*'s daughters held only of limited interest and as such void under S. 13 and gift over to *D*, held void under this section. (Vol 21) 1934 Oudh 35 (40) : 9 Luck 329 (F B).

[4] Where a grant is made alternatively the failure of the one, even on the ground of Ss. 13 and 14 will not operate to nullify the other. (1852) 42 E R 826 (840, 841) : 20 L J Ch 153, *Moneypenny* v. *Derring.* ((1822) 24 R R 553, *Beard* v. *Westcott, Ref.*) ✠ (92) 16 Bom 492 (497) (D B) ✠ (1915) 84 L J. Ch 505 (509): (1915) 1 Ch 837, *In re Davey*; *Prisk* v. *Mitchell.*

[5] Where an ulterior gift is to take effect on the happening of either of two contingencies one of which is void for remoteness and the other valid the Court will separate the two contingencies if they are separable though expressed in one clause and will give effect to the ulterior disposition on the happening of the valid contingency. (1859) 115 R R 257 (264, 265): 29 L J Q B 121, *Evers* v *Challis.*

Section 17 — Note 1

[1] Where a person transfers property to another absolutely, but the terms of the transfer direct that the income arising from the property should be accumu-

which the accumulation is directed exceeds the longer of the aforesaid periods, and at the end of such last-mentioned period the property and the income thereof shall be disposed of as if the period during which the accumulation has been directed to be made had elapsed.

(2) This section shall not affect any direction for accumulation for the purpose of—

(i) the payment of the debts of the transferor or any other person taking any interest under the transfer, or

(ii) the provision of portions for children or remoter issue of the transferor or of any other person taking any interest under the transfer, or

(iii) the preservation or maintenance of the property transferred; and such direction may be made accordingly.]

[a] *See* S. 16, legislative-note [a].

Transfer in perpetuity for benefit of public.

[a][18. The restrictions in sections 14, 16 and 17 shall not apply in the case of a transfer of property for the benefit of the public in the advancement of religion, knowledge, commerce, health, safety, or any other object beneficial to mankind.]

[a] *See* S. 16, legislative-note [a].

Section 17 — Note 1 *(contd.)*

lated, the direction would be a repugnant one and would be void under the provisions of S. 11. ('75) 1 Cal 104 (107, 108). (Case before the Transfer of Property Act.) ✠(82) 8 Cal 378 (387) (D B). (Do.)

[2] Limitations prescribed by this section are alternative as is shown by the word "or". (1884) 32 W R (Eng) 284 (285): 53 L J Ch 201, *Jagger* v. *Jagger*.

[3] If a person directs that to be done which as a result leads to an accumulation, it will amount to a direction for accumulation. (1855) 24 L J Ch 716 (719): 43 E R 1309, *Tench* v. *Cheese*

[4] A transferring property in 1920 with direction that its income should be accumulated for eighteen years from 1930—Income will be valid as to eight years up to 1938 and void beyond that year — Income from 1939 onwards will be disposed of as if period for accumulation had expired. (1841) 49 E R 231 (235): 10 L J Ch 266, *Ellis* v. *Maxwell* ✠(1849) 18 L J Ch 191 (193): 83 R R 360, *Nettleton* v. *Stephenson*.

[5] In computing the period of eighteen years from the date of transfer, the date of the transfer should be excluded (1808) 33 E R 748 (752): 15 Ves 248, *Lester* v. *Garland*.

[6] If a transferor makes a provision for the discharge of liabilities that are likely to arise in the future under a covenant or an agreement that has already been entered into, such a provision also will be good as one for the payment of "debts". (1859) 45 E R 339 (344): 29 L J Ch 230, *Varlo* v *Faden* ✠(1910) 80 L J Ch 29 (32): (1910) 2 Ch 553, *In re Hurlbatt*. (Provision for payment of debt must be *bona fide*.)

[7] Debts paid and satisfied out of capital fund — Provision for accumulation of income in order to recoup capital that has been taken out from fund is not provision for payment of debts. (1904) 73 L J Ch 543 (544): (1904) 1 Ch 826, *In re Heathcote*.

[8] Where an accumulation is directed with the object of giving something to the children which does not constitute only a part of the estate the direction will not come within the exception. (1853) 43 E R 17 (24): 23 L J Ch 204, *Edwards* v *Truck* (1852) 68 E R 654 (655): 22 L J Ch 90, *Jones* v. *Maggs*.

[9] Only accumulated fund to go to the children — Accumulation held for providing portions. (1904) 73 L J Ch 3 (6): (1904) 1 Ch 322, *In re Stephens*.

[10] Word 'portion' conveys the meaning of a sum of money secured to a child out of property either coming from or settled upon its parents. (1904) 73 L J Ch 3 (6): (1904) 1 Ch 322, *In re Stephens*

[11] It is not necessary that the interest given to the parents must be created by the same clause by which a provision for their children is made. (1852) 42 E R 958 (966): 22 L J Ch 1, *Barrington* v. *Liddel*.

[12] Any interest is interest, however minute. (1837) 7 E R 347 (352): 5 Cl. & Fin. 114, *Evans* v. *Hallier*.

SECTION 18 — SYNOPSIS

1. Scope.
2. "For the benefit . . . . . to mankind."
3. Muhammadan law.
4. Transfer to several objects some of which fail.

Scope. — [1] Gifts of land for charitable purposes are not void merely because they may go on for ever. (Vol 28) 1941 Rang 305 (308): 1941 Rang L R 410 (DB)✠(1882) 52 L J Q B 193 (197): 7 App Cas 633, *Goodman* v. *Saltash Corporation*.

[2] Object of the rule (i. e., the rule forbidding the tying up of property) is to prevent the mischief of making property inalienable unless for objects which are in some way useful or beneficial to the community. (1876) 6 L R P C 381 (394): 24 W R (Eng) 174, *Yeap Cheah Neo* v. *Ong Cheng Neo*.

[3] Bequest to charity to take effect beyond the period allowed by the rule against perpetuities is valid where the property had been given in the meantime to another charity. ('13) 40 Cal 192 (214).

[But see (Vol 6) 1919 Cal 809(812):46 Cal 485(DB)].

[4] Exception provided by this section extends to all transfers for the benefit of the public " in the advancement of religion". (Vol 10) 1923 Cal 708 (713) (D B)✠ (Vol 28) 1941 Mad 188 (191) (D B).

[5] Provisions of this section are a useful guide in considering questions arising in places where the Transfer of Property Act does not apply. ('09) 33 Bom 122 (189).

2. "For the benefit . . . . . to mankind."

[1] A purpose must, in order to be charitable be directed to the benefit of the community or a section of the community. ('10) 32 All 503 (511) (DB). (Distinction between public purpose and one which is not public is often subtle). ✠ ('92) 15 Mad 424 (444) (DB)✠ (1924) 93 L J P C 173 (177): 1924 App Cas 496, *Verge* v. *Somerville*.

[2] If the intention of the donor is merely to benefit specific individuals the gift is not charitable even though the motive of the gift may be to relieve their poverty or to accomplish some other purpose in reference to these particular individuals which would be charitable if not so confined; on the other hand, if the donor's object is to accomplish the abstract purpose of relieving poverty, advancing education or religion, etc., without reference to any particular individuals and without giving any particular individual the right to claim the funds, the gift is charitable. ('10) 32 All 503 (511) (DB) ✠(1842) 49 E R 545 (547): 11 L J Ch 336, *Nash* v. *Morley* ✠ (1740) 26 E R 454 (454): 2 Atk 87, *The Attorney General* v. *Pearce*.

19. Where, on a transfer of property, an interest therein is created in favour of a person without specifying the time when it is to take effect, or in terms specifying that it is to take effect forthwith or on the happening of an event which must happen, such interest is vested, unless a contrary intention appears from the terms of the transfer.

Vested interest.

A vested interest is not defeated by the death of the transferee before he obtains possession.

Explanation.—An intention that an interest shall not be vested is not to be inferred merely from a provision whereby the enjoyment thereof is postponed, or whereby a prior interest in the same property is given or reserved to some other person, or whereby income arising from the property is directed to be accumulated until the time of enjoyment arrives, or from a provision that if a particular event shall happen the interest shall pass to another person.

Section 18 — Note 2 *(contd.)*

[3] Objects which the English law would possibly regard as superstitious are sometimes allowable and even commendable according to Hindu and Mahomedan Laws ('81) 6 Bom 42 (50). (In deciding whether object is beneficial to public, customary law and common opinion among community to which parties interested belong must be taken into consideration.) ✠ ('75) 12 Bom H C R 214 (216) (DB).

[4] Intention to benefit the community is sufficient and it is not necessary to see in every case that if the object is carried out the community would in fact be benefited. (1895) 64 L J Ch 856 (858); (1895) 2 Ch 501, *In re Fovseaux.*

[5] A religious purpose can be a charitable purpose only where the religious services tend directly or indirectly towards the instruction or edification of the public. (1871) 40 L J Ch 640 (651) : L R 12 Eq 574, *Cocks* v. *Manners* ✠('06) 28 All 384 (387) (DB) ✠(1893) 62 L J Ch 342 (346) : (1893) 2 Ch 41, *In re White.*

[6] The following have been held to be good as charitable gifts :

(a) Gift for saying masses. (1930) 99 L J Ch 232 (234) : (1930) 1 Ch 524, *In re Roadley* ✠ (1934) 103 L J Ch 49 (52) : (1934) 1 Ch 162, *In re Caus* ✠('68) 2 Beng L R (OC) 148 (151).

[But see ('92) 15 Mad 424 (447) (DB) ✠ (1854) 61 E R 781 (784) : 23 L J Ch 947 *Heath* v *Chapman.*]

(b) Gift for hospitals. ('75) 14 Beng L R 442 (447) ✠ ('02) 6 Cal W N 321 (324).

(c) Trust for promoting the knowledge of the poor and ignorant inhabitants of a certain named place. (1885) 39 E R 1106 (1110) : (1835) 4 L J (NS) Ch 115, *West* v *Shuttleworth.*

(d) Gift to a voluntary association having for its object the teaching of ignorant and nursing of the sick. (1871) 40 L J Ch 640 (640, 651) : L R 12 Eq 574, *Cocks* v. *Manners.*

(e) Gift for the purpose of providing or keeping in good order a burial ground. (1905) 74 L J Ch 95 (98) : (1905) 1 Ch 68, *Attorney General* v *Lucas.*

(f) Trust for the provision of play fields, parks, gymnasiums for the health and welfare of the working classes (1932) 101 L J Ch 52 (54) : (1932) 1 Ch 133, *In re Hadden.*

[7] Trusts relating to *Muktad* and *Baj* ceremonies prevailing among Parsis are good as charitable gifts. ('09) 33 Bom 122 (211).

[8] Dedication to feed poor piligrims and distribute oil among them on certain days is for the benefit of the public and does advance religion. (Vol 28) 1941 Mad 188 (192) (DB).

[9] Sir Cowasji Jahangir Hall, Library and Rajabhai Tower which are occupied by Bombay University are buildings occupied for charitable purposes. ('92) 16 Bom 217 (228) (DB).

[10] The following have been held not to fall within the class of charitable gifts :

(a) Bequest with a direction "that a house for performing religious ceremonies to my late husband and myself be erected". (1875) L R 6 P C 381 (396) : 24 W R (Eng) 174, *Yeap* v *Ong.*

(b) Gift merely for the purpose of keeping up a tomb of the testator and of his family. (1864) 55 E R 507 (508, 509) : 33 L J Ch 674, *Fowler* v. *Fowler* ✠ (1862) 54 E R 1132 (1133) : 31 L J Ch 897, *Richard* v. *Robson.*

[See however (Vol 28) 1941 Mad 188 (192) (DB)]

(c) Gift to a voluntary association of women for the purpose of working out their own salvation by religious exercise and self-denial (1871) 40 L J Ch 640 (651) : L R 12 Eq 574, *Cocks* v. *Manners.*

(d) Bequest for the purpose of encouraging mere sports (1895) 64 L J Ch 795 (701) : (1895) 2 Ch 649, *In re Nottage* (Sport of yacht-racing)

(e) Legacy for the maintenance and up keep of a masonic temple. (1925) 95 L J Ch 46 (47) : 1925 Ch 746. *In re Porter.*

[11] Trust with a direction to the trustee to keep in repair testator's grave and those of his wife and child is a perpetuity. ('13) 40 Cal 192 (209)

[12] Whether a particular charity was for the benefit of the public or not is a question of fact. (Vol 28) 1941 Mad 188 (192) (DB)

3. Muhammadan law —[1] Principle of this section has been recognised by the Muhammadan law. (Vol 26) 1939 P C 185 (189) (P C).

4. Transfer to several objects some of which fail.—[1] Portion of the deed relating to other interests will be rejected and effect will be given to the portion creating a trust in favour of the charity. ('81) 7 Cal L R 241 (245, 246) ✠ ('03) 5 Bom L R 624 (632). (Trust for charity does not become void because it is incorporated in deed of transfer which, in respect of other interests created thereby, is void by reason of perpetuity).

[2] Fund given to charity as well to other objects —How much required for one object and how much for another not ascertainable—Fund will be divided equally among different objects and portion declared to be bad will go to residuary estate of donor (1866) 36 L J Ch 147 (149), *re Rigy's Trust* ✠ (1866) 35 L J Ch 845 (847) : L R 1 Eq 585, *Hoare* v. *Osborne.*

SECTION 19 — SYNOPSIS

1. Scope.
2. "Or in terms specifying that it is to take effect forthwith".
3. "On the happening of an event which must happen".
4. "Unless a contrary intention . . . transfer".
5. Vested interest is transferable and heritable.
6. Postponement of enjoyment.
7. Direction to accumulate.
8. Condition subsequent.
9. Provision for gift over is not proof of intention to the contrary.
10. Power of appointment.

1. Scope:—[1] This section and the corresponding S. 119, Succession Act, 1925, give expression to the Eng-

Section 19—Note 1 *(contd.)*

lish notion of vested interests and make it the law of the land except in the case of Muhammadans. (Vol. 20) 1933 Oudh 439 (444): 8 Luck. 602 (DB).

[2] An estate or interest is vested when there is an immediate right of present enjoyment or a present right of future enjoyment An estate or interest is contingent when the right of enjoyment is to accrue on an event which is dubious or uncertain. (Vol. 19) 1932 Cal. 600 (609): 59 Cal. 859 (DB).

[3] Intention of the person creating the interest must be gathered from the language employed by the grantor in the grant giving the plain and natural meaning to the words employed by him. (Vol. 16) 1929 P. C. 149 (151): 4 Luck. 305: 56 Ind. App. 213 (P. C.)

[4] Document must be construed as a whole, giving attention to every provision therein. (Vol. 15) 1928 P. C. 35 (37) (P. C).

[5] In cases of doubt, the rule is to so construe the document, as to lean to vesting. (1855) 24 L. J. Ch. 505 (507): 52 E. R. 581, *Brockle Bank* v. *Johnson* ✠(Vol. 22) 1935 Mad. 865 (866, 867)

[6] A vested interest is not the less so, because it might not be of any value when it actually falls into possession. (Vol. 18) 1931 Pat. 76 (77)

[7] This section does not apply unless there is a transfer of property. (Vol. 30) 1943 Bom. 7 (9) (DB).

2. "Or in terms specifying that it is to take effect forthwith".—[1] *X*, by will, directed trustees to divide estate, 21 years after testator's death into certain shares and gave one such share to his wife and stated that such share should vest in her at date of his death—*Held* that she took vested estate, though postponed in possession for 21 years. (Vol. 17) 1930 P. C. 7 (8) (P. C.).

[2] Trust deed provided that trustee should hold fund for use and benefit of *A* and *B* to be "made over" to them on their attaining 21 years of age—Words "to be made over" held more consistent with postponement of vesting in possession of that which is vested in interest than with postponement of vesting in interest itself. ('01) 28 Cal. 621 (633): 28 Ind. App. 159 (P. C.)

3. "On the happening of an event which must happen."—[1] Death of a person is a certain and not an uncertain event. (Vol. 19) 1932 Cal. 600 (609). 59 Cal. 859 (DB) ✠(Vol. 1) 1914 Mad. 64 (66) (DB) ✠(Vol. 12) 1925 All. 389 (390): 47 All. 496 (DB) ✠ Vol. 12) 1925 Mad. 599 (602) (DB). (Transfer made creating interest in favour of *B* not merely in event of *A*'s death but in event of *B* surviving *A*—*B* would take only contingent interest which would become vested only if he survived *A*.)✠ (Vol. 21) 1934 Oudh. 454 (455): 9 Luck. 173 (DB).

[2] Transfer made to *A* for life and then to *B*—*B*'s interest is vested interest. (1846) 4 Moo. Ind App. 137 (174) (P. C.) ✠('11) 38 Cal. 468 (472): 38 Ind. App. 54. (P.C)

[3] Income of fund given to *A* for his life—Corpus to be then divided and given to *B*, *C* and *D*—*B*, *C* and *D* held got vested interest in corpus. even before death of *A* (Vol. 23) 1936 P C. 285 (287) (P.C.)

[4] Testator provided that *A* and *B* should get his property after his and his wife's death—*A* and *B* held obtained under will vested interest. ('11) 33 All 558 (559) (DB).

[5] *A* nominated *B* as one entitled to receive provident fund of *A* in event of *A*'s death—*B* held, took vested interest in fund even before *A*'s death. (Vol. 23) 1936 Mad. 477 (479): 59 Mad. 855 (DB).

[6] Property given to *A* for life and after his death to *B* if he survived *A*, or to his heirs if he did not survive *A*—*B* held took vested interest and not contingent interest, contingent on his surviving *A*. (Vol. 12) 1925 All. 389 (391): 47 All. 496 (DB) ✠(Vol. 21) 1934 Oudh 59 (61): 9 Luck. 378 (DB) ✠ (Vol. 21) 1934 Oudh. 454 (455): 9 Luck 173 (DB).

[4] "Unless a contrary intention. . . transfer":—[1] The burden of proving the contrary intention is on those that assert it, and the weight of the burden is aggravated by the elimination in the explanation of circumstances which might, apart from the explanation, be thought sufficient to discharge it. (Vol. 18) 1931 Cal. 651 (655): 58 Cal. 768.

5. Vested interest is transferable and heritable.—[1] A vested interest, even though there is no present possession is a transferable interest in law. (Vol. 12) 1925 All. 389 (391): 47 All. 496 (DB)✠(Vol. 5) 1918 All. 115 (120): 40 All. 692 (DB) ✠ (Vol. 10) 1923 Bom. 415 (415) (DB) ✠ (Vol. 14) 1927 Lah. 166 (168) ✠ ('05) 1905 Pun. L. R No. 143, p. 499 (502) (DB) ✠ (Vol. 20) 1933 Mad. 885 (887) (DB) ✠ (Vol. 5) 1918 Oudh. 191 (192): 21 Oudh. Cas. 312 (DB) ✠ (Vol. 24) 1937 Pat. 163 (165) (DB) ✠ (Vol. 24) 1937 Sind. 306 (307, 308): 31 Sind. L. R. 506 (DB).

[2] Vested interest can be attached and sold in execution of a decree. (Vol 13) 1926 Mad 371 (373) (DB) ✠ (Vol 21) 1934 Oudh 454 (454) : 9 Luck 173 (DB) ✠ (Vol 21) 1934 Oudh 59 (61) : 9 Luck 378 (DB) ✠ (Vol 17) 1930 Rang 184 (185) (DB)✠ (Vol 34) 1947 Bom 185 (187).

[3] Vested interest is a heritable interest which will descend on the death of the owner of the interest to his heirs. ('96) 22 Bom 409 (414) (DB) ✠ (Vol 23) 1936 Cal 802 (803) : I L R (1937) 1 Cal 583 (DB) ✠ (Vol 14) 1927 Lah 166 (168) ✠ ('28) 109 I C 654 (654) (Lah) ✠ (Vol 6) 1919 Mad 768 (769) (DB) ✠ ('81) 4 Mad 124 (127) (DB) ✠ (Vol 16) 1929 Nag 27 (28) ✠ (Vol 14) 1927 Nag 226 (229).

[4] Vested interest is not defeated by the death of the transferee before he obtains possession.(Vol 24) 1937 Pat 247 (249) (DB) ✠ (Vol 16) 1929 Mad 32 (33).

6. Postponement of enjoyment. — [1] Mere fact that a transferee is not entitled to immediate enjoyment does not necessarily make the interest a contingent one. (Vol 20) 1933 Mad 885 (886, 887) (DB) ✠ (Vol 28) 1941 Rang 239 (240) ✠ (Vol 13) 1926 Mad 371 (373) (DB).

[2] Provision for postponement will be valid where the right of enjoyment is given in the mean-while to some other person, or the transferee is under the age of majority and the enjoyment is postponed till he attains that age. (1859) 70 E R 423 (426) : 1859 John 265, *Gosling's case*, ✠ ('88) 13 Bom 463 (468, 469) (DB) ✠ ('01) 26 Bom 319 (323, 324) (DB) ✠ ('96) 24 Cal 44 (52).

[3] Direction postponing payment held repugnant to estate created unless the property was given for the benefit of another in the interval. (Vol.14) 1927 Lah 404 (407) : 8 Lah 181 (DB).

[4] Gift of property to a person with a proviso that for 13 years the income of the property should be used for other purposes is valid. The gift to the person during the period of 13 years is limited one and becomes absolute on the expiry of that period. ('05) 1 Cal L J 605 (612).

7. Direction to accumulate.—[1] Intention that an interest shall not be vested is not to be inferred from a direction to accumulate the income arising out of the property until the time of payment arrives. (1840) 48 E R 1164 (1167) : 9 L J Ch 226, *Blease* v. *Burgh*.

8. Condition subsequent. — [1] Interest may be vested though it may be defeated by a condition subsequent. (Vol 28) 1941 Rang 239 (240).

When unborn person acquires vested interest on transfer for his benefit.

20. Where, on a transfer of property, an interest therein is created for the benefit of a person not then living, he acquires upon his birth, unless a contrary intention appear from the terms of the transfer, a vested interest, although he may not be entitled to the enjoyment thereof immediately on his birth.

Contingent interest.

21. Where, on a transfer of property, an interest therein is created in favour of a person to take effect only on the happening of a specified uncertain event, or if a specified uncertain event shall not happen, such person thereby acquires a contingent interest in the property. Such interest becomes a vested interest, in the former case, on the happening of the event, in the latter, when the happening of the event becomes impossible.

Exception.— Where, under a transfer of property, a person becomes entitled to an interest therein upon attaining a particular age, and the transferor also gives to him absolutely the income to arise from such interest before he reaches that age, or directs the income or so much thereof as may be necessary to be applied for his benefit, such interest is not contingent.

Section 19 —Note 8 *(contd.)*

[2] *A* granted certain land to his wife *B* on condition that if she had child by him grant should be taken as perpetual mokurrari but if she had no child by him grant should be taken as life mukurrari with remainder to *X* and *Y* — Deed held conferred on *X* and *Y* vested remainder liable to be displaced in event of child being born to *B*. ('90) 18 Cal 164 (176) : 17 Ind App 201 (PC).

[3] Will provided that after testator's death certain property should go to *B* for life and on his death to *B's* male issue and on failure of such issue to *D* — *D* held took vested interest in property. (Vol 27) 1940 Oudh 184 (189).

9. Provision for gift over is not proof of intention to the contrary.—[1] Property given to donee in clear words —Inclusion of clause providing for divesting of property from donee would not come in way of property being vested in him on date of gift. (Vol 1) 1914 Mad 64 (66) (D B).

[2] Provision for gift over will not render the prior gift a contingent one. (Vol 17) 1930 P C 7 (8) (P C).

[3] If, in addition to the provision for a gift over the grantor uses words clearly showing an intention to create only a contingent interest, the intention will prevail and the interest created will only be a contingent one. (1816) 35 E R 855 (855): 16 R R 142, *Glanvill* v. *Glanvill* ✠ (1836) 58 E R 979 (981) : 5 L J (NS) Ch 122, *Russel* v. *Buchaman*.

10. Power of appointment.—[1] Pendency of the power does not prevent the vesting of the property. (1883) 31 W R (Eng) 945 (946) : 24 Ch D 244, *Wilson* v. *Dugud* ✠ (1867) 36 L J C P 218 (223) : L R 2 C P 511, *Bradley* v. *Cartwright*.

[2] No gift to individual or class, otherwise than as they might take by execution of power of appointment given to third person — Individual or class does not take vested interest from time of creation of power. (1750) 28 E R 41 (41, 52) : 2 Ves Sen 61, *Marlbrough (Duke)* v. *Godolphin (Lord)*.

[3] Will bequeathed property to *A* for life with remainder to *B* — *A* also given general power of appointment under which she could appoint her daughter's sons to certain portion of property — Power of appointment would not prevent vesting of remainder. (Vol 24) 1937 Pat 163 (164) (D B).

Section 20 — Note 1

[1] Interest validly created in favour of unborn person — Such interest becomes vested in unborn person, upon his birth unless contrary intention appears from terms of transfer. ('01) 28 Cal 621 (634, 635) : 28 Ind App 159 (P C) ✠ (Vol 12) 1925 Mad 599 (602) (D B).

SECTION 21 — SYNOPSIS

1. Section does not affect rules of Muhammadan law.
2. Scope.
3. Contingent interest is transferable.
4. Contingent interest includes expectancies.
5. Transfer to person at particular age.
6. Transfer to persons 'then' living after prior interests.
7. Direction to do a duty under the law if a contingency.
8. Contingent interest when becomes vested.
9. Two or more contingencies.
10. Exception.
11. "Before he reaches that age".
12. "Or directs".

1. Section does not affect rules of Muhammadan law.—[1] Section does not affect rule of Muhammadan law. A contingent interest cannot be subject of valid gift. ('06) 28 All 342 (345) (D B). (Contingent interest not recognised by Muhammadan law) ✠ ('11) 36 Bom 214 (226) ✠ ('66) 5 Suth W R 4 (19) (DB).

2. Scope.—[1] Immediate right of present or future enjoyment—Interest is vested — Right itself to accrue on happening of uncertain event — Interest is contingent. (Vol 19) 1932 Cal 600 (609) : 59 Cal 859 (DB).

[2] On death of last surviving widow of late Raja his daughter, or failing her next heir, if any was to inherit the property—*Held* that until death of last surviving widow, interest created in favour of daughter was only contingent on her surviving last widow. (Vol 23) 1936 P C 131 (133) : 59 Mad 633 : 63 Ind App 224 (PC).

[3] Bequest of certain sum to *A* to be paid on occasion of marriage— Gift held contingent upon marriage taking place after the will came into effect. (Vol 17) 1930 Bom 191 (199, 200) : 54 Bom 358.

[4] Transfer to *A* for life then to her adopted son —If she died without adopting then to *B* and her sons —*B* obtained only contingent interest. (Vol 7) 1920 Bom 295 (296) (DB).

[5] Bequest to testator's wife for her lifetime and after her death to testator's nephew if he remains obedient to her — *Held* vesting postponed till death of wife and contingent upon his remaining obedient to her. (Vol 31) 1944 Bom 196 (197).

[6] Plot of land purchased by wife — Mutual agreements between husband and wife providing that husband would build house on site and on consideration thereof would be entitled to live in house for his lifetime—Both husband and wife to have right of residence and on their death their daughter to inherit it — Agreements held to create contingent interest. (Vol 23) 1936 Lah 1002 (1004) (DB).

Section 21—Note 2 *(contd.)*

[7] Provision as to provident fund money that if a member while in service should die or become insane sum standing to his credit should be paid to certain persons — His interest in the money is not contingent. (Vol 28) 1941 Rang 239 (241).

3. Contingent interest is transferable. [1]—Transfer of contingent interest passes to the transferee all interest possessed by transferor when contigency happened and interest vested in possession. (Vol 8) 1931 P C 138 (144) (PC) ✠ (1841) 3 Moo Ind App 435 (446) (PC).

[2] Contingent interest cannot be made subject of forced sale in attachment proceedings. (Vol 26) 1939 P C 6 (8) : I L R (1939) Bom 36 : 32 Sind L R 963 (P C). (*Confirming* (Vol 123) 1936 Sind 65 : 30 Sind L R 50).

[3] Contingent interest not being existing right is not sufficient for suit for declaration of right. ('08) 35 Cal 777 (789) (SB).

4. Contingent interest includes expectancies.—[1] Chance of heir apparent to succeed to a person as heir or other mere possibility of a like nature is not "contingent interest". ('06) 30 Bom 304 (315) (*Affirmed* on appeal in (1907) 31 Bom 165).

[But see ('87) 1887 All W N 84 (88) (DB).]

5. Transfer to person at particular age.—[1] Transfer to a person to take effect upon attaining a particular age— Interest is contingent till he attains that age. (1817) 35 E R 979 (988) 16 R R 168, *Leake* v. *Robinson* ✠ (1921) 90 L J Ch 499 (504), *In re Austor* (1905) 74 L J Ch 487, *Followed*. (This case was affirmed on appeal in *Astor (Viscount) In re* (1922) 91 LJ Ch 277.) ✠ (1801) 31 ER 1030 (1032, 1033) : 6 Ves 239, *Hanson* v. *Graham*.

[But see (1587) 76 E R 668 (675) : 3 Co Rep. 19a. *Boraston's case* ✠ (1849) 19 L J Ch 146 (147) : 84 R R 389, *Riley* v *Garnett* ✠ (Vol 19) 1932 Cal 600 (609) : 59 Cal 859 (DB)]

[2] Gift to such of a class of persons, as shall attain particular age is contingent. (1921) 90 LJ Ch 499 (506) *In re Astor* ✠ (1817) 35 E R 979 (988) : 16 R R 168. *Leake* v. *Robinson* ✠ (1843) 152 E R 1204 (1213) : 13 L J Ex 74, *Festing* v. *Allen* ✠ (1827) 6 E R 525 (542. 543) : 3 Bligh (NS) 260, *Duffield* v. *Duffield*.

[3] Bequest to *A* for life and then to her child who being a son shall attain age of twenty-one years — Bequest to son of *A* is contingent on his attaining twenty-one years. (Vol 12) 1925 Mad 599 (603) (DB).

[4] Under a settlement interest created in favour of all children of settlor to take effect after the youngest child attained age of twenty— *Held* that until the youngest child attained that age, the children had only a contingent interest. (Vol 17) 1930 P C 17 (18) : 8 Rang 8 : 57 Ind App 10 (PC).

6. Transfer to persons 'then' living after prior interests.— [1] Gift after prior interests to a person then living—Word "then" must be taken to refer to the last antecedent. (Vol 5) 1918 P C 206 (208) : 45 Ind App 257 : 43 Bom 88 (P C).

7. Direction to do a duty under the law, if a contingency.— [1] Mere direction by testator that his legacies charged should be given after the debts are discharged — Gifts which are otherwise vested are not made contingent (Vol 13) 1926 Mad 645 (646) (DB).

8. Contingent interest when becomes vested. — [1] Bequest in favour of A upon his attaining age of 21 — Interest is contingent on *A*'s attaining age of 21 —Until then it does not take effect — Property would vest in the heir-at-law of the testator as on intestacy until the happening of the event. ('81) 7 Cal 218 (224) ✠ ('05) 32 Cal 861 (869) (DB).

[2] *A* mortgaging property X to *B* with a clause providing that in the event of security being lost or diminished by reason of claims made thereto by third persons, *B* should recover his moneys from property Y — Subsequently *A* mortgaging property Y to *C* —Security given to *B* diminished by successful claims of third person to property X—*B* claiming to enforce his rights against property Y in priority to *C*. *Held* that *B's* claim against property Y was only contingent and became vested on the diminution of the security— That having happened subsequent to the mortgage to *C* *B* could not claim any priority against him. (Vol 17) 1930 Oudh 129 (131) (DB).

9. Two or more contingencies.— [1] On a transfer of property interest created in favour of a person to take effect on happening of more contingencies than one—All the contingencies must be fulfilled before interest can become vested. (1860) 54 E R 435 (437) : 126 R R 206, *Seccambe* v. *Edwards* ✠ (1857) 10 E R 1216 (1227) : 26 L J Ch 473, *Grey* v. *Pears*.

[2] Transfer made by which interest is created on fulfilment of two contingencies in the alternative — Estate would vest on either of them happeniug—Neither of the contingencies happening — Estate does not vest, (1871) 40 L J Ch 316 (317) : 11 Eq. 559, *In re Eddel's Trusts*.

10. Exception.—[1] On transfer of property, interest created in favour of a person on attaining particular age—Transferor by further clause, giving transferee income to arise from such interest, or directing such income to be applied for his benefit— Interest is not contingent. (1857) 26 L J Ch 635 (643) : 107 R R 167, *Browne* v. *Browne* ✠ (1711) 24 E R 150 (150): 3 Ch 317, *Stapleton* v *Cheales*.

[2] Whole of the income to arise from the interest created should be made available to the person in whose favour the interest is created. (1906) 75 L J Ch 359 (361) : (1906) 1 Ch 783, *Whitby* v. *Von Luedecke*.

[3] Income partly given to owner of the interest created and partly to third person— Interest created is contingent—Direction to apply whole or a part of income for the benefit of *A* until he shall attain a particular age, without any gift over of the unapplied portion— *A* gets vested interest — Fact that part of the income to be applied for his benefit depends upon discretion of trustee or other person does not effect matter, if such person has no discretion to spend any part of income for the benefit of third person. (1875) 23 W R (Eng) 314 (314) : 19 Eq. 286, *Fox* v *Fox* ✠(1907) 76 L J Ch 41 (44) : (1907) 1 Ch 180, *Williams* v. *Williams* ✠ (1922) 91 L J Ch 521 (527) : (1922) 2 Ch 321, *Foster* v. *Ussher*.

[But see (1896) 65 L J Ch 863 (867): (1896) 2 Ch 711 *Re Wintle* ✠ (1879) 27 W R (Eng) 544 (545) : 11 Ch D 406, *In re Grimshaw's Trusts*.]

[4] Property given to such members of a class of persons as shall attain a particular age and income directed to be applied for their benefit without specifying at the same time that the income from the respective shares should be applied for their benefit — Interest taken is contingent. (1902) 71 L J Ch 680 (682) : (1902) 1 Ch 945, *In re Gossling* ✠ ('87) 12 Bom 137 (145).

[5] Testator, after stating that his wife was in the family way, directing the executor to maintain the testator's wife, the expected son or daughter and the executor himself, out of the properties and effects bequeathed— Further declaration that should a son be born he also should be cherished and maintained and educated and brought up. And when he comes of age the executor should make over the whole of his remaining properties to the said son —*Held* that it could not be said that there was any definite ascertained interest

Transfer to members of a class who attain a particular age.

22. Where, on a transfer of property, an interest therein is created in favour of such members only of a class as shall attain a particular age, such interest does not vest in any member of the class who has not attained that age.

Transfer contingent on happening of specified uncertain event.

23. Where, on a transfer of property, an interest therein is to accrue to a specified person if a specified uncertain event shall happen, and no time is mentioned for the occurrence of that event, the interest fails unless such event happens before, or at the same time as, the intermediate or precedent interest ceases to exist.

Transfer to such of certain persons as survive at some period not specified.

24. Where, on a transfer of property, an interest therein is to accrue to such of certain persons as shall be surviving at some period, but the exact period is not specified, the interest shall go to such of them as shall be alive when the intermediate or precedent interest ceases to exist, unless a contrary intention appears from the terms of the transfer.

Illustration.

A transfers property to *B* for life, and after his death to *C* and *D*, equally to be divided between them or to the survivor of them. *C* dies during the life of *B*. *D* survives *B*. At *B*'s death the property passes to *D*.

Section 21 — Note 10 *(contd.)*

"to arise from the fund" within S. 107 of the Succession Act, 1865. (Vol 12) 1925 P C 27 (28, 29) : 49 Bom 167 : 52 Ind App 95 (P C).

[6] Other conditions of the exception satisfied — It makes no difference whether gift of the income precedes or follows the gift of the corpus. (1876) 45 L J Ch 208 (209) : 34 L T 120, *Bolding* v. *Strugnell.* (But see a contrary opinion expressed in *Spencer* v. *Wilson* (1873) 21 W R (Eng) 838 (839)).

11. "Before he reaches that age."—[1] Bequest to "such children of W. D. as shall severally attain the age of twenty-five years; the income of the property during their minorities to be applied for their respective support, maintenance etc."—Nothing said about disposal of the income between legatees attaining majority and their attaining the age of twenty-five — *Held* that children of W. D. took vested and not contingent interests. (1842) 49 E R 554 (558) : 11 L J Ch 338, *Davies* v. *Fisher.*

12. "Or directs."—[1] A direction has practically the same effect as a gift but not a power. (1926) 95 L J Ch 172 (176) : (1926) 1 Ch 223, *Blackwell* v. *Blackwell.*

[2] Trust deed provided that trustees should hold the trust fund for the use and benefit of the son or sons of the settlor to be made over to him or them on attainment by him or them of the age of 21 years with power in the meantime to spend such sum or sums out of the income for the maintenance of such son or sons as the trustee thought fit and accumulate the balance to form part of the corpus — *Held* that the power given to the trustee was not a direction—Interest in favour of the sons would be contingent. (Vol 18) 1931 Cal 651 (656) : 58 Cal 768.

Section 22 — Note 1

[1] Transfers creating interests in favour of such members only of a class as shall attain a particular age —Transfer is contingent on the members attaining a particular age. (1869) L R 8 Eq. 619 (624) : 17 W R (Eng) 985, *Merry* v. *Hill*☒(1881) 7 Cal 218 (223).

[2] Property given to *A* when he should attain a particular age and in the event of his dying before that age to *B*—*A* takes a vested interest under English law. (1835) 57 R R 27 (31) : 8 E R 539, *Phipps* v. *Ackers.*

[3] Transfer made to such members only of a class as shall attain a particular age, with a gift over in case the contingency does not happen — Interest is contingent. (1881) 7 Cal 218 (223, 224).

[4] *A* transferring property to such of his grandchildren as shall attain 18 years — On date of transfer *A* having two grand children *B* and *C*, ages respectively 15 and 13 years — By the time *B* attains 18, another grandson *D* born and subsequently two more grandsons *E* and *F* born—*B*, *C* and *D* take to the exclusion of *E* and *F* — *B* takes vested interest as soon as he attains 18 in one-third of the property—*C* and *D* each takes a contingent interest in one-third of the property which would become vested in them when they attain 18. (1791) 5 Bro C C 401 (404) : 29 E R 610 *Andrews* v. *Partington* ☒ (1801) 5 R R 322 (326) : 30 E R 1035, *Barrington* v. *Tristram*☒(1911) 80 L J Ch 249 (251) : (1911) 1 Ch 441, *In re Williams' Settlement.*

[5] *A* transferring property to *B* for life and then to such children of *X* as shall attain 18 years of age — *C*, first child of *X* being 15 years of age when *B* dies, but before he attains 18 years another child *D* born — *C* and *D* take under the transfer but not children born subsequent to *C*'s attaining 18. (1836) 42 R R 101 (104) : 59 E R 24, *Clarke* v. *Clarke.*

[6] *A* transferring property to *B* for life and then to such children of *X* as shall attain 18 years —*C*, first child of *X* attaining 18 years during the lifetime of *B*— After *C* attains 18, and before *B*'s death two children *D* and *E* born to *X*—*C*, *D* and *E* who were alive at *B*'s death take under the will but not sons born subsequently. *See* (1856) 112 R R 23 (24) : 69 E R 1017, *Gillman* v. *Daunt*

[7] A transferring property to such of his grandchildren as shall attain 18 years—On date of transfer first grandchild was over 18 years of age — Grandsons living at the date of the transfer take under the transfer to the exclusion of grandsons subsequently born. (1891) 39 W R (Eng) 697 (699) : (1891) 3 Ch 197, *Mervin* v. *Crossman.*

Section 23 — Note 1

[1] Testator bequeathing legacy to his son *N* and providing that in the event of *N* dying without marrying, or if married, without any lineal heir, his share shall revert equally to his surviving sisters or their heirs—*Held* that no time was fixed for the happening of the contingency ('13) 37 Bom 644 (649).

[2] Grant to certain widows with provision that on the death of last surviving widow the daughter would take the property—*Held* that no gift was expressed in favour of the daughter until she survived the last widow. (Vol 23) 1936 P C 131 (133) : 63 Ind App 224 : 59 Mad 633 (P C).

Section 24 — Note 1

[1] *A* transferring property to *B* for life and after his death to *C* and *D* equally to be divided between them or to the survivor of them — In the absence of

Conditional transfer.

25. An interest created on a transfer of property and dependent upon a condition fails if the fulfilment of the condition is impossible, or is forbidden by law, or is of such a nature that, if permitted, it would defeat the provisions of any law, or is fraudulent, or involves or implies injury to the person or property of another, or the Court regards it as immoral or opposed to public policy.

Illustrations.

(a) *A* lets a farm to *B* on condition that he shall walk a hundred miles in an hour. The lease is void.

(b) *A* gives Rs 500 to *B* on condition that he shall marry *A*'s daughter *C*. At the date of the transfer *C* was dead. The transfer is void.

(c) *A* transfers Rs. 500 to *B* on condition that she shall murder *C*. The transfer is void.

(d) *A* transfers Rs. 500 to his niece *C* if she will desert her husband. The transfer is void.

Fulfilment of condition precedent.

26. Where the terms of a transfer of property impose a condition to be fulfilled before a person can take an interest in the property, the condition shall be deemed to have been fulfilled if it has been substantially complied with.

Illustrations.

(a) *A* transfers Rs. 5,000 to *B* on condition that he shall marry with the consent of *C*, *D* and *E*. *E* dies *B* marries with the consent of *C* and *D*. *B* is deemed to have fulfilled the condition.

(b) *A* transfers Rs. 5,000 to *B* on condition that he shall marry with the consent of *C*, *D* and *E*. *B* marries without the consent of *C*, *D* and *E*, but obtains their consent after the marriage. *B* has not fulfilled the condition.

Section 24 — Note 1 *(contd.)*

indication to the contrary in the terms of the transfer interest will go to *C* or *D* surviving *B*, the owner of the prior interest. (1860) 129 R R 9 (14) : 29 L J Ch 577, *White* v. *Baker*.

[2] Legacy to two or more persons equally to be divided between them, or to the survivor or survivors of them — No special intent to be found in the will — Survivorship is to be referred to the period of division. (1819) 20 R R 268 (271) : 56 E R 613, *Cripps* v. *Wolcott*.

[3] No prior interest given in legacy — Period of division is death of testator. (Vol 2) 1915 Cal 414 (415) (DB)✠('79) 5 Cal 59 (61).

[4] Prior life-estate given — Period of division is death of the tenant for life. (1819) 20 R R 268 (271) : 56 E R 613, *Cripps* v. *Wolcott*.

[5] Interest created to accrue to such of certain persons as shall be surviving at some period, is contingent interest. (Vol 24) 1937 Pat 247 (249) (DB).

[6] Person not heard of for a long time by those who would naturally have heard of him if he were alive— There is no presumption as to time of his death. (Vol 13) 1926 P C 9 (11) : 5 Pat 312 : 53 Ind App 24 (P C)✠ ('05) 33 Cal 173 (178) : 32 Ind App 177 (P C).

SECTION 25 — SYNOPSIS

1. Scope.
2. "If the fulfilment of the condition is impossible."
3. "Is forbidden by law."
4. Fulfilment of the condition is immoral.
5. "Opposed to public policy."

1. Scope. — [1] A provision good by way of contract is also valid by way of condition. (1846) 17 L J Ex 106 (109) : 71 R R 808, *Cooke* v. *Turner*.

[2] In cases contemplated by this section, both the condition and the transfer dependant upon it are void. (1926) 95 L J Ch 136 (138, 139) : 134 L T 439, *In re Turton*.

[3] Transfer relating to personalty—Condition precedent originally impossible, or made so by act or default of testator, or illegal as involving *malum prohibitum*—Bequest is absolute—Performance of condition sole motive of bequest, or its impossibility unknown to the testator, or since becoming impossible by act of God, or being illegal as involving *malum in se* — Both gift and condition are void. (1888) 39 Ch D 116 (131, 132): 57 L J Ch 936, *In re Moore* ; *Trafford* v. *Maconochi* ✠(Vol 13) 1926 Mad 648 (650) (DB).

2. "If the fulfilment of the condition is impossible." — [1] Testator making bequest subject to a condition precedent before his death—Condition rendered impossible by testator's own act—Circumstances showing that testator intended that transfer should take effect only if the condition was fulfilled—Interest failed. (Vol 9) 1922 Cal 116 (117) : 48 Cal 1100 (DB).

[2] Party having no power to perform a condition without the consent or assistance of another condition is not necessarily impossible. (1739) 125 E R 1106 (1110) : Willes 153, *Acherley* v. *Acherley*.

3. "Is forbidden by law."—[1] Prohibition can be implied. (1834) 110 E R 1019 (1023): 5 B & Ad 887, *Forster* v. *Taylor*.

4. Fulfilment of the condition is immoral. — [1] Transfer conditional on continuance of immoral relations between transferor and transferee is void. (1900) 23 Mad 613 (615, 616) (DB).

5. "Opposed to public policy."—[1] Condition against public good, or public policy, is illegal. (1853) 23 L J Ch 348 (385) : 4 H L C 1, *Egerton* v. *Brownlow*.

[2] Public policy is not a branch of the law to be extended but is governed by judicial precedents. (1937) 106 L J K B 641 (651) : 53 T L R 885, *Fender* v. *Mildmay* ✠ (1902) 71 L J K B 857 (863) : 87 L T 372, *Janson* v. *Driefontein Consolidated Mines, Ltd.*,✠ (Vol 4) 1917 All 462 (464) : 39 All 51 (F B) ✠ (Vol 18) 1931 Bom 269 (271) (DB)✠(1875) 44 L J Ch 705 (705): 32 L T 354, *Printing and Numerical Registering Company* v. *Sampson*.

[3] Legacy given to a person on condition that she shall marry with the consent of *X*—Condition is valid. (1899) 68 L J Ch 15 (18): (1899) 1 Ch 63, *In re Nourse*✠ (1788) 21 E R 448 (452) : 2 W & T L C 146, *Scott* v. *Tayler*.

Section 26 — Note 1

[1] Where by an agreement between *A*, a widow, on the one side, and *B*, *C* and *D* on the other, it was agreed that *A* should not transfer her property without the consent of *B*, *C* and *D*, and *A* transferred her property with the consent of *B*, the other two being dead at the time, it was held that there was no substantial compliance with the condition. (Vol 13) 1926 All 181 (183, 185) (DB).

[2] A, by his will, gave to trustees £312 and several jewels in Vienna, in trust, to sell the same and pay rateably the creditors of his son if such creditors should within four months of the testator's decease, accept it as a composition, and discharge the son. Creditors applying within four months for payment of their demands agreeing to accept the payment as a composi-

27. Where, on a transfer of property, an interest therein is created in favour of one person, and by the same transaction an ulterior disposition of the same interest is made in favour of another, if the prior disposition under the transfer shall fail, the ulterior disposition shall take effect upon the failure of the prior disposition, although the failure may not have occurred in the manner contemplated by the transferor.

Conditional transfer to one person coupled with transfer to another on failure of prior disposition.

But, where the intention of the parties to the transaction is that the ulterior disposition shall take effect only in the event of the prior disposition failing in a particular manner, the ulterior disposition shall not take effect unless the prior disposition fails in that manner.

Illustrations.

(a) *A* transfers Rs. 500 to *B* on condition that he shall execute a certain lease within three months after *A*'s death, and, if he should neglect to do so, to *C*. *B* dies in *A*'s life-time. The disposition in favour of *C* takes effect.

(b) *A* transfers property to his wife; but, in case she should die in his life-time, transfers to *B* that which he had transferred to her. *A* and his wife perish together, under circumstances which make it impossible to prove that she died before him. The disposition in favour of *B* does not take effect.

Section 26 — Note 1 *(contd.)*

tion and agreeing to discharge son—Trustees, not selling the jewels within four months and the creditors not therefore actually discharging son: *Held* that the condition was substantially complied with by the creditors applying within time and agreeing to give a discharge on payment (1746) 26 E R 998 (1000) : 3 Atk 342, *Franco* v. *Alvares*.

[3] *A* gave a legacy to *X* who was in Australia "if he returned to England before the death of *Y*." *X* embarked within the time specified on board a British ship to return to England, but the ship and all the passengers perished at sea It was held that the condition was not fulfilled and *X*'s administratrix could not claim the legacy. (1857) 69 E R 1116 (1117) : 112 R R 153, *Priestley* v. *Holgate*.

[4] *A* bequeathed personal estate to *B* provided she married with the consent of *C*. *C* gave a general permission to *B* to marry as she thought fit. *B* subsequently married without the knowledge of *C* : *Held* that the condition was sufficiently complied with. (1816) 35 E R 642 (644) : 1 Mer 181, *Pollock* v. *Croft*.

[5] *M* executed a sale deed in favour of *S*, a minor—Sale deed providing that *S*'s father should discharge certain debts—*S*'s father discharged a portion of such debts and the balance was discharged by *S* himself : *Held* that the payment of the debts was not a condition precedent to the vesting of the property in *S*, and in any view, the payment of the debt by *S*'s father and *S* was a sufficient compliance. (Vol 11) 1924 Mad 544 (545).

[6] During the pendency of a suit for partition brought by *B* and *C* against *A*, the latter made a bequest to *B* and *C*, as an act of grace on the condition that 'should the suit which is brought by them under an illusion be disposed of against them and should they, after the Court's final decision humbly apply for assistance" they should receive a sum of money for their maintenance. After the death of *A*, *B* applied to the Collector of the District who was administering *A*'s estate, asserting *A*'s duty to maintain the applicant and demanding a larger sum of money than that bequeathed. *Held* that this was not a humble request, and that the condition was not fulfilled. ('05) 28 Mad 173 (180, 181) : 32 Ind App 105 (PC).

[7] Testator bequeathing a fund to *X* on her attaining the age of twenty one years or her marrying with the consent of her parents—At testator's death *X* had only one parent living, and she married under twenty-one with the consent of the living parent : *Held* that the condition was not fulfilled and that she did not get any vested interest on her marriage. (1876) 2 Ch D 753 (761, 762) : 45 L J Ch 519, *Dawson* v. *Oliver Massey*.

[8] Estate given to *X* on condition of his changing his name—Change of name by him is sufficient compliance—Application for Royal Sign Manual is not necessary. (1835) 53 R R 266 (267) : 131 E R 1247, *Davies* v. *Lowndes*.

[9] Where the transferor fixes a time limit within which the condition precedent is to be performed the performance of the condition within a reasonable time though not within the time specified would not be a substantial compliance with the condition : *See* S. 128 illus (viii), Indian Succession Act.

[10] If no time limit is fixed for the performance of a condition precedent it would be sufficient compliance with the condition if the thing was done within a reasonable time. (1835) 53 R R 266 (267) : 131 E R 1247, *Davies* v. *Lowndes*.

[11] Where the time fixed was not of the substance of the condition, but merely directory, the performance of the act within a reasonable time was held to be substantial compliance with the condition. (1920) 89 L J Ch 301 (303, 304) : (1920) 1 Ch 596, *In re Pockard*.

Section 27 — Note 1

[1] This section does not apply unless the prior and ulterior dispositions refer to the same interest. (Vol 29) 1942 Sind 145 (152) : I L R (1942) Kar 592.

[2] If the prior disposition is void *ab initio* the subsequent disposition also will fail on the principle embodied in S. 16. (Vol 29) 1942 Bom 155 (158) : I L R (1942) Bom 441.

[3] Award in respect of religious endowment agreed by parties as binding providing for appointment of sons of dedicator as manager each for term of 21 years in succession and after them eldest son of each of these sons each for same term. Eldest son of dedicator acting as manager for 21 years—Second son dying before expiry of 21 years and third dying before second son—Principle underlying S. 27 held applicable and eldest son of first son of dedicator was entitled to succeed as manager after death of second son. (Vol 19) 1932 Oudh 161 (162, 163) (DB).

[4] *A* made a bequest to a minor son and on his death before attaining majority to the widow for life and then to the daughters : *Held* that the gift to daughters took effect by the death of the widow before the minor son. (Vol 1) 1914 Cal 570 (571, 572) (DB).

[5] *A*'s wife was enceinte and *A*, by his will, left his property to the expected son—There was a gift over in case the son died before attaining majority —*A*'s wife gave birth to a daughter : *Held* that the gift over took effect, though the gift to the son failed in a manner

28. On a transfer of property an interest therein may be created to accrue to any person with the condition superadded that in case a specified uncertain event shall happen such interest shall pass to another person, or that in case a specified uncertain event shall not happen such interest shall pass to another person. In each case the dispositions are subject to the rules contained in sections 10, 12, 21, 22, 23, 24, 25 and 27.

Ulterior transfer conditional on happening or not happening of specified event.

Section 27 — Note 1 *(contd.)*
not contemplated by the testator. ('87) 15 Cal 282 (291) (DB).

[6] A gift made to a son, to be adopted by the wife of the testator and if the adopted son died without issue in the lifetime of the widow then to the daughters of the testator in equal shares—The adoption was found to be void *ab initio* : *Held* that the gift over in favour of the daughters would take effect although the contingency upon the happening of which it was to take effect had not happened in the way contemplated by the will. ('08) 35 Cal 896 (903) : 35 Ind App 118 (PC).

[7] Gift to a grandson who may be born within 10 years at the testator's death. A grandson was born within 10 years but the gift to him was invalid under Hindu law being to unborn person. If a grandson was not born within 10 years then there was a gift over. The prior gift failed but not in the manner intended by the testator. Hence the ulterior gift also failed. (Vol 13) 1926 Mad 936 (938) (DB).

SECTION 28 — SYNOPSIS

1. Scope.
2. "Interest therein may be created."
3. "With the condition superadded."
4. "Specified uncertain event."
5. "Shall pass to another person."
6. "Subject to rules. . . ."

1. Scope. — [1] Section 28 deals with a case in which, on the happening of a specified uncertain event the property transferred is to pass to a second donee, whereas, S. 31 refers to a mere cesser of the first donee's interest on the happening of a specified uncertain event, in which case the property will, in ordinary cases, revert to the donor." (Vol 22) 1935 Pat 401 (403) : 14 Pat 640 (DB).

[2] Where there is no defeasance of the prior interest, the gift over cannot come into operation. (Vol 15) 1928 Oudh 67 (73).

[3] On the happening of the uncertain event on which the interest created is to pass to another person, the prior estate is put an end to and the gift over takes effect. ('12) 14 Ind Cas 708 (710) (DB) (Cal) ✠ (Vol 15) 1928 All 699 (702) (DB).

[4] A testator bequeathed a fund to his sons *B*, *C* and *D* which was to be paid to them as and when they attained the age of 21 years, subject to the condition that in case any son died before the period of distribution to him of his share, the share was to go to his issue. *B* died before the period of distribution leaving issue, but before he died he made a will bequeathing his share to his wife. It was held that on his death before distribution his estate was divested and passed to his issue and that, therefore, the wife's claim to the property was not sustainable. ('84) 6 All 583 (597) (DB).

[5] *X* transferred property to *A* subject to the condition that if he died before attaining majority, it shall pass to *B*—*A* died before attaining majority : *Held*, property passed to *B*. (Vol 1) 1914 Cal 570 (571) (DB).

[6] *A* transfers property to *B*, *C* and *D* with a proviso that if any of them died without leaving a son or a son's son his share should go to the survivors. *B* died without leaving a son or son's son—*C* and *D* will get the share and not the heirs of *B*." ('72) Ind App Supp. 47 (70) (PC).

[7] Bequest to *A* and *B*, testator's two widows, with a condition that in case *A* or *B* does not reside in the family house she is to forfeit her share, which will go over to other heirs — *B* leaving the house : *Held*, *B* forfeits her share in property. ('97) 24 Cal 646 (656, 657) (DB).

[8] Bequest to *N* on condition of living in family house, otherwise gift over — Failure to reside — Gift over takes effect. ('11) 11 Ind Cas 634 (635) (Cal) ✠ ('12) 14 Ind Cas 708 (710) (DB) (Cal).

[9] Razinama providing that the properties to be held and enjoyed in common by *A* and *B* and that in the event of *A* having no issue, the entire properties to belong to *B*—*A* dying without leaving issue—Gift over takes effect. ('11) 34 Mad 250 (252) (DB).

[10] A defeasance clause in a partition deed of an estate that if a default in making certain payments shall be made the interest of the defaulter shall pass to another person is valid. (Vol 7) 1920 Mad 783 (787) (DB).

2. "Interest therein may be created." — [1] Word "interest" in S. 28 has the same meaning as the "thing bequeathed" in S. 131 of the Indian Succession Act, 1925. (Vol 22) 1935 Pat 401 (403): 14 Pat 640(DB).

[2] Interest created need not be absolute interest but may be a life interest. (1852) 68 E R 597 (600) : 21 L J Ch 511, *Rockford* v. *Hackman*.

[3] Interest created may be a contingent interest. (1853) 10 E R 359 (442) : 23 L J Ch 348, *Egerton* v. *(Earl) Brownlow*.

3. "With the condition superadded."—[1] Imposition of a condition should be made at time of making transfer and not subsequently. ('83) 6 All 313 (321) : 11 Ind App 44 (PC). (Gift of villages complete by delivery of possession—Subsequently an application to Collector stating the gift to be conditional : *Held*, application ineffective.)

[2] Where it is doubtful whether a condition be precedent or subsequent, the Court *prima facie* treats it as being subsequent. (Vol 25) 1938 P C 270 (275, 276) (PC).

[3] Condition subsequent with gift over clause — Unless intention of grantor is clear and definite presumption is against dividing of estate once vested. (Vol 12) 1925 Mad 599 (604, 605) (DB) ✠ (1883) 52 L J Ch 420 (421, 422) : 23 Ch D 158, *In re Viscount Exmouth*.

4. "Specified uncertain event."— [1] The contingency should be so expressed as not to leave it in any degree doubtful or uncertain what the contingency is which is intended to defeat the prior estate. (1855) 3 Drew 451 (470) : 61 E R 975, *Clavering* v. *Ellison*. (Expression 'educated in England' held not specific but doubtful.)

[2] The uncertainty referred to in the section is uncertainty in the happening of the event and not in the language in which it is expressed. ('84) 6 All 583 (597) (D B).

[3] Fund bequeathed to *K* on condition that it was to go over to *G* in case *K* died before "actually receiving" it from the executors — *K* dying before actually receiving fund : *Held* that *G* was entitled to the fund as the case was one of a specified event uncertain in its happening. (1879) 12 Ch D 639 (654) : 48 L J Ch 777, *Johnson* v. *Crook*.

Fulfilment of condition subsequent.

29. An ulterior disposition of the kind contemplated by the last preceding section cannot take effect unless the condition is strictly fulfilled.

Illustration.

A transfers Rs. 500 to *B*, to be paid to him on his attaining his majority or marrying, with a proviso that, if *B* dies a minor or marries without *C*'s consent, the Rs. 500 shall go to *D*. *B* marries when only 17 years of age, without *C*'s consent. The transfer to *D* takes effect.

Prior disposition not affected by invalidity of ulterior disposition.

30. If the ulterior disposition is not valid, the prior disposition is not affected by it.

Illustration.

A transfers a farm to *B* for her life, and, if she do not desert her husband, to *C*. *B* is entitled to the farm during her life as if no condition had been inserted.

Section 28 *(contd.)*

5. "Shall pass to another person." — [1] Gift over must be in favour of a definite person or persons. ('05) 32 Cal 861 (869) (D B).

6. "Subject to rules....." — [1] Transfer made in favour of *X* subject to a condition that if he disposes of it in any way, it will pass to *Y*— Condition subsequent is void under S. 10 and *X*'s intereet will not be divested even if he breaks the condition. (1797) 3 Ves 324 (325): 4 R R 7, *Bradley* v. *Peixoto.*

[2] Absolute gift to a wife subject to a condition that if she dies without issue the property would pass to other persons living at the date of the gift — Gift in favour of other persons is contingent—On happening of contingency ulterior transfer will become a vested interest by virtue of S. 21. (Vol 20) 1933 Mad 80 (83).

[3] Where the 'condition superadded' is of the nature specified in S. 25 the ulterior interest will fail. ('83) 6 All 313 (321) : 11 Ind App 44 (P C) ✠ (1912) 2 Ch 471 (478) : 81 L J Ch 800, *Noel* v. *Sandbrook.* (Condition that donees who were minors should not be in the custody or guardianship of their father— Condition is void as being against public policy.)

Section 29—Note 1

[1] Clear words are necessary to divest an estate once vested. ('87) 12 Bom 137 (147).

[2] A clause of defeasance, in order to be operative, must contain express words or words of necessary implication of a gift over to a definite person or persons. ('05) 32 Cal 861 (869) (D B).

[3] Where the gift over clause is ambiguous it should be construed in such a manner as not to divest an interest already vested. (Vol 12) 1925 Mad 599 (605) (DB).

[4] Gift over clause unambiguous—Literal construction should be adopted. (Vol 12) 1925 Mad 599 (604) (D B) ✠ (1920) 36 T L R 674 (675) : (1920) 2 Ch 469, *In re Evan's Contract.* (A will declared that a person entitled under the will shall within specified time assume the surname and arms of the testator, without providing for gift over on failure to do so : *Held*, it was merely expression of a desire of the testator and not a conditional limitation.)

[5] Bequest in favour of *A*, subject to a proviso that if within a particular period from the death of the testator, *A* refused or neglected to take the name and arms of the testator, then the property was to go over to *B*—*A* was abroad and remained in ignorance of his rights for more than the prescribed period : *Held* that the words "refuse" or "neglect" presupposed the exercise of will on the part of *A* and that a mere "failure" or "omission" due to ignorance did not fall within the expression "refuse or neglect" and the bequest was therefore not defeated. (1926) 1 Ch 992 (1006) : 96 L J Ch 9 *Re Quintin Dick*; *Cloncurry* v. *Fenton.*

[6] A partition deed between *A* and *B* provided as regards certain land that its usufruct was set apart for the maintenance of their mother and then provided as follows: "We shall divide the properties after defraying the funeral expenses of our mother. The land of the person that does not contribute to the said expenses shall be enjoyed by the person who contributes." *A* did not contribute : *Held* that the clause as to contribution was one of defeasance, that the words "if either of them does not contribute", must be construed as meaning " if either of them refuse to contribute" and that the mere failure of *A* to contribute did not divest him of his vested interest. ('11) 12 Ind Cas 256 (257) (DB) (Mad).

[7] Gift with a condition that if the donee did not reside in the house given the house should pass to another person— Occasional use of house by donee by keeping establishment in it with intention of again using it as residence : *Held* gift over did not take effect as residence contemplated was not exclusive residence. ('74) 1 Ind App 387 (398, 399) (P C).

[8] A bequest was made to *A* on condition that if she should have no legitimate children, then the property was to pass to *B*. *A* had one legitimate child born alive who died before her. *Held* that since *A* had a child though subsequently dead, the event contemplated happened and that the gift over did not take effect. *A* had the estate absolutely. (1810) 33 E R 1041 (1042) : 16 Ves 413, *Wall* v. *Tomlinson.*

[9] A house was bequeathed to *N* on condition that he should reside in the house, otherwise he will cease to have any interest in the house which would go to somebody else — *N* sold the house and made it impossible for himself to reside in the house—*Held* condition was broken. ('11) 11 Ind Cas 634 (635) (DB) (Cal).

[10] Party alleging that there has been a breach of a condition subsequent must prove it. (1862) 10 W R (Eng.) 681 (681, 682), *Wilkinson* v. *Dysen.*

[11] Condition, such as is referred to in S. 28 becoming impossible of fulfilment through no act or default of the person who has to perform it — Condition will be treated as void — Transferee of prior interest will take estate absolutely. (1739) 26 E R 407 (408) : 2 Atk 16, *Graydon* v. *Hicks* ✠ (Vol 12) 1925 Lah 594 (595) (DB) ✠ (Vol 11) 1924 All 625 (638) : 46 All 575 (DB).

[12] *A* transfers property to *B* subject to a condition that on his failure to perform a particular act it shall pass to another person. *B* is not able to do the thing by reason of duress or imprisonment. The non-performance of the act will not divest the estate and the gift over does not take effect. ('93) 20 Cal 15 (17) (DB).

Section 30 — Note 1

[1] A transfer to *A* for life with a subsequent disposition amounting to altering the legal course of inheritance would be invalid so far as the subsequent disposition is concerned. (Vol 18) 1931 P C 179 (181) : 58 Ind App 270 : 59 Cal 142 (PC) ✠ (Vol 20) 1933 Bom 34 (36) (DB).

[2] An ulterior disposition on the happening of a condition which is invalid for any reason would not take effect. ('99) 4 Cal W N 671*n* (677*n*). (Accumulation.) ✠ (1908) 77 L J Ch 265 (266) : (1908) 1 Ch 383

Condition that transfer shall cease to have effect in case specified uncertain event happens or does not happen.

31. Subject to the provisions of section 12, on a transfer of property an interest therein may be created with the condition superadded that it shall cease to exist in case a specified uncertain event shall happen, or in case a specified uncertain event shall not happen.

Illustrations.

(a) *A* transfers a farm to *B* for his life, with a proviso that, in case *B* cuts down a certain wood, the transfer shall cease to have any effect. *B* cuts down the wood. He loses his life-interest in the farm.

(b) *A* transfers a farm to *B*, provided that, if *B* shall not go to England within three years after the date of the transfer, his interest in the farm shall cease. *B* does not go to England within the term prescribed. His interest in the farm ceases.

Such condition must not be invalid.

32. In order that a condition that an interest shall cease to exist may be valid, it is necessary that the event to which it relates be one which could legally constitute the condition of the creation of an interest.

Section 30—Note 1 *(contd.)*

In re Beard. (Condition against public policy.) ✠ (Vol 22) 1935 All 1042 (1046): 58 All 467. (Condition void for repugnancy to absolute estate created—Section 11.)

[3] Where prior disposition is subject to a condition of defeasance with a gift over and the condition is valid but becomes subsequently impossible of fulfilment, the ulterior disposition fails. The prior disposition becomes absolute and free of the condition. (Vol 11) 1924 All 625 (638): 46 All 575 (DB).

Section 31 — Note 1

[1] Condition subsequent by way of defeasance is valid but Court is not bound to enforce it in all cases. (Vol 20) 1933 Oudh 291 (294, 295): 8 Luck 707 (DB).

[2] *A* executed a document in favour of *B* to the following effect: 'I sell property to you I have received consideration as follows: I have kept Rs 29,072-3 0 in deposit with you for payment to my creditor *B* and have received the balance of Rs. 1927-13-0 in cash. You should go with me to *B*. I shall request *B* for remission and if he reduces is, you should pay *B* the reduced sum and the balance to me If you fail to pay *B* as aforesaid by 30th December 1925 this sale-deed shall stand cancelled": *Held* that the document contained both a contract of sale and an act of transfer of the property, that the last clause was part of the contract of sale and not of the transfer of property, and that S. 31 did not exclude the right of the Court to give relief to the purchaser who fails to make payment of the price by the date agreed upon in the contract of sale. (Vol 23) 1936 P C 24 (25, 26): 63 Ind App 26: 15 Pat 127 (PC).

SECTION 32—SYNOPSIS

1. Condition void for uncertainty.
2. Condition as to residence.
3. Condition subsequent opposed to public policy.
4. Conditions in restraint of marriage.
5. Immoral conditions subsequent.
6. Provisions void for repugnancy.
7. Condition, fulfilment of which is impossible.
8. Effect of condition subsequent being illegal.

1. Condition void for uncertainty.—[1] A testator devised a certain income to *X* but added a clause that the payment of the income should be made only so long as *X* continued to reside in Canada: *Held* that the condition was void for uncertainty. (Vol 25) 1938 P C 270 (275) (PC).

[2] A condition that if the legatees should live with their father they should forfeit the legacy, is void for uncertainty (1912) 81 L J Ch 800 (804): (1912) 2 Ch 471, *In re Sandbrook.*

[3] Where a legacy is given to *N* on condition he remains obedient to *B*, the condition imposed on *N* is not void for uncertainty. (Vol 31) 1944 Bom 196 (197).

[4] Gift over of what may not be required by the first donee of the absolute interest, is void for uncertainty. (Vol 8) 1921 Lah 11 (16): 2 Lah 175 (DB).

[5] An absolute interest given to the first taker, followed by a gift over of what may not be required by him—The gift over, though couched in most direct and precise words, is void for uncertainty. (Vol 3) 1916 Cal 775 (778, 780) (DB).

2. Condition as to residence. — [1] A condition subsequent as to residence is a valid condition. (1857) 53 E R 423 (425): 116 R R 178, *Wynner* v. *Fletcher.*

[2] The meaning of the words 'reside' and 'residence' depends upon the context in which the words are used (Vol 25) 1938 P C 270 (275) (PC).

[3] Where a will devised property to certain female members of the family, and provided that if any of them lived in any other than a holy place for more than three months she would be deprived of all properties: *Held* that what was contemplated was a wilful, deliberate and intentional leaving and that it did not cover the case of a minor member who was removed to another place with the assistance of the police and kept there. ('91) 20 Cal 15 (17) (DB).

[4] A clause of forfeiture in the event of the devise not making the mansion house his usual and common place of abode and residence is not void for uncertainty. ('97) 24 Cal 646 (655, 656) (DB) ✠ (Vol 3) 1916 Cal 654 (656) (DB).

3. Condition subsequent, opposed to public policy — [1] A condition subsequent altering the legal course of inheritance would be void as being opposed to public policy. (Vol 18) 1931 PC 179 (181, 182): 58 Ind App 270: 59 Cal 142 (PC) ✠ (Vol 20) 1933 Bom 34 (36) (DB).

[2] A testator gave property to *H*, on condition that if *H* entered into the naval or military services of the country, the property was to go over to *F*: *Held* that the condition was void as being against public policy. (1908) 24 T L R 225 (226): (1908) 1 Ch 383, *In re Beard.*

[3] A condition that the donee, a woman, should cease to reside at *X* where the husband resided was held void. (1871) 40 L J Ch 242 (244): 12 Eq 604, *Wilkinson* v. *Wilkinson.*

[4] A condition that the legacy will be defeated if the infant donees should live with their father is against public policy. (1922) 91 L J Ch 250 (253): (1922) 1 Ch 75, *In re Boulter.*

[5] A condition that the infant donees should reside only in a particular place, wherever the parents may be is void as being opposed to public policy. (1912) 81 L J Ch 800 (804): (1912) 2 Ch 471, *Noel* v. *Sandbrook.*

[6] A condition, making an estate granted to a person defeasible in the event of failure of issue living at the time of her death is valid. ('78) 4 Cal 23 (28): 5 Ind App 138 (PC).

33. Where, on a transfer of property, an interest therein is created subject to a condition that the person taking it shall perform a certain act, but no time is specified for the performance of the act, the condition is broken when he renders impossible, permanently or for an indefinite period, the performance of the act.

Transfer conditional on performance of act, no time being specified for performance.

34. Where an act is to be performed by a person either as a condition to be fulfilled before an interest created on a transfer of property is enjoyed by him, or as a condition on the non-fulfilment of which the interest is to pass from him to another person, and a time is specified for the performance of the act, if such performance within the specified time is prevented by the fraud of a person who would be directly benefited by non-fulfilment of the condition, such further time shall as against him be allowed for performing the act as shall be requisite to make up for the delay caused by such fraud. But if no time is specified for the performance of the act, then, if its performance is by the fraud of a person interested in the non-fulfilment of the condition rendered impossible or indefinitely postponed, the condition shall as against him be deemed to have been fulfilled.

Transfer conditional on performance of act time being specified.

Section 32 — Note 3 *(contd.)*

[7] *A*, who was under a sentence of transportation for life, transferred property to *B* subject to the condition that in the event of *A*, returning after serving his sentence, the property *shall revert* to him : *Held* that the condition was legal. (Vol 10) 1923 Mad 67 (69) (DB).

[8] A transfer of property to the wife so long as she continued the cohabiting wife or the widow of the husband with gift over in case the marriage is dissolved, is not opposed to public policy. (1904) 20 T L R 282 (283) : (1904) 1 Ch 470, *In re Hope Johnstone.*

[9] Condition that if the legatee leads an unchaste life the grant should cease was held to be valid. (Vol 19) 1932 Cal 350 (351) : 59 Cal 102 (DB).

4. Conditions in restraint of marriage.—[1] A condition subsequent causing a forfeiture in the event of marriage without the consent of some persons named is valid. (1905) 53 W R (Eng) 293 (295) : 74 L J Ch 207, *Re Whiting's Settlement.*

[2] *X* bequeathed to a woman *Y* who was living under his protection £ 1200 a year subject to a condition that if she should marry after his death she should be paid £800 a year, the balance of £400 to be applied for the benefit of *X's* son by the woman : *Held* that the condition was not void. (1918) 1 Ch 458 (468, 469): 87 L J Ch 209, *In re Hewett.*

[3] A condition restraining marriage with a particular person is not bad. (1925) 95 L J Ch 37 (40) : (1925) 1 Ch 377, *In re Bathe.* ((1880) 16 Ch D 188, *Jenner* v. *Turner, Foll*)

[4] A legacy was given to *X* on condition that it was to cease if he married a relation by blood, the restraint was held void. (1927) 96 L J Ch 487 (490, 492): (1927) 2 Ch 264, *In re Lanyon.*

[5] A condition subsequent that a person should not re-marry is not void. (1875) 45 L J Ch 310 (312) : 1 Ch D 399, *Allen* v. *Jackson.*

5. Immoral conditions subsequent. — [1] *H* gave certain property to *W* who was his mistress but who lived with him as his wife, on condition of her continuing to be his wife and remaining obedient to him, it was held that the condition was not immoral. ('79) 2 All 433 (436) (DB).

6 Provisions void for repugnancy. — [1] A testator after conferring absolute estate on his sons, said in a subsequent clause that if any son died without leaving a son, his widow or daughters should not inherit the property; it was held that the clause was void for repugnancy (Vol 26) 1939 Cal 226 (231) : I L R (1939) 1 Cal 63 (DB) ✠ ('94) 17 Mad 150 (155) (DB).

[2] The testator gave absolutely to his wife certain properties, but provided that whatever she did not dispose of during her lifetime should go for the education of the Anglo-Indian community—It was held that the proviso was void for repugnancy. ('89) 13 Mad 379 (382).

[3] Where an absolute gift was made by *A* to *B*. but subsequently in a petition by *A* to the Collector for *dakhil kharij* between the parties *A* stated certain conditions as being attached to the gift The petition was treated as inefficacious for that purpose. ('83) 6 All 313 (321) : 11 Ind App 44 (P C).

7. Condition, fulfilment of which is impossible.— [1] A testator gave an annuity to his wife on condition that she should live in the family dwelling house to be thereafter built by him or by his executors and not in her father's house. The family house was never built as intended and the widow lived in her father's house. It was held that she did not forfeit the annuity. (Vol 5) 1918 Cal 463 (464) (D B)

8. Effect of condition subsequent being illegal— [1] Where a condition subsequent is illegal the transfer takes effect as if it had been made without any conditions whatever (Vol 13) 1926 Cal 561 (563): 53 Cal 251 ✠(Vol 12) 1925 All 437 (439) : 47 All 619 (DB) ✠ ('83) 6 All 313 (321) : 11 Ind App 44 (P C) ✠ (Vol 3) 1916 Cal 295 (301) (D B).

Section 33 — Note 1

[1] Interest created in land in favour of grantee subject to a condition that he shall plant a grove on the land—No time specified for planting grove : *Held* that the condition is not broken unless grantee renders the plantation impossible either permanently or for an indefinite period. (Vol 2) 1915 All 216 (217).

[2] Testator giving property to his daughter's son *X*, conditional on his living in the family house after the death of the widow of the testator, with a gift over on his failure so to reside — Daughter's son subsequently joining the widow in selling the house : *Held* that *X* was deprived of the interest given to him. ('12) 14 Ind Cas 708 (710) (D B) (Cal.)

Section 34 — Note 1

[1] Onus of proof of fraud is on the person alleging it (1839) 2 Moo Ind App 181 (244) (P C) ✠ ('76) 25 Suth W R 133 (134) ✠ ('79) 5 Cal 363 (388) (DB).

[2] Onus of proof of fraud is not discharged by proving suspicious circumstances. (Vol 28) 1941 P C 93 (95) (P C)✠(1839) 2 Moo Ind App 181 (246) (P C)✠(1855) 21 Beav 621 (623) : 111 R R 228, *Dean* v. *Thwaite.*

[3] Party bound to perform the act constituting the condition ignorant of the condition imposed upon him and therefore not performing it — Condition will take effect against him. (1874) 22 W R (Eng) 620 (621) : 18

Election.

35. Where a person professes to transfer property which he has no right to transfer, and as part of the same transaction confers any benefit on the owner of the property, such owner must elect either to confirm such transfer or to dissent from it; and in the latter case he shall relinquish the benefit so conferred, and the benefit so relinquished shall revert to the transferor or his representative as if it had not been disposed of,

Election when necessary.

subject nevertheless,

where the transfer is gratuitous, and the transferor has, before the election, died or otherwise become incapable of making a fresh transfer,

and in all cases where the transfer is for consideration,

to the charge of making good to the disappointed transferee the amount or value of the property attempted to be transferred to him.

Illustrations.

The farm of Sultanpur is the property of *C* and worth Rs. 800. *A* by an instrument of gift professes to transfer it to *B*, giving by the same instrument Rs. 1,000 to *C*. *C* elects to retain the farm. He forfeits the gift of Rs. 1,000.

In the same case, *A* dies before the election. His representative must out of the Rs. 1000 pay Rs. 800 to *B*.

The rule in the first paragraph of this section applies whether the transferor does or does not believe that which he professes to transfer to be his own.

A person taking no benefit directly under a transaction, but deriving a benefit under it indirectly, need not elect.

A person who in his one capacity takes a benefit under the transaction may in another dissent therefrom.

Section 34 — Note 1 *(contd.)*

Eq 290, *Astley* v. *Earl of Essex* ✠(1873) 21 W R (Eng) 558 (559) : 16 Eq 92 (96), *In re Hodge Legacy.*

[4] The day of an act done, or an event happening, ought in all cases to be excluded. (1808) 15 Ves 248 (256, 259): 10 R R 68, *In Lester* v. *Garland.*

[*See also* (1841) 10 L J Ch 161 (161, 162) : 11 Sim 434, *Gorst* v. *Lowndes* ✠ (1867) 36 L J Ch 339 (340) : L R 2 Ch 143, *Austin* v. *Tawney*]

SECTION 35—SYNOPSIS.

1. Scope.
2. Crown grants.
3. Property transferred must belong to another.
4. "Professes to transfer property."
5. "Confers any benefit on the owner."
6. "As part of the same transaction."
7. "Such owner must elect."
8. Election binds party's representative only.
9. Rule cannot be applied to cure an illegality.
10. Cancellation of document not necessary.
11. "Does or does not believe."
12. Person taking under two capacities.
13. Acceptance of benefit.
14. Presumption of election from two years' enjoyment.
15. Impossibility of restoring status quo.
16. Transferor's disability and election.
17. Ratification is not election.

1. Scope. — [1] The doctrine of election is that where a deed or will professes to make a general disposition of property for the benefit of a person named in it, such person cannot accept the benefit under the instrument without, at the same time, conforming to all its provisions and renouncing every right inconsistent with them. (1918) 1 Ch 300 (303): 87 L J Ch 143, *In re Macartney.* (Known as approbate and reprobate.) ✠(1920) 1920 App Cas 860 (870, 879): 89 L J P C 195, *Brown* v. *Gregson* ✠ (1875) 45 L J Ch 660 (664, 666): 34 L T 221, *Codrington* v. *Codrington*✠(Vol 15) 1928 Oudh 67 (82) ✠ (1887) 34 Ch D 160 (163, 164): 56 L J Ch 82, *In re Brooksbank*; *Beauclerk* v. *James.*✠(1874) 44 L J Ch 6 (14) : 30 L T 409, *Cooper* v. *Cooper.*

[2] The doctrine of election proceeds from the highest principles of equity. (1874) 30 L T (N S) 409 (410) : 44 L J Ch 6, *Cooper* v. *Cooper.*

[3] The rule of election rests upon plain and fair dealing. (1908) 77 L J P C 64 (66) : (1908) A C 224, *Douglas Menzies* v *Umphelby.*

[4] The principle of election enables Court to secure a just distribution of property in substantial accordance with the terms of the instrument. (1920) 89 L J P C 195 (198) : (1920) A C 860, *Brown* v. *Gregson.*

[5] Doctrine of election applies to all kinds of property and to all persons claiming property in any character. (1870) 40 L J Ch 5 (7) : 6 Ch 15, *Cooper* v. *Cooper* ✠ (1802) 32 E R 194 (197) : 7 Ves 480, *Webb* v. *Earl of Shaftesbury.*

[6] The doctrine of election will apply also to wills. (1794) 30 E R 846 (848) : 3 Ves 693, *Willson* v. *(Lord) Townshed* ✠ (1884) 26 Ch D 358 (363) : 53 L J Ch 571, *Griffiths Boscawen* v. *Scott.*

[7] Sections 180 to 190 of the Indian Succession Act deal with the application of the doctrine of election to wills. This section deals with the doctrine as applied to transfers of property. (Vol 28) 1941 Mad 430 (431) : I L R (1941) Mad 551 (DB).

[8] The doctrine of election is applied to cases between Muhammadans. (Vol 3) 1916 P C 27 (37) : 38 All 627 : 43 Ind App 212 (PC).

2. Crown grants. — [1] The doctrine of election does not apply to Crown grants. (1820) 37 E R 656 (660) : 22 W R (Eng) 157, *Cumming* v. *Forrester.*

3. Property transferred must belong to another. — [1] For the applicability of the section the property transferred must be one which the transferor has no right to transfer. (Vol 28) 1941 Mad 430 (431) : I L R (1941) Mad 551 (DB) ✠ (1869) L R 8 Eq 165 (174) : 38 L J Ch 392, *Wallaston* v. *King.*

4. "Professes to transfer property." — [1] Surrender by a Hindu widow to her immediate reversioners —Section has no application. (Vol 28) 1941 Mad 430 (431) : I L R (1941) Mad 551 (DB).

[2] Property not in fact belonging to a person— Intention to transfer it must be clear and manifest on

Exception to the last preceding four rules. — Where a particular benefit is expressed to be conferred on the owner of the property which the transferor professes to transfer, and such benefit is expressed to be in lieu of that property, if such owner claim the property; he must relinquish the particular benefit, but he is not bound to relinquish any other benefit conferred upon him by the same transaction.

Acceptance of the benefit by the person on whom it is conferred constitutes an election by him to confirm the transfer, if he is aware of his duty to elect and of those circumstances which would influence the judgment of a reasonable man in making an election, or if he waives enquiry into the circumstances.

Such knowledge or waiver shall, in the absence of evidence to the contrary, be presumed, if the person on whom the benefit has been conferred has enjoyed it for two years without doing any act to express dissent.

Such knowledge or waiver may be inferred from any act of his which renders it impossible to place the persons interested in the property professed to be transferred in the same condition as if such act had not been done.

Illustration.

A transfers to *B* an estate to which *C* is entitled, and as part of the same transaction gives *C* a coal-mine. *C* takes possession of the mine and exhausts it He has thereby confirmed the transfer of the estate to *B*.

If he does not within one year after the date of the transfer signify to the transferor or his representatives his intention to confirm or to dissent from the transfer, the transferor or his representatives may, upon the expiration of that period, require him to make his election; and, if he does not comply with such requisition within a reasonable time after he has received it, he shall be deemed to have elected to confirm the transfer.

In case of disability, the election shall be postponed until the disability ceases, or until the election is made by some competent authority.

Section 35 — Note 4 *(contd.)*

the face of the deed of transfer. (1760) 27 E R 259 (260) : 1 Edn 532, *Forrester* v. *Cotton* ✠ (1856) 44 E R 537 (541) : 26 L J Ch 218, *Wintour* v. *Clifton* ✠ (1792) 30 E R 460 (469) : 1 Ves Jun 514, *Blake* v. *Bunbury*. (Intention may be expressed in clear terms.)

[3] Intention to transfer implied in terms of deed — It must be plain by demonstration and by implications to be utterly improbable for transferor to mean anything otherwise. (1818) 3 E R 1428 (1438): 6 Dow 149, *Rancliffe* v. *Parkyns*.

[4] Use of general words—No case of election. (1760) 27 E R 259 (260) : 1 Edn 532, *Forrester* v. *Cotton* ✠ (1863) 33 L J Ch 511 (512) : 10 L T 255, *Miller* v. *Thurgood*. (Particularly so where transferor has partial interest in the property.)

[5] Transferor a co-owner, transferring "whole" of the property specifically conferring some benefit upon the other co-owner — The co-owner is put to election. (1863) 33 L J Ch 511 (512) : 10 L T 255, *Miller Thurgood*✠(1871) 40 L J Ch 253 (254): 6 Ch App 339, *Wilkenson* v. *Dent*.

[6] It is not necessary that the transferor should intend to put the party to election. (1875) 44 L J Ch 6 (16) : 7 H L 53, *Cooper* v. *Cooper*.

[7] Onus of proving the required intention rests on those contending for a case of election. (1818) 3 E R 1428 (1438) : 6 Dow 149, *Rancliffe* v. *Parkins*.

[8] Intention clear on face of deed to pass whole property —Burden of proving that transferor meant to transfer only what was left with him lies on those opposing election. (1792) 30 E R 464 (470) : 1 Ves Jun 514, *Blake* v. *Bunbury*.

[9] No extrinsic evidence admissible to show that transferor had an intention to pass what was not his. (1791) 30 E R 346 (346) : 1 Ves Jun 285, *Stratton* v. *Best* ✠ (1836) 48 E R 325 (328) : 5 L J Ch 260, *Clementson* v. *Gandy*.

5. "Confers any benefit on the owner."—[1] *A* having power to appoint property X to his child *B* — *B* also entitled to it in default of appointment — *A* appointing portion of property X to *B* and remainder to *C* who was not object of the power — *A* not giving any of his own property to *B*: *Held* that appointment in *C*'s favour was invalid (1794) 30 E R 660 (667) : 2 R R 235, *Bristow* v. *Warde*.

[2] *A* had a power to appoint certain property to children — Children also entitled to it in default of appointment — Property appointed to grand-children — Children given certain legacies: *Held* that children were bound to elect. (1796) 30 E R 676 (678) : 2 R R 260, *Whistler* v. *Webster*.

[3] Benefit conferred upon married woman in England with a restraint on anticipation— There can be no election by her. (1884) 27 Ch D 606 (612) : 54 L J Ch 201, *In re Wheatley*; *Smith* v. *Spence*.

[4] Part of the benefit granted failing — Owner will be put to his election in respect of the part which takes effect. (1783) 28 E R 1073 (1074): 1 Bro C C 186, *Newman* v. *Newman*.

6. "As part of the same transaction."—[1] The section is applicable only where the benefit and the burden come directly from the same transaction. (Vol 4) 1917 Oudh 210 (211) : 20 Oudh Cas 248 (DB)✠ (Vol 9) 1922 Mad 357 (358) (DB).

[2] *X* granting *Y* a village for maintenance — After death of *X* Government also granting *Y*, a portion of cash allowance allowed to his father *X* : *Held* no question of election could arise as grants were independent. ('03) 30 Cal 843(864): 1903 Pun Re No. 67:30 I. A. 190 (PC).

[3] Two deeds of antenuptial settlement, one dealing with realty and other with personalty — One deed disposed property which did not belong to settlor — The other conferred a benefit upon the owner of the property : *Held* that both deeds formed same transaction. (1851) 64 E R 824 (825): 20 L J Ch 213, *Bacon* v. *Cosby*.

[*See also* ('08) 1908 App Cas 224 (233) : 77 L J P C 64, *Douglas Menzies* v. *Umphelby*. (Two wills held to form coherent scheme of intention.)]

7. "Such owner must elect."—[1] Person not a owner of the property professed to be disposed of by

Apportionment.

36. In the absence of a contract or local usage to the contrary, all rents, annuities, pensions, dividends and other periodical payments in the nature of income shall, upon the transfer of the interest of the person entitled to receive such payments, be deemed, as between the transferor and the transferee,

Apportionment of periodical payments on determination of interest of person entitled.

Section 35 — Note 7 *(contd.)*

the transferor — He is not obliged to elect. (Vol 15) 1928 Oudh 67 (82) ✠ ('09) 1 Ind Cas 573 (583) (D B) (Cal).

[2] Hindu testator disposing of by his will certain ornaments described as "my own and my wife's ornaments" — He having other ornaments worn by her over which he had disposing power : *Held* that wife was not required to elect as regards her stridhan ornaments and other benefits under the will. ('89) 15 Bom 443 (452).

[3] "Owner" includes persons having not only vested but contingent rights and reversionary, remote and immediate interest. (Vol 15) 1928 Oudh 67 (82).

[4] Principle of election does not apply to creditors of the owner of property transferred. (1806) 33 E R 55 (59, 61) : 12 Ves 136, *Kidney* v. *Coussmaker* ✠ (1874) 44 L J Ch 6 (15) : 30 L T (N S) 409, *Cooper* v. *Cooper*.

[5] Where a testator purports to devise land *X* belonging to *A* to *B* who does not take any other interest under the will and also bequeaths a legacy to *C*, *C* will not be put to election by reason of the fact that subsequent to the testator's death he acquired an interest in *X*. (1886) 31 Ch D 466 (476, 477) : 55 L J Ch 401, *In re Chesham (Lord)* ; *Cavendish* v. *Dacre*.

3. Election binds party's representative only.— [1] A Hindu father elected to take under his father's will and for that purpose gave a release of ancestral property belonging to the family. His sons were held bound by his act ('96) 20 Bom 316 (337). (*Reversed* in ('97) 21 Bom 349 on other point.)

[2] Where there are several persons interested as co-owners in the property disposed of by the transferor and all of them receive benefit under the transfer, an election by one does not bind the others. (1868) L R 7 Eq 494 (496) : 19 L T 343, *Fytch* v. *Fytch*.

[3] Where one person is interested in the property as a tenant for life and the other as a remainderman, an election by the former does not bind the latter. (1799) 31 E R 321 (323) : 4 R R 307, *Ward* v. *Baugh*.

9. Rule cannot be applied to cure an illegality. — [1] Where *A* confers a benefit on *B* and professes to transfer the latter's property in such a way as to offend the rule against perpetuities, *B* cannot be compelled to make an election. (1905) 1 Ch 191 (199) : 74 L J Ch 62, *In re Oliver's Settlement*.

10 Cancellation of document not necessary.— [1] Owner of the property transferred electing to dissent from it — Document of transfer need not be cancelled. (1884) 4 L J Ch 39 (40), *Weale* v. *Rice*.

11. "Does or does not believe" — [1] If the transferor professes to transfer property which does not belong to him, and confers a benefit on the owner of the property, a case of election will be raised, irrespective of the question whether the transferor believed that the property was or was not his own (1806) 33 E R 273 (277) : 9 R R 175, *Thellusson* v. *Woodford* ✠ (1871) 6 Ch 339 (341) : 40 L J Ch 253, *Wilkinson* v. *Dent*

[But see (1760) 27 E R 259 (260) : 1 Edn 532, *Forrester* v. *Cotton*.]

[2] An assumption of power to give what the transferor knows not to belong to him is as much a ground of election as a disposition of what he has mistakenly conceived to be his own (1813) 35 E R 290 (294, 295) : 13 R R 58, *Welby* v. *Welby*.

12. Person taking under two capacities.—[1] A person received benefit under an endowment as a trustee. He claimed another estate against the trust in the capacity of an owner. It was held that he could do so (Vol 4) 1917 Oudh 210 (211) : 20 Oudh Cas 243 (DB).

13. Acceptance of benefit.—[1] A party is not to be taken to have made an election by acceptance of benefit unless he had knowledge of the circumstances of the transferor and of his own rights. (1791) 30 E R 372 (373) : 1 Ves Jun 335, *Wake* v. *Wake* ✠ (1861) 54 E R 879 (881) : 132 R R 251, *Sopwith* v. *Maughan*.

[2] An election made under a mistaken idea as to the value of the estates is not binding on the party. (1734) 24 E R 1081 (1083) : 3 P Wms 315, *Pusey* v. *Desbouvrie*.

[3] A party, with full knowledge of his rights making an election and deriving the benefits under a transaction will not be allowed to revoke. ('88) 12 Cal 60 (62) (DB).

14. Presumption of election from two years' enjoyment.— [1] The presumption under the rule can be repelled by evidence to the contrary. (Vol 12) 1925 Cal 724 (729) (D B). (Pardanashin lady — No evidence that will was explained to her or that she was called upon to make election — No presumption of knowledge from mere receipt of money under the will.)

15. Impossibility of restoring status quo. — [1] Mere receipt of money does not render it impossible to place the parties in the same condition as if the money had not been taken. (Vol 12) 1925 Cal 724 (729) (D B).

16. Transferor's disability and election.—[1] A transfer by a person under a legal disability cannot give rise to a case of election. ('11) 12 Ind Cas 591 (592) (Cal).

[2] A Hindu widow's inability to dispose of her husband's immovable property does not amount to a legal disability. It is only a limitation on her power of disposition imposed for some special purposes. Transfer by her, therefore, gives rise to a case of election. ('90) 14 Bom 438 (440, 441) (D B).

17. Ratification is not election. — [1] Where *A* purports to act on behalf of *B*, *B* may either ratify it or disown it *B's* act i- sometimes spoken as an election to ratify or disown *A's* act. (Vol 5) 1918 P C 196 (202): 42 Mad 523: 46 Ind App 72 (P C).

[2] A ratification is different from the doctrine of election referred to in this section. (Vol 26) 1939 Oudh 145 (152, 153): 14 Luck 595 (D B).

[3] A ratification must, in order to be valid, be made with knowledge of all circumstances. (1846) 4 Moo Ind App 1 (103) (P C) ✠ (Vol 26) 1939 Cal 387 (393): I L R (1938) 2 Cal 492 (D B) ✠ (Vol 12) 1925 All 190 (192) ✠ ('98) 25 Cal 1 (9): 24 Ind App 164 (P C) ✠ (1864-65) 2 Bom H C R 301 (304, 305).

SECTION 36—SYNOPSIS

1. Apportionment.
2. Principle of section, if applies where section is inapplicable.
3. "In the absence of a contract or local usage to the contrary."
4. "Rents."
5. "Annuities."

to accrue due from day to day, and to be apportionable accordingly, but to be payable on the days appointed for the payment thereof.

Apportionment of benefit of obligation on severance.

37. When, in consequence of a transfer, property is divided and held in several shares, and thereupon the benefit of any obligation relating to the property as a whole passes from one to several owners of the property, the corresponding duty shall, in the absence of a contract to the contrary amongst the owners, be performed

SECTION 36 — SYNOPSIS *(contd.)*

6. "Dividends."
7. "Other periodical payments in the nature of income."
8. "Payable on the days appointed."

1. Apportionment.—[1] Apportionment frequently denotes not division but distribution; and, in its ordinary technical sense, the distribution of one subject in proportion to another previously distributed. (1819) 1 Swan 337 (357) : 36 E R 412, *Ex parte Smith.*

[2] This section is based upon Ss. 2, 3 and 7, Apportionment Act, 1870, of England. (1900) 14 C P L R 84 (85).

2. Principle of section, if applies where section is inapplicable. —[1] In view of the following decision of the Privy Council, where this section is inapplicable, the principle of apportionment also cannot be applied. (Vol 10) 1923 P C 171 (173): 50 Ind App 276: 47 Bom 790 (P C).

[See however (Vol 24) 1937 Mad 219 (222) : I L R (1937) Mad 589 (D B)✠(Vol 5) 1918 Mad 557 (558): 41 Mad 370 (S B) ✠ (Vol 31) 1944 Mad 568 (568, 569) ✠ (Vol 22) 1935 Cal 39 (58): 61 Cal 711 (D B).]

3. "In the absence of a contract or local usage to the contrary."—[1] Where the terms of a transfer contain a clearly expressed intention that the right to receive payments should pass without being apportioned, the section does not apply and there will be no apportionment. (Vol 10) 1923 P C 171 (173): 47 Bom 790: 50 Ind App 276 (P C).

[2] Where it was provided that "the whole rent shall be payable on the Mahasankaranthi day" it was held that there was a contract to the "contrary." (Vol 3) 1916 Mad 323 (325): 39 Mad 283 (D B).

4. "Rents." — [1] Transferee is entitled to such portion of the rent only as is proportionate to the period between the date of the transfer and the date on which the rent is payable (1900) 14 C P L R 84 (85).

[2] Land annual rent of which is payable in two instalments, 10 annas on 1st of December and 6 annas on 1st of May transferred on 20th of February — 6 annas rent held accrued *de die in diem* over period from 1st of December to 1st of May, and transferee held entitled to that portion only of 6 annas share of rent as had accrued after 20th of February. (Vol 14) 1927 All 569 (570): 50 All 18 (D B).

5. "Annuities."—[1] In order to constitute an annuity the annual payments must be in the nature of income. (1858) 157 E R 678 (684) : 28 L J Ex 100, *Foley* v. *Fletcher.*

[2] Where the capital itself is repayable in annual instalments, it cannot be said that there is an annuity. (1903) 72 L J K B 215 (221): (1903) 1 K B 494, *Scoble* v. *Secretary of State.*

6 "Dividends."—[1]A share of profits will be a "dividend" when declared only in respect of share taken in a public concern. (1879) 28 WR (Eng) 28 (29) : 12 Ch D 655, *Carr* v. *Griffith* ✠ (1878) 47 L J Ch 735 (737) : 9 Ch D 159, *In re Cox's Trusts* ✠ (1858) 26 L J Ch 621 (622) : 6 W R (Eng) 407, *Hartley* v. *Allen.*

[2] A share of profits gained by an individual in a private partnership cannot be called a "dividend" and it will not be apportionable. (1878) 47 L J Ch 735 (737) : 9 Ch D 159, *In re Cox's Trusts* ✠ (1879) 28 W R (Eng) 28 (29) : 12 Ch D 655, *Carr* v. *Griffith* ✠ (1872) 8 Ch App 192 (196, 197): 42 LJ Ch 334, *Jones* v. *Ogle.*

[3] Profits arising out of the sale of new shares of a company and distributed amongst all the share-holders of the company are not "dividends." (1858) 27 L J Ch 621 (623) : 6 W R (Eng) 407, *Hartley* v. *Allen.*

[4] Shares transferred — No express reference made as to dividends thereon — Transferor is entitled to dividend of period prior to transfer—Fact that dividend was declared subsequent to transfer does not affect right of transferor. (Vol 17) 1930 All 615 (617) (DB) ✠ (1916) 85 L J Ch 598 (600) : (1916) 2 Ch 181, *In re Muirhead*; *Muirhead* v. *Hill.*

7. "Other periodical payments in the nature of income."—[1] Expression "periodical payments" must be taken to refer to payments *ejusdem generis* with rents, annuities, pensions and dividends. (1900) 14 C P L R 84 (85).

[2] Expression "periodical payments" refers to payments to be made at fixed periods and not periods variable at the discretion of individuals. (1872) 8 Ch App 192 (198) : 42 L J Ch 334, *Jones* v. *Ogle* ✠ (1863) 32 L J Ch 333 (337), *In re Maxwell's Trusts.*

[3] Directors of company entitled to certain share of company's profits once in five years unless special meeting of company directed otherwise —Payments held periodical and apportionable—Fact that period fixed could be changed held immaterial (1879) 12 Ch D 655 (664) : 28 W R (Eng) 28, *Carr* v *Griffith.*

[4] Payments to be 'periodical' must not only be declared at fixed intervals but must also be for or in respect of fixed periods. (1922) 2 Ch 442 (446) : 91 L J Ch 449, *Jowitt* v. *Keeling.*

[5] Agreement stating royalty payable at certain date but not stating when it is to be payable— Royalty can be held to be payable within reasonable time of coal being abstracted— Three months held reasonable. (Vol 27) 1940 Pat 609 (609, 610) (DB).

8. "Payable on the days appointed."—[1] Rent cannot, before it is payable, be attached under a garnishee order as a debt due. (1898) 67 L J C P 517 (518). *Barnett* v. *Eastman.*

[2] Company occupied premises under lease under which rent payable on usual quarter days—Lessor petitioned for winding up order in respect of his claim for apportioned rent — Lessor held could not present petition in respect of rent not yet due. (1889) 37 WR (Eng) Dig 45 (45) : 60 LT 665, *In re United Club and Hotel Co.*

Section 37 — Note 1

[1] Transfer of a share in a tenure which has been left out to a tenant in its entirety does not of itself effect a severance of the tenure. ('80) 5 Cal 902 (905) (FB).

[2] Transfer of share in tenure let out to tenant in its entirety—Apportionment of the rent can be made only by arrangement between all parties including tenant and in absence of such arrangement by suit for apportionment. ('12) 14 Ind Cas 292 (292, 293) (DB) (Cal) ✠ ('80) 5 Cal 941 (945) (DB).

[3] Certain persons jointly leased property to *X* and subsequently became divided by partition decree—This section held would enable one of persons so divided to enforce against lessee forfeiture clause in lease so far as

in favour of each of such owners in proportion to the value of his share in the property, provided that the duty can be severed and that the severance does not substantially increase the burden of the obligation; but if the duty cannot be severed, or if the severance would substantially increase the burden of the obligation, the duty shall be performed for the benefit of such one of the several owners as they shall jointly designate for that purpose :

Provided that no person on whom the burden of the obligation lies shall be answerable for failure to discharge it in manner provided by this section, unless and until he has had reasonable notice of the severance.

Nothing in this section applies to leases for agricultural purposes unless and until the [a][Provincial Government] by notification in the Official Gazette so directs.

Illustrations.

(a) *A* sells to *B*, *C* and *D* a house situate in a village and leased to *E* at an annual rent of Rs. 30 and delivery of one fat sheep, *B* having provided half the purchase money and *C* and *D* one-quarter each. *E*, having notice of this, must pay Rs. 15 to *B*, Rs. 7½ to *C*, and Rs. 7½ to *D*, and must deliver the sheep according to the joint direction of *B*, *C* and *D*.

(b) In the same case, each house in the village being bound to provide ten days' labour each year on a dyke to prevent inundation, *E* had agreed as a term of his lease to perform this work for *A*. *B*, *C* and *D* severally require *E* to perform the ten days' work due on account of the house of each. *E* is not bound to do more than ten days' work in all, according to such directions as *B*, *C* and *D* may join in giving.

[a] *Substituted* by A. O. for "Local Government".

(B) *Transfer of Immovable Property.*

Transfer by person authorized only under certain circumstances to transfer.

38. Where any person, authorized only under circumstances in their nature variable to dispose of immovable property, transfers such property for consideration, alleging the existence of such circumstances, they shall, as between the transferee on the one part and the transferor and other persons (if any) affected by the transfer on the other part, be deemed to have existed, if the transferee, after using reasonable care to ascertain the existence of such circumstances, has acted in good faith.

Illustration.

A, a Hindu widow, whose husband has left collateral heirs, alleging that the property held by her as such is insufficient for her maintenance, agrees for purposes neither religious nor charitable, to sell a field, part of such property, to *B*. *B* satisfies himself by reasonable enquiry that the income of the property is insufficient for *A*'s maintenance, and that the sale of the field is necessary, and, acting in good faith, buys the field from *A*. As between *B* on the one part and *A* and the collateral heirs on the other part, a necessity for the sale shall be deemed to have existed.

Section 37 — Note 1 *(contd.)*

his share was concerned. ('05) 29 Mad 29 (35, 36) (DB) ✠ (Vol 2) 1915 Mad 813 (814, 815) : 38 Mad 445 (DB).

[4] Value of the shares for the purposes of the section is their value at the time of the severance of the estate. ('03) 7 Cal W N 453 (454) (DB).

[5] In partition, occupancy holding went to one sharer and house of occupancy tenant situated in abadi passed to another sharer—Latter held could not recover rent for house and partition held could not create new obligation on part of tenant to pay rent for house. ('08) 30 All 282 (285, 287) (FB) ✠ ('08) 1908 All W N 123 (124) (SB).

[6] Notice mentioned in this section may be given either by the transferor or by the transferee. ('13) 19 Ind Cas 865 (867) (DB) (Cal).

[7] Principle of this section is applicable to agricultural leases. (Vol 3) 1916 Cal 410 (411) (DB) ✠ ('05) 29 Mad 29 (35) (DB) ✠ (Vol 2) 1915 Mad 813 (814) : 38 Mad 445 (DB).

SECTION 38 — SYNOPSIS

1. Section applies to transfers of immovable property only.
2. "Persons authorised only under circumstances in their nature variable."
3. "Transfers such property for consideration."
4. "Alleging the existence of such circumstances".
5. "After using reasonable care to ascertain the existence of such circumstances."
6. "Acted in good faith."
7. Transfer by operation of law.
8. Onus of proof.
9. Recitals in a deed—Evidentiary value of.

1. Section applies to transfers of immovable property only.—[1] This section deals with transfers of immovable property only. (Vol 7) 1920 Mad 496 (499) (DB).

2. "Persons authorised only under circumstances in their nature variable."—[1] Following persons are authorised to transfer property only under circumstances in their nature variable :

(a) A Hindu widow or other limited owner under Hindu law. (Vol 5) 1918 P C 196 (199) : 42 Mad 523 : 46 Ind App 72 (P C) ✠ (Vol 1) 1914 P C 90 (91) : 42 Cal 876 : 42 Ind App 64 (P C) ✠ ('13) 40 Cal 721 (752) (F B).

(b) A manager of joint Hindu family. (Vol 14) 1927 P C 121 (122) : 8 Lah 597 : 54 Ind App 211 (P C) ✠ (Vol 4) 1917 P C 188 (189) : 40 All 171 (P C) ✠ (1863) 1 Bom H C R (A C) 27 (30).

(c) A Hindu father. (Vol 4) 1917 P C 61 (63) : 39 All 437 : 44 Ind App 126 (P C).

(d) A *de facto* or *de jure* guardian of a Hindu minor. ('66) 10 Moo Ind App 454 (461) (P C).

(e) An executor under a will made by a Hindu and not governed by the Indian Succession Act, 1925. ('98) 22 Bom 1 (10) ✠ ('97) 25 Cal 103 (105) (DB) ✠ ('05) 32 Cal 861 (870) (DB).

(f) A mahant or a shebait. ('75) 2 Ind App 145 (151, 152) (P C) ✠ (Vol 13) 1926 P C 112 (118) : 53 Ind App 253 : 6 Pat 139 (P C).

(g) A guardian of a minor appointed by a Court. ('11) 11 Ind Cas 764 (764, 765) (All) ✠ (Vol 23) 1936

39. Where a third person has a right to receive maintenance, or a provision for advancement or marriage, from the profits of immoveable property, and such property is transferred [a][* * * *], the right may be enforced against the transferee, if he has notice [b][thereof] or if the transfer is

Transfer where third person is entitled to maintenance.

Section 38—Note 2 *(contd.)*
Bom 389 (392) : I L R (1937) Bom 1 (DB) ✠ ('90) 1890 Pun Re No. 56, page 146 (149) ✠ (Vol 23) 1936 Lah 946 (956) : 17 Lah 686 (DB).
[But see ('82) 10 Cal L R 547 (549) (DB).]

3. "Transfers such property for consideration." —[1] This section does not apply to an agreement to sell. ('01) 26 Bom 326 (336) (DB).

4. "Alleging the existence of such circumstances."—[1] If the transferee makes reasonable enquiry into the existence of the circumstances empowering the transferor to make the transfer and acts in good faith, the representations are binding on the persons who are affected by the transfer. (Vol 12) 1925 Lah 240 (241) : 5 Lah 511 (D B) ✠ (Vol 21) 1934 Lah 895 (896) (DB) ✠ ('96) 21 Bom 808 (815) (DB).

[2] Where no circumstances empowering the transferor to make the transfer are alleged, the transfer is not binding on the persons interested in the property. (Vol 8) 1921 All 137 (140) : 43 All 655 (DB).

[3] Representation by transferor of existence of necessity recited in instrument of transfer—Such recitals are evidence that such representations were made by transferor. (Vol 3) 1916 P C 110 (111) : 44 Cal 186 : 43 Ind App 249 (P C).

5. "After using reasonable care to ascertain the existence of such circumstances."—[1] Transferee must use reasonable care to ascertain whether the circumstances alleged as authorising the transferor to dispose of the property exist. ('80) 6 Cal 843 (847) : 8 Ind App 8 (P C) ✠ (Vol 4) 1917 P C 188 (189) : 40 All 171 (P C).

[2] What is material under the section is the use of reasonable care on the part of the transferee and not the actual existence of the circumstances. (Vol 25) 1938 Bom 388 (390) (DB) ✠ (Vol 20) 1933 Mad 639 (643) (DB) ✠ (Vol 10) 1923 Lah 660 (661) ✠ (09) 2 Ind Cas 366 (366) (Cal) ✠ ('66) 6 Suth W R 149 (150, 151) (DB) ✠ ('02) 4 Bom L R 587 (592) (DB).

[3] If the transferee uses reasonable care in making the enquiry and is satisfied on such enquiry that the necessary circumstances authorising the transfer exist, the absence of such circumstances, as a fact, will not affect the validity of the transfer in his favour. ('66) 10 Moo Ind App 454 (461) (P C) ✠ (1863) 1 Bom H C R 27 (30) (SB).

[4] Actual pressure on the estate, the danger to be averted, or the benefit to be conferred upon it, in the particular instance, is the thing to be regarded in deciding the sufficiency of the enquiry. (1856) 6 Moo Ind App 393 (423) (P C).

[5] Enquiry ought to be made from an independent source and not from one who is interested in upholding the transfer. (Vol 22) 1935 Lah 42 (44) (D B). (Nature of necessity for transfer and avenues of information available to transferee will have to be taken into consideration in deciding sufficiency of enquiry.) ✠ ('12) 35 Mad 108 (112) (D B) ✠ (Vol 22) 1935 Cal 94 (95) ✠ ('13) 20 Ind Cas 951 (952) (All) ✠ (Vol 10) 1923 Pat 197 (199) (D B) ✠ (Vol 9) 1922 Pat 122 (135) (D B).

[6] If the transferee satisfies himself that the purpose for which the transfer is made justifies the transfer, he is not bound to see to the application of money and will be protected even if the money is not applied to the purposes for which it was required. (1856) 6 Moo Ind App 393 (424) (P C) ✠ (Vol 14) 1927 P C 37 (41) : 49 All 149 : 54 Ind App 79 (P C).

6. "Acted in good faith." — [1] Where a person has acted honestly, he can be said to have acted in good faith. (1856) 6 Moo Ind App 393 (423, 424) (P C) ✠ ('76) 2 Cal 341 (351) : 4 Ind App 52 (P C).

7. Transfer by operation of law.—[1] A purchaser in execution of a money-decree against a Hindu father is not bound to go behind the decree, and show that he made an enquiry as to the nature of the debt. ('79) 5 Cal 148 (170) : 6 Ind App 88 (P C). (If purchaser has notice actual or constructive of character of debt and he purchases with such notice, he is not protected.) ✠ ('74) 1 Ind App 321 (332) (P C).

8. Onus of proof.—[1] Burden of proof will be on the transferee to establish that circumstances entitling transferor to dispose of property existed or he (transferee) took reasonable care to ascertain that they existed and acted in good faith. (Vol 14) 1927 P C 121 (122) : 54 Ind App 211 : 8 Lah 597 (P C) ✠ (Vol 1) 1914 P C 90 (91) : 42 Cal 876 : 42 Ind App 64 (P C) ✠ (Vol 1) 1914 P C 38 (40) : 36 All 187 (P C) ✠ (1864) 2 Bom H C R 348 (360) (S B) ✠ ('09) 31 All 176 (198) (F B).

[2] Where the mortgagee himself with whom the transaction took place, is setting up a charge in his favour made by one whose title to alienate, he necessarily knew to be limited and qualified, he may be reasonably expected to allege and prove facts presumably better known to him than to the infant heir. (1856) 6 Moo Ind App 393 (419) (P C).

[3] Lapse of time does not affect the question of onus of proof. It might give rise to a presumption of acquiescence or save the alienee from the adverse inferences arising from scanty proof, which might be offered on his behalf. (Vol 2) 1915 P C 57 (58, 59) : 43 Cal 417 (P C) ✠ (Vol 7) 1920 P C 64 (64, 65) : 47 Ind App 6 : 43 Mad 541 (P C).

9. Recitals in a deed— Evidentiary value of.—[1] Recitals in a deed as to the necessity, though evidence of the representation made by the transferor as to such necessity, are not by themselves to be relied upon as proof of existence of such necessity. (Vol 1) 1914 P C 38 (40) : 36 All 187 (P C). (There must be some evidence *aliunde* to substantiate facts recited.) ✠ (Vol 1) 1914 P C 164 (165, 166) (P C).

[2] Recital is clear evidence of the representation, and, if the circumstances are such as to justify a reasonable belief that an enquiry would have confirmed its truth, then when proof of actual enquiry has become impossible, the recital, coupled with such circumstances, would be sufficient evidence to support the deed. (Vol 3) 1916 P C 110 (111) : 44 Cal 186 : 43 Ind App 249 (P C) ✠ (Vol 5) 1918 Pat 469 (476) : 3 Pat L Jour 199 (S B).

SECTION 39—SYNOPSIS.

1. Scope.
2. Nature of right protected by section.
3. Section, if retrospective.
4. Transfer by executor or administrator.
5. "Right to receive maintenance."
6. Advancement.
7. Notice

1. Scope.—[1] It is not necessary to prove intention to defeat right of third person — Proof of bare notice of existence of such right is sufficient. (Vol 31) 1944 Bom 50 (57) (D B) ✠ (Vol 30) 1943 Bom 412 (413) : I L R (1943) Bom 646 (D B) ✠ (Vol 30) 1943 Bom 187 (190) (D B).

gratuitous; but not against a transferee for consideration and without notice of the right, nor against such property in his hands.

[c][* * * * * * * *]

[a] The words "with the intention of defeating such right" were *repealed* by the Transfer of Property (Amendment) Act, 1929 (20 [XX] of 1929), S. 11. [b] *Substituted ibid.*, for "of such intention". [c] The illustration was *repealed*, *ibid.*

Burden of obligation imposing restriction on use of land.

40. Where, for the more beneficial enjoyment of his own immoveable property, a third person has, independently of any interest in the immoveable property of another or of any easement thereon, a right to restrain the enjoyment [a][in a particular manner of the latter property], or

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Section 39—Note 1 *(contd.)*

[2] This section as amended does not create any new right in favour of any person. (Vol 32) 1945 Bom 34 (35) : I L R (1945) Bom 649.

2. **Nature of right protected by section.**— [1] Right referred to in the section is one which falls short of a charge. (Vol 27) 1940 Nag 163 (165) : I L R (1941) Nag 513 (D B) ✠ (Vol 20) 1933 Oudh 76 (78) (D B).

[2] Before applying the section, the nature of the right to be enforced should be fixed. (Vol 2) 1915 Mad 464 (466) (D B).

[3] Property sold in discharge of debts in respect of which creditors could have had property sold through Court, free of right of maintenance — Section would not enable person entitled to maintenance to proceed against property in hands of transferee even if he had notice of maintenance right (Vol 2) 1915 Mad 464 (470, 471) (D B) ✠(Vol 21) 1934 Sind 14 (16): 27 Sind L R 289.

[4] Where the transfer is binding on the person entitled to maintenance, etc., according to the law applicable to him, he cannot proceed under this section against the transferee, whether or not such transferee has notice of his right. (Vol 31) 1944 Bom 50 (57) (DB) ✠(Vol 30) 1943 Bom 412 (414): I L R (1943) Bom 646 (DB) ✠(Vol 20) 1933 Lah 901 (904): 15 Lah 9 (D B) ✠('76) 1 Cal 365 (377) (DB) ✠('04) 27 Mad 45 (50) (D B) ✠(Vol 17) 1930 Mad 824 (829): 54 Mad 132 (DB) ✠(Vol 19) 1932 Oudh 40 (43): 7 Luck 411 (D B) ✠(Vol 18) 1931 Lah 718 (718, 719): 13 Lah 41 (D B) ✠('84) 11 Cal 102 (106) (D B) ✠(Vol 21) 1934 Sind 14 (15, 17): 27 Sind L R 289 ✠('82) 4 All 296 (300) (F B) ✠('11) 4 Sind L R 278 (280).

3. **Section, if retrospective.** — [1] Section is not retrospective and the section applicable to a transfer made before its amendment came into force would be the old section. (Vol 21) 1934 Sind 14 (16): 27 Sind L R 289.

[But see (Vol 30) 1943 Bom 187 (190) (DB).]

4. **Transfer by executor or administrator.** — [1] Transfer by the executor or administrator will be subject to the provisions of this section. ('99) 23 Bom 342 (348) (D B).

5. "**Right to receive maintenance.**" — [1] Wife of a Hindu is entitled to be maintained by him irrespective of the possession of any property. (Vol 31) 1944 Bom 50 (57) (DB) ✠(Vol 34) 1947 Mad 376 (377).

[2] Right of a Hindu widow to receive maintenance is not a charge on the family property. (Vol 30) 1943 Bom 412 (413): I L R (1943) Bom 646 (D B) ✠(Vol 5) 1918 Mad 668 (668) (D B) ✠('82) 4 All 296 (299) (F B) ✠(Vol 11) 1924 Pat 679 (682): 4 Pat 73 (DB). (Obiter.) ✠('02) 27 Mad 45 (49) (D B) ✠(Vol 17) 1930 Lah 117 (118): 10 Lah 706 (D B) ✠(Vol 21) 1934 Pat 91 (102): 12 Pat 869 (DB) ✠('88) 15 Cal 292 (307) (S B) ✠(Vol 7) 1920 Lah 116 (117) ✠('75) 12 Bom H C R 69 (77, 78) (D B) ✠(Vol 19) 1932 Oudh 40 (42): 7 Luck 411 (DB) ✠(Vol 13) 1926 Oudh 338 (340): 1 Luck 318.

[But see ('67) 2 Agra 42 (43) (D B) ✠('67) 4 Bom H C R (A C) 73 (74) (D B) ✠ ('71) 15 Suth W R 263 (263) (DB) ✠('71) 7 Mad H C R 226 (228) (D B) ✠(Vol 4) 1917 Pat 204 (205) (DB).]

[3] Enforcement of the right to maintenance does not depend upon the question whether there exists any property other than the one transferred from which provision for maintenance can be made. ('83) 7 Bom 282 286) (DB) ✠('99) 23 Bom 342 (347) (DB).

[4] If a purchaser has notice of the existence of the widow, the burden is upon him to see that her claims are discharged before he purchases the property. (Vol 30) 1943 Bom 412 (414): I L R (1943) Bom 646 (DB).

[5] A right of residence under the Hindu law is a part of the right of maintenance. (Vol 19) 1932 Sind 162 (163) : 26 Sind L R 269 (D B) ✠('10) 8 Ind Cas 1057 (1058) (Bom) ✠('11)4 Sind L R 278 (280) (D B).

[6] Right of residence cannot be enforced against the transferee, whether with or without notice of the right, if the transfer is binding on the interest of the person claiming the right under the Hindu law. ('86) 1886 Bom P J 252 (D B) ✠('87) 1887 All W N 279 (279) (D B) ✠('78 80) 2 All 141 (142) (D B) ✠(Vol 18) 1931 Lah 718 (718): 13 Lah 41 (D B) ✠(Vol 7) 1920 Lah 135 (135, 136) ✠('89) 12 Mad 260 (267) (F B).

[But see ('83) 1883 Pun Re No. 84, p. 266 (268).]

[7] It will be only if no other place suitable for residence can be provided that a Hindu female can proceed against the transferee. ('11) 1911 Pun L R No 44, p. 209 (211): 1910 Pun Re No. 102 (DB) ✠('22) 69 Ind Cas 602 (607) (Pesh) ✠('72) 4 N W P H C R 153 (154) (DB).

6. **Advancement.**—[1] Advancement is a gift of money or property to the wife by the husband or to a child by a parent to enable the donee to anticipate the inheritance to the extent of gift. (1886) 55 L T 554 (556), *Abram* v. *Aldridge*.

7. **Notice.**—[1] Prudent transferee is not likely to inquire into the right of maintenance of a married daughter. (Vol 26) 1939 Cal 655 (656) (DB).

[2] Widow deliberately lived away from house of her deceased husband and, in collusion with her son refrained from giving purchaser notice of her right of residence in house — Purchaser held must be excused if he thought that she had foregone her right which could not be enforced against him. (Vol 17) 1930 Bom 47 (48).

[3] Hindu widow having right of residence in family house residing in it — Purchaser of property may be presumed to have notice of fact and of her right —It is for purchaser to show that transfer was binding on widow. (Vol 24) 1937 Mad 193 (194).

[4] Property gifted to person with condition that income of half the property to be given for maintenance of another person during his life-time — Donee sold entire property—Transferee held must have had notice of condition contained in deed of gift. ('12) 34 All 478 (480, 481) (DB).

SECTION 40 — SYNOPSIS

1. Scope.
2. "For the more beneficial enjoyment of his own immoveable property."

or of obligation annexed to ownership but not amounting to interest or easement.

where a third person is entitled to the benefit of an obligation arising out of contract and annexed to the ownership of immoveable property, but not amounting to an interest therein or easement thereon,

such right or obligation may be enforced against a transferee with notice thereof or a gratuitous transferee of the property affected thereby, but not against a transferee for consideration and without notice of the right or obligation, nor against such property in his hands.

Illustration.

A contracts to sell Sultanpur to *B*. While the contract is still in force he sells Sultanpur to *C*, who has notice of the contract. *B* may enforce the contract against *C* to the same extent as against *A*.

[a] *Substituted* by the Transfer of Property (Amendment) Act, 1929 (20 [XX] of 1929), S. 12 for "of the latter property or to compel its enjoyment in a particular manner".

SECTION 40 — SYNOPSIS *(contd.)*

3. "Or easement thereon"
4. "Right to restrain the enjoyment."
5. Negative or restrictive covenant.
6. Contract for the sale of immovable property.
7. Contract to pay maintenance.
8. Contract for pre-emption.
9. Contract to give a mortgage.
10. Contract to pay zarichaharam.
11. Contract to grant a lease.
12. Contract to pay land revenue or debt on land of another.
13. Miscellaneous.
14. Transferee with notice.
15. "Transferee."
16. Second transferee from *bona fide* first transferee.
17. Transfers by operation of law.
18. Contract for sale prior to attachment—Sale after attachment—Validity.
19. Injunction does not run with land.
20. Acquiescence in breach of restrictive covenant.
21. Covenant for title
22. Covenants between landlord and tenant.

1. Scope.— [1] The burden of a covenant affecting land does not run with the land. (Vol 9) 1922 P C 165 (166, 167) : 40 Ind App 376 (PC).

[2] In the case of landlord and tenant the burden of a covenant runs with the land. (Vol 12) 1925 Bom 330 (331).

[See however (Vol 3) 1916 Mad 102 (110) (DB).]

[3] Condition or a covenant restraining the enjoyment of the property transferred, where such condition or covenant is for the beneficial enjoyment of other property of the transferor, can under the second paragraph of S. 11 be enforced against the transferee himself and under the first paragraph of this section against the transferees from the transferee, if they had notice of the condition or covenant or if they were gratuitous transferees. (Vol 16) 1929 Pat 349 (350) (DB).

2. "For the more beneficial enjoyment of his own immoveable property." —[1] Covenantee must himself have interest in property for beneficial enjoyment of which covenant is entered into — If he has no such interest covenant is merely personal one and is not enforceable against assigns of covenantor. (Vol 23) 1936 Cal 727 (733, 734) (DB).

3. "Or easement thereon."—[1] Section does not apply to deed of sale creating easement. (Vol 4) 1917 Lah 397 (398).

[2] *A*, owner of Ghat adjoining river, sold portion of ghat which abutted river to *B*, and contracted with him that if river encroached upon purchased portion, he would allow *B* to use portion of ghat situated further back for religious ministrations— Sale deed held created easement right in *B* and such right held not governed by this section. (Vol 18) 1931 All 207 (208).

4. "Right to restrain the enjoyment." — [1] A contract to pay a certain sum of money on the happening of a particular event is not such a covenant as is contemplated by the first paragraph of this section. (Vol 18) 1931 All 552 (552) : 53 All 742 (DB). ((Vol 6) 1919 All 235 : 41 All 417, *Dissent.*)

[2] Contract by a purchaser with his vendor that he will pay annually a sum of money to the vendor is not within the section. (Vol 11) 1924 Cal 487 (488) (DB).

5. Negative or restrictive covenant. — [1] Absence of negative form of expression is immaterial if, in substance negative covenant is implied — Principle of this section as regards restrictive covenants will apply. (Vol 17) 1930 Cal 357 (360) : 57 Cal 953 (DB) ✠ (Vol 23) 1936 Cal 727 (732) (DB).

[2] In deciding whether a covenant in a lease is an affirmative or negative covenant, the Court must look to the substance and not to the form. (Vol 32) 1945 Cal 89 (92) (DB). (Covenant in head lease implying obligation to pay specified rent— Covenant cannot bind sub-lessee.)

6. Contract for the sale of immovable property. — [1] Although a contract for sale of immovable property does not create an interest in the property it creates an obligation "annexed to the ownership of the property" (Vol 4) 1917 Mad 4 (5) (DB).

[2] Obligation "annexed to the ownership of the property" can be enforced against a transferee of the property with notice of the obligation or a gratuitous transferee. (Vol 3) 1916 P C 245 (246) (PC) ✠ (Vol 16) 1929 P C 195 (200) (PC).

[3] Contract to sell cannot be said to be a "covenant running with the land" in the sense in which it is used in English law. (Vol 3) 1916 Mad 385 (385, 386) (DB).

[But see (1900) 22 All. 338 (339) (DB).]

[4] Contract unenforceable against the vendor cannot by virtue of this section be enforced against the transferee with notice (Vol. 15) 1928 Mad 407 (412) (DB) ✠ (Vol 22) 1935 Pat 237 (238).

[5] Mere offer to sell not perfected by acceptance cannot be enforced against a transferee of the property. (Vol 13) 1926 Mad 120 (122).

[6] Right of easement granted in perpetuity—It is not restricted by condition of reconveyance — Condition of reconveyance does not run with land—Transferee of land can enforce condition only if contract of reconveyance is assigned to him. (Vol 30) 1943 Nag 4 (5): I L R (1942) Nag 736 (D B). ((Vol 26) 1939 Nag 65, *Reversed.*)

7 Contract to pay maintenance.— [1] *A* made gift of certain property to *X*—*X* agreed to pay *B* Rs. 40 a year out of income of property: *Held* that it was obligation annexed to ownership of property. (Vol. 3) 1916 Bom 104 (105) : 41 Bom 372 (DB).

[2] Zamindar made grant for benefit of ladies of family of dasabandham dues recoverable by him from certain villages and himself undertook to collect and pay them—Obligation held annexed to ownership of

Section 40—Note 7 *(contd.)*

property and enforceable against transferees of vendee with notice of obligation. (Vol 3) 1916 Mad. 102 (110) (DB).

[3] *B*, *A's* widow, left her husband's separate property with *C* and *D* (who were other members of the family of the husband) in consideration of payment of allowance for maintenance by *C* to *B*—Obligation held not intended to be annexed to property transferred by *B* to *C* and *D* and this section held did not apply. ('09) 5 Mad L Tim 142 (143) (DB).

8. Contract for pre-emption.— [1] Right of pre-emption under a contract falls within the category of the rights dealt with by the second paragraph of this section. (Vol 14) 1927 All 170 (172): 49 All 527 (FB) ✠ ('09) 4 Ind Cas 743 (744) (Cal.).

[But see ('83) 1883 All W N 134 (134) (DB). (Case before T. P. Act.)]

[2] Right of pre-emption under a contract is not a "covenant running with the land." ('99) 22 All 1 (19) (FB) ✠ ('01) 24 Mad 449 (461) (DB).

[But see ('86) 8 All 102 (104) (FB) ✠ (Vol 11) 1924 Oudh 382 (384) (DB).]

9. Contract to give a mortgage.— [1] *A* took mortgage from *B* of certain property with notice of prior agreement by *B* to mortgage same to *C*—*A's* mortgage will be postponed to mortgage of *C* which, though taken subsequent to *A's* mortgage was in pursuance of prior agreement to mortgage. ('06) 29 Mad 177 (178) (DB).

10. Contract to pay zarichaharam.—[1] *A* executed *kabuliat* in favour of *zamindar* by which he agreed to pay *zarichaharam* (that is, one-fourth of the sale proceeds received by him whenever he sold his interest to another) to *zamindar*—Obligation held could not be said to be one annexed to ownership of immovable property." (Vol 18) 1931 All 552 (553): 53 All 742 (DB).

[2] Covenant to pay share of purchase money to landlord as condition precedent to recognition of transfer is one "running with the land" and enforceable against purchaser. (Vol 17) 1930 Cal 357 (360): 57 Cal 953 (DB) ✠ (Vol 10) 1923 Cal 679 (680) (DB).

11. Contract to grant a lease.—[1] Contract to grant a lease has been held not to be a covenant that runs with the land, and not enforceable against the representatives of the covenantor (Vol 12) 1925 All 427 (429): 47 All. 582 (DB).

12. Contract to pay land revenue or debt on land of another.—[1] Undertaking by a transferee of land *X* to pay Government revenue on land *Y* belonging to the vendor cannot be enforced against a purchaser from the transferee (Vol 31) 1944 Oudh 35 (37) ✠ ('13) 11 All L Jour 212 (214) ✠ ('13) 11 All L Jour 231 (232).

[2] Compromise entered into between cosharers *A* and *B* that *A* should get land *X* and *B*, land *Y*, and *A* should pay revenue of land *Y* in excess of Rs. 200—S. 40 held applied to the case. (Vol 7) 1920 Oudh 180 (182): 23 Oudh Cas 118 (DB).

[3] A vendor covenanted with *B*, purchaser, that he will discharge existing encumbrance on property or in default pay back purchase-money and take land. Covenant held could not be enforced by subsequent purchaser from *B* against *A* ('09) 6 Mad L Tim 264 (265) (DB).

[4] Partition among Hindu brothers—Each of them to discharge debt falling to his share from properties fallen to his share—*Held* that this was not mere personal covenant, but one annexed to ownership of immovable property. (Vol 20) 1933 Mad 715 (719) (DB).

13. Miscellaneous. — [1] Kanom deed provided that jenmi redeeming kanom should pay compensation for improvements effected by tenant at rates specified therein—Obligation of jenmi held could not be enforced under S. 40 against transferees from jenmi. (Vol 27) 1940 Mad 453 (455) (D B).

[2] *A*, co-owner, contracted with *B*, another co-owner, that *B* should be in sole management of whole of property and that *A* will receive only half income out of it —Purchaser from co-owner held could not be debarred from his inherent right to claim partition. (1900) 2 Bom L R 884 (887) (D B).

[3] Island between two branches of river belonged to third party—Land to north of northern branch belonged to *A* and that to south of southern branch belonged to *B*—*A* and *B* agreed that island should belong to *A* if northern branch became fordable and to *B* if southern branch became fordable — *B* subsequently purchased from third party island and thereafter when northern branch became fordable, *A* sued *B* for ejectment—*A* and *B* held could not impose by contract any burden on land of third party which would run with land in hands of any possessor of it by any title. ('72) Ind App Supp. 34 (39) (P C).

[4] *P* at his own cost constructed artificial channel through *D's* land to take water to his land — *D* agreed to pay *P* water rate for water taken by him for his own land from channel : *Held* that this was enforceable against transferees of property with notice. (Vol 22) 1935 Mad 975 (976, 977) (D B).

14. Transferee with notice. — [1] Right or the benefit of the obligation under this section is enforceable against a transferee of the property only if it can be said that he had notice of such right or obligation. (Vol 8) 1921 Bom 161 (162) : 45 Bom 170 (D B) ✠ (Vol 8) 1921 Mad 559 (560) (D B).

[2] Onus is on the transferee to show that he paid consideration and that he took the transfer without notice of the prior contract. (Vol 14) 1927 Mad 699 (700, 701) ✠ ('03) 5 Bom L R 991 (995).

[But see ('84) 1884 All W N 254 (254) (D B).]

[3] Although a contract for sale of immovable property is enforceable against a transferee thereof with notice of the contract, the transferee is not liable to the person in whose favour the contract was made for mesne profits until the sale is actually executed by a formal conveyance. (Vol 23) 1936 Bom 276 (277).

15. "Transferee."—[1] Transferee means a transferee under a registered conveyance when such conveyance is necessary for the validity of the transfer. (Vol 17) 1930 Pat 181 (182) (D B).

[2] A partition is a transfer. (Vol 12) 1925 Mad 492 (493).

16. Second transferee from bona fide first transferee.—[1] Assignee of land from a purchaser without notice is not affected by any right or obligation which does not "run with the land even though he may have notice himself. (1911) 2 K B 473 (483) : 80 L J K B 1107, *Wilkes* v. *Spooner* ✠ (1879) 49 L J Ch 68 (72, 73) : 11 Ch D 327 (337), *Attorney-General* v. *Biphosphate Guano Co.*

17. Transfers by operation of law.—[1] Assuming that this section has full scope, it is only if the purchaser at a judicial sale bought with notice of the contract that it could be enforced against him. (Vol 9) 1922 P C 393 (396) (P C).

[2] A person acquiring property by adverse possession cannot be said to be a transferee for consideration and is bound by a restrictive covenant even if he had no notice. (1905) 1 Ch. 391 (398) : 74 L J Ch 310, *In re Nisbet & Pott's Contract.*

18. Contract for sale prior to attachment—Sale after attachment—Validity. — [1] Sale in pursuance

41. Where, with the consent, express or implied, of the persons interested in immoveable property, a person is the ostensible owner of such property and transfers the same for consideration, the transfer shall not be voidable on the ground that the transferor was not authorized to make it: provided that the transferee, after taking reasonable care to ascertain that the transferor had power to make the transfer, has acted in good faith.

Transfer by ostensible owner.

Section 40 — Note 18 *(contd.)*

of the contract though subsequent to the attachment is valid. (Vol 29) 1942 Mad 67 (68, 69) ✠ (Vol 11) 1924 Mad 610 (610).

19. Injunction does not run with land.—[1] Injunction restraining the user by the defendant of his land cannot be enforced against an auction-purchaser of the property in execution of a decree. ('02) 26 Bom 140 (141) (DB). ((1881) 17 Ch D 685 *Attorney General* v. *Birmingham Tame & Rea Drainag Board, Foll.*) ✠ ('08) 32 Bom 181 (184) (D B).

[See however ('99) 12 C P L R 109 (110, 112)]

20. Acquiescence in breach of restrictive covenant. — [1] Person who is entitled to a restrictive covenant may by his conduct or omissions, put himself in such an altered relation to the person bound by it as makes it manifestly unjust for him to ask a Court to insist on its enforcement by injunction. (1884) 28 Ch D 103 (108) : 54 L J Ch 1, *Sayers* v. *Collyer* ✠ (Vol 16) 1929 Pat 349 (351) (D B).

[2] Covenant may be waived. ('09) 6 Mad L Tim 264 (265) (D B).

21. Covenant for title. — [1] Express covenant for title will, on the same principle, run with the land. (1842) 11 L J Q B 104 (106) : 2 Q B D 851, *Thomas* v. *Thomas* ✠ (Vol 16) 1929 All 293 (295) : 51 All 651 (D B).

[2] Where the T. P. Act does not apply, it has been held that a covenant for title is a personal covenant and not one running with the land and cannot be taken advantage of by a pre-emptor. (Vol 15) 1928 Lah 357 (359) : 9 Lah 659 (D B).

[3] Covenant for indemnity, undertaking that if the vendee should be deprived of the property the vendor would compensate him is not one running with the land. (Vol 15) 1928 Mad 894 (895) : 51 Mad 688 (D B). (Covenant for title in every sale deed runs with land.)

22. Covenants between landlord and tenant.—[1] Following covenants have been held to run with the land:

(a) A covenant by the lessee to pay rent. (1823) 107 E R 152 (154) : 25 R R 437, *Vyayan* v. *Arthur* ✠(Vol 22) 1935 Cal 368 (388) : 62 Cal 346 (D B).

(b) A covenant by the lessee not to transfer the land without the consent of the landlord. (Vol 10) 1923 Cal 679 (680) (DB).

(c) A covenant by the lessee not to so work a mine as to encroach upon the landlord's other property. (Vol 7) 1920 Pat 383 (400, 401) (D B).

(d) A covenant by the landlord to renew a lease at the option of the tenant. (Vol 8) 1921 Mad 541 (541) : 44 Mad 230 (DB) ✠ (Vol 14) 1927 Mad 513 (516) : 50 Mad 595 (D B) ✠ ('12) 16 Cal L Jour 217 (223) (D B).

(e) A covenant by the landlord to allow the tenant to erect a structure on the demised premises. (Vol 10) 1923 Oudh 114 (116) : 27 Oudh Cas 64.

[2] Covenant to renew a lease at the option of the lessee at a time when the lessor himself would have ceased to have any interest in the property was held to be a personal one and not one running with the land. (Vol 16) 1929 Cal 50 (54) : 55 Cal 841 (D B).

[3] Covenant in a lease that the lessee should not purchase the under-tenant's holding being for the benefit of the lessor's land will run with the land of the lessor. ('97) 1 Cal W N 174 (179) (DB).

[4] Covenant between landlord and tenant which runs with the land can be enforced against a sub-lessee if it is restrictive one. (1848) 41 E R 1143 (1144) : 2 Ph 774, *Tulk* v. *Mokhay*✠(Vol 23) 1936 Cal 727 (736) (DB).

[5] Lease provided for re-conveyance of certain lands comprised in lease whenever lessor may require them — Positive covenant held never runs with land either at law or in equity. (Vol 14) 1927 Cal 41 (43) (DB).

SECTION 41 — SYNOPSIS

1. Scope.
2. Execution sales.
3. Transfers of movable property.
4. Applicability to Provinces where the Act does not apply.
5. Ostensible owner with the consent of persons interested.
6. "Persons interested."
7. Express or implied consent.
8. Consent need not be to the transfer by the ostensible owner.
9. Consent under coercion, fraud, misrepresentation and mistake.
10. Attestation by person interested, if consent.
11. Motive of consent immaterial.
12. Consent must continue up to time of transfer.
13. Ostensible owner, if includes mortgagee.
14. Ostensible owner having some interest in the property
15. Subsequent transferees from first transferee.
16. Transferee must have acted in good faith after making reasonable enquiry.
17. "Good faith."
18. Reasonable care.
19. Plea of reasonable care and good faith, when to be taken.
20. Transferee's title to be considered with reference to date of transfer.
21. Burden of proof.

1. Scope.—[1] The section lays down a particular case of the general rule of estoppel. (Vol 31) 1944 All 1 (3) : I L R (1944) All 20 (DB) ✠ (Vol 30) 1943 Lah 168 (170)✠(Vol 30) 1943 Mad 459 (462)✠(Vol 12) 1925 Cal 993 (995).

[2] This section is a legislative enactment of the principle stated in (1872) Ind App Supp 40 (43) (P C). (Vol 30) 1943 Oudh 398 (401) ✠ ('86) 8 All 409 (414) (D B) ✠ (Vol 27) 1940 Rang 184 (185) ✠ (Vol 20) 1933 Rang 361 (362) (DB)✠(Vol 16) 1929 Pat 305 (306) (DB) ✠(Vol 7) 1920 Pat 1 (21) : 5 Pat L Jour 521 (S B) ✠ (Vol 17) 1930 Cal 92 (93) (D B)✠(Vol 13) 1926 Cal 916 (917, 918) (D B)✠(Vol 17) 1930 All 422 (425).

[3] This section is an exception to the general principle that a man cannot confer a better title than he himself has. (Vol 12) 1925 Cal 993 (995) ✠(Vol 7) 1920 Pat 1 (20) : 5 Pat L Jour 521 (S B) ✠(Vol 34) 1947 Bom 49 (52). (Condition in section must be strictly fulfilled.)

[4] An ostensible owner cannot invoke the provisions of this section for his benefit. (Vol 31) 1944 Mad 237 (238).

[5] It has been held that estoppel under this section cannot override the provisions of S. 52. (Vol 32) 1945 Nag 86 (93) : I L R (1944) Nag 852 (D B).

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2. Execution sales.—[1] The section does not apply to court sales in execution of decrees. (Vol 31) 1944 All 17 (23): I L R (1943) All 892 (DB) ✠ (Vol 33) 1946 Oudh 213 (220) (DB) ✠(Vol 22) 1935 All 234 (235) (DB) ✠ (Vol 21) 1934 Oudh 233 (235) (DB) ✠ (Vol 27) 1940 Nag 7 (8) ✠(Vol 14) 1927 Bom 368 (368) (DB) ✠ (Vol 29) 1942 Mad 193 (196).

[2] The principle of estoppel underlying this section has no applicability to court sales. (Vol 21) 1934 Oudh 233 (235, 236) (DB) ✠ (Vol 22) 1935 All 234 (235) (DB) ✠ (Vol 27) 1940 All 256 (258): I L R (1940) All 344 (DB).

[But see (Vol 11) 1924 All 63 (64) (DB) ✠ (Vol 17) 1930 All 521 (521, 522) (DB) ✠ ('12) 17 Cal L Jour 209 (212) (DB) ✠ (Vol 4) 1917 Mad 885 (885) (DB)]

3. Transfers of movable property. — [1] The principle underlying the section has been applied to transfers of movable property such as decrees. (Vol 29) 1942 Mad 28 (29) : I L R (1942) Mad 225 (DB).

[2] This section does not apply to the transfer of a decree. (Vol 3) 1916 Low Bur 27 (28) (DB).

4 Applicability to Provinces where the Act does not apply.—[1] In Provinces where the T. P. Act does not apply the principle underlying the section is held applicable. (Vol 29) 1942 Pesh 68 (70) ✠ (Vol 28) 1941 Pesh 59 (61) (DB) ✠ (Vol 34) 1947 Lah 199 (210) (DB) ✠(Vol 34) 1947 Lah 147 (155) (FB).

5. Ostensible owner with the consent of persons interested.—[1] A benamidar is an ostensible owner. (Vol 17) 1930 Nag 273 (278) : 26 Nag L R 277 (DB)✠ ('72) Ind App Sup 40 (43) (P C) ✠ ('73) 19 Suth W R 292 (297) (P C) ✠ ('37) 170 Ind Cas 590 (591) (DB) (Cal).

[2] The section will not apply unless the ostensible ownership of a person is consented to by the persons interested in the property. (Vol 26) 1939 Mad 299 (299) ✠ (Vol 5) 1918 Oudh 214 (216) ✠ (Vol 29) 1942 Mad 193 (196) ✠ (Vol 25) 1938 All 242 (250) (DB).

[3] The question whether person consented to the ostensible ownership of another is a question of fact. (Vol 14) 1927 Cal 220 (224) (DB).

[4] Where the person interested is incapable of giving consent, the section will have no application. (Vol 30) 1943 All 197 (200) (DB). (Minor.) ✠ (Vol 30) 1943 Mad 459 (461). (Do.) ✠ (Vol 29) 1942 Pesh 68 (70). (Do.) ✠ (Vol 18) 1931 P C 118 (120, 121) : 58 All 290 : 58 Ind App 206 (P C). (Do) ✠ (Vol 34) 1947 Lah 199 (210) (DB) (Do.) ✠ (Vol 31) 1944 All 1 (3) : I L R (1944) All 20 (DB). (Religious endowment.) ✠('23) 73 Ind Cas 711 (716) (Pesh). (Do.)

[5] Where the person interested has denied the so-called ostensible owner's interest in the property, the section cannot apply. (Vol 26) 1939 Lah 135 (137) (D B) ✠(Vol 18) 1931 Oudh 253 (255) (DB) ✠ (Vol 19) 1932 Nag 165 (168) : 28 Nag L R 227 ✠ (Vol 2) 1915 P C 103 (105) (P C).

[6] Where the person interested merely allows another to be in possession as manager or as licensee he cannot be said to have consented to the ostensible ownership of the other. (Vol 1) 1914 All 232 (234) : 36 All 308 (DB). (Manager.) ✠ (Vol 9) 1922 All 392 (393) : 44 All 674 (DB). (Do.) ✠ (Vol 18) 1931 Cal 144 (149) (DB) (Do.)✠ (Vol 12) 1925 Cal 1034 (1035) (DB) (Licensee.)

[7] Under the Hindu law, the fact that the name of a coparcener is used in acquiring the property cannot be taken to mean that the other coparceners hold out the purchasing coparcener as the ostensible owner of the property. (Vol 24) 1937 Pat 353 (355) ✠(Vol 15) 1928 Mad 635 (636) (DB).

[8] A Hindu widow in possession of her husband's property, or a mortgagor in possession of the mortgaged property cannot be said to be the ostensible owner of the property with the consent of the reversioner and the mortgagee respectively. (Vol 30) 1943 Lah 168 (170). (Widow) ✠ (Vol 12) 1925 All 79 (84) : 46 All 637 (DB) ✠ (Vol 21) 1934 Oudh 283 (285) (DB) ✠(Vol 18) 1931 Nag 144 (145):27 Nag L R 144✠(Vol 28) 1941 Pesh 59 (61) (DB). (Mortgagor.)]

[But see (Vol 23) 1936 Lah 405 (405) (DB) ✠ (Vol 16) 1929 Rang 117 (120) : 7 Rang 118 (DB).]

[9] The mere fact the real owner is a pardanashin lady will not preclude the transferee from claiming protection under this section. (Vol 31) 1944 All 42 (59) (DB).

[10] Gift of immovable property complete— Power of revocation not reserved—Donor ceases to have any interest in the property—There can be no question of donor continuing after the gift to be an ostensible owner. (Vol 34) 1947 Mad 127 (129).

[11] Original title deeds in the name of all co-owners—Fact that subsequently names of some only of the co-owners are entered in later documents does not necessarily mean that other co-owners have lost their title (Vol 34) 1947 Mad 287 (296) (D B).

6. "Persons interested"— [1] Where the ostensible ownership is in a third person with the consent of Hindu widow with a limited interest but not with the consent of the reversioners, an alienee from such ostensible owner cannot claim protection under this section as against the claims of the reversioners. (Vol 27) 1940 Sind 212 (213) : I L R (1940) Kar 403 (D B) ✠ (Vol 20) 1933 All 493 (494): 55 All 554 (D B).

[2] It has been held that a reversioner is not a person interested in the property in the possession of a Hindu widow, but has only a *spes successionis* and that a transfer by a third person as ostensible owner with the consent of the widow is not binding on the reversioner (Vol 29) 1942 All 175 (181) : I L R (1942) All 259 (D B).

[3] A trustee in whom property is vested in trust for a public institution, is a person interested in the property (Vol 22) 1935 Lah 410 (411).

[4] A transferee from the guardian of a minor cannot, as against the minor, claim protection under this section. ('07) 29 All 292 (294) (D B)

7. Express or implied consent. — [1] Where a mother having an interest in property allowed her son to mortgage it as his exclusive property, attested the mortgage deed and stated therein that she had no interest in the property, the son was held to be the ostensible owner with the express consent of the mother. ('13) 1913 Pun L R No. 278, page 935 (938) (D B).

[2] Where the real owner gets the property mutated in the revenue papers in the name of another making statements before the mutation officer disclaiming his own interest in the property, he expressly consents to the ostensible ownership of the other person (Vol 18) 1931 Nag 194 (196) : 27 Nag L R 283✠(Vol 13) 1926 Oudh 131 (132).

[3] Where the person interested allows the name of another to be recorded in the khewat as owner and himself manages the property on such other's behalf, he will be deemed to have impliedly consented to the ostensible ownership of the other. (Vol 22) 1935 Oudh 437 (440): 11 Luck 376 (D B).

[4] Mere silence is not consent. (Vol 12) 1925 Cal 993 (995). (Silence under circumstances inducing belief in others that another man is owner of property amounts to implied consent.) ✠ (Vol 31) 1944 Nag 20 (22) : I L R (1943) Nag 726 ✠ (Vol 34) 1947 Lah 147 (156) (F B)✠(Vol 5) 1918 Oudh 214 (216, 217) ✠ (Vol 7) 1920 Oudh 44 (50).

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[5] Two Muhammadan sisters and their brother inherited the property of a deceased person. The sisters allowed their brother to take possession, and manage the whole of the property. The sisters were not ignorant of the state of the family and of such claim as they might have to a share in the succession. It was held that brother was the ostensible owner of the property with the implied consent of the sisters. (Vol 15) 1928 P C 202 (208): 3 Luck 372: 55 Ind App 303 (P C).

[6] *A* who was a Government servant sent money to his brother *B* and allowed him to purchase property in his own name and deal with it as his own — *Held B* was an ostensible owner with the consent of *A*. (Vol 31) 1944 Mad 299 (300).

[7] One cosharer though recognised as owner at first settlement was never in possession of his share and allowed other cosharers to be in possession for a period of 40 years and without objecting to transfers effected by them — *Held*, the other cosharers were ostensible owners by his conduct and acquiescence. (Vol 30) 1943 Oudh 398 (401): 19 Luck 216

8. Consent need not be to the transfer by the ostensible owner.— [1] The words "with the consnt express or implied of the persons interested in immovable property" have reference to the ostensible ownership and not to the transfer by such owner. (Vol 31) 1944 Mad 299 (301) ✠ (Vol 30) 1943 Mad 459 (463) ✠ (Vol 21) 1934 All 193 (196, 197) : 56 All 582 (D B). ((Vol 16) 1929 All 943 : 52 All 139, *Dissent*)✠(Vol 24) 1937 Pesh 58 (60) (D B) ✠ (Vol 23) 1936 Lah 816 (818).

[But see (Vol 20) 1933 Lah 258 (259)✠ (Vol 2) 1915 Mad 614 (617) (D B).]

9. Consent under coercion, fraud, misrepresentation and mistake. — [1] Different views have been held as to whether a consent by the person interested to the ostensible ownership of another given under a mistake of law or of fact is valid :

(a) In the undermentioned case it was held that the consent referred to in the section is an intelligent consent and that a consent given by a person under a mistake as to his legal rights is not an intelligent consent. ('06) 3 All L Jour 534 (536).

(b) The following case held that a consent is not rendered unintelligent by reason of the fact that it was given under a mistake (Vol 6) 1919 Oudh 398 (400, 401): 22 Oudh Cas 243 (D B).

(c) The view that consent for the purposes of this section includes a consent given under a mistake has been taken in the following cases on the broad principle of estoppel. (Vol 25) 1938 Lah 86 (87) : I L R (1937) Lah 783 (D B) ✠(Vol 9) 1922 Nag 79 (80): 18 Nag L R 27.

10 Attestation by person interested, if consent. —[1] While the mere fact of attestation does not import knowledge or consent on the part of the attestor an attestation coupled with other circumstances may amount to proof of knowledge or consent. (Vol 31) 1944 All 42 (55) (D B) ✠ (Vol 27) 1940 Bom 126 (128) : 1940 Rang L R 180 (D B) ✠ (Vol 15) 1928 P C 20 (23) (P C).

11. Motive of consent immaterial. — [1] The consent of the real owner to the ostensible ownership of the transferor need not be with an intention to deceive the transferee in particular or anybody in general. (Vol 6) 1919 Oudh 398 (401) : 22 Oudh Cas 243 (D B)✠ (Vol 25) 1938 Lah 86 (87): I L R (1937) Lah 783 (D B).

[But see (Vol 5) 1918 Oudh 214 (217)]

12 Consent must continue up to time of transfer. — [1] The consent of the person interested to the ostensible ownership of another must continue up to the time of the transfer. (Vol 21) 1934 All 193 (197) : 56 All 582 (D B).

[See however (Vol 31) 1944 Mad 299 (301).]

[2] If a successor-in-interest or the heir of the real owner does not take any steps to assert his right and the ostensible owner transfers the property the transfer will be binding upon the successor-in interest or the heir of the real owner (Vol 28) 1941 Cal 318 (319) ✠ (Vol 8) 1921 Cal 549 (551) (D B).

13 Ostensible owner, if includes mortgagee.— [1] Where *A* executes a fictitious mortgage in the name of *B* and *B* transfers his mortgage right to *C* who has acted *bona fide* after taking reasonable care to ascertain that *B* had power to transfer his mortgage right, the assignment by *B* is not a transfer by an ostensible owner (Vol 17) 1930 Cal 92 (93, 94) (D B) (Per Mitter J., Jack J. contra.)✠(Vol 29) 1942 Mad 730 (730)

14. Ostensible owner having some interest in the property.— [1] If the ostensible owner possesses some interest in the property but is held out by the person interested as being the full owner, the transferee will be protected by the section. (Vol 15) 1928 Mad 778 (782) (DB) ✠ (Vol 4) 1917 Mad 775 (780) (DB).

15. Subsequent transferees from first transferee. —[1] The following case holds that the section in terms would apply not only to the first transferee from the ostensible owner, but also to subsequent transferees from the first transferee provided that such subsequent transferees had acted in good faith and with reasonable care, even though the first transferee himself had notice of the defect in the title of the transferor. (Vol 13) 1926 Cal 916 (918) (DB).

[2] The following case holds that the section does not apply in terms to subsequent transferees from first transfee but that the principle underlying the section would apply. (Vol 27) 1940 Cal 565 (568).

16. Transferee must have acted in good faith after making reasonable inquiry.— [1] The transferee will be protected only if he has acted in good faith after taking reasonable care to ascertain that the transferor had power to make the transfer. (Vol 25) 1938 Nag 142 (144) : I L R (1939) Nag 293 ✠ (07) 9 Bom L R 388 (392) (DB) ✠ (Vol 24) 1937 Pat 353 (357) ✠ ('11) 35 Bom 342 (348) (DB).

[2] A transferee who has acted in good faith, but has not taken reasonable care to ascertain that the transferor had power to transfer the property is not protected (Vol 23) 1936 Nag 214 (216) : I L R (1936) Nag 177 ✠ ('01) 1 Low Bur Rul 196 (197) (DB).

[3] A transferee who wilfully shuts his eyes and takes the transfer without any inquiry is not protected. (1881) 18 Ch D 93 (102, 103) : 50 L J Ch 834 *In re Morgan* ; *Pellgrem* v. *Pellgrem* ✠ (Vol 22) 1935 Rang 423 (426) (DB).

[4] A transferee who neither makes reasonable inquiries nor acts in good faith is not protected. (Vol 30) 1943 Nag 113 (114) ✠ (Vol 7) 1920 Pat 1 (20) : 5 Pat L Jour 521 (SB).

17. "Good faith."—[1] A transferee having notice of the real owner's title to the property cannot be said to have acted in good faith in purchasing the property from a person other than the real owner. (Vol 11) 1924 Lah 738 (741) (DB) ✠ (Vol 34) 1947 Mad 287 (296) (DB) ✠ (1864) 1 Suth W R 324 (324) (D B).

[2] Where a transferor is found in possession of the property, is recorded as owner in the revenue registers and holds the title deeds of the property, and the transferee deals with him in respect of it, there is nothing to show want of good faith on his part. ('04) 26 All 490 (493) (DB).

[3] Where the transferee who had dealings with the family of which the transferor was the managing member, was found to have colluded with the managing member in creating evidence destroying the interest of the other members in the property and took a mortgage

Section 41 — Note 17 *(contd.)*

of the property from such managing member alone without looking to the title deeds of the property, it was held that the transferee had not acted in good faith. (Vol 7) 1920 Pat 1 (20) : 5 Pat L Jour 521 (SB).

[4] Where a person purchased property fully knowing that his vendor had a title under a bogus sale-deed and with the intention of harassing the real owner, it was held that the transferee had not acted in good faith. (Vol 30) 1943 Nag 113 (114).

18. Reasonable care. — [1] The reasonable care required by the section is not reasonable care generally or with regard to every aspect of the transaction but has reference only to the ascertainment that the transferor had power to make the transfer. (Vol 15) 1928 Mad 778 (780) (DB).

[2] The degree of care required is that of an ordinary prudent man acting under the circumstances of the particular case. (Vol 30) 1943 Mad 459 (463) ✠(Vol 34) 1947 Lah 147 (150) (FB) ✠ (Vol 34) 1947 Bom 49 (53) ✠ (Vol 22) 1935 Rang 423 (425) (DB) ✠ (Vol 13) 1926 Cal 916 (918) (DB) ✠ (Vol 7) 1920 Pat 1 (20) : 5 Pat L Jour 521 (SB) ✠ (Vol 16) 1929 Cal 83 (86) ✠ (Vol 21) 1934 All 193 (197) : 56 All 582 (DB).

[3] The ordinary standard of diligence that would constitute 'reasonable care' for the purpose of ascertaining the transferor's power to transfer would be to inquire about the title of the transferor to the property, and to inspect the title deeds if any produced. (Vol 15) 1928 Mad 778 (780) (DB) ✠ ('09) 5 Low Bur Rul 125 (127) (DB). (Enquiry into title involves enquiry as to actual possession.)

[4] A transferee who does not make any enquiry into the title of the transferor cannot be said to have taken the reasonable care required by this section. (Vol 29) 1942 Oudh 313 (316) : 17 Luck 636 (DB)✠ (Vol 21) 1934 Pat 67 (68) ✠ (Vol 6) 1919 Mad Mad 50 (50) (DB) ✠ (Vol 2) 1915 P C 103 (105) (P C) ✠ (Vol 17) 1930 All 422 (425) ✠(Vol 17) 1930 All 847 (848) : 52 All 248 (DB)✠ (Vol 21) 1934 Bom 1 (5) (DB) ✠ ('12) 16 Ind Cas 825 (829) (DB) (Cal) ✠ (Vol 20) 1933 Oudh 166 (169) (DB) ✠ ('11) 12 Ind Cas 858 (858) (Low Bur) ✠ (Vol 16) 1929 Pat 305 (307) (DB).

[But see (Vol 22) 1935 Lah 410 (411, 412)✠ (Vol 24) 1937 Lah 272 (272, 273) (DB).]

[5] The mere fact that the transferee entrusted the enquiry to a solicitor and acted upon his opinion that everything was all right is not sufficient to constitute the reasonable care required, in the absence of proof that the solicitor properly discharged his duty. (Vol 27) 1940 Cal 565 (567) (DB).

[6] The mere fact that the transferee has satisfied himself that the transferor is in possession or that his name is found in the revenue papers or tax registers is not such an enquiry into title as to constitute the taking of reasonable care to ascertain that the transferor had power to transfer the property. (Vol 29) 1942 Oudh 313 (316) : 17 Luck 636 (DB) (Inspection of khewat) ✠ (Vol 34) 1947 Bom 49 (53) ✠ (Vol 19) 1932 Nag 165 (168) : 28 Nag L R 227 ✠ (Vol 16) 1929 Pat 305 (306) (DB) ✠ (Vol 17) 1930 All 521 (522) (DB) ✠ (Inspection of khewat.)✠(Vol 9) 1922 All 392 (393,394): 44 All 674 (DB). (House-tax register.) ✠ (Vol 14) 1927 Mad 1138 (1139) ✠ (Vol 14) 1927 Nag 41 (42) (Revenue papers) ✠ (Vol 21) 1934 Lah 885 (886, 887) : 16 Lah 313 (DB). (Municipal registers.) ✠ (Vol 7) 1920 Pat 1 (21) : 5 Pat L Jour 521 (SB) (Do.) ✠ (Vol 21) 1934 Oudh 165 (167) : 9 Luck 571 (Do.) ✠ ('01) 1 Low Bur Rul 196 (197) (DB). (Inspection of revenue records.) ✠ (Vol 17) 1930 Oudh 184 (191) (DB). (Revenue Records.)

[But see (Vol 27) 1940 Mad 523 (524).]

[7] If there is an instrument constituting the transferor the ostensible owner and the power to transfer is given or possessed thereunder and the transferor is in possession the transferee who rests satisfied with these must be deemed to have taken the reasonable care required and need make no further inquiries. (Vol 10) 1923 Cal 240 (245, 246) (DB) ✠ (Vol 15) 1928 Mad 778 (781) (DB) ✠ (Vol 3) 1916 Cal 745 (746) (DB).

[8] If there are indications in the title deeds themselves or there are other circumstances which put the transferee on notice or further inquiry the transferee cannot be said to have taken reasonable care unless he makes such further inquiry. (Vol 15) 1928 Mad 778 (780) (D B) ✠ ('09) 5 Low Bur Rul 125 (127) (DB) ✠ (Vol 2) 1915 Low Bur 104 (105).

[9] The question whether the transferee has taken the reasonable care required by the section in any particular case is one of fact (Vol 30) 1943 Mad 459 (463) ✠ (Vol 30) 1943 Oudh 398 (401) : 19 Luck 216✠ (Vol 22) 1935 Lah 410 (412) ✠ ('01) 23 All 442 (447) (DB) ✠ ('13) 1913 Mad W N 674 (676) ✠ ('02) 1 Low Bur Rul 196 (197) (DB) ✠ (Vol 7) 1920 Pat 1 (20) : 5 Pat L Jour 521 (SB) ✠ (Vol 21) 1934 All 193 (197) : 56 All 582 (DB) ✠ (Vol 27) 1940 Pat 480 (481) (DB).

[10] *A* executed a sale deed in favour of *B* and put him in possession. *B* on the same date executed an agreement to reconvey the property to *A* within a certain time. The sale deed and the agreement to reconvey really constituted a mortgage. *C* purchased the property from *B* after inspecting the sale-deed in favour of *B*. There were no indications in that deed to put him on notice or enquiry. It was held that he had taken the reasonable care. (Vol 15) 1928 Mad 778 (782) (DB).

[*See also* ('11) 10 Ind Cas 779 (780) (Rang).]

[See however (Vol 31) 1944 Mad 237 (238) ✠ ('86) 9 All 97 (103) (DB).]

[11] *K*, a Government lessee, sold the lease to *B*. *B* without getting the lease transferred to his name in Government papers sold it to *C*, who got his name recorded in Government papers. *B* subsequenly repurchased the lease from *C* but failed to get it re-transferred to his name in Government papers. Possession was with *C*. *C* afterwards came to an arrangement with the Government, surrendered the lease and received in lieu of it several other leases. *D* purchased one of these from *C* on looking into Government papers only. *B* sued for possession on the strength of his purchase. It was held that *D* was entitled to protection under this section. (Vol 16) 1929 Rang 17 (19); 6 Rang 643.

[See however ('01) 23 All 442 (447) (DB).]

[But see (Vol 27) 1940 Mad 523 (524).]

[12] Nephew, a transferee — He is presumed to know the real owner—*Held* no reasonable care was taken. (Vol 28) 1941 Lah 416 (418, 419).

[13] Hindu widow inheriting property from her husband allowing her husband's brother's name to be recorded as owner and otherwise showing her consent to his dealing with property as his own — No circumstances to put transferee on guard — *Held* reasonable care was taken. (Vol 31) 1944 All 42 (56) (DB).

[14] One brother sending money to another for the latter to invest in his own name — Latter purchasing property in his own name and then mortgaging it to pay off a debt — *Held* that the mortgagee was protected in spite of there having been some abortive criminal proceedings by the real owner against the ostensible owner for recovery of possession. (Vol 31) 1944 Mad 299 (302).

42. Where a person transfers any immoveable property, reserving power to revoke the transfer, and subsequently transfers the property for consideration to another transferee, such transfer operates in favour of such transferee (subject to any condition attached to the exercise of the power) as a revocation of the former transfer to the extent of the power.

Transfer by person having authority to revoke former transfer.

Illustration.

A lets a house to *B*, and reserves power to revoke the lease if, in the opinion of a specified surveyor, *B* should make a use of it detrimental to its value. Afterwards *A* thinking that such a use has been made, lets the house to *C*. This operates as a revocation of *B's* lease subject to the opinion of the surveyor as to *B's* use of the house having been detrimental to its value.

43. Where a person [a][fraudulently or] erroneously represents that he is authorized to transfer certain immoveable property and professes to transfer such property for consideration, such transfer shall, at the option of the transferee, operate on any interest which the transferor may acquire in such property at any time during which the contract of transfer subsists.

Transfer by unauthorized person who subsequently acquires interest in property transferred.

Nothing in this section shall impair the right of transferees in good faith for consideration without notice of the existence of the said option.

Illustration.

A, a Hindu, who has separated from his father *B*, sells to *C* three fields, *X*, *Y* and *Z*, representing that *A* is authorized to transfer the same. Of these fields *Z* does not belong to *A*, it having been retained by *B* on the partition; but on *B's* dying *A* as heir obtains *Z*. *C*, not having rescinded the contract of sale, may require *A* to deliver *Z* to him.

[a] *Inserted* by the Transfer of Property (Amendment) Act, 1929 (20 [XX] of 1929), S. 13.

Section 41 — Note 18 *(contd.)*

[15] Husband putting property in wife's name and himself taking part in the transaction by the wife—No suspicious circumstances — Reasonable care held taken. (Vol 30) 1943 Mad 459 (463).

[16] Transferee not making search in index in Sub-Registrar's Office to ascertain power of transferor to make transfer—He is not entitled to benefit of S. 41. (Vol 34) 1947 Bom 49 (53, 54) ✠ (Vol 34) 1947 Lah 199 (210) (DB). (Sale of house in a town.)

[17] Vendee accepting transfer of agricultural land on faith of entries in favour of his transferor in record of rights held protected under S. 41—Further enquiry by vendee as to title of transferor held not necessary. (Vol 34) 1947 Lah 147 (159) (FB).

19. Plea of reasonable care and good faith when to be taken.—[1] The plea that he had acted in good faith after taking reasonable care must be taken by the transferee in the trial Court itself and cannot be raised for the first time in appeal. (Vol 28) 1941 Pesh 59 (60) (DB) ✠(Vol 18) 1931 Bom 227 (227) (DB) ✠ ('05) 28 Mad 122 (123) (DB) ✠ (Vol 4) 1917 Mad 926 (928) (D B) ✠ (Vol 15) 1928 Nag 308 (313) ✠ (Vol 16) 1929 Pat 305 (307) (DB)✠(Vol 27) 1940 Pat 620 (621) (DB).

[2] Where the facts upon which plea that transferee had acted in good faith after taking reasonable care would have been based are on the record of the trial Court, the appellate Court will not only allow it to be raised but even consider it on its own initiative. ('36) 38 Pun L R 90 (91) ✠ (Vol 27) 1940 Lah 252 (253).

[3] The fact that a plea under this section has been found against in a former litigation with certain vendees from the same ostensible owner is no bar to the raising of the plea by other vendees in a subsequent litigation. (Vol 31) 1944 All 42 (59) (DB).

20. Transferee's title to be considered with reference to date of transfer.—[1] Where the real owner is a coparcener in a joint Hindu family and his share is transferred by the ostensible owner, the transferee becomes entitled to the share of the real owner at the date of transfer irrespective of its decrease or increase by any subsequent birth or death in the family. (Vol 30) 1943 Mad 459 (464).

21. Burden of proof.—[1] The onus is upon the transferee to show that he acted in good faith after taking reasonable care. (Vol 31) 1944 Mad 237 (238) ✠ (Vol 21) 1934 Pat 67 (68) ✠ (Vol 21) 1934 Oudh 165 (167) : 9 Luck 571 ✠ (Vol 17) 1930 All 847 (848) : 52 All 248 (D B) ✠ (Vol 16) 1929 Cal 636 (638) (D B) ✠ (Vol 14) 1927 Nag 41 (42) ✠ (Vol 10) 1923 Nag 15 (16) ✠ (Vol 21) 1934 Lah 658 (659) ✠ ('33) 13 Cal L R 280 (282) (P C) ✠ (Vol 16) 1929 All 737 (739) ✠ (Vol 28) 1941 Cal 318 (319).

[2] Where the transferee has let in his evidence as to his having acted in good faith after taking reasonable care, the onus will shift to the real owner to show that the transferee had notice of the defect in the transferor's title or of circumstances which if prosecuted would have led to a discovery of such defect (Vol 31) 1944 All 42 (58) (DB) ✠ (Vol 31) 1944 Mad 237 (238)✠ (Vol 18) 1931 Oudh 419 (421) (D B) ✠ (Vol 27) 1940 Rang 184 (186) ✠ (Vol 16) 1929 Cal 636 (638) (D B).

[3] Some circumstances must be specifically pointed out as the starting point of an enquiry which might have led to the discovery of the real owner's title. ('72) Ind App Sup 40 (45) (P C) ✠ (Vol 13) 1926 Cal 916 (918) (D B) ✠ (Vol 10) 1923 Cal 240 (245) (DB) ✠ (Vol 24) 1937 Pat 353 (355).

SECTION 43 — SYNOPSIS

1. Scope.
2. Section presupposes valid contract to transfer.
3. "Fradulently or erroneously represents."
4. "At the option of the transferee."
5. "On any interest which the transferor may acquire."
6. Transfer by person having partial interest in property.
7. "At any time during which the contract of transfer subsists."
8. "Transferor" and "transferee."
9. Second paragraph.

1. Scope.—[1] This section applies to all kinds of transfers for consideration. (Vol 2) 1915 Mad 972 (974) (D B). (Mortgage) ✠ (Vol 6) 1919 Cal 1024 (1025) (DB). (Do) ✠ ('03) 26 All 82 (86) (FB). (Do.) ✠ ('79) 4 Bom 34 (36) (D B) (Do.) ✠ (Vol 8) 1921 Cal 748 (749) (D B). (Exchange).

[2] Section applies only when a party in possession of special knowledge makes an incorrect represen-

Section 43—Note 1 *(contd.)*

tation to other party to the contract, whereby the other party is induced to enter into the contract, and the person making the representation gets the benefit of it (Vol 31) 1944 Mad 530 (530).

2. Section presupposes valid contract to transfer. —[1] A transferee from a minor cannot rely on this section. (Vol 24) 1937 All 610 (618) : I L R (1937) All 860 (F B).

[2] It has been held that a judgment-debtor, a decree passed against whom has been transferred to the Collector for execution and to whom para 11, Sch. III of the Code of Civil Procedure, 1908, applies, is a person incompetent to contract to the extent stated in the said paragraph, and that a transfer made by him in contravention thereof is not capable of being made good under this section. (Vol 4) 1917 Nag 215 (228) : 13 Nag L R 130 (F B).

[3] A transferee from a person who is adjudicated an insolvent of property which has vested in the Court or Official Receiver is entitled under this section to get the property, if the insolvent gets back the property after his discharge. (Vol 20) 1933 All 449 (451) : 55 All 503 (D B) ✠ (Vol 21) 1934 Lah 809 (811) : 16 Lah 392 (DB).

[4] The section will not also apply where the contract implied in the transfer is void for some other reason than the incompetency of the parties to the contract ('08) 30 All 38 (39) (D B)✠(Vol 15) 1928 Oudh 344 (345) : 3 Luck 636 (D B) ✠ (Vol 5) 1918 Mad 123 (126) : 41 Mad 418 (F B) ✠ (Vol 15) 1928 Oudh 153 (154) ✠ (Vol 4) 1917 Nag 215 (217, 226) : 13 Nag L R 130 (F B).

3. "Fraudulently or erroneously represents."— [1] The transferee must show that there was an erroneous or fraudulent representation on the part of the transferor that he is authorised to transfer the property. ('93) 20 Cal 1 (7) : 19 Ind App 221 (P C)✠(Vol 28) 1941 Oudh 123 (125) : 16 Luck 484 ✠ (Vol 5) 1918 Mad 383 (387) (D B) ✠ ('30) 1930 Mad W N 1054 (1057) ✠ (Vol 10) 1923 Cal 165 (165) (D B).

[2] A representation may be based, both on facts and on inferences drawn from documents of title. (Vol 17) 1930 All 786 (790) (DB).

[3] A recital or statement in the document of transfer that the transferor is entitled to the property transferred, is a representation that he is authorised to transfer it. ('08) 18 Mad L Jour 247 (249) (D B). *(Overruled* on another point in (Vol 5) 1918 Mad 123 : 41 Mad 418 (F B)) ✠ (Vol 14) 1923 Mad 649 (649) ✠ (Vol 24) 1937 Oudh 127 (128) (D B).

[4] The expression "fraudulently or erroneously" connotes that the transferee is not aware of the real facts and acts on the representation made. (Vol 21) 1934 All 969 (970) ✠ ('11) 34 Mad 159 (160) (D B) ✠ (Vol 12) 1925 Pat 470 (471) : 4 Pat 478 (D B) ✠ ('10) 34 Bom 175 (182) (D B)✠ (Vol 30) 1943 Oudh 196 (204) : 19 Luck 37 (D B) ✠ (Vol 25) 1938 All 22 (24) : I L R (1938) All 63 (D B) ✠ ('05) 32 Cal 832 (836) (D B) ✠ (Vol 7) 1920 Mad 659 (659) (D B) ✠ (Vol 4) 1917 Nag 215 (226) : 13 Nag L R 130 (F B)✠(Vol 21) 1934 Oudh 112 (114) : 9 Luck 359 (D B) ✠ (Vol 24) 1937 Pat 469 (471) (D B) ✠ (Vol 10) 1923 Cal 165 (165) (D B).

[But see (Vol 23) 1936 Oudh 313 (316) : 12 Luck 215 (D B) ✠ (Vol 4) 1917 Oudh 50 (52) : 20 Oudh Cas 72✠('90) 3 C P L R 72 (73).]

[5] If the transferee believes in the representation and acts upon it he is entitled to protection, even though, if he had been more careful he might have found out that the representation was not true. (Vol 24) 1937 Oudh 127 (128) (D B) ✠ (Vol 17) 1930 All 786 (790) (D B) ✠ ('11) 34 Mad 159 (160) (D B)✠ ('37) 172 Ind Cas 707 (708) (Cal).

[But see (Vol 2) 1915 Mad 1085 (1087) (D B).]

[6] Sale deed stating sale to be free from encumbrances — Vendee need not make enquiries— Mere notice of encumbrance on part of vendee is immaterial. (Vol 33) 1946 Mad 107 (107, 108).

[7] The production of the instrument of transfer containing the representation by the transferee will shift the burden of proof on to the transferor who has then to show that the transferee was aware of the true facts. (Vol 9) 1922 Cal 542 (543, 544) (D B).

[8] The question whether there has been a fraudulent or erroneous representation is one of fact. (Vol 10) 1923 Cal 165 (165) (D B).

[9] It has been held that where a transferee takes a transfer from a person who is a limited owner or from one who under the law governing him is not authorised to transfer the property except under certain circumstances the transferee will be presumed to be aware of the defect in title and that this section would not apply. (Vol 28) 1941 Oudh 123 (125) : 16 Luck 484.

[10] Sale by *A* to *B*— Sale deed stating property to be free from encumbrance— But *A* telling *B* expressly, at the time of sale that the property was subject to charge decree— There is no misrepresentation by *A* — S. 43 not applicable. (Vol 33) 1946 Mad 107 (108).

[11] Sale by *A* for himself and as guardian of his lunatic brother *B*— Sale in respect of *B*'s share held void— Subsequently on *B*'s death his share devolving on *A*— *Held* S. 43 did not apply as there was no fraudulent or erroneous representation by *A*. (Vol 33) 1946 Sind 99 (102) : I L R (1945) Kar 455.

4. "At the option of the transferee."— [1] The transferee must, under this section, exercise his option whether he will take the benefit of the section Till then the property acquired by the transferor will not pass to the transferee. (Vol 17) 1930 Nag 204 (204, 205) : 27 Nag L R 1.

[2] The transferee is at liberty to exercise the option at any time during which the contract of transfer subsists. (Vol 4) 1917 Oudh 50 (53) : 20 Oudh Cas 72.

5. "On any interest which the transferor may acquire."— [1] The section will operate on the subsequently acquired interest, in whatever manner such acquisition is made. (Vol 11) 1924 All 362 (365) : 46 All 310 (D B). (Inheritance) ✠ (Vol 4) 1917 Mad 926 (928) (D B) (Do)✠('82) 1882 Bom P J 157 (D B) (Do) ✠ ('83) 1883 Bom P J 121 (D B) (Do) ✠ ('10) 6 Ind Cas 37 (38) (D B) (All) (Do) ✠ (Vol 14) 1927 Cal 665 (668) (D B) (Do)✠(Vol 1) 1914 Cal 638 (640) (D B) (Transfer *inter vivos*.)✠('11) 33 All 382 (384) (D B) (Court auction).

[2] Where the guardian of a minor sells property belonging to the minor, and the latter, after attaining majority sells the same to X and subsequently gets the sale by the guardian set aside, X would be entitled to the property under this section. (Vol 20) 1933 Bom 42 (43) (D B).

[3] *A* and *B* were partners. *A* sold the property of the firm to *X*. In subsequent arbitration proceedings, the property fell to the share of *A*. It was held that the transferee *X* would, under S. 43, be entitled to the property (Vol 27) 1940 All 453 (455) : I L R (1940) All 674 (D B).

[4] The section will not operate on any other property acquired than that purported to be transferred by the transferor. (1900) 1900 Pun Re No. 32, p. 112 (114) (D B) ✠ (Vol 8) 1921 Mad 384 (385): 44 Mad 167 (D B)✠ (Vol 21) 1934 All 731 (732).

[5] The transferee will be entitled to whatever interest the transferor acquires, even though it be less than that purported to be transferred. (Vol 11) 1924

44 Where one of two or more co-owners of immoveable property legally competent in that behalf transfers his share of such property or any interest therein, the transferee acquires, as to such share or interest, and so far as is necessary to give effect to the transfer, the transferor's right to joint possession or other common or part enjoyment of the property, and to enforce a partition of the same, but subject to the conditions and liabilities affecting, at the date of the transfer, the share or interest so transferred.

Transfer by one co-owner.

Where the transferee of a share of a dwelling house belonging to an undivided family is not a member of the family, nothing in this section shall be deemed to entitle him to joint possession or other common or part enjoyment of the house.

Section 43—Note 5 *(contd.)*

Oudh 209 (213) (D B) ✠ (Vol 14) 1927 Rang 100 (102) : 4 Rang 532 (DB)✠(1910) 2 Ch 342 (346): 79 L J Ch 746, *In re Bridgewater's Settlement*; *Partridge* v. *Ward* ✠('02) 26 Bom 379 (385) (DB)✠('89) 2 C P L R 90 (92).

[6] The section will have no application if the transferor who has purported to transfer property in his personal capacity subsequently acquires the same as trustee for another (Vol 1) 1914 Cal 321 (323) (D B).

[7] Where the transferor never got actually any title to the property after his transfer, but was a party to a compromise under which the title was vested in a third person, it was held that the section had no application. (Vol 11) 1924 Bom 300 (301) (D B).

6. Transfer by person having partial interest in property.— [1] Where a person having some interest in property purports to transfer a larger interest on the fraudulent or erroneous representation that he is entitled thereto, and subsequently acquires a larger interest in the property, the transferee would be entitled to claim the property under this section. (Vol 2) 1915 Low Bur 77 (79) (D B) ✠ (Vol 4) 1917 Cal 467 (469) (D B) ✠ (Vol 5) 1918 Cal 419 (420) (D B).

7. "At any time during which the contract of transfer subsists"— [1] Where a mortgagor mortgaged property to which he was not entitled at the time but, after the mortgagee had obtained a decree on the mortgage, he acquired the same, it was held that such property was liable to be proceeded against by the mortgagee in execution of his decree. ('95) 18 Mad 492 (495) (D B) ✠ ('08) 1908 All W N 155 (156).

[2] Where the decree was satisfied by sale in execution thereof, it was held that a subsequent acquisition by the mortgagor did not accrue for the benefit of the mortgagee. ('11) 10 Ind Cas 443 (443) (All).

[3] Section 43 applies to transfers of undivided property where the transferor subsequently becomes entitled to it (Vol 10) 1923 Oudh 265 (270) : 26 Oudh Cas 245 (D B) ✠ (Vol 1) 1914 Oudh 426 (429) ✠ ('07) 7 Cal L Jour 644 (646, 647) (D B) ✠ (Vol 24) 1937 Pat 546 (549) : 16 Pat 230 (D B) ✠ ('91) 14 Mad 459 (462) (D B) ✠ (Vol 9) 1922 Pat 347 (348) (D B).

[But see (Vol 28) 1941 Oudh 123 (126) : 16 Luck 484.]

[4] Where *A* grants a lease of land belonging to Government and subsequently the Government declares the land to be at its disposal, it has been held that if the Government grants the land subsequently to the lessor, the lessee cannot claim the land under this section. (Vol 2) 1915 Mad 1085 (1087) (D B).

8. "Transferor" and "transferee."— [1] This section will, subject to the second paragraph, operate also against the privies of the transferor and it can be taken advantage of by the privies of the transferee. (Vol 2) 1915 Mad 1085 (1086) (D B) ✠ (Vol 1) 1914 All 366 (367) : 36 All 141 (D B) ✠ (Vol 2) 1915 Cal 751 (755 (D B).

[2] The word "transferee" does not include a court auction-purchaser. (Vol 25) 1938 Lah 360 (361)✠ ('13) 40 Cal 173 (184) (D B) ✠ ('79) 4 Cal 677 (682) (D B).

[3] If the Official Receiver sells property before a vesting order is made in his favour, and subsequently a vesting order is made, the purchaser will be entitled to the property under this section. (Vol 14) 1927 Mad 1 (3) : 50 Mad 135 (F B)✠(Vol 14) 1927 Mad 1091 (1092) (D B).

9. Second paragraph.—[1] If the subsequent transferee has notice of the option, he cannot claim the benefit of the second paragraph. (Vol 6) 1919 Cal 1024 (1025) (D B).

SECTION 44 — SYNOPSIS

1. Scope.
2. "Right to joint possession or other common or part enjoyment."
3. Right to enforce a partition—General.
4. "Subject to the conditions and liabilities."
5. Second paragraph—General.
6. "Dwelling-house."
7. "Undivided family."

1. Scope.—[1] The first part of the section makes the transferee from a co-owner as much a co-owner as his transferor was before the transfer. (Vol 17) 1930 Oudh 475 (478, 479) (DB) ✠ (Vol 22) 1935 Mad 1059 (1061) ✠ (Vol 11) 1924 Mad 741 (746) (DB) ✠ (Vol 22) 1935 Lah 651 (652) ✠ ('30) 51 Cal L Jour 424 (426) ✠ (Vol 19) 1932 All 393 (400) : 54 All 628 (DB) ✠ (Vol 4) 1917 Nag 45 (46) : 14 Nag L R 101.

[2] The second part of the section is designed to prevent an outsider from enforcing his way into a dwelling house in which other members of the transferor's family have a right to live. (Vol 27) 1940 Rang 53 (54, 55).

2 "Right to joint possesion or other common or part enjoyment."—[1] Every joint or co-owner of property has a proprietary right in the whole estate. (Vol 11) 1924 Cal 792 (793) (D B) ✠ (Vol 4) 1917 Nag 45 (46) : 14 Nag L R 101 ✠ ('11) 7 Nag L R 82 (84) ✠ (Vol 21) 1934 Lah 1 (3) ✠ (Vol 23) 1936 Mad 666 (667) ✠ (Vol 17) 1930 Sind 34 (36) : 24 Sind L R 208 (D B).

[2] The propristary right of a co-owner in the whole estate operates only to prevent any co-owner from setting up a claim to any parcel of the common property as his exclusive property, during the period of common ownership. (Vol 11) 1924 P C 144 (146) : 51 Cal 631 : 51 Ind App 293 (PC).

[3] A co-owner or his transferee, if ousted from joint possession is entitled to enforce his right to joint possession by a suit, and is not necessarily forced to sue for partition. ('95) 20 Bom 467 (468, 469) (D B) ✠ (Vol 14) 1927 Cal 936 (937) (D B). (('97) 26 Cal 553, *Foll.*) ✠ (Vol 2) 1915 Cal 264 (264) (D B) ✠ (Vol 19) 1932 All 81 (81) ✠ ('96) 18 All 361 (363).

[4] Where the co-owners have been enjoying the common property in separate plots for the sake of convenience, the Court will not decree to one co-owner joint possession of the portion in the actual cultivation of the other, the proper remedy of the former being a suit for partition. ('89) 18 Cal 10 (21) : 17 Ind App 110 (P C) ✠ (Vol 11) 1924 P C 144 (146) : 51 Cal 631 : 51 Ind App 293 (PC).

Section 44 — Note 2 *(contd.)*

[5] Usufructuary mortgage by one co-owner—He is not in possession and till mortgage is redeemed he has no present right to possession. (Vol 31) 1944 Pat 341 (342, 343) (DB).

3. Right to enforce a partition—General.—[1] In all cases of joint ownership, each party has a right to demand and enforce partition. ('69) 3 Beng L R (App) 120 (121) (DB) ✠ ('06) 28 All 627 (629) (DB) ✠ (Vol 2) 1915 Lah 416 (417) : 1915 Pun Re No 87 (DB).

[2] Under the section not only the transferee of a share, but also a transferee of any interest therein can sue for partition. (Vol 27) 1940 Mad 491 (492).

[3] To entitle a person to claim partition the parties need not have identical interests ('10) 37 Cal 918 (927) : 37 Ind App 198 (PC) ✠ ('97) 24 Cal 575 (583) (F B). (20 Cal 379, *Overruled.*)

[4] A subordinate tenure-holder under a co-owner is as much entitled to claim partition against the proprietors as purchaser from a co-owner. ('05) 1 Cal L Jour 40 (42) (DB). (Kaemi Mourasi Mirasdars.)

[5] A lessee for a term of years is held entitled to claim partition. ('03) 27 Mad 361 (366) (DB) ✠ (Vol 3) 1916 Pat 259 (261) : 1 Pat L Jour 441 (DB) ✠ (1852) 51 E R 733 (735), *Heaton* v. *Dearden.*

[6] Mortgagee entitled to possession can claim partition. (Vol 20) 1933 Bom 121 (122) (DB).

[7] A life tenant is entitled to claim partition. ('09) 9 Cal L Jour 428 (428) (DB).

[8] A mortgagee who is not entitled to possession is not entitled to sue for partition. (Vol 27) 1940 Mad 491 (492).

[9] A claim to partition will ordinarily be refused on the ground of inconvenience, where the plaintiff owns an interest of a temporary, precarious or qualified character, but will be generally allowed where the parties have permanent titles. ('97) 24 Cal 575 (582, 583) (F B).

[10] In the following case a monthly tenant was held entitled to partition. (Vol 16) 1929 Cal 710 (713) : 57 Cal 715 (DB)

[11] If the plaintiff in a suit for partition is not in joint possession, either actual or constructive, but is entitled to joint possession he must frame the suit as one for joint posssession and partition. (Vol 15) 1928 Rang 73 (76, 77) : 5 Rang 785 ✠ (Vol 5) 1918 Cal 393 (394) (DB) ✠ (Vol 10) 1923 Pat 162 (163) (D B) ✠ (Vol 24) 1937 Pat 525 (526) (DB). ((Vol 23) 1936 Pat 422, *Reversed*).

[12] The right to partition cannot be denied on the ground that the title on which it is based is liable to forfeiture in the events which have not occurred. ('10) 37 Cal 918 (927) : 37 Ind App 198 (PC).

[13] A partition effected at the instance of a person having a temporary interest, lasts only till the expiry of that interest. ('03) 27 Mad 361 (366) (DB).

4. "Subject to the conditions and liabilities."—[1] A mortgagee from a co-owner of his share in one or several items of property belonging to the co-owners will take it only subject to the right of the other co-owners to enforce a partition. If in such partition, the mortgaged property is allotted to another co-owner, the latter takes the property free of the mortgage and the mortgagee can proceed only against the substituted properties in the hands of the mortgagor. ('98) 23 Bom 385 (392, 393) (DB) ✠ ('93-1900) 1893-1900 Low Bur Rul 189 (190) ✠ (Vol 3) 1916 Mad 323 (324, 325) : 39 Mad 283 (DB)✠(Vol 6) 1919 Oudh 329 (330, 331)✠(Vol 1) 1914 Oudh 426 (429) ✠ ('95) 18 Mad 316 (318, 319)✠ (Vol 20) 1933 Lah 682 (685) (DB)✠(1900) 1900 Pun Re No. 32, p. 112 (115) (DB)✠('07) 6 Cal L Jour 46 (49, 50) (DB) ✠ ('93) 20 Cal 533 (536) (DB) ✠ ('02) 24 All 483 (486) (DB).

[2] The purchaser of the undivided interest of a Hindu coparcener of a joint Hindu family takes it subject to the liability of the coparcener of paying his father's debts and to all the equities available to the others members of the family. (Vol 14) 1927 Mad 471 (472, 473):50 Mad 535 (FB)✠('74) 11 Bom HCR 76 (82).

[3] The transferee cannot be saddled with new conditions or liabilities not existing at the date of the transfer. (Vol 12) 1925 Nag 68 (71) ✠ ('81) 5 Bom 496 (498).

[4] The purchaser of the undivided interest of a member of a joint Hindu family is entitled to have his share ascertained with reference to the state of the joint family property at the date of the transfer and is not affected by the subsequent birth of other coparceners. ('12) 35 Mad 47 (51, 52, 55, 61) (FB) ✠ (Vol 3) 1916 Bom 130 (131, 132):41 Bom 347 (DB) ✠ (Vol 23) 1936 Nag 34 (37) : 31 Nag L R (Supp.) 124 (DB).

[But see (Vol 20) 1933 Mad 158 (162) : 56 Mad 534 (DB) ✠ ('96) 21 Bom 797 (806) (DB).]

5. Second paragraph — General.—[1] Where a share in a dwelling house belonging to an undivided family has been transferred to a stranger, the transferee can enforce his rights with regard to such share only by a suit for partition. (Vol 3) 1916 Cal 170 (172) (DB) ✠ ('08) 30 All 324 (327) (FB).

[2] The right of a stranger transferee to have the house partitioned is subject to S. 4, Partition Act (IV of 1893). Under that section a stranger transferee claiming partition by metes and bounds may be compelled at the option of the other members of the family, to forego his legal right to such partition and to accept pecuniary compensation in lieu thereof. (Vol 4) 1917 All. 2 (3) : 39 All 672 (DB).

6. "Dwelling-house."—[1] The word "house" embraces not merely the actual structure or building, but includes also adjacent buildings, cartilage, garden, courtyard, orchard and all that is necessary for the convenient use and occupation of the house, but not that which is only for the personal use and convenience of a particular occupier. ('10) 12 Cal L Jour 525 (535) (DB) ✠ (Vol 15) 1928 Cal 539 (542) ✠ (Vol 25) 1938 Pat 13 (14) ✠ (Vol 28) 1941 Pat 4 (5).

[2] A hut which was capable of being used as a dwelling-house but was not so used for a number of years was held not to be a dwelling-house. (Vol 22) 1935 All 894 (894, 895).

[3] The family which owns the house need not itself actually or constantly occupy it. ('10) 7 Ind Cas 436 (440, 441) (DB) (Cal)✠('06) 9 Oudh Cas 156 (158, 159) ✠ (Vol 21) 1934 Cal 202 (203, 204) (DB)✠(Vol 22) 1935 Mad 628 (634).

7. "Undivided family."—[1] A "family" is not restricted to a body of persons who can trace their descent from a common ancestor, but includes a group of persons who live in one house under one head or management ('10) 12 Cal L Jour 525 (532, 533) (DB) ✠ (Vol 21) 1934 Cal 202 (203, 204) (DB).

[2] Undivided family must be taken to mean undivided qua the dwelling house in question and to be a family which owns the house but has not divided it. ('06) 9 Oudh Cas 156 (158)✠('08) 30 All 324 (328) (FB). (9 Oudh Cas 156, *Approved*)✠('10) 12 Cal L Jour 525 (533) (DB)✠('26) 97 Ind Cas 416 (416) (All) ✠ (Vol 15) 1928 Cal 539 (542) ✠ (Vol 2) 1915 Sind 17 (17):9 Sind L R 84 ✠ (Vol 28) 1941 Pat 4 (5).

[3] A family which has divided other property belonging to it, but which keeps the dwelling-house undivided, will be an "undivided family" for the purposes of this section. (Vol 17) 1930 Mad 561 (562):53 Mad 417.

[4] An "undivided family" includes all families who have not divided their dwelling-house, whether Hindus Muhammadans or Christians. ('08) 30 All 324 (327,

Joint transfer for consideration.

45. Where immoveable property is transferred for consideration to two or more persons and such consideration is paid out of a fund belonging to them in common, they are, in the absence of a contract to the contrary, respectively entitled to interests in such property identical, as nearly as may be, with the interests to which they were respectively entitled in the fund; and, where such consideration is paid out of separate funds belonging to them respectively, they are, in the absence of a contract to the contrary, respectively entitled to interests in such property in proportion to the shares of the consideration which they respectively advanced.

In the absence of evidence as to the interests in the fund to which they were respectively entitled, or as to the shares which they respectively advanced, such persons shall be presumed to be equally interested in the property.

Section 44 — Note 7 *(contd.)*

328) (FB). (29 All 308, *Overruled.*) ✠ (Vol 23) 1936 Lah 291 (292) ✠ ('06) 9 Oudh Cas 156 (158) ✠ (Vol 21) 1934 Cal 202 (204) (DB) ✠ (Vol 27) 1940 Rang 53 (54).

[5] A dwelling-house belonged to four brothers *A*, *B*, *C* and *D*, members of a Hindu family. In 1874 the shares of *A* and *B* were sold in execution of decrees against them. In 1877 the remaining shares were also sold and the house became the property of the plaintiff and one *K*. The plaintiff sued *K* for partition and obtained a decree. Pending execution, *K* conveyed his share back to *A* and *B*. The brothers had continued to occupy the house notwithstanding the changes in the ownership. *A* applied under S. 4 of the Partition Act, 1893, to be allowed to buy the plaintiff's share. It was held that after 1877 the house no longer belonged to the undivided family. The subsequent purchase of *K*'s interest by *A* and *B* did not entitle them to the benefit of S. 4 of that Act. ('98) 23 Bom 73 (76) (DB).

Section 45 — Note 1

[1] This section does not apply to gifts or bequests. ('11) 34 Mad 80 (81) (DB).

[2] *A* and *B* jointly purchased a property from *C*. *A* paid the whole consideration to *C*, but debited in his account books half the amount against *B*. *B* did not pay this amount to *A* but claimed half the property. It was held that *B* was entitled to half the property, but that the Court should pass a decree therefor only on condition of *B*'s paying up the amount. ('12) 15 Ind Cas 173 (173) (All).

[3] Whether there is a "contract to the contrary" is to be gathered from the words used by the parties, their conduct and the surrounding circumstances. Evidence of such conduct or circumstances is admissible to prove such contract. (Vol 29) 1942 Oudh 327 (329) : 18 Luck 92 (DB).

[4] *X* mortgaged his property to *A* and *B* each of whom advanced half the mortgage amount. *A* subsequently sued *X* and *B* for the recovery of half the mortgage-money from out of the whole of the mortgaged property. It was held that the defendants could not claim that *A* should proceed only against half the mortgaged property. (1900) 3 Oudh Cas 8 (12) (DB).

[But see (Vol 13) 1926 All 676 (677) (DB).]

[5] Where *A* and *B* purchased a property and *X* sued *A* for pre-emption of half the property and relied merely upon the presumption referred to in the last paragraph of the section in proof of the fact that *A* was entitled to half the property, it was held that the last paragraph of the section did not apply until there was an absence of evidence as to the interest of *A* and *B* in the fund advanced for the transfer, that *X* could have adduced evidence as to that matter but did not, and that therefore the presumption could not be drawn in his favour. (Vol 12) 1925 Oudh 369 (370).

[6] *A* and *B* together purchased a property. *X* sued them both for pre-emption of the whole property. *A* claimed that he was a cosharer and had a preferential right over *X* in respect of half the property. It was held that since he should and could have produced evidence as to his right and did not, no presumption in the last paragraph could be raised in his favour, and that *X* was therefore entitled to pre-empt the whole property. (Vol 15) 1928 Oudh 334 (335) : 3 Luck 674 (DB).

[7] Mortgage in favour of two persons — Presumption is that they advanced in equal shares. (Vol 17) 1930 All 98 (98) (DB).

[7-a] Two persons purchasing property — Their shares not specified in sale deed — They must be presumed to have purchased in equal shares. (Vol 33) 1946 Lah 399 (404) (FB).

[8] It has been held that the section is applicable to involuntary transfers. (Vol 28) 1941 Cal 416 (416).

[9] In the case of Parsees and Native Christians it has been held that a conveyance to two or more persons without words specifying their shares constitutes them joint tenants. ('99) 23 Bom 80 (98) (DB). (Parsees.) ✠ ('11) 34 Mad 80 (81) (DB). (Native Christians.)

[10] The principle of joint tenancy is unknown to the Hindu law, except in the case of coparcenary between the members of an undivided family. ('96) 23 Cal 676 (679) : 23 Ind App 37 (PC).

[11] A gift to two or more persons governed by the Hindu law will *prima facie* make them only tenants-in-common as regards such property. (Vol 8) 1921 All 50 (51) : 43 All 600 (DB) ✠ ('11) 33 All 41 (44) ✠ ('09) 1909 Pun Re No. 39, p. 126 (132) (DB) ✠ (Vol 14) 1927 Lah 126 (127) : 8 Lah 219 (DB) ✠ (Vol 7) 1920 Pat 275 (276).

[12] Gift to members of Hindu coparcenary — They *prima facie* take as tenants-in-common. (Vol 29) 1942 Sind 145 (153): I L R (1942) Kar 392 ✠ (Vol 13) 1926 Lah 677 (678) ✠ ('01) 26 Bom 415 (448) (DB) ✠ ('11) 33 All 665 (676).

[13] The following cases hold that if the gift is made to persons who are Hindus but who are incapable of forming a joint Hindu family, they will be presumed to take only as tenants-in-common. If on the contrary the gift is to persons who constitute such a family and if the donees would, but for the gift or will, have succeeded to the donor according to the law of intestate succession then the presumption is that they take as joint tenants. But not in other cases. ('05) 28 Mad 363 (373) (DB) ✠ (Vol 4) 1917 Mad 336 (339) (DB) ✠ (Vol 26) 1939 Mad 479 (480) ✠ ('02) 27 Mad 498 (503) (DB) ✠ (Vol 13) 1926 Mad 273 (278) : 49 Mad 98 (DB) ✠ (Vol 12) 1925 Mad 645 (653) ✠ (Vol 21) 1934 Mad 16 (21) (DB).

[14] A grant by the Government to two brothers who constitute a joint Hindu family *prima facie* constitutes them only tenants-in-common in the absence of any intention to the contrary expressed in the deed of grant. (Vol 20) 1933 P C 72 (75) : 60 Ind App 95 : 8 Luck 121 (PC).

46. Where immoveable property is transferred for consideration by persons having distinct interests therein, the transferors are, in the absence of a contract to the contrary, entitled to share in the consideration equally, where their interests in the property were of equal value, and, where such interests were of unequal value, proportionately to the value of their respective interests.

Transfer for consideration by persons having distinct interests.

Illustrations.

(a) *A*, owning a moiety, and *B* and *C* each a quarter share, of mauza Sultanpur, exchange an eighth share of that mauza for a quarter share of mauza Lalpura. There being no agreement to the contrary, *A* is entitled to an eighth share in Lalpura, and *B* and *C* each to a sixteenth share in that mauza.

(b) *A*, being entitled to a life-interest in mauza Atrali and *B* and *C* to the reversion, sell the mauza for Rs. 1,000. *A*'s life-interest is ascertained to be worth Rs. 600, the reversion Rs. 400. *A* is entitled to receive Rs. 600 out of the purchase money, *B* and *C* to receive Rs. 400.

47. Where several co-owners of immoveable property transfer a share therein without specifying that the transfer is to take effect on any particular share or shares of the transferors, the transfer, as among such transferors, takes effect on such shares equally where the shares were equal, and, where they were unequal, proportionately to the extent of such shares.

Transfer by co-owners of share in common property.

Illustration.

A, the owner of an eight-anna share, and *B* and *C*, each the owner of a four-anna share, in mauza Sultanpur, transfer a two-anna share in the mauza, to *D*, without specifying from which of their several shares the transfer is made. To give effect to the transfer one-anna share is taken from the share of *A*, and half an anna share from each of the shares of *B* and *C*.

48. Where a person purports to create by transfer at different times rights in or over the same immoveable property, and such rights cannot all exist or be exercised to their full extent together, each later created right shall, in the absence of a special contract or reservation binding the earlier transferees, be subject to the rights previously created.

Priority of rights created by transfer.

Section 45 — Note 1 *(contd.)*

[15] A gift to two or more persons governed by the Muhammadan law *prima facie* makes them only tenants-in-common and not joint tenants as regards the property gifted. (Vol 25) 1938 Mad 677 (681) (DB).

Section 46 — Note 1

[1] Sale of leased property — Interests of lessor and lessee in property are distinct interests—Purchase money can be apportioned between themselves. (1876) 2 Ch D 540 (546) : 24 W R (Eng) 636, *Morris* v. *Debenham*.

[2] *A* and *B*, owners in equal shares of certain property mortgaged it to *C* for a sum which was to be retained by *C* for the purpose of paying a prior mortgage which had already been executed by them to *D* —*C* failed to pay the prior mortgage as undertaken by him and the prior mortgagee sued for and recovered from *A* the amount due to him— *A* then sued *B* for contribution claiming half the amount so recovered from him—*B* objected to it on the ground that most of the consideration received under the prior mortgage had been received by *A* himself, and that therefore he could not recover half the amount recovered from him by the mortgagee — *Held* that this contention was not correct—*A* and *B* being equal sharers in the property mortgaged to *C*, each was entitled to half the consideration for that mortgage. (Vol 24) 1937 Oudh 138 (140) (DB).

[3] Where a tenant for life and the trustees under a settlement of the reversion in fee joined in executing a transfer, it was held that the transferee was entitled to see that a proper apportionment was made, in order to safeguard his interests against claims by the beneficiaries on the ground that the act of the trustee was not beneficial to their interests. (1834) 58 E R 762 (766). *Clark* v. *Seymour* (1876) 46 L J Ch 133 (136) : 25 W R (Eng) 301, *In re Cooper & Allen's Contract*.

Section 47 — Note 1

[1] *A* who had an absolute estate in 8 annas of certain property and *B* who had a life-interest in the other 8 annas thereof transferred an eight annas share in the common property to *D*. From the circumstances that *A* and *B* had not the same kind of estate in their respective shares in the property, and from a construction of the document of transfer it was held that *A* and *B* each purported to transfer only 4 annas out of his own share to *D* and that therefore *D* could get only a 4 annas share out of the share of *A* and a 4 annas share out of the life-interest of *B* which would come to an end at the death of *B*. (Vol 24) 1937 Sind 62 (65, 66).

SECTION 48 — SYNOPSIS

1. "A person."
2. "To create by transfer."
3. "At different times."
4. "Same immovable property."
5. "And such rights .... together."
6. "In the absence of a special contract etc."
7. Priority between registered instruments.
8. Priority between registered and unregistered instruments.
9. Priority between registered instruments of transfer and oral transfers.
10. Salvage liens.
11. Priority of mortgage-rights created by receivers.
12. Owelty-liens.
13. Crown-debts.
14. Charges created by manager appointed under the Bengal Tenancy Act.
15. Priority by estoppel.
16. Law in the Punjab.

1. "A person." — [1] For applicability of section the rights must have been created by the same person. (Vol 9) 1922 Mad 249 (259) (DB).

2. "To create by transfer." — [1] The creation of a charge is not a transfer within the section. (Vol 24) 1937 Lah 35 (37) : 17 Lah 659.

[2] Agreement to mortgage in favour of *A* — Subsequent mortgage to *B* — Suit by *A* against mortgagor

Section 48 — Note 2 *(contd.)*

for specific performance of agreement — *A* cannot be given priority over *B*'s mortgage under this section — An agreement to mortgage is not generally capable of specific performance. (Vol 25) 1938 Bom 357 (358) (DB).

[3] Agreement to sell to *A* — Subsequent sale of same land to *B* under registered conveyance - *B* having bought with notice of *A*'s contract, the contract should be given effect to. ('02) 26 Bom 159 (162) (DB).

[4] Prior agreement to sell has priority in law over later agreement to sell if there is knowledge of it. (Vol 26) 1939 All 817 (818) (DB).

[5] Agreement for sale — Subsequent registered mortgage to third party — Execution of sale deed subsequent to mortgage—*Held* actual conveyance entitled purchaser to priority over mortgagee, unless he was *bona fide* transferee for value. ('12) 15 Ind Cas 457 (457) (DB) (Mad).

3. "At different times." — [1] When two instruments are executed on the same day, that which is executed first takes priority, and evidence may be let in to show which was in fact executed first. ('07) 6 Cal L Jour 74 (82) (DB).

[2] Two transfers of same property executed on same day — Which of them executed first not known — Transferees take as joint tenants or tenants-in-common. ('07) 6 Cal L Jour 74 (82) (DB) ✠ (Vol 8) 1921 Mad 693 (694) (DB).

4 "Same immoveable property." — [1] The section will not apply where rights by transfer are created in or over different immovable properties. (Vol 25) 1938 Mad 547 (550).

5 "And such rights ..... together." — [1] Where the rights created can all exist or be exercised to their full extent together without conflicting with one another the question of priority becomes immaterial. ('85) 7 All 568 (572, 574) DB).

[2] Separate rights in favour of different persons — Exercise of rights without encroaching upon each other — Creation of rights in favour of different entities can be presumed. (Vol 6) 1919 Oudh 114 (115) : 21 Oudh Cas 317.

[3] *S* mortgaged certain specified plots of land to *A* out of one anna three pies share owned by him Subsequently, *S* mortgaged half of the one anna three pies share to one *B* without specifying any plots of land: *Held* that *B* was entitled to have partition of the share mortgaged to him to have such share assigned to him free of any incumbrance and to have the previously mortgaged plots of land assigned to the other half share. (Vol 10) 1923 Oudh 42 (43)

[4] A simple mortgage and a lease are not necessarily inconsistent and can co exist unless the lease has the effect of impairing the rights of the mortgagee or hampering his remedy. (Vol 6) 1919 Oudh 241 (244) : 21 Oudh Cas 360 (DB).

[5] Two usufructuary mortgages of same property — Later mortgage must give way to incidents of the earlier — Earlier mortgagee is entitled to possession. ('86) 8 All 409 (418) (DB) ✠ ('95) 22 Cal 33 (38) (DB) ✠ ('12) 14 Ind Cas 735 (736) (Oudh) ✠ (Vol 23) 1936 Lah 153 (155) (DB).

6 "In the absence of a special contract etc "— [1] Where after executing a transfer deed the transferor executes ano her document of transfer of same property in the period intervening between the date of execution of the prior document and the time provided for its taking effect, the first transferee though his document is executed earlier will lose his priority. (Vol 9) 1922 Pat 299 (301) : 1 Pat 281 (DB) ✠ ('12) 15 Cal L Jour 61 (67) (DB).

[2] *A* who sold property *X* to *B*, also executed to *B* a mortgage bond of property *Y* by way of indemnity against any loss that may be caused to *B* in respect of property *X*: *Held* that the mortgage had priority over subsequent mortgages executed by *A* on property *Y*, even though the consequence attached to the property under the indemnity bond might come into existence after the date of the subsequent mortgages. (Vol 7) 1920 Mad 650 (651) (DB).

[See however (Vol 17) 1930 Oudh 129 (131) (DB).]

[3] Mortgage to *A*, the deed being written on a plain paper with one anna receipt stamp—Presentation of the original deed by *A* and due registration — Mortgagor transferring the property to others subsequently: *Held*, from *A*'s deed it was clear that legally the mortgage therein began to operate from the date of the document. ('04) 29 Bom 46 (50 51) (DB).

[4] A mortgage was duly executed on 19th January, but registered on 23rd, the date of the deed having been altered by the mortgagor from 19th to 23rd— Another mortgage of the same property was executed and registered on 22nd: *Held*, first mortgage should have priority over the second. ('12) 13 Ind Cas 653 (655, 656) (DB) (Cal).

7. Priority between registered instruments. — [1] Two registered documents of transfer of same property—Priority of one over the other must be determined with reference to the time of its execution and not to the date of its registration. (Vol 33) 1946 Mad 140 (141) ✠ (Vol 29) 1942 Oudh 172 (173) : 17 Luck 362 ✠ ('04) 29 Bom 42 (44) (DB) ✠ (Vol 18) 1931 Sind 74 (74, 75) (DB) ✠ (Vol 21) 1934 All 70 (71) (DB) ✠ (Vol 6) 1919 Lah 196 (197) ✠ (Vol 5) 1918 Cal 539 (539) (DB) ✠ (Vol 5) 1918 Cal 960 (960) (DB) ✠ (Vol 13) 1926 Mad 39 (41). (Two sale-deeds.) ✠ ('04) 29 Bom 46 (51) (DB) ✠ (Vol 25) 1938 All 431 (432) ✠ (Vol 28) 1941 Pat 247 (248) (DB).

[See however ('78) 2 Bom 299 (343) (DB).]

8 Priority between registered and unregistered instruments.—[1] Under S. 50 (1) a subsequent registered document of which registration is either compulsory or optional has priority over a prior unregistered document of which registration is optional. (Vol 24) 1937 Lah 57 (58) ✠ (Vol 12) 1925 All 325 (326) : 47 All 338 (DB) ✠ (Vol 12) 1925 Oudh 506 (508) ✠ ('12) 34 All 631 (635) (DB) ✠ (Vol 4) 1917 Nag 209 (210) ✠ (Vol 2) 1915 Oudh 124 (124) ✠ ('01) 25 Mad 1 (2) (DB) ✠ ('09) 5 Nag L R 82 (83) ✠ ('84) 10 Cal 82 (85) (DB) ✠ (1900) 28 Cal 139 (141, 142) (DB) ✠ ('96) 20 Bom 158 (164, 165) (DB) ✠ ('96) 22 Bom 213 (215) (DB) ✠ (Vol 26) 1939 Lah 29 (31) : I L R (1939) Lah 261.

[See however ('85) 8 Mad 167 (168) (DB). (But if possession is given under prior deed it will be valid.)]

[2] Where the transferee under the registered instrument has notice of the prior unregistered transfer, he will not have priority over the latter. ('86) 10 Bom 105 (106, 107) (DB) ✠ (Vol 26) 1939 Lah 29 (30) : I L R (1939) Lah 261 ✠ (Vol 20) 1933 Lah 836 (838) (DB) ✠ (Vol 4) 1917 Oudh 161 (162) ✠ (Vol 2) 1915 Upp Bur 16 (17) ✠ ('13) 18 Ind Cas 46 (47) (DB) (Cal) ✠ (Vol 1) 1914 Cal 331 (332) (DB). (If a person is in possession, it is sufficient to put a purchaser on inquiry as to the nature and extent of his interest) ✠ (1900) 1900 Pun Re No. 56 p. 199 (204) (FB). (*Overruling* ('90) 1890 Pun Re No 115 (FB)) ✠ ('07) 17 Mad L Jour 319 (320) (DB) ✠ ('08) 30 All 130 (131, 132) (DB) ✠ ('93) 16 Mad 148 (164) (FB). (*Overruling* ('82) 5 Mad 73 and 139) ✠ (Vol 4) 1917 Nag 209 (210) ✠ (Vol 17) 1930 Rang 188 (190) ✠ ('02) 27 Bom 452 (471-473) (DB).

[3] Where the prior unregistered document is one of which registration is compulsory no question of priority arises. (Vol 15) 1928 Mad 546 (549, 552, 554) (D B) ✠ ('11) 9 Ind Cas 55 (55, 56) (DB) (Mad) ✠ (1890) 1890 Pun

49. Where immoveable property is transferred for consideration, and such property or any part thereof is at the date of the transfer insured against loss or damage by fire, the transferee, in case of such loss or damage, may, in the absence of a contract to the contrary, require any money which the transferor actually receives under the policy, or so much thereof as may be necessary, to be applied in reinstating the property.

Transferee's right under policy.

Section 48 — Note 8 *(contd.)*

Re No. 92, p. 277 (278) ✠ ('85) 1885 Pun Re No. 90, p. 193 (197) (FB). (('85) 1885 Pun Re No. 2, *Dissent.*)

9. Priority between registered instruments of transfer and oral transfers.—[1] An exception to the rule stated in this section is provided by S. 48, Registration Act, 1908. (Vol 21) 1934 Bom 189 (191) (D B). (This section must be read subject to S. 48, Registration Act.)

[2] In provinces where the Transfer of Property Act does not apply oral transfers of immovable property are not invalid and in such cases a registered document will have under S. 48, Registration Act, priority over the oral transfer. (Vol 3) 1916 Lah 291 (291) : 1916 Pun Re No. 30 (DB) ✠ ('13) 6 Low Bur Rul 144 (145)✠ (Vol 16) 1929 Lah 500 (501). (Unless the transferee under the Registered instrument had notice of the oral transfer.) ✠ (Vol 6) 1919 Lah 404 (406) : 1919 Pun Re No 132. (Do.) ✠ ('10) 5 Low Bur Rul 184 (FB). (Do.)

[3] A charge was assumed to be an oral transfer of property and was held postponed to a subsequent registered document, by virtue of the provisions of S. 48, Registration Act. (Vol 21) 1934 Bom 189 (191) (DB).

[4] An oral mortgage by deposit of title deeds if made prior in point of time to a registered mortgage, will be entitled to priority under this section. ('85) 11 Cal 158 (160) ✠ ('07) 33 Cal 410 (422) (DB)✠(Vol 17) 1930 Lah 920 (927) : 11 Lah 564 (DB).

[5] Where the Transfer of Property Act does not apply a mortgage by deposit of title deeds operates as a valid legal mortgage and has the same effect as any other mortgage. (Vol 3) 1916 Lah 39 (42, 43) : 1916 Pun Re No. 31 (DB)✠ (Vol 17) 1930 Lah 920 (927) : 11 Lah 564 (DB).

10. Salvage liens.— [1] An exception to the rule enunciated by this section is that a transfer for the purpose of saving the property from loss or destruction has priority over another transfer though prior in point of date. (Vol 18) 1931 P C 226 (228) : 58 Ind App 341: 59 Cal 463 (P C). ((Vol 17) 1930 Cal 151 : 57 Cal 298, *Reversed.*)

[2] Where two mortgages are executed both for saving the property from destruction the later mortgage in date will have priority over the earlier. ('07) 34 Cal 427 (441) (SB).

[3] In order to claim a salvage lien the person making the payment must have some interest in the property, or some right or duty towards the owner of the property, impelling him to make the expenditure. A mere volunteer cannot generally claim such a lien. ('77) 2 Cal 58 (80) (D B) ✠ ('13) 18 Ind Cas 247 (248) (D B) (Mad) ✠ ('04) 31 Cal 667 (679, 680) (D B).

11. Priority of mortgage rights created by receivers. — [1] Where the Court, with the object of preserving the property, orders the Receiver to raise a loan on the security of the property and expressly directs that the intending mortgagee from the Receiver should have a first charge, the mortgagee is entitled to priority over all other mortgages though of earlier dates. Where the purpose of the loan ordered to be raised on a first charge is not to preserve the property from loss or destruction etc., and this appears on the face of the order, the mortgagee advancing money on the faith of the order, cannot claim precedence over the earlier mortgages on the same property. (Vol 28) 1941 Cal 163 (166) : I.L R (1941) 1 Cal 155 (DB) ✠ ('07) 34 Cal 427 (434, 442) (S B) ✠ (Vol 13) 1926 Pat 94 (97) (D B).

12. Owelty-liens. — [1] If the Court in a suit for partition allots certain property to the mortgagor subject to certain amounts to be paid by him as owelty to other co-sharers the mortgage operates on the property allotted to the mortgagor subject to the owelty-liens of other co-sharers. ('08) 35 Cal 388 (391, 392) (SB).

13. Crown-debts. — [1] In the case of unsecured debts, the Crown as a creditor takes precedence over all other creditors. ('07) 29 All 537 (542, 543) (FB) ✠ ('06) 33 Cal 1040 (1046) ✠ (Vol 5) 1918 Mad 1111 (1115): 40 Mad 767 (D B) ✠ (Vol 13) 1926 Oudh 44 (45) ✠ ('76) 1 Bom 7 (9, 10) (D B).

[2] In the case of secured debts, the Crown has no preference and takes subject to prior incumbrances except where otherwise provided by law. ('07) 29 All 537 (543) (FB). (('78-80) 2 All 196, *Overruled.*) ✠ (Vol 21) 1934 Rang 321 (323) : 12 Rang 437 (DB)✠(Vol 6) 1919 Cal 908 (911, 912) : 45 Cal 853.

14. Charges created by manager appointed under the Bengal Tenancy Act. — [1] After the appointment of the manager under S. 95 of the Bengal Tenancy Act (1885) a co-owner has no power to deal with the whole of the estate. But the co-owner can deal with his own share in the estate. However the person taking from the co-owner takes subject to any charge, on the estate that might be properly incurred by the manager during the period of his management ('03) 31 Cal 305 (312) : 31 Ind App 24 (P C).

15. Priority by estoppel.—If a prior transferee has by misrepresentation induced another person to advance money or to purchase the property under the belief that there is no prior incumbrance, he will be estopped as against such other person from setting up his prior rights. (Vol 5) 1918 Cal 411 (411) (DB)✠(Vol 13) 1926 Mad 39 (40).

16. Law in the Punjab.— [1] The principle of this section that a later created right shall be subject to the rights previously created will apply to cases arising in the Punjab. (Vol 17) 1930 Lah 920 (926, 927) : 11 Lah 564 (D B)✠(Vol 25) 1938 Lah 430 (431) (DB).

Section 49 — Note 1

[1] In the case of an out and out sale where the vendor has entered into a contract to repurchase the property from the vendee, the vendor can recover the insurance amount. (Vol 18) 1931 Rang 210 (211, 212) : 9 Rang 452 (DB).

[2] Where the case is one of outright sale and the vendor retains no sort of interest in the property, he cannot recover from the insurer any money. (Vol 10) 1923 Rang 6 (9) : 11 Low Bur Rul 294 (DB).

[3] The section does not apply where the insurance is effected after the date of the transfer. (Vol 10) 1923 Rang 6 (8) : 11 Low Bur Rul 294 (D B).

[4] The transferee cannot in the absence of assignment of the policy in his favour, claim from the insurer direct, that the insurance amount should be paid to him. (Vol 10) 1923 Rang 6 (7): 11 Low Bur Rul 294 (D B).

50. No person shall be chargeable with any rents or profits of any immoveable property, which he has in good faith paid or delivered to any person of whom he in good faith held such property, notwithstanding it may afterwards appear that the person to whom such payment or delivery was made had no right to receive such rents or profits.

Rent *bona fide* paid to holder under defective title.

Illustration.

A lets a field to *B* at a rent of Rs. 50, and then transfers the field to *C*. *B*, having no notice of the transfer, in good faith pays the rent to *A*. *B* is not chargeable with the rent so paid.

51. When the transferee of immoveable property makes any improvement on the property, believing in good faith that he is absolutely entitled thereto, and he is subsequently evicted therefrom by any person having a

Improvements made by *bona fide* holders under defective titles.

SECTION 50—SYNOPSIS

1. Payment in good faith.
2. Payment in advance by tenant.

1. Payment in good faith. — [1] The expression "good faith" will exclude cases where a person has acted in a grossly negligent manner, sufficient to charge him with notice of the real owner's right. (Vol 26) 1939 Pat 540 (547) (DB).

[2] Lease of property by *A* to *B* — Property mortgaged to *C* — *C* entitled to realize rent— On notice by *C*, *B* paying rent to *C* — Property sold to *D* in execution of decree against *A* — *D* giving notice to *B* that mortgage was satisfied and rent should be paid to him —Without enquiry *B* paying rent to *D* — Mortgage in fact not satisfied — *B*'s payment to *D* held was not in good faith. (Vol 26) 1939 Pat 540 (547) (D B).

[3] *B* holding land from *A*—*A* dying — Executors of *A* entitled to rent from *B* — Without enquiring *B* paying rent to *A*'s widow — *B* held could not claim protection under this section. ('03) 1903 Pun Re No. 72, p. 304 (307).

[4] Rent paid *bona fide* to holder under defective title—Lessee is not liable to pay again to rightful owner. ('09) 33 Bom 96 (103, 104) (D B).

[5] *B* holding land from *A* — *A* dying — Dispute between *C* and *D* as to who should succeed to *A* — *B* aware of dispute paying rent to *D* — *C* really entitled to rent — *B* not protected under section. (Vol 14) 1927 Nag 237 (238).

[6] *A* letting land to *B* and then transferring same to *C*—*B* having notice of transfer paying rent to *A*—*B* is not protected. (1864) 1864 Suth W R (Act X Ruling) 6 (7) (DB)

[7] Lease of land taken by partners in business—Payment of rent by one partner to lessor even after knowledge of other partner of lessor's defective title—Payment is in bad faith. (Vol 30) 1943 Oudh 105 (106).

[8] Suit for rent—Tenant accustomed to pay rent to plaintiff's co-sharers—*Held* plaintiff's suit for share of his rent was not maintainable ('78)4 Cal 350(354)(DB).

[9] Receiver in insolvency leasing property—Lessee paying rent to receiver is protected. (Vol 19) 1932 Mad 95 (96): 55 Mad 316 (DB).

[10] Payments made by tenant to mortgagor after mortgage are valid against mortgagee only if at time of payment there was no notice of mortgage. (Vol 12) 1925 Cal 251 (253).

[11] Suit by co-sharer for arrears of rent — Rent paid by tenant to lambardar but not in his capacity as such—Payment held was *bona fide*. ('88) 1888 All W N 45 (45).

[12] The test of the *bona fides* of tenant when he pays rent to a particular person is whether he has paid rent to him before or not. If he has paid rent to a particular person to whom he has been paying rent hitherto, his good faith will be established. (Vol 16) 1929 Oudh 378 (380).

[13] Notice to tenant by co-sharer not to pay entire rent to other co-sharer—Tenant doing so in collusion with latter—Suit by former for his share of rent is maintainable. ('11) 33 All 308 (311)(DB) ✠(Vol 3) 1916 Mad 203 (208, 209) (DB) ✠('74) 23 Suth W R 53 (54).

[14] Payment to intervenor is not good if landlord is proved to be in receipt and enjoyment of rent prior to period in suit for rent. (Vol 5) 1918 Oudh 166 (167).

[15] Lessee paying rent to lessor without notice of transfer is protected. ('71) 15 Suth W R 508 (510) (DB) ✠(1862-64) 1862-64 Suth W R 30 (31) (F B).

2. Payment in advance by tenant —[1] A payment by the lessee in advance to the lessor is a mere loan to the lessor and is not payment of rent. (Vol 21) 1934 Pat 653 (657, 658) : 13 Pat 396 (D B) ✠(Vol 15) 1928 Sind 95 (96) ✠('08) 30 All 82 (84) (D B) ✠(Vol 18) 1926 Cal 204 (209) (DB) ✠('01) 14 C P L R 65 (66) ✠(Vol 9) 1922 Pat 339 (340) (D B) ✠(Vol 18) 1931 Rang 292 (293): 9 Rang 470.

[2] An advance by tenant will *pro tanto* operate as payment of rent as and when the rent falls due. (Vol 21) 1934 Pat 653 (658): 13 Pat 396 (D B).

[3] A payment in advance before the date of the transfer is not binding on the transferee to the extent of the rent accruing due after notice to the lessee of the transferee's rights. (Vol 18) 1931 Rang 292 (293, 294) : 9 Rang 470 ✠(Vol 21) 1934 Pat 653 (658) : 13 Pat 396 (DB).

[4] A payment in advance before the date of the transfer is binding on the transferee unless he is able to show that he is a transferee for value without notice. (Vol 13) 1926 Cal 204 (206, 207) (DB) ✠('08) 30 All 82 (84) (DB).

[5] If the arrangement between the mortgagor and tenant for pre-payment of rent, or for setting off future rent against money due to the tenant from the mortgagor, be made subsequent to the date of the mortgage, such arrangement will be treated as a collateral bargain between those parties and not binding upon the mortgagee. (Vol 13) 1926 Cal 204 (207) (DB).

[6] If before the date on which the rent falls due the landlord makes an assignment, the receipt of rent cannot be treated as a discharge by him, because by assignment before the rent falls due, he has parted with the power of giving such a discharge and payment of rent before it falls due cannot free the tenant from further liability. (Vol 9) 1922 Pat 339 (340) (DB).

[7] Lease by English mortgagor in possession after mortgage—Rent paid in advance—Lessee cannot claim it against mortgagee. (Vol 13) 1926 Bom 567 (570).

SECTION 51 — SYNOPSIS

1. Scope.
2. Muhammadan law.
3. Person claiming benefit under section must be a transferee.
   4. Improvements by cosharers.
   5. Improvements by a purchaser at a court sale.
6. "Improvements."

better title, the transferee has a right to require the person causing the eviction either to have the value of the improvement estimated and paid or secured to the transferee, or to sell his interest in the property to the transferee at the then market-value thereof, irrespective of the value of such improvement.

The amount to be paid or secured in respect of such improvement shall be the estimated value thereof at the time of the eviction.

When, under the circumstances aforesaid, the transferee has planted or sown on the property crops which are growing when he is evicted therefrom, he is entitled to such crops and to free ingress and egress to gather and carry them.

SECTION 51 — SYNOPSIS *(contd.)*

7. "Good faith"
8. "Absolutely entitled" to the property.
9. "Evicted therefrom by any person having a better title."
10. Representatives-in-interest of the transferee, if can claim benefit of section.
11. Modes of compensating the evicted transferee.
12. Value of improvements—How estimated.
13. Profit due to improvement is not included in mesne profits.
14. Right to crops.
15. Acquiescence and this section.

1. Scope. — [1] This section is an exception to the rule enunciated by the maxim *quicquid plantatur solo solo cedit.* (Vol. 15) 1928 Rang. 141 (142) (DB).

[2] The section is based upon the maxim that 'he who seeks equity, must do equity.' (Vol 16) 1929 All 12 (14): 51 All. 454 (DB) ✠ (Vol 27) 1940 Sind 77 (80): ILR (1940) Kar. 241 (DB) ✠ (Vol 24) 1937 Oudh. 75 (77): 12 Luck 133 ✠ (Vol 4) 1917 Oudh. 257 (259).

[3] In order that this section may apply, it is essential that (i) the person claiming relief under this section is a transferee of immovable property (ii) he has made improvements believing in good faith that he was absolutely entitled to the property, and (iii) he is evicted therefrom by a person with better title. (Vol. 16) 1929 Bom. 246 (248) (DB) ✠ (Vol 14) 1927 Nag 370 (373) ✠ (Vol. 13) 1926 Bom. 599 (600) (DB) ✠ (Vol. 25) 1938 Bom. 71 (74, 75) (DB).

[4] Where the section does not, in terms, apply the principle underlying it, being an equitable one, will apply. (Vol. 25) 1939 All. 342 (345).

[5] The principle of the section will also apply to cases arising in provinces to which this Act has not been extended. (Vol. 3) 1916 Lah 379 (380). (The Punjab.) ✠ (Vol. 20) 1933 Lah. 540 (541) (DB) (Do.) ✠ ('22) 70 Ind. Cas. 1 (3) (Pesh.)

[6] Where a transfer by a guardian of a Muhammadan minor is void *ab initio* and the minor subsequently sues for cancellation of the transfer, the Court can under S 41 of the Specific Relief Act award the transferee compensation for any improvements he might have made. (Vol. 13) 1926 Lah. 170 (171): 7 Lah 35 (DB) (Mortgage) ✠ ('30) 31. Pun. L R. 732 (734) (DB). (Sale—*Distinguishing* 1913 Pun. Re. No. 98)

2. Muhammadan law.—[1] The section is directly applicable to the cases of Muhammadan transferees. ('07) 30 Mad 197 (198) (DB)

3. Person claiming benefit under section must be a transferee —[1] It is only a 'transferee' of property that can claim the benefit of this section. (Vol. 2) 1915 Mad 263 (265) (DB)

[2] The word "transferee" is not defined in this Act, but its meaning must be ascertained by reference to the definition of the word "transfer" in S 5 (Vol. 27) 1940 Sind 77 (80). ILR (1940) Kar. 241 (DB).

[3] A legatee under a will is not a 'transferee'. (Vol 19) 1932 Bom. 190 (191) ✠ (Vol. 27) 1940 Sind 77 (78): ILR (1940) Kar. 241 (DB). *(Obiter).*

[4] The word 'transferee' will include a person in whose favour an instrument of transfer has been executed with all the formalities, necessary for its validity though the title conveyed by the instrument is defective, (Vol 27) 1940 Sind 77 (80): I L R (1940) Kar. 241 (DB) ✠ (Vol. 15) 1928 All. 41 (44) (DB).

[5] A person in whose favour an instrument of transfer has been executed by a *de facto* guardian of a minor is a 'transferee' within this section. ('07) 30 Mad. 197 (200) (DB) ✠ (Vol. 14) 1927 Bom. 611 (612): 51 Bom. 1040 (DB)

[6] A person in whose favour an instrument of transfer is executed by the father or manager of a joint Hindu family for no necessity is a transferee. (Vol 15) 1928 All 41 (43) (DB) (Sale.) ✠ (Vol. 16) 1929 All. 854 (855) (DB) (Gift.).

(7) A person in whose favour an instrument is executed but which is invalid for want of registration, is a 'transferee' (Vol 6) 1919 Mad. 1083 (1090): 40 Mad 1143 (F.B) ✠ (Vol. 27) 1940 Sind. 77 (79): ILR (1940) Kar 241 (DB)

[But see (Vol. 27) 1940 Rang. 172 (174).]

[8] A person in whose favour an instrument has been executed but the transaction is merely a colourable one and no title of any kind is intended to pass cannot be said to be a 'transferee'. (1854) 6 Moo. Ind App. 27 (51, 52) (P. C)

[9] Person managing Hindu widow's estate making improvements—Widow transferring property to *A*—*A* evicted by reversioner—*A* cannot claim amount spent by manager on improvements. (Vol. 28) 1941 Mad. 345 (350) (DB).

4. Improvements by cosharers.—[1] Co-sharer making repairs to property which was in ruins and thus making it fit for occupation—He is entitled to compensation. (Vol 12) 1925 All 770 (771, 772): 48 All 34 (D B).

[2] If one joint owner has in good faith effected valuable improvements upon the common property at his own expense, equity will upon a partition, in some way make an allowance to him therefor, in addition to his rateable share of the property. ('10) 12 Cal L Jour 25 (34) (D B).

[3] Improvements made without consent of other cosharers on property which was not to be delivered — No compensation granted. (Vol 10) 1923 Mad 358 (359): 46 Mad 104 (D B).

[4] Improvements by one co-sharer without protest from other co-sharers—Compensation allowed. (Vol 12) 1925 Oudh 45 (45).

5. Improvements by a purchaser at a court sale. — [1] A court auction-purchaser cannot, on the sale in his favour being set aside, claim the benefit of this section and obtain compensation for the improvements effected by him (Vol 18) 1931 All 277 (283): 53 All 334 (F B) ✠ ('13) 36 Mad 194 (197) (D B).

[2] If a man enters upon land as a stranger-purchaser at an execution sale and effects improvements thereon, he is entitled to compensation therefor upon the reversal of the judgment and sale irrespective of any question of good faith on the part of the purchaser.

Section 51 —Note 5 *(contd.)*

Even assuming good faith was essential, the good faith required should not, at any rate, go beyond an honest belief in the purchaser in the validity of his title. ('13) 36 Mad 194 (202) (D B) ✠ (Vol 13) 1926 Nag 160 (161)✠ ('75) 23 Suth W R 393 (394) (D B).

6 "Improvements" — [1] An "improvement" is anything done to the property which results in increasing its value. ('13) 36 Mad 194 (201) (D B).

[2] The repair of a house which is in a dilapidated condition is an improvement (Vol 16) 1929 Lah 825 (825) (D B).

[3] The removing of stones from a waste land or levelling it so as to make it fit for cultivation is an improvement. (Vol 12) 1925 Mad 1226 (1228).

[4] Moneys spent over necessary repairs and upkeep of the property, cannot be recovered as "improvements." (Vol 2) 1915 Mad. 263 (265) (D B) ✠ (Vol 16) 1929 Bom 230 (230) (D B)

[5] Moneys spent over the annual husbandlike operations such as manuring or levelling the land for the purpose of cultivation cannot be recovered as improvements. (Vol 1) 1914 Mad 138 (138) (D B).

7. "Good faith" — [1] It is one of the essential conditions for the applicability of the section that the person claiming compensation for improvements must have believed in "good faith" that he was absolutely entitled to the property. (Vol 19) 1932 All 210 (215) (D B) ✠ (Vol 16) 1929 All 12 (14) : 51 All 454 (D B).

[2] The benefit of S. 51 cannot be extended to the transferee, when there is a distinct finding that his conduct was not *bona fide* (Vol 32) 1945 All 227 (229) : I L R (1945) All 148 (D B).

[3] The expression "good faith" in this section has the same meaning as it has under the General Clauses Act 1897, namely that good faith does not go beyond an honest belief. ('13) 36 Mad 194 (202).

[4] The expression "good faith" is not incompatible with a mistake of law. ('07) 30 Mad. 197 (199) ✠ (Vol 7) 1920 Sind 31 (32, 33) : 14 Sind L R 12 (D B) ✠ (Vol 13) 1926 Mad 609 (613) (D B)

[5] The expression "good faith" is not incompatible with a certain degree of negligence,. (Vol 1) 1914 Mad 107 (107) (D B) ✠ (Vol 13) 1926 Mad 609 (613) (DB) ✠ (Vol 7) 1920 Sind 31 (32) : 14 Sind L R 12 (D B) ✠ (Vol 5) 1918 Oudh 1 (3) ✠ ('06) 2 Nag L R 34 (41) ✠ (Vol 22) 1935 Cal 625 (630) (D B) (Negligence in investigating title) ✠ ('09) 32 Mad 530 (531) (D B) (Do.)

[But see ('09) 3 Ind Cas 415 (417) (Cal) ✠ (Vol 27) 1940 Sind 77 (80) : I L R (1940) Kar 241 (D B) ✠ (Vol 27) 1940 Oudh 266 (269) (D B) (Failure on the part of the vendee to enquire about the right of pre-emption of cosharers) ✠ (Vol 1) 1914 Cal. 137 (141) : 41 Cal. 852 (D B) ✠ ('92) 1892 Bom P J 135 (D B) ✠ (Vol 15) 1928 All 41 (44, 45) (D B).]

[6] The question whether a person believed in good faith that he was absolutely entitled to the property is one of fact to be decided on the facts and circumstances of each case. (Vol 7) 1920 Sind 31 (32) : 14 Sind L R 12 (D B) ✠ (Vol 27) 1940 Oudh 266 (269) (D B) (Vendee failing to assure himself that cosharers would not pre-empt, cannot be said to have acted in good faith.) ✠ (Vol 13) 1926 Mad 609 (613) (D B) (Undisturbed possession for many years may give rise to an inference of good faith.) ✠ (Vol 5) 1918 Oudh 1 (2) (Vendee purchasing property knowing that vendor had only limited interest—Vendee cannot be said to have believed in good faith that he was absolutely entitled to it.) ✠ (Vol 15) 1928 All 41 (44) (D B) ✠ ('38) 1938 Oudh W N 281 (283) (Vendee taking a sale-deed of property from majority of cosharers — Sale pre-empted by a cosharer who was at the time of sale living abroad—Vendee was held to believe in good faith that he was absolutely entitled) ✠ (Vol 27) 1940 Sind 77 (79) : I L R (1940) Kar 241 (D B) ✠ ('07) 30 Mad 197 (199) (D B)✠(Vol 15) 1928 Mad 349 (354) (D B).

[7] The mere fact that a person has spent money on improvements does not by itself give rise to an inference of good faith (Vol 15) 1928 All 381 (385) (D B). (Improvements by mortgagee by conditional sale.)

[8] Where a person knows that he has no title to the property it cannot possibly be said that he believed honestly that he was absolutely entitled to the property. (Vol 13) 1926 Mad 921 (924) (DB) ✠ (Vol 11) 1924 Nag 142 (145)✠ (Vol 4) 1917 Oudh 257 (259).

[9] Where a person takes with notice of the defective title of the transferor, there is want of good faith. ('71) 16 Suth W R 169 (171) (DB) ✠ ('10) 12 Cal L Jour 391 (399) (DB) ✠ (72) 1872 Pun Re No. 7, p. 11 (12).

[10] Where a person purchased property with notice of a prior contract to sell and omitted to make any enquiry as to it, he could not be considered to have had on honest belief that he was absolutely entitled to the property. (Vol 1) 1914 Cal 137 (139) : 41 Cal 852 (D B).

[11] Where, apart from there being no evidence as to the kind of structures created, it is not possible to hold that the plaintiffs in good faith believed that they were absolutely entitled to the land, there is no scope for the application of S. 51. (Vol 34) 1947 Bom 241 (247) (DB).

[12] The omission to make an enquiry, which a prudent person would have made may however be a piece of evidence showing bad faith. (1874) L R 7 H L 135 (157), *Agra Bank* v. *Barry*.

8. "Absolutely entitled" to the property.— [1] The expression "absolutely entitled" means "full proprietorship" with heritable and absolutely transferable rights, as opposed for example to a life estate or a rent-free grant liable to presumption. (Vol 18) 1931 All 277 (287) : 53 All 334 (FB).

[2] So long as a transfer is subject to payment of rent or to any other condition, the transferee cannot be said to believe that he is "absolutely entitled" to the property. (Vol 24) 1937 Oudh 446 (447) : 13 Luck 450 (DB).

[3] The section cannot apply to cases of improvements by lessees, even if they are permanent tenure holders (Vol 26) 1939 Mad 247 (249) ✠ (Vol 24) 1937 Oudh 446 (447) : 13 Luck 450 (DB) ✠ (Vol 27) 1940 Rang 172 (174)✠ ('10) 37 Mad 1 (12) ✠ (1900) 27 Cal 570 (586) (DB) ✠ ('02) 29 Cal 871 (884) (DB) ✠ (Vol 12) 1925 All 261 (262) : 47 All 430 (Reversing on Letters Patent appeal the decision in (Vol 12) 1925 All 190) ✠ ('98) 22 Bom 1 (16) ✠ (Vol 6) 1919 Nag 144 (147) ✠ (Vol 5) 1918 Nag 210 (213)✠ (Vol 29) 1942 Oudh 231 (237) (DB).

[See however (Vol 22) 1935 Cal 625 (630) (D B). (Principle of section applied — Decision on facts.)✠(Vol 14) 1927 Mad 1023 (1024). (Lease of minor's property granted by his mother for particular purpose— Lessee spending money for that purpose—Minor suing through next friend for avoiding the lease — Lessee must be reimbursed)✠ (Vol 34) 1947 Mad 282 (285) (DB).

[4] Section has no application to cases of improvements made by mortgagees in possession. (Vol 15) 1928 All 381 (383) (DB)✠ (Vol 24) 1937 Nag 54 (56) : I L R (1938) Nag 160.

[See however (Vol 5) 1918 Mad 572 (574) (D B). (Form of document and conduct of mortgagor and mortgagee showing that mortgagee believed honestly to be absolute owner — Compensation allowed) ✠ (Vol 7) 1920 Upp Bur 56 (61): 3 Upp Bur Rule 141. (Although there is no recognition of the right to crops recognized in Ss. 51 and 108 (1) in the T. P. Act so far as the redemption of mortgages is concerned, principles under-

Section 51 — Note 8 *(contd.)*

lying those sections applied on equitable grounds to usufructuary mortgage which is of uncertain duration)].

[5] A person believing himself to be a permanent tenure holder is entitled to compensation for improvements effected by him on eviction by the landlord. ('05) 8 Oudh Cas 13 (19, 20) ✠ (Vol 17) 1930 Mad 298 (301) (DB). (Doubted in (Vol 26) 1939 Mad 247.)

[6] This section will not enable a trespasser to claim any compensation for the improvements that might have been effected by him. (Vol 31) 1944 Pat 77 (86) : 22 Pat 513 (DB) ✠ (Vol 24) 1937 Cal 129 (140) : I L R (1937) 1 Cal 203 (DB) ✠ ('37) 1937 Mad W N 533 (535) (D B) ✠ ('37) 18 Lah 350 (367) (DB) ✠ (Vol 27) 1940 Sind 77 (78) : I L R (1940) Kar 241 (DB) ✠ (Vol 11) 1924 Lah 370 (373) (DB).

[7] A transferee from a trespasser cannot claim any compensation for improvements effected by him. ('03) 13 Mad L Jour 214 (216) (DB) ✠ ('01) 28 Cal 142 (144) (DB).

[8] A transferee from a person having no title to the property cannot claim compensation under this section. (1900) 1900 Pun Re. No. 37, p. 135 (139) ✠ (Vol 11) 1924 Nag 210 (211).

[9] A trespasser is liable to be evicted from the land even if he has erected substantial buildings upon it. A trespasser, or even the Court cannot compel the real owner to accept compensation for his land instead of the land itself. The real owner is entitled to stand upon his strict rights and to claim possession of the land. (Vol 1) 1914 All 89 (90) ✠ ('92) 17 Bom 771 (772) (DB) ✠ (Vol 14) 1927 Lah 534 (535) ✠ ('28) 108 Ind Cas 618 (618) (Lah).

[10] It is usual in India to allow the trespasser to remove his material from the land, and to reserve in the decree leave to the trespasser to remove his material within a time to be fixed by the Court, failing which the real owner is to take possession of the land with or without the buildings which he may pull down at his will (Vol 31) 1944 Pat 77 (86): 22 Pat 513 (DB) ✠ (Vol 14) 1927 Nag 400 (401) ✠ (Vol 14) 1927 Nag 348 (349) ✠ ('29) 114 Ind Cas 696 (696) (DB) (Lah) ✠ (Vol 13) 1926 Lah 694 (695) (DB) ✠ (Vol 1) 1914 All 89 (90, 91).

[11] *A* purchased a house from a person who had no title to it, pulled it down, and built a new house in its place, but utilised some of the old material for the new construction. The real owner sued him for possession. It was held that since the old materials could not be separated from the new materials without destroying the house itself, the trespasser was not entitled to remove the new materials. ('12) 10 All L Jour 118 (120).

[12] This section will not apply at all to the transferees from a limited owner. (Vol 9) 1922 All 194 (195): 44 All 665 (DB) ✠ (Vol 1) 1914 All 227 (229) : 36 All 387 (D B) ✠ (Vol 12) 1925 All 261 (262) : 47 All 430 (DB) ✠ (Vol 13) 1926 Nag 384 (384).

[But see (Vol 6) 1919 Mad 685 (686) (DB). (Mere fact that transfer is taken from limited owner is not sufficient to conclude that transferee could not have believed that he was absolutely entitled to property.) ✠ (Vol 4) 1917 Bom 155 (158) : 42 Bom 136 (DB). (Gift of almost the whole of husband's immovable property by a Hindu widow for spiritual benefit of her deceased husband — Improvement by the transferee — Gift held invalid—Transferee held entitled to compensation)]

[13] Where a transferee knew that he was taking from a limited owner and also knew that the circumstances did not exist or wilfully abstained from ascertaining whether they existed or not, it cannot be said that he believed in good faith that he was absolutely entitled to the property. ('09) 32 Mad 530 (531) (DB) ✠ (Vol 3) 1916 Mad 413 (415) (D B) ✠ (Vol 5) 1918 Oudh 1 (3) ✠ (Vol 12) 1925 Mad 670 (671) ✠ ('09) 8 Ind Cas 415 (417) (Cal).

[14] Where a Hindu widow transfers property to *X* who makes some improvements during the life of the widow and some improvements after her death, the reversioner who succeeds in evicting *X* is liable to pay only the value of the improvements made after the death of the widow and not before. ('10) 12 Cal L Jour 391 (399) (DB).

[15] Where *A* purchases immovable property over which *B* has a right of pre-emption and *B* sues to enforce his right, *A* can claim the benefit of this section provided good faith is established. (Vol 20) 1933 Lah 540 (541) (DB) ✠ ('38) 1938 Oudh W N 281 (282) ✠ (Vol 13) 1926 Lah 629 (629).

[But see (Vol 15) 1928 Rang 26 (27).]

[16] *A* purchasing property and effecting improvements in anticipation of pre-emption suit—*A* cannot claim relief under this section when pre-emptor sues to enforce his right. (Vol 13) 1926 Lah 629 (629) ✠ (Vol 27) 1940 Oudh 266 (269) ✠ ('07) 1907 Pun Re No. 122, page 594 (598).

[17] A vendee of land which is subject to the right of pre-emption is not necessarily deprived of his right to compensation by the mere fact that he has effected the improvements with the full knowledge of such right. (Vol 27) 1940 Oudh 266 (269) ✠ ('07) 10 Oudh Cas 49 (57) (DB).

9. **"Evicted therefrom by any person having a better title".**—[1] The words "evicted therefrom by any person having a better title" must be construed in their natural sense. (Vol 16) 1929 All 12 (14) : 51 All 454 (DB).

[2] Purchaser of property making improvements thereon — Purchaser sued by prior simple mortgagee—Mortgagee is not person with better title — Purchaser cannot claim compensation. (Vol 18) 1931 All 277 (287): 53 All 334 (FB).

[3] Property sold subject to covenant for reconveyance—Suit for specific performance of covenant—Claim for improvements by vendee—*Held* no case of eviction—Doubted whether S. 51 would apply. (Vol 21) 1934 Mad 703 (705).

[4] The fact that the transferee has made improvements is no answer to a suit for eviction. (Vol 4) 1917 All 179 (180) : 39 All 463 (DB).

[5] Section is not inapplicable merely because the evictor is the transferor himself. (Vol 14) 1927 Bom 611 (612) : 51 Bom 1040 (DB).

10. **Representatives-in-interest of transferee, if can claim benefit of section.**—[1] The transferee's representatives in interest are entitled to claim the benefit of this section. (Vol 3) 1916 Mad 1090 (1092) (DB) ✠ (Vol 16) 1929 Bom 246 (249) (DB) ✠ (Vol 16) 1929 Lah 825 (825) (DB) ✠ ('07) 17 Mad L Jour 622 (625) (DB).

[But see (Vol 21) 1934 Cal 290 (291, 292) : 60 Cal 1388]

[2] Owner transferring property to *A* — *A* effecting improvements in good faith — *A* transferring property to *B*—*B* in possession at time of eviction—*B* held entitled to compensation for improvements effected by *A*. (Vol 9) 1922 P C 91 (93) (PC).

[3] *A*, the owner, transferred property to *B* who again transferred the property to *C*. *C* effected improvements *bona fide* and after his death, was succeeded by *D*, his heir. *D* was evicted by a superior title holder and he claimed compensation for the improvements that had been effected by *C*. *Held* that he was entitled to do so. (Vol 17) 1930 P C 297 (300) : 53 Mad 692 : 57 Ind App 305 (P C). (Confirming (Vol 13) 1926 Mad 609.)

52. During the [a][pendency] in any Court having authority in British India, or established beyond the limits of British India by [b][the Central Government [c][ ]], of [d][any] suit or proceeding [e][which is not collusive and] in which any right to immoveable property is directly and specifically in question, the property cannot

Transfer of property pending suit relating thereto.

Section 51 *(contd.)*

11. Modes of compensating the evicted transferee.—[1] The option of choosing between the two alternative modes of compensation provided by the section rests with the evictor and not with the transferee or the Court. ('05) 2 Nag L R 34 (41) ✠ (Vol 19) 1932 All 210 (215) (DB) ✠ (Vol 13) 1926 Mad 609 (614) (D B) ✠ (Vol 13) 1926 Bom 599 (600) (DB). (Case of a mortgagor redeeming mortgaged property—Option rests with the mortgagor.)

[2] Evictor too poor to pay for improvements — Order of lower Court directing evictor to sell his interest to transferee approved on appeal to High Court. (Vol 15) 1928 All 41 (45) (DB).

12. Value of improvements.— How estimated.— [1] The value of an improvement is the amount by which the market value of the property is increased by reason of the improvement and not the amount actually expended over such improvement. (Vol 17) 1930 P C 297 (300) : 57 Ind App 305 : 53 Mad 692 (PC) ✠ ('13) 40 Cal 555 (564) : 1913 Pun Re No. 77 (PC).

[2] The burden of establishing the present value of the improvement is on the transferee. (Vol 24) 1937 Lah 500 (504) (DB) ✠ (Vol 1) 1914 Mad 138 (138) (DB) ✠ (Vol 2) 1915 Mad 263 (265) (DB).

[3] The value of improvements is a question of fact and hence cannot be raised for the first time or considered in second appeal. (Vol 3) 1916 Lah 379 (379) (DB) ✠ ('11) 34 Mad 535 (542) (DB).

13. Profit due to improvement. — [1] *A*, a transferee from a Hindu widow without legal necessity, effected permanent improvements on the property and sold it to *B*. *C*, a reversioner sued *B* for possession and mesne profits. It was found that the rent of the property had increased by the improvements. It was held that *B* could claim the profits of improvements and such profits could be set off against *C's* claim for the mesne profits (Vol 9) 1922 P C 91 (93) (PC).

14. Right to crops. — [1] Mortgage decree in favour of mortgagee in possession — In execution land sold and purchased by stranger — Crop standing on land at time of sale — Mortgagee held was not entitled to recover value of crop from purchaser. ('90) 13 Mad 15 (16).

[2] *Held* that usufructuary mortgagee, whose duration under the mortgage was uncertain, or his tenant was entitled to all the crops sown or planted by him on the land which were growing thereon at the time of redemption provided that such crops were grown or planted before the person who grew them had notice of the intended redemption. (Vol 7) 1920 Upp Bur 56 (61) : 3 Upp Bur Rul 141.

[3] The person evicted is entitled to take the growing crops on the land at the time of the eviction only "under the circumstances aforesaid"., i. e., only if he had honestly believed that he was absolutely entitled to the property. (Vol 7) 1920 Sind 31 (33) : 14 Sind L R 12 (DB).

[4] The right to the crops and the ancillary right of ingress and egress for gathering and carrying the crops cannot be pleaded as a bar to the eviction itself. ('86) 8 All 502 (508, 509) (DB).

15. Acquiescence and this section. — [1] If a person having a right and seeing another person about to commit, or in the course of committing an act infringing upon that right, stands by in such a manner as really to induce the person who commits the act, and who might otherwise have abstained from it, to believe that he assents to its being committed, he cannot afterwards be heard to complain of the act. This is called the doctrine of acquiescence. (Vol 12) 1925 Oudh 258 (260) : 28 Oudh Cas 114.

[2] Doctrine of acquiescence is another phase of the doctrine of estoppel. (Vol 23) 1936 Cal 711 (713) : ✠ (Vol 12) 1925 Oudh 258 (260) : 28 Oudh Cas 114.

[3] This section has no reference to the conduct of the owner of the property at all. (Vol 7) 1920 Sind 31 (32) : 14 Sind L R 12 (DB).

[4] There is no question under this section of any estoppel against the owner of the property by reason of any conduct of his. (Vol 16) 1929 All 12 (14) : 51 All 454 (DB).

[5] If a person openly builds a shed and then a house on a site and the owner, with knowledge of his proceedings, offers no objection and takes no action for 8 or 10 years, the owner must treat such person as a licensee and cannot eject him without paying him compensation. (Vol 18) 1931 Nag 158 (159) : 27 Nag L R 183 ✠ (Vol 8) 1921 Nag 167 (168).

[6] Where a tenant or other person holding an interest in land makes certain improvements on the land believing himself to be entitled to a higher interest, or believing that he would be granted a certain interest in the land by the owner, and the owner acquiesces in it, if the owner wishes to eject the person from the land he should compensate him for the improvements. (Vol 20) 1933 Cal 612 (613, 614) ✠ ('97) 21 Bom 749 (754) (DB) ✠ ('89) 12 Mad 320 (323) (DB).

[7] As a general rule the wrongdoer cannot claim any compensation for the improvements made by him. ('06) 2 Nag L R 4 (5, 7) ✠ (Vol 22) 1935 Bom 219 (221, 222) (DB) ✠ (Vol 22) 1935 Cal 541 (544) : 62 Cal 492 ✠ (Vol 5) 1918 Mad 419 (419) (SB) ✠ (Vol 3) 1916 Mad 220 (221, 222) : 38 Mad 710 (FB) ✠ (Vol 2) 1915 Lah 235 (236) (DB) ✠ (Vol 3) 1916 Low Bur 81 (83, 84) : 8 Low Bur Rul 433 (DB) ✠ (Vol 10) 1923 All 11 (11) ✠ (Vol 7) 1920 Pat 109 (110) ✠ (Vol 26) 1939 Mad 247 (250).

[8] If wrongdoer has acted *bona fide* believing that he has a right to build or improve the land, there arises an equity in his favour which will entitle him to claim compensation for the improvements though there has been no acquiescence on the part of the true owner. ('78) 3 Cal L R 194 (196) ✠ (Vol 1) 1914 Mad 84 (85) (DB) ✠ (Vol 13) 1926 Mad 314 (316) ✠ (Vol 7) 1920 Bom 87 (87, 88) : 44 Bom 950 (DB) ✠ (Vol 3) 1916 Lah 239 (244) (DB) ✠ ('02) 29 Cal 871 (884) (DB) ✠ (Vol 2) 1915 Lah 305 (306).

SECTION 52 — SYNOPSIS

1. Scope.
2. This section and section 51.
3. This section and res judicata.
4. This section and Crown grants.
5. This section and Section 100.
6. Rights existing before suit not affected.
7. "During the pendency."
8. Proceeding must be pending before a Court.
9. Pendency of suit when commences.
10. Pendency of suit, how long continues.
11. Pendency of proceeding when commences and how long it continues.
12. "Which is not collusive."

be transferred or otherwise dealt with by any party to the suit or proceeding so as to affect the rights of any other party thereto under any decree or order which may be made therein, except under the authority of the Court and on such terms as it may impose.

[e][*Explanation.*— For the purposes of this section, the pendency of a suit or proceeding shall be deemed to commence from the date of the presentation of the plaint or the institution of the proceeding in a Court of competent jurisdiction, and to continue until the suit or proceeding has been disposed of by a final decree or order and complete satisfaction or discharge of such decree or order has been obtained, or has become unobtainable by reason of the expiration of any period of limitation prescribed for the execution thereof by any law for the time being in force.]

[a] *Substituted* by the Transfer of Property (Amendment) Act, 1929 (20 [XX] of 1929) S 14 for 'active prosecution'. [b] *Substituted* for 'the Governor-General in Council' by A. O. [c] The words 'or the Crown Representative' were *omitted* by the Indian Independence (Adaptation of Central Acts and Ordinances) Order, 1948 [23-3-1948]. [d] *Substituted* for 'a contentious' by Act 20 [XX] of 1929. [e] *Inserted*, *ibid.*

Provincial Amendments.

BOMBAY

Section 52 of the Transfer of Property Act, 1882, shall be renumbered as sub-s. (1) of S. 52 of the said Act, and

(i) in sub-s. (1) so renumbered after the word "question", the words and figures "if a notice of the pendency of such suit or proceeding is registered under S. 18 of the Indian Registration Act, 1908," and after the word "property" where it occurs for the second time the words "after the notice is so registered," shall be inserted; and

(ii) after the said sub-s. (1) so renumbered the following shall be inserted, namely :—

"(2) Every notice of pendency of a suit or a proceeding referred to in sub-s. (1) shall contain the following particulars, namely :—

(a) the name and address of the owner of immoveable property or other person whose right to the immoveable property is in question;

(b) the description of the immoveable property the right to which is in question;

(c) the Court in which the suit or proceeding is pending;

(d) the nature and title of the suit or proceeding; and

(e) the date on which the suit or proceeding was instituted."

— The Transfer of Property and the Indian Registration (Bombay Amendment) Act (Bombay Act 14 [XIV] of 1939), S. 3. [23-5-1939.]

SIND

Same as that of Bombay.

— The Transfer of Property and the Indian Registration (Sind Amendment) Act (Sind Act 14 [XIV] of 1939), S. 2. [14-5-1939]

SECTION 52 — SYNOPSIS *(contd.)*

13. Right to immovable property must be directly and specifically in question.
14. Applicability to moveable property.
15. Only property in litigation cannot be transferred.
16. Administration suit.
17. Mortgage suits.
18. Partition suits.
19. Suits for maintenance.
20. Pre-emption suit.
21. Suit for establishing will.
22. Suit for cancellation of trust deed.
23. Suit for specific performance of contract.
24. Winding up proceedings.
25. Suits for declaration of title or charge.
26. "Transferred or otherwise dealt with."
27. Transfer executed before suit.
28. Transfer executed before but registered after suit.
29. Transfers by operation of law.
30. Transfer by or in execution of decree or order.
31. Compulsory sales for recovery of Government dues.
32. Sale under Section 88, Criminal P. C.
33. Transfer by permission of Court.
34. "So as to affect the rights of."
35. "Any party."
36. "Any other party" — Co-defendants.
37. "Any decree or order."
38. Lease pendente lite.
39. Transferee pending suit is representative of transferor—Party within Section 47, Civil P.C.
40. Injunction on party not to transfer.
41. Modification of decree — Effect on execution sale or assignment of decree.

1. Scope. — [1] Section 52 does not render a sale *pendente lite* void. It is valid but is subject to the rights created by the decree passed in the pending litigation. Thus, where mortgaged property is sold to a third party pending suit on a later mortgage and the purchaser covenants to pay off the earlier mortgage, the fact that the transfer becomes unavailable as against the plaintiff under this section, does not take away the right of subrogation. (Vol 34) 1947 Mad 18 (30) (DB).

[2] General principles underlying the section have been applied in the Punjab and the North-Western Frontier Province. (Vol 17) 1930 Lah 356 (357) : 11 Lah 258 (F B) ✠ ('03) 1903 Pun Re No. 80, p. 345 (349) (F B) ✠ (Vol 29) 1942 Pesh 43 (45).

[3] This section is retrospective in its operation. (Vol 32) 1945 Bom 409 (412) (DB).

[4] Estoppel arising under S. 41 cannot override the imperative provisions of S. 52. (Vol 32) 1945 Nag 86 (90) : I L R (1944) Nag 852.

2. This section and Section 51. — [1] Party to a pending litigation cannot claim any compensation for improvements made by him *pendente lite* with full knowledge of the risk he runs in doing so. ('13) 25 Mad L Jour 324 (328) (DB).

[2] Transferee *pendente lite* made improvements pending litigation — Such transferee held had no right to claim any compensation from decree-holder who ousted him under decree. (Vol 19) 1932 All 210 (214) (DB) ✠ (Vol 16) 1929 All 943 (945) : 52 All 139 (DB)

3. This section and res judicata. — [1] This section cannot prevail against the rule of *res judicata* (Vol 21) 1934 Cal 552 (553) : 61 Cal 494 (DB).

Section 52 *(contd.)*

4. This section and Crown grants.—[1] Lease granted by Government Officer in charge of khas mahal —If such lease is made pending suit in respect of such property, doctrine of *lis pendens* would apply. (Vol 22) 1935 Cal 746 (747) : 63 Cal 523 (DB).

5. This section and section 100. — [1] Charge created by decree—Purchaser during pendency of suit—Case is covered by this section—Charge has preference over right of private or auction purchaser. (Vol 31) 1944 Bom 191 (193) : I L R (1944) Bom 274 (DB)✠(Vol 32) 1945 Mad 350 (351) ✠ (Vol 32) 1945 Mad 126 (127) : I L R (1945) Mad 726 (DB). (Section 100 does not override.) ✠ (Vol 33) 1946 Mad 51 (52). (Charge created by decree—Mortgage subsequent to decree—Mortgagee can pay off decree-holder and get execution sale (not confirmed) set aside)

6. Rights existing before suit not affected.—[1] Doctrine of *lis pendens* does not operate so as to defeat any right existing before the date of the suit. (Vol 30) 1943 Cal 577 (584)✠('80) 2 All 826 (827) (DB)✠(Vol 21) 1934 Mad 585 (587)✠(Vol 18) 1931 Lah 435 (436) (DB)✠ ('08) 1908 Pun Re No. 26, p. 144 (145) (DB) ✠ (Vol 24) 1937 All 108 (110) (DB)✠('78) 2 Bom 252 (255) (DB)✠ (Vol 9) 1922 Mad 390 (391) : 45 Mad 774 (DB).

[2] Attaching creditor who is entitled to redeem a mortgage does not lose this right by reason of the fact that he gets the property sold in execution of his decree after a suit is instituted on the mortgage. (Vol 15) 1928 Nag 97 (98) : 23 Nag L R 164 ✠ (Vol 19) 1932 All 356 (357) (DB).

[3] Sale in pursuance of decree on mortgage executed before suit — Doctrine of *lis pendens* affects such sale. (Vol 30) 1943 Cal 577 (585) ✠ (Vol 15) 1928 Lah 505 (507) ✠ (Vol 18) 1931 All 466 (480, 481) : 53 All 1023 (FB). (Per majority of Full Bench—Mukerji J. contra.)

[But see (Vol 26) 1939 Cal 655 (656) (DB)✠(Vol 21) 1934 Nag 36 (38) : 30 Nag L R 284 ✠ ('05) 32 Cal 891 (905) (DB)✠(Vol 21) 1934 Mad 585 (587)✠(Vol 19) 1932 Mad 566 (573) : 56 Mad 115 (DB).]

7. "During the pendency." — [1] Section as amended is not retrospective in operation. (Vol 18) 1931 Nag 138 (140).

8. Proceeding must be pending before a Court. —[1] Collector acting under S. 43, Madras Marumakkathayam Act (XXII of 1933) is not a Court for the purposes of this section. (Vol 26) 1939 Mad 151 (152).

[2] Registrar of Co-operative Societies acting under the Co-operative Societies Act (II of 1912) is a Court and a proceeding before him will operate as a *lis pendens*. (Vol 21) 1934 Mad 40 (42) : 57 Mad 426.

[3] Revenue Court dealing with partition proceedings is a Court and the proceedings will operate as *lis pendens*. (Vol 14) 1927 All 679 (680) : 50 All 22 (DB).

[4] Courts in England and France are foreign Courts. ('84) 8 Bom 571 (574).

[5] A suit in a foreign Court is not *lis pendens*. ('96) 19 Mad 257 (262) (DB).

[6] Where the Court has no jurisdiction to try the suit, a transfer pending such suit cannot operate as lis pendens and cannot affect any decree or orders in such suit. (Vol 25) 1938 Bom 121 (125) : I L R (1937) Bom 895 (DB).

[7] Suit filed on the equity side of the Supreme Court, does not operate as lis pendens so as to affect a transfer of immovable property in the mofussil. ('69) 11 Suth W R 554 (555) (DB).

[8] Mortgage suit for land part of which within jurisdiction of High Court—Leave first obtained—High Court acquires jurisdiction over entire suit — Decree passed in such suit comes within this section. (Vol 18) 1931 Cal 763 (767) : 58 Cal 598 (DB).

[9] Higher Court cannot be said to have no jurisdiction merely because the suit should be filed in a Court of a lower grade. ('10) 14 Cal W N 322 (324) (DB).

9. Pendency of suit when commences. — [1] Court not competent to try suit returning plaint for presentation to proper Court — Plaint represented to competent Court — Suit will be deemed to commence only from date of such subsequent representation. (Vol 27) 1940 Nag 185 (186) : I L R (1941) Nag 652.

[2] Plaint presented to a Court of a higher grade must be taken to be presented to a competent Court) ('10) 14 Cal W N 322 (324) (DB).

[3] Plaint rejected for insufficient stamp and again presented after making good deficiency — Suit cannot be deemed to be pending from date of original presentation. (Vol 7) 1920 Cal 675 (676) (DB).

[4] Court instead of rejecting plaint for insufficiency of stamp, receiving plaint and granting time to make good deficiency — Suit must be deemed to be pending from date when it is first received. (Vol 30) 1943 Bom 27 (30).

[5] Transfer made after application for restoration and before order passed on it restoring suit—Order held had effect of restoring suit from date of application for restoration. (Vol 6) 1919 Cal 40 (42) (DB).

[6] A suit instituted in *forma pauperis* commences from the date when the application for leave to sue as a pauper is made and not when the same is registered as a suit. (Vol 23) 1936 Mad 853 (854, 855) ✠ (Vol 26) 1939 Mad 275 (275).

[7] Suit by *A* against *B* to recover arrears of maintenance and enforcement of charge in respect of same on some of properties in hands of *B* — Application by *A* to amend plaint by including some more properties—Before application was allowed, *B* dying and his son selling properties sought to be newly added to third party—Amendment subsequently allowed and *B*'s son added as his legal representative—S. 52 held applied to alienation by *B*'s son. (Vol 32) 1945 Mad 219 (220).

10. Pendency of suit, how long continues. — [1] Transfer made during the pendency of execution proceedings or of an appeal from the decree would be affected by lis pendens. (Vol 24) 1937 Oudh 127 (129) (DB)✠(Vol 19) 1932 All 210 (212) (DB).

[2] Cross-objection under O 41, R. 22, Civil P. C., is not a continuation of the suit for the purpose of lis pendens. (Vol 4) 1917 Lah 13 (14) (DB).

[3] Application for review or revision cannot be said to be a continuation of the suit so as to attract the operation of the doctrine of lis pendens. ('11) 12 Ind Cas 849 (850) (Low Bur).

[4] Execution not time-barred but no execution application pending — S. 52 will still apply. (Vol 32) 1945 Mad 350 (350).

11. Pendency of proceeding when commences and how long it continues. — [1] Application under O. 21, R. 100, Civil P. C., is a proceeding which will operate as lis pendens on transfers made during the pendency thereof. (Vol 22) 1935 Oudh 462 (464) : 11 Luck 283 (DB).

[2] Application to file an award in Court is a proceeding which will operate as lis pendens on transfers made during the pendency thereof. ('92) 1892 Bom P J 5 (DB).

[3] Transfer executed between the date of the claim order and the claim suit will be affected by lis pendens. (Vol 26) 1939 Oudh 178 (179) : 14 Luck 543✠(Vol 24) 1937 Rang 473 (474) ✠ (Vol 2) 1915 Mad 495 (498) : 38 Mad 535 (DB) ✠ (Vol 12) 1925 Nag 82 (85) : 22 Nag L R 67.

[4] Claim order is not a "final" order until, either a suit to contest the order is finally decided or the period of limitation has expired. (Vol 27) 1940 Lah 497 (498).

Section 52 *(contd.)*

12. "Which is not collusive." — [1] Fact of suing, in itself initiates a contest and starts the lis. (Vol 27) 1940 Nag 8 (13) (DB).

[2] Mere fact that the suit ended in a compromise decree does not render the suit a non-contentious or collusive one. (Vol 21) 1934 Pat 270 (271).

[3] Mere fact that the defendant admits the plaintiff's claim does not render the suit a non-contentious or collusive one. (Vol 24) 1937 Nag 400 (402) : I L R (1937) Nag 452.

[4] A collusive suit is not a real suit. ('07) 31 Bom 393 (398) (D B). (*Friendly* suit brought to obtain declaration of rights of parties cannot be said to be "collusive".)✠('82) 6 Bom 703 (711, 712).

[5] Doctrine of *lis pendens* does not apply to collusive suits. ('13) 16 Oudh Cas 225 (231) (D B)✠(Vol 22) 1935 Pat 230 (230) ✠ (Vol 33) 1946 Oudh 99 (101): 21 Luck 185 (DB).

[6] Though a collusive suit does not operate as *lis pendens* a decree passed therein may be binding on the actual parties to the suit. ('87) 11 Bom 708 (713) (DB).

13. Right to immovable property must be directly and specifically in question. — [1] Suits or proceedings for personal reliefs against the defendants are outside this section. (Vol 17) 1930 Oudh 93 (95) : 5 Luck 625 (DB)✠(Vol 13) 1926 Cal 191 (192) (DB)✠(Vol 23) 1936 Cal 279 (281) : 63 Cal 1117 ✠ (Vol 15) 1928 Cal 441 (442, 443) : 55 Cal 701 (D B) ✠ (Vol 18) 1931 Oudh 63 (65) (D B)✠('80) 1880 Pun Re No. 113, p. 276 (282) (DB) ✠ (Vol 19) 1932 Bom 301 (302).

[2] Mere fact that in a suit for personal relief an injunction is granted against the defendant from alienating his property or an attachment is made of his properties does not make the suit one, in which a right to such property is directly and specifically in question. (Vol 17) 1930 All 387 (388, 389) ✠ (Vol 2) 1915 Oudh 157 (158)✠ (Vol 16) 1929 All 846 (846, 847) ✠ ('10) 11 Cal L Jour 528 (531) (D B)✠(Vol 28) 1941 Mad 208 (214) (DB).

[3] Suit against X as legal representative of Y, for recovery of money to be realised from the assets of Y in the hands of X, is not one in which the right to the property constituting the assets is directly and specifically in question. ('10) 8 Ind Cas 1208 (1209) (Low Bur)✠('08) 1908 Pun L R No. 52, p. 129 (135) (D B) ✠ ('03) 26 All 28 (31, 32) (DB). (19 All 504 *Dissented from.*)

[4] X attached certain properties in mofussil before suit for foreclosure instituted and purchased same in execution pending foreclosure suit — Decree for sale made in foreclosure suit held could not affect title of persons not parties to suit. ('71) 14 Moo Ind App 101 (109) (P C) (Case before the Act.)

[5] Whatever the nature of the decree it is binding on the person to whom the property is transferred during the litigation. (Vol 31) 1944 Bom 191 (193) : I L R (1944) Bom 274 (DB).

[6] Though a charge is not an interest in immovable property, it amounts to a "right to immovable property." (Vol 30) 1943 Cal 227 (231) (DB).

[6a] Where the point in issue was only whether a deed of settlement was true or false, it cannot be said that there was any right to immovable property in question. (Vol 32) 1945 Mad 454 (456).

[7] A suit or proceeding, in which, at its inception, no question as to right to any property is directly or specifically raised, may, at a subsequent stage thereof become a suit or proceeding in which such question is involved. In such cases the doctrine of *lis pendens* will apply. (Vol 23) 1936 Mad 589 (592). (Suit for maintenance or mesne profits—Charge created subsequently.) ✠('78) 4 Cal 402 (410) : 5 Ind App 211 (PC).

[But see (Vol 27) 1940 Nag 8 (13) (D B) ✠ (Vol 23) 1936 Pat 571 (572).]

[8] A suit which, at its inception, is one in which a right to property is in question, may, at a subsequent stage, cease to involve any such question, in which case, it will cease to operate as *lis pendens*. ('05) 32 Cal 198 (212, 217) : 32 Ind App 1 (P C)✠(Vol 23) 1936 Pat 571 (572). (Transfer does not affect rights of parties under decree)

[9] A transfer made before the property is brought within the control and jurisdiction of the Court is not affected by *lis pendens*. (Vol 6) 1919 All 320 (321, 322): 41 All 534 (DB)✠(Vol 7) 1920 Nag 92 (92, 93).

[10] In order that the doctrine of *lis pendens* may apply, the property in litigation must be described with sufficient precision so that its identity can be ascertained. ('09) 15 Cal L Jour 391 (393) ✠ (Vol 22) 1935 Oudh 49 (51) (DB).

[11] Alienee who knew that the particular property was in litigation cannot rely upon the fact that the property was misdescribed in the plaint. (Vol 8) 1921 Cal 730 (741) (DB).

[12] Doctrine of *lis pendens* is not based on any theory of notice, and the knowledge of the alienee as to the identity of the property he is buying, with the property described in the plaint, is immaterial. (Vol 24) 1937 Bom 244 (252, 253) (D B).

14. Applicability to moveable property. — [1] Principle underlying the section has no application to moveable property. (1894) 63 L J Ch 689 (692, 693) : 43 W R (Eng) 147, *Wigram* v. *Buckley*✠('12) 36 Bom 189 (198) (D B)✠('96) 9 C P L R 22 (24, 26)✠(Vol 30) 1943 Mad 94 (97) (D B).

[But see (Vol 17) 1930 All 380 (381, 382) (DB). (Per *Sulaiman J.*)✠(Vol 2) 1915 Mad 502 (502) (DB).]

15. Only property in litigation cannot be transferred. — [1] Section cannot apply where the property transferred is other than the one in litigation. (Vol 12) 1925 Nag 274 (277) : 21 Nag L R 133.

16. Administration suit. — [1] In a mere general claim for administration of a trust or of a deceased person's estate the suit does not operate as *lis pendens*. (Vol 10) 1923 Rang 69 (70) (DB) ✠ (Vol 11) 1924 Rang 221 (232) : 2 Rang 4 (DB).

[2] Particular property sufficiently indicated in suit —Suit would operate as *lis pendens*. (1887) 35 Ch D 297 (305) : 56 L J Ch 530, *Price* v. *Price* ✠ (Vol 11) 1924 Rang 221 (229) : 2 Rang 4 (DB) ✠ (Vol 17) 1930 Rang 132 (136) : 7 Rang 734 (D B) ✠ (Vol 12) 1925 Cal 395 (398) : 51 Cal 1033 (D B).

[3] Transfer after an order for sale by the Receiver in an administration suit, and before such sale, is subject to the result of the suit by virtue of the doctrine of *lis pendens*. ('05) 32 Cal 198 (218): 32 Ind App 1 (PC).

[4] Suit for administration of trust — Alienation by beneficiary during its pendency is subject to further orders of Court. (Vol 15) 1928 P C 38 (39): 55 Cal 532: 55 Ind App 81 (PC).

[5] Administration suit in High Court—Preliminary decree passed—Administrator appointed by subordinate Court can be permitted by it to sell property. (Vol 12) 1925 P C 261 (263) (PC).

17. Mortgage suits.—[1] The doctrine of *lis pendens* applies to mortgage suits also. In such suits the equity of redemption of the mortgagor is directly and specifically in question. (Vol 30) 1943 Cal 577 (584) ✠ (Vol 18) 1931 All 466 (480) : 53 All 1023 (F B) ✠ ('10) 13 Oudh Cas 50 (52) (D B) ✠ (Vol 9) 1922 Nag 89 (91) (F B).

[2] A transfer either privately by the mortgagor or by way of compulsory sale in execution of a decree or otherwise would be affected by the doctrine of *lis pendens*. (Vol 30) 1943 Lah 113 (118) (DB). (Private trans-

Section 52—Note 17 *(contd.)*

fer by mortgagor)✠(Vol 24) 1937 PC 260 (261): 31 Sind L R 652 (PC). (Do.)✠('88) 15 Cal 756 (761):15 Ind App 97 (PC) .(Do)✠(Vol 15) 1928 Lah 505 (507) (Sale in execution of decree.)✠(Vol 4) 1917 Bom 151 (152) 42 Bom 215 (D B). (Transfer under another Court's order.)✠(Vol 18) 1931 All 466 (480) : 53 All 1023 (F B)✠('11) 9 Ind Cas 772 (773) (Rang). (Sale in execution of money decree.) ✠(Vol 12) 1925 Oudh 496 (498) : 29 Oudh Cas 37 (DB) (Do.) ✠ (Vol 16) 1929 All 601 (602). (Auction sale in execution of Government dues.)

[3] The transferee is bound by the decree in the mortgage suit and takes subject to the incidents of the suit (Vol 20) 1933 All 201 (202) : 55 All 235 (D B) ✠ (Vol 27) 1940 Cal 150 (152, 153) (DB)✠('85) 9 Bom 141 (145) (D B)✠(Vol 15) 1928 Mad 612 (613) (DB)✠(Vol 9) 1922 Cal 235 (236) (D B).

[4] A purchaser under the decree in the suit gets a good title against all persons whom the suit binds. (Vol 5) 1918 Bom 105 (106) : 43 Bom 240 (D B).

[5] A purchaser under the decree cannot claim to redeem the mortgagee or purchaser in execution of the decree on the ground that he was not a party to the suit, though he could have redeemed the mortgagee before the sale ('90) 18 Cal 164 (178): 17 Ind App 201 (P C)✠(Vol 12) 1925 Oudh 496 (498) : 29 Oudh Cas 37 (DB)✠(Vol 20) 1933 All 201 (203) : 55 All 235 (DB).

[6] An application to file an award directing the sale of mortgaged property is an original proceeding to which the doctrine of *lis pendens* will apply. ('80) 4 Bom 34 (36, 37) (DB).

[7] A suit for contribution under S. 82 operates as a *lis pendens* and a transfer pending such a suit would be subject to the result of such suit. ('91) 13 All 371 (373) (DB).

[8] Where pending a suit between the mortgagor and the mortgagees, the mortgagor sold the equity of redemption to a stranger and the amount decreed as due in the first Court was increased in appeal, the purchaser was held bound by the result of the appeal. (Vol 16) 1929 P C 243 (245) : 56 Ind App 339 : 51 All 686 (P C).

[9] The lis in a mortgage suit continues until the mortgage decree is fully executed. ('01) 23 All 331 (334) (DB)✠(Vol 18) 1931 Mad 120 (122)✠(Vol 21) 1934 Mad 353 (354, 355) (DB)✠('10) 6 Nag L R 140 (142)✠(Vol 12) 1925 Mad 1039 (1039, 1040) ✠ (Vol 14) 1927 All 309 (310)✠(Vol 8) 1921 Cal 730 (741) (D B).

[10] Where the suit is one for foreclosure, the lis continues until a final decree foreclosing the mortgagor's right is passed. ('07) 29 All 76 (80, 81).

[11] A transfer of the mortgaged property by the mortgagor between the date of the decree and the date of the sale in execution of the decree, will be affected by *lis pendens*. (Vol 18) 1931 All 466 (480):53 All 1023 (FB) ✠ ('04) 28 Bom 361 (363) (DB) ✠ (Vol 2) 1915 Sind 9 (9, 10) : 9 Sind L R 86 (DB) ✠ (Vol 12) 1925 Mad 1039 (1040) ✠ (Vol 5) 1918 Cal 524 (525) (DB) ✠ (Vol 18) 1931 Pat 64 (67) : 10 Pat 234 (DB).

[12] A transfer by the mortgagor between the dates of the preliminary and final decrees is affected by *lis pendens* (Vol 12) 1925 Nag 132 (134):22 Nag L R 110. (Decree for foreclosure.) ✠ (Vol 19) 1932 All 210 (212) (DB) ✠ (Vol 13) 1926 Nag 21 (22) : 23 Nag L R 86 ✠ (Vol 22) 1935 Oudh 49 (51) (DB) ✠ (Vol 2) 1915 All 27 (28) (DB).

[13] Mortgagees pursuing their remedies on mortgages previously executed are not affected by any doctrine of *lis pendens* arising from suits subsequently instituted, but instituted prior to the sale, and the sale in execution of a mortgage decree is to be regarded as a legal action by mortgagee in enforcement of his pre-existing rights (which are unaffected by *res judicata*) rather than as an involuntary sale by the mortgagor and that the mortgagee who purchases will only be affected by the doctrine if he himself is impleaded in the *lis*. (Vol 32) 1945 Nag 86 (93) : I L R (1944) Nag 852.

18. Partition suits. — [1] Transferee of property pending suit for partition of immovable property will be bound by the decree passed in the suit. ('13) 18 Ind Cas 492 (493) (DB) (All)✠(Vol 23) 1936 Mad 887 (888, 889) : I L R (1937) Mad 66 (DB) ✠ (Vol 26) 1939 Mad 275 (275)✠(Vol 14) 1927 All 679 (680) : 50 All 22 (DB) ✠ ('98) 26 Cal 127 (128, 129) ✠ ('26) 3 O W N (Supp) 232 (239) (DB) ✠ (1900) 27 Cal 77 (83, 84) (DB) ✠ (Vol 15) 1928 Bom 65 (66) : 52 Bom 208 (DB) ✠ (Vol 21) 1934 Lah 457 (458) (DB)✠(Vol 11) 1924 Nag 393 (394) (DB) ✠ (Vol 23) 1936 Nag 125 (126):I L R (1936) Nag 22 (DB).

[2] Partition suit—No contest as to fractional share of parties — Section 52 does not apply. (Vol 28) 1941 Cal 436 (437, 438).

[3] Joint family property mortgaged — Purchase of property by mortgagee under final decree — Partition suit pending to which mortgagee is party — Purchase is not affected by *lis pendens*. (Vol 16) 1929 Cal 697 (699) : 57 Cal 597 (DB).

[4] Appeal from decree in partition suit — Share of parties in immovable property not disputed —Section 52 does not apply. (Vol 33) 1946 Oudh 99 (101) : 21 Luck 185 (DB).

[5] Partition suit—Sale of property pending suit in execution of decree for pre-partition debt binding on whole family—Property allotted to mother under partition decree — No provision made in decree as to above debt — Execution sale not affected by *lis pendens*. (Vol 33) 1946 Pat 306 (309) : 25 Pat 13 (DB).

19. Suits for maintenance. — [1] Maintenance suit—Charge asked for against properties described in plaint — Doctrine of *lis pendens* applies. (Vol 31) 1944 Bom 191 (192) : I L R (1944) Bom 274 (DB)✠(Vol 33) 1946 Bom 207 (209) : I L R (1945) Bom 885 (DB) ✠ (Vol 30) 1943 Cal 227 (232) (DB) ✠ (Vol 15) 1928 Mad 713 (719) (FB)✠('36) 169 Ind Cas 169 (171) (Nag)✠(Vol 26) 1939 Cal 655 (656) (DB) ✠ (Vol 27) 1940 Bom 395 (396) : I L R (1941) Bom 1 (DB) (Fact that transfer was effected to pay off plaintiff's husband's debts does not affect rule.)✠(Vol 16) 1929 Sind 102 (105, 106 ✠(Vol 23) 1936 Mad 84 (85) (DB). (Fact that whole family property is enumerated in schedule of plaint but charge is asked to be given on "a sufficient portion" thereof or decree gives charge only against some of properties though charge is asked for against all properties, does not prevent applicability of doctrine of *lis pendens*.)

[But see (Vol 14) 1927 Mad 403 (404).]

[2] No charge claimed in maintenance suit — Properties described in schedule of plaint for determining amount of maintenance — No question of *lis pendens* arises. ('96) 19 Mad 271 (272, 273) (DB).

[3] Properties charged by decree awarding maintenance — Transfer of such properties is affected by doctrine of *lis pendens* even though transfer is after decree, so long as properties remain charged under de ree. (Vol 26) 1939 Bom 403 (405)✠(Vol 15) 1928 Mad 612 (612) (DB) ✠ (Vol 22) 1935 Mad 867 (869):59 Mad 101 (DB). (Lis in such case continues so long as maintenance is due under decree.)✠('36) 19 Nag L Jour 254 (258). (Do.)

[4] Private award — Maintenance charged on property — Lis begins with application to file award and continues till satisfaction of maintenance decree or its satisfaction becomes unobtainable. (Vol 33) 1946 Bom 207 (210, 211) : I L R (1945) Bom 885 (DB).

20. Pre-emption suit. — [1] Doctrine of *lis pendens* applies to suits for pre-emption. (Vol 29) 1942

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Pesh 43 (45) ✠ (Vol 17) 1930 Lah 356 (357) : 11 Lah 258 (FB) ✠ (Vol 1) 1914 Oudh 352 (353):17 Oudh Cas 150 ✠ (Vol 21) 1934 Oudh 303 (307) : 9 Luck 475 ✠ (Vol 33) 1946 Nag 367 (371) : I L R (1946) Nag 758 ✠ (Vol 28) 1941 Lah 433 (441) : I L R (1942) Lah 155 (FB) ✠ (Vol 13) 1926 All 180 (181) : 48 All 221 (DB)✠ (Vol 14) 1927 All 336 (337) : 49 All 516 (DB).

[2] Resale of the property by the vendee in favour of the vendor pending the suit for pre-emption will be affected by *lis pendens* and cannot affect the pre-emptor's claim to a decree for pre-emption. (Vol 12) 1925 All 487 (488) : 47 All 625 (DB) ✠ (Vol 13) 1926 All 179 (180) : 47 All 923 (DB)✠('09) 5 Nag L R 136 (145) ✠ ('06) 2 Nag L R 150 (157).

[3] Sale pending a pre-emption suit in favour of a person having an equal or superior right of pre-emption to that of the plaintiff, does not conflict with the doctrine of *lis pendens* and is valid. (Vol 28) 1941 Lah 433 (436) : I L R (1942) Lah 155 (FB) ✠ (Vol 10) 1923 All 294 (294) (DB) ✠ (Vol 17) 1930 Lah 356 (357):11 Lah 258 (FB).

[But see (Vol 13) 1926 All 180 (181) : 48 All 221 (DB)✠(Vol 14) 1927 All 336 (337, 338):49 All 516 (DB).]

[4] Transfer by vendee after institution of suit — Transfer not being in recognition of right of pre-emption, transferee cannot set up superior right of pre-emption — Section applies. (Vol 8) 1921 Lah 363 (363) (D B).

[5] Transferee had, at time of transfer to him, lost his right of pre-emption, by lapse of time — Transfer will be affected by *lis pendens*. (Vol 1) 1914 All 356 (357) : 36 All 60 (DB)✠(Vol 8) 1921 All 105 (106) (DB). (Sale after institution of suit in favour of another pre-emptor in pursuance of agreement to sell made in his favour prior to institution of pre-emption suit but after expiry of limitation to sue for pre-emption — Doctrine of *lis pendens* applies.)✠(Vol 33) 1946 Lah 322 (325) (FB)✠(Vol 1) 1914 Oudh 352 (352) : 17 Oudh Cas 150 ✠ ('11) 1911 Pun Re No. 30 (DB).

[6] Pending suit for pre-emption, defendant vendee sold property again to third person — Plaintiff got plaint amended by impleading third person as party, who raised question of his own preferential right of pre-emption and same heard and decided against plaintiff—Latter held could not thereafter fall back upon S. 52 and claim that sale to third party was affected by *lis pendens*. ('05) 27 All 544 (547) (FB)✠(Vol 16) 1929 All 440 (441) (DB).

[7] Vendee-defendant in a pre-emption suit can improve his status pending the suit by dealing with the land, so as to defeat the claim of the pre-emptor. (Vol 28) 1941 Lah 433 (442) : I L R (1942) Lah 155 (FB) ✠ (Vol 28) 1941 Lah 444 (446):I L R (1942) Lah 190 (FB).

[8] A sale by a vendee in favour of a superior pre-emptor during the pendency of a suit for pre-emption but after the expiry of the period of limitation for a suit for pre-emption, does not entitle the subsequent transferee to be impleaded as a party to the suit so as to be able to defeat the right of pre-emption claimed by the plaintiff. The fact that the subsequent transferee has, as a result of the sale in his favour, obtained possession of the property in suit is immaterial. (Vol 33) 1946 Lah 142 (144, 145) : I L R (1946) Lah 467 (FB). (*Followed* in (Vol 33) 1946 Lah 322 (FB).)

[9] Suit for pre-emption of land by *W* — During pendency of suit, *C* claiming to be reversioner suing for declaration that his reversionary right cannot be affected by sale of land — Compromise of suit by vendee by which possession of land given to *C* on payment of purchase price — *C* held to be transferee of land from vendee — Transfer being *pendente lite C* was bound by decree in pre-emption suit. (Vol 34) 1947 Lah 175 (176).

21. Suit for establishing will. — [1] Suit by devisees under will for establishing will — Alienation by devisees pending suit will be affected by *lis pendens* (1742) 26 E R 509 (509) : 2 Atk 175, *Garth* v. *Ward*.

22. Suit for cancellation of trust deed.—[1] A suit for the cancellation of a trust deed and for recovery of the immovable property comprised in the trust, is a suit in which the right to immovable property is directly and specifically in question. (Vol 12) 1925 Cal 239 (244) (DB).

23. Suit for specific performance of contract.— [1] Suits for specific performance of contracts to transfer immovable property are suits in which the right to immovable property is directly and specifically in question and constitute *lis pendens*. (Vol 30) 1943 Bom 27 (30) ✠ (Vol 30) 1943 Cal 227 (230, 232) (DB) ✠ (Vol 9) 1922 Cal 412 (414) : 49 Cal 495 (DB) ✠ (Vol 21) 1934 All 713 (714) ✠ (Vol 11) 1924 Mad 307 (307).

24. Winding up proceedings. — [1] A petition to wind up a company does not constitute a *lis pendens* against a contributory of the company. (1866) L R 2 Ch 171 (177) : 15 W R (Eng) 292, *In re Bamnad's Banking Co.*

25. Suits for declaration of title or charge.—[1] Suits for declaration of title to immovable property — Doctrine of *lis pendens* applies. (Vol 25) 1938 Lah 448 (451).

[2] Suits for declaration of charge on property — Section 52 applies. (Vol 32) 1945 Cal 322 (325) (DB).

26. "Transferred or otherwise dealt with." — [1] Words "otherwise dealt with" will include the following:

(a) The entering into a contract for sale of the land in suit, which is capable of specific performance. (Vol 4) 1917 Oudh 193 (194) : 20 Oudh Cas 13.

(b) Partition of the property in suit. ('13) 37 Bom 427 (429) (SB).

(c) The obtaining of a collusive decree or order relating to the property. ('34) 11 Oudh W N 390 (392, 393) (DB) ✠ ('06) 1906 Pun Re No. 7, p. 17 (19) ✠ ('26) 27 Pun L R 439 (441).

(d) The entering into a compromise with a third party regarding the subject-matter of the suit. (Vol 9) 1922 Lah 403 (404) : 3 Lah 264.

(e) The erection of a fresh obstruction pending suit for removal of obstruction to property. (Vol 21) 1934 Lah 978 (979).

(f) Surrendering property to a third person pending suit for possession. (Vol 12) 1925 Nag 421 (421) : 21 Nag L R 144✠(Vol 12) 1925 Nag 132 (134) : 22 Nag L R 110.

[2] Mortgage with possession—Suit for pre-emption — Mortgagor executing simple money bond, pending suit, in substitution of mortgage bond — Pre-emption cannot be defeated by such act. ('88) 1888 Pun Re No. 102, p. 270 (271) (DB).

[3] Gift by *A* to *B*—Suit by *A* before registration of gift deed to revoke gift—*B* getting document registered pending suit—*Held*, per Macleod C. J., that *lis pendens* applies. (Vol 11) 1924 Bom 434 (436):48 Bom 435 (DB).

[4] In the following cases, the acts of a party were held not to amount to any transfer or other dealing with the property in suit :

(a) Where a party to a pending suit entered into a compromise with a third party merely recognising a transfer which had been made to him before suit. (Vol 16) 1929 Bom 337 (339) (DB).

(b) *A* executed mortgage in favour of *B* of certain properties and afterwards executed trust deed vesting such property in trustees — Subsequently, trustees discharged and *A* took possession of properties—*B* brought suit on mortgage and pending suit, *A* appointed new trustees—*A*'s act held not

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"transfer or other dealing" with property. (Vol 26) 1939 Oudh 161 (172) : 14 Luck 548 (DB).

(c) An adoption *pendente lite*. ('80) 5 Bom 630 (634, 635) (DB).

(d) An admission by a party to the suit of the execution of a deed before the Registering Officer. ('13) 9 Nag L R 155 (157).

(e) Pending mortgage suit, mortgagor executed mortgage to *X* for paying off other mortgages executed prior to suit in favour of *Y* and *X* — Act of mortgagor held not new transaction or dealing with property during pendency of suit. ('10) 7 Ind Cas 473 (473) (DB) (Cal).

(f) A mere filing of a suit for partition. (Vol 15) 1928 Mad 735 (741, 745) : 51 Mad 417 (FB).

[5] Order under O. 21, R. 101, Civil P. C., passed during pendency of suit—Defendant put in possession of property and more than a year had elapsed before suit disposed of — *Held*, *lis pendens* did not apply. (Vol 11) 1924 Mad 602 (602) (DB).

[6] Where there is only a contract to sell, this section would not apply. (Vol 32) 1945 Nag 86 (93) : 1 L R (1944) Nag 852.

27. Transfer executed before suit.—[1] Section has no application to transfers made before suit. (Vol 2) 1915 Mad 805 (806, 807) (DB).

[2] Person subsequent to institution of suit, added as party to suit—Transfer by such person before he was so made party cannot be affected by doctrine of *lis pendens*. (Vol 19) 1932 Pat 270 (271):11 Pat 415 (DB) ✠(Vol 12) 1925 Mad 487 (488).

[3] Person not party to suit, transferring property pending suit, and subsequently made legal representative of party who dies — Transferee cannot be affected by doctrine of *lis pendens*. (Vol 12) 1925 Bom 176 (177) (DB).

28. Transfer executed before but registered after suit.—[1] Section cannot apply so as to affect a transfer of property made before suit but registered thereafter. (Vol 12) 1925 Mad 710 (710) (DB)✠(Vol 9) 1922 Mad 249 (249, 258) (DB)✠('77) 1877 Bom P J 81 (DB).

[But see (Vol 8) 1921 Pat 150 (152) : 5 Pat L Jour 715 (DB).]

[2] While registration is a necessary solemnity in order to enforce a transfer, it does not suspend the transfer until registration actually takes place. (Vol 14) 1927 P C 42 (44) : 50 Mad 193 : 54 Ind App 89 (PC)✠(Vol 12) 1925 Bom 210 (219, 227) : 49 Bom 388 (FB).

29. Transfers by operation of law.—[1] Pending suit, defendant becoming insolvent and his property vesting in Official Receiver — Principle of *lis pendens* does not apply. ('02) 25 Mad 406 (413, 423) (DB) ✠(Vol 9) 1922 Mad 335 (336) (DB) ✠(Vol 26) 1939 Nag 128 (129).

[2] A sale by the Official Receiver is a private sale and not a sale by operation of law. Section 52 applies to such a sale. (Vol 32) 1945 Mad 350 (351).

30. Transfer by or in execution of decree or order.—[1] This section does not apply to transfers by way of a court sale in execution of a decree or order. ('01) 23 All 60 (62) (DB). (Sale in execution pending an appeal in a suit under O. 21, R. 63.)

[But see ('11) 9 Ind Cas 840 (840) (Cal) ✠ (Vol 10) 1923 Cal 252 (256) (DB) ✠ (Vol 9) 1922 Nag 81 (82) ✠ (Vol 18) 1931 All 466 (480) : 53 All 1023 (FB).]

[2] Partition suit—Sale of property pending suit in execution of decree for pre-partition debt binding on whole family—Property allotted to mother under partition decree—No provision made in decree as to above debt — Execution sale not affected by *lis pendens*. (Vol 33) 1946 Pat 306 (309) : 25 Pat 13 (DB).

[3] General principle of the doctrine of *lis pendens* will apply to transfers by way of a court sale in execution of a decree or order. (Vol 31) 1944 Bom 191 (194) ILR (1944) Bom 274 (DB)✠(Vol 33) 1946 Lah 322 (327, 328) (FB) ✠ (Vol 30) 1943 Bom 27 (30) ✠ (Vol 9) 1922 Nag 89 (90, 92) (FB)✠(Vol 5) 1918 Mad 578 (579) : 41 Mad 458 (SB)✠(Vol 24) 1937 Oudh 159 (163) : 12 Luck 540 (DB)✠(Vol 20) 1933 Lah 171 (172)✠('96) 24 Cal 69 (74, 75) (FB)✠(Vol 16) 1929 All 601 (602)✠('09) 32 Cal 891 (906) (SB) ✠ (Vol 17) 1930 Rang 132 (133, 135) : 7 Rang 734 (DB) ✠ (Vol 12) 1925 Pat 462 (464) : 4 Pat 619 (DB).

[4] The doctrine of *lis pendens* has been applied to a transfer of property in execution of a decree pending a suit for declaration of title to that property, notwithstanding that the attachment of the property had been effected before the institution of the suit. ('98) 25 Cal 179 (185) : 24 Ind App 170 (PC).

[5] A sale in execution of a mortgage decree, the mortgage having been executed before the institution of the suit is affected by the doctrine of *lis pendens*. (Vol 9) 1922 Nag 89 (91) (FB) ✠ (Vol 1) 1914 Sind 131 (132) : 8 Sind L R 264 (DB) ✠ (Vol 18) 1931 All 466 (480, 489) : 53 All 1023 (FB). (Per Mukerjee J., *contra* —('98) 25 Cal 179 : 24 Ind App 170 (PC), *Followed*.)

[But see (Vol 19) 1932 Mad 566 (573) : 56 Mad 115 (DB). (Dissenting from (Vol 4) 1917 Mad 751 : 40 Mad 77.) ✠ (Vol 32) 1945 Mad 91 (92) : I L R (1945) Mad 578 (DB)✠('05) 32 Cal 891 (903) (DB). (Per Mitra J.— Bret J., *contra*.) ✠ (Vol 13) 1926 All 480 (486) (DB) ✠ (Vol 29) 1942 Cal 394 (401) (DB).]

31. Compulsory sales for recovery of Government dues. — [1] A compulsory sale for the recovery of Government dues, when free of all incumbrances, is not affected by the doctrine of *lis pendens* even though it takes place, pending a suit on an incumbrance. (Vol 26) 1939 Mad 256 (256)✠(Vol 16) 1929 Rang 175 (176) : 7 Rang 113 (DB).

[2] Where such sale is not free from all incumbrances, the doctrine of *lis pendens* would apply thereto. (Vol 15) 1926 Mad 1161 (1163)✠('99) 26 Cal 966 (970) (DB) ✠ (Vol 9) 1922 Pat 542 (544) : 1 Pat 287 (DB)✠ ('03) 26 Mad 230 (236) (DB).

32. Sale under S. 88, Criminal P. C. — [1] The doctrine of *lis pendens* has been applied to the case of a sale under Ss. 88 and 89, Criminal P. C. (Vol 16) 1929 Bom 200 (201).

33. Transfer by permission of Court.—[1] The doctrine of *lis pendens* will not apply to a transfer sanctioned by the Court in which the suit is pending. (Vol 13) 1926 Pat 94 (98) (DB).

[2] The sanction by another Court for a transfer cannot except the transfer from the operation of *lis pendens*. (Vol 4) 1917 Bom 151 (152) : 42 Bom 215 (DB).

[3] A sale by the Official Receiver on a Hindu father's insolvency pending a suit for partition by the son is not affected by lis pendens where the sale is held after an application by the son for an injunction against the Receiver to stay the sale has been refused. (Vol 30) 1943 Nag 101 (109): ILR (1943) Nag 390 (DB).

34. "So as to affect the rights of." — [1] A transfer or dealing *pendente lite* is not *ipso facto* void but is only voidable. (Vol 7) 1920 Mad 126 (128) : 43 Mad 696 (DB). (Per *Oldfield J.*) ✠ (Vol 15) 1928 Mad 635 (637) (DB) ✠ (Vol 18) 1931 Oudh 157 (158) (DB) ✠ (Vol 24) 1937 Bom 244 (251) (DB). (Misdescription of land in pleadings prevents operation of doctrine.) ✠ (Vol 28) 1941 Lah 433 (442) : I L R (1942) Lah 155 (FB) ✠ (Vol 23) 1936 Nag 125 (126) : I L R 1936 Nag 22 (DB) ✠ (Vol 15) 1928 All 3 (5) : 50 All 290 (SB). (Per *Sulaiman J.*)✠(Vol 27) 1940 All 141 (142, 143).

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[2] The doctrine of *lis pendens* will apply only to transfers inconsistent with the rights declared by the decree in the suit. (Vol 30) 1943 Cal 577 (584)✠(Vol 5) 1918 Mad 1095 (1097): 40 Mad 955 (DB).

[3] The rights not embodied in the decree or order are not protected by this section. (Vol 6) 1919 Low Bur 103 (103, 104) : 10 Low Bur Rul 43 (DB).

[4] Plaintiff's suit dismissed — Transfer by the defendant *pendente lite* is not vitiated by *lis pendens*. (Vol 25) 1938 Nag 30 (34, 35) : I L R (1940) Nag 94 (DB).

[5] During the pendency of a mortgage suit, the defendant executed a lease of the mortgaged property to a third party. But after the mortgagee obtained a decree in his suit, he purchased by private sale from the mortgagor, the mortgaged property in full discharge of his decree — *Held* that the lease was not invalid. (Vol 26) 1939 All 611 (612) : ILR (1939) All 809 (DB).

[6] Defendant in mortgage suit, mortgaged the property *pendente lite* and with that money paid off the mortgage in suit — *Held* that the subsequent mortgage was not vitiated. (Vol 12) 1925 Nag 21 (24).

[7] Where a party assents to a transfer by the other party *pendente lite*, he cannot object to the transfer on the ground of *lis pendens*. (Vol 13) 1926 Cal 204 (207) (DB) ✠ (Vol 5) 1918 Pat 299 (300) (DB)✠ (Vol 20) 1933 All 579 (581) : 55 All 735 (DB).

[8] Where in a suit on behalf of a minor plaintiff, the next friend on behalf of the plaintiff and the defendant compromise the suit, under which certain property is transferred by the defendant to the minor plaintiff, the compromise is not vitiated by *lis pendens*. (Vol 22) 1935 Bom 54 (64) (DB).

[9] Where pending a suit for partition, both the plaintiff and the defendant transfer their respective shares to the same person, the doctrine of *lis pendens* cannot come into play. (Vol 16) 1929 Cal 697 (699) : 57 Cal 597 (DB).

35. "Any party."—[1] The doctrine of *lis pendens* cannot apply to an alienation by a person who is not a party to the suit. (Vol 12) 1925 Bom 176 (177) (DB). (Sale by person subsequently brought on record as legal representative of original defendant) ✠ (Vol 19) 1932 Pat 270 (271) : 11 Pat 415 (DB). (Transfer by puisne mortgagee of his rights) ✠ (Vol 32) 1945 Mad 454 (456).

[2] Where one of several legal representatives of a mortgagor was made a defendant to a suit on the mortgage it was held that a transfer, pending the suit, by another heir, who, though not an actual party, was represented by the defendant, was affected by *lis pendens*. ('03) 26 Mad 230 (234) (DB).

[3] Suit by *A* against *B* to recover arrears of maintenance and enforcement of charge in respect of same on some of properties in hands of *B*—Application by *A* to amend plaint by including some more properties — Before application was allowed *B* dying and his son selling properties sought to be newly added to third party — Amendment subsequently allowed and *B's* son added as his legal representative—S. 52 held applied to alienation by *B's* son. (Vol 32) 1945 Mad 219 (221).

[4] After the passing of a mortgage decree, *A*, one of the co-mortgagors sold his share to *B* — *A* died during the execution proceedings, but his legal representatives were not brought on record — Subsequent sale of mortgaged property in execution of decree held void so far as it affected *A's* share — Sale in favour of *B* held not affected by doctrine of *lis pendens*. (Vol 32) 1945 Bom 409 (412) (DB).

36. "Any other party."—Co-defendants —[1] *T* sued *D* for possession of certain property, and pending it he executed a mortgage of the property in favour of *W*. The suit was subsequently compromised to the effect that *T* and *D* should each take half the property — *D* was to pay off *W's* mortgage and *T* was not to be liable for it — *W* then sued *T* on his mortgage — It was held that *T* could not invoke the doctrine of *lis pendens* as against his transferee *W* and claim that *W* should not enforce the mortgage against the property in his hands. (Vol 15) 1928 All 3 (5, 9): 50 All 290 (SB).

[2] *X* obtained a money decree against *Y* and got his property attached in execution. Subsequently, *Y* mortgaged the property to *Z*, and still later, sold the property to *M* with the leave of the Court and paid off the decree — *Z* then sued *M* on the mortgage. It was held that *M* could not invoke the doctrine of *lis pendens* as against *Z*. (Vol 28) 1941 Mad 208 (214) (DB).

[3] The Court auction-purchaser in execution of a mortgage decree was held not entitled to impeach a transfer made by the mortgagor pending suit on the ground of *lis pendens*. ('98) 20 All 349 (351) ✠ (1857) 44 E R 842 (850): 26 L J Ch 797, *Bellamy* v. *Sabine*✠ (1858) 53 E R 553 (556) : 119 R R 325, *Tayler* v. *Thomas*.

[4] In order to enable a defendant to question an alienation *pendente lite* by a co-defendant, there must be an issue to be decided between the co-defendants even though the decision on such issue may not be necessary to give relief to the plaintiff in the suit. (Vol 5) 1918 Mad 578 (579, 580) : 41 Mad 458 (SB) ✠ (Vol 25) 1938 Pat 487 (493) (DB). *(Obiter.)*

37. "Any decree or order".—[1] "Any decree or order" includes a decree or order made on a compromise between the parties to the suit, provided that such compromise is not tainted by fraud or collusion. (Vol 30) 1943 Cal 227 (230) (DB) ✠ (Vol 33) 1946 Bom 462 (464) ✠ ('06) 29 Mad 426 (430, 433) (FB)✠(Vol 15) 1928 All 3 (7) : 50 All 290 (SB) ✠ (Vol 7) 1920 Mad 391 (394) : 43 Mad 37 (SB) ✠ (Vol 6) 1919 Low Bur 103 (103): 10 Low Bur Rul 43 (DB).

[2] The transferee cannot question the compromise decree on the ground that it was wrongly passed. ('10) 13 Oudh Cas 50 (52) (DB).

[3] The transferee can question a compromise decree on the ground of fraud (Vol 6) 1919 Oudh 317 (319) 22 Oudh Cas 171 (DB) ✠ (Vol 33) 1946 Bom 462 (464).

[4] Suit for maintenance — Compromise decree creating charge over property — Transferee of property during pendency of suit held bound by the decree. (Vol 31) 1944 Bom 191 (193) : I L R (1944) Bom 274 (DB).

[5] The words "any decree or order" are wide enough to include any order whatsoever. (Vol 30) 1943 Cal 227 (230, 232) (DB) ✠ (Vol 9) 1922 Cal 358 (363) : 49 Cal 220 (DB).

[But see ('71) 8 Beng L R 474 (489) (DB) ✠ ('01) 28 Cal 23 (26) (DB) ✠ (Vol 25) 1938 Cal 1 (5).]

[6] An award under Co-operative Societies Act for all practical purposes has the force and effect of a decree. (Vol 32) 1945 Nag 281 (282) : I L R (1945) Nag (651).

38. Lease pendente lite. — [1] This section applies to leases (whether in the ordinary course of management or otherwise) *pendente lite* by a party to the suit. (Vol 30) 1943 Cal 577 (585, 586) ✠ (Vol 18) 1931 Bom 539 (542) ✠ (Vol 12) 1925 Cal 251 (252, 253) ✠ (Vol 14) 1927 All 657 (658) : 50 All 202 (DB) ✠ (Vol 23) 1936 All 661 (662) (DB) ✠ (Vol 23) 1936 Mad 887 (891) : I L R (1937) Mad 66 (DB) ✠ (Vol 4) 1917 Mad 128 (130, 131) (SB). (Per *Seshagiri Ayyer J.*) ✠ (Vol 11) 1924 Nag 211 (213) ✠ (Vol 5) 1918 Nag 218 (219) : 14 Nag L R 133 ✠ (Vol 22) 1935 Oudh 462 (464) : 11 Luck 283 (DB) ✠ (Vol 14) 1927 Oudh 603 (604) : 2 Luck 659 ✠ (Vol 28) 1941 Pat 577 (580) : 20 Pat 346 (SB).

[a][53. *(1)* Every transfer of immoveable property made with intent to defeat or delay the creditors of the transferor shall be voidable at the option of any creditor so defeated or delayed.

Fraudulent transfer.

Nothing in this sub-section shall impair the rights of a transferee in good faith and for consideration.

Nothing in this sub-section shall affect any law for the time being in force relating to insolvency.

A suit instituted by a creditor (which term includes a decree-holder whether he has or has not applied for execution of his decree) to avoid a transfer on the ground that it has been made with intent to defeat or delay the creditors of the transferor, shall be instituted on behalf of, or for the benefit of, all the creditors.

(2) Every transfer of immoveable property made without consideration with intent to defraud a subsequent transferee shall be voidable at the option of such transferee.

For the purposes of this sub-section, no transfer made without consideration shall be deemed to have been made with intent to defraud by reason only that a subsequent transfer for consideration was made.]

[a] *Substituted* by the Transfer of Property (Amendment) Act, 1929 (20 [XX] of 1929), S. 15.

Section 52 — Note 38 *(contd.)*

[But see (Vol 3) 1916 Mad 323 (324) : 39 Mad 283 (DB) ✠ (Vol 22) 1935 Mad 875 (878) ✠ (Vol 17) 1930 All 289 (290) ✠ (Vol 4) 1917 Cal 222 (225) ✠ (Vol 14) 1927 Nag 295 (296) ✠ (Vol 14) 1927 Nag 299 (300) ✠ ('42) 1942 Oudh W N (BR) 16 (17) (DB) ✠ ('38) 1938 All L Jour (Sup) 20 (21).]

[2] *Lis pendens* affects a lease *pendente lite* by a party only to the extent to which it prejudices the other party under the decree or order. (Vol 24) 1937 Cal 763 (764) : ILR (1937) 2 Cal 181 (DB).

39. Transferee pending suit is representative of transferor — Party within S. 47, Civil P. C. — [1] A transferee, *pendente lite* from a party to a suit will be bound by the decree passed in the suit even if he is not made a party to the suit. (Vol 24) 1937 P C 260 (261) : 31 Sind L R 652 (PC).

[2] Even an auction-purchaser of the property pending a suit in respect of the property is a representative of the judgment-debtor. ('04) 26 All 447 (460) (FB) ✠ (Vol 23) 1936 All 479 (481) (DB) ✠ ('96) 24 Cal 62 (76) (FB). (*Overruling* ('89) 16 Cal 355)

[3] Where the property has been decreed to be given possession to the plaintiff or is sold in execution, the transferee *pendente lite* cannot re-ist delivery of possession to the decree-holder or the auction-purchaser. ('11) 39 Cal 220 (225, 226) (DB) ✠ (Vol 12) 1925 Cal 1243 (1244).

[4] Pending the suit the transferee is not entitled to be made a party to the suit, though the Court has a discretion to make him a party. (Vol 11) 1924 Cal 188 (189) (DB) ✠ ('98) 21 All 149 (151) (DB) ✠ ('84) 8 Bom 322 (337) ✠ (Vol 24) 1937 Bom 244 (253) (DB) ✠ (Vol 26) 1939 Nag 128 (129).

40. Injunction on party not to transfer. — [1] The Court can grant an injunction on a party not to effect a transfer *pendente lite*. ('09) 2 Ind Cas 265 (267) (DB) (Cal) ✠ ('12) 17 Cal L Jour 427 (430) (DB).

[2] A party is not bound to apply for an injunction restraining alienation *pendente lite* nor is the Court bound to grant it. (1900) 23 All 60 (65) (DB).

41. Modification of decree—Effect on execution sale or assignment of decree. — [1] Doctrine of *lis pendens* has no application where a property has been sold in execution of a money decree which is subsequently varied or reversed. ('05) 29 Bom 435 (448) (FB).

[2] A *bona fide* purchaser at an execution sale will get a good title notwithstanding the subsequent variation of the decree. The person in whose favour the variation is made can claim restitution from the other party to the suit. ('87) 10 All 166 (172) : 15 Ind App 12 (PC) ✠ ('13) 16 Oudh Cas 225 (231) (DB) ✠ ('86) 9 Mad 130 (133) (DB) ✠ (Vol 3) 1916 All 159 (160) : 38 All 240 (DB).

[3] Where a decree is assigned to a third party and appeal is thereafter filed against it, the assignment is affected by the doctrine of *lis pendens*. (Vol 3) 1916 Mad 745 (746) : 38 Mad 36 (DB).

SECTION 53 — SYNOPSIS

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Section 53 *(contd.)*

1. Scope.— [1] The principles of the section will apply even in places to which this Act is not directly applicable. (Vol 10) 1923 Lah 478 (479). (The Punjab) ✠ (Vol 25) 1938 Lah 156 (157) (DB). (Do.) ✠ ('11) 10 Ind Cas 922 (923). (Low Bur). (Burma before 1924.) ✠ ('13) 6 Low Bur Rul 170 (171). (Do.)

2. Suit by creditor for declaring a transfer as fraudulent. — [1] Suit by a creditor for a declaration that a certain transfer made by the debtor was fictitious and was intended to defraud creditors is not maintainable. (Vol 32) 1945 Mad 53 (54, 55) : I L R (1945) Mad 412 (DB).

3. This section and S. 23, Contract Act. — [1] Where *A* transfers property to *B* for the purpose of saving it from the creditors and the transfer is based on an agreement the object of which is fraudulent, S. 23, Contract Act, would apply and the transfer would be void even as between the parties. Section 53, T. P. Act, would not apply. (Vol 30) 1943 Nag 129 (134) : I L R (1943) Nag 42 (DB).

[2] The mere fact that one of the parties to the agreement is actuated by an unlawful intention and that the other party is aware of this will not make the object of the agreement an unlawful one. The transfer of property consequent upon such agreement will be under this section, not void. It will be binding as between the parties to it but voidable at the option of the creditors of the transferor. (Vol 30) 1943 Nag 129 (134): I L R 1943 Nag 42 (DB) ✠(Vol 23) 1936 Nag 207 (209) : I L R (1936) Nag 183.

4. Section applies only to transfers of immovable property.—[1] This section is limited to transfers of immovable property. (Vol 1) 1914 P C 137 (139) : 37 Mad 227 (PC) (Assignment of rights under decree—S. 53 does not apply.)

[2] The principles underlying the section may be applied to transfers of moveable property. ('01) 1901 Pun Re No 6, p. 18 (23) ✠ (Vol 19) 1932 Rang 13 (13) : 9 Rang 614 (DB) ✠ (Vol 25) 1938 Nag 249 (250, 251) : I L R (1940) Nag 316.

[3] According to the principles underlying this section, a deed is void against creditors when the debtor is in a state of insolvency and when the effect of the deed is to leave the debtor without the means of paying his present debts unless the transfer has been made upon valuable consideration and in good faith. (Vol 1) 1914 P C 137 (139) : 37 Mad 227 (PC).

5. Muhammadan law. — [1] There is no rule of Muhammadan law inconsistent with the provisions of this section. (Vol 17) 1930 All 462 (465) : 52 All 710 (DB) ✠ (Vol 4) 1917 Mad 841 (844) (DB).

6. "Transfer of property."— [1] "Transfer" includes transfers whether with or without consideration. (Vol 28) 1941 Oudh 205 (208) (DB).

[2] The section does not apply to sham or simulated transactions in which there is no intention to transfer and no conveyance of any rights in property. (Vol 31) 1944 All 214 (215): I L R (1944) All 325 ✠(Vol 33) 1946 Sind 78 (79) : I L R (1946) Kar 98 (D B) ✠ (Vol 31) 1944 Oudh 314 (316): 20 Luck 226 (DB) ✠(Vol 31) 1944 Nag 44 (52) : I L R (1944) Nag 342 (F B) ✠(Vol 30) 1943 Nag 129 (132) : I L R (1943) Nag 42 (D B) ✠(Vol 29) 1942 All 344 (345) : I L R (1942) All 848 (D B) ✠(Vol 10) 1923 Pat 564 (567) (D B) ✠ (Vol 28) 1941 Oudh 95 (97) ✠(Vol 28) 1941 Oudh 457 (464): 16 Luck 832 (DB).

[But see (Vol 12) 1925 Bom 287 (287, 288) (D B).]

[3] The defrauded creditors are not affected by sham transfers of property. (Vol 31) 1944 Mad 381 (383): I L R (1945) Mad 138 (DB) ✠(Vol 30) 1943 Nag 129 (136) : I L R (1943) Nag 42 (D B) ✠(Vol 17) 1930 P C 255 (256, 258) (P C) ✠('84) 10 Cal 616 (624) : 11 Ind App 10 (P C).

[4] A sham transfer need not to be set aside by a suit. (Vol 31) 1944 Nag 44 (52): I L R (1944) Nag 342 (FB) ✠(Vol 30) 1943 Nag 129 (132, 136): I L R (1943) Nag 42 (D B) ✠('08) 35 Cal 551 (560): 35 Ind App 98 (P C) ✠(Vol 27) 1940 All 407 (409): I L R (1940) All 542 (DB).

[5] A sham transfer can be challenged otherwise than under the provisions of this section. (Vol 7) 1920 Nag 80 (83): 16 Nag L R 3.

[6] Lack or gross inadequacy of consideration for a transaction is not a proof of its unreality. (Vol 31) 1944 Nag 133 (134): I L R (1944) Nag 125 ✠(Vol 23) 1936 Nag 207 (208): I L R (1936) Nag 183.

[7] A benami transaction is not necessarily a sham transaction not intended to be given effect to. (Vol 31) 1944 Nag 44 (54): I L R (1944) Nag 342 (F B) ✠(Vol 7) 1920 Mad 26 (39) (D B) ✠(Vol 21) 1934 Mad 587 (590).

[8] A partition of joint property is a transfer of property and can be avoided under this section. (Vol 10) 1923 Mad 577 (577) (DB). ((Vol 7) 1920 Mad 20, *Not followed.*) ✠(Vol 23) 1936 Bom 10 (12): 60 Bom 34 (DB) ✠(Vol 31) 1944 Mad 381 (382, 383): I L R (1945) Mad 138 (D B).

[*See also* (Vol 31) 1944 Nag 44 (52): I L R (1944) Nag 342 (F B). (Apart from whether partition is a "transfer", the principle of this section is applicable to cases of partition)].

[9] A deed of appointment made in accordance with a power reserved in deed of trust is a "transfer of property". ('94) 21 Cal 185 (202).

[10] This section does not in terms apply to cases of relinquishment. (Vol 25) 1938 Oudh 65 (67) (DB).

[11] Where the transaction is not a mere effacement of the interest of the alleged transferor, but is intended to convey rights to the next reversioner it would amount to a "transfer of property." (Vol 26) 1939 Bom 499 (500, 501) ✠(Vol 23) 1936 Nag 166 (167): I L R (1936) Nag 69.

[12] Judgment-creditor gave up his claim against his judgment-debtor and certified satisfaction of his decree—*Held* that the transaction was not a "transfer of property." ('09) 5 Mad L Tim 72 (72) (DB).

[13] Mortgagee giving up his claim against the mortgagor makes a gift and hence the principle of this section is applicable. (Vol 3) 1916 Mad 481 (482) (DB).

[14] A deed of waqf is a "transfer of property." (Vol 30) 1943 All 2 (5) (DB) ✠(Vol 16) 1929 All 277 (278) (DB).

[15] A transfer in execution of a decree is not a "transfer of property." (Vol 29) 1942 Mad 632 (633) : I L R (1943) Mad 47 (D B). (But principle of section may be applied.) ✠(Vol 16) 1929 All 238 (239): 51 All 595 (DB). (Do.) ✠('28) 110 Ind Cas 386 (386) (Lah).

[16] Where the owner allowed a third person to apply for mutation on the false allegation of an oral gift and acquiesced in the passing of an order for mutation, it was held that it was a transfer of property. (Vol 25) 1938 Oudh 165 (167) (DB).

7. Intent to defeat or delay creditors.—[1] The intention must be to defeat or delay the creditors generally and not merely one creditor. ('01) 25 Bom 202 (224) (DB) ✠(Vol 4) 1917 Low Bur 124 (124) (DB) ✠(Vol 17) 1930 Mad 665 (668).

[But see (Vol 4) 1917 Pat 448 (449, 450) (DB). (Section 53 applies even though only one creditor may have been defrauded.) ✠(Vol 26) 1939 Sind 97 (99) : I L R (1939) Kar 269 (DB). (Do.)]

[2] The test to determine whether certain transaction is fraudulent or not is to see whether the transfer

Section 53—Note 7 *(contd.)*

was executed as a mere cloak, the real intention of the parties being that the ostensible owner should retain the benefit for himself. ('97) 20 Mad 465 (466) (D B) ✠('01) 1901 Pun Re No 6, p. 18 (27) ✠(1900) 13 C P L R 180 (182, 183) ✠('05) 29 Bom 428 (434) (D B) ✠(Vol 14) 1927 Cal 836 (839, 840): 54 Cal 687 (DB).

[See however (Vol 5) 1918 Cal 82 (85) (D B). (Text not exhaustive.)✠ ('07) 34 Cal 999 (1012) (DB.) (Do.)]

[2a] A person may endeavour to defeat or delay his creditors by making a fictitious transfer which is not intended to take effect or by making a real transfer involving exchange of property which they may find it easily available to creditors for money or property difficult or impossible to seize. (Vol 32) 1945 All 42 (45): I L R (1944) All 737 (D B).

[3] The mere fact that a transfer has the effect of defeating or delaying the creditors does not render it fraudulent. (1882) 51 L J Ch 154 (156): 20 Ch D 389 *Golden* v. *Gillam*.

[4] If defeating or delaying the creditors is intended the motive is immaterial. ('38) 42 Cal W N 34 (37).

[5] Mere knowledge that the transfer is likely to prejudice the creditors, does not make it fraudulent. ('01) 25 Bom 202 (226) (D B).

[6] Intention is to be determined from the facts considered in relation to each other and weighed as a whole. (Vol 30) 1943 All 2 (5) (D B) ✠ (Vol 30) 1943 Mad 531 (534) (D B) ✠ (Vol 6) 1919 P C 6 (8): 15 Nag L R 68 (P C) ✠ (Vol 28) 1941 Oudh 205 (208) (D B).

[7] The conduct of the parties, prior, contemporaneous and subsequent, will be relevant for this purpose. (Vol 25) 1938 Lah 136 (137).

[See however (Vol 28) 1941 Mad 188 (191) (D B). (Intention cannot be judged by subsequent events.)]

[8] Nature of fraudulent transfer is not altered by the fact that subsequently some of the creditors have been fully satisfied. (Vol 9) 1922 All 449 (454): 44 All 748 (D B) ✠ (Vol 28) 1941 Rang 76 (77): 1940 Rang L R 777 (D B).

[9] The Court may presume a fraudulent intent where the transfer is made gratuitously or for a grossly inadequate consideration. (1870) 39 L J Ch 689 (690, 691): 18 W R (Eng) 906, *Freeman* v. *Pope*. (On appeal from (1870) 39 L J Ch 148) ✠ (1896) 66 L J Q B 111 (114): 75 L T 166, *Tetley, In re; Jeffrey Ex parte*.

[9a] Joint Hindu family — Father *A* and son *B* partitioning joint family property — Subsequently *B* selling his as well as his son *C*'s share in part of property to *A* without legal necessity — *A* then devising property absolutely to *C* — Transfer by *B* held fraudulent. (Vol 33) 1946 Sind 137 (140): I L R (1946) Kar 14.

[10] A transfer in consideration of natural love and affection is a voluntary or gratuitous transfer. (Vol 6) 1919 Oudh 95 (97) (D B) ✠ ('12) 1912 Pun Re No. 74 (D B).

[11] A voluntary transfer cannot be said *ipso facto* to be a fraudulent transfer and, if made *bona fide* it will be valid against the creditors. (Vol 28) 1941 Oudh 205 (208) (D B). (Deed of gift.) ✠ ('68-69) 4 Mad H C R 84 (88) (D B).

[12] The fact that a gratuitous transfer has resulted in defeating or delaying the creditors is not sufficient to raise the presumption that it is fraudulent. (1900) 69 L J Q B 722 (724): 83 L T 176, *Lane-Fox, In re; Gimblett, Ex parte*.

[13] It is necessary to show that the gratuitous transferor, at the time of the transfer, was indebted to others and was unable to meet his liabilities, or that he embarked soon after the transfer, on some hazardous business. (Vol 14) 1927 Lah 420 (421): 8 Lah 544 (D B)✠(Vol 20) 1933 Rang 252 (253) ✠ (Vol 1) 1914 All 424 (426) ✠ ('92) 16 Bom 1 (14).

[*See also* (Vol 28) 1941 Oudh 178 (179) (D B).]

[But see ('10) 33 Mad 205 (207) (D B). (Second paragraph applies to subsequent creditors also.)]

[14] When the debtor has no debts and is not in any embarrassed circumstances, a voluntary transfer in consideration of natural love and affection cannot be held to be fraudulent. (Vol 23) 1936 Lah 222 (224) (D B).

[15] Inadequacy of consideration may, under circumstances, be considered as evidence of fraud. (Vol 28) 1941 Oudh 457 (463): 16 Luck 832 (D B).

[16] A transfer intended to reserve a benefit to the debtor to the prejudice of the creditors, implies fraudulent intent. (Vol 31) 1944 Nag 44 (52): I L R (1944) Nag 342 (F B) ✠ (1903) 72 L J K B 237 (240): (1903) 1 K B 671, *Maskelyne* v. *Smith* ✠ (Vol 14) 1927 Cal 836 (839): 54 Cal 687 (D B).

[*See also* (Vol 30) 1943 Nag 129 (131): I L R (1943) Nag 42 (D B).]

[See however (Vol 5) 1918 Mad 377 (378) (D B). (Transfer not *bona fide* and effected to defraud creditors is void though the transferor secures no benefit.)]

[17] Trust was made for the benefit of all such creditors as were willing to accept the terms of the debtor and the debtor retained a benefit for himself: *Held* that the trust was fraudulent. (1878) 48 L J Q B 204 (206): 39 L T 424, *Spencer* v. *Slater*.

[*See also* (Vol 28) 1941 Cal 233 (236) (D B). (Trust deed intended to be a cloak for shielding property from creditors and benefiting the debtors.)]

[18] Transfer not intended as a cloak or device for protection of the transferor against the creditors, cannot be impeached as fraudulent. (Vol 3) 1916 Cal 404 (405) (D B)✠(Vol 25) 1938 Cal 818 (821) (D B).

[*See also* (Vol 28) 1941 Mad 188 (191). (Members of Christian family making arrangement for payment of creditors and incidentally making small provision for religious purposes.)]

[19] A person executed a trust deed of his properties with the chief object of paying off all his creditors. *Held* that the deed cannot be said to be fraudulent even though one of the objects is to avoid the Court of Wards taking over the estate. (Vol 10) 1923 Oudh 80 (87): 25 Oudh Cas 291 (D B).

[20] Son profligate — Transfer to grandson to save property held not fraudulent. (Vol 25) 1938 Oudh 65 (68) (D B).

[21] Family arrangement was come to by which some property was given to *A* and some cash to *B* in order to protect the property from the profligate habits of *B*: *Held* that the transaction was not fraudulent. ('84) 6 All 560 (572): 11 Ind App 164 (P C).

[22] That the debtor retains some interest in the property transferred is but a piece of evidence showing a fraudulent intent. ('11) 21 Cal L Jour 302 (303). (Per Cox J.)

[23] Indebtedness of the transferor on the date of the transfer is relevant to show a fraudulent intention (Vol 31) 1944 All 214 (216): I L R (1944) All 325 ✠ (1867) 7 Suth W R 513 (513) (D B)✠(1860) 14 Moo P C 121 (136): 15 E R 251, *Corlett* v. *Radcliffe*.

[24] Indebtedness at the time of transfer would not *per se* establish a fraudulent intent. (Vol 25) 1938 Lah 136 (137)✠('92-96) 2 Upp Bur Rul 315 (317).

[25] Where at the time of the transfer the transferor has other property sufficient to satisfy his creditors, the transaction cannot be fraudulent. ('80) 2 All 891 (895) (D B)✠(Vol 21) 1934 Rang 308 (309)✠(Vol 1) 1914 Lah 108 (110) ✠ (Vol 10) 1923 Nag 334 (335, 336) ✠ (Vol 6) 1919 Pat 236 (237) (D B)✠ ('89) 13 Bom 297 (300, 301) (D B)✠(Vol 5) 1918 Cal 82 (87) (D B) ✠ (Vol 15) 1928 All 476 (479) (D B).

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[26] A transfer by a person indebted, at the time, of all his properties indicates fraudulent intention. (1864) 1 Suth W R 41 (41) (DB)✠('79) 1879 Pun Re No 86, p. 232 (233)✠(Vol 16) 1929 All 872 (873) (D B)✠(Vol 4) 1917 Mad 484 (484) (D B) ✠ (Vol 24) 1937 Lah 847 (848) ✠ (Vol 15) 1928 Rang 1 (3) : 5 Rang 588 (D B).

[*See also* (Vol 30) 1943 All 2 (5) (D B).]

[26a] Partition between father and sons — No property allotted to father — All property given to sons— Sons undertaking to pay debts incurred by father — Partition held fraudulent. (Vol 34) 1947 Mad 203 (204).

[27] Relationship between the transferor and the transferee is not proof of fraudulent intention. (Vol 26) 1939 Lah 438 (439) (D B) ✠ (Vol 1) 1914 Low Bur 180 (182). (Suspicious circumstance.)✠(Vol 17) 1930 Rang 27 (29) : 7 Rang 477 (D B) ✠ (Vol 25) 1938 Sind 215 (217) : I L R (1939) Kar 136 (D B)✠('11) 1911 Pun L R No. 114, page 434 (435) ✠ (Vol 12) 1925 Rang 227 (228): 3 Rang 71.

[28] The fact that the transferee is a relative of the transferor may be material as evidence of bad faith. (1868) 10 Suth W R 445 (445) (D B) ✠ (Vol 11) 1924 Mad 779 (780) (D B).

[29] That the consideration for the transfer is a barred debt is not a strong evidence of bad faith. ('07) 17 Mad L Jour 11 (14) (D B) ✠ (Vol 24) 1937 Rang 471 (471) (Obiter)✠(Vol 17) 1930 Sind 284 (286) (D B).

[30] A transfer for consideration with no intent to reserve any benefit to the debtor is good against the creditors even though the transferor intended thereby to defeat an impending execution. (Vol 21) 1934 Mad 587 (592)✠(Vol 17) 1930 Mad 665 (667, 668).

[*See* (Vol 31) 1944 Mad 381 (383): I L R (1945) Mad 138 (D B).]

8. Benami transactions not necessarily fraudulent.—[1] A plea that a transfer is benami is not equivalent to a plea that the transfer is fraudulent. (Vol 3) 1916 P C 238 (240): 44 Cal 662: 44 Ind App 72 (PC).

9. Transfer is valid until avoided. — [1] A fraudulent transfer is valid until it is avoided by the creditors or the subsequent transferee. (Vol 31) 1944 Nag 133 (134): I L R (1944) Nag 125✠(Vol 30) 1943 Nag 129 (131, 135, 136): I L R (1943) Nag 42 (D B) ✠ (Vol 13) 1926 All 470 (471): 48 All 414 (D B)✠(Vol 17) 1930 All 438 (439)✠ (Vol 20) 1933 Cal 812 (813) ✠ ('12) 23 Mad L Jour 726 (726).

[2] As between the parties to the transfer the transfer cannot be avoided by either of them. (Vol 30) 1943 Nag 129 (131, 132, 135) : I L R (1943) Nag 42 (D B) ✠ (Vol 23) 1936 Nag 207 (209) : I L R (1936) Nag 183.

[3] The transfer is valid as between the parties thereto even if it has been avoided as against creditors or a subsequent transferee. (Vol 8) 1921 Lah 333 (335) (DB) ✠ (Vol 23) 1936 Nag 207 (209) : I L R (1936) Nag 183.

[4] As between the transferees, the transfer stands subject only to the right of the creditors to enforce their claim just as if the transfer had not been made. (Vol 26) 1939 Mad 894 (896) : I L R (1940) Mad 73.

[5] Where a transfer is set aside at the instance of a creditor, the case is governed by S. 65 of the Contract Act. (Vol 23) 1936 Nag 268 (269) : I L R (1937) Nag 94.

[6] Where a creditor or the subsequent transferee once affirms the transfer, he cannot afterwards avoid it. (Vol 15) 1928 All 234 (235) (DB) ✠ (Vol 21) 1934 All 948 (949, 950).

10. Who can avoid a fraudulent transfer.—[1] A fraudulent transfer cannot be avoided by any person except the person at whose instance the transfer is voidable. (Vol 30) 1943 Nag 129 (132, 134) : ILR (1943) Nag 42 (DB) ✠ (Vol 29) 1942 Mad 714 (715) ✠ (Vol 15) 1928 Lah 9 (16) (DB). (Creditor.)✠(Vol 2) 1915 Bom 89 (90) : 39 Bom 507 (DB). (Person acquiring title at court sale is not subsequent transferee or a person having interest.) ✠ (Vol 10) 1923 Nag 195 (196).

[2] The parties to a fraudulent transfer cannot set up the plea that the transfer was fraudulent. (Vol 30) 1943 Nag 129 (135) : I L R (1943) Nag 42 (DB) ✠ (Vol 23) 1936 Nag 207 (209) : I L R (1936) Nag 183 ✠ ('71) 15 Suth W R 273 (274) (DB) ✠ ('08) 31 Mad 206 (211) (D B).

[3] Where the fraud intended to be effected has been carried out substantially the Court will not allow any party to allege his own fraud in order to avoid his own deed. ('97) 20 Mad 326 (331) (DB) ✠ (Vol 22) 1935 All 529 (534) : 58 All 1 (FB) ✠ (Vol 4) 1917 Mad 297 (299) (D B) ✠ (Vol 11) 1924 Oudh 321 (323) (D B) ✠ ('08) 35 Cal 551 (558, 559): 35 Ind App 98 (PC)✠(Vol 2) 1915 Lah 264 (265).

[See however (Vol 14) 1927 Rang 86 (87) : 4 Rang 429 (DB). (Transfer with intention to defraud—Fraud effected—Transferor continuing in possession even after transfer—His possession will not be disturbed.)]

[4] Where a party to a fraudulent transaction seeks, as plaintiff, to enforce the transaction against the other party, the defendant can show his own turpitude in order to defeat the plaintiff. (Vol 30) 1943 Nag 129 (136) : I L R (1943) Nag 42 (D B) ✠ (Vol 30) 1943 Nag 113 (114) ✠ (Vol 19) 1932 Lah 503 (512) : 13 Lah 713 (FB). (Case law reviewed.) ✠ (Vol 10) 1923 Cal 90 (94) (D B) ✠ (Vol 10) 1923 All 504 (505, 507) : 45 All 396 (D B) ✠ (Vol 8) 1921 Low Bur 63 (66) : 11 Low Bur Rul 83 (DB) ✠ ('94) 18 Bom 372 (374) (DB) ✠('09) 32 Mad 323 (325) (DB) ✠ (Vol 28) 1941 Cal 233 (236) (D B).

[But see (Vol 20) 1933 Mad 457 (459) : 56 Mad 646 (DB). ((Vol 5) 1918 Mad 365, *Foll.*) ✠ (Vol 21) 1934 Mad 252 (254) ✠ (Vol 24) 1937 Pat 453 (453, 454) ✠ ('07) 31 Bom 405 (411, 412) (DB)]

[5] Where the intended fraud is not carried out a party to the transaction may allege his own fraud whether as a plaintiff or as a defendant. (Vol 30) 1943 Nag 129 (136) : I L R (1943) Nag 42 (D B) ✠ ('08) 35 Cal 551 (558, 559) : 35 Ind App 98 (P C) ✠ (Vol 23) 1936 Mad 717 (718) : 59 Mad 998 (FB). ((Vol 5) 1918 Mad 365 ; (Vol 13) 1926 Mad 1196 ; (Vol 11) 1924 Mad 604 and (Vol 4) 1917 Mad 297, *Overruled.*) ✠ (Vol 1) 1914 Bom 283 (283, 284) : 38 Bom 10 (DB) ✠ (Vol 10) 1923 All 164 (165).

11. "Creditor, meaning of." — [1] *A* who was an agent of *B* for purchasing supplies and who was remunerated by acommission on the price of supplies, was given advances from time to time. It was held that in respect of the balance of the advance in the hands of *A*, *B* could not be said to be a creditor. (Vol 14) 1927 Oudh 168 (169) (D B).

[2] A mortgagee from a person of his property is a "creditor" of that person. ('97) 1897 Bom P J 461 (DB) ✠ (Vol 3) 1916 Mad 494 (494) (DB).

[3] A person entitled to pre-emption is not a creditor of the transferor of the property. (Vol 12) 1925 All 358 (359) : 47 All 424 (DB).

[4] An auction-purchaser of the property transferred is not a creditor of the judgment-debtor. (Vol 2) 1915 Bom 89 (90) : 39 Bom 507 (DB).

[5] A creditor who has in execution of his decree, purchased the property transferred will be a 'creditor'. (Vol 26) 1939 Bom 508 (512).

[6] The liability, under Hindu law, of a husband to pay for the maintenance of his wife, during the years he had deserted her is a "debt" and the wife is, in that respect, a "creditor" of the husband. (Vol 14) 1927 Mad 657 (658).

[7] In the absence of desertion or separation a wife cannot be considered to be a "creditor" of the husband

Section 53 — Note 11 *(contd.)*
merely by reason of the fact that she is entitled to be maintained by the husband. (Vol 19) 1932 Oudh 40 (42) : 7 Luck 411 (DB).

12. "Of the transferor." — [1] *A* made a fraudulent transfer in favour of *B* for the purpose of defeating or delaying creditors. *A* left a will subsequently under which he appointed *G* as his executor. *X* obtained a decree personally against *G*, got his right, title and interest sold and then filed a suit against *G* and *B* for possession of the properties in the possession of *B*. It was held that he could not dispute a transfer by *A* to *B* as fraudulent. (1857) 6 Moo Ind App 510 (524) (PC).

[2] *X* made a gift of joint family property to his daughters at a time when his son *Y* was heavily indebted: *Held* that the creditors of *Y* could not avoid the transfer. (Vol 23) 1936 Mad 825 (826).

[3] Where *A* purchases property in the name of *B* with a view to keep the property out of reach of his creditors, this section will not apply. (Vol 23) 1936 Bom 160 (161) : 60 Bom 226.

[4] *A* gifted certain property to *B's* wife upon a request by *B* that *A* should transfer the property to his wife so as to protect it from his creditors. *Held* that *C* a creditor of *B* could not avoid the transaction. (Vol 31) 1944 Nag 133 (134) : I L R (1944) Nag 125.

13. Subsequent creditors. — [1] Subsequent creditors can impeach a fraudulent alienation by the debtor. ('10) 33 Mad 205 (206) (DB) ✠ (Vol 33) 1946 Sind 137 (140) : I L R (1946) Kar 14 ✠ (Vol 21) 1934 Rang 302 (303) : 12 Rang 666 ✠ (Vol 18) 1931 Oudh 134 (135) : 6 Luck 397 (DB) ✠ (Vol 11) 1924 Mad 779 (780) (DB) ✠ (Vol 14) 1927 Mad 657 (658) ✠ ('03) 5 Bom L R 255 (256, 257) ✠ (Vol 18) 1931 Oudh 333 (338) : 7 Luck 131 (DB) ✠ (Vol 8) 1921 All 298 (300) (DB). (Per *Stuart J.*) ✠ (Vol 17) 1930 All 610 (611) (DB) ✠ (Vol 14) 1927 Lah 420 (421) : 8 Lah 544 (DB). (Per *Tek Chand J* ; *Campbell J.*, contra.)

[But see (Vol 17) 1930 Nag 51 (53) ✠ (Vol 27) 1940 Oudh 200 (201) : 15 Luck 503 ✠ (Vol 1) 1914 Mad 641 (643) : 38 Mad 1071 (DB).]

14. Creditor need not obtain judgment on his debt before being entitled to impeach fraudulent transfer. — [1] It is not necessary to enable a creditor to impeach a fraudulent transfer that he should have obtained a decree on his debt. (Vol 14) 1927 Mad 657 (658) ✠ ('02) 27 Bom 146 (149) (DB) ✠ (Vol 13) 1926 Nag 494 (494) ✠ (Vol 10) 1923 Lah 478 (479, 480) (DB).

[But see ('82) 1882 Pun Re No. 10, page 36 (39) ✠ ('67) 2 Agra 411 (411)]

15. "At his option." — [1] The avoidance of a transfer under this section need not necessarily be by way of a suit instituted for the purpose. (Vol 31) 1944 Nag 44 (51) : ILR (1944) Nag 342 (FB). (Avoidance by an application under S. 4, Provincial Insolvency Act.) ✠ (Vol 7) 1920 Mad 748 (751) : 43 Mad 760 (FB). (Vol 5) ✠ 1918 Mad 421 : 41 Mad 612, OVERRULED.) ✠ (Vol 8) 1921 Mad 657 (659) (DB) ✠ (Vol 23) 1936 Mad 408 (410).

[But see (Vol 31) 1944 Nag 133 (134) : I L R (1944) Nag 125 (The transaction can be set aside only by a suit.)]

16. Plea in defence. — [1] Avoidance of a transfer may be effected by way of defence in a suit brought to enforce the transfer. (Vol 29) 1942 Mad 714 (715) ✠ (Vol 26) 1939 Sind 97 (98, 99) : I L R (1939) Kar 269 (DB) ✠ (Vol 21) 1934 All 155 (159) : 56 All 624 (FB) ✠ (Vol 14) 1927 Cal 836 (838) : 54 Cal 687 (DB) ✠ (Vol 7) 1920 Mad 748 (754) : 43 Mad 760 (FB). (Vol 5) 1918 Mad 421 : 41 Mad 612 and (Vol 4) 1917 Mad 519 OVERRULED; Suit under O. 21, R. 63, Civil P. C.) ✠ ('12) 15 Cal L Jour 649 (652) (DB) (Do.) ✠ (Vol 7) 1920 Nag 80 (81, 83) : 16 Nag L R 3. (Do.) ✠ (Vol 8) 1921 All 298 (301) (DB) (Do.) ✠ (Vol 7) 1920 Nag 83 (85). (Do.) ✠ (Vol 7) 1920 Bom 10 (10) (DB). (Do.)

[2] Claim to attached property made by a party to suit under S. 47, Civil P. C., on the basis of a transfer from the judgment-debtor: *Held* that the attaching creditor was entitled by way of defence to plead that the transfer was fraudulent. (Vol 25) 1938 Lah 136 (138) ✠ (Vol 23) 1936 Nag 166 (168) : I L R (1936) Nag 69.

[3] A plea that the transfer sought to be enforced is fraudulent must be raised in the written statement. It cannot be raised at the time of arguments if it would take the plaintiff unawares. (Vol 28) 1941 Oudh 457 (464) : 16 Luck 832 (DB).

[4] The plea that certain transfer was fraudulent can be taken by an attaching creditor as decree-holder in execution proceedings in answer to the claim of the judgment-debtor. It is not necessary to file a separate suit for that purpose. (Vol 33) 1946 Sind 137 (140, 141) : I L R (1946) Kar 14.

17. Avoidance of transfer in part. — [1] If a transfer offends this section as being in fraud of creditors, it cannot be upheld even to the extent to which it may be found to be supported by consideration. (Vol 26) 1939 Mad 745 (749) (DB). (Consideration paid at the time of transfer.) ✠ (Vol 22) 1935 Lah 404 (405) : 16 Lah 680 (DB). (Do.) ✠ (Vol 14) 1927 Mad 278 (279) (DB). (Do.) ✠ (Vol 25) 1938 Nag 249 (250). (Do.) ✠ (Vol 10) 1923 Lah 423 (424) : 4 Lah 211 (DB). (Do.) ✠ (Vol 17) 1930 Lah 1027 (1029) : 12 Lah 194 (DB). (Consideration paid in discharge of prior debts.) ✠ (Vol 26) 1939 Bom 508 (513). (Do.) ✠ (Vol 6) 1919 Bom 99 (100) : 43 Bom 707 (DB). (Do.) ✠ (Vol 28) 1941 Cal 378 (383) : I L R (1941) 1 Cal 536. (Do.) ✠ (Vol 28) 1941 Mad 690 (693). (Do.) ✠ (Vol 18) 1931 Mad 513 (519). (Consideration paid to third parties.) ✠ (Vol 7) 1920 Nag 83 (86). (Do.) ✠ (Vol 19) 1932 Lah 174 (176) : 12 Lah 763. (Do.)

[But see ('08) 35 Cal 1051 (1057) (DB) ✠ (Vol 23) 1936 Pesh 216 (216).]

[2] If part of the consideration consists in the discharge by the transferee, of a prior incumbrance on the property transferred, the transferee can be given a charge thereon for such amount. (Vol 20) 1933 Rang 191 (193) ✠ (Vol 14) 1927 Mad 278 (279) (DB) ✠ (Vol 28) 1941 Mad 690 (691).

[*See* (Vol 29) 1942 Mad 751 (753) (D B).]

18. Transfer taken in good faith and for consideration. — [1] To save a fraudulent transfer from being avoided both good faith and payment of consideration are essential. (Vol 1) 1914 P C 137 (139) : 37 Mad 227 (PC).

[2] The mere fact of payment does not necessarily establish good faith ('03) 5 Bom L R 213 (215, 216) (DB) ✠ (Vol 24) 1937 Oudh 349 (351) (DB).

[3] Payment of consideration may be an ingredient in showing good faith. (1882) 51 L J Ch 154 (156) : 20 Ch D 389, *In re Johnson*; *Golden* v. *Gillam*. ✠ (1864) 1 Suth W R 319 (320) (SB). (Case before T. P. Act.) ✠ (Vol 19) 1932 Rang 13 (15) : 9 Rang 614.

[4] Payment of consideration may shift the onus of proof of bad faith on to the person impeaching the transfer. (1882) 51 L J Ch 154 (156) : 20 Ch D 389, *In re Johnson*; *Golden* v. *Gillam* ✠ (Vol 10) 1923 Nag 17 (18).

[5] The second paragraph cannot come into operation unless the transfer is made by the transferor with intent to defraud the creditors. (Vol 25) 1938 Sind 215 (216) : I L R (1939) Kar 136 (DB).

[6] The fact that the transferee knew that transferor was in financial embarrassment does not establish

Section 53— Note 18 (*contd.*)
want of good faith on the part of the transferee. (Vol 34) 1947 Cal 154 (156) (DB).

19. Consideration. — [1] "Consideration" means valuable consideration. (1900) 13 C P L R 180 (183).

[2] A transfer in discharge of a time-barred debt has been held to be one for "consideration." (Vol 17) 1930 Sind 284 (286) (DB).

[3] A trust deed executed to pay the creditors and to avoid the Court of Wards taking over the estate is not a transfer for consideration. (Vol 10) 1923 Oudh 80 (86, 87) : 25 Oudh Cas 291 (DB).

20. Transfer for dower. — [1] A transfer for dower is a transfer for consideration. (Vol 14) 1927 Oudh 176 (176) (DB). (Provided wife had no knowledge of husband's prior debt.)

[2] A transfer in consideration of a dower debt due does not fall within this section. (Vol 28) 1941 Oudh 457 (462, 463) : 16 Luck 832 (DB).

21. Good faith. — [1] A transferee participating in the fraudulent intention of the transferor has no good faith. (Vol 6) 1919 Cal 773 (776) (DB) ✠ ('09) 13 C P L R 180 (183, 184) ✠ (Vol 14) 1927 Mad 278 (279) (DB) ✠ (Vol 13) 1926 Nag 293 (296) ✠ (Vol 16) 1929 Lah 409 (413) (DB) ✠ (Vol 22) 1935 Lah 404 (405) : 16 Lah 680 (DB).

[2] The fact that the transferee has notice of the fraudulent intention of the transfer or is relevant in arriving at a finding on the question of his good faith. (Vol 10) 1923 Mad 558 (561) : 46 Mad 478 (DB).

[3] The mere fact that the transferee has reason to suspect that there may be other creditors of the transferor does not prove lack of *bona fides*. (Vol 24) 1937 All 39 (41) : I L R (1937) All 153 (DB)

[4] The fact that the transferee may have knowledge that the transaction might defeat or delay some creditors does not necessarily import bad faith. ('97) 24 Cal 825 (828) (DB) ✠ (Vol 5) 1918 Cal 82 (85) (DB) ✠ (Vol 19) 1932 Rang 13 (14) : 9 Rang 614 (DB) ✠ ('23) 71 Ind Cas 20 (23) (Pesh).

[5] Payment of consideration is not conclusive proof of *bona fides*. (Vol 5) 1918 Cal 82 (85) (DB)✠ ('07) 34 Cal 999 (1008, 1012, 1013) (DB) ✠ (Vol 14) 1927 Nag 166 (167).

[6] Payment of consideration raises a presumption of good faith. (1900) 13 C P L R 180 (183) ✠ (Vol 15) 1928 Pat 199 (201) (DB).

22. Preference of one creditor over others. — [1] See section 54 of the Provincial Insolvency Act, 1920; S. 56 of the Presidency Towns Insolvency Act.

[2] A part from the law of insolvency, a preference by a debtor of one creditor over others, is not *ipso facto* deemed fraudulent (Vol 31) 1944 Nag 44 (52) : I L R (1944) Nag 342 (FB) ✠ (Vol 2) 1915 P C 115 (116) : 43 Ind App 104 : 43 Cal 521 (PC) ✠ (Vol 16) 1929 P C 279 (281) : 56 Ind App 379 : 7 Rang 624 (PC).

[3] Preference of one creditor over others does not render the transaction voidable, even if the debtor did this on set purpose. (Vol 30) 1943 Nag 129 (136) : I L R (1943) Nag 42 (DB) ✠ (Vol 34) 1947 Cal 154 (155) (DB) ✠ (Vol 3) 1916 P C 238 (240) : 44 Ind App 172 : 44 Cal 662 (PC) ✠ (Vol 28) 1941 Oudh 457 (463): 16 Luck 832 (DB).

[4] The fact that the creditor, who is preferred to others, knew that the other creditors would be defeated by the transfer, will not make the transfer voidable. (Vol 30) 1943 Nag 129 (136): I L R (1943) Nag 42 (DB) ✠ (Vol 21) 1934 Lah 161 (162) ✠ (Vol 1) 1914 Low Bur 180 (182) ✠ (Vol 14) 1927 Mad 278 (279, 280) (DB) ✠ (Vol 17) 1930 Mad 665 (667, 668) ✠ (Vol 24) 1937 Rang 471 (471).

[5] Where the transaction, in addition to its being a preference of one creditor to another, is intended to benefit the debtor, it would be fraudulent. (Vol 31) 1944 Nag 44 (52): I L R (1944) Nag 342 (FB) ✠(Vol 30) 1943 Nag 129 (131, 136): I L R (1943) Nag 42 (DB)✠ (Vol 6) 1919 P C 6 (9) : 15 Nag L R 68 (P C) ✠ (Vol 26) 1939 Bom 508 (512, 513) ✠ (Vol 26) 1939 Mad 745 (749) (DB) ✠ (1900) 23 Mad 184 (189) (DB) (Document securing debts not due.)✠(Vol 28) 1941 Cal 378 (382): I L R (1941) 1 Cal 536. (Do.) ✠ (Vol 14) 1927 Mad 278 (279) (DB). (Longer consideration stated.)✠(Vol 19) 1932 Mad 182 (184) (DB). (Do.)

[6] Absence of cash or any proved prior consideration and absence of pressure from transferee — *Prima facie* transfer is voidable. (Vol 20) 1933 Rang 191 (192).

[7] A transfer to a creditor in preference over other is bad where the transferee becomes a creditor for the first time by advancing money to the debtor at the time of the transfer. (Vol 22) 1935 Lah 404 (406) : 16 Lah 680 (DB).

23. Transferee from a transferee.—[1] A *bona fide* transferee from a fraudulent transferee would be protected. (Vol 10) 1923 Mad 558 (560) : 46 Mad 478 (DB) ✠ (Vol 17) 1930 All 438 (439, 440)✠ (Vol 25) 1938 Lah 73 (75) : I L R (1938) Lah 439 ✠ (Vol 27) 1940 Lah 198 (199).

[*See also* (Vol 11) 1924 Mad 67 (69) (DB)].

24. Questions of intent and good faith are questions of fact.— [1] The question with what intent a document was executed is generally one of fact. (Vol 29) 1942 Mad 522 (523)✠ ('21) 63 Ind Cas 169 (170) (DB) (Cal) ✠ (Vol 26) 1939 Oudh 230 (231) : 14 Luck 621 (D B) ✠ (Vol 7) 1920 Lah 24 (25).

[2] Whether the transferee acted *bona fide* or not is a question of fact. (Vol 13) 1926 Lah 25 (26) (D B) ✠ ('01) 25 Bom 202 (228) (DB).

[3] The question of *bona fides* of the transferee may be a question of law or a mixed question of law and fact, if it involves legal inferences to be drawn from other facts. (Vol 25) 1938 Sind 215 (216) : I L R (1939) Kar 136 (DB) ✠ (Vol 26) 1939 Sind 97 (98) : I L R (1939) Kar 269 (D B) ✠ ('08) 1908 Pun Re No. 81, p. 381 (386) (DB) ✠ (Vol 10) 1923 Nag 124 (125).

25. Frame of suit under the section.— [1] A suit under this section is one for a bare declaration under S. 42 of the Specific Relief Act, and not a suit under S. 39 of that Act. (Vol 26) 1939 Mad 894 (896) : I L R (1940) Mad 73✠(Vol 21) 1934 Rang 332 (333): 12 Rang 670 (Suit under O. 21 R. 63, Civil P. C. falls under S. 42)✠(Vol 17) 1930 Rang 27 (29): 7 Rang 477 (DB).

[But see (Vol 28) 1941 Bom 65 (66) (DB) ✠ (Vol 18) 1931 Rang 310 (311) : 9 Rang 367. (Suit under O. 21 R. 63, Civil P. C. held to be under S. 42— Suit under S. 53 of T. P. Act falls under S. 39).]

26. Suit must be a representative one.— [1] Suit under this section must be brought in a representative capacity, in accordance with the procedure prescribed by O. 1 R. 8, Civil P. C. (Vol 31) 1944 All 214 (215) : I L R (1944) All 325 ✠ (Vol 31) 1944 Nag 133 (134) : I L R (1944) Nag 125 ✠ (Vol 30) 1943 Lah 96 (97) (D B) ✠ (Vol 30) 1943 Mad 531 (534) (D B) ✠ (Vol 23) 1936 Pesh 15 (16) (D B)✠ (Vol 27) 1940 Mad 789 (790): ILR (1940) Mad 808 (DB) ✠ (Vol 28) 1941 Oudh 457 (465): 16 Luck 832 (DB) ✠ (Vol 28) 1941 Rang 76 (77). 1940 Rang L R 777 (DB)✠(Vol 26) 1939 Bom 508 (512) ✠ (Vol 8) 1921 Pat 53 (54) : 6 Pat L Jour 48 (DB).

[But see (Vol 25) 1938 Bom 289 (291): I L R (1938) Bom 445 ✠ (Vol 33) 1946 Sind 78 (81) : I L R (1946) Kar 98 (DB). (Suit under O. 21 R. 63, Civil P. C. need not be representative.) ✠ (Vol 21) 1934 Rang 200 (201) (DB).]

[a][53A. Where any person contracts to transfer for consideration any immoveable property by writing signed by him or on his behalf from which the terms necessary to constitute the transfer can be ascertained with reasonable certainty,

Part performance.

Section 53 — Note 26 *(contd.)*

[2] A creditor, who when proceeding under O. 21 R. 63 of Civil P. C., does not know the existence of other creditors is not bound to bring a representative suit. (Vol 27) 1940 Oudh 200 (202) : 15 Luck 503.

[3] A suit which is not meant to be for the benefit of all the creditors need not be brought in a representative capacity. (Vol 20) 1933 Cal 812 (812).

[4] A suit which does not involve the avoidance of any transfer need not be brought in a representative capacity. (Vol 21) 1934 Rang 302 (303): 12 Rang 666.

[5] The technical rule of procedure in the section does not apply to the North-West Frontier Province. (Vol 23) 1936 Pesh 158 (160) (DB).

[6] An objection as to the non-representative character of the suit if not taken in the trial Court, cannot be taken in the appellate Court. (Vol 31) 1944 All 214 (215) : I L R (1944) All 325 ✠ (Vol 14) 1927 Mad 666 (666, 667) ✠ ('07) 34 Cal 999 (1007, 1008) (DB) ✠ (Vol 25) 1938 Oudh 33 (35) (DB) ✠ (Vol 23) 1936 Rang 117 (118) : 14 Rang 81 (DB).

27. Leave of Court. — [1] A creditor instituting a suit to set aside a fraudulent transfer must follow procedure in O. 1, R. 8, Civil P. C. The Court must, at his expense, give notice of the suit to all persons whom it is sought to represent. (Vol 21) 1934 Rang 302 (303): 12 Rang 666 ✠ (Vol 21) 1934 Rang 332 (332, 333): 12 Rang 670 ✠ (Vol 14) 1927 Mad 666 (666).

[2] The requirement as to the obtaining of the permission of the Court cannot be waived. (Vol 30) 1943 Lah 96 (97) (DB).

[3] All creditors interested made parties — Leave of Court need not be applied under O. 1, R. 8, Civil P. C. (Vol 33) 1946 Mad 25 (30) : I L R (1946) Mad 486.

28. Defence need not be in representative capacity.—[1] The fourth paragraph of sub-s. (1) applies only to suits and not to defences. (Vol 26) 1939 Bom 508 (512) ✠ (Vol 29) 1942 Mad 128 (129).

29. Transferor insolvent — Suit by creditor under this section. — [1] Where subsequent to an alienation in fraud of creditors, the debtor is adjudged insolvent, a suit under this section is maintainable without the leave of the Insolvency Court. (Vol 29) 1942 Mad 483 (484) : I L R (1942) Mad 862 (DB) ✠ (Vol 28) 1941 Mad 903 (905): I L R (1942) Mad 1 (FB). ((Vol 6) 1919 Mad 167 : 42 Mad 684, *Overruled.*)

[But see (Vol 25) 1938 Lah 856 (857). (Leave necessary where alienation attacked is mortgage, the equity of redemption of which vests in the Official Receiver.)]

30. Avoidance of transfer by receiver in insolvency.—[1] A receiver in insolvency can, as representing the creditors, file a regular suit to set aside a transfer under this section. (Vol 13) 1926 Mad 826 (827) (DB) ✠ (Vol 5) 1918 Oudh 29 (30) : 20 Oudh Cas 295.

[2] A receiver in insolvency can, where a transfer by the insolvent is more than two years before his insolvency, apply under S. 4, Provincial Insolvency Act, 1920, to avoid the transfer voidable under this section. (Vol 31) 1944 Nag 44 (54): I L R (1944) Nag 342 (FB). ((Vol 25) 1938 Nag 546 : I L R (1940) Nag 293, *Overruled.*) ✠ (Vol 19) 1932 Cal 642 (647, 648) : 59 Cal 1135 (DB) ✠ (Vol 16) 1929 All 105 (107, 112) : 51 All 550 (FB). (Sen J. *Contra.*) ✠ (Vol 20) 1933 Mad 527 (528) ✠ (Vol 19) 1932 Sind 50 (51, 52) : 25 Sind L R 521 ✠ (Vol 22) 1935 Bom 316 (316, 317) (DB).

[3] A receiver in insolvency can apply under S. 4, Provincial Insolvency Act, even if a suit to set aside the transaction would be barred by limitation. (Vol 16) 1929 Sind 94 (96).

[*See also* (Vol 9) 1922 All 193 (196): 44 All 71 (DB).]

[But see (Vol 30) 1943 Mad 252 (252, 253).]

31. Auction-purchaser, whether is a subsequent transferee. — [1] An auction-purchaser at a sale in execution of a decree is not a "subsequent transferee". (Vol 6) 1919 Nag 122 (123). (Third party.) ✠ (Vol 17) 1930 Nag 51 (53). (Do.) ✠ (Vol 2) 1915 Bom 89 (90) : 39 Bom 507 (DB). (Do.) ✠ (Vol 26) 1939 Bom 508 (512). (Decree-holder.)

[2] If an auction-purchaser at a sale in execution of a decree happens to be also a creditor of the transferor the transfer could be avoided by him as a creditor, even after he had purchased the property in auction. (Vol 26) 1939 Bom 508 (512).

[But see (Vol 8) 1921 Mad 657 (659) (DB.)]

[3] An auction-purchaser who is not a creditor of the transferor can, if the decree-holder himself had avoided the fraudulent transfer, get the benefit of such avoidance. (Vol 23) 1936 Mad 408 (410).

32. Plea of fraudulent transfer. — [1] General allegations are insufficient even to amount to an averment of fraud of which any Court ought to take notice. (Vol 2) 1915 P C 7 (13) : 39 Bom 441 : 42 Ind App 135 (PC) ✠ (Vol 15) 1928 Mad 793 (794) (DB) ✠ (Vol 7) 1920 Oudh 182 (184) ✠ (Vol 20) 1933 Rang 169 (172).

33. Onus of proof.—[1] The onus of proving a deed fraudulent is on the person alleging it. (Vol 30) 1943 All 2 (5) (DB) ✠ (Vol 34) 1947 Cal 154 (156) (DB) ✠ (Vol 32) 1945 All 42 (45) : I L R (1944) All 737 (DB) ✠ (Vol 17) 1930 Lah 136 (137) ✠ ('01) 25 Bom 202 (206, 207) (DB) ✠ (Vol 17) 1930 Mad 665 (667) ✠ (Vol 25) 1938 Lah 73 (74) : I L R (1938) Lah 439 ✠ (Vol 11) 1924 Nag 363 (365) ✠ (Vol 28) 1941 Mad 690 (693) ✠ (Vol 28) 1941 Oudh 178 (179) (DB) ✠ (Vol 28) 1941 Oudh 205 (210) (DB) ✠ (Vol 28) 1941 Rang 108 (108, 109) : 1940 Rang L R 659 (DB).

[2] Where one kind of fraud is charged, another kind of fraud cannot, upon failure of proof, be substituted for it. ('87) 11 Bom 620 (644) : 14 Ind App 111 (PC) ✠ (Vol 3) 1916 Cal 120 (123) (DB) ✠ (Vol 3) 1916 Cal 876 (878) (DB) ✠ ('11) 10 Ind Cas 922 (923) (Low Bur).

[3] Fraud is usually established by circumstantial evidence. (Vol 30) 1943 Mad 531 (533) (DB) ✠ (Vol 24) 1937 Oudh 349 (351) (DB) ✠ (Vol 15) 1928 Nag 1 (4) : 23 Nag L R 143 (DB) ✠ (Vol 17) 1930 Lah 12 (14) ✠ (Vol 19) 1932 Cal 434 (435) : 59 Cal 180 (DB) ✠ (1900) 13 C P L R 180 (187).

[4] Fraud is not established by mere suspicion and conjecture. (Vol 7) 1920 Oudh 182 (184) ✠ (Vol 10) 1923 P C 73 (76) (PC).

[5] Where a transfer is proved to have been made with a fraudulent intent, the transferee has to show good faith and consideration. (Vol 30) 1943 All 2 (5) (DB) ✠ (Vol 34) 1947 Cal 154 (156) (DB) ✠ (Vol 20) 1933 Rang 191 (192) ✠ (Vol 14) 1927 Rang 331 (332) ✠ (Vol 13) 1926 Nag 494 (494) ✠ (Vol 28) 1941 Mad 690 (693) ✠ (Vol 17) 1930 Lah 136 (137).

SECTION 53A—SYNOPSIS

1. Scope.
2. Section, if retrospective.
3. "Contracts to transfer."
4. Consideration—Proof of.
5. "Immoveable property."
6. Contract must show clearly terms of transfer.
7. Acts of part performance under the section.

and the transferee has, in part performance of the contract, taken possession of the property or any part thereof, or the transferee, being already in possession, continues in possession in part performance of the contract and has done some act in furtherance of the contract,

and the transferee has performed or is willing to perform his part of the contract,

then, notwithstanding that the contract, though required to be registered, has not been registered, or, where there is an instrument of transfer, that the transfer has not been completed in the manner prescribed therefor by the law for the time being in force, the transferor or any person claiming under him shall be debarred from enforcing against the transferee and persons claiming under him any right in respect of the property of which the transferee has taken or continued in possession, other than a right expressly provided by the terms of the contract:

Provided that nothing in this section shall affect the right of a transferee for consideration who has no notice of the contract or of the part performance thereof.]

[a] *Inserted* by the Transfer of Property (Amendment) Act, 1929 (20 [XX] of 1929), S. 16.

SECTION 53A—SYNOPSIS *(contd.)*

8. Transferee's willingness to perform his part.
9. "Not been registered."
10. Invalidity of contract or transfer—Nature of.
11. Transferor debarred from enforcing his right to the property.
12. "Any person claiming under him."
13. Proviso.
14. Contract to transfer—Proof.
15. Section 27A, Specific Relief Act.
16. Law where this Act does not apply.
17. Limitation.
18. Plea of part performance.

1. Scope.—[1] This section partially imports into this country the English equitable doctrine of part performance. (Vol 30) 1943 Sind 81 (81): I L R (1942) Kar 513 (DB) ✠ (Vol. 25) 1938 Cal. 97 (99, 101, 103): ILR (1938) 1 Cal 607 (DB).

[2] Apart from this section and except as provided therein the doctrine of part performance is not applicable in India. (Vol 31) 1944 Oudh 212 (215): 19 Luck 565 (DB) ✠ (Vol 25) 1938 Mad 746 (748) ✠ (Vol 22) 1935 Rang 448 (448).

2. Section, if retrospective.—[1] The section cannot be applied to cases where the act of part performance was before the section came into operation and a suit was pending at the time it came into operation (Vol 30) 1943 Sind 81 (81): I L R (1942) Kar. 513 (DB) ✠ (Vol. 21) 1934 P C 235 (238): 58 Bom 650: 61 Ind App 388 (P.C.) (Vol 22) 1935 Pat 291 (297) 24 Pat. 672 (FB).

[2] The section will apply where the suit is instituted after the date on which the section came into operation though the act of part performance took place before the date. (Vol 31) 1944 Bom 105 (106) (DB) ✠ (Vol 21) 1934 All. 768 (770) ✠ (Vol 25) 1938 Cal 97 (99, 100, 104): I.L.R. (1938) Cal 697 (DB) ✠ (Vol 28) 1941 Cal. 287 (287) ✠ (Vol 23) 1936 Lah. 5 (5) ✠ (Vol 25) 1938 Nag 377 (383): I.L.R. (1939) Nag. 432 (DB) ✠ (Vol 27) 1940 Pat. 385 (388, 392): 19 Pat. 752 (FB) ✠ (Vol 24) 1937 Rang 402 (405): 1938 Rang. L R 216 (D.B).

[But see (Vol. 30) 1943 Mad. 445 (448, 449): I.L.R. (1943) Mad. 831 (FB) ✠ (Vol 32) 1945 Mad 171 (171, 172) ✠ (Vol 21) 1934 All 701 (701) ✠ (Vol 22) 1935 Bom 91 (93) ✠ (Vol 25) 1938 Cal 795 (796) ✠ (Vol 23) 1936 Nag 282 (282): I. L R. (1937) Nag 242 ✠ (Vol 23) 1936 Oudh 306 (307) (DB) ✠ (Vol 25) 1938 Pat 337 (346, 352 17 Pat 460 (DB) ✠ (Vol 26) 1939 Pat. 488 (489) (DB).]

3. "Contracts to transfer."—[1] The section applies not only to contracts to transfer as such, but also to instruments of transfer under the circumstances mentioned in the fourth para. (Vol 26) 1939 Oudh 85 (86).

[2] A lease is a transfer of property, and the section was held to apply to an unregistered instrument of lease. (Vol 24) 1937 All. 10 (12): I.L.R. (1937) All. 312 (D B) ✠ (Vol. 33) 1946 Mad. 310 (311) (DB) ✠ (Vol. 26) 1939 Oudh 85 (86) ✠ (Vol 23) 1936 Lah. 5 (5).

[3] A grant of a partial and limited interest in immovable property such as a right to dig minerals where the grantor does not exclude himself from working the mines has been held not to be a transfer of property so as to make the provisions of this section applicable. (Vol 31) 1944 Pat 261 (266): 23 Pat 115 (DB).

[4] The section has no application to a surrender by a tenant to the landlord. (Vol 27) 1940 Nag. 175 (176): I.L.R. (1940) Nag. 177.

[5] This section does not apply to the case of a family arrangement. (Vol 24) 1937 All 578 (580): I.L.R. (1937) All. 817 (F.B.) ✠ (Vol 26) 1939 All 529 (531) (DB).

4 Consideration—Proof of.—[1] Oral evidence to prove passing of consideration is admissible. (Vol 33) 1946 Mad. 452 (453).

5. "Immoveable property."—[1] The section does not apply to contracts to transfer moveable property. (Vol 21) 1934 Rang. 303 (304).

6. Contract must show clearly terms of transfer.—[1] The Contract itself must be in writing and show clearly what are the terms necessary to constitute the transfer. (Vol 31) 1944 Oudh 212 (220): 19 Luck. 565 (DB). (There should be a writing signed by the promisor) ✠ (Vol 34) 1947 Cal. 353 (361) (DB). (Contract must be in writing.) ✠ (Vol 30) 1943 Bom. 406 (407) ✠ (Vol 24) 1937 Nag. 402 (406) ✠ (Vol 27) 1940 Oudh 409 (410): 16 Luck 191 (DB) ✠ (Vol. 23) 1936 Nag. 282 (282): I.L.R. (1937) Nag. 242 ✠ (Vol. 33) 1946 Mad. 452 (453) ✠ (Vol 24) 1937 All. 36 (38) (DB) ✠ (Vol 20) 1933 Bom. 381 (384).

[2] A document merely referring to a previous oral agreement to transfer and its terms is not a "contract in writing" though a document which reduces to writing the terms of a previous oral agreement would be. (Vol 25) 1938 Rang 356 (357): 1938 Rang L R 692 (DB). (*Confirming* (Vol 25) 1938 Rang 49.) ✠ (Vol 26) 1939 Rang 206 (207): 1939 Rang LR 575 (DB) ✠ (Vol 31) 1944 Bom 105 (107) (DB) ✠ (Vol 30) 1943 Bom 406 (407).

[3] A document styled a receipt but which, in essence, contained all the essential terms of a contract to transfer, has been held to be sufficient for purposes of this section. (Vol 31) 1944 Oudh 212 (220): 19 Luck 565 (DB). (*Affirming* (Vol 27) 1940 Oudh 1: 15 Luck 43 on appeal.) (Vol 21) 1934 Rang 304 (305): 13 Rang 17.

7. Acts of part performance under the section.—[1] Section does not require that the contract must contain a direct covenant regarding transference of

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possession. (Vol 31) 1944 Oudh 212 (218) : 19 Luck 565 (DB).

[2] The "act in furtherance of the contract" need not of itself, unequivocally have reference to the contract. (Vol 21) 1934 Rang 304 (306): 13 Rang 17. (Payment of part of purchase price.) ✠ (Vol 28) 1941 Oudh 41 (43) : 16 Luck 99 (DB). (Payment of consideration and mutation.)

[3] Possession of Court through its receiver appointed at the instance of decree-holder is not an act in part performance of contract. ('37) I L R (1937) 1 Cal 65 (67).

[4] Lessee in possession under an existing lease—Subsequent agreement to renew lease—Continuation in possession after the expiration of the old lease is only referable to the agreement and therefore an act of part performance of the contract. (Vol 21) 1934 Cal 235 (237) : 60 Cal 1372 (DB).

[5] Where the promisee takes possession by trespass, he cannot, in a suit for ejectment, plead part performance. (Vol 19) 1932 Sind 42 (45):25 Sind L R 433 (DB).

[6] Specific consent of the transferor to the taking of possession by the transferee is not necessary. (Vol 31) 1944 Oudh 212 (215, 218):19 Luck 565 (DB). (*Affirming* (Vol 27) 1940 Oudh 1: 15 Luck 43 on appeal.)

8. Transferee's willingness to perform his part. — [1] It is not a sufficient compliance with the section that the transferee would have performed his part of the contract to some extent. (Vol 28) 1941 Bom 346 (348):I L R (1941) Bom 529 (DB). ((Vol 20) 1933 Bom 381 *Dissent.*)

[2] The party relying on the section must plead and show that it has fulfilled the contract or is ready to perform the same. (Vol 34) 1947 Nag 188 (191) : I L R (1946) Nag 991.

9. "Not been registered." — [1] A document which must be regarded as unregistered because the parties deliberately committed a fraud on registration, cannot attract the operation of this section. (Vol 32) 1945 Oudh 120 (121) (DB).

10. Invalidity of contract or transfer — Nature of.—[1] The section has no application where the contract to transfer or the instrument of transfer is invalid on any ground other than that it was not completed in the manner prescribed by the law for the time being in force. (Vol 14) 1927 Nag 177 (179). (Flow in transferee's position)✠(Vol 20) 1933 Mad 364 (366). (A contract against a minor.)✠(Vol 17) 1930 Pat 61 (62) (DB). (Agreement void under Legal Practitioner's Act)✠(Vol 20) 1933 Pat 165 (172) (DB). (Transfer of *spes successionis*) ✠ (Vol 17) 1930 Mad 298 (301) (DB). (Transaction against an idol or a *cestui que trust* or a minor.) (Vol 34) 1947 Nag 188 (191) : I L R (1946) Nag 991. (Contract by guardian to sell minor's immovable property.)

11. Transferor debarred from enforcing his right to the property. — [1] The rignt conferred by the section is one available only to the defendant to protect his possession. (Vol 27) 1940 P C 1 (2) : I L R (1940) 1 Cal 250 : I L R (1940) Kar (P C) 11 : 66 Ind App 293 (PC). (On appeal from 41 Cal W N 54)

[1a] Only in exceptional cases as a suit for specific performance doctrine of part performance can be invoked by plaintiff. (Vol 25) 1938 Mad 746 (748) ✠ (Vol 24) 1937 Nag 74 (76) : I L R (1936) Nag 115 (DB) ✠ (Vol 32) 1945 All 422 (423) : I L R (1945) All 910 (DB) ✠ (Vol 34) 1947 Pat 424 (426) : 25 Pat 764 (DB).

[1b] Part performance does not convey title to transferee. (Vol 23)1936 Pat 372 (378):15 Pat 460 (DB).

[2] A transferee under a contract of transfer takes possession in part performance of the contract. The property is sought to be taken in execution of a decree for ejectment previously obtained by the transferor against a third person. The transferee raises objections in the execution proceedings but does not succeed and is deprived of possession. Then he sues under O. 21, R. 103, Civil P. C. for possession. He is entitled to succeed, relying on the provisions of this section. (Vol 31) 1944 Oudh 212 (218) : 19 Luck 565 (DB). (*Affirming* (Vol 27) 1940 Oudh 1 : 15 Luck 43.)

[3] A transferee under a contract of transfer was deprived of possession by the transferor. The transferor's acts of aggression were not in the form of any legal proceedings. The transferee brought a suit for an injunction restraining him from interfering with his possession. It was held that the suit was competent under this section. (Vol 26) 1939 All 611 (613) : I L R (1939) All 803 (DB).

[4] The transferor is not debarred from enforcing rights expressly provided by the terms of the contract. (Vol 28) 1941 Bom 346 (349) : I L R (1941) Bom 529 (DB). (A suit for damages cannot be founded on S. 53A, T. P. Act, for breach of contract) ✠ (Vol 20) 1933 Bom 381 (384). (Lease — Suit for damages for breach of contract.)✠(Vol 29) 1942 Oudh 231 (236) : 17 Luck 530 (DB). (Transfer by way of lease—Suit for rent.)✠(Vol 31) 1944 Pat 35 (36). (Lease—Suit for rent.)

[But see (Vol 27) 1940 All 340 (341). (Lease—Transferor cannot sue for rent.) ✠ (Vol 26) 1939 Rang 188 (189). (Usufructuary mortgage—A suit for redemption.)✠ (Vol 23) 1936 Nag 174 (175). (Unregistered lease—Lessor suing for possession on expiry of lease.) (Vol 23) 1936 Cal 628 (629) : 62 Cal 294. (Lessor cannot claim rent from the lessee.)✠(Vol 27) 1940 Bom 281 (282) : I L R (1940) Bom 480. (Suit for rent on unregistered lease.)]

[5] This section creates no real right. It merely creates rights of estoppel which have no operation against third persons. (Vol 28) 1941 P C 128 (130) : I L R (1941) Kar (P C) 150 : 21 Pat 243 (PC).

[6] Transfer of property by the guardian of a minor — This section does not preclude minor from enforcing his rights in respect of the property. (Vol 31) 1944 Mad 337 (339, 340) : I L R (1944) Mad 749 (DB).

12. "Any person claiming under him."— [1] A reversioner of a Hindu widow is not a person claiming under the widow. (Vol 30) 1943 Cal 344 (345) : I L R (1943) 1 Cal 56 (DB). (*Affirming* (Vol 28) 1941 Cal 287.)✠(Vol 26) 1939 Lah 57 (57).

[See however (Vol 27) 1940 Nag 396 (399). (Reversioner claims under the widow where the alienation is for purposes binding on the estate.)]

[2] A minor suing by his next friend a transferee from his guardian — This section does not apply. (Vol 31) 1944 Mad 337 (340) : I L R (1944) Mad 749 (DB).

[3] A judgment-creditor who has attached the property of his judgment debtor in execution of his decree, is a person claiming under the judgment-debtor. (Vol 30) 1943 Mad 706 (707).

13. Proviso.— [1] The onus is on the person claiming part performance to show that the transferee had notice of the contract or of the part performance thereof. (Vol 22) 1935 Rang 12 (13).

14. Contract to transfer—Proof.—[1] Where there is no separate contract for transfer, the unregistered instrument of transfer is itself admissible in evidence in proof of such contract and part performance. (Vol 29) 1942 Oudh 231 (236) : 17 Luck 530 (D B) ✠ (Vol 20) 1933 Bom 381 (385).

[2] See also S. 49 of the Registration Act.

15. Section 27A, Specific Relief Act.— [1] Section 27A, Specific Relief Act, enables either party to the contract to sue for specific performance of the contract to lease immovable property if it has been partly performed. It in fact creates a ground of claim, whereas S. 53A of this Act creates merely a right of defence. (Vol 24) 1937 Nag 74 (76) : ILR (1936) Nag 115 (DB).

CHAPTER III.

OF SALES OF IMMOVEABLE PROPERTY.

54. "Sale" is a transfer of ownership in exchange for a price paid or promised or part paid and part-promised.

"Sale" defined.

[a]Such transfer, in the case of tangible immoveable property of the value of one hundred rupees and upwards, or in the case of a reversion or other intangible thing, can be made only by a registered instrument.

Sale how made.

[a]In the case of tangible immoveable property, of a value less than one hundred rupees, such transfer may be made either by a registered instrument or by delivery of the property.

Delivery of tangible immoveable property takes place when the seller places the buyer, or such person as he directs, in possession of the property.

A contract for the sale of immoveable property is a contract that a sale of such property shall take place on terms settled between the parties.

Contract for sale.

It does not, of itself, create any interest in or charge on such property.

[a] As to limitation to the territorial operation of paragraphs 2 and 3 of S. 54, *see* S. 1, *supra*. These paragraphs extend to every cantonment in British India—*see* the Cantonments Act, 1924 (2 [II] of 1924), S. 287.

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16. Law where this Act does not apply.—[1] The principles of this section which is based one quity are applicable even in provinces to which this Act does not apply. (Vol 24) 1937 Pesh 58 (60) (D B) ✠ (Vol 26) 1939 Lah 57 (57, 58) ✠ (Vol 28) 1941 Lah 407 (410) : I L R (1942) Lah 79 (F B). (In any case, stress cannot be laid upon the wording of the section but the rule will apply on general grounds.)

[But see (Vol 31) 1944 Lah 179 (180) (DB). (Principle of this section does not apply in Punjab.) ✠ ('45) 47 Pun L R 128 (129).]

17. Limitation.— [1] A defence raised under this section is not subject to any rule of limitation. (Vol 26) 1939 Cal 163 (165, 166) : I L R (1938) 2 Cal 328 (D B).

18. Plea of part performance.—[1] A plea of part performance involving questions of fact cannot be raised for the first time in second appeal. (Vol 28) 1941 Cal 33 (37).

SECTION 54—SYNOPSIS.

1. Scope.
2. Transfer under decree or order of Court.
3. "Transfer of ownership."
4. Transfer of mortgage interest.
5. Creation of easements.
6. Mutation proceedings.
7. Sale or lease.
8. "In exchange for a price."
9. "Paid or promised."
10. Non-payment of price.
11. Price different from that recited.
12. Inadequacy and inflation of price.
13. Sale of property of value of rupees one hundred or more.
14. Reversion.
15. "Or other intangible thing."
16. Execution of sale deed.
17. Sale of property of less than one hundred rupees in value.
18. Delivery of property.
19. Contract for sale.

1. Scope.—[1] It is a general principle that where the law prescribes a mode of transfer, compliance with that mode is necessary before property can pass so as to confer title against third persons. (Vol 10) 1923 Mad 241 (244) : 45 Mad 537 (D B), (And no principle like equitable construction of statutes should be resorted to.) ✠('11)33 All 728(731)(DB) ✠ (Vol 7) 1920 Nag 265(266).

[2] Where this section requires a registered instrument, title cannot pass by mere admission. (Vol 3) 1916 Cal 136 (141) : 43 Cal 790 (D B) ✠ ('12) 16 Cal L Jour 436 (437) (D B) ✠ (Vol 11) 1924 Pat 185 (186) (Deed of relinquishment does not confer a title.) ✠ ('06) 33 Cal 967 (983, 984) (D B) (Do.)✠ (Vol 12) 1925 Rang 63 (69) : 2 Rang 459) (Admission in different proceeding that one had sold land does not act as estoppel so as to do away with the necessity of registering the document.)✠ ('01) 24 Mad 377 (384) : 28 Ind App 46 (P C). (Alleged transfer of impartible zamindari—*Held*, such transfer could not be effected except by a registered document as required by law.)

[*See also* ('10) 7 All L Jour 664 (666) (DB). (Title to land cannot be transferred by a mere recital in a lease).]

[3] Sale required to be made by registered document—Title cannot pass by mere agreement of parties. (Vol 26) 1939 Mad 220 (223) ✠('01) 14 Mad L Jour 337 (338) (DB) ✠('01) 23 All 175 (180) (DB). (A benamidar cannot transfer the title to the real owner by giving him possession.)

[4] There can be no such thing in law as a title by estoppel. (Vol 5) 1918 Nag 102 (103) ✠('09) 36 Cal 920 (922) (D B). ("You cannot invoke the principle of estoppel to defeat the plain provisions of a statute, and we cannot evade the effect of S. 54 of T. P. Act by holding that the plaintiff is estopped from pleading it".) ✠(Vol 22) 1935 Rang 84 (86): 12 Rang 589 (DB). (Estoppel is a rule of evidence and not a source of title.) ✠(Vol 22) 1935 Rang 448 (448) ✠('13) 36 Mad 564 (569) (DB). (No waiver or transfer of rights can be recognized in case of immovable property without a registered instrument after the passing of the T. P. Act.)

[5] The object of registering the document as also of delivery of the property, is to publish to the world that such a document has been executed. ('09) 31 All 523 (526) (DB) ✠(Vol 15) 1928 All 726 (727, 728) : 50 All 986 (F B).

[6] The definition of sale in this section has been adopted in the Punjab as embodying a general principle. (Vol 3)1916 Lah 155(156):1916 Pun Re No. 53(FB).

[*See* (Vol 23) 1936 Lah 612 (615).]

[7] An oral sale is valid in the Punjab. (Vol 24) 1937 Lah 507 (513): I L R (1937) Lah 171 (DB). (No formal sale-deed was drawn up as purchaser failed to pay the balance of consideration but mutation proceedings showed that a verbal sale was alleged to have taken place and vendor himself had applied for the mutation to be attested — *Held*, such a verbal sale was permissible in the Punjab.)✠(Vol 20) 1933 Lah 262 (263) ✠('31) 32 Pun L R 295 (297) (D B) ✠('97) 1897 Pun Re No. 52, p. 229 (233) (DB).

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[*See also* (Vol 10) 1923 Lah 310 (310). (Where sale price is one hundred rupees and the sale-deed is not registered the transfer is still a sale).]

[8] In the Punjab no delivery of possession is necessary. ('28) 110 Ind Cas 243 (244) (Lah).

[9] Sale of property in Punjab of value of Rs. 100 or more — Sale-deed, if executed must be registered under S. 17, Registration Act — Unregistered deed is inadmissible as evidence of sale. (Vol 29) 1942 P C 67 (68, 69) : I L R (1942) Kar (P C) 153 : I L R (1942) Lah 656: I L R (1942) All 660: 69 Ind App 130 (P C).

[10] In the Punjab, contract of sale creates an equitable interest in the property in favour of the buyer. (Vol 17) 1930 Lah 131 (132) (D B). (Vendor becomes trustee of the property for the vendee and the vendee becomes a trustee for the vendor in respect of the purchase money.) ✠ (Vol 28) 1941 Lah 240 (240).

[*See also* (Vol 24) 1937 Lah 764 (765) (DB).]

2. Transfer under decree or order of Court.—[1] A sale in execution of a decree need not be registered. ('89) 2 C P L R 137 (138).

[2] The assignment of a security bond by the Court in favour of a party is not a sale. (Vol 18) 1931 All 389 (390): 53 All 786 (F B).

[3] A transfer effected by a compromise decree is not a sale, though such compromise transfers property from one party to another for a price. (Vol 18) 1931 All 741 (742): 53 All 100 (DB) ✠(Vol 15) 1928 All 67 (68): 50 All 454 (D B).

[4] A sale by the Official Receiver in insolvency with the sanction of the Court is not a transfer by operation of law, or by or in execution of a decree or order of Court. (Vol 14) 1927 Mad 1 (3) : 50 Mad 135 (F B) (Krishnan J., *dissenting.*) ✠(Vol 6) 1919 Cal 193 (193): 46 Cal 887 (D B) ✠(Vol 29) 1942 All 39 (41) : I L R (1942) All 120 (D B) ✠ (Vol 29) 1942 Oudh 424 (425): 18 Luck 433 (DB).

[But see (Vol 26) 1939 Oudh 55 (56): 14 Luck 404. ((Vol 14) 1927 Mad 1 : 50 Mad 135 (F B) distinguished on the ground that no sanction for the sale had been obtained in the case.)]

[5] No receiver in insolvency appointed — Court selling property under S. 58, Provincial Insolvency Act —Sale must be made by registered instrument. (Vol 27) 1940 Rang 186 (187): 1940 Rang L R 263 (DB).

3. "Transfer of ownership." — [1] A "transfer of ownership" by a person means a transfer by such person of his rights and interests in the property in full and permanently. A transfer of a part only of such interests or for a particular period reserving the rest for the transferor himself is not a transfer of ownership. ('07) 1907 Pun Re No. 136, p. 652 (654) ✠('03) 26 Mad 403 (408) (DB).

[2] It is not necessary that the transferor should be a full proprietor. He may be the owner of a partial interest in the property such as that of a mortgagee or an occupancy tenant. ('07) 1907 Pun Re No. 136, p. 652 (654) (DB).

[3] A sham transaction, not intended to pass any title, is not a sale. (Vol 26) 1939 Pesh 27 (28, 29) (DB) ✠(Vol 24) 1937 Oudh 493 (496): 13 Luck 484 (DB) ✠(Vol 19) 1932 Bom 247 (247): 56 Bom 556 (DB).

[4] A *bona fide* settlement of a disputed claim which is a mere recognition of each other's antecedent title is not a sale (Vol 16) 1929 All 788 (789) (DB) ✠('10) 34 Bom 139 (141) (DB) ✠('11) 9 Ind Cas 267 (268) (DB) (Mad).

[5] Whether there has been a transfer of ownership will depend upon the intention of the parties which must be ascertained from the facts and circumstances of the particular case. ('28) 109 Ind Cas 268 (270, 271) (DB) (Pat) ✠(Vol 15) 1928 Oudh 25 (26): 2 Luck 416 (DB) ✠('10) 7 Ind Cas 568 (569) (DB) (Lah) ✠(Vol 22) 1935 Rang 149 (149, 150) ✠('12) 37 Bom 53 (56) (DB) ✠(Vol 23) 1936 Oudh 410 (411, 412) : 12 Luck 339 (DB) ✠(Vol 34) 1947 All 110 (113) (DB) ✠(Vol 32) 1945 Mad 407 (409).

[6] It is not necessary that the word "convey" or any formal term should be employed. (Vol 23) 1936 Mad 918 (919).

[7] The words "bikri," "farokht," "kharidar" "bai" and "kharidgi" ordinarily will imply a sale. (Vol 4) 1917 Pat 117 (120) (DB).

[8] Deed styled as sale-deed—Court is not precluded from ascertaining true nature of deed. (Vol 14) 1927 Oudh 204 (205): 2 Luck 575 (DB).

[9] A transaction is known by the rights it confers in the transfer and not by the name by which it is labelled by the party. (Vol 12) 1925 Oudh 714 (714). (Transfer miscalled a lease when in reality it was a sale.) ✠('13) 25 Mad L Jour 245 (246) (DB) ✠(Vol 17) 1930 Oudh 300 (301): 5 Luck 721.

[10] A transfer by sale takes effect from the date of its execution; its operation is not postponed till the date of registration. (Vol 24) 1937 Nag 1 (3): I L R (1937) Nag 291 (DB) ✠(Vol 25) 1938 Nag 253 (253): I L R (1939) Nag 652 (DB).

[11] Sale complying with provisions of section — Sale is valid whether vendor is or is not in possession of property. (Vol 14) 1927 All 361 (363): 49 All 488 (DB) ✠(Vol 34) 1947 All 110 (113) (DB).

[But see ('09) 31 All 82 (91) (FB).]

[12] Delivery of possession to vendee is not necessary to validate sale. ('86) 13 Cal 297 (299) (DB).

4. Transfer of mortgage interest.—[1] A transfer of a mortgagee's interest for a price is a sale and must conform to its provisions. (Vol 9) 1922 Mad 344 (345, 346): 44 Mad 965 (DB) ✠(Vol 5) 1918 Cal 411 (413) (DB) ✠(Vol 8) 1921 Mad 277 (277) (DB).

[But see (Vol 1) 1914 Mad 353 (353, 354) ✠(Vol 6) 1919 Mad 547 (549) (DB).]

[2] Mortgagee becoming insolvent — His claim sold by Official Receiver by auction—Before registration of deed purchaser suing on mortgage — *Held*, purchaser was not entitled to sue as assignee of mortgage right in absence of registered deed. (Vol 23) 1939 Mad 165 (165, 166) (DB).

5. Creation of easements. — [1] The creation of a right of easement by an owner of property in favour of another is not a transfer of property. ('09) 31 All 612 (622) (D B) ✠(Vol 4) 1917 Low Bur 110 (111): 9 Low Bur Rul 24 ✠ (Vol 13) 1926 Mad 543 (544) ✠(Vol 16) 1929 Mad 79 (80) ✠(Vol 4) 1917 Cal 681 (686) (DB).

[2] Where an easement right is created in writing it must under the provisions of the Registration Act be registered if the value of the right is more than one hundred rupees. (Vol 4) 1917 Cal 681 (686) (DB).

6. Mutation proceedings. — [1] Mutation does not effect a transfer of property. (Vol 16) 1929 All 549 (550) (D B).

[2] The mere mutation will not, in the absence of a registered instrument, effect a transfer of rights in immovable property. (Vol 14) 1927 All 338 (339) ✠ ('08) 11 Oudh Cas 301 (304, 305) ✠ ('12) 13 Ind Cas 436 (438) (D B) (All).

[3] Mutation proceedings are not judicial proceedings in which the title to and the proprietary rights in immovable property are determined. (Vol 13) 1926 P C 100 (103) : 29 Oudh Cas 316 : 1 Luck 389 : 48 All 529 : 53 Ind App 220 (P C).

7. Sale or lease. — [1] Whether a transaction is a sale or a lease depends upon whether there has been a transfer of full proprietary rights or only a part of the

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transferor's interests. (Vol 30) 1943 Oudh 125 (127, 128) : 18 Luck 303 ✠ (Vol 29) 1942 Oudh 151 (154) : 17 Luck 701.

[2] Whether transaction is sale or lease must be decided on the terms of the document and the intention of the parties gathered from the surrounding circumstances. (Vol 28) 1941 Oudh 12 (14).

[3] Where there is a recurring liability to pay rent, the transaction cannot be regarded as a sale. (Vol 14) 1927 Oudh 161 (162) (D B).

[4] Where rent, however small, is reserved to be paid to the transferor the transaction can only be a lease even though it is a perpetual one and extensive rights are conferred on the transferee. (Vol 10) 1923 All 560 (561) ✠ ('07) 1907 Pun Re No. 136, p. 652 (655) (D B) ✠ (Vol 9) 1922 Oudh 81 (82) : 24 Oudh Cas 310 ✠ (Vol 23) 1936 Cal 727 (734) (D B) ✠ (Vol 11) 1924 Oudh 203 (205) : 27 Oudh Cas 167 ✠ (Vol 11) 1924 All 60 (61) (D B).

[5] Deed purporting to be perpetual lease — All proprietary rights transferred in consideration of substantial sum of money—Small rent reserved—Deed amounts to sale deed. (Vol 1) 1914 Lah 290 (292) (D B) ✠ (Vol 27) 1940 Pat 633 (641, 642) : 20 Pat 13 (S B) ✠ (Vol 22) 1935 Oudh 217 (226) : 10 Luck 392 (F B) ✠ (Vol 28) 1941 Oudh 12 (13) ✠ ('11) 33 All 104 (106) (D B).

8. "In exchange for a price." — [1] Price is an essential ingredient in all sales and in the absence thereof the transfer is not a sale. (Vol 17) 1930 Oudh 481 (495) : 6 Luck 282 (D B) ✠ (1900) 14 C P L R 117 (119) ✠ (Vol 14) 1927 Cal 889 (893) : 55 Cal 285 (D B) ✠ ('08) 10 Bom L R 617 (621) (D B) ✠ ('08) 4 Low Bur Rul 369 (371).

[2] The word "price" means money only. (Vol 18) 1931 Mad 140 (143) : 54 Mad 163 (D B) ✠ (Vol 9) 1922 Mad 311 (313) : 45 Mad 612 (F B) ✠ (Vol 14) 1927 Oudh 204 (205) : 2 Luck 575 (D B) ✠ (Vol 17) 1930 Oudh 481 (495) : 6 Luck 282 (D B).

[3] Price will include money which might be already due or which might be payable in future. (Vol 9) 1922 Mad 311 (313) : 45 Mad 612 (F B) ✠ (Vol 6) 1919 Nag 70 (71).

[4] A transfer of ownership in consideration of a dower debt due to the vendee would be an exchange of property for a 'price' and would be a sale. (Vol 5) 1918 Cal 113 (114) (D B) ✠ (Vol 26) 1939 All 348 (363) (D B) ✠ (Vol 2) 1915 Lah 251 (253) (D B) ✠ (Vol 4) 1917 Pat 18 (24) (D B) ✠ (Vol 12) 1925 Oudh 407 (407) : 28 Oudh Cas 227 ✠ (Vol 8) 1921 Nag 84 (85) : 17 Nag L R 103 ✠ (Vol 15) 1928 Mad 430 (433) (D B).

[But see (Vol 14) 1927 Oudh 204 (206) : 2 Luck 575 (D B) ✠ (Vol 13) 1926 Oudh 186 (189) : 1 Luck 83 : 29 Oudh Cas 108 (D B) ✠ ('02) 1902 Pun Re No. 86, p. 352 (356) (D B). *(Obiter.)*]

[5] A transfer in consideration of a decree debt payable by the vendor is a sale. (Vol 24) 1937 Mad 714 (715) (D B).

[6] A transfer in consideration of amounts which had been advanced by the transferee to the transferor by way of takkavi loans will be a sale. (Vol 11) 1924 Pat 392 (395, 396) (D B).

[7] A barred debt would be a good consideration for a sale. ('13) 21 Ind Cas 69 (72) (D B) (Oudh).

[8] The amount should, in order to constitute "price" be an ascertained sum of money or be capable of being ascertained at the time of the transfer. (Vol 13) 1926 Oudh 196 (197) (D B) ✠ (Vol 13) 1926 Oudh 368 (368) ✠ ('01) 14 C P L R 117 (119) ✠ (Vol 1) 1914 Cal 335 (336) : 41 Cal 148 (D B).

[But see (Vol 8) 1921 Oudh 248 (249) (D B) ✠ (Vol 34) 1947 All 110 (112) (D B).]

[9] A contract may appoint a way of determining price or it may stipulate for a fair price. (Vol 14) 1927 Cal 889 (893) : 55 Cal 285 (D B).

[10] The price must be ascertained only in the way appointed. ('01) 14 C P L R 117 (119, 120).

[11] A transfer in consideration of the transferee defraying the costs of a litigation, the amount of such costs not being ascertainable at the date of the transfer, is not a transfer for a "price" and is, therefore, not a sale. (Vol 13) 1926 Oudh 196 (197) (D B) ✠ (Vol 13) 1926 Oudh 368 (368).

[12] A transfer in lieu of dower, the amount thereof not having been ascertained or fixed, is not a sale. ('82) 5 All 65 (69) (D B) ✠ (Vol 10) 1923 Nag 330 (331) : 20 Nag L R 126.

[13] A transfer in consideration of past and future services is not for any "price" and is not a sale. ('10) 34 Bom 287 (290) (D B).

[But see (Vol 34) 1947 All 110 (112) (D B).]

[14] A transfer in consideration of the vendee clearing other land of the vendor or sinking well therein is not a sale. (Vol 8) 1921 Lah 82 (83) : 2 Lah 199 (D B) ✠ (Vol 10) 1923 Lah 70 (70).

[15] A transfer in consideration of a sum of money and a forbearance on the part of the vendee to set aside a court sale is not a sale. (Vol 18) 1931 Mad 140 (143) : 54 Mad 163 (D B).

[16] Transfer in consideration of sum of money —Mere fact that stipulations which do not constitute the consideration for the transfer are made in the deed of transfer does not render the transaction other than a sale. (Vol 23) 1936 P C 204 (206) : 63 Ind App 304 : 59 Mad 910 (P C).

[17] Minor's guardian drawing out monies belonging to minor from Court and executing security bond in Court's favour—Guardian failing to account for monies —Court assigning bond to minor on his attaining majority—*Held* that transaction was not sale. (Vol 18) 1931 All 389 (390): 53 All 786 (FB).

[18] An authority by *A* to *B* to sell *A's* property includes an authority to receive the price. (Vol 29) 1942 Mad 634 (639): I L R (1942) Mad 775 (DB).

9. "Paid or promised."— [1] The fact that the price is not to be paid at all if possession is not delivered, does not prevent the transaction from being a sale. (Vol 2) 1915 All 347 (347): 37 All 631 (DB).

[2] Sale-deed reciting that vendor had received Rs. 1000—Finding that there was no such payment—*Held* there was no sale. (Vol 11) 1924 Nag 146 (147).

10. Non-payment of price.—[1] Where the parties intend to transfer ownership but do not intend that the price should be paid at all, the transaction would be void as a conveyance. (Vol 19) 1932 Bom 247 (247): 56 Bom 556 (DB) ✠ ('98) 22 Bom 176 (180, 183) (DB).

[2] Where the title is intended to pass and the price is intended to be paid, the mere fact that the price is not actually paid at the time of the conveyance will not prevent title from passing to the buyer. (Vol 11) 1924 All 938 (939) ✠ (Vol 3) 1916 Lah 155 (156): 1916 Pun Re No. 53 (FB) ✠ (Vol 16) 1929 All 85 (86) ✠ (Vol 18) 1931 Pat 236 (239) : 10 Pat 264 (DB) ✠ (Vol 11) 1924 Mad 544 (545) ✠ (Vol 6) 1919 Low Bur 20 (20) : 10 Low Bur Rul 133 ✠ (Vol 6) 1919 Low Bur 140 (141) ✠ (Vol 9) 1922 Pat 619 (641) (SB) ✠ ('23) 71 Ind Cas 145 (149) (Pesh) ✠ ('09) 11 Bom L R 383 (385) (DB) ✠ ('10) 6 Nag L R 98 (102) ✠ ('99) 23 Bom 525 (527) (DB) ✠ (Vol 6) 1919 Cal 855 (856) (DB) ✠ (Vol 7) 1920 Mad 164 (164): 43 Mad 712 (DB).

[But see ('81) 3 All 77 (81) (DB).]

[3] The seller cannot, on the ground merely of non-payment of the price, claim to retain possession as against the buyer of the property sold. (Vol 6) 1919 Low Bur 20 (20): 10 Low Bur Rul 133 ✠ (Vol 6) 1919

Section 54—Note 10 *(contd.)*
Low Bur 140 (141) ✠ (Vol 7) 1920 Mad 164 (164): 43 Mad 712 (DB) ✠ (Vol 31) 1944 Mad 124 (125).

[4] A sale cannot be set aside on the ground of non-payment of price. (Vol 16) 1929 Bom 147 (150): 53 Bom 321 (DB) ✠ ('01) 14 C P L R 57 (58) ✠ (Vol 21) 1934 Lah 917 (919) (DB) ✠ ('09) 11 Bom L R 383 (385) (DB) ✠ ('13) 36 Mad 8 (10) (DB).

[5] Non-payment of purchase money— Seller can sue buyer for purchase money or enforce seller's charge against properties sold. (Vol 6) 1919 Low Bur 20 (20): 10 Low Bur Rul 133 ✠ ('01) 14 C P L R 57 (58) ✠ (Vol 6) 1919 Low Bur 140 (141) ✠ ('99) 23 Bom 525 (527) (DB) ✠ ('09) 11 Bom L R 383 (385) (DB) ✠ ('11) 34 Mad 543 (544) (DB).

[6] The non-payment of consideration may often be very strong evidence to show that the parties did not intend the document to be operative. But it is not conclusive to show such an intention. (Vol 5) 1918 All 337 (338) (DB) ✠ (Vol 4) 1917 Mad 492 (494) (DB) ✠ (Vol 15) 1928 All 391 (392) (DB).

[7] Where a conveyance is duly executed and registered the presumption will, in the absence of circumstances to the contrary, be that the parties intended the title to pass forthwith and the consideration to be paid. ('97) 21 Mad 56 (57, 58) (DB) ✠ ('09) 4 Ind Cas 541 (541): 13 Cal W N 692 (DB) ✠ (Vol 3) 1916 Lah 336 (336) (DB) ✠ ('09) 32 Mad 72 (75) (DB).

[8] Evidence showing that it was intention of parties that title should not pass until certain conditions are fulfilled—In such cases title will not pass until those conditions are fulfilled. ('13) 19 Ind Cas 562 (562) (DB) (Cal) ✠ ('04) 28 Mad 124 (126) (DB) ✠ ('12) 37 Bom 53 (56) (DB).

[9] Parties agreeing that title should not pass until the price is paid—In such cases title will not pass until the price is paid. (Vol 3) 1916 Lah 336 (336) (DB) ✠ (Vol 7) 1920 Oudh 29 (30) ✠ ('13) 19 Cal L Jour 146 (148) ✠ (Vol 21) 1934 Pat 68 (69) ✠ (Vol 15) 1928 Oudh 439 (441, 442): 4 Luck 13 (DB) ✠ (Vol 22) 1935 Pat 45 (46).

[10] The mere registration of a conveyance does not necessarily convey title, without regard to the intentions of the parties. (Vol 9) 1922 Lah 356 (357): 3 Lah 389 (DB) ✠ (Vol 4) 1917 Cal 589 (590) (DB) ✠ (Vol 7) 1920 Pat 774 (774) ✠ (1900) 27 Cal 7 (10) (DB) ✠ ('04) 28 Mad 124 (126) (DB).

[11] The Court has to see what the intention of the parties was in each particular case. ('09) 4 Ind Cas 541 (541): 13 Cal W N 692 (DB) ✠ (Vol 34) 1947 Pat 1 (3) (DB). (Intention is to be gathered from sale-deed itself —Sale-deed ambiguous— Surrounding circumstances may be looked to—*Held* upon construction of deed that title passed on execution.) ✠ (Vol 9) 1922 Lah 356 (357): 3 Lah 389 (DB).

[12] The arrangement between the parties as to when the title should pass is a contract between the parties and if reduced to writing cannot be varied or contradicted by oral evidence. Such an arrangement is not a recital of a fact such as the passing of consideration. (Vol 25) 1938 Pat 505 (506): 17 Pat 318 (DB).

[13] The fact that the price is not payable into the hands of the vendor but in some other way does not alter the nature of the transaction. (Vol 24) 1937 Rang 287 (292): 14 Rang 766 (DB).

11. Price different from that recited.—[1] A party to a sale can show that the consideration was something different from that recited in the deed. (Vol 1) 1914 All 208 (209): 36 All 537 (DB) ✠ ('09) 10 Cal L Jour 27 (29) (DB) ✠ (Vol 15) 1928 Rang 47 (48): 5 Rang 636 (DB).

[2] The party who has acknowledged the receipt of consideration in the sale deed can show that he did not receive it. (1900) 22 All 370 (375, 376): 27 Ind App 93 (P C). (Affirming ('96) 18 All 168.) ✠ ('98) 20 All 447 (455): 25 Ind App 137 (P C).

[3] The onus ordinarily, and especially where the sale deed and the property have been delivered to the buyer, would be on the seller to show that there was no consideration for the deed. (Vol 6) 1919 Pat 414 (415, 416): 4 Pat L Jour 517 (DB) ✠ ('91) 18 All 409 (417) (SB).

[4] The onus to show that there was no consideration may be rebutted by other circumstances and then the onus will shift to the vendee to prove payment. ('86) 8 All 641 (643) (DB).

[5] A third party cannot question the passing of consideration between the vendor and the vendee. (Vol 15) 1928 Pat 44 (45): 7 Pat 95 (DB) ✠ ('13) 25 Mad L Jour 248 (249) (DB) ✠ ('12) 1912 Pun L R No 110, page 389 (340 (DB).

12. Inadequacy and inflation of price.—[1] A sale is not invalid merely by reason of the inadequacy of the consideration. (Vol 2) 1915 Mad 1055 (1055) (DB) ✠ (Vol 11) 1924 Nag 124 (125).

[2] The inflation of the price in a sale-deed by the parties for purposes of their own does not vitiate the sale, if otherwise valid. (Vol 11) 1924 All 938 (939).

[3] *A* selling property to *B* for Rs. 1200—Rs. 550 to be paid by *B* to prior mortgagee and balance before Sub-Registrar—Latter amount paid but taken back by *B*—Former amount paid—Sale held valid. (Vol 10) 1923 All 530 (531): 45 All 559 (DB).

13. Sale of property of value of rupees one hundred or more.—[1] A sale of property of the value of rupees one hundred or more can be effected only by a registered instrument. (Vol 9) 1922 P C 56 (58): 24 Oudh Cas 272: 48 Ind App 365 (P C).

[2] An unregistered document conveys no title whatever. (Vol 16) 1929 Nag 65 (65) ✠ (Vol 21) 1934 Rang 303 (304) ✠ (Vol 16) 1929 Rang 280 (281): 7 Rang 271 (DB) ✠ (Vol 5) 1918 Pat 637 (638) ✠ (Vol 14) 1927 Oudh 482 (483): 3 Luck 107 (DB) ✠ (Vol 14) 1927 Nag 289 (289) ✠ (Vol 24) 1937 Mad 22 (24) ✠ ('11) 9 Ind Cas 55 (55) (DB) (Mad) ✠ (Vol 11) 1924 All 396 (396) ✠ (Vol 16) 1929 Cal 231 (232).

[3] Sale of fields— Sale-deed registered—Suit by vendee for declaration of his title to other fields on allegation that fields of wrong number were entered in sale deed—Fields respecting which declaration was sought worth more than Rs. 100—Plaintiff held acquired no title to such fields in absence of registered document. ('47) 1947 Nag L Jour 245 (258).

[4] The value of the property sold must be taken to be the amount for which it is sold and not the market value of the property. ('71) 15 Suth W R 558 (559) (DB) ✠ (Vol 24) 1937 Pesh 39 (40).

[But see (Vol 23) 1936 Lah 307 (316): 16 Lah 177 (DB).]

[5] The incompleteness due to want of registration is not a thing of which the executant himself can take notice though as regards third parties the point of time at which the transfer is deemed to have been effected is when the deed of transfer can be said to be a registered deed. (Vol 23) 1936 Cal 17 (18): 62 Cal 979 (DB).

14. Reversion.—[1] Where property in the possession of tenants is transferred by the owner what is transferred is really a "reversion" and consequently such a transfer must be made only by registered instrument. (Vol 3) 1916 Bom 223 (223): 40 Bom 313 (DB) ✠ (Vol 25) 1938 Lah 304 (305) ✠ (Vol 25) 1938 Mad 100 (101, 102) (DB).

[But see ('99) 2 Oudh Cas 74 (77).]

15. "Or other intangible thing."—[1] The words "intangible thing" have reference only to immovable property and not to moveable property. (Vol 26) 1939

Section 54—Note 15 *(contd.)*
All 305 (307): I L R (1939) All 275 (DB) ✠ (Vol 22) 1935 Pat 492 (493).

[2] The words "other intangible thing" are intended to embrace those imponderables which are related to immovable property such as for example a reversionary right. (Vol 27) 1940 All 458 (460): I L R (1940) All 568 (DB) ✠ (Vol 21) 1934 Nag 13 (15).

[3] The following are not "intangible things":
(a) A right of re-purchase under a contract for the re-purchase of immovable property. (Vol 17) 1930 All 101 (103) (DB).
(b) A license to sell electricity. (Vol 27) 1940 All 458 (460): I L R (1940) All 568 (DB).
(c) A copyright in books. (Vol 26) 1939 All 305 (307): I L R (1939) All 275 (DB).
(d) A turn of worship. (Vol 14) 1927 Pat 7 (8): 6 Pat 245 (DB).
(e) A debt already become due. ('05) 27 All 564 (567) (DB).
(f) A simple decree for money or for possession of immovable property. (Vol 22) 1935 Pat 492 (493).
(g) A final decree for sale under O. 34, R. 5 of the Code of Civil Procedure. (Vol 12) 1925 Oudh 399 (399, 400): 28 Oudh Cas 382.
(h) The right of a mortgagee in moveable property. ('87) 10 All 20 (23).

[4] The following are "intangible things":
(a) A right of easement. (Vol 22) 1935 Pat 492 (493).
(b) A right to the rents and profits that may accrue in immovable property. (Vol 22) 1935 Pat 492 (493).
(c) The interest under a deed of settlement by which a person is granted an income in future rents and profits of certain immovable property and also a share in the proceeds of the sale of the property in future. (Vol 23) 1936 P C 230 (233, 234): 63 Ind App 340: 14 Rang 400 (P C).
(d) A share of two pies in a *mahal*. (Vol 33) 1946 All 125 (126).

[5] There is a conflict of opinion as to whether an equity of redemption vested in the mortgagor is or is not an "intangible thing":
(a) One view is that the equity of redemption is "tangible immovable property" whatever may be the nature of the mortgage. (Vol 15) 1928 All 726 (728, 729): 50 All 986 (FB) ✠ (Vol 26) 1939 Bom 31 (33): I L R (1939) Bom 71 (DB) ✠ (Vol 24) 1937 Pat 178 (179): 15 Pat 772 (DB).
(b) Another view is that in all cases the equity of redemption is an intangible thing. (Vol 2) 1915 Oudh 149 (150): 18 Oudh Cas 109 (DB).
(c) A third view is that where the property is subject to a simple mortgage the equity of redemption is tangible immovable property, but that where the mortgage is a usufructuary one the equity of redemption is an 'intangible thing" within the meaning of this section. ('01) 24 Mad 449 (463) (DB) ✠ (Vol 8) 1921 Oudh 124 (124): 24 Oudh Cas 155 ✠ ('13) 11 All L Jour 407 (410) (DB) ✠ (Vol 6) 1919 Cal 107 (107) (DB) ✠ (Vol 6) 1919 Cal 325 (326) (DB) ✠ *('06)* 3 Nag L R 72 (74) ✠ (Vol 23) 1936 Bom 175 (175): 60 Bom 220 (DB) ✠ (Vol 21) 1934 Nag 13 (15).

[6] The right of a mortgagee where the mortgage is a simple one is "intangible property". (Vol 28) 1941 Nag 5 (6): I L R (1941) Nag 615 (DB) ✠ ('01) 24 Mad 449 (463) (DB) ✠ (Vol 16) 1929 All 161 (164): 51 All 494 (DB).

[7] An undivided share in property connoting rights of possession and enjoyment is tangible property. (Vol 23) 1936 P C 230 (233): 14 Rang 400: 63 Ind App 340 (P C).

[8] In the Punjab where the Transfer of Property Act does not apply the sale of the equity of redemption where the mortgage is a usufructuary one need not be registered where the value of the right is less than one hundred rupees. ('12) 1912 Pun L R No. 138, p. 423 (424) ✠ ('13) 1913 Pun L R No. 332, p. 1102 (1103).

16. Execution of sale-deed.—[1] A person having a general power of attorney in his favour authorizing him to execute documents on behalf of the person executing the power of attorney can sign the sale deed on behalf of the latter. (Vol 6) 1919 Oudh 201 (202) (DB).

[2] Where an illiterate person touches the pen and hands it over to another and asks him to sign the sale deed on his behalf, it is a sufficient execution of the deed. (Vol 6) 1919 Oudh 201 (202) (DB).

[3] A sale deed purported to be executed by several persons but actually signed by only one of them is not ineffective on that ground. ('08) 31 Mad 114 (116) (DB).

[4] Attestation is not legally indispensable for the validity of a sale deed. (Vol 29) 1942 Pesh 83 (84).

17. Sale of property of less than one hundred rupees in value.—[1] In the case of a sale of property of the value of less than one hundred rupees a mere unregistered document without any delivery of property cannot convey any title. ('09) 5 Mad L Tim 263 (264) (DB) ✠ (Vol 4) 1917 Mad 951 (951) (DB).

[2] The non-registration of a document is not fatal to the validity of the transfer if the transferee is able to establish a prior oral sale and delivery of possession in pursuance thereof. (Vol 24) 1937 Mad 265 (265) (DB).

[3] Oral sale to *D* by mortgagor of property usufructuarily mortgaged—Later on *D* paying and obtaining possession from mortgagee — Subsequent sale by registered deed to *P*—*P* depositing amount for payment to mortgagee—*P* held entitled to possession. (Vol 33) 1946 Pat 81 (82).

18. Delivery of property.—[1] For the purposes of this section there must be a real and not a constructive delivery of property. (Vol 8) 1921 P C 8 (9, 10): 48 Cal 509 : 48 Ind App 127 (P C) ✠ (Vol 15) 1928 All 726 (728): 50 All 986 (F B).

[2] It is not sufficient if the vendor is in possession and says "henceforth I am your tenant". ('12) 15 Ind Cas 228 (229) (D B) (Cal).

[3] A recital in the document that possession has been given is not equivalent to a delivery of possession for the purposes of this section. (Vol 21) 1934 Nag 13 (15, 16).

[4] There is a conflict of opinion as to whether a sale to the usufructuary mortgagee of the property sold should be only by a registered instrument or whether it might be by delivery of property.
(a) According to one view the transfer must be by a registered instrument. ('07) 34 Cal 207 (210) (D B). (Essence of a transfer by delivery of property is change of possession.)✠(Vol 15) 1928 All 726 (728): 50 All 986 (F B) ✠ (Vol 20) 1933 Cal 544 (545) ✠ ('06) 16 Mad L Jour 28 (30) (D B).
(b) According to another view, the delivery of possession contemplated by the section is such delivery as the nature of the property admits of, and where the vendor by appropriate acts or declarations converts the vendee's possession into that of an owner it is sufficient delivery of property. (Vol 12) 1925 Mad 566 (567) (D B)✠(Vol 13) 1926 All 300 (300)✠ (Vol 26) 1939 Bom 31 (33) : I L R (1939) Bom 71 (D B) ✠ (Vol 3) 1916 Nag 93 (96) : 12 Nag L R 139 ✠ (Vol 2) 1915 Mad 573 (574) : 38 Mad 1158 (D B)✠(Vol 22) 1935 Lah 164 (165)✠(Vol 23) 1936 Lah 756 (757) ✠ (Vol 23) 1936 Rang 497 (498) ✠

Rights and liabilities of buyer and seller.

55. In the absence of a contract to the contrary, the buyer and the seller of immoveable property respectively are subject to the liabilities, and have the rights, mentioned in the rules next following, or such of them as are applicable to the property sold :

(1) The seller is bound —

(a) to disclose to the buyer any material defect in the property [a][or in the seller's title thereto] of which the seller is, and the buyer is not, aware, and which the buyer could not with ordinary care discover;

(b) to produce to the buyer on his request for examination all documents of title relating to the property which are in the seller's possession or power;

Section 54—Note 18 *(contd.)*

(Vol 20) 1933 Cal 411 (412) : 60 Cal 384✠(Vol 24) 1937 Pat 178 (180) : 15 Pat 772 (D B) ✠ (Vol 21) 1934 Pat 301 (302) ✠ (Vol 2) 1915 Nag 114 (115, 116): 12 Nag L R 3✠(Vol 4) 1917 Oudh 345 (346) : 20 Oudh Cas 33.

[5] A mere delivery of property does not itself amount to a sale. In order to constitute a sale, the delivery must be made in pursuance of a contract to sell. (Vol 3) 1916 Nag 93 (96) : 12 Nag L R 139 ✠ (Vol 4) 1917 Nag 214 (214).

[6] Proof of formal delivery of possession is not necessary. If there is proof that the possession passed to the buyer and that it did so with the assent of the seller and in connection with and to give effect to the contract of sale it is sufficient. (Vol 2) 1915 Mad 1059 (1060) (D B)✠('09) 5 Mad L Tim 263 (264) (D B).

19. Contract for sale.—[1] Every sale implies a contract for sale. (Vol 14) 1927 Nag 177 (178, 179).

[2] A contract for sale does not create any interest or charge upon the property. (Vol 3) 1916 P C 139 (141): 44 Cal 542: 44 Ind App 15 (P C)✠ (Vol 21) 1934 P C 68 (71): 61 Ind App 115: 13 Pat 242 (P C)✠(Vol 21) 1934 P C 235 (237): 61 Ind App 388: 29 Sind L R 74: 58 Bom 650 (P C) ✠ (Vol 17) 1930 All 1 (2) : 52 All 338 (F B)✠(Vol 33) 1946 Lah 322 (328) (F B) ✠ (Vol 5) 1918 Mad 681 (690) : 40 Mad 365 (F B)✠(Vol 32) 1945 Nag 86 (93): I L R (1944) Nag 852 (D B).

[3] A sale by auction is only a contract for sale. ('97) 1897 Pun Re No. 52, p. 229 (232) (D B).

[4] A contract for re-sale is merely a contract for sale. (Vol 11) 1924 All 400 (402) : 46 All 333 ✠ (Vol 2) 1915 Bom 22 (23): 39 Bom 472 ✠ (Vol 17) 1930 All 101 (103) (D B)✠(Vol 16) 1929 Mad 807 (810).

[5] No distinction can be drawn between a contract for sale and a contract for purchase. (Vol 11) 1924 Pat 81 (82) (D B).

[6] A contract for pre-emption or for re-purchase does not create any interest or charge on the property. (Vol 11) 1924 All 400 (402): 46 All 333 (D B).

[7] *A* received a price from *B* and transferred to him possession of the property contracted to be sold but there was no registered sale deed. Some years afterwards, the creditors of *A* sought to attach the property as the property of the vendor. It was held that the last clause of this section did not apply and that the vendor had no attachable interest in the property. (1900) 24 Bom 400 (402) (D B) ✠ ('04) 26 All 266 (269, 270) (D B) ✠ (Vol 11) 1924 Mad 610 (610).

[But see ('09) 36 Cal 920 (921, 922) (D B)✠('04) 28 Bom 466 (470) (D B).]

[8] A mere agreement to sell immovable property merely creates a right to obtain another document conveying property and is not compulsorily registrable under S. 17 of the Registration Act. (Vol 20) 1933 All 846 (848) : 56 All 142 (D B) ✠ (Vol 1) 1914 Mad 577 (577): 37 Mad 480 (D B)✠(Vol 14) 1927 Bom 195 (206): 51 Bom 247 ✠ (Vol 19) 1932 Lah 95 (95) (D B) ✠ (Vol 24) 1937 Rang 402 (405) : 1938 Rang L R 216 (D B)✠('92) 5 C P L R 102 (102) ✠(Vol 14) 1927 All 287 (287) : 49 All 806 (F B) ✠ (Vol 13) 1926 Pat 89 (90) (D B).

[9] A mere agreement to re convey immovable property does not require to be registered. (Vol 1) 1914 Bom 231 (232) : 38 Bom 703 (D B) ✠ (Vol 15) 1928 Bom 97 (100) : 49 Bom 862 (D B)✠('10) 11 Cal L Jour 426 (428) (D B)✠(Vol 10) 1923 Rang 242 (244).

[10] An agreement to sell which acknowledges the receipt of either purchase-money or earnest-money need not be registered. (Vol 18) 1931 Cal 171 (172) : 58 Cal 449 (D B)✠(Vol 21) 1934 Pat 495(497, 498): 13 Pat 620 (D B) ✠ (Vol 16) 1929 Mad 243 (245): 52 Mad 300(DB).

[11] A contract to sell is an obligation annexed to the ownership of immovable property within the meaning of S. 40 of this Act. (Vol 29) 1942 Mad 67 (68).

[12] Contract for sale not completed by conveyance—Parties can sue for damages for breach of contract or for specific performance. (Vol 3) 1916 All 366 (367) : 38 All 154 (D B) ✠ ('10) 7 All L Jour 887 (889) (D B) ✠ (Vol 14) 1927 Nag 177 (178) ✠ (Vol 4) 1917 Mad 1009 (1009) (D B) ✠ (Vol 4) 1917 Pat 585 (589) (D B) ✠ (Vol 12) 1925 Cal 61 (63) : 52 Cal 121 (D B) ✠ (Vol 2) 1915 Mad 305 (306): 37 Mad 403 (D B).

[13] Contract for sale—Contract completed—Vendee can sue for possession and vendor, for recovery of purchase-money. (Vol 3) 1916 All 366 (367) : 38 All 154 (D B) ✠ ('91) 4 C P L R 92 (93, 94) ✠ ('13) 36 Mad 8 (10) (D B).

SECTION 55—SYNOPSIS

1. Scope.
2. Paragraph 1, clause (a).
3. Paragraph 1, clause (b).
4. Paragraph 1, clause (c).
5. Paragraph 1, clause (d).
6. Paragraph 1, clause (f).
7. Paragraph 1, clause (g).
8. Implied contract for title —Paragraph 2.
9. Paragraph 3.
10. Right to rents and profits and interest on purchase-money.
11. Paragraph 4, clause (b).
12. Paragraph 5, clause (b).
13. Third party, if can enforce contract between *A* and *B* as to payment of purchase-money.
14. Paragraph 5, clause (d).
15. Property sold subject to incumbrances — Incumbrances found invalid— Person entitled to benefit.
16. Paragraph 6, clause (a).
17. Paragraph 6, clause (b).
18. Omission to make disclosures referred to in paragraph 1, clause (a).
19. "In the absence of a contract to the contrary."

1. Scope.—[1] This section deals with the rights and liabilities of the parties to a contract for sale as well as those of the parties to a completed conveyance. (Vol 13) 1926 Mad 569 (570).

[2] The obligations imposed by the section, except para 2, are in the nature of statutory obligations and are not implied covenants (Vol 11) 1924 Mad 541 (546).

(c) to answer to the best of his information all relevant questions put to him by the buyer in respect to the property or the title thereto;

(d) on payment or tender of the amount due in respect of the price, to execute a proper conveyance of the property when the buyer tenders it to him for execution at a proper time and place;

(e) between the date of the contract of sale and the delivery of the property, to take as much care of the property and all documents of title relating thereto which are in his possession as an owner of ordinary prudence would take of such property and documents;

(f) to give, on being so required, the buyer, or such person as he directs, such possession of the property as its nature admits;

(g) to pay all public charges and rent accrued due in respect of the property up to the date of the sale, the interest on all incumbrances on such property due on such date, and, except where the property is sold subject to incumbrances, to discharge all incumbrances on the property then existing.

(2) The seller shall be deemed to contract with the buyer that the interest which the seller professes to transfer to the buyer subsists and that he has power to transfer the same:

Provided that, where the sale is made by a person in a fiduciary character, he shall be deemed to contract with the buyer that the seller has done no act whereby the property is incumbered or whereby he is hindered from transferring it.

The benefit of the contract mentioned in this rule shall be annexed to, and shall go with, the interest of the transferee as such, and may be enforced by every person in whom that interest is for the whole or any part thereof from time to time vested.

(3) Where the whole of the purchase money has been paid to the seller, he is also bound to deliver to the buyer all documents of title relating to the property which are in the seller's possession or power:

Provided that, *(a)* where the seller retains any part of the property comprised in such documents, he is entitled to retain them all, and *(b)* where the whole of such property is sold to different buyers, the buyer of the lot of greatest value is entitled to such documents. But in case *(a)* the seller, and in case *(b)* the buyer, of the lot of greatest value, is bound, upon every reasonable request by the buyer, or by any of the other buyers, as the case may be, and at the cost of the person making the request, to produce the said documents and furnish such true copies thereof or extracts therefrom as he may require; and in the meantime, the seller, or the buyer of the lot of

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Section 55—Note 1 *(contd.)*

[3] In the following cases the obligations imposed by the section are referred to as covenants. (Vol 15) 1928 Sind 61 (63) : 23 Sind L R 237 ✠ (Vol 11) 1924 Pat 822 (822).

[4] Every sale deed is necessarily based upon the contract. (Vol 16) 1929 All 837 (839) (D B).

[5] If a contract is void or voidable on the ground of fraud, misrepresentation, coercion, undue influence, mutual mistake, want of consideration, etc., the sale itself which is based upon such contract will also be vitiated to the same extent. ('98) 22 Bom 176 (180, 181) (D B) ✠ (Vol 9) 1922 P C 403 (405) : 50 Ind App 69 : 45 All 179: 26 Oudh Cas 223 (P C).

[6] Where a wrong property was sold by *A* to *B* under a mutual mistake of fact between them, it was held that the contract preceding the sale being void under S. 20 of the Contract Act, the sale itself was void and that *B* was entitled, under S. 65 of that Act, to recover the purchase-money paid by him. (Vol 17) 1930 All 252 (254) (D B).

[7] The rules in this section are not applicable to sales *in invitum*. ('10) 8 Ind Cas 605 (605) (D B) (Low Bur).

[8] The principles underlying the provisions of this section have been applied to cases arising in provinces to which this Act does not apply. (Vol 29) 1942 Lah 275 (278) : I L R (1943) Lah 17 (F B) ✠ (Vol 6) 1919 P C 124 (125) (P C) ✠ (Vol 7) 1920 Nag 144 (145) ✠ (Vol 24) 1937 Pesh 8 (9) (D B) ✠ (Vol 28) 1941 Lah 407 (412): 1 L R (1942) Lah 79 (F B).

[9] There is no obligation on the Court in the Provinces where the Act does not apply to so use the Act as if every particular detail of it is the law of the Province. (Vol 12) 1925 Lah 92 (93).

[10] In the following case it was held that the seller could not rely upon para. 4, cl. (b) but could rely upon general principles of equity for his lien. (Vol 14) 1927 Lah 103 (103): 8 Lah 257 (D B).

[11] In the following case it was held that in a suit for possession by a vendee under a completed sale, there being no rigid rules such as those contained in Ss. 55 (1) (f) and (4) (b) in North-West Frontier Province. The Court could pass a decree for possession in favour of the buyer conditional upon his paying the unpaid purchase-money to the seller on the grounds of justice, equity and good conscience. (Vol 31) 1944 Pesh 9 (10) (D B).

2. Paragraph 1, clause (a).—[1] The seller is bound to disclose all latent defects which are material and of which he is aware, but not patent defects. (1800) 31 E R 707 (707) : 5 R R 107, *Rowles* v. *Round* ✠ (1922) 92 L J Ch 194 (201) : 128 L T 622, *Simpson* v. *Gilley*.

[1-a] A defect in property only prejudices the buyer in the physical enjoyment of the property but defect in title exposes him to adverse claim. (Vol 23) 1936 Nag 4 (6): 31 Nag L R (Supp) 101.

[2] The test of materiality of defect is that the defect must be of such a nature that it might be re-

greatest value, as the case may be, shall keep the said documents safe, uncancelled and undefaced unless prevented from so doing by fire or other inevitable accident.

(4) The seller is entitled—

(a) to the rents and profits of the property till the ownership thereof passes to the buyer;

(b) where the ownership of the property has passed to the buyer before payment of the whole of the purchase-money, to a charge upon the property in the hands of the buyer, [a][any transferee without consideration or any transferee with notice of the non-payment], for the amount of the purchase-money, or any part thereof remaining unpaid, and for interest on such amount or part [a][from the date on which possession has been delivered].

(5) The buyer is bound—

(a) to disclose to the seller any fact as to the nature or extent of the seller's interest in the property of which the buyer is aware but of which he has reason to believe that the seller is not aware, and which materially increases the value of such interest;

(b) to pay or tender, at the time and place of completing the sale, the purchase-money to the seller or such person as he directs: provided that, where the property is sold free from incumbrances, the buyer may retain out of the purchase-money the amount of any incumbrances on the property existing at the date of the sale, and shall pay the amount so retained to the persons entitled thereto;

(c) where the ownership of the property has passed to the buyer to bear any loss arising from the destruction, injury or decrease in value of the property not caused by the seller;

(d) where the ownership of the property has passed to the buyer, as between himself and the seller, to pay all public charges and rent which may become payable in respect of the property, the principal moneys due on any incumbrances subject to which the property is sold, and the interest thereon afterwards accruing due.

(6) The buyer is entitled—

(a) where the ownership of the property has passed to him, to the benefit of any improvement in, or increase in value of, the property, and to the rents and profits thereof;

(b) unless he has improperly declined to accept delivery of the property, to a charge on the property, as against the seller and all persons claiming under him, [* * *][b] to the extent of the seller's interest in the property, for the amount of any purchase-money properly paid by the buyer in anticipation of the delivery and for interest on such amount; and, when he properly declines to accept the delivery, also for the earnest (if any) and for the costs (if any) awarded to him of a suit to compel specific performance of the contract or to obtain a decree for its rescission.

An omission to make such disclosures as are mentioned in this section, paragraph *(1)*, clause *(a)*, and paragraph *(5)*, clause *(a)*, is fraudulent.

[a] *Inserted* by the Transfer of Property (Amendment) Act, 1929 (20 [XX] of 1929), S. 17. [b] The words "with notice of the payment" were *repealed*, *ibid.*

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asonably supposed that if the buyer had been aware of it, he might not have entered into contract at all. (Vol 22) 1935 Bom 16 (20): 59 Bom 83 (D B).

[3] The following have been held to be defects in title.

(a) The existence of an incumbrance not known to the buyer and which he could not discover by exercise of reasonable care. (Vol 12) 1925 Mad 968 (969).

(b) The existence of an easement over the property. (1901) 70 L J Ch 822 (823): (1901) 2 Ch 825, *Turner* v. *Moon* & (Vol 22) 1935 Bom 16 (19, 20): 59 Bom 83 (D B).

(c) The existence of a liability of the land being taken over by a company under a local Act. (1836) 150 E R 540(544): 5 L J (NS) Ex 207, *Ballard* v. *Way*.

(d) The existence of a restrictive covenant attached to the property sold. (1907) 76 L J Ch 621 (624): (1907) 2 Ch 191, *Pemsel* v. *Tucker* & (1903) 72 L J K B 873 (875): (1903) 2 K B 487, *Molyneux* v. *Hawtrey*.

(e) The existence of a public right of way over the property not discoverable with ordinary care. (1922) 91 L J Ch 567 (570): (1922) 2 Ch 199, *Yandle & Sons* v. *Sutton*.

[4] The existence of a nuisance in the neighbourhood of the property sold is a defect in the property. (1849) 68 E R 170 (173): 18 L J Ch 329, *Lucas* v. *James*.

[5] The existence of an underground culvert running through the middle of the property is a defect in property where the property is sold for residential purposes. (1902) 71 L J Ch 666 (667): (1902) 2 Ch 258, *In re Puckett & Smith's Contract*.

[6] Where at the time of the contract the seller is himself not aware of the defect, he cannot obviously disclose it and is, therefore, not bound to disclose it. (1849) 68 E R 170 (173): 18 L J Ch 329, *Lucas* v. *James*.

[7] Where the buyer is aware of the defects there is no duty on the part of the seller to inform him of such defects. (Vol 12) 1925 Mad 968 (969).

[8] There is no duty on the part of the seller to inform the buyer of the defects unless the buyer could

Section 55—Note 2 *(contd.)*

not with ordinary care discover them. (Vol 17) 1930 Cal 561 (563) : 57 Cal 1189 (D B) ✠ (Vol 32) 1945 Bom 187 (192) (D B) ✠ (Vol 23) 1936 Nag 4 (6):31 Nag L R (Supp) 101 ✠ (Vol 2) 1915 Sind 21 (22):9 Sind L R 97.

[9] Where a prior incumbrance is registered the seller is not under any obligation to disclose it. ('05) 27 All 561 (563). (Mortgage.) ✠ (Vol 2) 1915 Sind 21 (22) : 9 Sind L R 97. (Do.)

[But see (Vol 25) 1938 Nag 441 (442).]

[10] The buyer cannot be said to be guilty of negligence in not asking for the title deeds of an adjoining property which *prima facie*, he has no right whatever to ask his vendor to produce and it is the vendor who is bound to disclose any covenant restricting the enjoyment of the property sold, which would be apparent from an examination of such title deeds. (Vol 12) 1925 Bom 183 (184, 185) (D B).

[11] On the discovery of a defect in title which the seller was bound to disclose under this clause the buyer may retire from the contract and refuse to complete it. (1830) 39 E R 114 (119, 120) : 8 L J Ch 74, *Dalby* v. *Pullen* ✠ (Vol 22) 1935 Bom 16 (18) : 59 Bom 83 (DB) ✠(Vol 12) 1925 Bom 85 (87):49 Bom 325 (DB)✠(Vol 12) 1925 Lah 481 (481) : 6 Lah 308 (D B).

[12] An omission to make the disclosure of the nature referred to in this clause will entitle the buyer not only to avoid the contract, where the transaction has not passed beyond the stage of contract, but to set aside the sale itself where the contract has been completed by the execution of the conveyance. (Vol 29) 1942 Sind 81 (82): I L R (1942) Kar 32 (D B)✠(Vol 13) 1926 Cal 385 (389, 390) : 52 Cal 914 (D B) ✠ (Vol 12) 1925 Rang 372 (373) (D B).

[13] Before the sale is set aside the buyer cannot sue for return of the purchase-money. (Vol 29) 1942 Sind 81 (82) : I L R (1942) Kar 32 (D B).

[13a] Several items of property sold at one price — Purchaser can have contract of sale rescinded so far as items with regard to which defect in title is discovered and recover damages — He need not surrender other items. (Vol 32) 1945 Mad 205 (206, 207).

[14] Where a misrepresentation is fraudulent the buyer may claim damages in tort, for any loss that he may have sustained by reason of such fraud. (Vol 19) 1932 Nag 148 (150) : 28 Nag L R 184.

[15] An innocent misrepresentation by a party is not a ground in law for a claim for any damages. (1883) 52 L J Q B 609 (618) :11 Q B D 255, *Joliffe* v. *Baker* ✠('96) 18 All 322 (324, 325) (D B).

[16] Where, in an auction sale, the condition of sale notified that the would-be buyer should satisfy himself as to the nature of the property sold, it was held that there was a contract to the contrary and that the seller was not liable to disclose, under this clause, any defect in the property. ('21) 65 Ind Cas 734 (735) (D B) (Lah).

3. **Paragraph 1, clause (b).**— [1] Where a contract for sale is made without any special conditions or stipulations as to title, the seller is bound, at all times and under all circumstances, to make out a marketable title. (Vol 25) 1938 Bom 77 (78) ✠ (Vol 14) 1927 Sind 49 (50) : 19 Sind L R 41 ✠ (Vol 7) 1920 Mad 859 (861) (D B) ✠ (Vol 15) 1928 Lah 154 (155) : 9 Lah 67 (D B).

[2] A good or marketable title would mean a title "free from reasonable doubt" within the meaning of cl. (b) of S. 25 of the Specific Relief Act. (Vol 10) 1923 Bom 148 (150,152, 154) : 47 Bom 369 (D B) ✠(Vol 15) 1928 Oudh 475 (477) (D B) ✠ (Vol 22) 1935 Bom 16 (18): 59 Bom 83 (D B).

[3] A title which will expose the buyer to litigation or hazard is not such a title as is referred to in S. 25 of the Specific Relief Act. (Vol 9) 1922 Sind 33 (36) : 15 Sind L R 180 ✠ ('87) 14 Cal 518 (526).

[4] The failure to make out a marketable title will entitle the buyer to put an end to the contract. (Vol 14) 1927 Bom 195 (202) : 51 Bom 247 (D B) ✠ (Vol 12) 1925 Sind 220 (220, 221) (D B) ✠(Vol 15) 1928 Lah 154 (156) : 9 Lah 67 (D B).

[5] Where there is an express contract to make out a marketable title and the vendor fails to make it out the buyer can put an end to the contract. (Vol 12) 1925 Bom 64 (65, 68) (D B) ✠ (Vol 12) 1925 Bom 69 (79) : 49 Bom 245 (D B) ✠ ('12) 14 Ind Cas 811 (811) (Low Bur).

[6] The duty of the seller to produce documents of title under this clause arises only "on the request" of the buyer and not if there is no such request. (Vol 4) 1917 Low Bur 166 (167) (D B).

[7] The seller is bound to produce only such documents which are in his possession or power and not the documents which are not in his possession or power, though, if he has expressly agreed to produce the title deed such agreement will be a contract to the contrary and he cannot escape liability by relying upon this clause. (Vol 30) 1943 Mad 593 (596, 597)✠ (Vol 1) 1914 Cal 137 (139) : 41 Cal 852 (D B).

[8] Where the buyer is not satisfied with the title on the documents which are produced and which alone the seller is bound to produce, and insists on the seller producing documents which are not in his possession or power and which he did not undertake to produce by the terms of the contract for transfer, the seller is entitled to rescind the contract. (Vol 30) 1943 Mad 593 (597).

[9] Where a contract of sale mentions a sum to be paid as damages in case of its breach and the buyer refuses to carry out the contract after the seller has made out a marketable title the seller is entitled to claim from the buyer reasonable compensation under S. 74 of the Contract Act, even without showing that he has actually suffered any loss. (Vol 16) 1929 Mad 783 (784).

4. **Paragraph 1, clause (c).** — [1] If the seller gives to the question put by the buyer an answer which he knows to be false he would be guilty of a breach of duty and misrepresentation. (Vol 19) 1932 Nag 148 (149) : 28 Nag L R 184.

[2] An information regarding the income or the rental of the property to be sold is a relevant question within the meaning of this clause. (Vol 19) 1932 Nag 148 (149) : 28 Nag L R 184.

[3] Even where the seller has, under the contract an express power of rescission, if requisitions are made which he is unwilling to comply with, the power does not enable him to override reasonable requisitions. (Vol 14) 1927 Bom 195 (201) : 51 Bom 247 (DB).

5. **Paragraph 1, clause (d).**— [1] It is the duty of the buyer not only in the first instance to pay or tender the price, but also to prepare a conveyance and tender it to the seller for execution. (Vol 6) 1919 P C 124 (125) (P C) ✠ (Vol 15) 1928 Bom 328 (330) (DB).

[2] In a contract for sale of land, time is not regarded as being of the essence of the contract if there is nothing in the express stipulations between the parties, the nature of the property, or the surrounding circumstances which would make it inequitable to apply the rule. (Vol 7) 1920 Cal 651 (653) (DB) ✠ (Vol 6) 1919 Sind 68 (69) : 12 Sind L R 144 (DB) ✠ (Vol 12) 1925 Mad 211 (212) ✠ (Vol 8) 1921 Mad 141 (141) (DB) ✠ (Vol 14) 1927 Sind 49 (50) : 19 Sind L R 41.

[3] The tender of the price and of the proper conveyance must be made within a reasonable time. (Vol 16) 1929 P C 195 (200) (PC).

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[4] Where there is unreasonable delay in the completion of the contract either party can make time the essence of the contract by giving notice to the other limiting the time for performance, at the expiration of which he will treat the contract as broken. Such limitation of time also must be reasonable. (Vol 7) 1920 Cal 651 (654) (DB) ✠(Vol 15) 1928 Lah 154 (155, 156): 9 Lah 67 (DB).

[5] Where the seller refuses to execute a proper document it is not necessary for the buyer to go through the useless form of tendering a conveyance to the seller for execution before he can enforce his contract against the seller by specific performance ('67) 4 Bom H C R (O C) 125 (128) (DB) ✠ (Vol 8) 1921 Low Bur 16 (18) : 11 Low Bur Rul 94 (DB).

[6] Where the buyer has performed his part of the contract it is the duty of the seller to execute the conveyance. (Vol 12) 1925 Rang 382 (383) (DB) ✠ ('11) 10 Mad L Tim 79 (80) (DB) ✠ (Vol 8) 1921 Low Bur 16 (17): 11 Low Bur Rul 94 (DB).

[7] Seller's duty to execute the conveyance is not discharged by the execution of a document which is not operative to effect a legal transfer. (Vol 8) 1921 Low 16 (17, 18) : 11 Low Bur Rul 94 (DB).

[8] The offer of an unregistered document is not a discharge of the seller's duty. (Vol 15) 1928 Mad 344 (345).

[9] Where the seller has executed the conveyance tendered by the buyer and handed it over to him, and the buyer has received it, the seller is not under any further obligation to get it registered. The buyer can himself present the document for registration and get it registered. (Vol 3) 1916 Mad 14 (16) (DB).

[10] Where the buyer has allowed the time for registration to elapse he is not entitled to ask the seller to execute another conveyance. (Vol 15) 1928 Mad 344 (345).

[11] Where the buyer has paid the price but the conveyance has not been executed for some reason the buyer can recover the purchase-money paid by him. ('03) 25 All 618 (624, 625) (DB) ✠ (Vol 21) 1934 Cal 699 (702).

[12] It has been held that the buyer can, under this clause, call upon the seller to execute a conveyance in favour of his nominee. (Vol 22) 1935 Bom 340 (341, 343) : 59 Bom 582 (DB).

6. Paragraph 1, clause (i).—[1] In a suit for specific performance of the contract for sale, the law allows the plaintiff, for the sake of convenience and in order to avoid multiplicity of suits, to make a claim for possession also. (Vol 12) 1925 Bom 181 (182) (DB) ✠ (Vol 25) 1938 Rang 290 (291) ✠ ('10) 37 Cal 57 (61) (DB).

[2] It is open to the plaintiff after the execution of the conveyance, or after the suit for specific performance is decreed, to sue for possession on the basis of his title. (Vol 1) 1914 Mad 465 (467) : 38 Mad 698 (DB) ✠ (Vol 12) 1925 Bom 181 (182) (DB) ✠ (Vol 13) 1926 Rang 197 (198) ✠ (Vol 11) 1924 Mad 360 (363) : 47 Mad 150 (DB) ✠ (Vol 5) 1918 Nag 221 (223) : 14 Nag L R 176.

[3] Where there has been express agreement not only to convey but also to deliver possession the right to the execution of a conveyance and the right to possession may arise coincidentally and a suit for specific performance alone might bar a subsequent suit for possession based on the same agreement. (Vol 11) 1924 Mad 360 (363) : 47 Mad 150 (DB).

[4] Where the property sold is a house, the possession that its nature permits delivery of is vacant possession. ('32) 1932 Mad W N 122 (124) (DB).

[5] Where the property sold is in the possession of tenants, the handing over of the title deeds is a sufficient delivery of possession. ('10) 8 Ind Cas 805 (805) (DB) (Low Bur).

[6] The obligation under this clause is on the seller to give possession and not on the buyer to go and take possession. (Vol 3) 1916 Pat 222 (222, 223) : 1 Pat L Jour 140 (DB).

[7] Where the seller fails to give possession after the execution of the conveyance the remedy of the buyer is to sue for recovery of possession and not to sue for specific performance. ('11) 1911 Pun L R No. 92, p. 371 (373) : 1911 Pun Re No. 18.

[But see (Vol 24) 1937 Rang 31 (36).]

[8] The breach of a covenant for title will not entitle the buyer to avoid the sale on that ground but will entitle him only to a claim for damages. (Vol 20) 1933 Lah 262 (263).

[9] It has been held that where possession of a portion of the property sold is not given to the buyer, the latter can sue to avoid the sale itself on that ground. (Vol 20) 1933 Mad 382 (383).

[10] Where the buyer knows that he will not get immediate possession and if under his contract he is entitled to such immediate possession of the property contracted to be sold he may under S. 53, Contract Act, put an end to the contract even before he has completed the purchase by paying full consideration. ('32) 1932 Mad W N 122 (124, 125) (DB).

7. Paragraph 1, clause (g).—[1] The buyer can under this clause insist that the obligation under this clause should be fulfilled at or before the execution of the conveyance. (Vol 22) 1935 Oudh 142 (142) (DB)✠ (Vol 13) 1926 Mad 569 (570).

[2] Where property is sold free of incumbrances but after the execution of the conveyance it turns out that the property is subject to incumbrances and the buyer is compelled to pay them, he can recover the amount so paid by him from the seller under S 69, Contract Act. (Vol 15) 1928 P C 98 (99) : 50 All 371 : 55 Ind App 135 (PC).

[2a] Sale of house free from incumbrances—Purchaser paying off money due under attachment of property before date of sale — Vendor held liable to reimburse purchaser for any amount due under attachment which purchaser had paid. (Vol 33) 1946 Mad 241 (245) (DB).

[2b] Tenant transferring his interest to landlord by registered sale-deed— Landlord subsequetly discovering that property was subject to mortgages — Landlord can renounce his position as vendee and resume old relationship of landlord and tenant. (Vol 34) 1947 Cal 328 (329).

[3] The seller's obligation to discharge prior incumbrances on the property sold arises, in all cases except where the property is sold subject to incumbrances. In order to raise this obligation the sale need not be expressed to be free from incumbrances. (Vol 16) 1929 All 791 (791) : 51 All 1053 (DB) ✠ (Vol 21) 1934 Oudh 492 (493) : 10 Luck 274 (DB)✠(Vol 31) 1944 Mad 572 (573). (Exclusion of S. 55 (1) (g) ought to be expressly mentioned and cannot be implied.)✠(Vol 32) 1945 Bom 187 (195) (D B). (Clause (g) is an implied term unless negatived by contract.)

[3a] Encumbered property not to be presumed to have been sold free from encumbrances—Whether property is sold subject to encumbrance is question of fact—Seller contracting to sell property subject to a mortgage and to sell it for a fixed price without reference to discharge of the mortgage or retention of any part of consideration by vendee—Property must be held to be sold subject to encumbrance. (Vol 32) 1945 All 39 (40, 41) (DB).

[4] The mere fact that the buyer is aware of the incumbrance does not relieve the vendor of the liability to get the same discharged. (Vol 14)1927 Mad 193(193).

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[5] In a sale of lease-hold property the seller must pay all the rent due up to the date of sale even though a portion of it had been incurred even before the seller himself owned the property. (Vol 11) 1924 Pat 822 (822) (DB).

[6] The liability of the seller to pay prior incumbrances being a personal liability of the seller cannot be enforced against the transferee from him after the contract for sale falls through by reason of the seller's non-compliance with this clause. (Vol 13) 1926 Mad 173 (174) (DB).

[7] The obligation under this clause is not one which runs with the land and cannot be enforced against any person other than the transferor. (Vol 14) 1927 Mad 1072 (1072).

[8] Any person other than the buyer cannot enforce the obligation under this clause. ('09) 6 Mad L Tim 264 (265) (DB).

[9] The word incumbrance includes also a recurring liability like that of a maintenance allowance. (Vol 21) 1934 Oudh 492 (493) : 10 Luck 274 (DB).

[10] Where the seller covenanted with the buyer that if by reason of any prior incumbrances the buyer lost possession, the seller would refund the purchase-money, it was held that the covenant was not contrary to the statutory obligation under this clause, but was only an additional security. (Vol 15) 1928 P C 98 (99) : 55 Ind App 135 : 50 All 371 (PC). (*Reversing* (Vol 11) 1924 All 937.)

8. Implied contract for title — Paragraph 2. — [1] Paragraph 2 contemplates a completed sale. (Vol 17) 1930 Cal 561 (563) : 57 Cal 1189 (DB).

[But see (Vol 29) 1942 All 39 (41) : I L R (1942) All 120 (DB).]

[2] The contract implied by Para. 2 corresponds to the covenants for title and for quiet enjoyment in an English conveyance. (Vol 5) 1918 Mad 1315 (1321) : 40 Mad 338 (F B)✠(Vol 17) 1930 Cal 561 (563) : 57 Cal 1189 (DB).

[3] This paragraph is an exception to the doctrine *caveat emptor*, so far as sales of immovable property by act of parties are concerned. (Vol 10) 1923 Lah 590 (590) (DB)✠('05) 8 Oudh Cas 345 (347).

[4] The paragraph implies a warranty of title in all sales executed after the Transfer of Property Act came into force whether such warranty be expressed or not in the conveyance. (Vol 31) 1944 All 243 (244) : I L R (1944) All 612✠(Vol 11) 1924 Cal 148 (150) (DB) ✠ (Vol 23) 1926 Mad 255 (256) ✠ (Vol 6) 1919 Cal 404 (405)✠ (Vol 17) 1930 Mad 748 (750) ✠ (Vol 12) 1925 Lah 481 (481) : 6 Lah 308 (DB) ✠ (Vol 19) 1932 Nag 5 (9, 10) : 28 Nag L R 31 (FB)✠(Vol 18) 1931 Sind 141 (142) : 25 Sind L R 173✠(Vol 17) 1930 Sind 12 (12): 24 Sind L R 172✠(Vol 10) 1923 All 169 (169).

[5] The warranty implied under this paragraph is absolute and, in the absence of a contract to the contrary, irrebuttable. (Vol 17) 1930 All 771 (773): 52 All 304 (DB)✠(Vol 4) 1917 Nag 125 (127).

[6] The liability under the paragraph would be deemed to subsist notwithstanding the fact that the buyer may have some idea as to the defect of the title of the seller. (Vol 31) 1944 All 243 (244) : I L R (1944) All 612✠(Vol 19) 1932 All 546 (547) : 54 All 774✠ ('89) 16 Cal 330 (342)✠(Vol 5) 1918 Mad 1315 (1320) : 40 Mad 338 (FB)✠(Vol 4) 1917 Nag 125 (127)✠(Vol 18) 1931 Sind 141 (142) : 25 Sind L R 173✠ (Vol 16) 1929 Pat 388 (389) : 8 Pat 432 (DB).

[See however (Vol 3) 1916 Mad 603 (603) (DB).]

[7] Where a guardian executed a sale on behalf of a minor on obtaining permission from the District Judge but the permission was found to be ineffective and consequently the sale was held invalid, it was held that buyer was not entitled to any relief on the covenant for title against the guardian or the minor. (Vol 21) 1934 All 645 (651) : 56 All 997 (DB).

[8] In auction sales there is no guarantee by the Court or by the decree-holder corresponding to the guarantee under this paragraph. (Vol 11) 1924 Cal 172 (172) (DB). (Rent sale.) ✠ ('01) 28 Cal 235 (237) (DB)✠ ('06) 3 All L Jour 820 (823) (DB) ✠('29) 10 Lah L Jour 488 (490, 491)✠(Vol 12) 1925 Lah 467 (468) : 6 Lah 283 (DB)✠(Vol 18) 1931 Nag 116 (117) : 27 Nag L R 318✠('10) 8 Ind Cas 605 (605) (DB) (Low Bur).

[9] It is only the right, title and interest of the judgment-debtor that passes to the auction-purchaser, and the latter takes them subject to any claims that may subsequently be made by third parties. (Vol 24) 1937 All 18 (19) ✠(Vol 20) 1933 All 63 (64, 65) : 54 All 948 (DB)✠(Vol 17) 1930 Lah 937 (941).

[10] A covenant for title is not the same thing as a contract of indemnity. (Vol 15) 1928 Mad 894 (896) : 51 Mad 688 (DB)✠('02) 26 Bom 750 (754) (DB).

[11] Where the seller stated that the property was subject to a yearly tenancy but it was found that the tenancy was a permanent one, it was held that on the ground of the defect in the quality of the property the buyer was entitled to claim damages for breach of the implied contract. (Vol 3) 1916 Bom 279 (280, 281) (DB).

[12] Where the quantity of certain land sold was found to be less than that stated in the sale deed, it was held that a breach of a covenant implied by this clause had been committed. (Vol 8) 1921 Lah 357 (360).

[But see (Vol 3) 1916 Mad 526 (526) (DB).]

[13] It has been held that this clause imports not only a covenant for title, but also a covenant for quiet enjoyment. The covenant for quiet enjoyment means that, the buyer shall not be disturbed in his possession and enjoyment of the property. (Vol 19) 1932 Nag 5 (9) : 28 Nag L R 31 (FB) ✠ (Vol 17) 1930 Sind 12 (12): 24 Sind L R 172✠(Vol 15) 1928 Sind 61 (62) : 23 Sind L R 237✠(Vol 3) 1916 Mad 14 (15) (DB).

[14] It has been held that this clause does not import any contract to put the buyer in possession of the property sold. (Vol 13) 1926 Mad 495 (496).

[15] It has been held that the liability under the proviso is not enforceable against the person who has acted in a fiduciary character but only against the person on whose behalf the sale is executed and that even this cannot be done if the sale is not binding upon the latter person. (Vol 21) 1934 All 645 (650, 651) : 56 All 997 (DB).

[16] The following case holds that a breach of a warranty implied by law in respect of a sale effected by a guardian cannot result in a personal liability on the ward for damages. (Vol 11) 1924 Oudh 99 (100).

[17] It has been held that where the Official Receiver purports to sell property to which the insolvent has ceased to have title, the sale cannot be said to have been made in a fiduciary character within the proviso to paragraph 2. (Vol 29) 1942 All 39 (41): I L R (1942) All 120 (DB).

[18] The following persons can take advantage of the implied contract:

(a) A transferee from the buyer. (Vol 16) 1929 Bom 361 (363, 364, 365) ✠ (Vol 22) 1935 Mad 961 (963) ✠ (Vol 4) 1917 Mad 296 (297) ✠ (Vol 19) 1932 Nag 5 (9) : 28 Nag L R 31 (FB).

(b) A pre-emptor of the buyer. (Vol 17) 1930 All 771 (774) : 52 All 604 (DB) ✠ (Vol 18) 1931 Nag 166 (168) : 27 Nag L R 392✠ (Vol 15) 1928 Lah 357 (359) : 9 Lah 659 (DB).

(c) A transferee from the pre-emptor. (Vol 16) 1929 All 293 (295) : 51 All 651 (DB).

[19] After the buyer transfers the property purchased by him, to a second transferee, he cannot claim

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the benefit of the covenant in respect of such property unless he shows that he has settled with his transferee and is himself entitled to damages on this covenant. (Vol 17) 1930 Mad 748 (751).

[20] A breach of the implied contract under this paragraph takes place where there is an adverse right or an outstanding interest, charge, or claim, which may prevent the buyer from enjoying the estate. (Vol 3) 1916 Bom 279 (280) (DB).

[21] *A* sells property to *B* free of incumbrances. But subsequently it is found that there are prior incumbrances. The statutory contract must be deemed to have been broken by the seller. (Vol 9) 1922 P C 176 (176) (P C).

[22] *A* sells property to *B* and it is subsequently found that a portion of it has already been granted by *A* to another person. There is a breach of the covenant of title. The mere fact that possession of that portion has not been given to the buyer does not debar him from claiming damages for the breach. (Vol. 26) 1939 All 170 (172) (DB).

[23] Where on the date of the sale itself the seller had no title to the whole or part of the property sold, the implied contract is broken with the execution of the conveyance. (Vol 2) 1915 Nag 46 (47) : 11 Nag L R 186 ✠ (Vol 21) 1934 Mad 687 (688) : 57 Mad 1016 ✠('02) 26 Bom 750 (754) (DB). (Although the buyer may be ignorant of the breach.) ✠ (Vol 2) 1915 Mad 766 (767) (DB). (Do.)

[24] Where the seller has power to transfer the property on the date of the sale, but the transaction is a voidable one at the instance of a third person, a breach of the implied contract will take place when the transaction is avoided by such third person and not on the date of the sale itself. (Vol 19) 1932 Nag 3 (4).

[25] On a breach of the contract implied by this paragraph the buyer will be entitled to claim damages for such breach under S. 73 of the Contract Act. (Vol 3) 1916 Bom 279 (281) (DB) ✠ ('29) 31 Pun L R 482 (484) (DB) ✠ (Vol 8) 1921 Mad 384 (385) : 44 Mad 167 (DB) ✠(Vol 20) 1933 Nag 364 (365) ✠(Vol 4) 1917 Nag 125 (127) ✠('02) 5 Oudh Cas 78 (80) ✠(Vol 17) 1930 Mad 748 (750).

[26] Where a sale is free of incumbrances, and the buyer, on discovery of an incumbrance is compelled to pay the incumbrancer, he can under S 69 of the Contract Act recover the money so paid. (Vol 15) 1928 P C 98 (99) : 50 All 371 : 55 Ind. App. 135 (P C).

[27] Where an incumbrance, not disclosed at the time of the sale, is discovered thereafter, the buyer can sue for damages notwithstanding he has not paid off the incumbrance. (Vol 18) 1931 Nag 166 (168) : 27 Nag L R 392.

[28] The measure of damages in a suit for damages on the implied contract would be governed by the provisions of S. 73 of the Contract Act. (Vol 8) 1921 Lah 357 (360) (DB) ✠ (Vol 17) 1930 Mad 748 (750) ✠(Vol 16) 1929 Lah 416 (418) (DB) ✠ ('08) 32 Bom 165 (171).

[29] The buyer is entitled on the implied covenant to claim not only the value of the property conveyed but also the value of the improvements effected by the buyer in the ordinary course. (Vol 18) 1931 Nag 14 (16) : 27 Nag L R 207.

[30] Sale deed by *A* and *B*—Covenant for title by both—*B*'s share in property found encumbered—Both *A* and *B* are liable in damages to buyer. (Vol 30) 1943 Mad 752 (753).

[31] The implied covenant for title under this paragraph may be negatived by a contract to the contrary. (Vol 14) 1927 Sind 120 (122) : 19 Sind L R 337 ✠ (Vol 7) 1920 Mad 634 (635) (DB).

[32] Where there is a covenant in the sale deed that the seller shall not be liable for any defect of title in the property transferred, it will be a contract to the contrary. ('07) 30 Mad 284 (286) (DB).

[33] A clause in the sale deed that the seller had not created any incumbrances on the property does not exclude the statutory covenant for title. (Vol 13) 1926 Mad 255 (256) ✠ ('10) S Ind Cas 91 (95) (DB) (Cal).

[34] An express warranty of title and possession is not a contract to the contrary. (Vol 12) 1925 All 704 (705).

[35] A stipulation that if the buyer lost possession of any portion of the property he was entitled to rescind the contract and sue for the consideration is not a contract to the contrary. (Vol 19) 1932 All 224 (226) (DB) ✠ (Vol 20) 1933 All 203 (205) (DB).

[36] A stipulation that the heirs and reversioners of the seller would have no objection and if they claimed the land, the seller would pay damages, price and costs and take back the land, is not a contract to the contrary. (Vol 10) 1923 Lah 590 (591) (DB).

[37] A stipulation that if any dispute arose through the seller in respect of the land, he would get it settled, is not a contract to the contrary excluding the covenant for title. (Vol 2) 1915 Mad 689 (690).

[38] A contract to the contrary cannot be deduced from the mere fact that the buyer was aware of the defect in title. (Vol 5) 1918 Mad 1315 (1319) : 40 Mad 338 (FB).

[*See also* (Vol 32) 1945 Mad 205 (206). (Express covenant for title—Buyer knowing defect in title of seller before purchase—He can still sue for damages for breach of covenant)]

[39] It has been held that a contract excluding the covenant for title implied by this paragraph must be embodied in the deed itself and that an oral agreement to that effect is not admissible in evidence under S. 92 of the Evidence Act. (Vol 17) 1930 All 771 (774) : 52 All 604 (DB).

[40] The benefit of an implied covenant for title may be waived by the buyer, who cannot, after such waiver take advantage of it. ('90) 13 Mad 158 (165) (DB) ✠ ('92) 15 Mad 50 (53) (DB).

9. Paragraph 3. — [1] The title deeds for the property sold belong to the buyer as an incident of the property sold, though not granted by express words. ('87) 11 Bom 485 (486) (DB).

[2] Where the mortgagee sells the mortgage property under a power of sale which he has under S. 69 of the Transfer of Property Act, the mortgage deed must be handed over to the buyer. (Vol 26) 1939 Mad 774 (775) (DB).

[3] Where the buyer had executed a promissory note to the seller for the price, but did not tender a proper conveyance to him for execution by him under paragraph I, clause (d) it was held in a suit by the seller on the promissory note, that the buyer was not entitled to claim that the seller did not give him the title deeds, and that he was consequently not bound to pay the amount due on the note. (Vol 6) 1919 P C 124 (125) (P C).

[4] The buyer of the lot of a greatest value is, under the proviso, entitled to the possession of the title deeds, and the seller has no right as against him to retain them even though he had covenanted with the earlier buyers of other portions of the property that he would produce the title deeds when required; but, in such a case, according to the English practice, the purchaser of the greatest value must give a covenant to the seller that he will produce the deeds and indemnify the seller against his liability under the

Section 55 — Note 9 *(contd.)*

covenants in the prior sale deeds. (Vol 28) 1941 Bom 48 (49) : I L R (1941) Bom 55 (DB).

10. Right to rents and profits and interest on purchase-money.—[1] In the Punjab where the Act is not in force, it has been held that after the contract for sale the seller is not entitled to rents and profits after the date fixed in the contract for completing the sale. (Vol 17) 1930 Lah 131 (132) (DB).

[2] Where, on the passing of ownership, delivery of possession has been given to the buyer but he has not paid the purchase-money, the act of taking possession will be regarded as an implied agreement on the part of the buyer to pay interest on the purchase money from the date on which he took possession. (1806) 33 E R 10 (11) : 8 R R 275 *Fludyer* v. *Cocker*.

[See however (Vol 17) 1930 Nag 32 (32).]

[3] It is inequitable in the absence of an express stipulation that either party to a contract of sale should, at one and the same time, enjoy the benefits flowing from possession of the property and those flowing from the possession of the purchase-money : the estate and the purchase money are things mutually exclusive. (Vol 28) 1941 P C 114 (118, 119) (P C) ✠(Vol 5) 1918 P C 129 (134) : 45 Ind App 233: 43 Bom 181 (P C).

[4] Where on the passing of ownership no delivery of possession is given to the buyer, and no purchase-money is paid by the buyer to the seller the buyer will be entitled to the rents and profits from the seller from the date of the conveyance, but the seller will not be entitled to a charge for interest on the unpaid purchase-money. (Vol 24) 1937 Sind 198 (201) : 31 Sind L R 150 (D B).

[5] The right of the seller to interest on the purchase-money is not absolute, but will depend upon the equities and circumstances of each case. ('12) 35 Mad 625 (627) (DB) ✠(Vol 20) 1933 Rang 401 (402).

[See however (Vol 20) 1933 Oudh 33 (34, 35) : 8 Luck 185 (D B).]

[6] The seller cannot claim interest if the non-payment of the purchase-money is due to his own default. (Vol 5) 1918 Oudh 398 (402) : 21 Oudh Cas 234 (DB) ✠ (Vol 5) 1918 Mad 716 (717) (D B) ✠ (Vol 17) 1930 Lah 568 (571) : 11 Lah 587 (D B) ✠ (Vol 8) 1921 Mad 498 (503, 504) (D B).

[But see ('93) 1893 Bom P J 349 (D B).]

[7] Where a portion of the consideration money is retained by the purchaser under the express terms of the contract between the parties to be paid to an encumbrancer, the seller will not be entitled to any interest on such money. (Vol 30) 1943 Mad 482 (486, 487): I L R (1943) Mad 885 (DB).

[8] Where before the ownership has passed to the buyer, the seller has delivered the property but the buyer has not paid the purchase-money the seller would be entitled to the rents and profits of the property until the date of conveyance. It has been held that in such cases the seller would be entitled to interest on the purchase-money. (Vol 9) 1922 Bom 186 (187) : 46 Bom 195 (D B) ✠ ('93) 1893 Bom P J 349 (D B) ✠ (Vol 20) 1933 Mad 844 (845, 846).

11. Paragraph 4, clause (b). — [1] The seller's charge under this Act is non-possessory. ('07) 30 Mad 524 (525) (DB) ✠ (Vol 26) 1939 Nag 210 (212) : I L R (1939) Nag 636 ✠ (Vol 7) 1920 Mad 164 (164) : 43 Mad 712 (DB) ✠ (Vol 19) 1932 Bom 247 (248, 252) : 56 Bom 556 (DB) ✠ ('08) 30 All 125 (127) (DB) ✠ (Vol 10) 1923 Pat 205 (206) (DB).

[2] The seller's charge being non-possessory a condition in the decree that the unpaid purchase-money should be paid before possession is delivered to the plaintiff cannot be imposed, though the Court can, in order to avoid multiplicity of suits, incorporate the statutory charge in the decree and order that it should be paid within a particular time. (Vol 7) 1920 Mad 164 (164) : 43 Mad 712 (D B) ✠ (Vol 34) 1947 Mad 92 (94) (D B) ✠ (Vol 31) 1944 Mad 124 (124, 125) ✠ (Vol 19) 1932 Bom 247 (251) : 56 Bom 556 (DB) ✠ (Vol 26) 1939 Nag 210 (212, 213) : I L R (1939) Nag 636 ✠ ('11) 34 Mad 543 (544) (DB) ✠ (Vol 24) 1937 Sind 198 (200) : 31 Sind L R 150 (DB).

[But see ('89) 11 All 244 (252) (D B) ✠ (Vol 32) 1945 All 139 (139, 140) (D B) ✠ (Vol 20) 1933 Rang 401 (402) ✠ (Vol 5) 1918 Low Bur 26 (27) (D B) ✠ (Vol 1) 1914 Cal 239 (241) (D B) ✠ ('04) 27 Mad 28 (30) (D B) ✠ ('90) 4 C P L R 92 (93, 94) ✠ ('78) 2 Bom 547 (549) (D B) ✠ ('10) 6 Nag L R 98 (102) ✠ (Vol 31) 1944 Pesh 9 (10) (D B).]

[3] The charge is not only for the unpaid purchase-money but also for the interest on such amount from the date on which possession has been delivered. ('13) 1913 Pun Re No. 39 ✠ ('90) 13 Mad 158 (165) (DB).

[4] This paragraph, by itself, does not give the seller any right to interest on the purchase-money. Its object is to give the seller a charge on the property for the unpaid purchase-money and of the interest also assuming that interest is payable. ('12) 35 Mad 625 (627) (D B).

[*See also* (Vol 30) 1943 Mad 482 (487) : I L R (1943) Mad 885 (D B).]

[5] The paragraph will not apply unless the ownership of the property has passed to the buyer. (Vol 26) 1939 Rang 46 (47) (D B) ✠ (Vol 12) 1925 Mad 660 (668).

[6] *A* sold certain property to *B* for 935 rupees directing *B* to pay 435 rupees to *C*. *D* pre-empted *B* by depositing 935 rupees into the Court. This was drawn by *B* who did not, however, pay *C*, who therefore recovered it from *A*. *A* thereupon sued *D* to enforce his charge. It was held that *D* got the property only after he had paid the purchase-money and this clause did not apply. (Vol 1) 1914 All 349 (349) (DB).

[7] *A* agreed to purchase property from *B* and, before completion of the purchase, sold the property to *C* and asked *B* to execute the conveyance in favour of *C*. *B* executed the conveyance to *C* who did not, however, pay the purchase-money to *A*. It was held that *A* had no charge on the property in *C*'s hands. (Vol 28) 1941 Mad 128 (129) (D B).

[8] The charge given by this paragraph to the seller is an interest in immovable property. (Vol 21) 1934 Mad 615 (616) (D B).

[9] The charge given by this paragraph is transferable. (Vol 2) 1915 Cal 543 (544) : 42 Cal 849 (D B) ✠ (Vol 18) 1931 Nag 89 (90) : 27 Nag L R 288 ✠ (Vol 21) 1934 Lah 348 (349) (D B) ✠ (Vol 5) 1918 Mad 1045 (1048) : 39 Mad 997 (F B) ✠ (Vol 14) 1927 Nag 332 (333) ✠ (Vol 25) 1938 Mad 457 (458) (D B).

[10] The charge under this paragraph can be attached by a creditor of the seller in execution of a decree against the latter. (Vol 13) 1926 Mad 903 (903) ✠ ('09) 31 All 443 (444) ✠ (Vol 24) 1937 Lah 608 (609) ✠ (Vol 22) 1935 Mad 872 (873) : 59 Mad 1 (D B) ✠ (Vol 28) 1941 Bom 198 (200) : I L R (1941) Bom 290 (D B).

[11] The charge can be enforced against a transferee from the buyer with notice of the non-payment. (Vol 28) 1941 Lah 10 (15) : I L R (1941) Lah 568 (D B) ✠ (Vol 26) 1939 Mad 876 (877) ✠ (Vol 19) 1932 Oudh 88 (90) : 7 Luck 405 (D B).

[12] The charge cannot be enforced against a *bona fide* purchaser without notice. (Vol 9) 1922 Mad 335 (336) (DB).

[13] Where property is sold to several purchasers in several shares, the seller has a lien for the whole of unpaid purchase-money on the whole of the property

Section 55 — Note 11 *(contd.)*

in the hands of the buyers. He is not concerned with the proportion of the purchase-money paid by each of them. (Vol 21) 1934 Lah 348 (349) (D B).

[14] Where the consideration for the sale is a covenant by the buyer such as a promise to allot certain shares of a company in future, there is no purchase-money due, and consequently, no question of any charge for unpaid purchase-money arises. (Vol 26) 1939 Rang 46 (47) (D B). (('04) 31 Cal 57 : 30 Ind App 238 (P C), *Foll*)

[15] The question whether a separate agreement for payment of the purchase-money is to be in addition to or in substitution of any charge, so that the sale can be considered to be one in consideration of a covenant depends upon the intention of the parties, to be gathered from the document itself and the surrounding circumstances. (Vol 5) 1918 Mad 82 (83) (D B) ✠ ('83) 1883 Pun Re No. 66, page 194 (197) (D B).

[16] Where the sale was in consideration of a sum of money which the buyer undertook to pay by instalments it was held that such undertaking was not a "contract to the contrary" within the meaning of this section. ('04) 31 Cal 57 (72) : 30 Ind App 238 (P C).

[17] A mere undertaking by the buyer to discharge the debt due to the creditor of the seller from out of the money in consideration of which the sale is made is not "a contract to the contrary." The charge is, therefore, not excluded by such an undertaking. (Vol 29) 1942 Lah 275 (278) : I L R (1943) Lah 17 (F B) ✠ (Vol 5) 1918 Mad 1045 (1048) : 39 Mad 997 (F B). (Overruling ('10) 33 Mad 446 and ('11) 21 Mad L Jour 359.) ✠ (Vol 8) 1921 All 54 (54) : 43 All 314 (D B) ✠ (Vol 21) 1934 Oudh 240 (242) : 10 Luck 26 (D B) ✠ (Vol 20) 1933 Oudh 33 (34) : 8 Luck 185 (DB) ✠ (Vol 29) 1942 Bom 67 (70) (D B). (Purchase-money does not lose its character by such direction.)

[But see ('13) 11 All L Jour 152 (154) ✠ (Vol 3) 1916 Oudh 143 (144, 145)]

[18] The charge is not excluded merely by the seller accepting a promissory note or other personal undertaking from the buyer or third party. (Vol 30) 1943 Mad 28 (29) : I L R (1943) Mad 405 (D B) ✠ (Vol 32) 1945 Mad 407 (409). (Charge not put an end to by vendor obtaining decree on pro-note and transferring it to some one else.) ✠ (Vol 17) 1930 Lah 568 (570) : 11 Lah 587 (D B) ✠ (Vol 26) 1939 Mad 590 (592) ✠ (Vol 8) 1921 All 74 (75) : 43 All 544 (D B).

[19] The charge is not excluded by a recital that the purchase-money is reserved with the buyer in order that he may execute an hypothecation bond for that amount in favour of seller. ('13) 25 Mad L Jour 245 (247) (D B).

[20] The charge is not excluded by a recital that the consideration money has been received. (Vol 3) 1916 Oudh 143 (145) ✠ ('83) 1883 Pun Re No. 66 p. 194 (197) ✠ (Vol 13) 1926 Oudh 81 (83) : 1 Luck 7 (D B).

[21] It has been held that where the purchaser agreed to pay the purchase-money only after redemption of a mortgage on the property, this was a contract to the contrary and no charge arose. (Vol 29) 1942 Bom 67 (71) (D B).

[22] Where a mortgage is taken by the seller from the buyer for the purchase-money due, and thus a higher security than that afforded by the charge is taken, the inference would be that the charge is excluded or abandoned. (Vol 6) 1919 Nag 109 (111) : 15 Nag L R 109 ✠ (Vol 14) 1927 Mad 219 (221) : 50 Mad 548 (D B).

[23] Where the seller had taken two promissory notes and a mortgage for the purchase-money it was held that the purchase-money was replaced by the notes and the mortgage and there was no question of a charge for outstanding purchase-money. (Vol 21) 1934 Rang 190 (192).

[But see (Vol 17) 1930 Lah 568 (570) : 11 Lah 587 (D B)]

[24] Where a mortgage is executed, but is not registered the charge is not excluded. (Vol 7) 1920 Mad 152 (152) ✠ (Vol 14) 1927 Mad 219 (221) : 50 Mad 548.

[25] Where in pursuance of an undertaking by the buyer to pay the creditor of the seller, the buyer enters into an agreement with the creditor and makes himself liable directly to him for the amount, the seller is freed from the liability to pay the creditor, and there is no longer any purchase-money payable by the buyer to the seller. Consequently, there is no longer any charge for unpaid purchase-money. ('13) 36 Mad 348 (350) (D B) ✠ (Vol 5) 1918 Mad 1045 (1049) : 39 Mad 997 (F B).

[26] The novation between the buyer and the creditor has been held to be a contract to the contrary. (Vol 14) 1927 Mad 219 (221) : 50 Mad 548 (D B).

[27] Where it is agreed between the seller, the buyer and a third party that the buyer should pay the purchase money to the third party, and not to the seller there is no purchase-money and consequently no charge. ('11) 1911 Pun L R No. 20, page 126 (129) (DB).

[28] Where *A*, the father of *B*, a minor, sold property *X* for 2600 rupees out of which a sum of 800 rupees was left with the buyer on condition that he should keep it until *B* attained majority and then pay it over to *B*, it was held that *A* had no charge under this clause for any purchase money. (Vol 26) 1939 Mad 722 (724) (D B).

[29] Where at the time of the sale there is a contract to the contrary excluding a charge, the charge does not arise at all, and there is no question of its revival later on. (Vol 14) 1927 Mad 219 (225) : 50 Mad 548 (D B).

[30] *A* sold property to *B* who did not pay a part of the purchase-money. *C* pre-empted *B* and paid the purchase-money to *A*. Subsequently, the pre-emption was set aside and *A* sued *B* for the unpaid purchase-money. It was held that as soon as *C* paid the purchase-money to *A*, his charge under this clause was extinguished and could not be enforced until *A* refunded to *C* the money received by him from *C*. ('13) 16 Oudh Cas 1 (3).

[31] Where the seller endorsed upon the sale deed a receipt for the full purchase-money and delivered the title deeds to the buyer, and a third person relying upon this endorsement took a transfer of the property by way of mortgage, it was held that the seller was estopped under S. 115 of the Evidence Act from claiming a charge for the unpaid purchase-money against the transferee. ('09) 33 Bom 53 (61) (DB).

12. Paragraph 5, clause (b). — [1] It has been held that in cases covered by the proviso the buyer must pay the amount retained by him to the persons entitled to it forthwith on the date of the sale-deed. (Vol 12) 1925 All 488 (490) ✠ (Vol 23) 1936 All 598 (599) (DB).

[2] It has been held in the following cases that in cases covered by the proviso there is no breach of contract until the payment by the buyer becomes impossible. (Vol 14) 1927 Oudh 455 (456) : 2 Luck 731 (DB).

[3] The buyer is not bound to pay or tender the purchase money unless the seller is ready and willing to perform his part of the bargain by executing the conveyance. (Vol 10) 1923 Sind 50 (52) : 16 Sind L R 278 (DB).

[4] It has been held that the duty of the buyer under this clause is to pay the purchase-money at the time of the registration (Vol 24) 1937 Nag 246 (247) : I L R (1938) Nag 45.

Section 55 — Note 12 *(contd.)*

[5] The buyer cannot break the contract on the ground that the property is subject to incumbrances. (Vol 4) 1917 Low Bur 166 (167) (DB)✠('07-08) 4 Low Bur Rul 86 (87).

[6] The amount retained by the buyer if not paid by the buyer to the incumbrancer must be paid to the seller. (Vol 23) 1936 Mad 526 (530).

[7] If there is any unexpended balance out of the amount retained by the vendee in the hands of the vendee as a result of a statutory reduction of the debt by the scaling down of the debt under some Debt Relief Legislation it must be paid to the seller. (Vol 30) 1943 Mad 482 (486) : I L R (1943) Mad 885 (DB)✠(Vol 29) 1942 Mad 525 (526) (DB).

[8] In the case of a sale subject to incumbrances the amount payable on the incumbrance is really not purchase-money at all and the seller is not concerned as to whether and when the money is paid. (Vol 3) 1916 Oudh 143 (144) ✠ ('83) 10 Cal 92 (95).

[9] In the case of a sale subject to incumbrances there is an implied contract by the buyer to indemnify the seller against any loss caused to the seller by reason of a non payment of the incumbrance. ('12) 16 Cal W N 1040 (1042) (DB) ✠ (Vol 5) 1918 Mad 1135 (1136) (DB) ✠ (Vol 20) 1933 Mad 424 (426) : 56 Mad 724.

[10] Where after the sale the seller remains liable either personally or in respect of his other properties the sale is one free of incumbrances although the parties might have stated it to be one subject to incumbrances. On the other hand, if he is not so liable the sale though stated to be free of incumbrances is really one subject to incumbrances. (Vol 21) 1934 All 406 (418) : 56 All 766 (FB)✠(Vol 22) 1935 Lah 50 (51).

[11] Where the direction in the sale deed to the buyer to pay a third person specifies a time within which the payment is to be made, the payment must be made within that time. Where no time is specified such payment must, under S. 46 of the Contract Act, be made within a reasonable time from the date of the sale deed. (Vol 24) 1937 Lah 608 (609) ✠ (Vol 20) 1933 All 386(388) : 55 All 490 (DB)✠ ('07) 6 Cal L Jour 398 (402)(DB) ✠ (Vol 18) 1931 All 95 (97): 52 All 761(DB).

[But see ('12) 34 All 429 (433) (DB).]

[12] The direction to pay the purchase-money or part of it to a simple money creditor of the seller is ordinarily revocable at any time before payment has actually been made. The seller can also vary the direction and ask the buyer to pay it to himself or to any other person. But in such a case, if the sale is free of encumbrances the vendee will be entitled to retain such amount as may be necessary to pay off the encumbrances. (Vol 29) 1942 Mad 583 (584).

[13] The seller is always entitled to recover personally from the buyer the unpaid purchase money as a debt due. (Vol 29) 1942 Lah 275 (278) : I L R (1943) Lah 17 (FB) ✠ (Vol 18) 1931 All 99 (100, 101) : 52 All 901 (DB) ✠ (Vol 23) 1936 All 870 (872) (DB) ✠ (Vol 6) 1919 Mad 367 (368) (DB).

[14] A transferee from the buyer is not personally liable to the seller for the unpaid purchase-money. (Vol 11) 1924 Mad 358 (359) (DB)✠(Vol 1) 1914 All 131 (134).

[14a] When the vendee happens to be a minor or a ward of Court, he cannot incur a personal liability with respect to the unpaid purchase-money. In such a case the only remedy open to the vendor is to recover the unpaid purchase-money by enforcement of the charge against the property sold. (Vol 32) 1945 All 156 (158) (D B).

[15] Unpaid purchase money left with the vendee is a "debt" due by him to the vendor and can be attached in execution of a decree against the vendor. (Vol 29) 1942 Lah 275 (278, 279) : I L R (1943) Lah 17.

[16] Where the buyer under a contract for sale does not pay the purchase-money at the time of completing the sale, the seller will be entitled to put an end to the contract under S. 39, Contract Act. He may also claim damages under S. 73, Contract Act. (Vol 19) 1932 All 454 (456) (DB).

[17] Where the buyer retains the amount of any incumbrance by virtue of the proviso and does not pay it to the persons entitled thereto within a reasonable time from the date of the sale, the seller would be entitled to sue for damages under S. 73, Contract Act. (Vol 21) (1934) All 617 (617) ✠ (Vol 15) 1928 Oudh 148 (151) (DB) ✠ ('07) 6 Cal L Jour 398 (402) (DB) ✠ (Vol 24) 1937 Nag 246 (247, 248) : I L R (1938) Nag 45.

[18] Where *A* sold to *B* property free of incumbrances and stated that a certain amount was to be retained to pay *C*, a prior incumbrancer, and it was found that it was insufficient to pay *C*, it was held that *B* was not bound to pay the amount either to *A* or to *C*, but may retain it until the property is made free of incumbrance. (Vol 29) 1942 Mad 650 (651) ✠ ('99) 21 All 223 (226, 227) : 26 Ind App 45 (PC)✠ (Vol 27) 1940 Cal 380 (383).

[19] In a claim for purchase-money against the buyer it is not necessary that the seller should show that he had suffered any damage on the ground of any non-payment. (Vol 24) 1937 Lah 608 (609) ✠ (Vol 21) 1934 All 406 (422) : 56 All 766 (FB) ✠ (Vol 23) 1936 All 870 (872) (DB) ✠ ('13) 36 Mad 348 (351) (DB).

[20] In a suit for damages for breach of the obligation to pay the purchase-money the seller is not bound to show that he has actually suffered any damage. (Vol 18) 1931 All 754 (755) : 53 All 946 (DB) ✠ ('10) 34 Mad 479 (481) ✠ ('12) 34 All 429 (433) (DB) ✠ (Vol 17) 1930 Pat 46 (49) : 8 Pat 860.

[But see (Vol 21) 1934 All 406 (422) : 56 All 766 (FB) ✠ ('06) 16 Mad L Jour 20 (22) (DB) ✠ ('04) 14 Mad L Jour 285 (286) (DB) ✠ (Vol 20) 1933 Nag 379 (382) : 29 Nag L R 298 (DB).]

[21] Where the purchase-money is contracted to be paid before the Sub-Registrar, there is a contract to the contrary and the amount need not be paid at the time of the execution of the sale deed. ('08) 8 Ind Cas 804 (804) (DB) (Mad).

[22] *A* agreed to sell to *X* or his nominee certain immovable property. There was no provision that in case nominee was mentioned, *X* should remain liable for the balance of the purchase-money. The conveyance was made to a nominee as buyer who undertook to pay the balance. It was held that the nominee was substituted for *X*, and that the latter was therefore not under a personal liability to pay the purchase-money. (Vol 20) 1933 P C 143 (145) : 60 Ind App 183: 11 Rang 186 (PC).

[23] *A* sold certain property to *B*. A part of the purchase-price was left with *B* for payment to *C*, a simple money creditor of *A*. As part of the same transaction of sale *A* undertook to pay immediately an existing incumbrance on the property. In case of *A*'s failure to do so *B* was to pay it off and recover it from *A*. On *A*'s failure to discharge the mortgage, *B* declined to pay the amount left with him either to *C* or *A*. It was held that as the property was sold free from incumbrances *B* was entitled to retain the amount left with him to pay off the incumbrance and that either the direction to pay to *C* or *A*'s undertaking to discharge the mortgage could not be regarded as contracts to the contrary so as to preclude *B* from retaining amount for the purpose of discharging the mortgage. (Vol 29) 1942 Mad 583 (583, 584).

[24] A tender of purchase-money is sufficient to discharge the obligation under this clause. ('10) 8 Ind Cas 804 (804) (DB) (Mad).

Section 55 *(contd.)*

13. Third party, if can enforce contract between *A* and *B* as to payment of purchase-money.— [1] Where *A* sells property to *B* and *B*, the buyer, retains a portion of the purchase-money for paying third party, *B* does not thereby become personally liable to the third party. (Vol 10) 1923 P C 54 (54) (PC). ((Vol 6) 1919 Pat 583, *Affirmed.*)

[2] Where *A* sells property to *B* and *B* retains a portion of the purchase-money for paying a creditor of *A*, even where *B* expressly undertakes with *A* to pay the creditor of the latter, such creditor cannot enforce the contract. (Vol 29) 1942 Lah 275 (278) : I L R (1943) Lah 17 (FB) ✠ (Vol 21) 1934 All 770 (772) ✠ (Vol 13) 1926 Pat 474 (477): 5 Pat 468 (DB) ✠ (Vol 17) 1930 Mad 382 (389): 53 Mad 270 (FB) ✠ (Vol 21) 1934 Pat 1 (2).

[3] The buyer does not, by reason merely of his contract with the seller to pay the creditor of the latter become a trustee for the creditor. (Vol 29) 1942 Lah 275 (278) : I L R (1943) Lah 17 (FB) ✠ (Vol 3) 1916 All 232 (233) : 38 All 209 (DB) ✠ (Vol 12) 1925 Cal 599 (602): 52 Cal 100 (DB).

[But see (Vol 5) 1918 Cal 941 (942) (DB) ✠ (Vol 14) 1927 Mad 421 (421).]

[4] Where the parties to the contract stand in a fiduciary relation to the stranger such as that of a trustee, a guardian, etc., the stranger may enforce the contract which is for his benefit. (Vol 5) 1918 Cal 941 (942) ✠ (Vol 1) 1914 Cal 129 (131): 41 Cal 137 (DB) ✠ (Vol 19) 1932 Oudh 82 (84) : 7 Luck 292.

[5] Where on the strength of the contract between *A* and *B*, that *B* should pay a third party, *B* enters into direct relationship with the third party and makes himself personally liable to him, the third party can sue *B* on the contract. (Vol 22) 1935 Mad 115 (116) (DB).

14. Paragraph 5, clause (d).— [1] The liability of the buyer under this clause attaches as an incident of the property sold, in the absence of a contract to the contrary, and is complete when the property passes. ('06) 29 Mad 519 (523) (D B).

[2] Where property which was the subject of a yearly tax was sold in the middle of the year, it was held that the buyer was, as against the municipality, liable to pay the whole tax and not merely for instalments accruing due after the date of sale. ('07) 30 Mad 423 (425).

[3] Where the seller is bound to make a payment, and he fails to pay it, and the buyer has to pay it, the buyer can recover the same from the seller under S. 69 of the Contract Act. (Vol 13) 1926 Cal 385 (387) : 52 Cal 914 (D B).

[4] A buyer making a payment which he is himself bound to pay cannot recover it from the seller under S. 69 of the Contract Act. (Vol 3) 1916 Mad 980 (982): 39 Mad 795.

15. Property sold subject to incumbrances — Incumbrances found invalid — Person entitled to benefit.—[1] Where property is sold subject to certain incumbrances and it is afterwards found that they are invalid, the buyer is entitled to the benefit. ('09) 31 All 583 (589) : 36 Ind App 203 (P C).

[2] Immovable property sold subject to mortgage— Mortgage debt scaled down at instance of mortgagor agriculturist, under Madras Agriculturists' Relief Act (1938) — Purchasers although non-agriculturists are entitled to benefit of reduction and are liable to extent of amount scaled down. (Vol 29) 1942 Mad 527 (527) (D B).

[3] The buyer purchasing the property subject to incumbrance is entitled to contest the validity of the incumbrances. ('13) 18 Cal L Jour 354 (357).

[4] *A* sold to *B* property *X* for Rs 3000 out of which Rs. 928-8-0 were to be retained by the buyer to discharge a prior mortgage. That mortgage comprised only property *X* and no other. By reason of the subsequent passing of the U. P. Agriculturists' Relief Act (XXVII of 1934), the amount payable under the mortgage was reduced to Rs. 732-13-0 and the vendee discharged the mortgage by paying only Rs 732-13-0. *A* thereupon sued *B* for the balance of Rs. 195-11-0. It was held that he was entitled to recover. (Vol 27) 1940 All 351 (352) : I L R (1940) All 340 (D B).

[5] Sale free from incumbrance— Sum left in hands of vendee to discharge prior mortgage— Due to passing of Madras Agriculturists' Relief Act, 1938, amount payable to mortgagee reduced— Seller is entitled to recover balance as unpaid purchase-money. (Vol 30) 1943 Mad 482 (487) : I L R (1943) Mad 885 (D B).

16. Paragraph 6, clause (a).— [1] Where under the sale, the buyer is entitled to get possession of the property at once, he will be entitled to damages for the period he is kept out of possession for no fault of his. (Vol 22) 1935 Oudh 142 (142).

17. Paragraph 6, clause (b).— [1] Where under a contract for sale *A*, the seller, puts *B*, the buyer, in possession and receives the purchase-money, and the contract is not completed for no fault of the buyer, it cannot be said that by reason of the fact that *B* was placed in possession, he has accepted delivery within the meaning of this clause, and that he has no charge on the property. (Vol 1) 1914 Low Bur 53 (54) :7 Low Bur Rul 262 ✠ (Vol 3) 1916 Low Bur 38 (39).

[2] Where the contract has been duly completed in the manner prescribed by S. 54, this clause does not apply. (Vol 24) 1937 Bom 142 (143) :I L R (1937) Bom 140✠ (Vol 15) 1928 Bom 328 (332) (D B)✠ ('10) 8 Mad L Tim 464 (464) (D B). (Even if the sale is otherwise invalid.)

[3] Where the contract for sale was not completed and possession was not delivered owing to the fact that the property agreed to be sold became non-existent it was held that the buyer was entitled to claim a refund of the purchase money which had been paid by him, personally from the seller as on a failure of a consideration. (Vol 21) 1934 Cal 148 (149) (D B).

[4] If the buyer pays the purchase money before the time of conveyance charge arises from the moment the purchase-money in whole or in part is paid by the buyer in pursuance of the contract of sale. ('97) 23 Bom 56 (61) (D B) ✠ (Vol 3) 1916 Nag 78 (79, 80) : 13 Nag L R 19 ✠ (Vol 3) 1916 Low Bur 38 (39)

[But see ('10) 8 Mad L Tim 361 (362) (D B) ✠ (Vol 9) 1922 Nag 81 (81, 82).]

[5] It has been held that the charge for the earnest money comes into existence at the time the earnest-money is paid. (Vol 29) 1942 Sind 120 (120) : I L R (1942) Kar 200.

[6] Where at a sale in Government auction, the buyer is to deposit the price within a certain time but the confirmation is to take place only later on, it cannot be said that the auction-purchaser pays the purchase money "in anticipation of delivery", and he is, therefore not entitled to any interest on the purchase-money by reason of the delay in the confirmation of the sale. (Vol 15) 1928 Bom 328 (329) (D B).

[7] A buyer cannot be said to improperly decline to accept the delivery by the fact of his rejecting the contract for a valid reason caused by the seller's default. (Vol 16) 1929 Mad 189 (191) (D B).

[But see (Vol 15) 1928 Bom 328 (332) (D B).]

[8] Seller's title would be doubtful where there is 'reasonable probability of litigation' in respect of the property agreed to be purchased — Fact that after subsequent judicial investigation the seller's title was found.

Section 55—Note 17 *(contd.)*

to be clear will not deprive the buyer of his charge if at the time of the completion of the contract, the seller was not able to give a title free from reasonable doubt. (Vol 30) 1943 Sind 92 (93): I L R (1942) Kar 543 (DB).

[9] Though if the default is that of the buyer he cannot have a charge under this clause; he will, in respect of any purchase-money that had been paid by him, be entitled to a return thereof, which can be enforced independent of any charge. (Vol 14) 1927 Mad 204 (206) ✠ (Vol 29) 1942 Sind 37 (39): I L R (1941) Kar 495 (D B).

[10] Where earnest-money has been paid by the buyer and the contract goes off by his default he will have no charge for it. (Vol 23) 1936 Cal 51 (52): 63 Cal 804. (In the absence of contract to contrary or if inferred from terms of contract)

[11] The buyer's charge under this clause extends not only to the purchase-money but also to the interest on such amount. (Vol 16) 1929 Mad 189 (191) (D B)✠ ('09) 31 All 68 (71): 36 Ind App 44 (P C).

[12] Where in a contract for sale, a certain amount was provided as liquidated damages in the event of default on either side and the seller did not carry out his part of the contract, it was held that the charge which the buyer had under this clause did not extend to the amount of damages awarded. (Vol 16) 1929 Mad 189 (191) (D B).

[13] Where a trustee sells trust property and receives the earnest-money but refuses to complete the sale, the buyer cannot have any charge on the trust property. (Vol 19) 1932 Cal 356 (366): 59 Cal 586 (D B).

[14] Where a guardian of a minor agrees to sell property of the minor for a purpose binding on the minor and receives purchase-money but refuses to complete the contract, it has been held that the buyer has a charge on the minor's property. (Vol 26) 1939 Nag 209 (210).

[15] Earnest money is a guarantee for the performance of a contract. (Vol 17) 1930 Bom 213 (214) (D B) ✠(Vol 23) 1936 Cal 51 (52): 63 Cal 804✠(Vol 13) 1926 Cal 339 (343) (D B)✠(Vol 3) 1916 Nag 104 (111): 12 Nag L R 177 (D B) ✠(Vol 24) 1937 Mad 681 (683) ✠ (Vol 25) 1938 Mad 246 (247).

[16] When the transaction goes forward the earnest money becomes part of the purchase-money. (Vol 17) 1930 Bom 213 (214) (DB)✠('10) 33 Mad 375 (379) (DB).

[17] Earnest money is forfeited if the transaction falls through by reason of the fault or failure on the part of the buyer. (Vol 13) 1926 P C 1 (2) (P C).

[18] The test to see whether an amount paid is earnest-money is to find whether the parties intended that the amount paid was to be treated, not merely a part payment, but as a guarantee for the due performance of the contract. (Vol 7) 1920 Cal 679 (680) (D B).

[19] The principle of forfeiture of the earnest-money will not apply when the buyer does not repudiate the contract. (Vol 6) 1919 Sind 68 (69): 12 Sind L R 144 (D B) ✠ ('10) 33 Mad 375 (385) (D B) ✠ ('11) 15 Cal L Jour 410 (411) (D B).

[20] Where the Court finds that the amount of the deposit is so great in comparison with the amount payable under the contract, that the parties cannot have intended it as a mere guarantee for performance, but rather as a punishment or penalty for non-performance of the contract the Court may refuse to allow the retention of the whole of deposit. But where there is no disproportion and nothing unreasonable in regarding the deposit as a guarantee, then the defaulter will not be allowed to recover back what he has paid on an express stipulation that it shall be forfeited in the event of default. (Vol 24) 1937 Mad 681 (683, 684).

[21] Where the seller, in a suit for specific performance by the buyer, totally denied the contract for sale but specific performance was refused by the Court not on the ground that there was no contract, but on the ground that the buyer failed to pay the purchase-money within the time specified, it was held that the buyer could not be said to have repudiated the contract and that he was entitled to a return of the earnest-money. ('97) 24 Cal 897 (899) (DB).

[22] Where in pursuance of the contract for sale the buyer has paid purchase-money and obtained possession, but the contract falls through for no default of the buyer, the charge which he may have on the property for the purchase-money will not entitle the buyer to retain possession as against the seller. ('10) 8 Mad L Tim 464 (464) (DB). (Charge given by section is no answer to claim for possession by vendor.)

[See however (Vol 31) 1944 Mad 556 (557).(Decree for possession passed in favour of seller on condition of his paying purchase money into Court.)]

[23] The charge can be enforced not only against the seller but against all persons claiming under him irrespective of notice notwithstanding the provisions of S. 100. (Vol 24) 1937 Bom 142 (144): I L R (1937) Bom 140.

[24] The buyer's charge under this section is an interest in immovable property. (Vol 13) 1926 P C 94 (96): 53 Ind App 214 (P C).

[25] A consent decree between the parties making the earnest money payable by instalments and providing that the seller's interest in the property should remain mortgaged and should be liable to be brought to sale in execution for recovering the money is entirely consistent with the charge declared by this section and is in no way a waiver or modification of the charge. (Vol 30) 1943 Sind 236 (236, 237): I L R (1943) Kar 342 (DB).

[26] Where the buyer has paid purchase-money and the contract goes off without any default on his part, he can independently of this clause, sue for the recovery of the purchase-money personally from the seller. (Vol 11) 1924 Mad 903 (903).

18. Omission to make disclosures referred to in paragraph 1, clause (a).— [1] A seller is not bound under para. 1, cl. (a) to make a disclosure of a fact where either he himself has no knowledge of that fact or where the buyer himself could, with ordinary care, have discovered it. In such cases the seller cannot be considered to be guilty of fraud in not disclosing the fact. (Vol 15) 1928 Bom 427 (429, 430): 52 Bom 883 (DB) ✠ (Vol 10) 1923 Cal 641 (643): 50 Cal 615 (DB) ✠ (Vol 12) 1925 Mad 968 (969) ✠ (Vol 2) 1915 Sind 21 (22): 9 Sind L R 97.

19. "In the absence of a contract to the contrary."— [1] In order to exclude the statutory liabilities referred to in this section, the contract must be so clearly inconsistent with them as to lead to the inference that it has been made to qualify the generality of the rule. (Vol 20) 1933 All 203 (205) ✠ (Vol 23) 1936 Cal 12 (14).

[2] The statutory charge under para 4 cl. (b) was held not excluded by any contract, covenant, or agreement with respect to the purchase-money which was not inconsistent with the continuance of the charge. ('03) 31 Cal 57 (72): 30 Ind App 238 (PC).

[3] Where reliance is placed upon an express contract to conclude the operation of the statute, the contract, to be binding, must be expressed in plain and unambiguous terms. ('10) 8 Ind Cas 91 (95) (DB) (Cal) ✠ (Vol 7) 1920 Mad 634 (635) (DB)✠ (Vol 31) 1944 Mad 572 (573).

[1][**56.** If the owner of two or more properties mortgages them to one person and then sells one or more of the properties to another person, the buyer is, in the absence of a contract to the contrary, entitled to have the mortgage-debt satisfied out of the property or properties not sold to him, so far as the same will extend, but not so as to prejudice the rights of the mortgagee or persons claiming under him or of any other person who has for consideration acquired an interest in any of the properties.]

Marshalling by subsequent purchaser.

[1] *Substituted* by the Transfer of Property (Amendment) Act, 1929 (20 [XX] of 1929), S. 18.

SECTION 56—SYNOPSIS.

1. Scope.
2. "Then sells one or more of the properties."
3. "But not so as to prejudice the rights of the mortgagee."
4. Executing Court when can give effect to right of marshalling.

1. Scope.—[1a] Section 56 is intended for the benefit of the buyer and not the real owner. (Vol 34) 1947 Lah 230 (232).

[1] This section is not in force in the Punjab and in the N. W. F. Province, but the principle of the section has been held applicable. (Vol 27) 1940 Lah 291 (292) ✠ (Vol 28) 1941 Pesh 49 (51) (DB).

[2] The right of marshalling is an exception to the rule of contribution enacted in S. 82. (Vol 23) 1936 Mad 106 (111) : 59 Mad 121 (DB) ✠ (Vol 11) 1924 Mad 749 (753) (DB).

[3] Where a single survey number is mortgaged first and later on a portion of it is sold or mortgaged, this does not make the property "two or more properties" at the time of the first mortgage. ('39) 1939 Nag L Jour 235 (236).

[4] Section 56 has been applied to case of a charge. (Vol 24) 1937 Oudh 301 (311) (DB).

[5] The following case holds that though the section is inapplicable in terms to a charge, the principle underlying it can be applied (Vol 31) 1944 Nag 25 (27) : I L R (1944) Nag 230 (D B).

[6] Where the vendee of one of the mortgaged properties undertook as part of the consideration for the sale, to discharge the mortgage to a certain extent and it was further agreed between the vendor and the vendee that the balance of the mortgage amount should be paid by the vendor himself on failure of which he was to be personally liable for the amount, if was held that there was a "contract to the contrary" between the vendor and the vendee. (Vol 13) 1926 All 415 (415, 417, 418) (DB).

[6a] Contract to the contrary need not be express — It may be implied—Undertaking by purchaser of one of several items of mortgaged property to discharge mortgage out of consideration held implied contract to the contrary. (Vol 33) 1946 Mad 59 (60).

[7] If *A* purchases one of the mortgaged properties with an express condition that it is not to be liable for the debt and *B* purchases another of the mortgaged properties with the condition that the entire debt is to be satisfied by *B* out of the consideration in his hands, *A* can claim that the property in the hands of *B* should be sold first.(Vol 16)1929 Pat 664(671) : S Pat 585(DB).

[8] The utility of S. 56 is not impaired by notice. The section can be applied before another person acquires for valuable consideration any interest in the property. (Vol 34) 1947 Lah 230 (232).

2. "Then sells one or more of the properties."—[1] This section does not in terms apply to cases where subsequent to a mortgage of several items one or more of such items is sold in execution of a decree against the mortgagor. (Vol 16) 1929 All 309 (311) : 51 All 606 (DB) ✠ (Vol 17) 1930 All 634 (636) (DB).

[2] Principle of section applies to sale in execution of a decree. (Vol 27) 1940 Lah 291 (292) ✠ (Vol 34) 1947 Lah 230 (232).

[But see (Vol 16) 1929 All 309 (311) : 51 All 606 (DB).]

[3] In the exercise of its discretion under O. 34, R. 4, Civil P. C , the Court can order that the mortgaged properties other than the properties sold in execution may be sold first, for the purpose of adjusting the equities between the parties (Vol 19) 1932 All 85 (87) : 53 All 391 (DB).

[4] It has been held that if the execution purchase was a collusive one or if the purchaser had paid only for the equity of redemption, no equity would arise in his favour and the Court should not make the sale in an order different from that fixed by the mortgagee. (Vol 14) 1927 Cal 522 (526) (DB).

[5] This section or the principle underlying it does not apply to a lessee from the mortgagor. (Vol 13) 1926 Cal 525 (527) (DB).

[6] Where *X* held a mortgage over items *a*, *b* and *c* under one mortgage document, and another mortgage over item *d*, and he sued only on the former one impleading *Y* who was a subsequent purchaser of item *a*, it was held that *Y* was no doubt entitled to claim that *X* should first sell items *b* and *c* by virtue of the doctrine of marshalling laid down in this section, but that he had no right either in equity or in law to claim that *X* should exhaust his remedy against item *d* also, the subject of the second mortgage, before proceeding against item *a*. (Vol 27) 1940 Mad 776 (776) (DB).

3. "But not so as to prejudice the rights of the mortgagee." — [1] Every item of the mortgaged property is a security for the entire mortgage debt and the mortgagee, as such, has a right to realise the whole of the mortgage debt from any item of the mortgaged property. (Vol 26) 1939 All 314 (314) : I L R (1939) All 150 (DB) ✠ (Vol 19) 1932 All 85 (87) : 53 All 391 (DB)✠(Vol 5) 1918 Mad 1030 (1031): 40 Mad 968 (FB).

[2] Where a mortgagee of items *X* *Y* and *Z* release *X* and *Y* from the mortgage and sues to enforce his mortgage against *Z*, a subsequent purchaser of *Z* cannot claim under this section that the mortgagee should satisfy his debt first out of properties *X* and *Y*, inasmuch as such a claim would prejudice the rights of the mortgagee (Vol 25) 1938 Mad 503 (503, 504) ✠(Vol 15) 1928 Mad 500 (501) : 51 Mad 848 (DB) ✠ (Vol 23) 1936 Rang 266 (267) : 14 Rang 198 (DB). (*Reversing* (Vol 22) 1935 Rang 139.) ✠ (Vol 17) 1930 Lah 731 (732) : 11 Lah 694 (DB).

[But see (Vol 28) 1941 Pesh 49 (51) (DB).]

[3] Though a mortgagee has an absolute right to give up any portion of the mortgaged properties and to limit his claim to the other portion, he has no such absolute right, where such other portion consists of several items, to determine in what order such items should be sold for the satisfaction of his debt. (Vol 19) 1932 All 85 (88) : 53 All 391 (DB) ✠ (Vol 14) 1927 Cal 522 (526) (DB).

[4] In each case, it will have to be considered as a matter of fact whether marshalling would cause any substantial prejudice to the prior mortgagee. (Vol 30) 1943 All 156 (158) : ILR (1943) All 444 (DB).

[5] The Court has, at the time of passing the decree under O. 34, R. 4, Civil P. C., a discretion to regulate order of sale so as to adjust the equities between the parties and the right of the mortgagee is only subject

Discharge of Incumbrances on Sale.

57. *(a)* Where immoveable property subject to any incumbrance, whether immediately payable or not, is sold by the Court or in execution of a decree, or out of Court, the Court may, if it thinks fit, on the application of any party to the sale, direct or allow payment into Court, —

Provision by Court for incumbrance and sale freed therefrom.

(1) in case of an annual or monthly sum charged on the property, or of a capital sum charged on a determinable interest in the property—of such amount as, when invested in securities of the [a][Central Government], the Court considers will be sufficient, by means of the interest thereof, to keep down or otherwise provide for that charge, and

(2) in any other case of a capital sum charged on the property—of the amount sufficient to meet the incumbrance and any interest due thereon.

But in either case there shall also be paid into Court such additional amount as the Court considers will be sufficient to meet the contingency of further costs, expenses and interest, and any other contingency, except depreciation of investments, not exceeding one-tenth part of the

Section 56 — Note 3 *(contd.)*

to this discretion of the Court. (Vol 19) 1932 All 85 (88) : 53 All 391 (DB) ✠ (Vol 11) 1924 Pat 459 (464) : 3 Pat 522 (DB) ✠ (Vol 26) 1939 All 314 (315, 316) : I L R (1939) All 150 (DB) ✠ ('08) 31 Mad 419 (423) (FB) ✠ (Vol 11) 1924 Mad 509 (510) (DB) ✠ (Vol 14) 1927 Cal 522 (526) (DB). (Discretion must be exercised on judicial principles.)

[6] Where there is no right of marshalling in any party, the Court may still, for the purpose of adjusting the equities between the parties, regulate the order of sale, though it may be different from that fixed by the mortgagee. (Vol 19) 1932 All 85 (87): 53 All 391 (DB)✠ (Vol 26) 1939 All 314 (316): ILR (1939) All 150 (DB)✠ (Vol 11) 1924 Mad 509 (510) (DB).

[7] In the absence of any equities in favour of any party, the mortgagee is entitled to sell the properties in any order he chooses, and it is not open either to the Court or to the defendants to compel him to proceed against any particular property first. (Vol 19) 1932 All 85 (87): 53 All 391 (DB)✠(Vol 12) 1925 Mad 332 (333) (DB) ✠ (Vol 14) 1927 Cal 522 (526) (DB).

[See however (Vol 12) 1925 Mad 1214 (1214)(DB).]

[8] Mortgagee having purchased himself some of the mortgaged properties after his decree on the mortgage, claimed to execute the decree against the other properties which had been subsequently purchased by third persons. It was held that the purchasers cannot insist that the mortgagee should sell also the property purchased by him, and that any equity which they might have must be worked out only in a separate suit. (Vol 10) 1923 Pat 44 (44) (DB).

4. Executing Court when can give effect to right of marshalling.—[1] Where a question as to the order in which the mortgaged properties should be sold has been raised and determined by the decree, the Court cannot, at the time of the execution, go behind the order so made. (Vol 13) 1926 Mad 1144 (1144) ✠ (Vol 30) 1943 Mad 705 (706) (DB).

[2] Where the decree merely states that the properties mentioned therein should be sold without any determination as to the order in which such properties are to be sold, the executing Court has a discretion to regulate the order of sale of the various items. (Vol 21) 1934 Pat 329 (329) (DB) ✠ (Vol 13) 1926 Mad 1031 (1032) (DB) ✠ (Vol 26) 1939 All 314 (315) : ILR (1939) All 150 (DB).

[See however (Vol 12) 1925 Pat 484 (486) (DB).]

[But see (Vol 3) 1916 Oudh 288 (288) (DB).]

[3] All the properties decreed against must be advertised for sale and when they are actually brought into execution and become subject to sale, it would be then for the Court to decide on just and equitable grounds which property ought to be sold first. (Vol 11) 1924 Pat 802 (802) : 3 Pat 962 (DB).

[4] Even in the absence of any right of marshalling existing in any of the parties, the executing Court can regulate the order of sale for the purpose of adjusting the equities between the parties. (Vol 31) 1944 Nag 25 (27) : I L R (1944) Nag 230 (DB) ✠ ('08) 31 Mad 419 (423) (FB) ✠ (Vol 19) 1932 All 85 (87) : 53 All 391 (DB) ✠ (Vol 18) 1931 All 657 (658, 659) (DB).

[5] Where there are no equities in favour of any party the mortgagee is entitled to choose the order in which the properties decreed against should be sold. (Vol 12) 1925 Pat 484 (487) (DB) ✠ (Vol 11) 1924 Mad 366 (367): 47 Mad 688.

[6] Properties A and B were mortgaged to X and subsequently A was sold to R—X obtained a decree against R and the mortgagor for sale of both A and B—He then applied for execution by sale of both the properties—The Court ordered in the exercise of its discretion that property B should be sold first—X thereupon did not press the petition which was consequently dismissed. Within a week thereof X applied again for execution of his decree but for sale of property A alone. It was held that X could not be allowed to fetter the exercise of the Court's discretion by thus applying for the sale of A alone. ('10) 7 Ind Cas 4 (5) (DB) (Cal).

Section 57 — Note 1

[1] Where the subject-matter of a sale is property subject to incumbrances, this section empowers the Court to provide for the discharge of the encumbrances, and then to declare the property free from such incumbrances. (Vol 3) 1916 Pat 113 (114) : 2 Pat L Jour 118 (DB).

[2] The section has no application where the incumbrance has merged into a decree and a question of the adjustment of the decree out of Court is involved. ('01) 24 Mad 412 (413) (DB). (Overruled on another point in ('05) 28 Mad 473 (FB).)

[3] The principle of this section may be applied to cases arising in the Punjab. ('07) 1907 Pun Re No. 148, p. 687 (691) (DB).

[4] Section 57 may be applicable to maintenance allowance charged on property. (Vol 24) 1937 Nag 36 (36) : I L R (1938) Nag 183.

[5] In a mortgage suit the Court can pass by consent a combination of several decrees in favour of different mortgagees, determining the order in which they are to be paid and incorporating orders which the Courts would be amply justified in making under S. 57. (Vol 18) 1931 Cal 763 (769) : 58 Cal 598 (DB).

original amount to be paid in, unless the Court for special reasons (which it shall record) thinks fit to require a larger additional amount.

(b) Thereupon the Court may, if it thinks fit, and after notice to the incumbrancer, unless the Court, for reasons to be recorded in writing, thinks fit to dispense with such notice, declare the property to be freed from the incumbrance, and make any order for conveyance, or vesting order, proper for giving effect to the sale, and give directions for the retention and investment of the money in Court.

(c) After notice served on the persons interested in or entitled to the money or fund in Court, the Court may direct payment or transfer thereof to the persons entitled to receive or give a discharge for the same, and generally may give directions respecting the application or distribution of the capital or income thereof.

(d) An appeal shall lie from any declaration, order or direction under this section as if the same were a decree.

(e) In this section "Court" means (1) a High Court in the exercise of its ordinary or extraordinary original civil jurisdiction, (2) the Court of a District Judge within the local limits of whose jurisdiction the property or any part thereof is situate, (3) any other Court which the [b][Provincial Government] may, from time to time, by notification in the Official Gazette, declare to be competent to exercise the jurisdiction conferred by this section.

[a] *Substituted* by A. O. for "Government of India". [b] *Substituted* by A. O. for "Local Government".

CHAPTER IV.

OF MORTGAGES OF IMMOVEABLE PROPERTY AND CHARGES.

"Mortgage," "mortgagor," "mortgagee," "mortgage-money" and "mortgage-deed" defined.

58. *(a)* A mortgage is the transfer of an interest in specific immoveable property for the purpose of securing the payment of money advanced or to be advanced by way of loan, an existing or future debt, or the performance of an engagement which may give rise to a pecuniary liability.

The transferor is called a mortgagor, the transferee a mortgagee; the principal money and interest of which payment is secured for the time being are called the mortgage-money, and the instrument (if any) by which the transfer is effected is called a mortgage-deed.

(b) Where, without delivering possession of the mortgaged property, the mortgagor binds himself personally to pay the mortgage money, and agrees, expressly or impliedly that, in the event of his failing to pay according to his contract, the mortgagee shall

Simple mortgage.

SECTION 58 — SYNOPSIS.

1. The Punjab and the North-West Frontier Province.
2. Mortgage is a transfer of an interest in immovable property.
3. Sub-mortgages.
4. Agreement to grant or accept a mortgage.
5. Revival of earlier mortgage.
6. Muhammadan widow's possession in lieu of dower.
7. Specific immovable property.
8. Mortgage and pledge of future property.
9. Mortgage of moveables.
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21. Mortgage by beneficiary under trust.
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23. Mortgage by one person when binding on another.
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28. Mortgage by conditional sale.
29. Distinction between mortgage by conditional sale and a sale with a clause for repurchase.
30. Sale or mortgage — Tests of distinction.
31. Mortgage by conditional sale or other kinds of mortgage.
32. Usufructuary mortgage.
33. Zuripeshgi lease.
34. Kanom.
35. English mortgage.
36. Equitable mortgage.
37. Anomalous mortgages.
38. Simple mortgage usufructuary.
39. Sale in execution of mortgage decrees and money decrees.
40. Construction.

1. The Punjab and the North-West Frontier Province.—[1] In the Punjab and in the North-West Frontier Province, the definitions of the various kinds

have a right to cause the mortgaged property to be sold and the proceeds of sale to be applied, so far as may be necessary, in payment of the mortgage money, the transaction is called a simple mortgage and the mortgagee a simple mortgagee.

Mortgage by conditional sale.

(c) Where the mortgagor ostensibly sells the mortgaged property —

on condition that on default of payment of the mortgage-money on a certain date the sale shall become absolute, or

on condition that on such payment being made the sale shall become void, or

on condition that on such payment being made the buyer shall transfer the property to the seller,

the transaction is called a mortgage by conditional sale and the mortgagee a mortgagee by conditional sale :

[a][Provided that no such transaction shall be deemed to be a mortgage, unless the condition is embodied in the document which effects or purports to effect the sale] ;

[a] *Inserted* by the Transfer of Property (Amendment) Act, 1929 (20 [XX] of 1929), S. 19.

Usufructuary mortgage.

(d) Where the mortgagor delivers possession [a][or expressly or by implication binds himself to deliver possession] of the mortgaged property to the mortgagee, and authorizes him to retain such possession until payment of the mortgage money, and to receive the rents and profits accruing from the property [b][or any part of such rents and profits and to appropriate the same] in lieu of interest, or in payment of the mortgage-money, or partly in lieu of interest [c][or] partly in payment of the mortgage-money, the transaction is called an usufructuary mortgage and the mortgagee an usufructuary mortgagee

[a] *Inserted* by the Transfer of Property (Amendment) Act, 1929 (20 [XX] of 1929), S. 19. [b] *Substituted ibid.*, for "and to appropriate them". [c] *Substituted ibid.*, for "and".

Section 58—Note 1 *(contd.)*

of mortgages given in this Act, which does not apply in those provinces, have always been accepted as correctly describing their essential ingredients and incidents. (Vol 27) 1940 Lah 401 (403) : I L R (1941) Lah 71 (FB)✠(Vol 19) 1932 Lah 465 (466): 13 Lah 660 (FB)✠ (Vol 23) 1936 Pesh 43 (45) (D B)

[2] Where by S. 16 of the Punjab Alienation of Land Act, 1900, the mortgaged property could not be brought to sale by the Civil Court, the definition under cl. (b) of the present section was not applied to a simple mortgage so as to give the mortgagee a right of sale through Court. (Vol 28) 1941 Lah 274 (276) (DB).

2. Mortgage is a transfer of an interest in immovable property. — [1] A mortgage-debt is not an actionable claim. It is the transfer of an interest in immovable property. ('12) 34 All 273 (276) (D B)✠(Vol 18) 1931 Cal 223 (227) : 58 Cal 136 (DB)✠('01) 29 Cal 1 (6) (FB).

[2] The interest referred to in this section has reference to interest less than ownership which continues with the mortgagor. The interests transferred in the several classes of mortgages are, however, not identical. (Vol 23) 1936 Rang 290 (291): 14 Rang 292 (DB)

[3] A mortgage being the transfer of an interest in immovable property is distinguishable from a charge, which is a security of property without any transfer of any interest therein (Vol 30) 1943 Pesh 24 (26) (DB)✠ (Vol 23) 1936 Nag 125 (127) I L R (1936) Nag 22 (DB) ✠(Vol 16) 1929 All 281 (285) : 51 All 312 (D B)✠ (Vol 23) 1936 Oudh 196 (200) (DB) ✠ (Vol 22) 1935 All 150 (151)✠(Vol 28) 1941 Lah 274 (275) (D B)✠(Vol 9) 1922 Pat 529 (532) : 1 Pat 387 (D B)✠(Vol 28) 1941 Cal 436 (440 441).

[See however (Vol 28) 1941 All 345 (349, 351) : I L R (1941) All 691 (F B)✠(Vol 1) 1914 Nag 32 (34): 10 Nag L R 81.]

[4] Though there is no transfer of an interest in the case of a charge the right is more than a personal obligation being a right to payment out of a particular fund or property. (Vol 8) 1921 Mad 514 (515) (D B) ✠ (Vol 13) 1926 Mad 903 (904) ✠ (Vol 23) 1936 Lah 482 (484) (D B).

[5] A document which gives immovable property as security for the satisfaction of a debt, or for payment in future of a sum, without transferring any interest therein, merely constitutes a charge on the property and is not a mortgage (Vol 19) 1932 Lah 465 (466): 13 Lah 660 (F B)✠(Vol 8) 1921 Mad 514 (515) (DB) ✠ (Vol 1) 1914 All 187 (188) : 36 All 201 (DB).

[6] *A* usufructuarily mortgaging land to *B*— Subsequently *A* taking further advance from *B* on security of land already mortgaged on same conditions as original mortgage — Transaction held to be charge and not fresh mortgage. (Vol 30) 1943 Pesh 24 (26) (DB)✠(Vol 19) 1932 Lah 465 (466) : 13 Lah 660 (F B).

[7] If the new transaction purports to cancel the earlier one, or contains conditions substantially different from those contained in the original mortgage or an additional area of land is included in this security, the transaction may amount to a fresh mortgage as evidencing an intention to transfer an interest in property and not merely to create a security. (Vol 30) 1943 Pesh 24 (27) (D B)✠(Vol 19) 1932 Lah 465 (467) : 13 Lah 660 (FB).

[8] A charge is not, like a mortgage, subject to redemption or foreclosure. (Vol 20) 1933 All 934 (938) (D B).

[9] A mere undertaking by the borrower of money that he will not alienate his property until the loan is paid does not transfer any interest in the property to the creditor and a document merely containing such an undertaking is, therefore not a mortgage. (Vol 4) 1917 All 4 (5, 6): 39 All 244 (FB) ✠ (Vol 24) 1937 Lah 35 (37) : 17 Lah 659 (DB).

[10] Where a covenant not to alienate is associated with words expressly making property, a security for the debt, there may be a transfer of an interest constituting a mortgage. (Vol 3) 1916 Pat 11 (13) : 1 Pat L Jour 563 (D B).

[11] Whether there is a transfer of an interest depends upon the intention of the parties gathered from the document as a whole. ('90) 13 All 28 (37) (D B) ✠ ('06) 29 Mad 531 (533) (D B).

[12] It is not necessary that there should be a formal transfer of interest in so many words. ('11) 21 Mad

(e) Where the mortgagor binds himself to re pay the mortgage-money on a certain date, and transfers the mortgaged property absolutely to the mortgagee, but subject to a proviso that he will re-transfer it to the mortgagor upon payment of the mortgage-money as agreed, the transaction is called an English mortgage.

English mortgage.

[a][*(f)* Where a person in any of the following towns, namely, the towns of Calcutta, Madras, [b][and Bombay] [c][ ] and in any other [d]town which the [e][Provincial Government concerned] may, by notification in the [f][Official Gazette], specify in this behalf, delivers to a creditor or his agent documents of title to immoveable property, with intent to create a security thereon, the transaction is called a mortgage by deposit of title-deeds.]

Mortgage by deposit of title-deeds.

[a] *Inserted* by the Transfer of Property (Amendment) Act, 1929 (20 [XX] of 1929), S. 19. [b] *Substituted* for 'Bombay and Karachi' by the Indian Independence (Adaptation of Central Acts and Ordinances) Order, 1948, [22-3-1948.] [c] The words "Rangoon, Moulmein, Bassein and Akyab" were *repealed* by A. O. [d] For notifications relating to the towns of — Bandra, Kurla and Ghatkopar-Kirol, *see* Gazette of India, 1924, Pt I, p. 1064; Chittagong, *see* Gazette of India, 1929, Pt. I, p. 1280; Dacca, Narayanganj, Cawnpore, Allahabad and Lucknow, *see* Gazette of India, 1933, Pt 1, p. 158; Coimbatore, Madura, Cocanada and Ernakulam, Cochin, *see* Gazette of India, 1935, Pt. I, p. 326. [e] *Substituted* by A. O. for "Governor General in Council". [f] *Substituted* by A. O. for "Gazette of India".

[a][*(g)* A mortgage which is not a simple mortgage, a mortgage by conditional sale, an usufructuary mortgage, an English mortgage or a mortgage by deposit of title-deeds within the meaning of this section is called an anomalous mortgage.]

Anomalous mortgage.

[a] *Inserted* by the Transfer of Property (Amendment) Act, 1929 (20 [XX] of 1929), S. 19.

Section 58 — Note 2 *(contd.)*

L Jour 562 (569) (DB)✠(Vol 5) 1918 Mad 558 (560) (DB).

[13] Where a bond provided for re-payment of a debt and stated "as collateral security I mortgage 23 bighas" etc., but there was no express transfer of any interest, it was held that it was a mortgage. ('05) 9 Cal W N 1001 (1002) (DB).

[14] Where the true nature of the contract between the parties is one of a charge, the erroneous belief of the parties that they had created a simple mortgage would not affect such true nature of the document. (Vol 14) 1927 Sind 66 (75) ✠ (Vol 1) 1914 Nag 32 (36) : 10 Nag L R 81.

[15] The word "taran" is ordinarily understood to signify a charge rather than a mortgage. (Vol 20) 1933 Bom 298 (300) (DB).

[16] Where *A* and *D* executed a mortgage to *X* and subsequently *A* borrowed a further sum of money from *X* and executed a further deed stating that until the latter sum was paid he was not entitled to redeem the earlier mortgage, it was held that the deed was a mortgage. (Vol 9) 1922 All 174 (177, 178) : 44 All 37 (FB)✠ (Vol 17) 1930 P C 176 (177) : 5 Luck 365: 57 Ind App 173 (PC).

[17] *A* executed a mortgage in favour of *B*, *C* and *D*. On a partition between *B*, *C* and *D* the mortgage fell to the share of *D*. *A* subsequently executed an instrument in favour of *D* recognizing *D* as the sole mortgagee, raising the rate of interest and stipulating for an extension of the period of redemption. It was held that this was not a fresh mortgage but merely an agreement. (Vol 12) 1925 All 501 (502) : 47 All 310 (FB).

[18] Where by a compromise between the mortgagor and the mortgagee, the mortgagee released certain items from the mortgage, it was held that this did not effect any fresh transfer of interest to the mortgagee in respect of the non-released-portions and was therefore not a mortgage. (Vol 5) 1918 Mad 1204 (1206, 1209).

[19] Executant of bond admitting receipt of certain amount from obligees and agreeing to pay interest regularly — Stipulation that in default of payment of interest obligees would be put into possession of certain property referred to as mortgaged property — Obligees to enjoy usufruct and appropriate profits to interest — *Held* that there was transfer of interest in property contingent upon default being made in payment of interest and bond was mortgage from date of its execution. (Vol 30) 1943 All 337 (339) : I L R (1943) All 802 (FB). (It was contended that the bond was a simple money bond at its inception, but was liable to be converted into a usufructuary mortgage on default in payment of interest.).

[20] Debentures issued by a company are not mortgages, though they bind the estate of the company. (Vol 26) 1939 Mad 202 (203) : I L R (1939) Mad 199 (DB). (*Quære.*)

[21] Where a person states in the document that he had "mortgaged" the property, it will be assumed that he intended to transfer an interest in the property. (Vol 28) 1941 Lah 274 (275) (DB).

[22] Where in a mortgage there is covenant to pay and a charge on property, it implies that the property may be sold for the debt and the mortgage is a simple mortgage (Vol 28) 1941 Lah 274 (275) (DB).

[23] A mortgage being a transfer of an interest in immovable property such interest is capable of transfer by way of assignment, mortgage, etc., and is heritable. (Vol 3) 1916 Upp Bur 5 (6) : 2 Upp Bur Rul 89 ✠ ('13) 18 Ind Cas 455 (457) (DB) (Cal).

[24] From the time of lending his money, the mortgagee, whether he be in or out of possession acquires the right to have the mortgaged property secured from deterioration in the hands of the mortgagor or of any other person to whose rights those of the mortgagee are superior. ('05) 28 Mad 208 (209) (DB).

3. Sub-mortgages. — [1] A mortgage by the mortgagee of his right is called a sub-mortgage. (Vol 3) 1916 Upp Bur 5 (6) : 2 Upp Bur Rul 89.

[2] All the provisions of law applicable to mortgages will apply to sub-mortgages also, such as attestation, registration etc. (Vol 22) 1935 Rang 483 (483)

[3] A mortgagee can effect an equitable sub-mortgage of his right by deposit of the mortgage deed. (Vol 23) 1936 Rang 366 (366).

[4] Where the original mortgage is itself one by deposit of title deeds the mortgagee can create a sub-mortgage by a second deposit of such title deeds. (Vol 25) 1938 Mad 865 (874) (DB) ✠ (Vol 22) 1935 Rang 483 (483) ✠ (Vol 24) 1937 Rang 69 (69, 70) : 14 Rang 522 (DB).

Section 58 — Note 3 *(contd.)*

[5] A sub-mortgagee is entitled to be paid the amount due to him under his sub-mortgage in priority to the claim of a subsequent assignee of the mortgage rights. (Vol 30) 1943 Mad 100 (103) : I L R (1943) Mad 195 (DB).

[6] The sub-mortgagee without privity of the mortgagor only takes subject to the state of account between the mortgagor and the mortgagee at the date of the sub-mortgage. (Vol 26) 1939 All 719 (720) : I L R (1939) All 943 (DB) ✠ (Vol 15) 1928 Mad 382 (383) (DB) ✠ (Vol 6) 1919 Mad 1082 (1082) (DB) ✠ (Vol 15) 1928 Nag 223 (224, 225) (DB).

[7] Payments of interest and payments on account of capital made by the mortgagor to the mortgagee after, but without knowledge of, the transfer must in the absence of collusion be allowed to the mortgagor as against the sub-mortgagee. (Vol 15) 1928 Rang 30 (31) : 5 Rang 749 ✠ (1900) 1900 Pun Re No. 31, page 102 (107) (FB).

[8] A sub-mortgage is extinguished by the payment of the mortgaged-debt by the mortgagor if he has no notice or knowledge of the sub-mortgage, and acts in good faith. ('05) 29 Bom 199 (202) (DB) ✠ ('95) 1895 Pun Re No. 12, page 46 (48) (DB) ✠ (1900) 1900 Pun Re No. 31, page 102 (111) (FB) ✠ (Vol 11) 1924 Oudh 209 (216) (DB) ✠ ('13) 18 Ind Cas 389 (390) (Oudh) ✠ (Vol 25) 1938 Pesh 73 (76) (DB) ✠ (Vol 19) 1932 Mad 115 (116, 117) : 55 Mad 320 (DB) ✠ (Vol 8) 1921 Mad 374 (376) (DB)

[9] If the original mortgagor has notice of the sub-mortgage he cannot make any payment to the mortgagee so as to bind the sub mortgagee. (1900) 1900 Pun Re No. 31, page 102 (111) (FB) ✠ ('09) 12 Oudh Cas 260 (267) (DB) ✠ ('13) 18 Ind Cas 389 (390) (Oudh).

[10] Original mortgagor having notice of a sub-mortgage cannot dispossess the sub-mortgagee (where the mortgage is with possession) without redeeming him. ('08) 18 Mad L Jour 462 (463) (DB) ✠ (Vol 12) 1925 Rang 140 (142) : 2 Rang 561 (DB).

[11] Where the sub mortgagee brings the mortgagee's interest to sale and purchases it himself he cannot resist a suit by the mortgagor for redemption of the original mortgage. ('10) 7 Mad L Tim 191 (192) (DB).

[12] The position of a mortgagee in relation to the sub-mortgagee is closely analogous to that of a surety. (Vol 5) 1918 Lah 310 (312) : 1918 Pun Re No. 3 (DB) ✠ ('13) 18 Ind Cas 389 (390) (Oudh) ✠ (Vol 27) 1940 Pesh 25 (26).

[13] A mortgagee cannot by taking a fresh mortgage in discharge of his earlier mortgage, prejudice the rights of his sub mortgagee to proceed to bring the mortgagee's rights under the earlier mortgage to sale. (Vol 6) 1919 Mad 1082 (1083) (D B) ✠ ('08) 18 Mad L Jour 462 (463) (DB).

[14] In a suit by the mortgagor for redemption against the mortgagee and his sub-mortgagee, the proper form of the decree is that upon the amount due to the mortgagee being paid into Court, the mortgagee and the sub-morigagee should re convey the estate to the mortgagor; the mortgagor is not bound to wait until the accounts between the mortgagee and the sub-mortgagee are settled. (Vol 14) 1927 Mad 703 (704) ✠ ('06) 28 All 638 (641) (DB).

[15] In a suit by the mortgagor for redemption against the mortgagee and his sub-mortgagee, the judgment should direct an account of what is due to the original mortgagee and then of what is due to the sub-mortgagee and upon payment to the latter of the sum due to him not exceeding the sum due to the original mortgagee and upon payment of the residue, if any of what is due to the original mortgagee, both shall re-convey the property to the mortgagor. ('91) 15 Bom 691 (693) (DB).

[16] Where pending a suit for redemption against the mortgagee and the sub-mortgagee the mortgagee dies and his representatives are not brought on record, the suit abates as the mortgagor has no cause of action against the sub-mortgagee. ('96) 20 Bom 549 (552) (DB).

4. Agreement to grant or accept a mortgage. — [1] An agreement to give a mortgage merely creates a right in the promisee to get a regular deed of mortgage and does not of itself create any mortgage or charge upon the immovable property dealt with by the agreement. (Vol 17) 1930 P C 76 (78) (PC) ✠ (Vol 25) 1938 Mad 889 (892) : I L R (1939) Mad 7 (FB).

[2] An agreement to mortgage for a sum of money to be advanced cannot be specifically enforced though a suit for damages for breach of such a contract will lie. (Vol 25) 1938 Bom 357 (358) (DB) ✠ (Vol 12) 1925 Rang 291 (293) : 4 Rang 1 (FB) ✠ (Vol 23) 1936 Lah 727 (729) : 17 Lah 270 (DB) ✠ (Vol 22) 1935 Mad 1045 (1045) ✠ ('05) 8 Oudh Cas 5 (9) ✠ ('08) 11 Oudh Cas 217 (218).

[3] A mortgage holds good to the extent of the amount paid. Where any part of the amount agreed to be advanced remains unpaid, a suit will not lie for recovering such part. (Vol 29) 1942 Lah 234 (236): I L R (1943) Lah 746 (DB).

[4] Where money has actually been advanced and subsequently the borrower agrees to mortgage property to secure such advance, such an agreement can be specifically enforced (Vol 15) 1928 P C 80 (82) : 55 Ind App 107 : 7 Pat 305 (PC).

[5] The principle that an agreement to lend a sum of money is not specifically enforceable, has no application where money has been left with the mortgagee to pay off the mortgagor's creditor and on the failure of the mortgagee to do so the mortgagor sues to recover the money (Vol 20) 1933 Lah 1 (2, 3).

[6] Where the mortgagor allows the loan to remain with the mortgagee on the understanding that it is to be taken by him from time to time, a suit for its recovery is not one to enforce a contract of loan but merely one for recovery of a deposit. (Vol 3) 1916 Oudh 184 (185).

[7] Property mortgaged usufructuarily — Possession not given, property being seized by Collector under decree against mortgagor — Mortgagee held entitled to damages for non-delivery of possession. ('90) 17 Cal 432 (436) (PC).

[8] If the agreement is merely to execute a mortgage as and when called upon to do so, the fact that a subsequent mortgage is called for and executed will not make the debt and the mortgage part of the same transaction but the debt will constitute an "antecedent debt" within the meaning of the Hindu law. (Vol 25) 1938 Mad 889 (892) : I L R (1939) Mad 7 (FB).

5. Revival of earlier mortgage. — [1] Where a new security is accepted in lieu of an old one but the former is found to be invalid, the mortgagee can fall back upon the earlier one. (Vol 14) 1927 Nag 83 (84).

[2] Mortgagee accepting new security for old one from reversioners — Later mortgage found not binding on reversioners in suit on that mortgage — Reversioners held could not claim that invalid mortgage operated as release of old mortgage. (Vol 3) 1916 P C 68 (70) : 39 All 178 : 44 Ind App 60 (P C) ✠ (Vol 25) 1938 All 418 (423) : I L R (1938) All 714 (FB).

6. Muhammadan widow's possession in lieu of dower.—[1] A Muhammadan widow retaining possession of her husband's property in lieu of dower is not a mortgagee of the property. ('01) 23 All 432 (433) (DB) ✠ ('02) 25 Mad 658 (659).

[See however ('07) 9 Bom L R 188 (197, 198).]

Section 58 — Note 6 *(contd.)*

[2] In the case of a Muhammadan widow in possession in lieu of dower, neither the possession of the property nor the right to retain that possession when acquired is conferred upon the widow by the agreement or by the bounty of her deceased husband. The possession of the property being once peaceably and lawfully acquired, the right of the widow to retain it till her dower debt is paid is conferred upon her by the Muhammadan law. (Vol 12) 1925 P C 63 (65) : 52 Ind App 145 : 47 All 250 (PC)✠(Vol 31) 1944 Pat 163 (169) (DB).

[3] A Muhammadan widow's right to retain possession in lieu of dower is not transferable. (Vol 31) 1944 Pat 163 (169, 171) (DB).

7. **Specific immovable property.** — [1] For the creation of a valid mortgage the property mortgaged must be specific. ('10) 12 Cal L Jour 137 (138) (DB) ✠ (Vol 5) 1918 Cal 557 (566) (DB). (General description not sufficient.)

[2] If the hypotheca is sufficiently precise to enable the property to be determined even after a lapse of time, it is "specific" property. (Vol 1) 1914 Mad 306 (307) (DB)✠(Vol 6) 1919 Mad 718 (726) (DB).

[3] Where the mortgagor purported to give in the earlier part of the deed the properties described in the schedule to the document and later on added "all other mouzas, mahals etc., comprised in the sanad," it was held that the properties comprised in the sanad were also mortgaged, though not referred to in the schedule. ('98) 26 Cal 395 (398) (PC).

[4] Where the instrument purported to pledge certain specified properties as well as certain properties not specified but mentioned in general as "I have pledged to you the properties in villages *A, B, C*, etc.," it was held that the mortgage attached only to the specified properties. (Vol 18) 1931 Cal 732 (733) (SB).

[5] The following are illustrations of cases of specific description of property:

(a) 'Our rights and property in taluk R.' ('86) 8 All 486 (489) (DB).

(b) "Our zamindari property." ('90) 12 All 175 (179) (DB).

(c) "The entire zamindari of village *P* with hills, jungles as well as our entire right and income and kattubadis on enfranchished inams." ('02) 25 Mad 42 (50) (DB).

(d) "My jiroyati and inam lands which I own at the village of my residence." (Vol 1) 1914 Mad 306 (307) (DB).

[6] A mortgage of the equity of redemption is a mortgage of specific immovable property. ('95) 22 Cal 33 (41) (DB).

[7] A right to specific performance of an agreement to sell is not an interest in immovable property and cannot be the subject of a mortgage. (Vol 4) 1917 Mad 358 (362) (DB).

[8] Profits that would accrue from immovable property in the future do not constitute an interest in immovable property and cannot be mortgaged. (Vol 26) 1939 Lah 15 (16) (DB).

8. **Mortgage and pledge of future property.**— [1] A mortgage of property that may come into existence in the future operates merely as an agreement to mortgage such property when it comes into existence. ('86) 13 Cal 262 (264) (DB).

[2] Even in an hypothecation of moveable property the property must be existing. ('96) 23 Cal 592 (601).

9. **Mortgage of moveables.** — [1] The section does not apply to a mortgage of moveable property. ('11) 7 Nag L R 72 (75)✠(Vol 28) 1941 Mad 805 (805).

[2] A mortgage of moveable property is valid and a decree can be passed in enforcement of the mortgage. (Vol 27) 1940 Mad 929 (930, 931) : I L R (1941) Mad 144 (DB)✠(Vol 19) 1932 Cal 524 (526) : 59 Cal 667 (DB) ✠ (Vol 11) 1924 Cal 990 (991) ✠ ('05) 7 Bom L R 138 (139).

[3] Mortgage of moveable property — Mortgagee is entitled to sell property in execution. (Vol 20) 1933 Mad 241 (242) : 56 Mad 560 ✠ ('02) 4 Bom L R 577 (581) (DB)✠(Vol 26) 1939 Lah 398 (403) (DB).

[4] Delivery of possession is not necessary for a mortgage of moveable property. ('03) 6 Oudh Cas 230 (231)✠(Vol 19) 1932 Cal 524 (526) : 59 Cal 667 (D B) ✠ (Vol 11) 1924 Cal 990 (991)✠(Vol 26) 1939 Lah 398 (403) (DB) ✠ ('06) 8 Bom L R 344 (345) (DB) ✠ (Vol 3) 1916 Bom 77 (80).

[5] The mortgagee's right is only to enforce the mortgage by suing for sale of moveable property or by the appointment of a receiver to secure possession of it. (Vol 27) 1940 Mad 929 (930, 931) : I L R (1941) Mad 144 (DB).

[6] Mortgage of moveable property — Possession delivered to mortgagee — Mortgagor after proper notice failing to repay — Mortgagee can sell property without intervention of Court. (Vol 19) 1932 Bom 613 (614).

[7] A mortgagee of moveables without possession is liable to be defeated by the mortgagor selling the property to a *bona fide* transferee without notice. (Vol 26) 1939 Lah 15 (16) (DB)✠(Vol 15) 1928 Rang 28 (28, 29): 5 Rang 633 (DB)✠(Vol 10) 1923 Rang 60 (61) ✠ ('11) 7 Nag L R 72 (79) ✠(Vol 27) 1940 Mad 929 (932) : I L R (1941) Mad 144 (DB)✠ (Vol 6) 1919 Mad 779 (779) : 42 Mad 59 (DB).

[8] Mortgage of produce of land —Land subsequently leased — Standing crop on land claimed by mortgagee before its removal— Mortgagee's title must prevail over lessee with notice of mortgage. (Vol 27) 1940 Mad 929 (931) : I L R (1941) Mad 144 (DB).

[9] Mortgage of moveable property is to be distinguished from pledge — In former case ownership of goods passes — In latter case pledgee gets possession but no right to goods beyond what is necessary to secure debts. (Vol 30) 1943 Mad 73 (74) (DB).

[10] While there can be a hypothecation of moveables without delivery of possession, there can be no pledge of moveable property without an actual delivery of the moveables. ('94) 21 Cal 241 (244) (SB) ✠ ('35) 62 Cal 1046 (1051)✠(Vol 26) 1939 Lah 15 (16) (DB).

[11] A subsequent pledge without notice of the prior hypothecation will have priority over a previous hypothecation. ('35) 62 Cal 1046 (1051) ✠(Vol 19) 1932 Cal 524 (530, 531) : 59 Cal 667 (DB) ✠ ('89) 2 C P L R 108 (109).

[12] The remedy of foreclosure extends to mortgage of chattels. (Vol 2) 1915 Cal 161 (168) : 42 Cal 455 (DB).

[13] A pledgee's remedy is only a sale of the property. He cannot obtain a foreclosure. (Vol 2) 1915 Cal 161 (168) : 42 Cal 455 (DB).

[14] No particular formality is necessary to create a mortgage of moveable property (Vol 3) 1916 Bom 77 (80).

10. **"For the purpose of securing the payment of money."**— [1] A transfer of an interest in immovable property must, in order to constitute a mortgage be for the purpose of securing the payment of money advanced by way of a loan or a debt or the performance of an engagement giving rise to a pecuniary liability. (Vol 10) 1923 All 586 (587) : 45 All 581 (DB).

[2] The test for seeing whether a transaction is a mortgage or not is to see whether the property comprised in it is made security for a loan or a debt or the performance of an engagement. ('02) 26 Bom 252 (256) (FB)✠('13) 24 Mad L Jour 479 (481) (DB)✠(Vol 2) 1915 Mad 382 (383) (DB)✠('13) 20 Ind Cas 544 (545) (Oudh).

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[3] If it appears from the deed that it was the intention of the parties to create a security on the land, it is sufficient to create a mortgage. ('70) 13 Suth W R 82 (85) (FB).

[4] *A* purporting to mortgage to *B* property with possession for 14 years — After expiration of term *A* to come into possession of property without settlement of accounts—*B* to return property without *A*'s paying mortgage-money — Transaction held was not mortgage, there being no security for payment of any money or performance of any engagement. ('03) 25 All 115 (119): 30 Ind App 54 (PC).

[5] Perpetual lease by *A* in *B*'s favour for certain advance, not as security for repayment but as acquittance —Agreement to re-transfer property on payment of money—Transaction held was not mortgage. ('84) 10 Cal 30 (35) : 10 Ind App 129 (PC).

[6] A deed gave the creditor the right to take possession of the property described in it for the purpose of receiving from the profits thereof, the amount of the debt with interest, if the debt was not paid off within the period fixed. It was held that there was a transfer of an interest for the purpose of securing the payment of money. ('89) 13 Bom 90 (93) (FB).

[7] Executant of bond covenanting to pay interest regularly on sum but in default of payment of interest obligee to take possession of certain specified property— Bond held was mortgage intention being that property should be security for debt. (Vol 30) 1943 All 337 (339): I L R (1943) All 802 (FB).

[8] Deed in the form of a (Mustaki) lease mortgage —Transferor letting transferee in possession for 7 years — Property to be taken back after 7 years as redeemed and mortgage debt to be treated as paid up — No payment on account of principal or interest to be made by transferor at any time — Deed held lease and not a mortgage. (Vol 30) 1943 Pesh 15 (17) (DB).

[9] Where a part of the consideration for a mortgage was the payment by the mortgagee of Rs. 2400 to a decree-holder of the mortgagor and the mortgagee paid only Rs. 1950 in full satisfaction of the decree, held that the mortgage was for securing the payment of money advanced and the mortgagee could not be said to have advanced the full amount of Rs. 2400. (Vol 34) 1947 Mad 197 (199) (DB).

11. "Existing or future debt."—[1] A deposit of title deeds as security for money due on a general balance of account that may be struck in the future is a mortgage. ('80) 2 Mad 239 (257) : 7 Ind App 83 (PC).

[2] A mortgage may be executed to secure a future debt. ('12) 15 Cal L Jour 61 (65) (DB).

[3] A security bond given to an officer of the Court to secure an amount that may be decreed or ordered by the Court, is a mortgage to secure a future debt. ('99) 26 Cal 246 (249) (DB) ✠ ('05) 32 Cal 494 (496) (DB) ✠ (Vol 2) 1915 Cal 533 (533, 534) (DB).

[4] The hypothecation of property for the purpose of securing a future liability to pay the mortgage-money in case the mortgagee should be deprived of the mortgaged property is a mortgage to secure a contingent liability. (Vol 12) 1925 Pat 288 (290) (DB).

[5] A mortgage may be made not only to secure a present advance but also a future advance contemplated by the parties up to a particular limit. ('89) 11 All 136 (143) : 16 Ind App 12 (PC).

12. "Or the performance of an engagement." — [1] The word "engagement" means a contract and the phrase "which may give rise to a pecuniary liability" includes cases where the breach of the engagement will give rise to a right to claim damages. ('02) 25 Mad 50 (54) (DB).

[2] *X* executing rent deed to *Y* respecting latter's property— By same deed *X* hypothecating his property for payment of rent — Document held one for securing performance of engagement. ('94) 17 All 55 (57) (FB). (Difference under Act No. I of 1879 (Indian Stamp Act), S. 49)

[3] A kootchit executed by the stake-holder of a chit fund of his property in favour of the subscribers for the due performnce of his obligation to conduct the chit properly is a mortgage for the performance of an engagement which may give rise to a pecuniary liability. (Vol 5) 1918 Mad 997 (997) (DB) ✠ (Vol 14) 1927 Mad 773 (775).

[4] Where *A* sells property to *B* and executes a document of indemnity agreeing that if *B* was deprived of the property or suffered loss, *A* would pay the whole amount of the mortgage the document contains an engagement which may give rise to a personal liability. (08) 5 All L Jour 723 (724) (DB) ✠ (Vol 7) 1920 Mad 650 (651) (DB).

[5] Where *A* took a loan of paddy stated as being worth Rs. 300 from *B* and promised to pay interest on the loan in paddy at a specified rate and hypothecated certain property therefor, it was held that it was an engagement which would give rise to a pecuniary liability and that it was therefore a mortgage. (Vol 8) 1921 Cal 172 (173, 174) : 48 Cal 625 (FB).

[6] *A* applying for possession of property decreed — Appeal by judgment-debtor, *B*—*A* ordered to be placed in possession on his furnishing security for restoring property to *B* in case he succeeded in appeal—*C* executing security bond and hypothecating property — Transaction held to be mortgage. (Vol 15) 1928 Oudh 143 (143) : 3 Luck 298 (FB).

13. "Mortgagor." — [1] Where *A* and *B* join in mortgage as mortgagors, but the property mortgaged is only *B*'s property and no property of *A* is included in the mortgage, *A* is not a "mortgagor." (Vol 11) 1924 All 787 (788) (DB).

14. "Mortgagee." — [1] Where a judgment-debtor executes a security bond in favour of the Judge of a Court for the due performance of any decree or order that may be passed against him, the decree-holder does not thereby become the mortgagee. ('03) 30 Cal 1060 (1062) (DB).

15. Mortgage-money. — [1] Under the second paragraph of cl. (a) the principal money and interest of which payment is secured is "mortgage-money" (Vol 16) 1929 All 411 (413) ✠ (Vol 7) 1920 Lah 271 (271) ✠ (Vol 5) 1918 Low Bur 64 (65) : 9 Low Bur Rul 106 (DB) ✠ (Vol 16) 1929 All 77 (78) ✠ (Vol 6) 1919 Cal 46 (48):46 Cal 448 (DB)✠(Vol 26) 1939 Lah 129 (133) (DB) ✠ (Vol 8) 1921 Mad 229 (230) (DB).

[2] The "principal money" will include not only the principal money originally advanced but all amounts that may be added to it as part of the principal money (e. g., the costs under S. 72). (Vol 2) 1915 Mad 402 (403).

[3] A mortgage may be executed for the interest alone on a loan without the principal itself being secured. (Vol 27) 1940 Pat 512 (513) (DB).

[4] A mortgagee, in the absence of any contract to the contrary, is entitled to treat the interest due under the mortgage as a charge on the estate. (Vol 11) 1924 P C 183 (183) : 51 Ind App 377 : 5 Lah 425 (PC).

[5] Where there is no stipulation for interest express or implied, in the mortgage document, it cannot be claimed as part of the mortgage-money. ('13) 40 Cal 514 (517) (DB)✠('86) 8 All 182 (185) (DB)✠('10) 5 Ind Cas 285 (286, 287) (DB) (All)✠(Vol 11) 1924 Pat 302 (303) (D B).

[6] The question whether the interest claimed is on any agreement to pay it in the mortgage bond depends

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upon the particular terms of the document. ('11) 35 Bom 327 (332) (PC).

[7] Mortgage bond fixing date for payment of mortgage-money—Payment of interest till such debt provided for—Payment of interest till payment of principal may be implied. (Vol 10) 1923 Lah 648 (649) : 4 Lah 346 (DB) ✠ ('01) 11 Mad L Jour 183 (185) (SB) ✠ (Vol 15) 1928 Lah 342 (344): 9 Lah 140 (DB)✠(Vol 10) 1923 All 7 (8) : 44 All 772 (DB)✠('12) 16 Ind Cas 216 (217) (DB) (All) ✠ (Vol 22) 1935 Oudh 213 (216) : 10 Luck 481 (DB)✠(Vol 13) 1926 Oudh 378 (379)✠(Vol 11) 1924 Mad 736 (740).

[But see (Vol 7) 1920 Pat 170 (171) (DB).]

[8] Where payment of interest till payment of principal is implied, *post diem* interest would be a charge on the property. (Vol 6) 1919 Cal 46 (47): 46 Cal 148 (DB).

[9] Stipulation as to payment of interest without limitation as to period of its currency — In default of payment at end of each year creditors to be at liberty to treat interest as principal — *Post diem* interest granted. ('98) 20 All 171 (180) : 25 Ind App 915 (PC).

[10] Principal and interest stipulated to be paid within one year — On failure property to be deemed to be sold for entire money — No *post diem* interest held was intended to be charged. ('21) 63 Ind Cas 533 (535) (DB) (Lah).

[11] Mortgage deed providing for payment of principal and interest within one year - Further covenant not to transfer property till payment in full of principal and interest — Contract held was to pay interest untill payment — Interest held was recoverable as part of mortgage money and not merely as damages. ('97) 19 All 39 (49) : 23 Ind App 138 (PC).

[*See also* (Vol 1) 1914 All 171 (172) (DB) ✠ ('98) 25 Cal 246 (249) (DB). (('97) 23 Ind App 138 : 19 All 39 (PC), *Followed*.)]

[12] Where there is no express or implied provision for *post diem* interest, the mortgagee may be granted interest technically as damages and the rate would be *prima facie* the same as that provided in the bond. ('06) 2 Nag L R 162 (163) (PC)✠(Vol 9) 1922 Lah 254 (257) : 3 Lah 200 (FB)

[13] *Post diem* interest at a reasonable rate might also be decreed under the Interest Act, 1839, though there may be no agreement express or implied, to pay interest. ('95) 17 All 581 (586) (FB).

16. Non-payment of consideration — Effect.—

[1] A mortgage without consideration will be a void transaction (Vol 17) 1930 Nag 166 (169)✠('11) 11 Ind Cas 4 (4) (DB) (All)✠(Vol 1) 1914 Mad 684 (685) (DB) ✠ (Vol 4) 1917 Mad 492 (493) (DB) ✠ (Vol 11) 1924 Lah 381 (381).

[2] A mortgage would in the absence of a covenant or stipulation to the contrary, be complete, i.e., the transfer of interest is effected, not when the consideration is paid or made good, but when the mortgage contract is entered into, regardless of whether and when the consideration is paid. (Vol 3) 1916 Lah 155 (156) : 1916 Pun Re No. 53 (FB)✠(Vol 6) 1919 Mad 781 (782): 42 Mad 20 (DB)✠(Vol 9) 1922 Pat 299 (301):1 Pat 281 (DB) ✠ ('12) 15 Cal L Jour 61 (67) (DB)✠(Vol 4) 1917 Pat 514 (515) : 2 Pat L Jour 168 (DB) ✠ ('12) 34 All 273 (276) (DB) ✠ (Vol 6) 1919 Lah 402 (404).

[3] A mortgage is *prima facie* only a security for a debt and where the debt does not exist to any extent, the security cannot be enforced to that extent (Vol 4) 1917 Mad 492 (495) (DB)✠('11) 1911 Pun L R No. 192, p. 716 (725) : 1911 Pun Re No. 31 (DB).

[4] In the case of a mortgage, the presumption would be in favour of immediate transfer of interest but this presumption is rebuttable. (Vol 3) 1916 Lah 155 (156): 1916 Pun Re No. 53 (FB) ✠ (12) 13 Ind Cas 653 ('55, 656) (DB) (Cal).

[5] A provision in a mortgage deed that the mortgagor will make over the mortgage deed to the mortgagee upon payment of the full consideration does not amount to a contract that the mortgage was not to take effect until payment of the consideration. (Vol 9) 1922 Pat 299 (301) : 1 Pat 281 (DB).

[6] A mortgage of which the whole cash has not been paid is valid to the extent of the money advanced unless the mortgagor has expressly put an end to the mortgage (Vol 29) 1942 Lah 234 (236) ✠ I L R (1943) Lah 746 (DB)✠(Vol 3) 1916 Lah 155 (157) : 1916 Pun Re No. 53 (FB) ✠ ('33) 1933 Bom P J 82 ✠(Vol 4) 1917 Pat 514 (517) : 2 Pat L Jour 168 (DB) ✠ (Vol 12) 1925 Oudh 132 (134) ✠ (Vol 6) 1919 Oudh 251 (251) (DB) ✠ ('08) 35 Cal 1051 (1057) (DB) ✠ (Vol 7) 1920 Mad 906 (909) (DB) ✠ (Vol 6) 1919 Mad 1117 (1124) (DB)✠ (Vol 14) 1927 Pat 388 (390) (DB) ✠ (Vol 5) 1921 Cal 435 (440) (DB) ✠ ('12) 34 All 273 280) (DB)

[But see ('34) 18 Mad 126 (128) (DB).]

[7] To the extent to which the money was not paid, there will be a failure of consideration. (Vol 4) 1917 Mad 630 (635) : 40 Mad 308 (FB)✠('10) 11 Cal L Jour 197 (202) (DB) ✠ ('12) 35 Mad 114 (118) (DB)

[8] Where the mortgagee undertakes to pay the creditors of the mortgagor, there is no failure of consideration, if the liability of the creditors is cleared off and this is so even if the creditors forgo their rights. ('83) 1883 All W N 213 (214) (DB).

[9] Where the mortgagee undertakes to pay the creditors of the mortgagor, he must pay them within a reasonable time. (Vol 5) 1918 Oudh 331 (332) ✠ (Vol 18) 1931 All 95 (96) : 52 All 761 (DB).

[10] Mortgagee not paying off mortgagor's creditors within reasonable time — Mortgagor suffering damages — Mortgagee is liable for same. ('07) 10 Oudh Cas 69 (73) (DB)✠('21) 63 Ind Cas 87 (89) (DB) (All) ✠ (Vol 24) 1937 Oudh 138 (140) (DB) ✠ (Vol 23) 1936 All 598 (600) (DB).

[11] Consideration not paid by mortgagee — Mortgagor can sue for compensation but not for specific performance. (Vol 29) 1942 Lah 234 (236) I L R (1943) Lah 746 (DB) ✠ (Vol 25) 1938 Lah 21 (22) ✠ (Vol 22) 1935 Pat 125 (126)✠(Vol 10) 1923 Cal 567 (567 ✠(Vol 3) 1916 Cal 530 (530, 531) : 43 Cal 59 (DB) ✠ ('08) 11 Oudh Cas 89 (92) (DB) ✠ ('13) 34 All 273 (276) (DB)✠ (Vol 18) 1931 All 40 (44) : 52 All 1037 (DB).

[But see (Vol 12) 1925 Lah 174 (174)✠(Vol 18) 1931 All 95 (98) : 52 All 761 (DB).]

[12] Mortgagee not paying consideration — Suit by mortgagor for compensation—Measure of compensation is different between amount stipulated and amount paid — Mortgagor is also entitled to any loss he may have sustained. (Vol 25) 1938 Lah 21 (22) ✠ ('91) 13 All 200 (205) (DB).

[But see ('05) 8 Oudh Cas 5 (9).]

[13] Usufructuary mortgagee undertaking to pay off prior mortgagee and obtain possession — On his failure mortgagee paying off and obtaining possession — Usufructuary mortgagee cannot claim possession from mortgagor. (Vol 12) 1925 Oudh 132 (134) ✠ (Vol 11) 1924 Oudh 425 (426) : 27 Oudh Cas 60 ✠ ('06) 1906 Pun Re No. 103, p. 363 (365) (DB).

[14] Where the redemption of the prior mortgage was not a condition precedent to obtaining possession, the mortgagee was given a decree for possession on condition of his paying the mortgagor the amount payable to the first mortgagee. (Vol 6) 1919 Oudh 104 (105). (('11) 34 All 273, *Rel. on.*)

[15] In the Punjab non-payment of consideration after demand avoids the mortgage unless the mortgagee condones the breach or the non-payment ('07) 1907

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Pun Re No. 59, p. 274 (277) (FB) ✠ (Vol 1) 1914 Lah 187 (197, 198):1915 Pun Re No. 3 (D B).

[16] Where the mortgagor admits receipt of consideration though in point of fact, he did not receive any, mortgage is not avoided. (Vol 1) 1914 Lah 316 (316, 317) : 1914 Pun Re No. 67 (DB).

17. **Mortgage without title.**—[1] A mortgage of property to which the mortgagor has no title creates no lien on the property. ('08) 4 Nag L R 28 (30).

[2] If *A* mortgages land to *B* to which he has no title and subsequently acquires that property the mortgage will attach to the property (1900) 1900 Pun Re No. 32, p. 112 (114, 115) (DB) ✠ (Vol 2) 1915 Mad 972 (974) (DB).

[3] Mortgagee knowing of want of title to property mortgaged in mortgagor at time of mortgage — Title subsequently acquired — Mortgage does not attach to property. (Vol 25) 1938 All 22 (25) : I L R (1938) All 63 (DB).

[4] Mortgage of property without title — Mortgagor acquiring other property — Mortgagor cannot be compelled to make good to mortgagee out of that property for loss caused by want of title to mortgaged property. (1900) 1900 Pun Re No. 32, p. 112 (114) (DB)

18 **Mortgage by person having voidable title.** —[1] A person who has acquired property under a voidable title can himself give a good title in respect of that property to a *bono fide* purchaser or mortgagee from him who deals for value and has no notice of the defects in the title (Vol 11) 1924 Mad 67 (69) (DB).

19. **Mortgage by co-owners.**—[1] One of several co-owners, whether tenants-in-common or joint tenants, can ordinarily mortgage his share. (Vol 30) 1943 Posh 17 (20) ✠ ('03-04) 2 Low Bur Rul 167 (167) ✠ ('11) 12 Ind Cas 858 (858) (Low Bur) ✠ ('74) 11 Bom H C R 76 (80) (DB) ✠ ('06) 8 Bom L R 550 (551) (DB)

[2] A mortgage by coparcener of a joint Hindu family of joint family property, neither for a family necessity nor for discharging an antecedent debt, is void *in toto* and is not binding even on his own share. (Vol 4) 1917 P C 41 (42) : 39 All 500 : 44 Ind App 163 (P C) ✠ ('09) 31 All 176 (217) (FB).

20 **Mortgage by purdanashin women.** — [1] Where the legal adviser of a pardanashin lady, obtains a mortgage from her the Court is entitled and bound to examine the transaction with close scrutiny and strictly insist on the mortgagee showing that the client was fully aware of the meaning and effect of the deed and that the transaction was a fair and honest one. (Vol 1) 1914 P C 95 (96) (PC).

[2] The circumstances under which a pardanashin woman agrees to mortgage property must be carefully examined in order to ascertain that she had independent advice, that the lady had sufficient intelligence to understand the relevant and important matters, that she did understand them as they were explained to her, that nothing was excluded and that there was no undue influence or misrepresentation (Vol 8) 1921 P C 118 (122) : 47 Ind App 265 (P C) ✠ (Vol 12) 1925 P C 204 (209, 210) : 47 All 703 : 28 Oudh Cas 338 : 52 Ind App 342 (PC) ✠ (Vol 23) 1936 P C 207 (210, 211) : 11 Luck 346 : 63 Ind App 326 (PC).

[3] Where for want of explanation, a pardanashin woman does not understand that she was making herself personally liable to pay the money borrowed under a mortgage, the mortgage does not bind her at all. (Vol 27) 1940 P C 134 (135) : I L R (1940) 2 Cal 436 : I L R (1940) Kar (P C) 271 : 67 Ind App 309 (PC).

[4] Where the execution of a mortgage deed by a pardanashin lady is found not to be her mental or conscious act, there being no room for a semi-conscious act, the whole deed is affected and must be set aside. If those founding on the deed fail to show that the grantor intelligently understood the deed there is an end of the matter. The question of undue influence does not arise. (Vol 27) 1940 P C 147 (150) : I L R (1940) Kar (P C) 341 : 67 Ind App 377 (PC).

21. **Mortgage by beneficiary under trust.**—[1] A person having a beneficial interest in property, under a trust deed is competent to mortgage his interest. (Vol 27) 1940 P C 134 (136) : I L R (1940) 2 Cal 436:I L R (1940) Kar (PC) 271 : 67 Ind App 309 (PC).

22. **Mortgage by person incompetent to contract.**—[1] A mortgage by a minor who is incompetent to contract is void. ('06) 28 All 508 (515) (DB)✠(Vol 8) 1921 All 326 (327) (DB).

[2] Mortgage by minor — Creditor cannot recover money even under Ss. 64 and 65 of the Contract Act. ('03) 30 Cal 539 (548) : 30 Ind App 114 (PC).

[3] A mortgage by minor is incapable of founding a plea of estoppel (Vol 15) 1928 P C 152 (156) (PC).

[But see ('98) 25 Cal 371 (394) (SB)✠('95) 21 Bom 198 (201) (DB).]

[4] *A* mortgaging joint family estate as his own absolute property and also getting his minor brother, *B*'s signature by way of assent to mortgage—Mortgage held to be void so far as *B* was concerned. ('12) 34 All 296 (306) : 39 Ind App 109 (PC).

23. **Mortgage by one person when binding on another.** — [1] The guardian of a minor under the Hindu law can mortgage the minor's property only in case of necessity and not otherwise. ('99) 26 Cal 707 (711) : 26 Ind App 97 (PC).

[2] A guard an appointed under the Guardians and Wards Act, 1890, can mortgage with the sanction of the Court and not otherwise ('80) 2 All 902 (903) (DB) ✠ (Vol 14) 1927 Mad 233 (235) : 50 Mad 217 (DB) ✠ (Vol 23) 1936 Lah 946 (956) : 17 Lah 686 (DB).

[3] Mortgage by guardian appointed under Guardians and Wards Act without sanction of Court—Mortgage is voidable — Minor avoiding same has to restore any benefit he has received thereunder ('98) 23 Bom 287 (290) (D B) ✠('99) 22 Mad 289 (291) (D B) ✠('12) 16 Cal L Jour 537 (538) (DB).

[4] A Hindu widow can mortgage her husband's estate so as to bind the reversioners only in the case of necessity and not otherwise. (Vol 20) 1933 Oudh 170 (175): 8 Luck 538 (DB).

[5] Mortgage by Hindu widow — Reversioners not questioning same—Third party cannot question its validity. (Vol 10) 1923 Pat 122 (126, 127): 2 Pat 217 (DB).

[6] An executor or administrator may make a valid mortgage binding on the estate. ('78) 1 All 710 (720) (FB).

[7] A mortgage by a partner of a firm for the benefit of the firm will be binding on the other members of the firm. (1841) 2 Moo Ind App 487 (500) (PC).

[8] Where certain male members of a family governed by Muhammadan law mortgaged property belonging to themselves and to purdanashin members of the family the mere fact that the ladies left the management of the property in the hands of the males, does not show that the male members represented the female members in the transaction; it is not therefore binding on them. ('13) 40 Cal 378 (385) (PC).

24. **Mortgage in favour of minor.** — [1] A mortgage executed in favour of a minor who had advanced the whole of the mortgage-money is enforceable by him or by other persons on his behalf. (Vol 4) 1917 Mad 630 (635, 638) 40 Mad 308 (FB) (('10) 33 Mad 312, *Overruled.*) ✠(Vol 16) 1929 All 604 (605) (D B) ✠('81) 3 All 408 (412) (DB) ✠(Vol 6) 1919 Pat 561 (563) : 4 Pat L Jour 682 (DB).

[2] The fact that the minor may have had no power to transfer the mortgage-money and may, on that

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ground, be entitled to recover it back, is not a sufficient ground for holding that a mortgage in favour of a minor cannot be enforced against the property, although the minor may not be entitled to sue the mortgagor on the personal covenant to pay, and the advance, by reason of his incapacity to contract, may not be strictly by way of loan. (Vol 4) 1917 Mad 630 (635): 40 Mad 308 (FB).

25. Simple mortgage—Possession. — [1] Possession remains with the mortgagor. (Vol 14) 1927 Rang 33 (36): 4 Rang 368 (FB) ✠(Vol 1) 1914 Nag 32 (34): 10 Nag L R 81 ✠(Vol 27) 1940 Lah 486 (489): I L R (1941) Lah 601 (DB) ✠(Vol 5) 1918 Cal 933 (937, 938): 44 Cal 425 (DB).

[2] In the absence of an express stipulation, the rents and profits of the land belong to the mortgagor. (Vol 26) 1939 Rang 321 (322): 1939 Rang L R 403 (FB).

[3] The fact that possession subsequently passes to the mortgagee does not convert a simple mortgage into a usufructuary mortgage. (Vol 10) 1923 Nag 161 (161).

[4] The onus of proving what the transaction is by which possession passed to the mortgagee under a simple mortgage is on the mortgagor. (Vol 15) 1928 Rang 44 (46): 5 Rang 668 (DB).

[5] The mortgagee can set up and plead an agreement to sell under which the possession was given. (Vol 14) 1927 Rang 33 (35): 4 Rang 368 (FB). ((Vol 12) 1925 Rang 322: 3 Rang 243, *Overruled.*)

[6] Mortgage-deed providing that mortgagee should take possession if interest remained unpaid by due date and thereafter enjoy properties as usufructuary mortgagee—Position of mortgagee as simple mortgagee held was not changed. ('11) 8 All L Jour 594 (598) (PC).

[7] Loan advanced to be paid by mortgagor by particular date with interest—Deed reciting that possession was given to mortgagee, but not actually given—Mortgage held to be simple one. ('06) 2 Nag L R 162 (163) (PC).

[8] Simple mortgage—Mortgagee let into possession in pursuance of contemporaneous oral agreement that mortgagee should go into possession in satisfaction of his claim for interest—Agreement held could be proved so as to preclude mortgagee from claiming interest. ('87) 1887 All W N 61 (61) (DB).

26. Mortgagor binds himself personally to pay.—

[1] In order to constitute a transaction a simple mortgage, the mortgagor must bind himself to pay the mortgage-money. (Vol 5) 1918 Mad 997 (997) (D B) ✠(Vol 5) 1918 Mad 558 (559) (D B) ✠(Vol 26) 1939 Rang 321 (322): 1939 Rang L R 403 (F B) ✠(Vol 2) 1915 Nag 63 (64): 12 Nag L R 19 ✠(Vol 25) 1938 Cal 524 (525) (DB).

[2] The personal liability may be express or may be a matter of implication. ('11) 15 Cal W N 722 (725) (DB) ✠('06) 4 Cal L Jour 510 (516) (D B) ✠(Vol 28) 1941 Lah 274 (276) (DB) ✠(Vol 19) 1932 Lah 164 (166): 13 Lah 259 (DB) ✠(Vol 11) 1924 Nag 97 (98): 20 Nag L R 46 ✠(Vol 24) 1937 Rang 151 (153): 14 Rang 685.

[3] Even though there is no express covenant to pay the borrower remains personally liable to pay off the mortgage. (Vol 31) 1944 Nag 289 (290, 291): I L R (1944) Nag 568 (FB). (Whether the mortgage is simple or by a conditional sale the mortgagor is bound by the contract in the first instance to pay the debt.)

[4] In considering the question whether there is a personal liability to pay, it must be borne in mind, (1) that a loan *prima facie* involves such a personal liability, (2) that such a liability is not displaced by the mere fact that security is given for repayment of the loan with interest, but (3) that the nature and terms of such security may negative any personal liability on the part of the borrower. (Vol 3) 1916 P C 119 (120): 44 Cal 388: 44 Ind App 87 (P C).

[5] A personal covenant to repay the mortgage-money must be presumed to exist in all mortgages unless there is something in the nature or terms of the mortgage to negative it. ('08) 30 All 388 (390) (D B) ✠('92) 14 All 513 (519) (DB) ✠(Vol 22) 1935 Pesh 10 (10) ✠(Vol 19) 1932 Lah 164 (166): 13 Lah 259 (DB).

[6] As regards the terms of a document negativing personal liability, the general rule is that a covenant to pay the debt in a particular manner will exclude the general personal liability for such payment. ('95) 22 Cal 434 (444): 22 Ind App 68 (PC) ✠(Vol 16) 1929 Nag 254 (256): 25 Nag L R 187 (FB). (Lahangahan mortgage.)

[7] Mortgagor covenanting to pay debt out of hypothecated estate: *Held* there was no personal covenant to pay. ('83) 10 Cal 740 (742): 11 Ind App 83 (PC).

[8] Where the mortgagor stipulated that he will pay the mortgage-money on a particular date and that if the property was sold for arrears of revenue, then the mortgagee could recover from the person or other property of the mortgagor, it was held that there was no personal covenant to pay. ('89) 16 Cal 540 (543, 544) (DB).

[9] Where the remedy provided in the mortgage was foreclosure of the mortgage in default of payment it was held that there was no personal liability. (Vol 2) 1915 Nag 63 (64): 12 Nag L R 19.

[10] The words "we shall, on paying the money advanced, recover the property" interpreted as containing a promise to pay the amount. ('03) 27 Mad 526 (527) (FB).

[11] Even if there be no personal covenant to pay the mortgagor may become personally liable under section 68. (Vol 3) 1916 P C 119 (120): 44 Cal 388: 44 Ind App 87 (PC).

[12] A suit to enforce the personal liability on the personal covenant to pay in a mortgage deed is not governed by Art. 132 of the Limitation Act. ('85) 7 All 502 (505, 506): 12 Ind App 12 (PC).

[13] A mortgagee wishing to enforce the personal liability is not bound to sue also for the realisation of the security. (Vol 22) 1935 Lah 672 (676): 16 Lah 640 (DB).

[14] A covenant to pay does run with the land and the assignee of the equity of redemption is not personally liable to the mortgagee for the amount. (Vol 17) 1930 Nag 139 (142): 26 Nag L R 312.

27. "Mortgagee shall have the right to cause the mortgaged property to be sold." — [1] In a simple mortgage, the interest transferred is the right to have the mortgaged property sold in satisfaction of the debt. (Vol 3) 1916 Pat 11 (13): 1 Pat L Jour 563 (D B) ✠('94) 1894 All W N 57 (58) (DB) ✠(Vol 26) 1939 Rang 321 (322): 1939 Rang L R 403 (F B) ✠(Vol 26) 1939 Cal 323 (325) (DB) ✠(Vol 25) 1938 Cal 524 (525) (DB) ✠(Vol 1) 1914 Nag 32 (34): 10 Nag L R 81.

[2] The agreement by the mortgagor that the mortgagee shall have a right to cause the mortgaged property to be sold, need not be express. (Vol 24) 1937 Mad 148 (149) ✠(Vol 2) 1915 Mad 370 (371) (D B) ✠('11) 9 Ind Cas 828 (829) (DB) (All).

[3] Agreement giving right to mortgagee to cause mortgaged property to be sold may be implied from words used. (Vol 3) 1916 Pat 11 (13): 1 Pat L Jour 563 (DB) ✠(Vol 9) 1922 Pat 529 (532): 1 Pat 387 (DB).

[4] Personal covenant to pay mortgage-money — Agreement giving right to mortgagee to cause mortgaged property to be sold may be implied. ('04) 27 Mad 526 (528) (FB) ✠ (Vol 1) 1914 Nag 32 (35, 36):

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10 Nag L R 81 ✠(Vol 21) 1934 Oudh 255 (256): 10 Luck 10 (DB) ✠(Vol 16) 1929 Lah 289 (290).

[5] Words of hypothecation generally import the right of the mortgagee to bring the mortgaged property to sale for the satisfaction of the claim. ('11) 9 Ind Cas 828 (829) (DB) (All) ✠('99) 12 C P L R 26 (33) ✠('10) 6 Nag L R 20 (24).

[6] Document containing personal covenant to pay—Other parts of document showing that there was no covenant: *Held*, this was no simple mortgage and mortgagee had no right to bring mortgaged property to sale. (Vol 25) 1938 All 418 (421): 1 L R (1938) All 714 (FB).

[7] Mortgage of field—Same to stand mortgaged till payment of mortgage-money — Mortgagor to pay compound interest if repayment is not made within time—Agreement that creditor might get land sold held was implied. (Vol 1) 1914 Nag 32 (35): 10 Nag L R 81.

[8] The words *rehan, arh* and *mustagharag* import a power of sale but not the words *muakhaza, dastawez mukfuti, tamassuk* or *makbuza.* ('13) 20 Ind Cas 870 (871) (Oudh) *(Mustagharg)* ✠('91) 13 All 28 (41, 43) (DB). (Do.) ✠('94) 1894 All W N 57 (58) (DB) ✠('13) 11 All L Jour 570 (573) (DB) ✠('13) 11 All L Jour 580 (584) (DB) ✠('12) 34 All 446 (449) (DB). *(Muakhaza)* ✠('90) 13 All 28 (42) (DB) (Do.) ✠('12) 15 Ind Cas 851 (851) (All) *(Dastawaz makfuli)* ✠('12) 10 All L Jour 120 (122, 123) *(Tamassuk)* ✠(Vol 4) 1917 All 439 (440, 441 : 38 All 361 (DB) *(Makbuza.)*

[9] The right to "cause the mortgaged property to be sold", means a right to cause the property to be sold through the intervention of the Court. (Vol 26) 1939 Rang 321 (322): 1939 Rang L R 403 (FB) ✠('96) 19 Mad 249 (252): 23 Ind App 32 (PC).

[10] The mortgagee has a right only to cause the mortgaged property to be sold and not to claim possession of the property. A decree therefore which gives possession to the mortgagee on default of payment is illegal. ('96) 19 Mad 249 (254): 23 Ind App 32 (PC).

28. Mortgage by conditional sale.—[1] For a mortgage by conditional sale under cl. (c) there must be an ostensible sale i e, a transaction which bears the appearance of a sale but is not really that of which it bears the appearance (Vol 8) 1921 Mad 12 (16): 43 Mad 589 (F B) ✠(Vol 27) 1940 Cal 486 (487): I L R (1940) 2 Cal 573 (DB) ✠(Vol 4) 1917 Cal 217 (217) (D B) ✠(Vol 13) 1926 Bom 107 (109) (D B) ✠(Vol 16) 1929 All 174 (174).

[2] The sale being merely an ostensible one, the mortgagor does not lose his title or the right to possess the property. (Vol 26) 1939 Nag 287 (294) (DB).

[3] Where the document purports to be a mortgage only but says that on default of payment the land is to be regarded as sold, it is not a mortgage by conditional sale. (Vol 8) 1921 Mad 12 (16): 43 Mad 589 (DB) ✠('31) 14 Nag L Jour 31 (32, 33) (Rev).

[4] There is no covenant to pay in a mortgage by conditional sale (Vol 4) 1917 Nag 57 (57) ✠(Vol 7) 1920 Nag 244 (244).

[5] The absence of a personal covenant does not render the transaction any the less a debt secured by immovable property. (Vol 31) 1944 Nag 289 (291): I L R (1944) Nag 568 (FB). *(Overruling* (Vol 29) 1942 Nag 88: I L R (1942) Nag 357 in so far as it held that a preliminary decree for foreclosure is not a debt.)

[But see (Vol 28) 1941 Oudh 479 (481): 16 Luck 789 (DB).]

[6] The words "on a certain date" mean "on or before a certain date". (Vol 1) 1914 Cal 823 (823, 824) (DB).

[7] The fixing of a certain date for payment is an essential ingredient of the mortgage by conditional sale. (Vol 15) 1928 Cal 825 (825) (DB).

[8] The words "on a certain date" refer to the default in the second clause and not to the payment in the third and fourth clauses. (Vol 15) 1928 Mad 28 (32, 34) (DB).

[9] The absence of the mention of a certain date is no indication that the transaction was not a mortgage. (Vol 12) 1925 Cal 1151 (1153) (DB).

29 Distinction between mortgage by conditional sale and a sale with a clause for re-purchase.—[1] In a sale with a clause for re-purchase the ownership vests in the transferee from the date of the document and there is no question of any debt being in existence after the date of the transaction. Futher, the right of re-purchase can be exercised only on a strict compliance with the terms of the agreement. (Vol 29) 1942 Cal 452 (453) (DB) ✠(Vol 12) 1925 Oudh 533 (534) (D B).

[2] In a mortgage by conditional sale the debt subsists and the right to redeem remains with the debtor. (Vol 29) 1942 Cal 452 (454) (DB) ✠(Vol 26) 1939 Cal 730 (731): I L R (1940) 1 Cal 133 (DB).

[3] Where a deed hypothecated property with a stipulation that in default of payment within a stipulated period or if the mortgagor dies without payment within that period the transaction should be a "complete sale", it was held that the transaction was a mortgage by conditional sale. ('06) 28 All 496 (507): 33 Ind App 107 (P C).

[4] A co-sharer of a patti took possession of the share of another co-sharer under an agreement that any sharer who pays the revenue due by a defaulting sharer should take possession of such defaulting sharer's share without power of transfer and without liability for rendition of accounts; on failure of the defaulter to pay the amount within 12 years, the possessor should be the owner of it. It was held that the transaction was a mortgage by conditional sale. ('04) 26 All 337 (341) (DB).

30. Sale or mortgage — Tests of distinction. — [1] Where the transaction is apparently a sale, the onus of showing that it is a mortgage lies on the person who contends against the tenor of the deed. (Vol 23) 1936 P C 65 (69) (P C) ✠(Vol 31) 1944 Oudh 305 (306) (DB).

[2] Where the document is apparently a mortgage, the onus is on the person who alleges it to be a sale to prove it. (Vol 12) 1925 Rang 377 (379): 3 Rang 367 (DB).

[3] The form of the transaction is not the final test of determining whether it is a sale or a mortgage. The true test is the intention of the parties in entering into the transaction. (Vol 31) 1944 Lah 175 (177) ✠(Vol 3) 1916 P C 49 (50): 43 Ind App 284: 38 All 570 (P C) ✠(Vol 13) 1926 Bom 497 (507): 50 Bom 566 (F B) ✠(Vol 28) 1941 Oudh 479 (481): 16 Luck 789 (DB) ✠('95) 1895 Pun Re No. 100, p. 471 (473) (FB) ✠(Vol 6) 1919 Mad 1 (5): 42 Mad 407 (FB) ✠(Vol 34) 1947 Pesh 33 (34) ✠(Vol 31) 1944 Oudh 305 (306) (D B) ✠(Vol 33) 1946 P C 178 (179) (P C) (Court must find substance behind the form—But where oral evidence is unreliable and contradictory Court cannot safely depart from written evidence of documents)

[4] If the parties intended that the transfer was only by way of security, the transaction would be a mortgage. (Vol 23) 1936 P C 65 (69) (P C) ✠ ('94) 21 Cal 882 (898): 21 Ind App 96 (P C).

[5] If the parties intended a permanent transfer the transaction would be a sale even though the deed happens to be in the form of a mortgage. ('95) 1895 Pun Re No. 100, p. 477n (478n) (DB) ✠(Vol 34) 1947 Pesh 33 (34) ✠(Vol 4) 1917 Mad 368 (369, 370) (D B) ✠(Vol 12) 1925 Mad 37 (39) ✠(Vol 18) 1931 Lah 258 (260): 12 Lah 488 (DB) ✠('90) 3 C P L R 154 (155).

Section 58—Note 30 *(contd.)*

[6] The question whether a document which is ostensibly a sale-deed is intended to be only a pretence for a mortgage-deed is in every case a question of fact to be determined on the contents of the document and the surrounding circumstances. (Vol 31) 1944 Lah 175 (177, 178) ✠(Vol 21) 1934 Nag 18 (20) ✠(Vol 28) 1941 Oudh 479 (481): 16 Luck 789 (D B) ✠(Vol 28) 1941 Oudh 582 (584): 17 Luck 198 (DB) ✠(Vol 34) 1947 Mad 60 (61) (DB) ✠(Vol 34) 1947 Pesh 33 (34).

[7] A mortgage is none the less a mortgage because its terms are onerous. (Vol 15) 1928 Oudh 103 (104): 2 Luck 470 (DB) ✠(Vol 6) 1919 Oudh 374 (375).

[8] A mortgage does not cease to be a mortgage because its terms are such as to render redemption impossible. ('13) 16 Oudh Cas 9 (18) (D B) ✠('12) 15 Oudh Cas 1 (5) (DB).

[9] It is only where the deed of sale and the contract to re-purchase are parts of one and the same transaction that the sale could be a mortgage, but the mere fact of singleness of the transaction, though a strong piece of evidence, is not conclusive that the transaction is a mortgage. (Vol 14) 1927 All 321 (327): 49 All 405 (DB).

[10] It cannot be said broadly that where there is an ostensible sale subject to the condition of re-purchase the transaction must necessarily always be a mortgage by conditional sale. It will be for the person pleading that it is an out and out sale, to establish it. In the absence of such proof it must be held to be a mortgage. (Vol 16) 1929 All 619 (619) (DB).

[11] As between the parties to the document or documents, the intention to treat the transaction as an out and out sale or as a mortgage, must be decided on a consideration of the contents of the documents themselves with such extrinsic evidence of surrounding circumstances as may be required to show in what manner the language of the documents is related to existing facts. Oral evidence of such intention is not admissible by virtue of S. 92 of the Evidence Act. (1900) 22 All 149 (158, 159) : 27 Ind App 58 (P C) ✠ (Vol 31) 1944 Lah 175 (177) ✠ ('02) 26 Bom 252 (256) (F B) ✠ (Vol 11) 1924 P C 226 (227) : 47 Mad 729 : 51 Ind App 305 (P C) ✠ (Vol 3) 1916 P C 49 (53, 54) : 38 All 570 : 43 Ind App 284 (P C)✠(Vol 34) 1947 Pat 345 (347) (D B) ✠ (Vol 34) 1947 Mad 60 (61) (D B).

[12] Evidence of the conduct of parties cannot be let in to show the intention of the parties. (Vol 4) 1917 P C 207 (209) : 45 Cal 320 : 44 Ind App 236 : 9 Low Bur Rul 114 (P C) ✠ ('11) 11 Ind Cas 124 (125) (Cal)

[13] *Prima facie* an absolute conveyance, containing nothing to show that the relation of debtor and creditor is to exist between the parties, does not cease to be an absolute conveyance and become a mortgage merely because the vendor stipulates that he shall have a right of repurchase. ('90) 12 All 387 (391) : 17 Ind App 98 (P C) ✠ (Vol 6) 1919 Mad 1 (5, 6) : 42 Mad 407 (F B). *(Overruling* (Vol 1) 1914 Mad 37.) ✠ (Vol 31) 1944 Oudh 305 (307) (D B).

[14] The question whether a sale and an agreement to reconvey were intended to create a mortgage or not must be decided with reference to the surrounding circumstances. (Vol 2) 1915 Mad 651 (651) (D B).

[15] Where two deeds, one a sale and the other an agreement to reconvey, are of even date, there would arise a presumption in favour of the transaction being a mortgage. ('11) 33 All 585 (587, 592) (F B) ✠ (Vol 1) 1914 Bom 177 (178) : 39 Bom 119 (D B) ✠ (Vol 1) 1914 Bom 179 (180) (D B) ✠ (Vol 2) 1915 Mad 790 (790) (D B) ✠ (Vol 34) 1947 All 334 (336) (D B).

[16] Where a sale-deed and an agreement to reconvey are not of even date and, at the time of the sale, there was no intention of executing an agreement to reconvey, the documents would not constitute a mortgage. (Vol 24) 1937 Rang 402 (403) : 1938 Rang L R 216 (D B) ✠ (Vol 22) 1935 Rang 212 (213) ✠ ('95) 17 All 451 (453) ✠ ('83) 5 All 324 (329, 330) (F B).

[17] Surrounding circumstances that will tend to show that a transaction is a mortgage and not a sale:

(a) The price fixed being far below the real value of the property, (Vol 11) 1924 P C 226 (230) : 47 Mad. 729 : 51 Ind App 305 (P C) ✠ (Vol 12) 1925 P C 75 (78) : 3 Rang 106 (P C) ✠ (Vol 28) 1941 Oudh 582 (584) : 17 Luck 198 (D B)✠(Vol 34) 1947 Pat 345 (347) (D B) ✠ (Vol 31) 1944 Oudh 305 (309) (D B).
[See however (Vol 31) 1944 Lah 175 (178).]

(b) The sale deed being accompanied by an agreement to reconvey, stated in the sale deed itself and imposing an obligation on the seller to repurchase the property. (Vol 11) 1924 P C 226 (230) : 47 Mad 729 : 51 Ind App 305 (P C).

(c) The time fixed for repurchase not being of the essence of the contract. (Vol 11) 1924 P C 226 (230) : 47 Mad 729 : 51 Ind App 305 (P C) ✠ (Vol 28) 1941 Oudh 582 (584) : 17 Luck 198 (D B).

(d) That there was a debt subsisting at the time to discharge which, the document was executed (Vol 3) 1916 Mad 1074 (1077, 1078) (D B).

(e) Possession not having been given to the purchaser at the time of the ostensible sale. (Vol 16) 1931 Bom 371 (374) (D B) ✠ (Vol 21) 1934 Nag 18 (20)✠ ('07) 6 Cal L Jour 208 (211) (D B) ✠ ('21) 64 Ind Cas 583 (584) (D B) (Cal).

(i) When the stipulated period for repurchase is a long term. ('21) 64 Ind Cas 583 (584) (D B) (Cal).

(g) The purchase of stamp paper by the vendor, and the vendor remaining in possession. (Vol 6) 1919 Cal 109 (109, 110) (D B) ✠ (Vol 34) 1947 Mad 60 (62) (D B)
[See however (Vol 21) 1934 Nag 18 (19).]

(h) That a relation of debtor and creditor existed between the parties at the time of the sale though it is not a test by itself. (Vol 12) 1925 Cal 105 (105) (D B) ✠ (Vol 18) 1931 Bom 371 (374) (D B) ✠ (Vol 27) 1940 Bom 1 (3) ✠ (Vol 27) 1940 Nag 84 (86) ✠ (Vol 21) 1934 Nag 18 (20) ✠ (Vol 16) 1929 Rang 39 (40) (D B) ✠ (Vol 24) 1937 Rang 402 (403). 1938 Rang L R 216 (D B) ✠ (Vol 26) 1939 All 539 (541) ✠ (Vol 28) 1941 Oudh 479 (481) : 16 Luck 789 (D B).

(i) The term 'Shartiah Dai" usually employed in the Punjab as indicative of an intention to execute a mortgage by conditional sale. (Vol 31) 1944 Lah 175 (178).

(j) A stipulation for payment of interest, though it is not conclusive. (Vol 34) 1947 Pat 345 (347) (D B).

[18] In an agreement for re-purchase accompanying a sale, the words used were similar to those in Bengal Regulation, I of 1798 relating to the deposit of mortgage-money into the treasury and the amount payable on re-purchase included not only the price fixed but also a sum due on an account open to be increased. It was held that these circumstances indicated a mortgage. (1900) 22 All 149 (161) : 27 Ind App 58 (P C).

[19] Where a transfer was in terms absolute but for a consideration far less than the real value, and was accompanied by an agreement that if the amount is satisfied from out of the rents and profits the vendee will give back the land to the vendor, it was held that the transaction was a mortgage. (1837) 2 Moo Ind App 1 (21, 22) (P C).

[20] Where though there was a conveyance in fee, the acts of the parties showed that they treated the transaction from the first as one of security and that a power of repurchase on the footing of redemption

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was intended to be reserved, it was held that the transaction was in the nature of a mortgage. (1849) 5 Moo Ind App 72 (79, 81) (P C).

[20a] Land sold to *A* for payment of arrears of land revenue for 50 years in consideration of certain sum — Land revenue to be paid by *A*—After expiry of 50 years, if amount received was paid back, land to be returned—In default, sale to become absolute – Transaction held to be mortgage by conditional sale. (Vol 34) 1947 Pesh 33 (34).

[21] In a deed of conditional sale, it was recited by the transferor, "if we do not pay your amount by the due date, (viz., within five years) we agree to this document being treated as a sale deed;" *Held* that the conveyance was not a sale but a mortgage. (Vol 31) 1944 Mad 237 (237).

[22] Three documents executed on 19th September 1905 — By first document, *A* selling items 1 to *G* for Rs. 15,000—By second document, *G* agreeing to reconvey property for same amount after five but within ten years of execution — Third document a security bond though relating to item 2 containing provisions governing item 1 as well — First and second documents read with third held created mortgage by conditional sale. (Vol 30) 1943 Mad 100 (101) : I L R (1943) Mad 195 (D B).

[23] Document mentioning that property was sold conditionally for the amount stated therein and put in possession of the transferee — Transferee to enjoy property till five years — Amount not to carry any interest nor the property which was land, any rent — Land revenue to be paid by transferee who was to sow the land himself or by leasing to others — At the agreed time, the transferor to redeem the land by paying the amount and obtain receipt therefor—On default of payment the conditional sale was to be an absolute sale. *Held* on construction that the deed was a mortgage. (Vol 29) 1942 Nag 115 (117) : I L R (1942) Nag 592 (D B).

[24] A stipulation in a sale-deed that on the executant handing over half the price the vendee would hand over half the property — Deed, held amounted to mortgage by conditional sale. (Vol 13) 1926 All 670 (671) (D B).

[25] Where the document does not contain any condition for reconveyance but only states that on payment of the money the vendees will give up possession and return the deed there is no sale but a mortgage. ('21) 64 Ind Cas 583 (584) (D B) (Cal).

[26] Deed of conveyance followed by an Ekrarnama by which the parties agreed that if the vendor pays to the vendee in cash the principal with interest in lump after the expiry of ten years held to be a mortgage. (Vol 12) 1925 Cal 862 (863, 864) (D B).

[27] Consideration received less than the value of the property—Parties referred to as debtor and creditor — Property to be re-conveyed to transferor on re-payment of consideration within 12 years — Transaction held mortgage by conditional sale. (Vol 27) 1940 Bom 63 (64) (D B).

[28] Where a deed of transfer contained a stipulation that if at any time within three years the transferor was to pay back the amount paid to him in respect of the property transferred with interest after deducting the income which the transferee might derive from the property there should be a reconveyance to the transferor, it was held that the transaction amounted only to a mortgage by conditional sale and not to a sale with a condition for repurchase. (Vol 27) 1940 Nag 84 (86, 87).

[29] Mortgagee authorized to construct house according to his liking at his own cost—Deed containing also stipulation that mortgagor would be liable for whole amount—Transaction is mortgage and not an out and out sale. (Vol 20) 1933 Lah 155 (156) (D B).

[30] Where a document purported to be a sale out and out and under it the purchaser took possession of the property and on the same day there was an ekrarnamah to the effect that if the purchase-money was repaid within four years the purchaser would be bound to give up the property—*Held* that the deeds did not constitute a mortgage but a sale with a contract for repurchase. ('09) 2 Ind Cas 930 (931) (D B) (Cal).

[31] A document was described in its earlier portion as a deed of sale out and out—There was no mention of interest; the amount was prescribed not as principal but as consideration—The transferee was allowed to have his name registered after expunction of the name of the transferor; the transferee and after him his sons and grandsons in succession were to continue peacefully to enjoy the property, and neither the transferor nor his heir was to have any claim to or concern in the property at any time : *Held* that the document was not one of mortgage but a sale deed out and out with a condition of repurchase. ('13) 21 Ind Cas 19 (20, 21) (D B) (Cal).

[32] The words "principal amount" and the clause that if the money be not paid within the time limited the *kobala* will be regarded as a deed of absolute sale are not by themselves sufficient for holding that the transaction is a mortgage and not an absolute sale. ('22) 67 Ind Cas 113 (115) (DB) (Cal).

[33] Vendor claiming back possession after 60 years —*Held* that after a lapse of long time cogent evidence is needed to prove that document is not what it purports to be. (Vol 16) 1929 Cal 548 (553) (D B).

[34] A mortgagor executed a deed of absolute sale in favour of his mortgagee who was about to sue on his mortgage—Some days later, the mortgagee executed an agreement to reconvey the property within eighteen months if the mortgagor paid the money : *Held* that in the circumstances of the case the transaction amounted to a sale with an agreement to reconvey and not to a mortgage by a conditional sale. (Vol 2) 1915 Mad 651 (652) (D B).

[35] Under a document which purported to be a sale deed the transferee was put in possession by a decree of Court on payment of the amounts mentioned in the document and which the transferee had undertaken to pay—No time for redemption was fixed nor was any amount fixed as payable on redemption : *Held* that the transaction did not amount to a mortgage. (Vol 14) 1927 Mad 1081 (1082).

[36] A deed of transfer of lands under a sale in lieu of principal and interest due upon a pre-existing mortgage, reserving to the vendor the right to re-purchase the same on payment of the sale consideration within twenty years, even when read with a lease of the same lands by the vendee to the vendor at an annual rent which was liable to reduction in proportion to any fractional payment of the sale price amounts to a sale and not a mortgage. (Vol 3) 1916 Bom 215 (217) : 40 Bom 378 (D B).

[37] Document described as sale-deed—Executants referred to as vendors — Property stated to be sold to vendee and entire consideration money received—Executants given right to take back sold property if they paid money specified in document within certain period —No reference to redemption of property within that period — If executants failed to take back possession within time fixed, deed to be deemed to be one of absolute sale—After execution of deed vendee's name substituted in revenue papers — Transaction held was sale and not mortgage. (Vol 31) 1944 Oudh 305 (308, 309) (D B).

Section 58 — Note 30 *(contd.)*

[38] Sale deed in favour of Mahomedan — There is no presumption in Oudh that because he would not charge interest he agreed to transaction of mortgage being clothed in garb of sale-deed. (Vol 31) 1944 Oudh 305 (309) (DB).

[39] Where a sale and an agreement to reconvey form part of a single transaction constituting a mortgage, but the sale alone is registered and the agreement is unregistered no valid mortgage is created by the transaction. (Vol 13) 1926 Bom 497 (506, 507) : 50 Bom 566 (F B). ((Vol 1) 1914 Bom 231 : 38 Bom 703, *Overruled.*) ✠ (Vol 8) 1921 Bom 442 (443) (DB) ✠ (Vol 10) 1923 Rang 52 (54) : 11 Low Bur Rul 456 ✠ (Vol 14) 1927 Rang 314 (315) ✠ (Vol 6) 1919 Mad 711 (712) (DB) ✠ (Vol 1) 1914 Mad 639 (639) (F B).

[40] Where the agreement and the sale are independent transactions, i. e., where the intention was not to create a mortgage but to execute a sale and give an agreement to reconvey, the latter agreement need not be registered. (Vol 13) 1926 Bom 497 (508) : 50 Bom 566 (FB) ✠ (Vol 13) 1926 Bom 97 (99) : 49 Bom 862 (D B) ✠ (Vol 14) 1927 Rang 314 (315).

Effect of Proviso to Cl (c).

[41] The proviso is really of the nature of a rule of evidence. (Vol 23) 1936 Sind 209 (210) : 30 Sind L R 196 (D B) ✠ ('46) 48 Pun L R 517 (518) (D B).

[42] The object of the proviso was to shut out an enquiry whether a sale with a stipulatton for re-transfer is a mortgage when the stipulation is not embodied in the same document. (Vol 33) 1946 Mad 456 (457) (D B).

[43] The proviso has been added to restrict the inference to be drawn in favour of a mortgage only to cases where the condition of repurchase is embodied in one document which effects or purports to effect a sale. (Vol 18) 1931 Bom 371 (372) (D B).

[44] The meaning of the proviso is that though the transaction may in fact be a mortgage, yet when the condition of resale is not embodied in the document that effects or purports to effect the sale, then the transaction cannot be treated as a mortgage. (Vol 33) 1946 Nag 264 (266) : I L R (1946) Nag 278 (D B) ✠ (Vol 33) 1946 Mad 456 (457) (DB) ✠ (Vol 34) 1947 Pat 345 (346) (D B).

[45] The proviso does not mean that if the conditions are embodied in the same document the transaction will necessarily be a mortgage (Vol 21) 1934 Nag 18 (19) ✠ (Vol 28) 1941 Oudh 582 (584) : 17 Luck 198 (D B).

[46] Whether a transaction is a mortgage will still depend upon the intention of the parties as gathered from the document itself and the surrounding circumstances. (Vol 27) 1940 All 227 (229) (D B) ✠ (Vol 25) 1938 Oudh 57 (59) : 13 Luck 680 (D B) ✠ (Vol 24) 1937 All 724 (726).

[47] The agreement to reconvey in the deed of sale will indicate the intention to create a mortgage rather than a sale and this will be so even when the proviso applies. (Vol 27) 1940 Nag 84 (86).

[48] The proviso is not applicable to the Punjab. ('46) 48 Pun L R 517 (518) (D B).

31. Mortgage by conditional sale or other kinds of mortgage. — [1] The test whether a particular document is a mortgage by conditional sale or is some other kind of mortgage is not what the parties have said it is; but is rather whether it fulfils those statutory requirements which the Legislature has laid down. (Vol 28) 1941 All 169 (170) : I L R (1941) All 240.

32. Usufructuary mortgage.—[1] The characteristics of a usufructuary mortgage are (1) that the possession of the mortgaged property is delivered or agreed to be delivered to the mortgagee (2) that the mortgagee is to appropriate the rents and profits in lieu of interest or of principal or of both (3) that the mortgagor does not incur any personal liability to repay the money; and (4) that, there being no personal liability to pay, there is no 'forfeiture' and therefore the remedies by way of foreclosure or sale are not open to the mortgagee. (Vol 27) 1940 Lah 401 (403) : I L R (1941) Lah 71 (F B) ✠ (Vol 29) 1942 Cal 55 (58) (DB) ✠ (Vol 27) 1940 Cal 426 (427) (D B) ✠ (1900) 2 Bom L R 201 (202) (DB) ✠ ('07) 4 Low Bur Rul 222 (224) ✠ ('93) 17 Bom 425 (428) (D B) ✠ (Vol 5) 1918 Mad 1033 (1038) (D B) ✠ (Vol 28) 1941 Pat 301 (302) (D B) ✠ (Vol 32) 1945 Lah 282 (284) (D B).

[2] In Upper Burma the usual form of mortgage is usufructuary. ('12) 1 Upp Bur Rul 125.

Delivery of possession.

[3] The word "delivers" does not necessarily mean delivers immediately. Where the mortgagor is not in a position to give immediate possession, it is sufficient if he gives the right to possession. ('12) 16 Oudh Cas 58 (60, 61).

[4] The main difference between a usufructuary mortgage and an ordinary mortgage is that in the former it is part of the initial agreement by which the security is created that the mortgagee shall at once go into possession of the mortgaged property and apply the proceeds he may derive from the use and occupation of it to discharge the mortgaged debt; while in the case of an ordinary mortgage of the usual sort, it is, in general, not the initial intention of the parties that the mortgagee should go into possession of the property pledged immediately for at all although he is empowered to do so if the interest on the mortgage money be not paid. (Vol 12) 1925 P C 63 (65) : 47 All 250 : 52 Ind App 145 (P C).

[5] Mortgagee was to enter into possession on failure of repayment by the stipulated date, an event which may or may not have happened — No initial agreement to deliver possession—Mortgage held simple and not usufructuary. (Vol 17) 1930 All 175 (176).

[6] No delivery of possession by mortgage deed — Mortgagee not entitled to retain possession till mortgage money repaid—Agreement not inconsistent with English mortgage —Mortgage held not partly English and partly usufructuary and therefore not anomalous mortgage. (Vol 23) 1936 Pat 211 (216) : 14 Pat 560 (D B).

[7] Where a simple mortgage was executed in 1898 and subsequently in 1904 the same property was leased to the mortgagee with a direction to apply the rent towards the interest due under the mortgage, it was held that mortgage did not get converted into a usufructuary mortgage. (Vol 3) 1916 Mad 974 (974).

[8] The mere fact that possession was given to the mortgagee over the mortgaged property will not necessarily show that the mortgage was a usufructuary one. (Vol 31) 1944 All 198 (199) : I L R (1944) All 588.

[9] A usufructuary mortgage does not cease to be so by reason of the fact that instead of actually taking possession on the date of the mortgage, the mortgagee leases it back to the mortgagor for the period of the mortgage. It does not become a simple mortgage on that account. (Vol 31) 1944 All 221 (222): I L R (1944) All 346 (D B) ✠ (Vol 27) 1940 Mad 946 (948, 949) (DB) ✠ (Vol 14) 1927 All 552 (553, 554) : 49 All 658 (D B) ✠ (Vol 18) 1931 Lah 498 (499) (D B) ✠ (Vol 30) 1943 Mad 220 (221).

[10] Where a usufructuary mortgagee leases the property back to the mortgagor, oral evidence is not admissible to show that the document was intended only to be a simple mortgage as it will be contradicting the terms of the written document. (Vol 20) 1933 P C 178 (180) : 60 Ind App 273 : 14 Lah 466 (P C).

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[11] To be a usufructuary mortgage, it is sufficient if the mortgagor delivers such possession as the nature of the property is capable of. (Vol 20) 1933 Oudh 35 (36) : 8 Luck 190 (D B).

[12] The mortgagor may, instead of giving actual possession, direct the tenants of the mortgaged property to pay rent to the mortgagee. (Vol 30) 1943 Sind 59 (61) : I L R (1942) Kar 452 (D B) ✠ (Vol 2) 1915 Mad 382 (383) (D B) ✠ (Vol 19) 1932 Mad 768 (769) (D B).

[13] Where a usufructuary mortgage is of a share of a common holding the mortgagee is entitled to joint possession. ('36) 38 Pun L R 566 (567).

[14] The words "or expressly or by implication binds himself to deliver possession" were inserted in the section by the amending Act of 1929 in order to negative the view that in the absence of actual delivery of possession, the mortgage was not a usufructuary one. (Vol 29) 1942 Oudh 172 (174) : 17 Luck 362.

[15] A usufructuary mortgagee is entitled to the exclusive possession of the property mortgaged and has the right to exclude others, including the owner, from its possession. (Vol 25) 1938 All 577 (584):I L R (1938) All 304 (S B).

[16] If a usufructuary mortgagee does not get possession he may sue for possession or for damages for breach of the contract to give possession ('81) 4 All 14 (16) (D B) ✠ (Vol 29) 1942 Oudh 172 (174) : 17 Luck 362✠ ('82) 4 All 281 (283) (D B)✠ ('82) 4 All 245 (247, 248) (D B).

[17] A usufructuary mortgagee who is empowered to take possession and appropriate the rents and profits in lieu of his debt, is not bound to take possession. He has merely a power to do so, and if he chooses to forgo the benefit it would have no effect as between him and the mortgagor to recover his debt. ('09) 32 Mad 281 (283) (D B).

[18] If the usufructuary mortgagee permits the mortgagor to receive the rents and profits and a subsequent incumbrancer comes in and he has a notice thereof, he exposes himself to the claim of the subsequent incumbrancer. ('03) 26 Mad 662 (668, 669) (SB) ✠ (1841) 2 Moo Ind App 487 (500, 501) (P C).

[19] Mortgaged property not delivered to usufructuary mortgagee but in possession of trespasser—Mortgage subsisting — Mortgagor is entitled to sue trespasser for possession and mesne profits — Possession delivered to mortgagee—Mortgagee deprived of possession by trespasser— Right to sue for possession vests in mortgagee (Vol 26) 1939 Mad 887 (888).

[19a] Where a part of the property mortgaged usufructuarily is not delivered to the mortgagee, the mortgagee cannot claim by way of interest the profits of the property not delivered to him. (Vol 32) 1945 All 202 (203) : I L R (1945) All 676 (F B).

[20] The mortgagor must authorise the mortgagee to retain possession until payment of the mortgage-money. Where the mortgagee is authorised to retain possession for a certain period only, the mortgage is not a usufructuary one. (Vol 16) 1929 Pat 605 (608) : 8 Pat 16 (D B) ✠ (Vol 27) 1940 Cal 486 (487) : I L R (1940) 2 Cal 573 (D B).

Appropriation of rents and profits.

[21] Where the rents and profits are not to be taken in lieu of interest or principal but are to be set off against the interest agreed upon and in case of deficit the mortgagor is to be personally liable therefor, the mortgage is not a usufructuary one. (Vol 10) 1923 Mad 71 (71, 72) (D B).

[22] In the case of a lekha mukhi in the Punjab in which the mortgagor undertakes no personal liability, while the mortgagor is competent at any time to claim redemption on payment of the amount, the mortgagee is not entitled to sue for his debt. (Vol 27) 1940 Lah 401 (404) : I L R (1941) Lah 71 (F B) ✠ (Vol 18) 1931 Lah 498 (499) (D B).

[23] The most common form of usufructuary mortgage which has been in vogue in India for a very long time is the one in which the mortgagee is entitled to appropriate the rents and profits in lieu of interest. (Vol 27) 1940 Lah 401 (404) : I L R (1941) Lah 71 (F B) ✠ ('70) 1870 Pun Re No. 15, p. 51 (52) (D B) ✠ (Vol 12) 1925 Pat 288 (289) (D B) ✠ (Vol 4) 1917 Pat 14 (14) (D B) ✠ ('70) 1870 Pun Re No. 81, p. 208 (209) (D B) ✠ (1865) 2 Mad H C R 382 (383) (D B) ✠ ('68) 3 Mad H C R 363 (365) (D B).

[24] Where a mortgage deed states that until the mortgagor pays the amount on account of the principal, the mortgagee shall continue in possession and occupation, the mortgagee takes his chance of the rents and profits being greater or less than the interest which might have been reserved by the bond and the mortgagor is entitled to redeem on repayment of the mortgage-money. ('02) 24 All 521 (531) : 29 Ind App 148 (P C).

[25] Where the mortgagee is put in possession of the mortgaged property in lieu of interest and it has not been found that he has ever been dispossessed, he is not entitled to any interest but is entitled to the principal only. (Vol 13) 1926 Cal 1239 (1239) (D B).

[26] Where the mortgage is security only for the principal and the mortgagee is to have the profits in lieu of interest which is not payable otherwise, the mortgagee is not entitled to interest if he fails to take possession from the mortgagor. ('92) 17 Bom 425 (428) (D B) ✠ (Vol 8) 1921 Bom 28 (29) : 45 Bom 523 (DB).

[27] The fact that the document does not make any express provision for the appropriation of the usufruct for interest or principal does not make it any the less a usufructuary mortgage, if the necessary inference from the terms of the document is that it is to be appropriated to the one or the other. (Vol 8) 1921 Mad 12 (16, 17) : 43 Mad 589 (F B).

[28] Where there is no stipulation to pay interest but possession is given, it must be taken as an implied part of the mortgage contract that the usufruct must be taken in lieu of interest. ('04) 6 Bom L R 630 (632) (D B).

[29] The words "or any part of such rents and profits" were added in 1929 so as to cover cases where the mortgagee retains part of the rents and profits in discharge of the debt, and pays the balance to the mortgagor. Such cases were regarded before the amendment as anomalous mortgages. ('31) 1931 Mad W N 595 (599).

Absence of personal liability.

[30] There is no personal liability on the part of the mortgagor to repay the mortgage-money to the mortgagee, in a usufructuary mortgage. Consequently, the mortgagee cannot sue the mortgagor personally for the recovery of the debt. (Vol 1) 1914 Mad 317 (318) (DB) ✠('03) 5 Bom L R 119 (121) (D B)✠ (Vol 26) 1939 Lah 235 (236) (D B) ✠ (Vol 23) 1936 Pesh 48 (51) (D B) ✠ ('01) 3 Bom L R 156 (157) (DB)✠(Vol 2) 1915 Cal 376 (377) (D B)✠(Vol 15) 1928 Lah 355 (356) (DB).

[31] The interest of a usufructuary mortgagee is not a debt. (Vol 27) 1940 Lah 401 (405): I L R (1941) Lah 71 (FB).

[*See also* (Vol 28) 1941 Oudh 479 (481): 16 Luck 789 (D B). (Case of mortgage by conditional sale—(Vol 27) 1940 Lah 401 : I L R (1941) Lah 71 (FB), *Applied.*)]

[32] The interest of a usufructuary mortgagee cannot be attached as a 'debt' under O. 21, R. 46 of the Code of Civil Procedure (Vol 3) 1916 Mad 434 (435, 436) : 39 Mad 389 (DB)✠(Vol 15) 1928 Mad 648 (650, 651)✠ ('11) 35 Bom 288 (292) (DB).

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[See however (Vol 29) 1942 Pesh 66 (68). (Usufructuary mortgage containing covenant to pay can be attached under O. 21, R. 46.)]

[33] The interest of a usufructuary mortgagee can be attached under O. 21, R. 54 as immovable property. ('11) 35 Bom 288 (292, 293) (DB).

[34] The existence of a mere covenant to pay unaccompanied by a hypothecation of property (i. e., by a grant of the power of sale) does not change the character of what would otherwise be a usufructuary mortgage, so as to enable the mortgagee to sue for sale. (Vol 29) 1942 All 326 (327) : I L R (1942) All 363 (D B) ✠ (Vol 25) 1938 All 418 (421): I L R (1938) All 714 (SB) ✠(Vol 8) 1921 Mad 183 (192) : 44 Mad 301 (DB)✠('08) 10 Bom L R 615 (617) (D B) ✠ ('05) 28 All 157 (160) (DB). (Madras view disapproved.) ✠ (Vol 20) 1933 Lah 151 (151) (DB)

[But see (Vol 19) 1932 Lah 164 (167) : 13 Lah 259 (D B)✠(Vol 29) 1942 Cal 55 (58) (DB) ✠ (Vol 22) 1935 Lah 103 (104) : 16 Lah 612 (DB).]

Time limit for redemption.

[35] It is not necessary in a usufructuary mortgage to fix any period of redemption. A possessory mortgage providing that the mortgagee is to obtain possession of the property in lieu of a fixed sum with a condition that redemption is to take place whenever the mortgage-money is paid, is a good usufructuary mortgage. (Vol 15) 1928 Oudh 1 (5) : 3 Luck 1 (F B).

[36] The fixing of times for redemption is not inconsistent with the nature of a usufructuary mortgage. (Vol 8) 1921 Mad 183 (191, 192) : 44 Mad 301 (D B)✠ (Vol 8) 1921 Mad 517 (517) (D B) ✠ ('08) 32 Bom 569 (571) (D B)✠('13) 16 Oudh Cas 56 (62) ✠ (Vol 27) 1940 Cal 426 (427) (DB)✠(Vol 26) 1939 Lah 235 (236) (DB) ✠(Vol 27) 1940 Cal 436 (438) (DB)✠(Vol 21) 1934 Pat 217 (220) (DB) ✠ (Vol 25) 1938 Pat 388 (389) (D B) ✠ ('02) 26 Bom 252 (258) (FB).

[But see (Vol 9) 1922 Pat 167 (169): 1 Pat 350 (DB).]

[37] The fixing of a term for redemption is not equivalent to a covenant to pay at the end of the term. (Vol 8) 1921 Mad 183 (192) : 44 Mad 301 (D B).

[38] Mortgagees whose mortgages are not with possession cannot resist a suit for possession by a purchaser of the equity of redemption. (Vol 16) 1929 P C 288 (289) (P C).

[39] The addition of a condition that on default, the transaction should be treated as a sale does not, in an ordinary possessory mortgage, convert it into an anomalous mortgage. (Vol 12) 1925 Mad 366 (366).

[40] The covenants that the mortgagor would pay rent of the mortgaged land, that if, on any occasion the mortgagee had to pay arrears of rent he may recover the same from the mortgagor with interest, that if the mortgagor had already made a transfer or created a charge on the property the mortgagee can realise his amount from other property of the mortgagor etc , are not sufficient to change the character of the mortgage as a usufructuary one. (Vol 27) 1940 Cal 426 (428) (FB) ✠(Vol 24) 1937 Pat 94 (95) ✠ (Vol 29) 1942 Cal 522 (523) : I L R (1942) 2 Cal 28 (DB).

33. Zuripeshgi lease. — [1] A zuripeshgi lease is a lease for a premium ; usually, however, it amounts to a mortgage. (Vol 8) 1921 Nag 161 (162)✠('68) 3 Agra 146 (146) (D B)✠('69) 6 Beng L R 563*n* (564*n*) (DB)✠('75) 24 Suth W R 275 (278) (D B) ✠ (Vol 11) 1924 Pat 580 (581) : 3 Pat 465 (DB)✠('67) 2 Agra 122 (122) (DB).

[2] Whether a zuripeshgi lease amounts to a mortgage depends upon the question whether the premium is advanced as a loan and whether the land is intended to be security for such loan. ('98) 2 Cal W N 758 (759) (DB)✠('03) 16 C P L R 49 (51)✠(Vol 22) 1935 Pat 360 (364) (D B) ✠ (Vol 15) 1928 Pat 410 (411, 412) : 7 Pat 690 (DB).

[3] If the original premium is not an advance which is repayable but is satisfied by the lease, and there is no idea of giving any security for the loan, the transaction would be a lease and not a mortgage. ('83) 7 Mad 203 (206) (FB)✠(Vol 25) 1938 Pat 35 (36, 37) (D B) ✠ (Vol 26) 1939 Pat 265 (266, 267) ✠ (Vol 6) 1919 Mad 322 (324) : 41 Mad 959 (DB).

[4] The test to determine if a zuripeshgi lease is a mortgage is whether there is a secured debt and a right of redemption. (Vol 10) 1923 Pat 122 (128) : 2 Pat 217 (D B) ✠ ('82) 6 Bom 674 (680) (D B) ✠ (Vol 28) 1941 Pat 296 (298) (D B).

[5] Once you get a debt with the security of land for its re-payment, it is a mortgage by whatever name it is called. (Vol 25)1938 Pat 388 (389) (DB)✠(Vol 15) 1928 Pat 410 (412) : 7 Pat 690 (DB)✠(Vol 6) 1919 Mad 322 (324) : 41 Mad 959 (D B)✠(Vol 28) 1941 All 56 (59, 60) I L R (1941) All 17 (DB).

[6] Under documents styled zuripeshgi ticca patowa pattahs, the tenants advanced at the commencement, to the lessor, a certain sum of money for the liquidation of debts due to his creditors, the tenants being entitled to recover payment by retaining out of the rents payable by them, a yearly instalment of the sum advanced with interest at the rate of 6 annas per mensem. The leases contained an exprsss obligation by the tenants to quit occupation at their expiry. *Held* that the tenants' possession under them was, in part at least not that of cultivators only, but that of creditors operating repayment of the debt due to them, by means of their security. ('97) 24 Cal 272 (279, 280): 23 Ind App 158 (PC).

[7] Where *A* received from *B* Rs. 250 not by way of advance or loan but as a deposit by way of security for the due payment of the rent, and executed in favour of *B* what was termed as a zuripeshgi, it was held that this was only a lease and not a mortgage. ('69) 12 Suth W R 214 (215) (D B).

[8] *A* received a sum of money from *B*, and executed a zuripeshgi lease to *B* reciting that out of the rent, *B* was to appropriate a certain portion to the liquidation of the debt and to pay the balance of the rent to *A*. It was held that this was a mortgage. (1864) 1 Suth W R 52 (53) (DB) ✠ (Vol 13) 1926 Pat 77 (79) (DB).

[9] A deed in the form of Mustaki (lease) mortgage whereby the transferor purports to mortgage temporarily a garden stipulating that the transferee shall remain in possession for 7 years and that on expiry of the said period the whole mortgage sum of the mortgagee will be considered to have been paid up and the property being thus redeemed will come into possession of the owner without payment of any money held to be lease and not a mortgage. (Vol 30) 1943 Pesh 15 (17) (DB).

[10] The fact that no interest was provided for and a premium merely was paid at the inception of the lease may give rise to an inference that there was a lease and not a usufructuary mortgage. (Vol 2) 1915 Cal 769 (770) (D B).

[11] Thika lease— Possession of thikadar neither as security for repayment of advance nor to continue after expiry of period of thika till repayment — Transaction held lease and not mortgage. (Vol 34) 1947 Pat 78 (80) (DB).

[12] *A* gave a lease to *B* of a coal mine for 999 years. He also mortgaged by the same document the lands to *B* for a loan advanced by *B*. The deed further provided that *B* who had under the lease to pay royalty to *A*, could appropriate the royalty towards the mortgage-debt. Subsequently, the leasehold interest and the mortgage interest became vested in different per-

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sons. The mortgaged 'property was ordered to be sold subject to the lease thus regarding the two as separable transactions. (Vol 21) 1934 P C 119 (122, 123) (PC).

34. Kanom.— [1] In some cases a kanom may be a mere lease a sum being advanced as security for the rent or for proper cultivation to be repaid on the expiry of the time. In other cases, and most frequently, it is created as a lease by way of mortgage to secure a loan advanced to the jenmi (proprietor). Rent is payable in the case of every kanom, but all kanoms partake to a certain extent of the incidents of a usufructuary mortgage. ('81) 3 Mad 382 (383) (FB).

[2] A kanom in its mortgage aspect is a usufructuary mortgage. ('99) 22 Mad. 350 (351) (DB).

[3] Usually there is no covenant to pay and hence a suit for recovery of the money or for sale of the kanom property is not maintainable. ('99) 22 Mad 350 (351) (DB).

[4] In every kanom the kanomdar has an inherent right to hold for 12 years according to the custom of the country but this right can be excluded by the jenmi by an express agreement. ('79) 2 Mad 193 (193) (DB) ✠ ('91) 14 Mad 76 (77) (DB)✠(1862-63) 1 Mad H C R 296 (297) (DB).

[5] A kanomdar does not forfeit the right to hold for 12 years by his default to pay his parapad, i. e., the nett rent. As to whether he would forfeit his right to hold if he denies the jenmi's title, the cases are conflicting. (1862-63) 1 Mad H C R 112 (112) (DB)✠ (1863) 1 Mad H C R 113*n* (113*n*) (DB).

[6] A kanomdar would forfeit his right to hold if he denies the jenmi's title. (1863) 1 Mad H C R 445 (446) (DB) ✠ (1865) 2 Mad H C R 109 (110) (DB) ✠ (1865) 2 Mad H C R 161 (161) (DB).

[But see (Vol 3) 1916 Mad 652 (654) (DB) ✠ ('04) 27 Mad 26 (27) (DB).]

35. English mortgage. — [1] Where one of the parties is a Hindu and the property is situated in the mofussil the mortgage, though in an English form, should be treated as a mortgage by conditional sale. (Vol 5) 1918 Mad 373 (376) (DB).

[2] The three essentials of an "English mortgage" are: (1) The mortgagor should bind himself to repay the mortgage-money on a certain day. (2) The property mortgaged should be transferred "absolutely" to the mortgagee. (3) The 'absolute' transfer should be made subject to a proviso that the mortgagee will reconvey the property to the mortgagor upon repayment of the mortgage money, on the date on which the mortgagor bound himself to repay the same. ('02) 25 Mad. 220 (235) (FB)✠(Vol 26) 1939 Rang. 321 (322) : 1939 Rang L R 403 (FB) ✠ (Vol 23) 1936 Cal 646 (648) : I L R (1937) 1 Cal 359 ✠ (Vol 22) 1935 Cal 659 (661) (DB) ✠ (Vol 23) 1936 Pat 211 (214) : 14 Pat 560 (DB).

[3] An English mortgage will not cease to be so by the mere fact that the mortgagor undertakes to pay taxes, etc. (Vol 23) 1936 Cal 646 (648, 649):ILR (1937) 1 Cal 359 ✠ (Vol 29) 1942 Mad 628 (630) : ILR (1942) Mad 851 (DB) ✠ (Vol 33) 1946 Bom 499 (505, 506).

[4] Where on a construction of the document it is found that one or other of the essentials of an English mortgage is absent, then the mortgage is not an English mortgage. (Vol 22) 1935 Cal 659 (662, 663) (DB).

Personal liability.

[5] In an English mortgage, the debtor remains personally liable to pay the debt. ('06) 4 Cal L Jour 510 (513) (DB).

[6] Where the intention is to create an English mortgage a covenant to pay will in fact be presumed. (1913) 12 R R 82 (85, 86) : 2 Ball & B 274, *Goodman v. Grierson.*

[7] The personal covenant must be to repay the money on a certain date. The object is that it should be known with certainty when the mortgagor may redeem or the mortgagee proceed to foreclose or sell, an object which is not defeated by providing for earlier payments of interest. (Vol 23) 1936 Pat 211 (219) : 14 Pat 560 (DB).

[8] An option as regards earlier payment or an extension of time for payment is a matter of grace and does not affect the undertaking to repay on a certain date. (Vol 29) 1942 Mad 628 (630) : I L R (1942) Mad 851 (DB)✠ (Vol 23) 1936 Pat 211 (214, 219) : 14 Pat 560 (DB).

Absolute transfer.

[9] Section 58, cl. (c) cannot be construed as declaring an English mortgage to be an absolute transfer of the property but as merely declaring that such a mortgage would be absolute, were it not for the proviso for retransfer. The clause does not determine what legal effect follows from the particular form of words, it merely prescribed the form of words necessary to constitute what is known as an English mortgage. The clause deals with form, not with substance. (Vol 26) 1939 P C 14 (19) : I L R (1939) Kar (PC) 78 : I L R (1939) 1 Cal 283 : 66 Ind App 50 (PC).

[10] Whatever form is used nothing more than an interest is transferred and that interest is subject to a right of redemption. (Vol 5) 1918 Mad 373 (376) (DB)✠ (Vol 3) 1916 Low Bur 103 (103) : 8 Low Bur Rul 413 (DB)✠ (Vol 19) 1932 Cal 775 (782) : 59 Cal 1314 (DB).

[11] Unlike a mortgagor in England, the mortgagor under an English mortgage under the Act retains a legal interest both before and after the date fixed for payment. (Vol 26) 1939 P C 14 (19) : I L R (1939) Kar (P C) 78 : I L R (1939) 1 Cal 283 : 66 Ind App 50 (PC).

[12] Where a lessee for 999 years mortgaged, by way of an English mortgage, his leasehold interest to *X*, held that there was no privity of estate created between *X* and the lessor so as to make *X* liable for the burdens of the lease. (Vol 26) 1939 P C 14 (19) : I L R (1939) Kar (PC) 78 : I L R (1939) 1 Cal 283 : 66 Ind App 50 (PC). (The contrary view taken in (Vol 14) 1927 Cal 725 : 54 Cal 813, following (1819) 21 R R 585 (590), *Williams* v. *Bosanquet*, is not good law.)

[13] Where the instrument said "I hereby mortgage and assign" the estate, etc., it was held that the use of the word "assign" was sufficient to create an absolute transfer in favour of the mortgagee. ('02) 25 Mad 220 (235) (FB).

[14] The expression "grant, convey or transfer" followed by an absolute and indefeasible estate of inheritence in possession constitutes absolute transfer. (Vol 23) 1936 Pat 211 (218) : 14 Pat 560 (DB).

Proviso for reconveyance.

[15] Where the proviso for reconveyance was "upon repayment to the mortgagee of all sums due to him by the mortgagors the mortgagee shall reconvey the said property to the mortgagors," it was held that the third condition of an English mortgage was not satisfied as the covenant to reconvey did not depend upon payment being made at the stipulated time. ('02) 25 Mad 220 (236) (FB).

Possession of property.

[16] The mortgagee acquires the right to take possession as soon as the mortgage is executed, whether a right of entry is expressly covenanted for or not. (Vol 19) 1932 Pat 360 (362) (DB) ✠ (Vol 6) 1919 Cal 908 (912) : 45 Cal 653 ✠ (Vol 23) 1936 Pat 211 (220) : 14 Pat 560 (DB).

[17] The fact that the mortgagee obtained possession by proceedings which subsequently proved to be a

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nullity, could not stand in his way. (Vol 12) 1925 Cal 77 (79) (DB).

[18] The mortgagor in possession will be entitled to rents and profits until the mortgagee chooses to go into possession. (Vol 25) 1938 Pat 539 (543): 17 Pat 726(DB) ✠ (Vol 23) 1936 Pat 211 (220, 221) : 14 Pat 560 (DB).

[19] The fact that the rents collected by the mortgagee have to be accounted for by the mortgagee does not detract from the proposition that the right to the rents is in the mortgagee. (Vol 27) 1940 Cal 429 (432): ILR (1941) 1 Cal 197.

36. Equitable mortgage. — [1] An equitable mortgage in English law is of much wider import than it is under this Act. (Vol 20) 1933 Mad 293 (295) : 56 Mad 546 (DB).

[2] In the Punjab equitable mortgage has the same legal effect as any other mortgage. (Vol 17) 1930 Lah 920 (922, 927) : 11 Lah 564 (DB).

[3] The essentials of a mortgage by deposit of title deeds under the section are: (1) There must be a delivery of documents of title of immovable property. (2) Such delivery must be made to a creditor or his agent. (3) Such delivery must be made with intent to create a security thereon. (Vol 1) 1914 Bom 15 (16) : 38 Bom 372 (DB) ✠ (Vol 16) 1929 Rang 65 (66) : 7 Rang 28 (DB) ✠ (Vol 22) 1935 Lah 821 (823) (DB) ✠ (Vol 24) 1936 Lah 251 (254) (DB) ✠ (Vol 12) 1925 Mad 723 (724) : 48 Mad 454 (DB) ✠ (Vol 13) 1926 Mad 743 (743, 744).

Delivery of documents of title.

[4] Where the title deeds are already with the creditor for a purpose unconnected with any loan, and the debtor writes to the creditor that he may retain the deeds as security for the loan, a delivery must be deemed to have been made and an equitable mortgage is therefore created by such deposit. ('71) 16 Suth W R 203 (205) (DB).

[5] What is delivered must be a document of title. If the documents deposited show no kind of title in the depositor, no mortgage is created. ('11) 21 Mad L Jour 454 (455) (DB) ✠ (Vol 19) 1932 Cal 589 (593) : 59 Cal 781 (DB).

[6] It is not necessary that the documents deposited should connect the mortgagor with some predecessor of his, who had acquired the property originally. It is sufficient if the documents deposited show the mortgagor's title to the property. (Vol 19) 1932 Cal 589 (593): 59 Cal 781 (DB).

[7] It is not necessary that the whole or even the most material of the documents of title to the property should be deposited. It is sufficient if the deeds deposited *bona fide* relate to the property or are material evidence of title and are shown to have been deposited with the intention of creating a security thereon. (Vol 25) 1938 Rang 149 (150) : 1938 Rang L R 316 (FB). ((Vol 20) 1933 Rang 299 : 11 Rang 239, *Overruled.*) ✠ (Vol 15) 1928 Pat 304 (311) : 7 Pat 520 (DB) ✠ (Vol 4) 1917 Pat 268 (271, 272) : 2 Pat L Jour 293 (DB) ✠ (Vol 19) 1932 Cal 589 (592) : 59 Cal 781 (DB) ✠ (Vol 25) 1938 Mad 865 (874) (DB) ✠ (Vol 17) 1930 Lah 920 (922) : 11 Lah 564 (DB).

[8] A copy of a jamabandi record is not a document of title. (Vol 23) 1936 Lah 251 (255) (DB) ✠ (Vol 22) 1935 Lah 721 (724) : 16 Lah 1113 (DB).

[9] A document cannot be considered a document of title unless it is clear that a better document is not available. (Vol 23) 1936 Lah 251 (255) (DB).

[10] *A* relinquished in favour of his father *B* his share in property *x* and *B*, in consideration thereof gave *A* property *y*. There was no deed for this latter transfer. *A* deposited a copy of the deed of relinquishment (which referred to the gift by *B* of property *y* to *A*) with *C* in respect of a loan. It was held that the said document was a document of title and was sufficient to create an equitable mortgage. (Vol 17) 1930 Lah 731 (733) : 11 Lah 694 (DB).

[11] The doctrine of equitable mortgage requires the mortgagor to deprive himself of the possession of the document which creates his title so as to render him unable to deal with the property upon the assertion that the title is still with him. (Vol 22) 1935 Lah 10 (12) ✠ (Vol 23) 1936 Lah 251 (255) (DB).

[12] Further illustrations of documents of title :

(a) Patta of lands in the mofussil. (Vol 12) 1925 Mad 723 (725) : 48 Mad 454 (DB) ✠ (Vol 18) 1931 Mad 613 (615).

(b) A mortgage is a document of title of the mortgagee. (Vol 23) 1936 Rang 366 (366).

(c) An expired lease is a document of title to the lease-hold when the lessee obtains a renewal of the lease. (Vol 21) 1934 Rang 51 (57).

(d) Share certificate. ('11) 11 Ind Cas 783 (784) (DB) (Low Bur).

(e) Record by Revenue Surveyor reciting an oral sale and revenue tax receipts. (Vol 25) 1938 Rang 149 (150) : 1938 Rang L R 316 (FB).

(f) "Sold notes" by firms from whom machinery of a factory was purchased, the drafts for the purchase price, and receipts by the firms for the amounts paid, insurance certificates are all documents of title of the factory (Vol 26) 1939 Lah 398 (403) (DB).

(g) Original probate of a will accompanied by a certified copy of a redemption certificate relating to the property, the original having been lost, creates a good equitable mortgage. (Vol 19) 1932 Cal 589 (593) : 59 Cal 781 (DB).

[13] Illustrations of documents which are not documents of title :

(a) Map of property and unimportant letters. (Vol 26) 1939 Lah 398 (401) (DB) ✠ (Vol 24) 1937 Lah 926 (928) (DB). (A copy of a plan submitted to the Municipality for sanction to build on the site.)

(b) A mortgage is not a document of title of the mortgagor. (Vol 13) 1926 Mad 743 (743).

(c) Where the original title deed is not available a copy thereof may be a good document of title but not where the original is in existence and its production is within the power of the mortgagor. (Vol 22) 1935 Lah 10 (11) ✠ (Vol 22) 1935 Lah 721 (722) : 16 Lah 1113 (DB) ✠ (Vol 19) 1932 Cal 356 (365) : 59 Cal 586 (DB) ✠ (Vol 19) 1932 Cal 589 (593) : 59 Cal 781 (DB).

(d) A document of title of moveable property such as a machinery cannot be construed as a document of title of immovable property merely because the moveable property has by subsequent fixture to the immovable property become immovable property. (Vol 25) 1938 Lah 255 (258) (DB).

(e) A mutation entry is not a document of title. (Vol 22) 1935 Lah 957 (957) (DB).

(f) A treasury certificate that certain sums of money were deposited in the Imperial Bank of India as the purchase price of certain land is not a document of title. (Vol 22) 1935 Lah 957 (957) (DB).

Scope of the security is the scope of the title.

[14] (1) Where titles of property are handed over with nothing said except that they are to be security, the law supposes that the scope of the security is the scope of the title. (2) Where, however, titles are handed over accompanied by a bargain, that bargain must rule. (3) Lastly, when the bargain is a written bargain, it, and it alone, must determine what is the scope and extent of the security. (Vol 3) 1916 P C 115 (116) : 43

Section 58 — Note 36 *(contd.)*
Cal 895 : 43 Ind App 122 : 8 Low Bur Rul 458 (PC)✠ (Vol 10) 1923 PC 50 (53) :50 Ind App 77 : 1 Rang 66 : 50 Cal 338 (PC).

[15] Where a deposit of title deeds of several properties was made but on the back of the promissory note executed for the loan there was a note as to security: "grant of a house in 14th Street, Rangoon" it was held that the property mortgaged was only the house and not the other properties. (Vol 3) 1916 P C 115 (116, 117) : 43 Cal 895 : 43 Ind App 122 : 8 Low Bur Rul 458 (PC).

[16] Where a title deed relating to two properties was deposited as security for a loan, but the memorandum accompanying it mentioned one of such properties alone as pledged the depositary was held not entitled to claim an equitable mortgage over the other property. (1863) 33 L J Ch 51 (53) :9 L T 471, *Wydle* v. *Rodford.*

[17] Where a person puts up a superstructure on a plot of land of which he is a tenant and subsequently purchases the land from the landlord the title-deeds though relating to land alone would clearly cover the superstructure also and the deposit thereof would create an equitable mortgage of the entire property consisting of the ground and the superstructure thereon. (Vol 29) 1942 Mad 369 (370).

Delivery must be made to a creditor or his agent.

[18] The delivery must be made to the creditor or it agent. (Vol 24) 1937 Rang 154 (157) : 1937 Rang L R 303 (DB). (Agent.)

[19] Where a person was acting as attorney for both the parties and delivery of the document was made to him through his assistant but there was no proof that the delivery was made to him as agent of the creditor, it was held that there was no valid equitable mortgage. (Vol 19) 1932 Cal 823 (825) (DB) ✠ (1813) 35 E R 249 (250) : 13 R R 32, *Ex parte Kanzington.*

[20] Where at the time the deeds are handed over there is no antecedent or existing debt nor any agreement for any future advance, the handing over will not constitute an equitable mortgage. ('86) 10 Bom 634 (645).

[21] A debtor may execute a promissory note to the creditor and at the same time deposit title deeds by way of security. (Vol 12) 1925 Cal 485 (491) (DB).

[22] Deposit of title-deeds under agreement to cover present and future advances — Each advance becomes charge on property — Not fresh deposit of title-deeds is necessary. (Vol 23) 1936 Cal 412 (413) (DB).

[23] Where the title deeds already in the possession of the creditor are agreed to be held by him as a security for a further advance, there is a constructive delivery of the deeds which is sufficient to create an equitable mortgage. (Vol 16) 1929 Rang 107 (108) ✠ (Vol 15) 1928 Sind 172 (186) : 23 Sind L R 97 (DB) ✠ (Vol 24) 1937 Rang 154 (156) : 1937 Rang L R 303 (DB) ✠ ('98) 25 Cal 611 (614, 615).

[24] *A* executed two promissory notes for Rs. 350 and Rs. 2000 respectively to *B* and also deposited title deeds by way of equitable mortgage. Subsequently, he executed a single promissory note for Rs. 3000, being the amonut then due on the two promissory notes, the deeds already deposited remaining with *B*. It was held that the retention of the deeds by *B* was enough to raise a presumption that the parties intended that they should be retained as security for the amount of the last note. ('08) 4 Low Bur Rul 371 (373).

The delivery must be with intent to create security.

[25] The mere fact that title deeds are handed over by *A* to *B* does not establish a mortgage. (Vol 14) 1927 Bom 167 (168, 169) (DB).

[26] Title deeds must be handed over in pursuance of an agreement to give them as security for the loan advanced. (Vol 31) 1944 P C 22 (23) : I L R (1944) Kar P C 73 (PC) ✠ (Vol 10) 1923 P C 87 (88) : 1 Rang 545 (PC).

[27] The mere fact that title deeds of the debtor are found to be with the creditor without any explanation or connection being established between the loan and the title deeds will not constitute a mortgage. (Vol 1) 1914 Bom 15 (16) : 38 Bom 372 (DB).

[28] Oral evidence is admissible to prove the circumstances under which the documents came to be in the possession of the alleged mortgagee. (Vol 24) 1937 Rang 69 (71) : 14 Rang 522 (DB)

[29] *A* and *B* constituted the partners of a firm. *B* was, under the agreement of partnership, bound to redeem certain partnership property mortgaged with *C*. *A* advanced money to clear off the mortgage and obtained the title deeds of the property from the mortgagee "as a manager of the firm." It was held that the transaction was not a mortgage by *B* to *A* but was merely a partnership transaction. (Vol 10) 1923 P C 87 (88) : 1 Rang 545 (PC)

[30] There was no antecedent debt to secure which the title deeds were deposited—Intention from inception was to effect a legal mortgage — A legal mortgage was prepared and accepted—It was, however, invalid under S. 59—*Held*, deposit of title deeds could not be fallen back upon. ('93) 18 Mad 29 (30) (DB).

[31] *A* agreeing to pay Rs. 10,000 to *B*—*B* depositing on 2nd April 1883, title deeds for preparation of mortgage-deed—*B* asking for money — *A* not prepared to pay until deed was prepared—Deed executed on 6th April 1883—Money paid immediately before execution —*A* stating that he had advanced money on the security of title deeds on the same day—Mortgage-deed not registered though it was known to require registration —*Held*, no equitable mortgage was created as there was no debt or advance when the title deeds were deposited nor were they intended to stand as security—The mortgage-deed held was intended to be the security. ('86) 10 Bom 634 (644).

Registration.

[32] Under this section no memorandum need accompany a deposit in order to create a mortgage, though such a memorandum is not prohibited. (Vol 10) 1923 Mad 262 (265) (DB)✠(Vol 4) 1917 Mad 799 (801) (DB) ✠ (Vol 27) 1940 Lah 285 (287) (DB).

[33] If the memorandum constitutes the bargain between the parties the memorandum itself constitutes the mortgage and must be registered. (Vol 30) 1943 Sind 36 (38) : I L R (1942) Kar 479 (DB) ✠ (Vol 20) 1933 Pesh 35 (36, 37) (DB) ✠ (Vol 8) 1921 Lah 253 (254) (DB) ✠ (Vol 24) 1937 Cal 741 (743) : I L R (1938) 1 Cal 187 (DB) ✠ (Vol 22) 1935 Rang 333 (334) (DB) ✠ (Vol 19) 1932 Bom 401 (402, 403) ✠ (Vol 1) 1914 Bom 15 (16) : 38 Bom 372 (DB).

[34] If the memorandum was merely the record of an already completed bargain it need not be registered. (Vol 30) 1943 Sind 36 (38) : I L R (1942) Kar 479 (DB) ✠ (Vol 10) 1923 P C 50 (53) : 50 Cal 338 : 1 Rang 66 : 50 Ind App 77 (PC).

[35] For the purpose of considering whether the memorandum is to be taken as embodying the bargain between the mortgagor and the mortgagee or as evidencing a transaction which had already been completed before the memorandum was executed or delivered, not only the terms of the document must be looked into but also the surrounding circumstances. (Vol 25) 1938 Cal 823 (826, 827) (DB).

[36] Where the parties professing to create a mortgage by deposit of title deeds contemporaneously enter into a

Section 58 — Note 36 *(contd.)*

contractual agreement, in writing which is made an integral part of the transaction and is itself an operative instrument and not merely evidential, such a document must under the statute, be registered. (Vol 26) 1939 P C 167 (170) : 66 Ind App 184 : I L R (1939) 2 Cal 243 : I L R (1939) Kar (P C) 287 (PC). (Confirming on appeal in (Vol 25) 1938 Cal 308 : I L R (1937) 2 Cal 586.)

[37] *A* giving promissory note to *B* and also memorandum containing list of title deeds as agreed —Memorandum held was mere record of particulars of deeds and was admissible in evidence without registration. (Vol 18) 1931 P C 36 (38) : 58 Ind App 68 : 54 Mad 257 (PC) ✠ (Vol 30) 1943 Sind 36 (39) : I L R (1942) Kar 479 (DB).

[38] In the Punjab where the Act does not apply, a memorandum constituting the bargain between the parties must be registered under the Registration Act. (Vol 28) 1941 Lah 224 (225) (DB) ✠ (Vol 24) 1937 Lah 135 (140) (DB).

[39] *B* borrowed from *A* a certain sum upon a pronote and upon the terms that title deeds of certain property would be deposited as security. The title deeds and pronote were accordingly handed over to *A*'s agent who thereupon wrote a letter forwarding the same to *A*. It was held that the letter having been written by *A*'s agent to *A* could not be regarded as itself constituting the agreement between *A* and *B*, so as to require registration. (Vol 31) 1944 P C 22 (23, 24) : I L R (1944) Kar (PC) 73 (PC).

Remedy of the equitable mortgagee :

[40] An equitable mortgagee has remedies similar to those of a simple mortgagee. (Vol 23) 1936 Rang 400 (401) (DB).

[41] A mortgagee by deposit of title deeds is not deprived of his right to recover the debt by his inability to produce either the deeds deposited or any memorandum of deposit when the Court believes that there was a deposit and that the deeds have been really lost. (1863) 11 W R (Eng) 1019 (1020) : 2 N R 547, *Baskkett* v. *Skeel*.

[42] Where at the time of a mortgage by deposit of title deeds a person other than the mortgagor is in possession of the property, the mortgagee will be imputed with notice of the title and of all facts and circumstances under which possession was retained, which any one dealing with property cannot, without risk, ignore. (Vol 7) 1920 P C 274 (276).

Territories in which equitable mortgage can be made :

[43] The territorial restrictions referred to in the clause have reference to the delivery of the deeds, and not to the situation of the property. Even if the property is situated out of British India a valid mortgage might be created if the delivery of the title deeds is made in the territories specified. (Vol 19) 1932 Bom 642 (644) : 57 Bom 234.

[44] The property may be situated outside the territories specified provided the delivery was made within such territories. ('97) 24 Cal 348 (349). (Deposit in Calcutta—Some of the properties outside Calcutta.) ✠ ('92) 14 All 238 (241) (DB) ✠ (Vol 1) 1914 Bom 15 (17) : 38 Bom 372 (DB) ✠ ('12) 6 Low Bur Rul 23 (25) (DB).

[But see (Vol 34) 1947 Lah 324 (335) (FB). ((Vol 20) 1933 Lah 972 and (Vol 23) 1936 Lah 946 : 17 Lah 686, *Overruled*.)]

[45] A delivery outside the specified territories will not create a mortgage even if the property is within such territory. (Vol 19) 1932 Cal 823 (825) (DB) ✠ (Vol 19) 1932 All 451 (452) (DB) ✠ ('04) 28 Mad 54 (56) (DB) ✠ (Vol 14) 1927 Pat 41 (42) (DB).

[46] An equitable mortgage may be made by deposit in Madras of the title deeds of property situated within the Civil and Military Station of Bangalore. (Vol 18) 1931 P C 239 (241) : 59 Cal 439 : 58 Ind App 333 (PC).

[47] A deposit in England of the title deeds of land in India was held to create a valid mortgage on the land. (1862) 11 W R (Eng) P C Dig 6 (6) : 6 L T 767, *Sam* v. *Lallah*.

[48] The expression "person in any of the following towns" does not mean that the person delivering the document should be in the towns specified. The various towns must be read as going with "delivers." It is only the delivery that should be made within the said towns. (Vol 24) 1937 Bom 39 (41) : I L R (1937) Bom 763.

[49] Where *A*, in Bombay asked *B* in Poona to send the title deeds by post and *B* sent them by post, it was held that the delivery to the Post Office was a delivery to *A*'s agent made in Poona and not in Bombay. (Vol 24) 1937 Bom 39 (43) : I L R (1937) Bom 763.

Punjab :

[50] The Act does not apply to the Punjab and a part of the Province of Delhi. Therefore there is no prohibition of creating an equitable mortgage in any part of those provinces. (Vol 31) 1944 P C 22 (24) : I L R (1944) Kar (P C) 73 (P C). (Delhi.) ✠ (Vol 22) 1935 Lah 10 (11). (The Punjab.)

37. Anomalous mortgages.—[1] Under the present definition, a combination of a simple mortgage and a usufructuary mortgage and a combination of a mortgage by conditional sale and a usufructuary mortgage would amount to anomalous mortgages. ('41) 73 Cal L Jour 246 (248) (DB).

[2] A mortgage may be anomalous without being made up of two or more of the four types defined in the section. (Vol 23) 1936 Pat 211 (220) : 14 Pat 560 (DB).

[3] Forms of anomalous mortgages:

(a) A mortgage with possession containing also a covenant to pay the principal and interest. (Vol 14) 1927 P. C. 32 (36) : 50 Mad 180 : 54 Ind App 68 (PC) ✠ (Vol 29) 1942 Cal 55 (58) (DB) ✠ ('91) 14 Mad 232 (234) (DB).

(b) A mortgage with possession with a stipulation that the transferee should appropriate the rents and profits for a specified term of years and then give back the land. ('02) 26 Bom 252 (258) (FB) ✠ ('98) 21 Mad 1 (3) (DB).

(c) Mortgagor to repay the instalments with interest or to redeem at any time—Mortgagee to remain in possession — Mortgage held anomalous. (Vol 6) 1919 P C 121 (123) : 15 Nag L R 134 (PC).

(d) A usufructuary mortgage with a clause that if the mortgagor does not pay off the mortgage-money in accordance with the demand of the mortgagee the latter will be entitled to realize the money by auction sale of the mortgaged property with the help of the Court. (Vol 27) 1940 Cal 426 428 (DB).

(e) A mortgage deed provided that on receipt of certain amount the possession of the property was made over to the mortgagee — It was then stipulated that after a period of 28 years the debt would be extinguished both as regards the principal and interest — There was a stipulation by which the mortgagor agreed that in the event of the mortgagee being dispossessed of the property in any way, the mortgagor would on account of the period of dispossession, be liable to pay interest at certain rate per month—There was, in addition to this, a personal covenant to pay — *Held*, that the mortgage in question was an anomalous mortgage. (Vol 27) 1940 Cal 372 (372, 373).

Section 58 — Note 37 *(contd.)*

(i) Where a mortgage deed contained one clause which would make it a usufructuary mortgage but another clause provided in the most explicit terms for recovery of the amount due from the mortgaged property it was held that the mortgage was not usufructuary but was anomalous. (Vol 25) 1938 Lah 145 (147) (DB).

(g) Words in the mortgage were "if the amount of this mortgage deed is not satisfied according to the stipulation agreed upon the mortgaged property shall stand foreclosed as given below. I will have no connexion with the mortgaged property in future" — The words "lahan gahan" were used — Deed held to be anomalous mortgage and not mortgage by conditional sale. (Vol 27) 1940 Nag 156 (157): I L R (1941) Nag 607 (DB).

(h) Mortgage was in the first instance a simple mortgage and in the event of non-payment of principal sum on the date fixed, mortgage to be converted into usufructuary mortgage. (Vol 21) 1934 Rang 159 (159).

(i) Where a mortgage deed contained a covenant to pay interest but nowhere was there any covenant to repay the principal and subsequently the mortgagor deposited certain title deeds not mentioned in the mortgage as further security — *Held* that it was an anomalous mortgage. (Vol 15) 1928 Rang 16 (17) : 5 Rang 558 (DB).

(j) Mortgage without possession — Mortgagor not entitled to redeem before five years — On non-payment mortgagee given a right of foreclosure — No ostensible sale or any requirement of S. 58 (c) — *Held*, anomalous mortgage. (Vol 28) 1941 All 169 (171) : I L R (1941) All 240.

(k) A mortgage bond ran thus: "We shall pay off your said amount within three years from today. But if in the meantime a third party brings any suit against us or any one of us and attaches or endeavours to bring into auction any property of us, then, without waiting for the due date, you shall forthwith bring a suit for foreclosure of this kot kobala and having got a decree shall be owners of the properties mentioned in the schedule" — *Held*, that the document was not a mortgage by conditional sale but an anomalous mortgage. (Vol 14) 1927 Cal 836 (840) : 54 Cal 687 (DB).

(l) In a dakhali-rehan deed, the mortgagors stated that they had taken a loan which they expressly promised to pay by a certain date — It was next stipulated that in the event of non-payment, the creditors would be put in possession of certain property as dakali rehandars until payment — There was a further stipulation that if the creditors, through any act done by the mortgagor or in any manner failed to get possession over the property, they should be at liberty to realize the principal with interest from the person and properties of the mortgagors or from the rehan property in any manner they liked — *Held*, that the mortgage was of an anomalous kind. (Vol 24) 1937 Pat 261 (262) (DB).

38. Simple mortgage usufructuary.—[1] Under the present section a simple mortgage usufructuary is an anomalous mortgage. (Vol 21) 1934 Oudh 255 (255): 10 Luck 10 (DB) ✠ (Vol 26) 1939 All 615 (616).

[2] The characteristic of this mortgage is that the property is collaterally pledged as in the case of a simple mortgage with a covenant to pay, and the mortgagee is given the usufruct of it by allowing him to take the rents and profits. ('04) 27 Mad 526 (527) (FB) ✠ ('93) 17 Bom 425 (428) (DB) ✠ (Vol 1) 1914 Nag 36 (37) : 10 Nag L R 185.

[3] Where under an instrument purporting to be a mortgage possession is transferred and there is a stipulation to pay the money at a particular time, failing which the property is to be regarded as sold to the mortgagee, it was held that it was a simple mortgage usufructuary and not a mortgage by conditional sale. (Vol 8) 1921 Mad 12 (16) : 43 Mad 589 (FB).

[4] Where a mortgage provided that if the mortgagee took possession, he would be entitled to receive the rents and profits in lieu of interest, but that, if during the period of possession the profits did not cover the amount of interest at a certain rate, the mortgagor would make good the deficiency; it was held that this was a combination of a simple and a usufructuary mortgage. ('06) 28 All 225 (231): 33 Ind App 42 (PC).

[5] Mortgage—Mortgagee to take possession of property on default in payment of interest and to enjoy usufruct in lieu thereof—Mortgage held was not simple but anomalous from date of execution. (Vol 30) 1943 All 337 (339) : I L R (1943) All 802 (FB).

[But see (Vol 4) 1917 Mad 198 (199) (DB).]

39. Sale in execution of mortgage decrees and money decrees. — [1] Where a simple mortgagee obtains only a money decree against the mortgagor and sells the property in execution, the auction-purchaser gets only the right, title and interest of the judgment-debtor at the time of the sale. ('75) 1 All 240 (245) (FB).

[2] A sale in execution of a mortgaged decree will pass the right, title and interest of the judgment-debtor existing not at the time of sale, but at the time of the mortgage. ('75) 1 All 240 (245) (FB).

[3] If a mortgagee puts up the mortgaged property for sale in execution of a decree, he sells the entire interest that he and the mortgagor could jointly sell and not merely the right, title and interest of the mortgagor as they stood at the time of the sale. ('79) 4 Cal 817 (820, 823) (DB).

40. Construction.—[1] Where the instrument is of a doubtful character it is incumbent on the Court to ascertain the intention of the parties as disclosed in the deed itself. (Vol 29) 1942 Nag 115 (116) : I L R (1942) Nag 592 (DB) ✠ ('08) 10 Bom L R 615 (616) (DB).

[2] The scope of the mortgage deed with respect to the items of the property mortgaged is to be determined from the intention of the parties as expressed in the deed. ('68) 3 Agra 27 (29) (DB).

[3] *A* gave a mortgage to *B*, and it was stated therein that if the mortgagor sold the mortgaged property or any part of it, he would pay over the entire proceeds to *B*. *A* subsquently sold a part of the property to *C* without the consent of *B*, and a portion of the proceeds was paid to *B*. It was held that the clause did not empower the mortgagor to sell the mortgaged property to any one without the consent of the mortgagee free of the mortgage but that it was merely a provision for piecemeal redemption. (Vol 24) 1937 P C 124 (126) : I L R (1937) Lah 245 : 64 Ind App 126 : 31 Sind L R 271 (PC).

[4] A mortgage deed specifically enumerated certain villages as the property mortgaged but in describing the rent thereof, included the rent of other villages also. It was held that the mortgage should be treated as operative only in respect of the villages specifically mentioned. (Vol 1) 1914 Cal 793 (794) (DB).

[5] The land mortgaged was stated to be 12 bighas out of the mortgagor's holding of 15 bighas. The proportionate rent was also stated. The mortgagee obtained a decree for sale and the property was sold by auction. It was, however, subsequently found that the holding contained 25 bighas, but the rent was the same. The auction-purchaser, therefore, claimed posses-

[a]59. Where the principal money secured is one hundred rupees or upwards, a mortgage

Mortgage when to be by assurance.

[b][other than a mortgage by deposit of title deeds] can be effected only by a registered instrument signed by the mortgagor and attested by at least two witnesses.

Where the principal money secured is less than one hundred rupees, a mortgage may be effected either by [c][a registered instrument] signed and attested as aforesaid, or (except in the case of a simple mortgage) by delivery of the property.

[d][* * * * *]

[a] As to limitation to the territorial operation of S. 59, *see* S. 1, *supra*. Section 59 extends to every cantonment in British India, *see* Cantonments Act, 1924 (2 [II] of 1924), S. 287. [b] *Inserted* by the Transfer of Property (Amendment) Act, 1929 (20 [XX] of 1929), S. 20. [c] *Substituted* by the Transfer of Property (Amendment) Act, 1904 (6 [VI] of 1904), S. 3, for "an instrument". [d] The third paragraph was *repealed* by the Transfer of Property (Amendment) Act, 1929 (20 [XX] of 1929), S. 20.

Section 58 — Note 40 *(contd.)*

sion of the land in proportion to the rent stated in the bond out of the 25 bighas. It was held that it was not correct, as between a debtor and a creditor, to give the creditor a larger portion than what was mortgaged to him just because of the proportion of the rent. (Vol 23) 1936 Cal 780 (781).

[6] By a bond a mortgagor charged a half share of the profits of his mouza with the payment of the mortgage debt and interest. It was further stipulated that the mortgagee should take the management of the mouza, render accounts to the mortgagor and if the mortgagor failed to pay the debt when due the mortgagee should continue in possession till all the debt was paid. It was also provided that the mortgagor will have no power to transfer or alienate the property. It was held that it was a mortgage of the profits of the mouza and not the mouza itself. Had the last condition stood alone, it would have been sufficient to constitute a simple mortgage of the estate itself. ('75) 1 All 611 (612, 613) (DB).

[7] A usufructuary mortgagee was to take profits in lieu of interest which was fixed. Any deficiency was to be paid by the mortgagor and in case of default the mortgagee was to recover it from the property *Z*. It was held that *Z* was secured for the payment of the deficiency in interest. ('12) 16 Ind Cas 982 (983) (DB) (All).

[8] *A* mortgaged property to *B*. Afterwards a dispute having arisen between them, it was agreed that the property should be put in possession of the mortgagee and he should take the interest from the profits and the excess should be paid to the mortgagor. The arrangement was to come into effect on the same date and was recorded by the Court (Revenue). It was held that this arrangement effected a fresh contract of mortgage. (Vol 12) 1925 Oudh 308 (309) : 27 Oudh Cas 357.

SECTION 59 — SYNOPSIS.

1. Scope.
2. Mortgage when sum secured is one hundred rupees or upwards.
3. Mortgage where sum secured is less than one hundred rupees.
4. Registered instrument.
5. "Signed."
6. Attested by two witnesses.
7. Attestation and estoppel.
8. Mortgage by company.
9. Unregistered bond—Admissibility in evidence.
10. Effect of transaction where registration is invalid.

1. Scope. — [1] A simple mortgage can be made only by a registered instrument, whatever be the amount of the principal money secured. ('11) 12 Ind Cas 25 (26) (Low Bur).

[2] Anomalous mortgages such as a kanom or a melcharth or melkanom rent, must, in order to be valid, conform to requirements of this section. (Vol 8) 1921 Mad 243 (245) : 44 Mad 344 (DB).

[3] A mortgage of moveables is not governed by this section and does not require to be registered or attested. (Vol 11) 1924 Mad 542 (544) (DB)✠(Vol 28) 1941 Mad 305 (805).

[4] The technical rules, such as are referred to in this section, relating to the execution, and attestation of a mortgage have not been applied in the Punjab and a part of the Province of Delhi where the Act is not in force. (Vol 23) 1936 Lah 946 (953) : 17 Lah 686 (DB)✠(Vol 17) 1930 Lah 920 (922) : 11 Lah 564 (DB).

[5] It has been held that where a transaction of mortgage is entered into and completed within the area in which the T. P. Act is in force but the property is situate outside such area, the form and the validity of the conveyance are determined not by the *lex loci contractus* but by the *lex situs* of the property involved. (Vol 34) 1947 Lah 324 (335) (FB).

[6] It has been held that the Act is not exhaustive and that an award of arbitrators could create a valid mortgage though unattested and unregistered. (Vol 11) 1924 Sind 23 (24) : 17 Sind L R 178 (DB).

[7] A document of mortgage, though properly executed in accordance with S. 63A of the Dekkhan Agriculturists' Relief Act (XVII of 1879) will be invalid if it is not duly attested as required by this section. ('09) 33 Bom 44 (49) (DB).

2. Mortgage when sum secured is one hundred rupees or upwards. — [1] Where a statute requires a transfer to be made in a particular manner, it can be made only in the way so pointed out by the statute, or by a decree of a competent Court. (Vol 28) 1941 P C 90 (92) : I L R (1942) Mad 82 : I L R (1941) Kar (PC) 127 : 68 Ind App 136 (PC).

[2] An unregistered document of mortgage when the principal amount secured is one hundred or upwards does not affect the property dealt with by it. (Vol 8) 1921 Oudh 203 (203)✠('12) 14 Ind Cas 815 (816) (Upp Bur) ✠ ('04) 28 Mad 54 (56) (DB) ✠ ('08) 31 Mad 330 (332) (DB).

[3] Where an unregistered bond requiring registration is executed in consideration of previous bonds the previous bonds do not get merged in the unregistered bond and the promisee does not lose his right to proceed to enforce such previous bonds. ('12) 14 Bom L R 26 (29) (DB).

[4] An oral mortgage, in a case where the sum secured is one hundred rupees or upwards is invalid and conveys no interest. (Vol 22) 1935 Rang 230 (232) : 13 Rang 274 (FB). (No evidence is admissible to prove such a mortgage.)✠(Vol 4) 1917 Low Bur 128 (129) : 8 Low Bur Rul 334 (FB) ✠ (Vol 27) 1940 Rang 11 (12) : 1939 Rang L R 645 (FB)✠(Vol 19) 1932 All 259 (259) (DB).

Section 59 — Note 2 *(contd.)*

[5] Where possession has been delivered to the lender in an unregistered or oral mortgage where the sum secured is one hundred rupees or upwards, the borrower cannot sue for redemption on the basis of the mortgage. His remedy would be to sue for possession on title, and the lender's remedy is to sue for recovery of the amount paid by him. (Vol 27) 1940 Rang 11 (12) : 1939 Rang L R 645 (FB)✠(Vol 4) 1917 Low Bur 128 (129) : 8 Low Bur Rul 334 (FB) ✠ (Vol 22) 1935 Rang 230 (232) : 13 Rang 274 (FB)✠(Vol 34) 1947 Bom 206 (208). (Usufructuary mortgage.)✠(Vol 19) 1932 All 259 (259, 260) (DB)✠(Vol 22) 1935 All 578 (578)✠(11) 34 Mad 64 (67) (DB).

[6] Suit for redemption based on inadmissible mortgage deed is maintainable where defendant admits that he is mortgagee and is willing to restore possession on payment of mortgage amount. (Vol 34) 1947 Lah 335 (338, 339).

[7] Until the mortgage document is registered the mortgagee is not under any obligation to advance the mortgage-money to the mortgagor. Till then there is no debt in the hands of the mortgagee payable to the mortgagor. A creditor of the latter cannot therefore attach such amount in the hands of the mortgagee. (Vol 9) 1922 All 384 (385) (DB).

[8] A mere admission by *A* that *B* was in possession of his property as mortgagee under an oral mortgage for a consideration of over Rs. 100 is insufficient to create a mortgage. (Vol 34) 1947 Pat 110 (111).

3. Mortgage where sum secured is less than one hundred rupees. — [1] A simple mortgage, even for less than one hundred rupees, must be made only by a registered instrument. (Vol 1) 1914 Low Bur 207 (207) (DB).

[2] Where delivery of the property is not possible, as where the mortgagee is already in possession as a usufructuary mortgagee, a fresh mortgage to him can only be made by a registered instrument. (Vol 17) 1930 All 136 (140) : 52 All 281 (FB)✠('08) 11 Oudh Cas 248 (250).

[3] Where an instrument recited that a mortgage with possession "has been made from the ensuing year" it was held that the parties intended to effect a mortgage by delivery after a year. (Vol 25) 1938 Mad 85 (86, 87).

[4] The delivery contemplated by the section is delivery contemporaneous with the contract of mortgage and not delivery subsequent to it. (Vol 4) 1917 Oudh 203 (203).

[5] An oral mortgage by delivery of possession where such can be made is as good as a mortgage by a registered instrument. A prior mortgage of the former kind will be entitled to priority over a subsequent mortgage of the latter kind. ('71) 1871 Pun Re No. 47, page 109 (111).

[6] A usufructuary mortgage was executed in 1900 by an unregistered instrument for Rs. 95. It was held that the admissibility of a document was a matter of procedure governed by the present law, and, therefore, it was not admissible under S. 49 of the Registration Act. (Vol 26) 1939 Rang 188 (189) : 1939 Rang L R 39.

[7] In Bengal a permanent tenure can be transferred only by a registered instrument under the provisions of the Bengal Tenancy Act, 1885. Consequently, a mortgage of such tenure can be effected only by a registered instrument even if the consideration is less than one hundred rupees. ('99) 3 Cal W N 499 (501) (DB).

4. Registered instrument. — [1] A deed not validly registered conveys no interest in the property dealt with by it. ('91) 18 Cal 556 (569) (FB)✠(1900) 1900 Pun L R No. 21, page 81 (85) (DB)✠(Vol 7) 1920 Lah 302 (303).

[2] A mortgage deed not validly presented as required by S. 32 of the Registration Act cannot be said to be validly registered and cannot convey any interest. (Vol 18) 1931 P C 52 (56, 57) : 10 Pat 481 : 58 Ind App 58 (PC).

[3] Where non-existing property is included in the document merely for the purpose of effecting registration the deed cannot be said to have been validly registered. (Vol 1) 1914 P C 67 (71) : 41 Ind App 110 : 41 Cal 972 (P C).

[4] Where property not intended to be conveyed or transferred at all is included in the document merely for the purpose of effecting registration, the registration is invalid and conveys no title. (Vol 8) 1921 P C 8 (10) : 48 Cal 509 : 48 Ind App 127 (PC)✠(Vol 23) 1936 P C 91 (93) : 63 Ind App 169 : 59 Mad 539 (PC)✠(Vol 21) 1934 P C 157 (167) : 56 All 468 : 61 Ind App 286 (PC).

[5] The registration would be invalid in the following cases :

(a) The property so incorrectly or insufficiently described that it cannot be identified. ('95) 18 Mad 364 (367) (DB) ✠ (Vol 14) 1927 Mad 586 (589) (DB)✠('12) 15 Ind Cas 335 (336) (All) ✠ (Vol 15) 1928 Cal 385 (386, 387) (DB).

(b) Deed registered in an office within whose jurisdiction the property is not situate. (Vol 1) 1914 P C 67 (71) : 41 Cal 972 : 41 Ind App 110 (PC).

(c) Registration effected notwithstanding the denial of execution by the executant. ('03) 26 All 57 (59, 60) (DB).

[6] Where some property, however small, is included with the intention of transferring it by way of mortgage, for the purpose of getting it registered by a particular Sub-Registrar, the registration is valid. (Vol 7) 1920 Mad 974 (975) (DB)✠(Vol 14) 1927 Mad 863 (865) : 50 Mad 800 (DB).

[7] The registration is not rendered invalid by the mere fact that the property included in the document did not belong to the mortgagor, unless it is shown that both the mortgagor and the mortgagee colluded to insert the item with the knowledge that the mortgagor had no title and with no intention of transferring it. ('10) 13 Oudh Cas 265 (268) (DB) ✠ (Vol 11) 1924 All 473 (473) (DB) ✠ (Vol 6) 1919 All 450 (451, 452) : 41 All 22 (DB)✠(Vol 18) 1931 Mad 335 (339) (DB)✠(Vol 16) 1929 Mad 432 (435, 436, 440) (DB) ✠ (Vol 6) 1919 Pat 572 (573) : 4 Pat L Jour 433 (DB).

[8] Where the mortgagee does not know that the mortgagor had no title to the property included, and the mortgagor represents to the mortgagee that he is the owner, the mortgagor cannot take advantage of his own fraud by pleading that the deed is not registered at the proper place. (Vol 9) 1922 All 231 (232) (DB).

[9] Where a document is registered in Book IV instead of Book I the registration is not invalid. ('10) 34 Bom 202 (207) (DB)✠(Vol 34) 1947 Mad 175 (176).

[10] An omission by the Sub-Registrar to affix his seal to the document does not render the registration invalid. ('02) 6 Cal W N 528 (530) (DB).

[11] When a mortgage is embodied in more documents than one then all such papers must be registered in order to constitute a valid mortgage. ('04) 27 Mad 348 (350) (DB).

5. "Signed." — [1] The mortgagor can sign by an agent. ('03) 6 Oudh Cas 279 (287)✠(Vol 2) 1915 All 466 (467) (DB)✠('09) 12 Oudh Cas 257 (259)✠('03) 16 C P L R 45 (46).

[2] The signature can be made by means of types or by a facsimile, or, where the mortgagor is an illiterate

Section 59 — Note 5 *(contd.)*

person, by his mark. ('05) 1 Nag L R 14 (15)✠(Vol 3) 1916 Bom 123 (124) : 41 Bom 384 (DB).

[3] A literate person making a mark cannot be said to have signed the document. ('05) 32 Cal 550 (551) : 2 Cri L Jour 405 (DB).

[4] A person who is literate but becomes incapable of writing owing to paralysis and who has been in the habit of affixing a name stamp through his servant, can validly execute a document by such affixture. ('98) 25 Cal 911 (916) (DB).

[5] A mortgage not signed by the mortgagor is not a mortgage at all. (Vol 11) 1924 Lah 249 (249) (DB).

[6] A mortgage intended to be executed by all the sharers in a certain property but actually executed by some of them only is wholly inoperative. (Vol 6) 1919 Lah 78 (79).

[7] Mortgage executed in Oudh in such old time as 1822 bearing expression 'Sahi' instead of signature of executant can be held to be valid. (Vol 26) 1939 Oudh 96 (98, 99) : 14 Luck 393.

[8] The execution of the document implies the intelligent appreciation of the contents of the document and signing it in token of the acceptance of such contents. (Vol 22) 1935 Pat 497 (499).

[9] The signing of the document without delivery thereof to the executee is not execution of the document. Execution means all acts necessary to make the parties to the contract bound thereby. (Vol 20) 1933 Pat 129 (129)

[10] Execution means, where the document has to be attested by witnesses, the signing in the presence of the witnesses. (Vol 10) 1923 Cal 149 (150) (DB).

[11] The mere fact that a document is signed and attested a few days after it is written out, does not render its execution invalid or alter its legal effect. (Vol 6) 1919 Oudh 23 (24) (DB).

6. Attested by two witnesses.— [1] The requirement as to attestation must be enforced with stringency. (Vol 5) 1918 All 211 (215) : 40 All 187 (DB).

[2] There is no particular form for attestation, nor is it necessary that the signatures of the attesting witnesses must appear in any particular place on the document. (Vol 31) 1944 Bom 25 (26) : I L R (1944) Bom 388.

[3] A mortgage not attested by two witnesses is not enforceable as a mortgage. (Vol 3) 1916 P C 169 (171) (PC).

[4] A mortgage attested by one witness only cannot operate as a mortgage. ('12) 16 Cal W N 1075 (1076) (DB) ✠ ('99) 26 Cal 78 (79) (DB) ✠ (Vol 2) 1915 Oudh 65 (71) : 18 Oudh Cas 168 (DB) ✠ (Vol 1) 1914 Low Bur 135 (135) (DB) ✠ (Vol 13) 1926 Rang 145 (145)

[5] A mortgage is not enforceable if it is not attested at all. (Vol 14) 1927 Pat 131 (132) (DB) ✠(Vol 14) 1927 Cal 926 (928) (DB).

[6] A mortgage instrument not attested by two witnesses cannot operate to create a charge. (13) 35 All 164 (165) (FB) ✠ (Vol 3) 1916 All 103 (104) : 38 All 461 (DB) ✠ ('05) 7 Bom L R 934 (935) (DB) ✠ (Vol 13) 1926 Sind 88 (89) : 18 Sind L R 282 (DB) ✠ ('01) 14 C P L R 42 (45) ✠ (Vol 4) 1917 Mad 849 (852) (DB) ✠ ('08) 31 Mad 337 (337) (DB).

[But see ('07) 17 Mad L Jour 39 (39) (DB).]

[7] A mortgage deed not attested by two witnesses is admissible in evidence to prove a personal covenant to pay the amount. ('09) 32 Mad 410 (413, 414) (FB). (('95) 18 Mad 29, *Overruled.)* ✠ (Vol 20) 1933 Sind 257 (257) (DB) ✠ (Vol 13) 1926 Rang 145 (145, 146) ✠ (Vol 8) 1921 Low Bur 34 (35, 36) : 11 Low Bur Rul 148 (DB) ✠ (Vol 3) 1916 Oudh 185 (187) (DB) (Simple mortgage-deed.) ✠ (Vol 4) 1917 All 483 (483) (DB) ✠ (Vol 3) 1916 All 103 (104) : 38 All 461 (DB) ✠ ('08) 1 Cal L Jour 510 (513, 518) (DB).

[8] A validly attested document can be proved only in the mode provided by S. 68 of the Evidence Act and in the absence of such proof it cannot be used as evidence of the personal covenant to pay. ('07) 30 Mad 251 (252) (DB) ✠(Vol 9) 1922 Cal 160 (162) (DB) ✠ (Vol 13) 1926 Oudh 266 (267, 268).

[9] In the Punjab a mortgage is not required by law to be attested and therefore need not be proved in the manner provided by S. 68 of the Evidence Act. (Vol 15) 1928 Lah 148 (149) ✠ (Vol 16) 1929 Lah 495 (495) (DB).

[10] The admission by the mortgagor of the execution of the document is not an admission of the validity of the document. Such an admission therefore does not dispense with proof of attestation as required by law. (Vol 14) 1927 Mad 143 (144) ✠ (Vol 23) 1936 All 169 (170) (DB) ✠ (Vol 8) 1921 Cal 276 (276) (DB) ✠ (Vol 6) 1919 Mad 463 (470) (DB).

[11] If it appears on the face of the document or in the evidence that the document is not validly attested by two witnesses as required by law, no decree can be given on the basis of such mortgage. (Vol 12) 1925 P C 203 (204) : 5 Pat 58 : 52 Ind App 362 (P C). (*Reversing* (Vol 9) 1922 Pat 70 : 6 Pat L Jour 465.)

[12] Where there is no proof one way or the other about attestation and there is nothing to show on the face of the document or in the evidence that it has not been properly attested admissions of execution would be sufficient proof of the execution and the validity of the document. (Vol 3) 1916 Nag 5 (9) : 13 Nag L R 121 ✠ (Vol 10) 1923 Bom 90 (91, 92) : 47 Bom 137 (D B).

[13] Where a mortgage document is invalid for want of due attestation, the mortgagee can, under section 65 of the Contract Act, recover from the mortgagor any money which he may have advanced to him under the mortgage. (Vol 5) 1918 Oudh 22 (23, 24) : 20 Oudh Cas 506 (DB).

7. Attestation and estoppel.— [1] The mere attestation of a document by a relative of the executant of a document does not necessarily import concurrence. ('69) 13 Moo Ind App 209 (229) (P C) ✠(Vol 2) 1915 All 255 (256) : 37 All 350 (DB).

[2] Attestation by itself would neither create estoppel nor imply consent ; it does not involve the attestor in any knowledge of the contents of the deed or affect him with notice of its provisions. (Vol 3) 1916 P C 110 (112) : 44 Cal 186 : 43 Ind App 249 (P C) ✠ (Vol 15) 1928 P C 20 (23) (P C) ✠ (Vol 9) 1922 P C 20 (22) : 49 Cal 334 : 49 Ind App 16 : 18 Nag L R 1 (PC).

[3] Where in addition to the fact that a person attested the deed, there is evidence to show that he consented to and acquiesced in the execution of the document, it is a legitimate inference to draw from such evidence that he not only witnessed the execution of the document but also consented to the transaction. (Vol 15) 1928 P C 20 (23) (P C).

8. Mortgage by company. — [1] Mortgage by a company— Failure to register it under S. 109 of the Companies Act does not render the mortgage wholly invalid : it is valid as an admission of debt but, as against a creditor or liquidator, it cannot create a valid charge. (Vol 17) 1930 P C 66 (75) : 5 Luck 128 : 57 Ind App 76 (PC).

9. Unregistered bond — Admissibility in evidence. — [1] An unregistered mortgage cannot be received in evidence for purposes which involve the giving effect to the mortgage itself. (Vol 28) 1941 Rang 261 (262) : 1941 Rang L R 706 (F B) ✠ (Vol 25) 1938 Pat 479 (480).

[2] An unregistered mortgage may be received in evidence to prove a personal covenant to pay. (Vol 19)

References to mortgagors and mortgagees to include persons deriving title from them.

[a][59A. Unless otherwise expressly provided, references in this Chapter to mortgagors and mortgagees shall be deemed to include references to persons deriving title from them respectively.]

[a] *Inserted* by the Transfer of Property (Amendment) Act, 1929 (20 [XX] of 1929), S. 21.

Rights and Liabilities of Mortgagor.

60. At any time after the principal money has become [a][due], the mortgagor has a right, on payment or tender, at a proper time and place of the mortgage-money, to require the mortgagee *(a)* to deliver [b][to the mortgagor the mortgage-deed and all documents relating to the mortgaged property which are in the possession or power of the mortgagee], *(b)* where the mortgagee is in possession of the mortgaged property, to deliver possession thereof to the mortgagor, and *(c)* at the cost of the mortgagor either to re-transfer the mortgaged property to him or to such third person as he may direct, or to execute and (where the mortgage has been effected by a registered instrument) to have registered an acknowlegment in writing that any right in derogation of his interest transferred to the mortgagee has been extinguished :

Right of mortgagor to redeem.

Section 59 — Note 9 *(contd.)*

1932 Mad 734 (737) : 56 Mad 169 (DB) ✠ (Vol 21) 1934 Rang 196 (197) ✠ (Vol 20) 1933 Cal 786 (787).

[3] An unregistered mortgage may be received in evidence to prove an acknowledgment of the existence of another mortgage. (Vol 25) 1938 Mad 865 (875) (DB).

[4] An unregistered mortgage can be received in evidence to prove the nature of a person's possession (Vol 28) 1941 Rang 261 (262) : 1941 Rang L R 706 (FB) ✠ (Vol 22) 1935 All 155 (155).

[5] A deed in the nature of but not in the form of a mortgage giving right to mortgagor to redeem requires registration. If unregistered it cannot be used in a suit for redemption, but can be used to explain mortgagee's possession. (Vol 34) 1947 Lah 335 (337).

10. Effect of transaction where registration is invalid.— [1] A mortgage which is registered but the registration of which is invalid, cannot operate as a charge. (Vol 12) 1925 Rang 55 (58) : 2 Rang 429 (DB) ✠ (Vol 1) 1914 Nag 32 (36) : 10 Nag L R 81 ✠ (Vol 12) 1925 Rang 1 (2) : 2 Rang 313 (DB).

[2] An invalidly registered mortgage may be used in evidence to prove the debt by reason of the personal covenant to pay recited in the document ('07) 4 Low Bur Rul 88 (93) (DB) ✠ (Vol 8) 1921 Low Bur 34 (36) : 11 Low Bur Rul 148 (DB) ✠ (Vol 24) 1937 Cal 347 (350) (DB) ✠ (Vol 10) 1923 Mad 447 (448) : 46 Mad 435 (DB).

[3] Where a mortgage document, executed in consideration of two prior mortgages, is not validly registered, the mortgagee can fall back upon the two prior mortgages. ('96) 19 Mad 160 (161) (DB).

[4] It has been held that an invalidly registered usufructuary mortgage document cannot be used in evidence to recover money under S. 68 inasmuch as such a claim involves the proof of the mortgage as a mortgage. (Vol 24) 1937 All 711 (713, 714).

Section 59-A —Note 1.

[1] It has been held that the word "mortgagor" would not include a mortgagee from him, but would include persons succeeding by inheritance or by will or by sale or by auction sale to the right of the equity of redemption held by the mortgagor. (Vol 26) 1939 All 190 (192) : I L R (1939) All 185 (DB).

[2] The word 'mortgagor' includes the subsequent purchaser of the mortgaged property. (Vol 33) 1946 Nag 226 (227): I L R (1946) Nag 297 ✠ (Vol 26) 1939 Nag 256 (258).

[3] It has been held that the word "mortgagee" would not include a mortgagee from the mortgagee. (Vol 24) 1937 Rang 56 (58) (DB).

[4] A person who succeeds to the right of a mortgagor by survivorship will be a "mortgagor" within the meaning of this section. (Vol 21) 1934 Oudh 246 (249): 9 Luck 657 (DB).

[5] Where the equity of redemption vests in several persons either by devolution or transfer, such persons will be co-mortgagors. Though the word "mortgagor" would include such legal representatives under the terms of this section, it would not mean that the relationship between them *inter se* would not be that of co-mortgagors. (Vol 23) 1936 Oudh 47 (49) (DB).

[6] It has been held that S. 91 is a provision to the contrary in that it provides that "besides the mortgagor, the following persons are entitled to redeem" and at the same time includes among those persons such persons as derive title from the mortgagor. (Vol 29) 1942 Bom 98 (99) : I L R (1942) Bom 169 (DB).

SECTION 60—SYNOPSIS

1. Scope.
2. Mortgage of moveables.
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4. Right of redemption, what is.
5. Right of redemption, when arises.
6. 'Payment."
7. Payment or tender must be of mortgage-money.
8. Assignment of mortgage — Equity between mortgagor and mortgagee.
9. Payment or tender must be made to mortgagee.
10. "Mortgagee."
11. Payment or tender to one of several co-mortgagees.
12. Payment or tender to one of several co-heirs of a deceased mortgagee.
13. Delivery of deeds.
14. Delivery of possession.
15. Re-transfer of mortgaged property.
16. "Mortgaged property."
17. Right to registered acknowledgment.
18. Proof of redemption.
19. Extinguishment of right to redeem by act of parties.
20. Purchase by mortgagee at court sale, if extinguishes right to redeem.
21. Subsequent mortgagee purchasing at sale held by prior mortgagee under his power of sale.
22. Mortgagee purchasing at sale held by himself under his power of sale.
23. Extinguishment of right to redeem by decree of Court.
24. Extinguishment of right of redemption by operation of law.

Provided that the right conferred by this section has not been extinguished by act of the parties or by [c][decree] of a Court.

The right conferred by this section is called a right to redeem and a suit to enforce it is called a suit for redemption.

Nothing in this section shall be deemed to render invalid any provision to the effect that, if the time fixed for payment of the principal money has been allowed to pass or no such time has been fixed, the mortgagee shall be entitled to reasonable notice before payment or tender of such money.

Redemption of portion of mortgaged property.

Nothing in this section shall entitle a person interested in a share only of the mortgaged property to redeem his own share only, on payment of a proportionate part of the amount remaining due on the mortgage, except [d][only] where a mortgagee, or, if there are more mortgagees than one, all such mortgagees, has or have acquired, in whole or in part, the share of a mortgagor.

[a] *Substituted* by the Transfer of Property (Amendment) Act, 1929 (20 [XX] of 1929), S 22 for "payable".
[b] *Substituted ibid.*, for "the mortgage deed, if any, to the mortgagor." [c] *Substituted, ibid.*, for "order".
[d] *Inserted, ibid.*

SECTION 60—SYNOPSIS *(contd.)*

25. Clog on redemption—General.
26. Clog—Anomalous mortgage.
27. Stipulation giving mortgagee option to purchase the property.
28. Stipulation against redemption by persons other than the mortgagor.
29. Provision for long period for redemption, if clog.
30. Stipulation for collateral advantage.
31. Clog—Penalty in case of default.
32. Clog—Stipulation that mortgage will not be redeemed before paying other amounts due.
33. Hard terms—Not a clog.
34. Clog—Miscellaneous.
35. Clogging provisions, if binding on purchasers of equity of redemption.
36. Clogging provisions, when to be impeached.
37. Provision for reasonable notice before redemption.
38. Piecemeal redemption—Last para of section.
39. Mortgagee allowing redemption of a share, if splits up security as to the rest.
40. Mortgagee releasing part of mortgaged property from mortgage, if splits up security.
41. Mortgagee acquiring share in property.
42. Undivided property—Mortgagee purchasing share—Redemption.
43. One co-mortgagor acquiring mortgagee right—Redemption by other.
44. One mortgagor—Two or more mortgagees—Redemption by paying one alone.
45. Suit for redemption.
46. Costs of mortgagee in suit for redemption.
47. Onus of proof in suit for redemption.
48. Suit for possession by mortgagee under terms of mortgage deed—Mortgagor, if can plead right of redemption in defence.
49. Adverse possession of equity of redemption.
50. Lis pendens.
51. Mortgage pending attachment.
52. Amendments in section not retrospective.

1. Scope.—[1] In India the distinction between legal and equitable estates is not recognised—Despite the mortgage the ownership of the estate remains with the mortgagor and the expression 'equity of redemption' is misleading in so far as it implies that the interest of the mortgagor is something less than the interest of an owner. ('01) 14 C. P. L. R. 177 (179).

[2] In spite of the mortgage, the mortgagor remains the owner of the property, the mortgagee, whatever may be the nature of the mortgage, being only a transferee of an interest in such property. (Vol. 15) 1928 All 726 (729): 50 All 986 (FB).

[3] The right of redemption is a right which a mortgagor may seek to enforce, and not a liability which he may be compelled to discharge. ('11) 21 Mad L Jour 213 (226) (FB) ✠ (Vol 26) 1939 Bom 303 (304, 305) ✠ (Vol 22) 1935 Cal 139 (141): 62 Cal 75 (DB).

[4] Section 60 contemplates a case in which the mortgage is still subsisting and the mortgagor goes to the Court to obtain return of his property on repayment of what is still due. Section 62 on the other hand says that in the case of a usufructuary mortgage the mortgagor has a right to recover possession when principal money is paid off. That is not a case of redemption at all. (Vol 33) 1946 All 400 (402).

2. Mortgage of moveables.—[1] The principle of S. 60 applies to moveables also. A mortgage of moveables can be redeemed even after the expiry of the due date fixed for payment. (Vol 6) 1919 Mad 946 (947) (DB).

3. Law where Act not in force.—[1] Though the Act and this section have no application to the North-West Frontier Province and the Punjab, the principles of S. 60 apply to cases arising in these provinces. (Vol 17) 1930 P. C. 142 (143): 11 Lah 251: 57 Ind App 168 (P C) (N.W.F.P.) ✠ (Vol 24) 1937 Lah 49 (51) (DB) (Punjab.) ✠ (Vol 2) 1915 Lah 362 (363): 1915 Pun Re No. 103 (D B). (Punjab.) ✠ ('04) 1904 Pun Re No. 2 page 12 (14) (DB) (Punjab.)

4. Right of redemption, what is.—[1] A right to redeem means the right to buy back or set free by payment. (Vol. 5) 1918 Pat 322 (323): 3 Pat L Jour 490 (DB) ✠ ('11) 33 All 97 (98) (DB). (A right to redeem is a right to pay or tender the mortgage-money and when the mortgagee is in possession to obtain from him delivery of possession.)

[2] A suit for redemption may be brought without tendering the mortgage money to the mortgagee. (Vol. 30) 1943 Bom 191 (192) (DB) ✠ (Vol 8) 1921 All 353 (355): 43 All 638 (FB). ✠ (Vol. 4) 1917 Oudh 415 (416) ✠ ('01) 24 Mad 408 (411) (DB) ✠ (1865) 3 Suth W R 128 (129) (DB) ✠ (Vol 13) 1926 Pat 512 (513): 6 Pat 102 (DB) ✠ (Vol. 9) 1922 All 377 (378): 44 All 730 (DB) ✠ ('26) 13 Oudh L Jour 330 (331). (Amount to be tendered for redemption in dispute—Mortgagor's suit for redemption cannot be dismissed on ground that no tender was made.)

[3] Suit for redemption brought without tendering mortgage-money—Redemption will not be allowed unless amount declared by decree to be due to mortgagee be paid or tendered on or before date fixed by Court in decree. (Vol 8) 1921 All 353 (355): 43 All 638 (FB) ✠

Section 60 — Note 4 *(contd.)*
(Vol. 4) 1917 Oudh 415 (416) ✠ (Vol. 8) 1921 All 71 (72) : 43 All 424 (DB).

[*See also* (Vol 30) 1943 Bom 191 (192) (DB).]

[4] Mortgagee entitled to remain in possession till mortgage-debt wholly discharged from rents and profits of property — Mortgagor's right to get back property after debt has been cleared is a right of redemption. ('93) 6 C P L R 28 (32, 33) ✠ (Vol 23) 1936 Cal 200 (201).

[5] *A*, *B* and *C* co-mortgagors—Mortgagee in possession of property—Mortgage to be discharged not from rents and profits of property alone— Mortgagors also entitled to pay mortgage-money or whatever remained due out of it and claim back property—*A* suing for accounts and redemption of mortgage under Dekkhan Agriculturists' Relief Act—*A*, being agriculturist found entitled to benefit of its provisions—Amount found due on taking accounts under Act found to have been completely paid out of usufruct of property — Unconditional decree passed in *A*'s favour for recovery of property from mortgagee—*A* taking possession under decree — *A* has "redeemed" mortgage for purpose of S. 92, T. P. Act and is entitled to subrogation under that section. (Vol 30) 1943 Bom 191 (192) (DB).

5. Right of redemption, when arises.—[1] Where a mortgage-deed provides for a period of payment of the mortgage-money, the mortgagor's right to redeem will arise only after the expiry of the period and not before, inasmuch as before the expiry of such period the mortgage-money would not be "due" in the sense that the mortgagee could sue to recover it. (Vol 19) 1932 All 153 (157) (DB).

[2] A suit for redemption of a mortgage before the amount has become due on the mortgage is not maintainable even if the mortgagor has tendered the amount due with interest up to the expiry of the specified. period. (Vol 27) 1940 Cal 437 (438) (DB).

[*See also* (Vol 2) 1915 Cal 699 (700) : 42 Cal 1146 (DB) .]

[3] A suit to redeem a mortgage before the amount has become due on the mortgage is not maintainable even if the mortgagee (where the mortgage is one with possession), has done something which he was not authorised to do, but which did not destroy or permanently injure the property in any way. (Vol 23) 1936 Oudh 130 (131) (DB).

[4] The fact that the time fixed for redemption is very long will not enable the right of redemption to be exercised before the expiry of such time, unless the provision for such a long time amounts to a clog on redemption or is for some other reason not binding on the mortgagor. (Vol 12) 1925 All 42 (43). (The rule is not affected by the fact that the term fixed is such a long period as 60 years or that it is provided in the deed that even after the expiry of the term there should be no redemption.) ✠ (Vol 12) 1925 Cal 105 (106) : 51 Cal 935 (DB). (Mortgagee in possession — Period of 50 years—Mortgagor allowed to redeem after 26 years because the mortgagee's conduct had become such as to make it dangerous to allow him to be in possession for the full period— Relief was given on grounds of equity.) ✠ (Vol 6) 1919 Mad 819 (820) (DB). (Period fixed 37 years.) ✠ (Vol 23) 1936 Oudh 130 (131) (DB) (Period of 60 years.) ✠ (Vol 16) 1929 Oudh 54 (54) : 4 Luck 203 (DB). (Usufructuary mortgage—Redemption postponed for 99 years—Terms as to rate of interest, etc, in no way unconscionable — *Held* that contract could be enforced and that term as to redemption did not amount to clog on equity of redemption.) ✠ ('12) 15 Ind Cas 917 (917) (Pesh) (Period of 150 years.) ✠ (Vol 23) 1936 Lah 168 (170) (DB). (Term of 25 years by itself is not clog on equity of redemption.) ✠ ('23) 72 Ind Cas 941 (944) (Pesh). (Term in mortgage-deed postponing redemption till after expiry of ten "abad" years held amounted to a clog on equity of redemption and was unenforceable.) ✠ (Vol 8) 1921 All 143 (144) (DB). (Period fixed 40 years — Term held not binding on mortgagor as it was inequitable—*Held*, he could redeem earlier.) ✠ ('82) 4 Mad 113 (118) (DB). (Iladarawara mortgage (for 60 years) in South Canara— Redemption before expiry of term not allowed.) ✠ (Vol 16) 1929 Lah 523 (523) (DB).

[5] Where the mortgagor covenants that he will pay the mortgage-monery "by" a particular date, he is entitled to redeem at any time before that date. (Vol 28) 1941 Mad 484 (485) : I L R (1941) Mad 767 (FB).

[6] Where no period is fixed in the mortgage deed for redemption, the right to redeem arises immediately after the mortgage is made. ('13) 35 All 227 (230) : 40 Ind App 74 (PC) ✠ ('07) 17 Mad L Jour 177 (178) (DB) ✠ ('12) 39 Cal 828 (831) (DB) ✠ (Vol 16) 1929 Mad 339 (341) (DB) ✠ (Vol 28) 1941 Sind 158 (160) : I L R (1941) Kar 124 (DB).

[*See also* (Vol 20) 1933 Lah 84 (85).]

[7] By the custom of Malabar, a kanom enures for 12 years, unless the parties thereto provide by express contract, for its redemption at an earlier date. ('03) 26 Mad 727 (728) (FB) ✠ ('07) 30 Mad 300 (302) (DB).

[8] An otti mortgage cannot be redeemed before the lapse of 12 years. (1862 63) 1 Mad H C R 261 (262) (DB) ✠ (1862-63) 1 Mad H C R 122 (123) (DB).

[9] Case falling under Dekkhan Agriculturists' Relief Act— Mortgagor held entitled to redeem notwithstanding a period was fixed before which he bound himself not to redeem. ('82) 6 Bom 734 (736) (DB).

[10] A default on the part of the mortgagee to perform his part of the contract may give rise to a right of redemption on the part of the mortgagor before the expiry of the period fixed. (Vol 14) 1927 Oudh 12 (13, 14) : 2 Luck 279 (DB).

[11] Where the mortgagee undertakes to make certain payments towards dues payable by the mortgagor and defaults in doing so, the mortgagor can redeem the mortgage notwithstanding that the period specified in the mortgage has still to run. (Vol 14) 1927 Oudh 12 (13, 14) : 2 Luck 279 (D B) ✠ ('12) 34 All 659 (662) (DB) ✠ (Vol 12) 1925 Mad 825 (827).

[But see ('66) 1 Agra 91 (93) (D B) ✠ (Vol 32) 1945 Mad 340 (342).]

[12] Right of the mortgagor to demand possession from his usufructuary mortgagee after the mortgage had been paid off from the rents and profits of the property according to the terms of the mortgage, is not a right to redeem and can be exercised as soon as the mortgage is so paid off, although a term has been fixed in the mortgage document for payment and such term has not expired. (Vol 5) 1918 Oudh 432 (434) (D B) ✠ (Vol 6) 1919 Mad 819 (821) (D B).

6. "Payment".—[1] A "payment" must be made in current coin of the realm or currency notes unless the mortgagee accepts some other form of payment. (1900) 24 Bom 619 (621) (DB).

[2] Debt contracted in particular currency—It must be repaid in that currency or its equivalent ('92) 16 Bom 599 (602, 603) (DB).

[3] Money borrowed in sikka rupees to be repaid in British currency calculated according to face value of coin—Re-payment must be in such currency as so calculated, and not the value of metal in sikka coins borrowed. ('09) 11 Bom L R 318 (326) (DB).

[4] Settlement of accounts between *A* and *B*— Amount received by *A* on behalf of *B* given credit and balance struck — Settlement is equivalent to payment of amount by *A* to *B*. (1861) 30 L J Q B 308 (313) : 4 L T (N S) 547, *Holland* v. *Russell*.

Section 60—Note 6 *(contd.)*

[5] No stipulation as to payment of sum borrowed —Lender can, under English and Indian Law, decline to receive sum due to him in instalments—He can claim payment of whole sum at one and same time. ('02) 24 All 461 (463) (DB).

[6] A memorandum on a mortgage document that a certain amount has been paid towards the mortgage does not require to be registered under S. 17, Registration Act, and is admissible in evidence without registration. ('86) 9 All 108 (115) (F B) ✠ (Vol 7) 1920 Mad 742 (744) : 43 Mad 803 (DB) ✠ ('04) 27 All 305 (307) (DB) ✠ (Vol 15) 1928 Mad 1050 (1051) (DB).

[7] An endorsement not only that a certain amount has been received but that the mortgage has been extinguished must be registered. (Vol 14) 1927 Lah 237 (237).

7. Payment or tender must be of mortgage-money.—[1] Mortgage-money includes the costs incurred by the mortgagee under the provisions of S. 72. (Vol 2) 1915 Mad 402 (403, 404). (Costs of defending suit.) ✠ (Vol 9) 1922 Lah 252 (254) (DB).

[2] Mortgagor stating "I shall pay the interest from my own pocket": *Held* that interest was not a charge on property (Vol 4) 1917 All 165 (165) (DB).

[3] Deed providing for redemption on payment of principal only — Provision for interest disconnected from clause regarding redemption — Mortgagor held could redeem on payment of principal only. (Vol 11) 1924 Lah 273 (275) (DB).

[*See also* (Vol 12) 1925 Lah 182 (182) (DB).]

[4] Until delivery of possession mortgagor to pay interest— Possession delivered at once — Interest held was only payable until delivery of possession — Mortgagor held entitled to redeem on payment of principal only. ('02) 24 All 521 (531) : 29 Ind App 148 (PC).

[5] Usufructuary mortgagee unable to get possession owing to mortgagor's default—He will be entitled to interest, whether described as interest or as damages for breach of covenant to deliver possession. (Vol 10) 1923 All 377 (378) ✠(Vol 19) 1932 Mad 175 (176, 177).

[6] Usufructuary mortgagee, entitled to possession or to interest in case he failed to get possession owing to any defect in mortgagor's title, allowing mortgagor to remain in possession—He loses his right to interest by his acquiescence. ('04) 27 All 313 (316) (DB)✠('09) 31 All 325 (327) (DB).

[7] Mortgagor entitled to redeem at end of second year by payment of principal and interest—Mortgagor suing for redemption after close of second year alleging that in first half of second year he had deposited principal and for interest for both years mortgagee had obtained decrees against him — This held was not showing a valid tender or payment of "mortgage-money," which included interest due. ('89) 16 Cal 307 (309) (P C).

[8] On happening of particular contingency, mortgage-money to become payable as if due date had elapsed : *Held* that this only accelerated due date. Mortgagor held not bound to pay interest on redemption up to original date fixed. ('08) 32 Bom 521 (529, 530) (DB)

[9] Mortgagee acquiring share of mortgagor—Redemption by part owner of mortgaged property — He must deposit or tender whole amount due. (Vol 10) 1923 Mad 533 (534) : 47 Mad 7 (DB).

[10] Mortgagee retaining part of mortgage-money to redeem prior mortgage but not doing so Suit by mortgagor will not lie to recover that sum—Mortgagee cannot claim amount not paid. (Vol 3) 1916 Oudh 110 (111) : 19 Oudh Cas 12.

[11] Consideration for mortgage being certain amount to be paid by mortgagee to holder of decree against mortgagor—Lesser amount paid and satisfaction of decree entered—Mortgagee is entitled only to amount actually paid. (Vol 34) 1947 Mad 197 (199) (DB)

[12] If the mortgagee hands over to the mortgagor the sum retained for redeeming prior mortgage after the mortgagor had sold away his equity of redemption, the mortgagee cannot claim that sum from the purchaser of the equity of redemption. (Vol 3) 1916 Oudh 110 (111) : 19 Oudh Cas 12.

8. Assignment of mortgage — Equity between mortgagor and mortgagee. — [1] Mortgagor not receiving full amount of mortgage but granting receipt for full amount and leaving it in possession of mortgagee—Mortgagee assigning mortgage for full amount to another—Mortgagor cannot redeem merely on payment of amount actually received by him. (1885) 54 W R (Eng) 141 (142) : 31 Ch D 151, *Bickerton* v. *Walker*.

9. Payment or tender must be made to mortgagee. — [1] One partner is the agent of the others and a payment to him is a valid discharge of the mortgage debt due to the partnership. ('09) 19 Mad L Jour 221 (222) (DB).

[2] Joint Hindu family mortgagee — Karta is agent of family — Payment to him is valid discharge of mortgage. (Vol 11) 1924 Oudh 161 (161) : 26 Oudh Cas 286 ✠ (Vol 15) 1928 Cal 125 (126) (DB).

[3] Where *C* executed a mortgage in favour of *A* and *B* and, subsequently, *B*, the junior member, gave notice to *C* that *A* had ceased to represent the family, a payment made to *A* alone is not a valid discharge of the claim of *B*. (Vol 1) 1914 All 450 (451) (D B).

[4] Payment to a Hindu minor mortgagee may be validly made to his *de facto* and *de jure* guardian. (Vol 14) 1927 Lah 237 (237).

[5] No valid payment can be made to a *de facto* guardian of a Muhammadan minor mortgagee. (Vol 12) 1925 Lah 541 (541).

[6] A payment to a junior member of the mortgagee's family upon the express direction given by the mortgagee, is a payment to a person authorised to receive it, and is a good payment. (Vol 29) 1942 Pat 408 (409).

10. "Mortgagee". — [1] The word mortgagee includes persons deriving title from him. ('02) 26 Bom 643 (646) ✠ ('13) 1913 Pun L R No. 136 p. 474 (475) : 1913 Pun Re No. 7.

[2] The assignee of a mortgagee stands in the same position as that of the mortgagee although the mortgagor was not a party to the assignment. (Vol 15) 1928 Nag 223 (224, 225) (DB).

[3] Assignment by mortgagee — Mortgagor paying money to mortgagee without notice of assignment— Payment is binding on assignee. (Vol 7) 1920 Mad 742 (743) : 43 Mad 803 (DB) ✠ (Vol 11) 1924 Nag 401 (405).

11. Payment or tender to one of several co-mortgagees.—[1] In considering the question whether a payment or tender to one of several co-creditors is a good discharge of the debt the principle applicable is the same whether the debt is a personal or secured. ('02) 25 All 155 (157, 158) (DB).

[But see ('90) 3 C P L R 15 (16)✠ ('05) 1 Nag L R 24 (26)]

[2] One of the co-creditors such as co-mortgagees cannot give a valid discharge for the whole debt. (Vol 30) 1943 Pesh 1 (3) (DB) ✠ (Vol 14) 1927 Cal 425 (429) (DB) ✠ (Vol 21) 1934 Cal 1 (3) (DB) ✠ (Vol 7) 1920 Pat 464 (468) : 5 Pat L Jour 151 (DB) ✠ ('05) 1 Nag L R 24 (26)✠ (Vol 17) 1930 All 98 (98, 99) (DB)✠ (Vol 16) 1929 Pat 704 (704) ✠ ('11) 14 Oudh Cas 45 (48) ✠ (Vol 5) 1918 Oudh 91 (92) ✠ (Vol 5) 1918 Upp Bur 19 (21) : 3 Upp Bur Rul 42 ✠ (Vol 26) 1939 All

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600 (601) (DB) ✠ (Vol 5) 1918 Mad 29 (30) : 41 Mad 637 (DB) ✠ (Vol 30) 1943 Mad 407 (407) (DB) ✠ (Vol 4) 1917 Lah 443 (446) : 1917 Pun Re No. 68 (FB) ✠ (Vol 9) 1922 Lah 64 (64) (DB).

[But see ('79) 4 Cal 350 (354, 355) (DB) ✠ ('93) 1893 Pun Re No. 60 p. 267 (270) ✠ (Vol 4) 1917 Pat 82 (84) : 2 Pat L Jour 520 (DB) ✠ ('13) 36 Mad 544 (552) (FB) ✠ ('86) 9 All 205 (209).]

[3] Agreement between joint creditors *A* and *B* that *A* alone shall receive sum—Payment to *B* with notice of agreement is not good discharge of debt. ('96) 19 Mad 471 (475) (DB).

12. Payment or tender to one of several co-heirs of a deceased mortgagee.—[1] As a general rule one of several co-heirs cannot give a valid discharge of a debt to which they have succeeded. ('02) 25 Mad 26 (39) (DB) ✠ (Vol 6) 1919 Bom 78 (79) : 43 Bom 487 (DB) ✠ ('03) 27 Bom 292 (295) (DB) ✠ (Vol 3) 1916 Mad 1128 (1128) (DB) ✠ ('07) 6 Cal L Jour 383 (395) (DB) ✠ (Vol 7) 1920 Pat 464 (468) : 5 Pat L Jour 151 (DB) ✠ (Vol 16) 1929 All 250 (250, 251) : 51 All 589 (DB) ✠ (Vol 2) 1915 Oudh 29 (30) : 18 Oudh Cas 154 (DB).

[2] A payment to one of several coparceners in respect of a debt in favour of the head of the family is not a good discharge. (Vol 5) 1918 Mad 29 (31) : 41 Mad 637 (DB).

13. Delivery of deeds.—[1] A mortgagee is not bound to deliver the mortgage deed and other documents of title until actual tender or payment of the mortgage-money. (Vol 9) 1922 Bom 433 (435).

[2] *A* mortgaging property to *B*—*B* assigning mortgage to *C*—Subsequently *C* re-conveying property to *A* and *A* re-mortgaging it to *C*—*C* held bound, on redemption by *A*, to give back original mortgage deed and re-conveyance also as title deeds. (1862) 10 W R (Eng) 720 (720) : 125 R R 975, *Hudson* v. *Malcolm*.

[3] Mortgagee by virtue of other transactions, interested in having title deeds—He can ask mortgagor, as condition of delivery of deeds, to execute covenant that he would produce them when necessary. (1844) 63 E R 340 (340) : 13 L J Ch 239, *Capper* v. *Terrington*.

[4] Mortgagee decreed to re-convey undivided moiety of mortgaged property to mortgagor, a part of debt being satisfied—Mortgagee held entitled to retain title deeds of whole property — Mortgagee held should execute covenant to produce deeds when necessary. (1854) 65 E R 354 (354) : 2 Sm & G 174, *Yates* v. *Plumbe*.

[5] After redemption, if the mortgagee is unable to deliver the deeds on the ground that they have been destroyed or lost, the mortgagor is entitled to compensation for such loss or destruction. (Vol 9) 1922 Mad 299 (300) (DB) ✠ ('96) 12 Mad L Jour 63 (63, 64) (DB). (Mortgagee cannot be compelled to give any security for compensation in absence of provision in decree.)

[6] The loss of the deeds will not deprive the mortgagee of his right to recover his debt—But where no such loss is established he cannot recover unless he produces the bond. (Vol 13) 1926 All 741 (743) : 48 All 78 (DB).

[7] Mortgagee fraudulently destroying deed in order to deprive mortgagor of equity of redemption—Amount due not ascertainable without document — Mortgagor held could recover property without any payment. (1864) 1 Bom H C R 177 (180) (DB).

[8] Mortgagor giving mortgagee six months' notice of his intention to pay off mortgage—Mortgagee losing title deeds and not furnishing indemnity—Mortgagor not paying amount until after time limited by notice—Mortgagee held not entitled to interest after end of six months and should give indemnity for loss of deeds. (1847) 60 E R 725 (726) : 15 Sim 531, *Maddleton (Lord)* v. *Eliot*.

14. Delivery of possession. — [1] Mortgagee in possession of property — Mortgagor is on redemption entitled to get back possession. ('21) 63 Ind Cas 114 (115) (DB) (All).

[2] Mortgaged property a kotah with an exit—Mortgagee cannot block it and deliver possession of property in that state — Property must be in same state as at time of mortgage. ('08) 4 Nag L R 57 (59) ✠ (Vol 7) 1920 Lah 239 (240).

[3] Mortgagee evicted by title paramount — Obligation to give back possession on redemption ceases. ('13) 16 Oudh Cas 199 (202). (E. g., a prior mortgagee)

[4] Mortgagor not delivering property to mortgagee or not paying whole mortgage-money — Obligation on part of mortgagee to give back possession does not arise at all. (Vol 6) 1919 Oudh 36 (37). (Possession not delivered.) ✠ (Vol 7) 1920 Oudh 24 (24). (Whole mortgage money not paid.)

[5] If the property is lost through mortgagee's negligence, he is liable to account for it to the mortgagor. (Vol 9) 1922 Bom 156 (157) : 46 Bom 218 (DB).

[6] Mortgagee mixing his own property with mortgaged property—He must identify fully property mortgaged—If he is unable to do that, mortgagor is entitled to whole property. ('01) 3 Bom L R 152 (153) (DB).

[7] A mortgagee in possession should hand over to the mortgagor on redemption all the lands of which he has got possession as mortgagee even though some of them did not form part of the property originally mortgaged. (Vol 11) 1924 All 444 (445) : 46 All 152 (DB) ✠ (Vol 10) 1923 Bom 42 (42).

[8] Through mistake mortgagee put in possession of more land than that specified in mortgage deed — Mortgagee must deliver possession of whole property. (Vol 10) 1923 Bom 42 (42).

[9] Mortgagee not entitled to possession entering into possession wrongfully — Mortgagor can sue for possession without redeeming mortgage. (Vol 22) 1935 Pat 174 (175) (DB).

[10] Mortgagee by conditional sale taking possession of property without instituting proceedings for foreclosure under Bengal Regulation, XVII of 1806 —His entry into possession is wrongful—Mortgagor can sue for ejectment without suing for redemption. ('06) 28 All 496 (508) : 33 Ind App 107 (P C).

[11] Usufructuary mortgagee held entitled to all the crops growing on the land at the time of redemption, provided that such crops were sown or planted by the mortgagee or his tenant without notice of the intended redemption. (Vol 7) 1920 Upp Bur 56 (58, 61) : 3 Upp Bur Rul 141.

15. Re-transfer of mortgaged property. — [1] The mortgagor is the legal owner of the property whether it is re-conveyed to him or not. The re-conveyance is merely a useful protection for the mortgagor. ('03) 25 All 446 (454) (DB).

[2] Where the mortgagor transfers his equity of redemption to another and there is no personal liability to pay, he is no longer a "mortgagor" and cannot claim to redeem the mortgage. (Vol 8) 1921 Mad 51 (53) (DB).

[3] This section requires that the re-conveyance is to be at the cost of the mortgagor. (Vol 17) 1930 Bom 401 (406) (DB) ✠ ('02) 26 Bom 643 (648).

16. "Mortgaged property." — [1] The "mortgaged property" in the case of a sub-mortgage is the mortgagee right mortgaged to the sub-mortgagee. ('07) 29 All 385 (395, 401) (FB).

Section 60—Note 16 *(contd.)*

[But see ('95) 18 All 83 (86) (DB). (Following ('91) 13 All 432.)]

[2] The sub-mortgagee can sue to bring to sale the mortgagee right alone. (('07) 29 All 385 (405) (FB). (('91) 13 All 432, *dissented from.*) ✠ (Vol 3) 1916 Upp Bur 5 (6) : 2 Upp Bur Rul 89.

[3] The mortgagee can sue for redemption of his sub-mortgage. (Vol 9) 1922 Bom 424 (425, 426) (DB).

[4] Mortgagor *A* suing mortgagee *B* and sub-mortgagee *C* for redemption—*B* dying—Legal representatives not brought on record—Suit held abated on *B*'s death there being no privity between *A* and *C*. ('96) 20 Bom 549 (552, 553) (DB).

17. Right to registered acknowledgment.—[1] Acknowledgment in writing by mortgagee that any right in derogation of mortgagor's interest transferred to the mortgagee has been extinguished should, if the mortgage is for more than one hundred rupees, be necessarily registered under S. 17 (1) (b), Registration Act, 1908. ('84) 6 All 335 (339, 340) (DB) ✠ (Vol 13) 1926 All 693 (694): 48 All 705 (DB) ✠ ('77) 2 Bom 489 (492, 493) (DB) ✠ ('83) 7 Bom 123 (124) (DB).

[But see ('80) 4 Bom 235 (238) (DB). (Case under the Registration Act of 1877) ✠ ('81) 5 Bom 181 (183) (DB). (Do.) ✠ ('07) 9 Bom L R 254 (257, 258) (DB). (Do.)

18. Proof of redemption.—[1] Mortgagor selling his property to mortgagee—Sale price, equal to mortgage-money, due on the date, appropriated by mortgagee towards mortgage in his accounts—Sale deed and conduct of parties held sufficient proof of redemption of mortgage. (Vol 21) 1934 Oudh 98 (99) (DB).

[2] Unregistered receipt of redemption cannot in itself be used as evidence of redemption but coupled with fact of delivery of possession, it is good evidence of redemption of mortgage in fact. (Vol 6) 1919 All 94 (94).

19. Extinguishment of right to redeem by act of parties.—[1] A mere acquiescence or silence where the mortgagee is claiming as owner is not sufficient to extinguish the right to redeem. ('04) 4 All L Jour 787 (790). (*Overruled* on another point in (Vol 2) 1915 All 70: 37 All 165 (FB.)) ✠ (Vol 2) 1915 All 203 (206).

[2] A mere mutation of names in the revenue registers is not sufficient to extinguishment of the right to redeem. (Vol 21) 1934 Oudh 246 (248): 9 Luck 657 (DB) ✠ ('11) 9 Ind Cas 431 (433) (Oudh) ✠ (Vol 10) 1923 Nag 274 (277) ✠ ('29) 120 Ind Cas 789 (790) (DB) (Lah).

[3] The "act of parties" means acts to which both the mortgagor and mortgagee are parties. (Vol 2) 1915 All 203 (206) ✠ ('71) 15 Suth W R 353 (354) (DB).

[4] A deposit by the mortgagor of the mortgage-money under S. 83 does not extinguish the mortgage where the mortgagee does not accept it. (Vol 11) 1924 All 26 (28): 45 All 592 (DB).

[5] The act of parties extinguishing right to redeem must be independent of the mortgage transaction and not part and parcel of it. (Vol 6) 1919 All 126 (128) (DB).

[6] A condition in the mortgage deed that on default of payment on a certain date the mortgagee shall become the absolute owner, will not extinguish the right to redeem on that date. ('88) 11 Mad 403 (404) (DB).

[7] A purchase by the mortgagee subsequent to the mortgage, of the equity of redemption will extinguish the right to redeem. (Vol 6) 1919 All 126 (128) (DB) ✠ (Vol 6) 1919 Pat 574 (577) (DB) ✠ (Vol 21) 1934 Pat 301 (302).

[8] Mortgage admitted—Onus is on mortgagee to show that mortgage has been extinguished by subsequent sale. (Vol 17) 1930 P C 91 (92): 11 Lah 199: 57 Ind. App. 86 (P C) ✠ (Vol 10) 1923 Lah 243 (244) ✠ (Vol 2) 1915 Mad 1150 (1151) (DB) ✠ ('05) 1 L R Bur Rul 5 (6) ✠ ('13) 20 Ind Cas 666 (667) (Low Bur).

[9] Mortgagee having power of sale under mortgage deed entering into contract of sale in exercise of that power—Mortgagor can redeem at any time before completion of sale. (Vol 31) 1944 Bom 156 (158, 159): I L R (1944) Bom 549 (DB).

[10] Parties to mortgage settling their claims by compromise—Mortgage-debt to be extinguished—Property to be divided among parties in specific shares—Decree passed in terms of compromise—Subsequent suit for redemption is barred. (Vol 1) 1914 P C 27 (29): 42 Cal 801: 42 Ind App 1 (P C).

[11] Preliminary foreclosure decree—If mortgagor failed to pay within six months, mortgage to be foreclosed—Mortgagor not being able to find funds gives up possession to mortgagee who remained in unchallenged possession for over forty years—Right of redemption held lost. (Vol 16) 1929 P C 61 (62, 63) (P C).

[12] Mortgagee to become absolute owner after expiry of five years from date of mortgage if mortgage money not paid by then—After that date, mortgagee applying for mutation—Mortgagor consenting to it—Right to redeem held extinguished. ('13) 21 Ind Cas 87 (87) (All).

[13] Razinama by mortgagor relinquishing all rights in property in favour of mortgagee under Bombay Land Revenue Code and complementary kabuliyat by mortgagee in favour of Government do not necessarily amount to transfer of the property so as to extinguish equity of redemption. (Vol 13) 1926 Bom 40 (41): 49 Bom 847 (DB). ((Vol 1) 1914 Bom 123 and (Vol 1) 1914 Bom 124: 39 Bom 55, *Dissent.*)

[14] A purchase of the mortgagee right by a co-mortgagor may or may not extinguish the mortgage. It depends upon the intention of the mortgagor acquiring it. (Vol 21) 1934 Lah 143 (144).

[15] Charge-holders agreeing to postpone charge and give priority to rights of equitable mortgagee—Charge-holders also agreeing on sale by equitable mortgagee or through Court to execute all documents necessary for effectively vesting property in purchaser — Surplus moneys remaining in hands of mortgagee after exercise of power of sale by him to be handed over to mortgagor—Agreement held did not extinguish right of charge-holders to redeem equitable mortgage. (Vol 32) 1945 Bom 161 (162).

20. Purchase by mortgagee at court sale, if extinguishes right to redeem.—[1] Mortgagee obtaining decree and at sale in execution thereof purchasing property with leave of Court—Equity of redemption is extinguished by purchase. ('89) 16 Cal 682 (692) : 16 Ind App 107 (P C).

[2] Mortgagee obtaining decree on money claim unconnected with mortgage, and, at sale in execution thereof purchasing mortgaged property, with leave of Court—Right to redeem is extinguished. (Vol 10) 1923 Cal 121 (129) (DB).

[3] Mortgage property brought to sale in execution of money decree obtained by third party against mortgagor—Mortgagee purchasing property without leave of Court—Mortgagee gets irredeemable title to property. ('04) 7 Oudh Cas 307 (311) (DB) ✠ ('04) 32 Cal 296 (316): 32 Ind App 23 (P C) ✠ ('04) 27 Mad 428 (429) (DB) ✠ ('01) 24 Mad 96 (111) (DB). ((1900) 23 Mad 377, held not good law.)

[4] Mortgagee in possession bound to pay revenue, rent or other public charges—Default in payment—Revenue or rent sale—Mortgagee purchasing property himself or in some other person's name on his behalf—Right to redeem is not extinguished. ('66) 10 Moo Ind App 540 (558) (P C). (Fraud by mortgagee.) ✠ (Vol 3) 1916 P C 227 (228): 44 Cal 573: 44 Ind App 30 (P C).

Section 60 — Note 20 *(contd.)*

(Fraud by agent of minor mortgagee.): ✠('98) 22 Bom 271 (274) 275) (DB). (Mortgagee purchasing in name of another.) ✠('84) 7 Mad 111 (112) (DB) ✠(Vol 14) 1927 All 747 (748): 50 All 36 (DB) ✠(Vol 5) 1918 Cal 192 ((193) (DB) ✠(Vol 3)1916 Bom 108 (109): 40 Bom 483 (DB).

[5] Mortgage with possession by tenant—Default by mortgagee to pay rent—Holding sold in execution of rent decree and purchased by landlord—Mortgagor's right of redemption is extinguished and does not revive by subsequent purchase by mortgagee. (Vol 26) 1939 Pat 382 (385) : 18 Pat 133 (DB).

[6] The purchase by the mortgagee of a part of the mortgaged property does not extinguish the whole mortgage-debt, even where the value of the property purchased is equal to the amount due on the mortgage decree. (Vol 7) 1920 Mad 375 (377): 43 Mad 372 (FB). (('11) 10 Mad L Tim 240, *Overruled.*) ✠(1900) 22 All 284 (FB) ✠ ('01) 26 Bom 88 (95, 98) (S B) ✠ (Vol 27) 1940 Pat 45 (46) (DB) ✠ (Vol 11) 1924 Mad 364 (364) (DB).

21. Subsequent mortgagee purchasing at sale held by prior mortgagee under his power of sale — [1] First mortgagee duly exercising his power of sale— Subsequent mortgagee purchasing property at such sale, in absence of anything to impeach *bona fides* of transaction, acquires same irredeemable title as if he were stranger. ('01) 24 Mad 96 (110) (DB).

22. Mortgagee purchasing at sale held by himself under his power of sale.—[1] A purchase by the mortgagee himself at a sale held by him under a power of sale given to him on his mortgage is a nullity. (Vol 16) 1929 Bom 24 (26, 27).

[See however ('86) 10 Bom 49 (54, 55, 56) (DB). (Mortgagee would get unimpeachable title if mortgagor agreed not to dispute sale).]

23. Extinguishment of right to redeem by decree of Court.—[1] The decree of Court referred to is the final decree in a foreclosure suit under O. 34. R. 3 and the final decree in a redemption suit under O. 34 R. 8 Civil P. C. (Vol 17) 1930 Bom 401 (405) (DB)✠(Vol 7) 1920 Oudh 204 (206, 207) (DB) ✠('11) 13 Bom L R 162 (170)✠(Vol 3) 1916 Nag 120 (123):13 Nag L R 69.

[2] A decree for possession in favour of a mortgagee who is entitled to such possession under the terms of his mortgage does not extinguish the mortgagor's right to redeem. (Vol 30) 1943 Nag 271 (272, 273) : I L R (1944) Nag 40.

[3] Until a final decree for redemption or foreclosure is passed, the right to redeem is not lost even if the time fixed for payment in the preliminary decree has expired. ('10) 7 All L Jour 953 (956) (DB) ✠ (Vol 18) 1931 Oudh 121 (122) : 6 Luck 610 (DB) ✠ (Vol 18) 1931 All 223 (223) (DB).

[4] The right to redeem is not extinguished, where the final decree for redemption or foreclosure omits to make such a declaration. ('09) 36 Cal 122 (127) (DB)✠ (Vol 23) 1936 Pat 420 (420, 421) : 15 Pat 607 (DB). (Suit for redemption.)

[5] So long as the right to redeem exists a suit for redemption would not be barred by *res judicata.* (Vol 24) 1937 Mad 214 (216) : I L R (1937) Mad 545 (FB). (('02) 25 Mad 300 (FB) held overruled by A I R (Vol 21) 1934 P C 205 : 56 All 561 : 61 Ind App 362 (PC).) ✠ (Vol 27) 1940 Mad 577 (578).

[6] Even after the foreclosure if the mortgagee sues on the personal covenant to pay, he thereby opens the foreclosure and the mortgagor may thereupon redeem. (1846) 50 E R 378 (380) : 15 L J Ch 347, *Lockhart* v. *Hardy* ✠ ('11) 13 Bom L R 162 (168).

[7] A decree for sale does not extinguish the debt and the right to redeem. (Vol 9) 1922 P C 11 (13): 43 All 469 : 48 Ind App 465 (PC) ✠ (Vol 27) 1940 All 416 (420) : I L R (1940) All 580 (DB) ✠ (Vol 1) 1914 Bom 200 (200, 201) : 39 Bom 41 (DB) (Preliminary decree does not extinguish right to redeem.) ✠ (Vol 5) 1918 Bom 1 (2, 6) : 43 Bom 334 (FB). (Do.) ✠ (Vol 24) 1937 Nag 196 (196) : I L R (1939) Nag 310 ✠ (Vol 23) 1936 Lah 562 (564) (DB).

[See however (Vol 13) 1926 Mad 816 (818, 819, 820): 49 Mad 691 (DB). (Final decree for sale extinguishes right of redemption).]

[8] Where in pursuance of the mortgage decree the properties are sold and the sale is confirmed the right to redeem would be extinguished '(07) 29 All 339 (346) : 34 Ind App 102 (PC) ✠ (Vol 16) 1929 Pat 323 (324)(DB) ✠ (Vol 7) 1920 Oudh 204 (207) (DB) ✠ (Vol 18) 1931 Oudh 69 (71) (DB).

[9] A head of joint Hindu family mortgaging properties to *X* — Mortgage binding on *M* as member of family — Suit upon mortgage — *M* not made party — In execution of decree, *X* purchasing property himself — After sale, *M*, without impeaching mortgage and decree claiming that his right of redemption was unaffected by decree — Right to redeem held extinguished by sale unless sale was set aside in properly constituted suit (Vol 7) 1920 P C 1 (3) : 47 Cal 924 : 47 Ind App 91 (PC).

[10] Suit to redeem usufructuary mortgage filed in 1888 — Consent instalment decree passed in 1889 — On default of payment of two instalments right to redeem not to remain — On default mortgagee applying for foreclosure — Fresh order for making previous order absolute held unnecessary as Ss. 92 and 93 were not then in force — Decree of 1889 held extinguished mortgagor's right to redeem — Suit to redeem brought in 1938 held barred by *res judicata* (Vol 32) 1945 Bom 307 (310).

24. Extinguishment of right of redemption by operation of law. — [1] The equity of redemption may be extinguished by operation of law as where the mortgagee acquires the equity of redemption by inheritance or by adverse possession. (Vol 8) 1921 Mad 82 (84) : 44 Mad 253 (DB). ((Vol 2) 1915 Mad 573 : 38 Mad 1158 held overruled by (Vol 6) 1919 P C 44 : 46 Ind App 285 : 43 Mad 244 (PC).) ✠ (Vol 10) 1923 Lah 495 (496) : 4 Lah 249 (DB). (It is to be decided on facts of each case whether circumstances established adverse title.) ✠ (Vol 16) 1929 Mad 16 (18, 19) (DB) ✠ (Vol 8) 1921 Oudh 124 (125) : 24 Oudh Cas 155.

[2] A revenue sale of mortgaged property may extinguish the right of redemption. ('84) 7 Mad 111 (112) (DB) ✠ ('66) 10 Moo Ind App 540 (557) (PC)

[3] Inam land mortgaged by inamdar to third person — Resumption of land by Government not operating as forfeiture of land — Resumption does not destroy right of redemption. ('12) 36 Bom 539 (542)(DB).

[4] Redemption suit withdrawn or abandoned without permission under O. 23, R. 1 (2), Civil P. C., and consequently dismissed—Fresh suit for redemption is barred by O. 23, R. 1 (3), Civil P. C. (Vol 32) 1945 Mad 225 (228) (DB).

25. Clog on redemption — General. — [1] Any provision in the mortgage deed which attempts to deprive the mortgagor of his right to redeem absolutely and at any time, after the mortgage-money has become payable, is void. (1681) 22 E R 1064 (1065) : Freeman 69, *Jason* v. *Eyres* ✠ (1892) 61 L J Ch 49 (53) : 1892 App Cas 1, *Salt* v. *Northempton* ✠ (Vol 12) 1925 All 643 (644) (DB) ✠ (Vol 14) 1927 Oudh 237 (238) (DB) ✠ (Vol 12) 1925 Oudh 720 (721) ✠ (Vol 7) 1920 Pat 144 (145) : 5 Pat L Jour 423 (DB).

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[2] The mortgagor cannot contract himself out of his right of redemption (Vol 4) 1917 Low Bur 39 (39) ✠ (Vol 11) 1924 Rang 83 (83) : 1 Rang 419 (DB).

[3] A contract which amounts to a "clog on the equity of redemption" may be regarded as opposed to public policy and consequently as void under S. 23, Contract Act (Vol 31) 1944 All 204 (206) : I L R (1944) All 302 (DB).

[4] Section 60 as it stands, merely enacts that redemption is to be according to the terms of the mortgage contract and there is nothing in the T. P. Act which says anything about clogs on the equity of redemption. The question whether a provision in a mortgage contract is contrary to law must be decided with reference to the law applicable in British India and not the English rule. (Vol 18) 1931 All 380 (383) : 53 All 580 (DB) ✠ (Vol 20) 1933 All 70 (71) : 54 All 1041 (DB) ✠ (Vol 8) 1921 Bom 51 (52) : 45 Bom 117 DB).

[But see (Vol 11) 1924 Oudh 193 (198, 202) : 27 Oudh Cas 4]

[5] It is not possible to lay down any hard and fast rule as to what should and what should not be regarded as a clog on redemption. Each case must be decided on its own facts and circumstances. (Vol 16) 1929 Oudh 30 (31) : 4 Luck 147 (DB) ✠ (Vol 1) 1914 Oudh 379 (381) : 17 Oudh Cas 313 ✠ (Vol 12) 1925 All 643 (644) (DB) ✠ (Vol 18) 1931 All 380 (384) : 53 All 580 (DB).

[6] Whether clause in mortgage deed is clog on redemption — Court has to look, not to events as they have or have not happened but only to possible or probable effect of such clause on right of redemption. (Vol 20) 1933 Oudh 460 (461) : 9 Luck 151 (DB).

Right to redeem absolutely.

[7] A right to redeem absolutely may be said to be clogged by any stipulation which prevents the mortgagor from getting back the mortgaged property as free and unfettered as if there was no mortgage (Vol 17) 193 . P C 142 (144) : 11 Lah 251 : 57 Ind App 168 (PC).

[8] A provision in the mortgage deed or in a document forming part of the same transaction that the mortgagee should even after redemption, continue in possession as a tenant or in some other capacity will be a clog on redemption (Vol 12) 1925 All 427 (428, 429): 47 All 582 (DB) ✠ (Vol 21) 1934 Pat 397 (398) ✠(Vol 2) 1915 Nag 26 (27, 28) : 11 Nag L R 180 ✠ (Vol 9) 1922 Bom 277 (278) :46 Bom 409 (DB) ✠(Vol 10) 1923 Nag 115 (115) ✠ (Vol 24) 1937 Lah 49 (51, 52) (DB) ✠ ('11) 35 Mad 744 (749) (DB)

[9] A stipulation that the right of redemption shall be extinguished on default in payment is a clog on redemption (Vol 12) 1925 Oudh 11 (13) (DB).

[10] Stipulation that mortgage should be converted into a sale is a clog on redemption. (Vol 31) 1944 Mad 237 (238) ✠ ('94) 1894 Pun Re No 131 page 497 (498) (DB)✠(Vol 28) 1941 Mad 666 (669) (DB) ✠ (Vol 5) 1918 Cal 638 (639) (DB).

[11] Where the property mortgaged is already subject to any obligation, the mortgagor cannot on redemption get back the property free from such obligation and such obligation cannot be considered as clogging redemption. (1912) 81 L J Ch 137 (146) : 1912 App Cas 52, *De Bears Consolidated Mines* v. *British South Africa Co Ltd.* (Reversing (1911) 80 L J Ch 65 which affirmed (1910) 79 L J Ch 345.)

Right to redeem at any time after the due date for payment.

[12] Any condition or stipulation which prevents the mortgagor from redeeming at any time after the date fixed for payment of the mortgage money will be a clog on redemption. (Vol 12) 1925 All 34 (35) (DB) ✠ (Vol 15) 1928 Mad 234 (238) (DB) ✠ (Vol 17) 1930 Mad 305 (312) : 53 Mad 805 (DB) ✠ (Vol 12) 1925 All 42 (43)✠(Vol 7) 1920 Pat 787 (789) (DB)✠(Vol 2) 1915 Low Bur 95 (96) ✠ (Vol 14) 1927 Lah 226 (227) (DB) ✠ ('84) 1884 Bom P J 254 (DB).

[But see (Vol 16) 1929 All 388 (389) (DB). ((Vol 9) 1922 P C 17 : 49 Ind App 60 : 44 All 185 : 25 Oudh Cas 8 (P C) *was not referred to.*)✠('11) 10 Ind Cas 243 (244) (All)✠('03) 6 Oudh Cas 167 (174).]

[13] Usufructuary mortgage—Mortgagor entitled to redeem after sixty years on one particular day only — Stipulation held a clog on redemption. (Vol 18) 1931 All 380 (382, 383) : 53 All 580 (DB).

[14] Mortgagor letting mortgaged property to mortgagee—Mortgagee to hold it until mortgage money paid — Covenant is not a clog. ('05) 7 Bom L R 772 (782, 783).

Stipulation must be part of the same transaction as the mortgage.

[15] The doctrine of clog on the equity of redemption applies only to stipulations entered into as part of the same transaction as the mortgage, affecting the right of redemption. (Vol 9) 1922 Bom 277 (278) : 46 Bom 409 (DB)✠(Vol 17) 1930 Mad 305 (313) : 53 Mad 805 (DB) ✠(Vol 4) 1917 Oudh 237 (239) : 20 Oudh Cas 97 ✠ (Vol 10) 1923 Oudh 143 (144) (DB)✠(Vol 16) 1929 Bom 186 (187) : 53 Bom 360.

[16] The equitable doctrine of clogging the equity of redemption is not applicable to subsequent and independent contracts qualifying the right to redeem. (Vol 17) 1930 All 136 (148) : 52 All 281 (FB) ✠ (Vol 13) 1926 Oudh 228 (229) : 1 Luck 92 : 29 Oudh Cas 118 (DB) ✠ (1902) 71 L J Ch 768 (768) : 1902 App Cas 461, *Reeve* v. *Lisle* ✠ (Vol 7) 1920 Bom 82 (83) (DB)✠(Vol 4) 1917 Nag 79 (80, 81) ✠ (Vol 17) 1930 Pat 121 (123) (DB)✠ (Vol 3) 1916 Mad 841 (841) : 39 Mad 1010 (DB) ✠ (Vol 22) 1935 Pat 353 (354) (DB). (Subsequent agreement granting permanent lease not a clog) ✠ ('12) 34 All 620 (628) : 15 Oudh Cas 285 (PC).

[But see (Vol 16) 1929 Bom 186 (187) : 53 Bom 360✠(Vol 7) 1920 Pat 144 (145) : 5 Pat L Jour 423 (DB)✠('92) 16 Bom 705 (707) (DB)]

[17] A subsequent contract for sale of the equity of redemption to the mortgagee and for delivery of possession to him of the property is not invalid as a clog. (1863) 32 L J Ch 648 (653) : 8 L T 627, *Gossip* v. *Wright*✠(Vol 14) 1927 Rang 33 (35) : 4 Rang 368 (FB) ✠(Vol 19) 1932 Cal 126 (133): 59 Cal 117 (DB). *(Obiter.)* ✠(Vol 4) 1917 Nag 79 (80, 81) ✠ ('03) 27 Bom 297 (300) (DB)✠(Vol 11) 1924 Rang 89 (90).

[18] Subsequent agreement providing that if amount subsequently lent was not paid within a particular time stipulations in former deed were not to be in force— Court will not allow additional advantage to be obtained through necessity of debtor — Principle "once a mortgage always a mortgage" would apply. (1864) 1864 Suth W R (FB) 79 (80, 81) (FB)✠('03) 27 Bom 154 (156) (DB).

[19] Subsequent contract not to redeem without paying unsecured debts due to mortgagee is enforceable against mortgagor personally but not against his transferees. (Vol 10) 1923 Oudh 24 (25)✠(Vol 1) 1914 Oudh 304 (305) : 17 Oudh Cas 303✠(Vol 12) 1925 Oudh 593 (594).

[See however (Vol 17) 1930 All 136 (149) : 52 All 281 (FB). (Contract though not clog, is unenforceable.)✠ (Vol 4) 1917 Oudh 388 (389). (Contract is unenforceable as clog)]

The stipulation must have been entered into by the mortgagee in his character as such.

[20] *A* purchasing property from *B* for £51,000— £5,000 to be paid in cash and balance secured by mort-

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gage by *A* to *B* — Agreement of sale stating that *A* should give *B* a certain option, failing to do which he will pay *B* £5,000 in addition to balance of purchase-money secured by mortgage—This held was not a clog on redemption. (1909) 26 T L R 138 (139), *Davis* v. *Chamberlain.*

Effect of clogging stipulations.

[21] A stipulation which is a clog on redemption does not invalidate the mortgage as a whole. (Vol 9) 1922 Oudh 221 (223).

26. Clog—Anomalous mortgage.—[1] Principle of clog on redemption applies to anomalous mortgages also. (Vol 9) 1922 P C 17 (19) : 44 All 185 : 25 Oudh Cas 8 : 49 Ind App 60 (PC) ✠ (Vol 12) 1925 Mad 366 (366) ✠ (Vol 5) 1918 Cal 638 (639) (DB) ✠ (Vol 5) 1918 Upp Bur 32 (33) : 2 Upp Bur Rul 141 ✠ ('07) 30 Mad 61 (66) (DB). (Mortgage before Act.)

[But see (Vol 11) 1924 Rang 83 (85) : 1 Rang 419 (DB).]

[2] A provision for renewal of *kanom*, being permissible under the customary law of Malabar, is not a clog on redemption. (Vol 24) 1937 Mad 126 (127) ✠ (Vol 5) 1918 Mad 509 (510) (DB).

27. Stipulation giving mortgagee option to purchase the property. — [1] A stipulation for an option to the mortgagee to purchase the mortgaged property will be one for a collateral advantage which clogs the right of redemption and is therefore void. (1705) 23 E R 935 (935) : 2 Vern 520, *Jennings* v. *Ward* ✠ (1904) 73 L J Ch 526 : 90 L T 731, *Samual* v. *Jairah Timber and Wood Paving Corporation.* (Per *Lord Lindley.)*✠ (Vol 34) 1947 Mad 51 (52) (DB).

[2] Stipulation by the mortgagor that he will not sell to any one except the mortgagee clogs the right of redemption and is void. (Vol 17) 1930 Pat 121 (124) (DB).

[3] If the stipulation for pre-emption by the mortgagee is for pre-emption at any time before redemption it is not ordinarily a clog on redemption. (Vol 15) 1928 Pat 637 (639) : 8 Pat 243 (DB) ✠ ('98) 2 Cal W N 575 (576) (DB) ✠ ('09) 3 Sind L R 130 (131) (DB). ((1900) 22 All 238, *Foll.*)

[4] If the right of pre-emption given to the mortgagee is exercisable even after the mortgage is redeemed or is exercisable at a fixed price or at a concession price it may be a clog on redemption. ('01) 24 Mad 449 (455, 458, 459) (DB). (Right exercisable after redemption.) ✠(Vol 15) 1928 Pat 637 (639) : 8 Pat 243 (DB). (Right exercisable at fixed price.)✠(Vol 16) 1929 Mad 243 (250): 52 Mad 300 (DB). (Right exercisable at concession price.)

28. Stipulation against redemption by persons other than the mortgagor.—[1] Condition that mortgage is redeemable only during life of mortgagor is void —Mortgage is nevertheless redeemable by his heirs. (1702) 22 E R 1195 (1195) : Freeman 258, *Price* v. *Perrie*✠(1758) 28 E R 605 (606): 1 Eden 54, *Spurgeon* v. *Collier*✠('94) 1894 Pun Re No. 131, p. 497(499) (DB).

[2] Mortgage redeemable by mortgagor and heirs male of his body—It is redeemable by assignee of mortgagor. (1681) 23 E R 288 (288) : 1 Vern 33, *Howard* v. *Harris* ✠ (1714) 24 E R 384 (385) : 1 P W 268, *Floyer* v. *Lavington* ✠ ('94) 1894 Pun Re No. 131, p. 497 (499) (DB).

29. Provision for long period for redemption, if clog.—[1] If the period fixed for redemption is a reasonable one it is not a clog on redemption. (1893) 67 L J Ch 540 (541) : 47 W R (Eng) 84, *Biggs* v. *Hoddinnott.*

[2] The mere fact that the period fixed for redemption is a long one is not by itself a clog on redemption. (Vol 31) 1944 Mad 501 (502)✠(Vol 20) 1933 All 70(71): 54 All 1041 (DB). (60 years held not necessarily clog.) ✠ (Vol 16) 1929 Oudh 30 (31) : 4 Luck 147 (DB). (35 years.) ✠ (Vol 32) 1945 Oudh 113 (114) : 20 Luck 85 (DB). (51 years.)✠(Vol 16) 1929 Oudh 54 (55): 4 Luck 203 (DB). (Period of 99 years.)✠(Vol 20) 1933 Lah 373 (374). (50 years.)✠(Vol 12) 1925 All 42 (43). (Term of 60 years.) ✠ (Vol 23) 1936 Lah 168 (170) (DB). (25 years.)✠('12) 15 Ind Cas 917 (918) (Lah). (150 years.) ✠('96) 20 Bom 677 (684) (DB).

[See however ('04) 26 All 479 (481) (DB). (30 years or upwards may be regarded by a Court of equity as unconscionable or oppressive — Period of 15 years held not oppressive.)]

[But see (Vol 14) 1927 Oudh 224 (225) : 2 Luck 588. (Period of 200 years constitutes a clog — Contra see (Vol 13) 1926 Oudh 38.)]

[3] Long period for redemption coupled with other circumstances may be a clog on redemption. (Vol 16) 1929 Oudh 30 (31) : 4 Luck 147 (DB) ✠ (Vol 11) 1924 Lah 129 (130) (DB). (Period of 51 years coupled with power to mortgagee to spend as much money on improvement as he likes and charge interest on it is a clog on redemption.)✠(Vol 12) 1925 All 643 (645) (DB) ✠ (Vol 1) 1914 All 334 (336) : 36 All 551 (DB) ✠ (Vol 20) 1933 Oudh 460 (460) : 9 Luck 151 (DB) ✠ ('10) 1910 Pun L R No. 128, p. 352 (352, 353). (The condition in a mortgage deed for the term of 29 years requiring the mortgagor to pay interest for the full term along with the principal at the time of redemption and not within the term if he chose, is a clog on the equity of redemption.)

30. Stipulation for collateral advantage. — [1] Mortgage with possession by *A* in favour of *B*—Rupees 4,000 per year to be allowed to mortgagee for certain charges that would be incurred by mortgagee for usual annual repairs, etc., to mortgaged property—Agreement held not for collateral advantage that could be objected to. (Vol 10) 1923 P C 26 (27) : 50 Ind App 41 : 46 Mad 108 (PC).

[2] Where the mortgagor of a mill agreed to pay the mortgagee remuneration as manager of the mill, it was held not to be bad. ('11) 13 Bom L R 162 (191).

[3] *A* borrowed money from *B* for building factory and mortgaged factory — Stipulation that *A* would pay two and half per cent. commission in perpetuity on income of factory, held bad. (Vol 13) 1926 Bom 495 (496) (DB).

[4] *A* mortgaged to *B* for Rs. 1200 his kachha built tiled shop situated in busy part of Benares — If *B* constructed any building on mortgaged property by demolition of kachha shop, *A* to pay entire cost of construction with mortgage-money, at time of redemption — *B* spent Rs. 8,000 odd in constructing new pucca building in place of dilapidated shop—Stipulation held did not amount to a clog. (Vol 31) 1944 All 204 (207): I L R (1944) All 302 (DB).

[5] Any collateral covenant which though advantageous to mortgagee does not fetter redemption is not a clog. ('09) 3 Sind L R 130 (131) (DB).

31. Clog—Penalty in case of default.—[1] High rate of interest is not a clog on redemption. (Vol 16) 1929 Oudh 30 (32) : 4 Luck 147 (DB) ✠ (Vol 17) 1930 Cal 207 (208) : 56 Cal 960 (DB) ✠ (Vol 15) 1928 Oudh 330 (333) (DB)✠(Vol 16) 1929 All 411 (413).

[2] Provision for compound interest on default is not a clog on redemption. ('93) 20 Cal 360 (365) (DB)✠ (Vol 17) 1930 Cal 207 (208): 56 Cal 960 (DB) ✠ ('04) 28 Bom 371 (377) (DB) ✠ (Vol 32) 1945 Oudh 113 (114) : 20 Luck 85 (DB).

[3] If the provision for compound interest on default amounts to a penalty within S. 74, Contract Act, the Court will relieve against the penalty. (Vol 21) 1934

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Mad 31 (36, 40) (FB). (Compound interest is not always penal, but shall amount to penalty, if it is excessive or abnormal.) ✠ (Vol 5) 1918 Cal 557 (568) (DB) ✠ (Vol 20) 1933 All 70 (71) : 54 All 1041 (DB) ✠ (Vol 10) 1923 Rang 61 (64) : 11 Low Bur Rul 356 (DB) ✠ ('91) 1891 Pun Re No. 99, p 471 (472) (DB) ✠ (Vol 15) 1928 Lah 601 (603, 604) (DB) ✠ (Vol 11) 1924 Bom 264 (268) ✠ ('88) 2 C P L R 9 (15).

[4] Excessive interest not amounting to a penalty may also be relieved against under the provisions of the Usurious Loans Act, 1918. (Vol 20) 1933 All 70 (71): 54 All 1041 (DB) ✠ (Vol 1) 1914 Lah 241 (242) (DB). (Interest at Re. 1-4 per. cent. per mensem not excessive.) ✠ (Vol 17) 1930 Oudh 173 (175) : 4 Luck 415 (DB).

[5] Apart from the provisions of the Contract Act and the Usurious Loans Act, Court cannot interfere with the sanctity of contracts. (Vol 20) 1933 All 70 (71, 73) : 54 All 1041 (DB) ✠ (Vol 17) 1930 Cal 207 (208) : 56 Cal 960 (DB).

[6] Mortgagor to pay interest at 25 per cent. per annum, and to pay compound interest at that rate in case of default in payment — In absence of pressure or undue influence, no relief held could be given on grounds of mere hardship. (Vol 5) 1918 P C 48 (49) : 1918 Pun Re No. 101 (P C).

[7] A stipulation that the mortgage shall be redeemable only on payment, at a future time or on the happening of a given event, of a larger sum than that advanced, even though interest is made payable in the meanwhile, is not a clog. ('07) 10 Oudh Cas 214 (218) ✠ ('04) 28 Bom 371 (375) (DB).

[8] A stipulation for payment of deorha (one and half times the principal amount advanced) at redemption is not a clog. ('07) 10 Oudh Cas 214 (218) ✠ (Vol 13) 1926 Oudh 502 (503, 504).

[9] On default of payment on a particular day mortgage to be redeemed only by payment of one mura of rice for each rupee of mortgage money — Price of rice rising in market — Stipulation held penal and unenforceable. (1862) 1 Mad H C R 81 (82) (DB).

32. Clog — Stipulation that mortgage will not be redeemed before paying other amounts due. — [1] Subsequent mortgage not only for second advance but incorporating prior mortgage — Former is really mortgage for both amounts — Stipulation to pay them both together is not clog on redemption. ('04) 28 Bom 349 (358, 359) (F B).

[2] Mortgagor selling portion of mortgaged property after first mortgage and then executing second mortgage — Stipulation that he will not redeem first without redeeming second is not binding on purchaser. ('09) 3 Ind Cas 44 (45) (DB) (All).

[3] A stipulation in a mortgage that the mortgagor will not redeem it without paying an earlier personal debt is a clog on redemption. ('09) 11 Bom L R 318 (326) (DB).

[4] A mere stipulation to pay other sums also at the time of redemption is not a clog if the redemption itself is not fettered thereby. (Vol 15) 1928 All 99 (100) (DB).

33. Hard terms — Not a clog. — [1] The mere fact that the terms of the mortgage are hard is not a clog on redemption. (Vol 6) 1919 Lah 5 (5) : 1919 Pun Re No. 94 (DB). (Mortgage for 40 years — Interest at 2 per cent. per month — Terms held not clog.) ✠ (Vol 6) 1919 Lah 407 (408). (Mortgage for 30 years — Interest at 12 annas per cent. to be calculated every four years and added to principal if not paid — Costs of improvements by mortgagee chargeable at time of redemption — Conditions held not clog.) ✠ (Vol 32) 1945 Oudh 113 (114) : 20 Luck 85 (DB). (Mortgage with possession for 51 years — Provision for compound interest on default — Expenses of repairs by mortgagee to be added to redemption money — Terms held not clog.)

34. Clog — Miscellaneous. — [1] Mortgagor to pay mortgage-money within stipulated time out of his own pocket without selling or charging mortgaged property — Provision is clog on redemption. (Vol 17) 1930 All 283 (285) (DB) ✠ (Vol 14) 1927 Oudh 199 (200) : 2 Luck 564 (DB) ✠ ('92) 16 Bom 599 (601, 602) (DB) ✠ (Vol 14) 1927 Oudh 237 (237) (DB).

[*See also* (Vol 3) 1916 P C 49 (51) : 38 All 570 : 43 Ind App 284 (P C).]

[2] A stipulation that the mortgagor shall redeem without recourse to a loan from anybody is a clog on redemption. (Vol 1) 1914 All 334 (336) : 36 All 551 (DB) ✠ (Vol 9) 1922 Oudh 221 (223) ✠ (Vol 12) 1925 All 34 (35) (DB).

[3] Stipulation by mortgagor not to alienate property without mortgagee's consent is a clog. (Vol 11) 1924 Mad 57 (62) (DB).

[4] Stipulation permitting mortgagor to redeem before due date without alienating other property of his was held good as special concession personal to mortgagor. (Vol 15) 1928 All 131 (134) (DB).

[5] Mortgage deed provided that mortgagor would pay rent of fields mortgaged to zemindar, and if he failed to so pay it and mortgagee paid it, equity of redemption would be lost and mortgagee would become owner of the property : *Held* that the clause was a clog on equity of redemption. (Vol 21) 1934 All 888 (889).

[6] Profits of property mortgaged not sufficient to cover interest — Provision to pay balance of interest at time of redemption : *Held* not a clog on redemption. (Vol 13) 1926 All 171 (172) (DB).

[7] Covenant for quiet enjoyment in a usufructuary mortgage is not a clog. (Vol 12) 1925 Nag 11 (15).

35. Clogging provisions if binding on purchasers of equity of redemption. — [1] A clogging provision is void not only against the mortgagor but also against purchasers of equity of redemption or against subsequent mortgagees. (Vol 17) 1930 P C 142 (144) : 11 Lah 251 : 57 Ind App 168 (P C). (Purchaser of equity of redemption.) ✠ (Vol 7) 1920 Pat 144 (145) : 5 Pat L Jour 423 (DB). (Purchaser of equity of redemption.)

[But see (Vol 10) 1923 All 123 (123)]

[2] A clogging provision is void against subsequent mortgagees also. (Vol 24) 1937 Lah 49 (52) (DB).

36. Clogging provisions, when to be impeached. — [1] Relief against a clogging provision is an equitable relief which is granted only if impeached within a reasonable time. Where the mortgage was executed in 1880 and the suit was brought in 1920, relief against a stipulation amounting to a clog was refused. (Vol 10) 1923 Nag 60 (61) : 19 Nag L R 1.

37. Provision for reasonable notice before redemption. — [1] In India, there is no rule requiring any notice to be given before redemption. ('07) 17 Mad L Jour 177 (178) (DB).

[2] Under S. 60 a provision for reasonable notice before payment or tender of the mortgage-money may validly be made by the parties. (Vol 11) 1924 Bom 264 (269) ✠ (Vol 33) 1946 Mad 542 (544) : I L R (1946) Mad 739 (F B).

[3] Deed providing for notice by mortgagee as well as by mortgagor — Mortgagee giving notice for payment — A little delay by mutual agreement on part of mortgagor to pay amount, held did not necessitate notice by mortgagor or payment of interest in lieu of notice. (Vol 11) 1924 Bom 264 (269, 270).

[4] Deed providing that if mortgagee wanted payment he must give notice before beginning of cultivation season of particular year — Provision held did not dis-

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able mortgagor from redeeming mortgage at any time. (Vol 10) 1923 Mad 553 (556) (DB).

[5] A provision for redemption only in a particular month or season of any year is not a clog on redemption and is valid. (Vol 4) 1917 Oudh 123 (124)✠(Vol 17) 1930 All 283 (285) (DB) ✠ (Vol 13) 1926 All 665 (666, 667) : 48 All 611 (DB). (Assumed.)✠(Vol 33) 1946 Mad 542 (544) : I L R 1946 Mad 739 (F B).

[But see (Vol 6) 1919 Oudh 385 (386).]

38. Piecemeal redemption — Last para of section. — [1] A mortgage is one and indivisible. (Vol 27) 1940 Mad 498 (501) (DB)✠(Vol 1) 1914 Nag 31 (31) : 10 Nag L R 72. (Civil Procedure Code does not affect rule regarding indivisibility of mortgage nor Mitakshara rule that no coparcener has definite share till partition.) ✠ ('92) 1892 Pun Re No. 42, p. 156 (159) (DB)✠(Vol 15) 1928 Sind 101 (102) : 22 Sind L R 243✠(Vol 16) 1929 Bom 139 (141) : 53 Bom 353 ✠ (Vol 17) 1930 Bom 466 (467) : 54 Bom 625 (F B) ✠ ('22) 64 Ind Cas 211 (213) (DB) (Lah). (A mortgagee can effect assignment of his mortgagee rights either in whole or in part, and if he does in part, this does not mean that he is destroying indivisibility and integrity of mortgage security qua mortgagor.) ✠ (Vol 10) 1923 Rang 119 (119) : 4 Upp Bur Rul 132✠(Vol 20) 1933 Rang 392 (393) (DB)✠ (Vol 11) 1924 Nag 266 (268) : 20 Nag L R 115 (Mortgagee accepting part of mortgaged property in lieu of his whole mortgage-debt does not affect indivisibility— Party entitled to redeem cannot redeem a portion so taken by paying proportionate mortgage-debt.)✠(Vol 27) 1940 Cal 60 (64). (*Obiter.*)✠(Vol 14) 1927 Pat 117 (122) (DB) ✠ ('09) 1 Ind Cas 264 (277) (DB) (Cal) ✠ (Vol 24) 1937 Mad 136 (137).

[2] If the mortgagee does not agree a mortgagor or a person interested in a part of the mortgaged property cannot redeem a part of the mortgaged property by payment of a proportionate part of the mortgage-debt. ('06) 28 All 1 (17) : 32 Ind App 229 (P C) ✠ (Vol 24) 1937 P C 124 (126) : I L R (1937) Lah 245 : 31 Sind L R 271 : 64 Ind App 126 (P C) ✠ (Vol 23) 1936 All 595 (597) (DB)✠(Vol 24) 1937 Mad 136 (137)✠(Vol 15) 1928 Sind 101 (102, 103) : 22 Sind L R 243 (As between the mortgagee and holders of equity of redemption, former has right to recover whole of his debt from whatever portion of mortgage property he wishes to proceed against.) ✠ (Vol 10) 1923 Rang 119 (120) : 4 Upp Bur Rul 132 ✠ (Vol 11) 1924 Nag 266 (268) : 20 Nag L R 115 ✠ ('83) 7 Bom 467 (472) (DB) ✠ (Vol 14) 1927 Oudh 542 (543) (DB) ✠ ('09) 1 Ind Cas 264 (277) (DB) (Cal) ✠ (Vol 8) 1921 Cal 792 (794) (DB). (Apportionment will not be forced upon mortgagee unless some special equitable considerations are established.) (Vol 7) 1920 Pat 67 (69) : 5 Pat L Jour 644 (DB) ✠ (Vol 13) 1926 Pat 94 (100) (DB) ✠ (Vol 27) 1940 Mad 498 (501) (DB) ✠ ('84) 8 Bom 481 (488) (DB). (Mortgage of ancestral property by father—Unless deed provides for redemption of son's interest by payment of proportionate part of debt, mortgage is indivisible.) ✠ (Vol 19) 1932 All 85 (90) : 53 All 391 (DB). (Integrity of mortgage not broken—Mortgagee can insist on whole mortgage amount being paid—Court cannot order piecemeal redemption.)✠('13) 16 Oudh Cas 199 (200) (Purchaser of equity of redemption of the part of mortgaged property is not entitled to redeem that part only by paying proportionate part of mortgage-money.)✠(Vol 28) 1941 Lah 421 (422).

[*See also* (Vol 17) 1930 Bom 466 (475) : 54 Bom 625 (FB) (The mortgagor can, however, relinquish a part of the equity of redemption, provided he pays the whole of the amount due.)✠(Vol 13) 1926 Bom 363 (364) (DB). (Do.)]

[3] Mortgagee willing to allow partial redemption— Still mortgagor or other person entitled to redeem, though entitled only to or interested in a share of mortgaged property, can redeem whole mortgage. (Vol 4) 1917 All 401 (401) : 39 All 719 (DB)✠(Vol 14) 1927 Pat 25 (26) (DB) (Subject however to safeguarding of the equal title to redeem of any other person having a right of redemption.) ✠ (Vol 14) 1927 Cal 479 (480) ✠ (Vol 6) 1919 Cal 1061 (1062) (DB)✠(Vol 13) 1926 Bom 303 (304) : 50 Bom 331 (DB)✠(Vol 16) 1929 Bom 139 (140, 141) : 53 Bom 353 ✠ (Vol 20) 1933 Nag 44 (47) : 29 Nag L R 77 ✠ (Vol 10) 1923 Rang 119 (120) : 4 Upp Bur Rul 132✠(Vol 20) 1933 Rang 392 (393) (DB)✠ (Vol 12) 1925 Lah 651 (652) ✠ (Vol 15) 1928 Lah 105 (105) (DB)✠('06) 28 All 1 (17) : 32 Ind App 229 (PC)✠ ('03) 6 Oudh Cas 223 (229) (DB) ✠ ('99) 22 Mad 209 (212) (DB)✠(Vol 34) 1947 Pesh 45 (48) (DB).

[But see ('01) 5 Cal W N 83 (85) (DB). (Whether to allow piecemeal redemption or not depends upon the wishes of the mortgagee.)]

[4] Mortgagor cannot be compelled to redeem piecemeal, his right being to redeem the whole subject to the equities of the other persons interested. (Vol 20) 1933 Cal 154 (165) : 59 Cal 1372 (DB) ✠ ('28) 109 Ind Cas 176 (177) (DB) (Mad) ✠ (Vol 12) 1925 Mad 351 (351) (DB)✠(Vol 18) 1931 Pat 434 (435) ✠ (Vol 17) 1930 Pat 579 (582) : 9 Pat 930 (DB)✠(Vol 4) 1917 All 401 (401) : 39 All 719 (DB)✠(Vol 9) 1922 Bom 424 (425) (DB)

[5] One of several mortgagors can redeem the entire mortgage subject to proper safeguarding of the rights to redeem which the owners of other shares may possess (Vol 8) 1921 P C 125 (125) : 16 Nag L R 154 : 48 Cal 22 : 47 Ind App 207 (P C). (Contrary view in ('06) 28 All 279 cannot be considered to be good law.)

[6] The integrity of a mortgage can be broken up by operation of law and by act of parties at the time of and subsequent to the contract of mortgage. (Vol 26) 1939 Nag 136 (139) (DB).

[7] The parties can agree to a piecemeal redemption. ('99) 22 Mad 209 (211, 212) (DB) ✠ (05) 28 Mad 555 (557) (DB) ✠ ('12) 1912 Pun Re No. 50 (DB).

[8] Mortgage of several houses—Provision "If I sell any house I will pay the entire sale proceeds thereof to the mortgagee and will not take credit for interest on the amount paid", *held* entitled mortgagor to redeem part without redeeming whole of mortgaged property. (Vol 24) 1937 P C 124 (126) : I L R (1937) Lah 245 : 31 Sind L R 271 64 Ind App 126 (P C).

[9] *J* suing for redemption of his share only stating that if mortgagee objected to redemption of a share, he was willing to redeem whole—Mortgagee not accepting latter offer—*J* held entitled to redeem his share only. ('07) 10 Oudh Cas 193 (196) (P C).

[10] *A*, the father and *B*, *C* and *D* the members of a family, mortgaging property to *X*—*A's* suit for redemption dismissed—Then *B*, *C* and *D* sued for redemption of whole property : *Held* that dismissal of *A's* suit operated to exclude his share from mortgage and, therefore, *B*, *C* and *D* could redeem only their shares. ('07) 29 All 215 (216) (DB).

[11] *A*, *B*, *C* and *D*, motgagors suing separately to redeem their shares—Decrees passed in suits of *A* and *B* for such redemption, without objection by the mortgagee—On appeal in suits of *C* and *D* mortgagee claiming that their suits for partial redemption ought not to be allowed—Passing of decree in suits of *A* and *B* held broke up integrity of the mortgage. (Vol 16) 1929 All 260 (262) (DB).

[12] Mortgage by Hindu father of joint family property—Application by father under Encumbered Estates Act—Mortgage-debt apportioned between father and his sons, father being held liable for 1/5 portion

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and sons, for 4/5—Sons claiming redemption—Contention by mortgagee that sons ought to redeem whole mortgage and not only that part of it which affected them: *Held* that mortgage-debt under S. 60 meant that portion of amount of mortgage which was still due—Under Encumbered Estates Act, mortgage on father's share was discharged—It was only 4/5ths of original mortgage debt that remained to be secured by mortgage deed and 4/5 property could be applied to payment of that debt (Vol 31) 1944 All 232 (233): I L R (1944) All 349 (DB)

[13] Indivisibility destroyed by conduct of mortgagee himself—Piecemeal redemption allowed. ('31) 3 Mad 230 (233) (DB)

[14] Plaintiff himself by his conduct splitting up equity of redemption cannot thereafter rely upon the fact that equity of redemption is indivisible. (Vol 10) 1923 Lah 22 (23)

39 Mortgagee allowing redemption of a share, if splits up security as to the rest.—[1] Mortgagee allowing one of several sharers in mortgaged property to redeem his share on payment of a proportionate part of mortgage debt—Mortgage remains indivisible except as to portion in respect of which mortgagee allowed redemption—Another sharer cannot redeem his share only. (Vol 29) 1942 P C 50 (52): I L R (1942) All 608: I L R (1942) Kar (P C) 99: 69 Ind App 98 (P C).

[2] Mortgagee accepting settlement with some of mortgagors and agreeing to recover from them a proportionate part of debt payable by them out of property owned by them and submitting to scheme of payment enforced on him by operation of Relief of Indebtedness Act— Principle laid down in S. 60 does not apply—It would be most inequitable to allow mortgagee to recover entire debt again from other co-mortgagors — Court held entitled in view of special circumstances, to treat settlement as between mortgagee on one side and co-mortgagors on the other as an adjustment of part of claim which reduced liability of other co-mortgagors under mortgage. (Vol 31) 1944 Nag 225 (229): I L R (1945) Nag 194 (DB).

40. Mortgagee releasing part of mortgaged property from mortgage, if splits up security—[1] A mortgagee can release any part of the mortgaged property and enforce the whole mortgage against the other properties. ('06) 28 All 174 (177, 178) (F B) ✠(Vol 9) 1922 All 352 (354): 44 All 146 (DB) ✠(Vol 3) 1916 Mad 863 (868): 38 Mad 310 (DB) ✠('86) 9 Mad 453 (454) (DB) ✠('05) 7 Bom L R 191 (193)(DB).

[But see ('05) 1 Cal L Jour 337 (339, 340) (DB) ✠('80) 2 All 906 (907) (DB) (Mortgagee cannot release any item of the mortgage-property.)]

[2] A release of a portion of the property by the mortgagee will not entitle a sharer to make a piecemeal redemption. (Vol 19) 1932 All 246 (247) (DB) ✠(Vol 23) 1936 Rang 266 (268, 269): 14 Rang 198 (DB) ✠(Vol 21) 1934 Cal 775 (776): 61 Cal 894 (DB) ✠(Vol 26) 1939 Pat 49 (51): 18 Pat 141 (DB).

[*See also* (Vol 29) 1942 P C 50 (53): I L R (1942) All 608: I L R (1942) Kar (P C) 99: 69 Ind App 98 (P C).]

[3] Release of part of charged property from charge by owner's action (by transferring without giving notice of charge to transferee)—Charge-holder can recover entire amount of charge from remaining property. (Vol 34) 1947 Oudh 122 (126).

41. Mortgagee acquiring share in property.—[1] Under S. 60, the integrity of a mortgage is broken only if the mortgagees have acquired in whole or in part the share of a mortgagor. ('47) 1947 All L Jour 244 (245).

[1a] The acquisition by the mortgagee of a part of the mortgaged property does not extinguish the mortgage in its entirety, but only *pro tanto* in respect of that part. (Vol 29) 1942 Mad 44 (46, 47) (D B) ✠('06) 4 Cal L Jour 195 (196, 197) (D B.) ✠ ('88) 10 All 570 (574, 576). (Principle of rule formulated in last part of S. 60 applies also to adjective law, that is, rules of procedure such as those relating to execution of decree for possession of immovable property.)

[2] When the mortgagee himself acquires a part of the property, he is bound to pay himself a quota of the mortgage-debt and the mortgage-debt rateably due to him in respect of that part is thus discharged. (Vol 20) 1933 Pesh 97 (98) ✠ (1900) 22 All 284 (289) (F B) ✠ (Vol 11) 1924 Mad 864 (864) (DB) ✠ (Vol 14) 1927 Oudh 542 (543) (DB) ✠ (Vol 15) 1928 Rang 266 (266): 6 Rang 417 (DB).

[3] Mortgagee acquiring part of property—Other properties are liable for only balance of mortgage debt ('08) 12 Cal W N 745 (746) (DB) ✠ ('89) 13 Bom 47 (49) (DB) ✠ ('89) 2 C P L R 90 (92, 93) ✠(Vol 10) 1923 Rang 61 (63): 11 Low Bur Rul 356 (DB) ✠ (Vol 10) 1923 Pat 490 (491): 2 Pat 715 (DB) ✠(Vol 6) 1919 Cal 822 (823) (DB).

[4] Mortgagee acquiring part of property — Integrity of mortgage is split up. (Vol 7) 1920 Bom 191 (192) (DB) ✠ ('97) 21 Bom 619 (625, 626) (DB)✠ (Vol 10) 1923 Rang 61 (63): 11 Low Bur Rul 356 (DB).

[5] Mortgagee acquiring part of property—Not only all owners of other properties are entitled to redeem them by paying whole balance of mortgage-debt but each of such owners is entitled to redeem on payment of a proportionate part of the debt. (Vol 17) 1930 Cal 810 (814): 57 Cal 872 (DB) ✠ (Vol 24) 1937 All 44 (45) (DB) ✠ (Vol 27) 1940 All 528 (530) ✠(Vol 27) 1940 Oudh 97 (102): 15 Luck 175 (DB) ✠(Vol 2) 1915 Oudh 211 (213, 215) (DB) ✠(Vol 21) 1934 Pat 648 (650): 13 Pat 364 (DB) ✠(Vol 15) 1931 Nag 44 (44): 27 Nag L R 4 ✠ (Vol 24) 1937 Rang 359 (360) ✠ (Vol 23) 1936 Pat 629 (631): 15 Pat 481 (DB) ✠ ('10) 8 Mad L Tim 409 (410) (DB)✠ ('36) 164 Ind Cas 490 (493) (DB).(Cal) (('10) 32 All 612: 37 Ind App 182 (P C), *Followed.*) ✠(Vol 5) 1918 Cal 806 (806) (DB).

[6] Mortgagee acquiring part of property—Person interested in a share only of mortgaged properties cannot redeem anything more than his share ('70) 13 Moo Ind App 404 (415, 416) (P C) ✠ (Vol 20) 1933 All 257 (259): 55 All 359 (FB) ✠(Vol 3) 1916 Mad 863 (865): 38 Mad 310 (DB) ✠ ('11) 1911 Pun L R No. 197, page 737 (760): 1911 Pun Re No. 62 (DB) ✠(Vol 14) 1927 Mad 1039 (1040) (DB) ✠ (Vol 7) 1920 Oudh 234 (236) (DB) ✠ (Vol 27) 1940 All 528 (530) ✠(Vol 32) 1945 All 388 (389) ✠(Vol 11) 1924 Oudh 40 (44): 26 Oudh Cas 308 (DB).

[But see (86) 10 Bom 658*n* (658*n*) (DB) ✠ (Vol 12) 1925 Pat 57 (58): 3 Pat 818 (DB) ✠ ('86) 10 Bom 656*n* (657*n*) (DB) ✠ (Vol 13) 1926 Bom 303 (304): 50 Bom 331 (DB) ✠ (Vol 24) 1937 Mad 136 (138) ✠(Vol 1) 1914 Bom 259 (259, 260) (DB).]

[7] Mortgagee purchasing part of property in execution of decree obtained by him on prior mortgage of said part only—Mortgagor cannot redeem other part by payment of proportionate amount. (Vol 25) 1938 All 22 (25): I L R (1938) All 63 (DB) ✠ ('10) 32 All 612 (617): 37 Ind App 182 (P C).

[8] The words "proportionate part of the amount remaining due on the mortgage" mean "proportionate to the value of the properties mortgaged". ('70) 13 Moo Ind App 404 (408, 409) (P C) ✠(1900) 22 All 284 (293) (FB) ✠(Vol 7) 1920 Mad 375 (378): 4

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Mad 372 (FB). ((1900) 22 All 284 and ('70) 13 Moo Ind App 404 (P C) *Followed*; (1911) 10 Mad L Tim 240, *Overruled*) ✠(Vol 19) 1932 Mad 18 (19) ✠(Vol 23) 1936 Cal 537 (540) ✠ (Vol 25) 1938 Cal 618 (622): I L R (1958) 2 Cal 590 (DB) ✠ (Vol 11) 1924 All 11 (11, 12) : 45 All 46 (DB) ✠ (Vol 3) 1916 All 108 (108): 38 All 103 (DB)✠ (Vol 21) 1934 Mad 250 (251) ✠(Vol 5) 1918 Oudh 404 (405) : 21 Oudh Cas 172 (DB).

[But see (Vol 8) 1921 Nag 96 (96).]

[9] The 'acquisition" referred to in the last para of S. 60 may be in any manner, e. g., by purchase, inheritance or otherwise. ('11) 1911 Pun L R No. 197: 1911 Pun Re No. 62 (DB). (Purchase and inheritance.)✠(Vol 11) 1924 Mad 364 (364) (DB). (Court auction-purchase.)✠(Vol 27) 1940 Mad 498 (502) (DB). (Acquisition may be by inheritance or devise.)✠(Vol 16) 1929 All 604 (606) (DB). (Mortgagee becoming heir to mortgagor.) ✠ (Vol 7) 1920 All 129 (131) : 42 All 544 (DB). (Acquisition of part of equity of redemption by mortgagee after decree for sale.)✠(Vol 34) 1947 Nag 210 (215, 216, 222) (DB). (Mortgagee acquiring interest in mortgage property by foreclosure.)

[*See also* ('97) 21 Bom 619 (626) (DB). (Inheritance)]

[10] Mortgagee taking further charge from some of original mortgagors — Integrity of original mortgage is not broken up. ('08) 11 Oudh Cas 73 (74)✠(Vol 12) 1925 Oudh 150 (152).

[But see ('05) 1905 Pun Re No. 91, p. 279 (281) (DB)]

[11] No acquisition by mortgagee of any part of equity of redemption—No question of splitting up of integrity of mortgage and of allowing piecemeal redemption arises. (Vol 10) 1923 All 397 (397) (DB).

[12] Words "share of a mortgagor" in the section mean share of a mortgagor in the equity of redemption —Last para of the section does not apply where mortgagee purchases portion of mortgaged property free of his incumbrance by paying full value—Owner of other part of property cannot redeem merely by paying proportionate part of debt (Vol 27) 1940 Mad 498 (501) (DB)✠('36) 164 Ind Cas 490 (493) (DB) (Cal)✠ (Vol 17) 1930 Cal 619 (620, 621) (DB).

[13] Some of mortgagees acquiring share of a mortgagor—Last para of section does not apply — Owner of part of property cannot redeem mortgage by paying proportionate part of mortgage money. (Vol 10) 1923 Mad 533 (538) : 47 Mad 7 (DB). (Per *Krishnan J.*)✠ (Vol 26) 1939 All 600 (601) (DB)✠(Vol 12) 1925 Oudh 609 (609) : 27 Oudh Cas 360✠(Vol 26) 1939 Nag 136 (139) (DB)✠(Vol 24) 1937 Nag 262 (263) : I L R (1937) Nag 503 ✠ (Vol 11) 1924 All 11 (11, 12) : 45 All 46 (DB) ✠ ('12) 23 Mad L Jour 475 (478) (DB) ✠(Vol 32) 1945 Bom 69 (71, 72).

[14] Mortgagee acquiring part of property — One owner of part of property paying up entire mortgage amount — Mortgagee's rights are determined including his right to retain possession of purchased property — Mortgagee can sue afresh in respect of his purchase — But Court can decide in suit for redemption how much mortgage money is chargeable on property purchased by mortgagee and allow redemption of rest on payment of proportionate amount (Vol 10) 1923 Mad 533 (538) : 47 Mad 7 (DB).

[15] Subsequent mortgagee acquiring share in equity of redemption — Last paragraph of S. 60 applies — He can redeem his share only from first mortgagee by paying proportionate part of amount due on that mortgage. (Vol 24) 1937 Rang 220 (222) : 1937 Rang L R 13 (DB).

[16] Lease by mortgagor after mortgage—Mortgagee obtaining decree without impleading lessees and bringing part of mortgaged property to sale and purchasing it—Subsequent suit by mortgagee against lessees for sale of mortgaged property in their possession for realizing proportionate amount of mortgage money chargeable on that property — Lessees can redeem on payment of proportionate amount of mortgage money. (Vol 32) 1945 Pat 106 (108, 109).

[17] The last paragraph of S. 60 cannot be applied to a decree which is not for a lump sum as in the case of a maintenance charge decree. Hence the purchase by the decree-holder in the previous execution case of one of the items of the properties charged would not attract the operation of S. 60, when a fresh execution is taken out for realisation of further amounts of maintenance accruing due by the default of the judgment-debtor. (Vol 32) 1945 Pat 278 (279, 280) : 24 Pat 245 (DB).

42. Undivided property—Mortgagee purchasing share — Redemption.— [1] Several co-sharers mortgaging undivided property — Mortgagee purchasing undivided share of one of them — Other co-sharers can only redeem whole leaving mortgagee to sue for partition. ('91) 15 Bom 24 (26) (DB)✠ ('97) 21 Bom 619 (626) (DB).

[2] Several co-sharers mortgaging undivided property—Mortgagee purchasing undivided share of one of them—Other co-sharers can, in same suit, get decree for partial redemption and partition. (Vol 10) 1923 Mad 533 (534, 536) : 47 Mad 7 (DB).

[See however ('33) 6 Mad 61 (62) (DB). (Other co-sharers cannot redeem wholly or partly until they have ascertained their shares in suit for partition.)✠ ('97) 20 Mad 295 (298) (DB). (Do.)]

43. One co-mortgagor acquiring mortgagee right—Redemption by other.—[1] One of several co-mortgagors acquiring mortgagee rights in property— The question has arisen as to whether this section applies so as to allow the other co mortgagors to redeem their shares alone—According to the undermentioned cases, such acquisition splits up mortgage — Principle of S. 60 applies — Piecemeal redemption by other co-mortgagors can be allowed. (Vol 21) 1934 Oudh 348 (349) (DB) (It is not necessary that the share in the equity of redemption acquired by the mortgagee should be specified) ✠ (Vol 13) 1926 Lah 601 (602) (DB) ✠ (Vol 28) 1941 Lah 421 (422).

[But see (Vol 5) 1918 Cal 602 (604) (DB)]

[2] One of mortgagors redeeming whole mortgage— Mortgage comes to an end — Redeeming mortgagor is not "mortgagee" — Section 60 does not apply — Other co-mortgagors can get back their shares on payment of proportionate part of mortgage-money. (Vol 10) 1923 Lah 129 (130, 131) (DB).

44. One mortgagor—Two or more mortgagees —Redemption by paying one alone.—[1] *A* executing mortgage in favour of *B* and *C* as tenants-in-common—*A* cannot redeem part of property by paying to one of mortgagees his separate debt. (Vol 6) 1919 P C 24 (26) : 47 Cal 175 : 46 Ind App 272 (PC).

45. Suit for redemption. — [1] A benamidar can sue for redemption whether the beneficial owner is a party to the suit or not. (Vol 7) 1920 Pat 21 (24).

[2] A mortgagor seeking redemption may alternatively claim that the mortgage has been paid off but that if anything is found due, he is willing to pay it. ('01) 24 Mad 408 (411) (DB).

[3] Mortgagee of lease-hold property escaping payment of rent which he had to pay—Mortgagee and not mortgagor is entitled to benefit of non-payment—Mortgagor cannot claim at time of redemption to deduct such sum from mortgage money. (Vol 7) 1920 Pat 66 (67). (('11) 10 Ind Cas 113 (All), *Foll.*)

[4] Suit for redemption — Mortgage found not valid — Suit must be dismissed — Mortgagor can sue for possession — Mortgagee can claim repayment. (Vol 13)

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1926 Rang 201 (201, 202). (Mortgagor can sue for possession—Mortgagee can claim repayment.)✠(Vol 28) 1941 Rang 234 (235): 1941 Rang L R 309 (DB). (Do.)✠ (Vol 22) 1935 Rang 230 (232): 13 Rang 274 (FB). (Do.)

[See however (Vol 1) 1914 Cal 894 (895) (DB). (Mortgagor can be given decree for possession if he proves title)]

[But see ('31) 63 Ind Cas 400 (400) (DB) (Pat). (Mortgagee cannot resist redemption—Suit need not be dismissed)]

[4a] Usufructuary mortgage for more than Rs. 100 not registered—Owners of land cannot sue for redemption — Owners can treat mortgagee as trespasser and evict him without repaying loan advanced by him. (Vol 34) 1947 Bom 206 (208).

[5] Foreclosure and redemption suits— Each party can enforce his rights against others—If, on accounting, balance is against any party, he must pay it. (Vol 13) 1926 Mad 955 (958) (DB) ✠ (Vol 14) 1927 Mad 189 (190).

[6] A suit for redemption cannot be met by a plea of a right of pre-emption under an agreement. (Vol 11) 1924 Mad 57 (61).

[7] Redemption suit—Decree for redemption unless it involves decision that right to redeem was extinguished cannot operate as *res judicata*. (Vol 21) 1934 P C 205 (207) : 56 All 561 : 61 Ind App 362 (PC)✠ (Vol 17) 1930 Oudh 465 (467) (DB).

[But see (Vol 17) 1930 Oudh 270 (272) : 5 Luck 684 (DB). *(Obiter.)*]

[8] Mortgagee's interest divided between more than one person—Mortgagor cannot, at his pleasure, bring separate suits against each of them for redemption. (Vol 14) 1927 Bom 513 (513, 514) (D B).

[9] Redemption suit by transferee from mortgagor— Plaintiff can claim redemption with respect to rights of his transferor and no more — Any other question from this point of view must be foreign to scope of suit. (Vol 32) 1945 All 388 (389).

[10] Oral mortgage of land by *A* to *B* — *A* then settling land with *C* for Rs. 1000 and leaving Rs. 600 with him for redeeming oral mortgage of *B* — *C* depositing mortgage money under S. 83 and failing to obtain possession from *B* instituting suit for possession —Suit held in effect one to redeem oral mortgage. (Vol 34) 1947 Pat 110 (111).

46. Costs of mortgagee in suit for redemption.— [1] In a suit for redemption where there has been no tender of the amount before suit the mortgagor must pay the costs of the suit. (Vol 5) 1918 Mad 942 (945) (D B) ✠ ('84) 8 Bom 190 (193) (D B) ✠ ('98) 22 Bom 440 (446) (D B) ✠ ('95) 8 C P L R 113 (121) ✠ ('09) 2 Ind Cas 662 (669) (D B) (Cal).

[2] Mortgagee refusing valid tender — Subsequent suit for redemption—Mortgagee is not entitled to costs. (1911) 80 L J Ch 295 (297) : 103 L T 895, *Rourke* v. *Robinson* ✠ (1918) 88 L J Ch 31 (37) : 119 L T 526, *Graham* v. *Seal* ✠ ('03) 5 Bom L R 387 (389) ✠ ('99) 1 Bom L R 381 (383) (D B).

[3] A mortgagee who unsuccessfully disputes the mortgagor's right to redeem will be disentitled to his costs. ('84) 1884 Bom P J 254 (D B).

47. Onus of proof in suit for redemption.— [1] Redemption suit—Mortgagor must establish that there is a subsisting mortgage in respect of which he is entitled to relief claimed. (Vol 10) 1923 All 441 (441) ✠ (Vol 20) 1933 All 21 (24) : 54 All 975 (D B) ✠ (Vol 21) 1934 Lah 121 (122) ✠ (Vol 13) 1926 Oudh 546 (547) ✠ (Vol 14) 1927 Lah 574 (576) ✠ (Vol 34) 1947 Pat 110 (111) ✠ (Vol 7) 1920 All 92 (93) : 42 All 575 (F B) ✠ (Vol 25) 1938 Oudh 16 (16) : 13 Luck 669.

[2] Redemption suit — Mortgagor failing to prove subsisting mortgage— Suit must fail (Vol 30) 1943 All 393 (399, 403) : I L R (1944) All 76 (F B). (Specific mortgage pleaded must be proved) ✠ ('27) 100 Ind Cas 58 (59) (Lah) ✠ (Vol 14) 1927 All 781 (782) ✠ (Vol 18) 1931 Oudh 378 (379, 380) : 7 Luck 94 ✠ ('07) 17 Mad L Jour 122 (123) (D B) ✠ (Vol 12) 1925 Rang 7 (7) : 2 Rang 397.

[3] Mortgagor cannot succeed merely because the mortgagee has failed to establish his defence. ('89) 11 All 438 (450) (F B) ✠ (Vol 1) 1914 All 43 (44).

[4] Redemption suit — Plaintiff adducing *prima facie* evidence of his right — Onus shifts to opponent. ('75) 3 Ind App 85 (98) (P C) ✠ ('89) 11 All 438 (448) (F B) ✠ (Vol 18) 1931 Pat 295 (296): 10 Pat 417 (DB) ✠ ('03) 27 Bom 271 (278) (D B).

[5] What is *prima facie* evidence to show right to redeem depends upon the facts of each case. (Vol 3) 1916 All 98 (100) (D B).

[6] Suit for redemption of mortgage executed 45 years before suit — Specific mortgage pleaded not proved but defendant proved to be mortgagee under some mortgage — Plaintiff held sufficiently discharged onus to prove his case. ('03) 27 Bom 271 (277, 278) (D B).

[7] The admission by the defendant that he is a mortgagee under the mortgage set up, may dispense with proof of the plaintiff's right. (Vol 16) 1929 All 305 (306) ✠ (Vol 16) 1929 All 242 (242) ✠ ('13) 20 Ind Cas 666 (666) (Low Bur) ✠ (Vol 16) 1929 Rang 179 (180, 181) : 7 Rang 140✠('03) 27 Bom 271 (278) (D B).

[8] Redemption suit—Admission by defendant that he is mortgagee under suit mortgage must be one made in same suit and not in other proceeding. *See* ('84) 8 Bom 543 (546, 547) (D B).

[9] Defendant admitting mortgage— Onus is on him to show that it is not redeemable. (Vol 5) 1918 Mad 121 (122) (D B) ✠ (Vol 9) 1922 Mad 185 (185) (D B).

[10] The very fact of the mortgagee selling his rights is an express acknowledgment of the existence of a subsisting mortgage and the very fact of the defendant purchasing those rights is an acceptance on his behalf of an existing mortgage, at the date of the sale to him. (Vol 11) 1924 All 458 (458, 459) (D B).

[11] Admission by mortgagee in his written statement that he is a mortgagee in possession of land in dispute is a sufficient acknowledgment that he is liable to be redeemed at the date of the admission. (Vol 16) 1929 All 242 (242).

[12] Defendant admitting a mortgage but denying that plaintiff is mortgagor —Latter cannot succeed on mere admission of defendant. (Vol 12) 1925 Oudh 250 (251).

[13] Mortgagor failing to prove mortgage pleaded by him— Defendant admitting to be mortgagee under different mortgage — Mortgagor can be given a decree on basis of admitted mortgage. ('93) 17 Bom 365 (368) (D B) ✠ ('88) 1888 Bom P J 131 (D B) ✠ (Vol 4) 1917 Mad 495 (499) (D B) ✠ ('07) 30 Mad 388 (390) (D B) ✠ ('12) 14 Ind Cas 815 (816) (Upp Bur)✠(Vol 10) 1923 Rang 24 (25) : 4 Upp Bur Rul 114.

[But see (Vol 21) 1934 All 656 (657) ✠('26) 96 Ind Cas 304 (305) (D B) (All) ✠ (Vol 13) 1926 Oudh 546 (547) ✠ ('26) 98 Ind Cas 1035 (1037) (Oudh).]

[14] Mortgagee admitting mortgage — Admission must be taken as a whole — Mortgagor wishing to rely on admission can be given decree for redemption only on payment of amount admitted. ('12) 14 Ind Cas 815 (816) (Upp Bur) ✠ (Vol 10) 1923 Rang 24 (25) : 4 Upp Bur Rul 114.

48. Suit for possession by mortgagee under terms of mortgage deed — Mortgagor, if can plead right of redemption in defence. — [1] Suit by mortgagee for possession in accordance with terms of mort-

Obligation to transfer to third party instead of re-transference to mortgagor.

[a][**60A.** *(1)* Where a mortgagor is entitled to redemption, then, on the fulfilment of any conditions on the fulfilment of which he would be entitled to require a re-transfer, he may require the mortgagee, instead of re transferring the property, to assign the mortgage-debt and transfer the mortgaged property to such third person as the mortgagor may direct; and the mortgagee shall be bound to assign and transfer accordingly.

(2) The rights conferred by this section belong to and may be enforced by the mortgagor or by any encumbrancer notwithstanding an intermediate encumbrance; but the requisition of any encumbrancer shall prevail over a requisition of the mortgagor and, as between encumbrancers, the requisition of a prior encumbrancer shall prevail over that of a subsequent encumbrancer.

(3) The provisions of this section do not apply in the case of a mortgagee who is or has been in possession.]

[a] Sections 60-A and 60-B were *inserted* by the Transfer of Property (Amendment) Act, 1929 (20 [XX] of 1929), S. 23.

Right to inspection and production of documents.

[a][**60B.** A mortgagor, as long as his right of redemption subsists, shall be entitled at all reasonable times, at his request and at his own cost, and on payment of the mortgagee's costs and expenses in this behalf, to inspect and make copies or abstracts of, or extracts from, documents of title relating to the mortgaged property which are in the custody or power of the mortgagee.]

[a] *See* S. 60A, legislative-note [a].

Right to redeem separately or simultaneously.

[a][**61.** A mortgagor who has executed two or more mortgages in favour of the same mortgagee shall, in the absence of a contract to the contrary, when the principal money of any two or more of the mortgages has become due, be entitled to redeem any one such mortgage separately, or any two or more of such mortgages together.]

[a] *Substituted* by the Transfer of Property (Amendment) Act, 1929 (20 [XX] of 1929), S. 24.

Section 60—Note 48 *(contd.)*

gage— Mortgagor cannot claim to redeem mortgage in that suit. (Vol 24) 1937 Oudh 406 (409) : 13 Luck 357 (D B) ✠ (Vol 15) 1928 Lah 668 (669) (D B) ✠ (Vol 13) 1926 Oudh 357 (358) : 2 Luck 213 (D B).

[See however (Vol 7) 1920 Oudh 311 (311).]

[But see (Vol 12) 1925 Oudh 235 (236).]

[2] Suit by mortgagee against lessees from mortgagor to recover possession in accordance with terms of mortgage—Neither lessees nor mortgagor can claim to redeem mortgage. (Vol 32) 1945 Mad 225 (229) : I L R (1945) Mad 803 (D B).

49. Adverse possession of equity of redemption. — [1] Third person in adverse possession of mortgaged property for 12 years as full owner — Suit for redemption against him does not lie. ('12) 34 All 289 (294) (P C) ✠ ('79) 2 Mad 226 (228, 229) (D B).

50. Lis pendens.—[1] A purchaser from the mortgagor pending a redemption suit takes subject to the event of the suit and must redeem within the time fixed by the decree passed in the suit. ('85) 9 Bom 141 (145) (D B)✠(Vol 13) 1926 Nag 21 (22, 23).23 Nag L R 86.

[2] The mortgagee under a mortgage made during the pendency of a redemption suit cannot claim to redeem the mortgage after the sale. ('91) 18 Cal 164 (178) : 17 Ind App 201 (P C).

[3] A subsequent mortgagee of an equity of redemption made during the pendency of a suit on the earlier mortgage for foreclosure is bound by the decree though not made a party thereto. (1805) 32 E R 1062 (1063): 8 R R 131, *Bishop of Winchester* v. *Paine*.

[4] If the mortgagee purchases the equity of redemption after a suit for redemption has been filed, he is liable to be redeemed as to the whole of the property including the share purchased by him. ('86) 10 Bom 646 (655) (D B).

51. Mortgage pending attachment.—[1] Property mortgaged pending attachment — Auction purchaser allowing his right to get possession barred by limitation— He cannot sue for redemption. (Vol 13) 1926 Mad 966 (967) (D B).

52. Amendments in section not retrospective.— [1] The amended section is not retrospective. (Vol 21) 1934 Cal 775 (776) : 61 Cal 894 (D B).

Section 60A — Note 1

[1] The interest of a mortgagee is intangible immovable property and the transfer of such interest can be effected only by a registered instrument (Vol 28) 1941 Rang 122 (126) (DB)✠(Vol 16) 1929 All 161 (163, 164): 51 All 494 (D B) ✠ (Vol 5) 1918 Cal 411 (413) (D B)✠ (Vol 13) 1926 Mad 903 (904).

SECTION 61 — SYNOPSIS.

1. Scope.
2. "Mortgagor."
3. Contract to the contrary.
4. Section, if retrospective.
5. Waiver of right to consolidate.

1. Scope. — [1] Where a mortgagor has executed several mortgages in favour of the same mortgagee over the same property, he is, in the absence of a contract to the contrary, entitled to redeem any of them without at the same time redeeming the others. (Vol 24) 1937 Oudh 321 (322): 13 Luck 215 (DB)✠(Vol 24) 1937 Pat 156 (158) : 15 Pat 742 (DB).

2. "Mortgagor." — [1] The word "mortgagor" includes not only the mortgagor himself but also his heirs and survivors. (Vol 21) 1934 Oudh 246 (249) : 9 Luck 657 (DB)✠(Vol 22) 1935 Oudh 213 (216) : 10 Luck 481 (DB).

[2] If *A* as manager of the joint Hindu family, executes a mortgage deed, and after his death *A's* son *B*, the then manager of the family, executes another mortgage deed in favour of the same mortgagee, agreeing to repay the second mortgage-money along with the first, this section will apply. (Vol 21) 1934 Oudh 246 (249) : 9 Luck 657 (DB).

[3] This section will not apply where one mortgage is by *A* as the sole mortgagor, and the other mortgage,

Right of usufructuary mortgagor to recover possession.

62. In the case of a usufructuary mortgage, the mortgagor has a right to recover possession of the property [a][together with the

Section 61— Note 2 *(contd.)*

by *A* jointly with *B*. (Vol 7) 1920 Pat 67 (69): 5 Pat L Jour 644 (DB) ✠ (Vol 14) 1927 Mad 1039 (1042) (DB).

[4] Where there are two or more mortgagors, one of them alone cannot, by executing a mortgage with a contract for consolidation, affect the right of his co-mortgagors to redeem the original mortgage. (Vol 23) 1936 Oudh 202 (203) (DB)✠('13) 20 Ind Cas 667 (668) (Oudh)✠(Vol 9) 1922 All 174 (177) : 44 All 37 (FB)

3. Contract to the contrary. — [1] The right conferred by Ss. 60 and 62 to redeem a mortgage upon payment of the mortgage-money due under that mortgage is qualified by the provisions of this section. (Vol 17) 1930 All 136 (149): 52 All 281 (FB). (Per *Kanj J.*

[2] It is open to the parties under this section to enter into a contract to combine two or more mortgages and to agree that one shall not be redeemed without redeeming the others also. (Vol 3) 1916 Oudh 329 (330, 331) ✠ (Vol 17) 1930 All 136 (149, 156) : 52 All 281 (FB)✠('05) 9 Cal W N 789 (791) (DB) ✠ (Vol 22) 1935 Oudh 213 (214) : 10 Luck 481 (D B).

[3] A contract, that the first mortgage shall not be redeemed unless the second mortgage is redeemed is valid. (Vol 24) 1937 Nag 54 (55) : I L R (1938) Nag 160✠(Vol 20) 1933 Lah 864 (865) (D B)✠(Vol 27) 1940 All 101 (103) ✠ (Vol 10) 1923 Oudh 143 (144) (DB) ✠ (Vol 16) 1929 Oudh 40 (41) (D B) ✠ ('31) 132 Ind Cas 376 (377) (DB) (Lah) ✠ (Vol 19) 1932 All 558 (559) (DB).

[4] A contract that the second mortgage shall not be redeemed unless the first is redeemed is valid. (Vol 15) 1928 Pat 582 (583, 584) : 8 Pat 68 (D B)✠('13) 18 Ind Cas 718 (719) (DB) (All).

[5] A contract that neither the first nor the second shall be redeemed separately is perfectly valid and binding on the mortgagor. (Vol 18) 1931 All 197 (198) ✠(Vol 21) 1934 Oudh 246 (249) : 9 Luck 657 (D B) ✠ (Vol 13) 1926 Lah 633 (633, 634) (D B)✠(Vol 25) 1938 Mad 562 (564) (D B) ✠ (Vol 22) 1935 Oudh 213 (216): 10 Luck 481 (D B) ✠ (Vol 9) 1922 All 41 (42) (D B) ✠ (Vol 13) 1926 Lah 494 (495) : 7 Lah 297 (D B).

[6] Where there is a contract that a further charge created on property shall not be redeemed without redeeming an earlier mortgage, the contract is perfectly valid and enforceable. (Vol 3) 1916 Oudh 329 (331) ✠ ('10) 6 Ind Cas 165 (166) (DB) (All)✠('85) 9 Bom 236*n* (236*n*)✠('09) 31 All 482 (485, 494) (DB).

[7] The contract to the contrary must be clearly and unequivocally expressed and must be strictly construed. (Vol 1) 1914 Oudh 23 (24) : 16 Oudh Cas 267✠(Vol 13) 1926 Oudh 59 (61)✠(Vol 7) 1920 Lah 387 (388): 1 Lah 105 (DB).

[8] The onus of establishing a contract to the contrary is on the mortgagee. (Vol 7) 1920 Lah 387 (388): 1 Lah 105 (DB)✠(Vol 4) 1917 Oudh 388 (389).

[9] A covenant in the later of two mortgagors ran: "When the whole of the mortgage-money due under this deed together with the amount due under the previous deed shall be paid the mortgage shall be redeemable". It was held, that it was a contract to the contrary within the meaning of this section. (Vol 9) 1922 All 403 (403).

[10] *A* executed a usufructuary mortgage in favour of *B*. Later, *A* borrowed a further sum from *B* and executed a document which provided : "I shall first pay this debt including principal and interest and thereafter I can redeem the mortgaged village having paid up the mortgage-money. Without the payment of this debt, I cannot redeem the mortgaged village". It was held that the deed was a deed of further charge and that the contract to the contrary was enforceable. (Vol 15) 1928 Oudh 273 (275, 276) : 3 Luck 459 (DB)✠ (Vol 17) 1930 P C 176 (177) : 57 Ind App 173 : 5 Luck 365 (PC).

[11] *A* executed in favour of *B* different mortgage deeds relating to different plots of land at the same time. Each deed contained a clause, which ran: "When I, the mortgagor, will pay up the entire money secured on the other mortgage deeds which have been executed to-day, I would get my land redeemed from the mortgagee." It was held that the agreement did not amount to consolidation of the transactions into one transaction. The clause merely contained a collateral agreement as to the date when the right of redemption in each case was to be exercised. (Vol 27 1940 Lah 98 (99, 100) DB)

[12] *A* executed a usufructuary mortgage in favour of *B* and later on, a second mortgage in his favour to secure further advances. It was agreed at the time of the second mortgage that if the interest was not paid annually, the mortgagee could, if he so desired, sue to recover the money due on the second mortgage. It was also agreed that the first mortgage should not be redeemed without the redemption of the second mortgage also being effected. It was held that the agreement did not amount to a contract to the contrary. (Vol 10) 1923 All 454 (454, 455).

[13] Where a mortgagee has been in possession by virtue of a mortgage created before 1901 in Punjab and second mortgage or charge is created after 1901 on the same property with the stipulation that possession will remain with the mortgagee till the second mortgage is redeemed or the charge is paid, the Collector can declare that the mortgage created before 1901 has been extinguished but cannot order that possession be handed over to the mortgagor without payment of the additional charge or mortgage-debt. (Vol 34) 1947 Lah 278 (280) (FB).

4. Section, if retrospective.—[1] The amendment of the section has no retrospective effect. (Vol 24) 1937 Pat 156 (158) : 15 Pat 742 (DB) ✠ (Vol 34) 1947 Mad 18 (32) (DB).

5. Waiver of right to consolidate. — [1] *A* made four mortgages in favour of *B* and subsequently made another mortgage in favour of *C* the consideration being that *C* should discharge *B*'s mortgages. *C* discharged the first three mortgages in favour of *B*, but not the fourth. Subsequently *B* sued on his fourth mortgage impleading *C* as a subsequent mortgagee. The latter set up prior mortgage rights in respect of the mortgages discharged by him. It was held that *B*'s conduct in receiving payment in respect of the three prior mortgages operated as a waiver of his right to consolidate his mortgages and that consequently *C* was entitled to priority in respect of the mortgages so paid off. (Vol 24) 1937 Cal 194 (198) (DB).

SECTION 62 — SYNOPSIS

1. Scope.
2. Suit for possession by co-mortgagor.
3. "Recover possession."
4. Clause (a).
5. Clause (b).
6. Lease to mortgagor.
7. "When the term . . . . . has expired."
8. Successive suits for possession.
9. This section and section 61.

1. Scope.— [1] This section is a special provision which is supplementary to the general provisions of S 60. (Vol 1) 1914 Oudh 376 (377): 17 Oudh Cas 389 ✠ (Vol 17) 1930 All 136 (157) : 52 All 281 (FB).

mortgage-deed and all documents relating to the mortgaged property which are in the possession or power of the mortgagee],—

(a) where the mortgagee is authorized to pay himself the mortgage-money from the rents and profits of the property,—when such money is paid ;

(b) where the mortgagee is authorized to pay himself from such rents and profits [b][or any part thereof a part only of the mortgage money]—when the term, if any, prescribed for the payment of the mortgage-money has expired and the mortgagor pays or tenders to the mortgagee [c][the mortgage money or the balance thereof] or deposits it in Court as hereinafter provided.

[a] *Inserted* by the Transfer of Property (Amendment) Act, 1929 (20 [XX] of 1929), S 25. [b] *Substituted ibid.*, for "the interest of the principal money". [c] *Substituted, ibid*, for "the principal money".

Section 62 — Note 1 *(contd.)*

[2] A suit for redemption of a usufructuary mortgage necessarily involves a prayer for possession and is in substance a suit for possession. ('03) 25 All 115 (120) : 30 Ind App 54 (PC) ✠ (Vol 1) 1914 Cal 894 (895) (DB) ✠ (Vol 11) 1924 Mad 292 (294) : 47 Mad 203 (DB) ✠ (Vol 22) 1935 All 578 (578).

[3] In a case falling within clause (a) of the section, suit of the mortgagor for possession is not one for redemption. ('97) 11 C P L R 103 (105) ✠ (Vol 17) 1930 Mad 160 (166) (DB) ✠ (Vol 33) 1946 All 400 (402) (DB).

2. Suit for possession by co-mortgagor.— [1] Where the mortgage-debt is fully satisfied out of the rents and profits of the property, one of the several co-mortgagors has no right to take possession of the shares of his co-mortgagors ; he can recover possession only of his own individual share. ('85) 7 All 376 (378) (DB) ✠ ('94) 16 All 254 (255) (DB) ✠ ('13) 16 Oudh Cas 163 (172).

[2] Even in a case where the mortgage has been paid out of the usufruct of the property, it may be held in the particular circumstances of the case, that a co-mortgagor has redeemed the property. (Vol 30) 1943 Bom 191 (193) (DB).

3. "Recover possession."—[1] Where a usufructuary mortgage is followed or preceded by a mortgage, under which the mortgagee is not entitled to hold possession of the property, the satisfaction of the usufructuary mortgage will entitle the mortgagor to get back the possession of the property. (Vol 17) 1930 All 136 (139,157): 52 All 281 (FB).

4. Clause (a).— [1] Form of mortgage described in cl. (a) resembles a *vivum vadium* in which no time is fixed for redemption and the mortgagee is entitled to remain in possession till the entire mortgage-debt is wiped off from the rents and profits of the property. ('93) 16 Mad 486 (489, 490) (DB) ✠ (Vol 12) 1925 Mad 825 (826) ✠ ('88) 1 Cal L R 256 (258).

[2] The words "when the money is paid" mean when the money is paid from the rents and profits and do not include a payment by the mortgagor. ('93) 16 Mad 486 (489, 490) (DB) ✠ (Vol 17) 1930 Mad 160 (162, (DB) ✠ ('93) 6 C P L R 43 (48).

[3] A suit to recover possession of the property by the mortgagor before the debt is satisfied out of the rents and profits is premature and must be dismissed. ('93) 16 Mad 486 (488) (DB) ✠ ('93) 6 C P L R 43 (48) ✠ (Vol 6) 1919 Mad 819 (820) (DB).

[4] Where it is the intention of the parties as expressed in the deed that the mortgagee is to take the rents and profits for a certain period, on the expiry of which the mortgage-money is to be deemed to be satisfied, the mortgagor cannot, before the expiry of the period, recover possession of the mortgaged property. ('80) 2 Mad 314 (316) (DB) ✠ (Vol 12) 1925 Mad 825 (827).

[5] Where the term fixed does not form the essence of the contract, the mortgagor is entitled to recover possession of the property as soon as the mortgage-debt is satisfied from the rents and profits, even before the expiry of the term. (Vol 5) 1918 Oudh 432 (434) (DB) ✠ (Vol 1) 1914 Oudh 160 (162): 17 Oudh Cas 218.

[6] Even in cases where the term fixed forms the essence of the contract, the mortgagor may be allowed to recover possession of the mortgaged property before the end of the term on equitable ground. (Vol 12) 1925 Mad 825 (827) ✠ (Vol 4) 1917 Cal 853 (854) (DB) ✠ ('12) 34 All 659 (662) (DB) ✠ (Vol 5) 1918 Oudh 432 (434) (DB).

[7] Where a mortgagor sues the mortgagee in possession claiming to redeem the property before the period fixed for redemption or before the amount paid was discharged out of the income of the property, alleging that the amount advanced was much less than the amount of consideration specified in the mortgage, the mortgagor is not entitled to redeem earlier than the period fixed. (Vol 32, 1945 Mad 340 (342).

[8] *A* executed in favour of *B*, what purported to be a mortgage with possession for 14 years The deed provided that on the expiration of the term, the mortgagor shall come into possession without settlement of account. When the term expired, *B* refused to give up possession of the property on the ground that owing to the misrepresentation of the mortgagor he had not received the entirety of the premises comprised in the deed. *B* claimed the right to hold the property until he had recouped himself. It was held that *A* was entitled to rely on his proprietary right and in the absence of any stipulation express or implied in the mortgage-deed depriving him of the right to recover possession, he was entitled to succeed. ('03) 25 All 115 (120) : 30 Ind App 54 (PC).

5. Clause (b).— [1] Where the rents and profits are to be taken in lieu of the interest, the mortgagee takes his chance of the rents and profits being greater or less than the interest which might have been reserved by the mortgage-bond and the mortgagor is entitled to recover possession of the mortgaged property on payment of the principal money only. ('02) 24 All 521 (531) : 29 Ind App 148 (PC).

[2] Where under the terms of the mortgage, the mortgagee was to receive the rents and profits in lieu of interest and pay a certain sum out of the rents and profits as malikana to the mortgagor which sum was never paid, the mortgagor was held entitled to redeem on paying the principal after deducting the unpaid malikana. (Vol 11) 1924 All 591 (592) : 46 All 633 (DB) ✠ (Vol 14) 1927 Pat 235 (285) (DB).

[3] The mortgagor cannot get credit for any rent payable on account of the mortgaged properties to the landlord which is not actually paid by him. (Vol 21) 1934 Cal 149 (150) (DB).

[4] *A* executed a usufructuary mortgage in favour of *B*, the rents and profits to be appropriated in lieu of interest. *A* failed to deliver possession of a portion of the mortgaged property, but *B* took no steps to call for additional security. It was held that *B* had acquiesced in his dispossession and was, therefore, not entitled to claim interest on the mortgage-money on account of

63. Where mortgaged property in possession of the mortgagee has, during the continuance of the mortgage, received any accession, the mortgagor, upon redemption, shall, in the absence of a contract to the contrary, be entitled as against the mortgagee to such accession.

Accession to mortgaged property.

Where such accession has been acquired at the expense of the mortgagee, and is capable of separate possession or enjoyment without detriment to the principal property, the mortgagor desiring to take the accession must pay to the mortgagee the expense of acquiring it. If such separate possession or enjoyment is not possible, the accession must be delivered with the property; the mortgagor being liable, in the case of an acquisition necessary to preserve the property from destruction, forfeiture or sale, or made with his assent, to pay the proper cost thereof, as an addition to the principal money, [a][with interest at the same rate as is payable on the principal, or, where no such rate is fixed, at the rate of nine per cent. per annum].

Accession acquired in virtue of transferred ownership.

In the case last mentioned the profits, if any, arising from the accession shall be credited to the mortgagor.

Where the mortgage is usufructuary and the accession has been acquired at the expense of the mortgagee, the profits, if any, arising from the accession shall, in the absence of a contract to the contrary, be set off against interest, if any, payable on the money so expended.

[a] *Substituted* by the Transfer of Property (Amendment) Act, 1929 (20 [XX of 1929), S. 26, for "at the same rate of interest".

Section 62 — Note 5 *(contd.)*

dispossession. (1900) 24 All 521 (531) : 29 Ind App 148 (PC) ✠ (Vol 21) 1934 Cal 149 (150) (DB) ✠ ('04) 27 All 313 (317) (DB).

[5] A personal covenant by the mortgagor to pay year by year, the deficiency in the profits is not sufficient to enable the mortgagee to add the deficiency to the principal. (Vol 4) 1917 All 165 (165) (DB).

6. Lease to mortgagor.—[1] Where the mortgagee leases back the property to the mortgagor, if the mortgage and the lease form part of one transaction, namely the transaction of mortgage, the lease providing only the mode in which the interest upon the mortgage is to be paid, the mortgagor cannot redeem the mortgaged property without paying the arrears of rent. ('98) 20 All 401 (407) (DB) ✠ ('05) 32 Cal 576 (580) (DB) ✠ (Vol 5) 1918 Mad 942 (944) (DB).

[2] Where the two transactions of lease and mortgage are independent transactions, the mortgagor cannot be compelled, as a condition precedent to the redemption of the mortgage, to pay off the arrears of rent due under the lease. ('04) 27 All 313 (316) (DB) ✠ (Vol 24) 1937 Lah 790 (791).

7. "When the term .....has expired."— [1] There is nothing to prevent a term being fixed in a usufructuary mortgage, for the mortgagee's enjoyment during which the mortgage cannot be redeemed. (Vol 26) 1939 Lah 235 (236) (DB) ✠ (Vol 27) 1940 Cal 437 (438)(DB)✠(Vol 15)1928 Pat 637(638): 8 Pat 243 (DB).

[2] A mortgagee who has failed to get possession for a portion of the period fixed by reason of the fault of the mortgagor is not thereby entitled to get the period extended or added to. (Vol 14) 1927 Mad 173 (174) (DB).

[3] This section cannot prevail against the provisions of S. 26G of the Bengal Tenancy Act (VIII of 1885 as amended by Bengal Act VI of 1938). Even if a term is fixed until the expiry of which the mortgagor is not entitled to redeem, the mortgagor can sue to recover possession of the property after 15 years. (Vol 29) 1942 Cal 55 (57) (DB).

[4] Where, under the terms of the usufructuary mortgage, the mortgagee is to take the profits in lieu of interest and the mortgagor is to redeem on payment of the principal at the end of the stipulated period the mortgagor cannot recover possession at the end of the period until he pays or tenders or deposits into the Court the principal. ('09) 31 All 318 (322) (DB).

[5] Where the usufructuary mortgagee is to take profits in lieu of interest and the mortgagor is liable under the terms of the mortgage to pay interest in default of payment of principal at the end of the stipulated period and there is nothing in the deed to show that such interest is not to be a charge on the property, then the mortgagor cannot recover possession until he pays or tenders or deposits into Court the principal together with such interest. (Vol 30) 1943 Mad 109 (110).

8. Successive suits for possession.— [1] A dismissal of a suit for possession under this section on the ground that it is premature, does not bar a subsequent suit claiming the same relief. ('99) 21 All 251 (259) (D B).

9. This section and section 61.— [1] Where a usufructuary mortgage is followed or preceded by a simple mortgage or a deed of further charge and there is no contract to the contrary within the meaning of S. 61, the mortgagor has a right, on the mortgage-debt being satisfied, to recover possession of the mortgaged property under this section without at the same time redeeming the other mortgages. (Vol 1) 1914 Oudh 23 (24) : 16 Oudh Cas 267.

[2] Where the mortgage deed contains a contract to consolidate the charges, the mortgagor cannot recover back the possession of the property without redeeming all the charges. (Vol 17) 1930 P C 176 (177) : 5 Luck 365 : 57 Ind App 173 (P C).

SECTION 63 — SYNOPSIS

1. Scope.
2. Accretions to land.
3. Buildings, etc., erected on mortgaged land.
4. Tree fallen on land.
5. Acquisitions by the mortgagee.
6. "During the continuance of the mortgage."
7. "Be entitled as against the mortgagee to such accession."
8. Suit to recover accession to mortgaged property—Nature of.
9. Costs of acquisition.
10. Consent of mortgagor.

1. Scope.—[1] The expression "accession" is not confined to physical acquisitions or additions to the mortgaged property but will include also the acquisition of an interest in property. ('31) 1931 Mad W N 595 (597, 598) ✠ ('09) 7 Mad L Tim 148 (150) (D B) ✠

[a][63A. *(1)* Where mortgaged property in possession of the mortgagee has, during the continuance of the mortgage, been improved, the mortgagor, upon redemption, shall, in the absence of a contract to the contrary, be entitled to the

Improvements to mortgaged property.

Section 63 — Note 1 *(contd.)*

('02) 25 All 46 (47) (D B) ✠ (Vol 11) 1924 Nag 155 (155) (D B) ✠ (Vol 1) 1914 All 199 (201).

2. Accretions to land. — [1] Where there is an acquisition of land from the sea or a river by gradual, slow and imperceptible means, there, from the supposed necessity of the case, and the difficulty of having to determine year by year, to whom an inch, or a foot, or a yard belongs, the accretion by alluvion is held to belong to the owner of the adjoining land. Such an accretion will be an "accession" to the adjoining land within the meaning of this section, and if the accession is made while the adjoining land is in the possession of the mortgagee the mortgagor will, on redemption, be entitled to such accession also. ('70) 13 Moo Ind App 467 (473) (P C) ✠ ('06) 28 All 256 (260) (D B) ✠ ('99) 22 Mad 464 (469) : 26 Ind App 107 (P C) ✠ (Vol 1) 1914 Mad 290 (293) (D B).

3. Buildings, etc., erected on mortgaged land. — [1] Unless and until a stranger erecting building on the land of another gives up his right to remove the building it cannot be said that it is an accession to the property. If he gives up such right the building will become an accession to the property. (Vol 18) 1931 All 277 (285) : 53 All 334 (F B).

[2] Where, under a contract with the mortgagor, *A* built a pucca house on the mortgaged property, one of the stipulations in the contract being that *A* should live in it for a certain rent as long as the house stood on the land, it was held that the house must be regarded as an accession to the mortgaged property. (Vol 22) 1935 Rang 420 (422) (DB).

[3] Where the mortgaged property is a kachcha house and the mortgagee in possession substitutes in its place an entirely new building it is not an accession but the case is one of improvement governed by S 63-A. (Vol 31) 1944 All 204 (205): I L R (1944) All 302 (DB).

[4] In the case of machinery brought into a mortgaged building, it may be necessary in some cases to consider, how far the definition of the expression "attached to the earth" in S. 3 of the Act will bear upon the decision of the question. (Vol 26) 1939 Mad 684 (685) (D B).

[5] Where the machinery installed in a building is in the nature of a "fixture" thereto it will be an "accession" to the building. (Vol 20) 1933 Rang 195 (197) : 11 Rang 322 (D B) ✠ (Vol 12) 1925 Rang 250 (251, 252) (D B) ✠ (Vol 22) 1935 Lah 350 (354) : 16 Lah 881 (DB).

4. Tree fallen on land.—[1] Where by natural causes, a tree falls on the mortgaged land in the possession of a mortgagee under a mortgage under which he is entitled to take the produce of the property for interest, the tree is not "accession" to the property. The mortgagee is entitled to it as part of the produce of the property. (Vol 19) 1932 All 500 (502) (D B).

5. Acquisitions by the mortgagee.—[1] Section 63 deals expressly with accessions which have been acquired at the expense of the mortgagee and would appear to be clearly applicable to cases in which a subordinate tenure has admittedly been acquired by the mortgagee as an accession to the mortgaged property. S. 63 cannot be read as entitling the mortgagor to recover acquisitions made by the mortgagee for his own benefit in circumstances which do not bring him within S. 90, Trusts Act. (Vol 19) 1932 P C 199 (201) : 59 Ind App 366 (P C).

[2] It has been held that an extension into adjoining Government waste land made by the mortgagee is not an accession to the mortgaged property. (Vol 11) 1924 Rang 131 (131, 132) ✠ (Vol 23) 1936 Rang 127 (127, 128)

6. "During the continuance of the mortgage."—[1] The section applies only to accessions received during the continuance of the mortgage. (Vol 18) 1931 All 277 (283) ; 53 All 334 (F B)✠(Vol 8) 1921 Mad 627 (628, 629) (D B).

[2] Where a usufructuary mortgagee of a share of a village took during the currency of his mortgage, a mortgage by way of conditional sale of an occupancy holding of a tenant of the village, but subsequent to the expiry of his own mortgage, foreclosed the mortgage by conditional sale it was held that the right acquired by foreclosure of such mortgage must be held to be an accession to which the mortgagor would be entitled on redemption. ('09) 10 Cal L Jour 83 (87) (DB) ✠ ('01) 14 C P L R 169 (170).

7. "Be entitled as against the mortgagee to such accession"—[1] A mortgagor is not obliged to take an accession to the mortgaged property and pay for it. If he wishes to take it he must pay the mortgagee the costs of the acquisition if any under the second paragraph of the section. (Vol 4) 1917 Lah 430 (431) ✠ (Vol 13) 1926 Pat 572 (574) (DB).

[2] Where the mortgagor never treated certain acquisitions as accessions or made any claim thereto and allowed the mortgagee to remain in possession of the lands as occupancy raiyat, it was held that he could not subsequently claim the same as accessions. (Vol 13) 1926 Pat 572 (574) (D B).

8. Suit to recover accession to mortgaged property — Nature of.—[1] It has been held that a suit after redemption, to take over accessions to the mortgaged property is not one for redemption within the meaning of Art. 148 of the Limitation Act, but is one that will be governed by Art. 144 of that Act. (Vol 4) 1917 Lah 430 (431, 432).

9. Costs of acquisition.—[1] A building or a grove which is an accession to the land is not capable of separate possession and enjoyment and if the construction or the planting of the grove is not made with the mortgagor's assent and is not necessary for the preservation of the principal property, the mortgagor is not bound to pay any costs to the mortgagee on redemption. (Vol 18) 1931 All 277 (283, 284, 287) : 53 All 334 (F B). ((Vol 15) 1928 All 381, *Not approved.*) ✠ ('26) 92 Ind Cas 262 (262, 263) (Oudh). (Grove.)✠ (Vol 17) 1930 Rang 63 (64) : 8 Rang 233 (DB). (Fruit trees.) ✠ ('29) 116 Ind Cas 894 (895) (D B) (Lah).

[2] A well newly constructed on the mortgaged land by the mortgagee unless it is constructed with the mortgagor's consent should be delivered over to the mortgagor on redemption and he is not bound to pay the cost thereof. (Vol 1) 1914 Nag 68 (70) : 10 Nag L R 166.

[3] Where an old well on mortgaged land which had been rendered useless from natural causes, was repaired by the mortgagee with the mortgagor's consent, it was held that the mortgagee can claim the amount spent therefore. ('95) 17 All 282 (284).

10. Consent of mortgagor. — [1] The consent of the mortgagor spoken of in the second paragraph of the section, may be oral or even tacit. (Vol 9) 1922 Nag 262 (263).

Section 63A — Note 1

[1] An auction-purchaser in execution of a decree under a prior mortgage to which the puisne mortgagee was not a party, cannot claim the amount spent by him

improvement; and the mortgagor shall not, save only in cases provided for in sub-section (2), be liable to pay the cost thereof.

(2) Where any such improvement was effected at the cost of the mortgagee and was necessary to preserve the property from destruction or deterioration or was necessary to prevent the security from becoming insufficient, or was made in compliance with the lawful order of any public servant or public authority, the mortgagor shall, in the absence of a contract to the contrary, be liable to pay the proper cost thereof as an addition to the principal money with interest at the same rate as is payable on the principal, or, where no such rate is fixed, at the rate of nine per cent per annum, and the profits, if any, accruing by reason of the improvement shall be credited to the mortgagor.]

[a] *Inserted* by the Transfer of Property (Amendment) Act, 1929 (20 [XX] of 1929), S. 27.

Renewal of mortgaged lease.

64. Where the mortgaged property is a lease [a][ ], and the mortgagee obtains a renewal of the lease, the mortgagor, upon redemption, shall, in the absence of a contract by him to the contrary, have the benefit of the new lease.

[a] The words "for a term of years" were *repealed* by the Transfer of Property (Amendment) Act, 1929 (20 [XX] of 1929), S. 28.

Section 63A — Note 1 *(contd.)*

on improvements. (Vol 18) 1931 All 277 (289) : 53 All 334 (FB) ✠ ('97) 20 Mad 120 (123, 124) (DB).

[2] A purchaser from the mortgagor who pays off a prior mortgagee is entitled to the costs of improvements effected by him, as a prior charge as against the subsequent mortgagee. (Vol 13) 1926 Lah 430 (431) : 7 Lah 212 (DB).

[3] If a mortgagor has agreed to become liable for the costs of any improvement that the mortgagee might make, he would be so liable even though the improvements are not of the nature referred to in subs. (2). (Vol 31) 1944 All 204 (206) : I L R (1944) All 302 (DB).

[4] Where under the mortgage agreement the mortgagor made himself liable for reasonable improvements by the mortgagee, it was held that this condition did not justify the demolition and rebuilding of a house at a cost equal to several times the mortgage-debt. (Vol 7) 1920 Lah 28 (29) (D B).

[5] Where under the terms of the mortgage, the mortgagor expressly agrees to pay at the time of redemption the costs of construction of any new building which the mortgagee may erect upon the mortgaged property after demolition of the old building the mortgagee would be entitled to such costs at the time of redemption even though the costs incurred are several times the mortgage-debt (Vol 31) 1944 All 204 (206) : I L R (1944) All 302 (DB).

[6] The mortgagor agreed in the mortgage-deed that if the mortgagee constructed wells on the land he would recoup the mortgagee the costs thereof, but the mortgagee after having constructed wells in a portion of the property purchased such portion himself : *Held* that the contract did not contemplate the mortgagee himself purchasing the land and that it would be inequitable to allow the mortgagee to have the benefit of the wells and also to claim the costs thereof from the mortgagor. ('06) 28 All 593 (596) (DB).

[7] If there is a contract under which the mortgagor will not be entitled to the improvements, it may be reasonably inferred that if the improvements are such that they cannot be severed from the land and taken away by the mortgagee the mortgagor must be held liable to pay the costs of such improvements. (Vol 34) 1947 Mad 197 (202) (DB).

[8] A usufructuary mortgage in Malabar carries with it the mortgagee's right to effect and claim the costs of improvements. The fact that a part of the mortgage property was in Malabar and the mortgage-deed was in Malayalam language do not necessarily lead to the inference that there was an implied "contract to the contrary." (Vol 34) 1947 Mad 197 (202) (D B).

[9] Where a mortgagee seeks to make the mortgagor liable for a large amount as cost of improvements it is the duty of the mortgagee to establish by indubitable evidence the fact of the execution of such improvements and the actual expenses incurred by him for effecting them. (Vol 34) 1947 Mad 197 (202) (DB).

[10] The mortgagee is entitled to interest on the costs of the improvement in cases where such costs are allowable to him under sub-s. (2). (Vol 27) 1940 Lah 199 (200).

[11] It has been held that though a decree for redemption fixes the value of improvements made by the mortgagee, a re-valuation of such improvements can be made at the time of execution of the decree if circumstances show that the value has increased or decreased subsequent to the decree. ('97) 20 Mad 124 (128) (D B) ✠ ('87) 10 Mad 367 (368) (DB).

Section 64 — Note 1

[1] This section applies even where the mortgagee was forced to renew the lease and there was no collusion between him and the landlord. ('02) 6 Cal W N 372 (374 375) (DB).

[2] An occupancy tenant made a usufructuary mortgage of his holding, there being an arrangement between himself and the mortgagees as to the payment of rent. The rent fell into arrears and the landlord determined the tenancy, ejected the tenants and granted a new lease to the mortgagees : *Held* that the mortgagor's attempt to treat the new lease as one for his benefit was really asking in effect for the transfer of the lease to himself, that this was prohibited by S. 9 of the Agra Rent Act, 1881, and that the mortgagor could not get the benefit of the lease. ('05) 2 All L Jour 583 (584, 585) (DB).

[3] Where a new lease was obtained *bona fide* by the mortgagee after giving all parties interested notice and an opportunity of renewal it was held that such new lease is not for the benefit of the mortgagor. ('21) 62 Ind Cas 692 (694, 695) (DB) (Cal).

[4] The renewal by the mortgagee of the patta for the mortgaged land or the making of a new settlement with the Government does not take away the right of the mortgagor to redeem the land so settled. ('05) 32 Cal 296 (312) : 32 Ind App 23 (PC).

[5] Inam land resumed — *Held* that the mortgagor was entitled to the land on redemption. ('12) 36 Bom 539 (542) (DB) ✠ (1900) 24 Bom 482 (483) (DB).

Implied contracts by mortgagor.

65. In the absence of a contract to the contrary, the mortgagor shall be deemed to contract with the mortgagee —

(*a*) that the interest which the mortgagor professes to transfer to the mortgagee subsists, and that the mortgagor has power to transfer the same;

(*b*) that the mortgagor will defend, or if the mortgagee be in possession of the mortgaged property, enable him to defend, the mortgagor's title thereto;

(*c*) that the mortgagor will, so long as the mortgagee is not in possession of the mortgaged property, pay all public charges accruing due in respect of the property;

(*d*) and, where the mortgaged property is a lease [a][* *], that the rent payable under the lease, the conditions contained therein, and the contracts binding on the lessee have been paid, performed and observed down to the commencement of the mortgage; and that the mortgagor will, so long as the security exists and the mortgagee is not in possession of the mortgaged property, pay the rent reserved by the lease, or, if the lease be renewed, the renewed lease, perform the conditions contained therein and observe the contracts binding on the lessee, and indemnify the mortgagee against all claims sustained by reason of the non payment of the said rent or the non-performance or non-observance of the said conditions and contracts;

(*e*) and, where the mortgage is a second or subsequent incumbrance on the property, that the mortgagor will pay the interest from time to time accruing due on each prior incumbrance as and when it becomes due, and will at the proper time discharge the principal money due on such prior incumbrance.

[b][* * * *]

The benefit of the contracts mentioned in this section shall be annexed to and shall go with the interest of the mortgagee as such, and may be enforced by every person in whom that interest is for the whole or any part thereof from time to time vested.

[a] The words "for a term of years" were *repealed* by the Transfer of Property (Amendment) Act, 1929 (20 [XX] of 1929), S. 29. [b] Certain words were *repealed*, *ibid.*

SECTION 65 — SYNOPSIS

1. Scope.
2. Clause (a).
3. "In the absence of a contract to the contrary."
4. Remedies of mortgagee on breach of the implied contracts under this section.
5. Benefit of contract goes with mortgagee's interest.

1. Scope.—[1] Contracts implied under this section cannot be said to be "covenants running with the land." (Vol 4) 1917 Mad 228 (230, 231) : 39 Mad 959 (DB).

[2] Where a mortgage was executed in 1880 and the mortgagor lost his title to a portion of the property subsequently, it was held that the mortgagee could not claim any damages by reason of the diminution of his security. ('13) 35 All 48 (57) : 40 Ind App 31 (PC).

2. Clause (a). — [1] A breach of the covenant under this clause does not render the mortgage itself void. ('08) 12 Cal W N 94 (96) (DB).

[1a] It has been held that the warranty of title contained in this clause, includes a warranty of quiet enjoyment. (Vol 31) 1944 All 195 (195) : I L R (1944) All 277 (DB).

[2] The mortgagor cannot derogate from his own grant and he and his representatives will not be allowed to deny his title as against the mortgagee. (Vol 9) 1922 P C 382 (383) (PC).

[3] Where the mortgage is forbidden by law the mortgagor is not estopped from denying his title as against the mortgagee. ('12) 34 All 640 (642) (DB) ✠ (Vol 18) 1931 All 38 (40) (DB) ✠ ('96) 19 Mad 200 (206, 208) ✠ ('03) 6 Oudh Cas 331 (333, 335, 336) (DB) ✠ (Vol 15) 1928 Oudh 500 (501) (DB) ✠ (Vol 17) 1930 Bom 135 (137) : 53 Bom 676 (DB). (No estoppel against statute.) ✠ (Vol 2) 1915 Cal 161 (164) : 42 Cal 455 (DB). (Do.) ✠ ('12) 34 All 155 (157) (DB). (Do.)

[4] Where the truth is known to the mortgagee the mortgagor is not estopped from denying his title against the mortgagee (Vol 11) 1924 Nag 363 (365) ✠ ('10) 34 Bom 175 (182) (DB).

[5] The failure to disclose at the time of the mortgage the existence of a prior incumbrance is a breach of an obligation imposed by cl. (a). ('10) 7 Ind Cas 251 (252) (DB) (Cal).

[But see (Vol 21) 1934 Nag 149 (151) : 30 Nag L R 303.]

[6] The mortgagee cannot, if he was aware of the defect of title at the time of the mortgage, get any relief on the implied contract under cl. (a). (Vol 18) 1931 Lah 694 (695, 696).

[But see (Vol 2) 1915 Mad 1215 (1218) (DB).]

3. "In the absence of a contract to the contrary."—[1] The mortgagee knew all the circumstances when he took his mortgage. It was held on the facts of the case that there was an implied understanding between the parties that there should be no such contract as is referred to in clause (a) of this section. ('08) 4 Mad L Tim 437 (438) (D B).

4. Remedies of mortgagee on breach of the implied contracts under this section.— [1] In respect of every one of the contracts referred to in the various clauses of the section, the mortgagee has the general remedy, by way of damages under S. 73 of the Indian Contract Act, 1872. (Vol 23) 1936 Mad 433 (433) ✠ (Vol 31) 1944 All 195 (196) : I L R (1944) All 277 (D B) ✠ (Vol 12) 1925 Rang 130 (131, 132).

Contract falling under clause (a).

[2] A breach of the implied contract referred to in this clause will be "default on the part of the mortgagor" by which the security is rendered insufficient within the meaning of S. 68, clause (b) and will entitle the mortgagee to sue for the mortgage-money. ('10) 7 Ind Cas 251 (252) (D B) (Cal) ✠ (Vol 18) 1931 Oudh 5 (5) : 6 Luck 374.

[a][65A. *(1)* Subject to the provisions of sub-section *(2)*, a mortgagor, while lawfully in possession of the mortgaged property, shall have power to make leases thereof which shall be binding on the mortgagee.

Mortgagor's power to lease.

(2) (a) Every such lease shall be such as would be made in the ordinary course of management of the property concerned, and in accordance with any local law, custom or usage.

(b) Every such lease shall reserve the best rent that can reasonably be obtained and no premium shall be paid or promised and no rent shall be payable in advance.

(c) No such lease shall contain a covenant for renewal.

(d) Every such lease shall take effect from a date not later than six months from the date on which it is made.

(e) In the case of a lease of buildings, whether leased with or without the land on which they stand, the duration of the lease shall in no case exceed three years, and the lease shall contain a covenant for payment of the rent and a condition of re-entry on the rent not being paid within a time therein specified.

(3) The provisions of sub-section *(1)* apply only if and as far as a contrary intention is not expressed in the mortgage deed; and the provisions of sub-section *(2)* may be varied or extended by the mortgage deed and, as so varied and extended, shall, as far as may be, operate in like manner and with all like incidents, effects and consequences, as if such variations or extensions were contained in that sub-section.]

[a] *Inserted* by the Transfer of Property (Amendment) Act, 1929 (20 [XX] of 1929), S. 30.

Section 65—Note 4 *(contd.)*

[3] A mortgagee suing for damages for breach of the covenant of title is entitled to interest on the sum advanced by him. (Vol 31) 1944 All 195 (196) : I L R (1944) All 277 (D B).

Contract falling under clause (c).

[4] Under S. 72 cl. (b) the mortgagee may spend the necessary amount for payment of public charges and can claim to be reimbursed under S. 69 of the Contract Act. (Vol 24) 1937 Nag 225 (226) ✠ (Vol 25) 1938 Nag 459 (461) : I L R (1939) Nag 246 ✠ (Vol 27) 1940 Nag 285 (286, 287).

Contract falling under clause (e).

[5] In cases falling under cl. (e) the mortgagee will have a remedy under S. 72, cl. (b) and S. 68, cl. (c) of this Act. ('90) 13 Mad 192 (195) (D B).

[6] In a case falling under cl. (e) the mortgagee has a remedy under S. 69 of the Contract Act. (Vol 9) 1922 All 153 (154) : 44 All 67 (D B).

[7] In a case falling under cl. (e) the mortgagee can claim subrogation rights under S. 92 of this Act. (Vol 24) 1937 Mad 826 (830).

[8] Where a puisne mortgagee of property obtained a decree for sale after redemption of prior incumbrances and the property was put up for sale after redemption of prior incumbrances, but the sum realised was not sufficient even to cover prior incumbrances, it was held that having regard to this section the puisne mortgagee was entitled to claim a personal decree under S. 90 of the Act (now O. 34, R. 6 of the Code of Civil Procedure) for the amount due to him including the amount paid by him for redemption. ('03) 26 All 93 (95).

5. Benefit of contract goes with mortgagee's interest.—[1] A contract can be enforced by or against the contracting parties or if they are dead, then by or against their legal representatives. (Vol 24) 1937 Nag 225 (225).

[2] A contract cannot be enforced by or against third persons even though such third persons may be transferees of property from the contracting parties. ('12) 34 All 63 (64) : 39 Ind App 7 (P C).

[3] A contract implied by this section cannot be enforced against a purchaser of the equity of redemption at a revenue sale. ('06) 30 Mad 67 (71) (D B).

[But see ('12) 17 Ind Cas 878 (879) (Low Bur). (Purchaser of mortgaged property from mortgagor).]

[4] A person who has acquired the equity of redemption by adverse possession cannot be said to derive any title through the mortgagor and cannot be proceeded against on an implied contract by the mortgagor under this section. (Vol 4) 1917 Mad 228 (232) : 39 Mad 959 (DB).

[5] Where a covenant by the mortgagor was not one under this section, it was held that such covenant could not be enforced against a subsequent incumbrancer of the mortgaged property. (Vol 3) 1916 Mad 859 (862) : 38 Mad 18 (D B).

Section 65A—Note 1

[1] The section does not apply to cases where the mortgage was executed before the date of the introduction of the section. (Vol 20) 1933 Mad 876 (878) ✠ (Vol 18) 1931 Pat 210 (211) : 10 Pat 332 (D B) ✠ (Vol 24) 1937 Oudh 146 (149) : 12 Luck 161 ✠ (Vol 34) 1947 Cal 73 (74) (D B).

[2] The section will not apply to a mortgage executed before the section was introduced even if the lease itself was executed subsequent to the introduction of the section. (Vol 27) 1940 Mad 669 (669) ✠ (Vol 23) 1936 Mad 942 (942) (Obiter.)

[3] Whether a lease granted by the mortgagor who has executed the mortgage before this section was introduced is binding on the mortgagee or not is to be determined with reference to the law as it stood prior to the introduction of the section. (Vol 34) 1947 Cal 73 (74) (D B) ✠ (Vol 22) 1935 All 511 (512) ✠ (Vol 24) 1937 Oudh 146 (149) : 12 Luck 161 ✠ (Vol 25) 1938 Pat 189 (191) (D B) ✠ (Vol 34) 1947 All 240 (242).

[4] A lease by a mortgagor who is not in possession of the mortgaged property at the time he grants the lease, is not binding on the mortgagee under this section. (Vol 20) 1933 Mad 876 (878).

[5] Whatever may be the rights of a mortgagor under a simple mortgage to grant leases in the usual course of management, there is considerable difficulty on the part of a mortgagor, who has created an English mortgage, to grant such a lease as this. Such a mortgagor can only act as agent on behalf of the mortgagee, and without the concurrence of the mortgagee such a lease cannot be binding on the mortgagee. (Vol 17) 1930 Cal 335 (338) : 57 Cal 82 (D B).

[6] The test to determine whether a lease granted by a mortgagor is a transaction in the ordinary course of

Waste by mortgagor in possession.

66. A mortgagor in possession of the mortgaged property is not liable to the mortgagee for allowing the property to deteriorate; but he must not commit any act which is destructive or permanently injurious thereto, if the security is insufficient or will be rendered insufficient by such act.

Explanation.—A security is insufficient within the meaning of this section unless the value of the mortgaged property exceeds by one third, or, if consisting of buildings, exceeds by one-half, the amount for the time being due on the mortgage.

Rights and Liabilities of Mortgagee.

Right to foreclosure or sale.

67. In the absence of a contract to the contrary, the mortgagee has at any time after the mortgage money has become [a][due] to him, and before a decree has been made for the redemption of the mortgaged property, or the mortgage-

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Section 65A—Note 1 *(contd.)*

management is, whether he would have granted the lease if he had known that he would continue indefinitely as a full owner of the property. (Vol 15) 1928 Nag 303 (304).

[7] A temporary lease of land would ordinarily be in the course of management (Vol 3) 1916 Cal 870 (872) (D B) ✠ ('68) 10 Suth W R 325 (325) (D B).

[8] A lease for three years was held, on the facts of the case, not to be in the ordinary course of management and not binding on the mortgagee. (Vol 19) 1932 Rang 113 (114) : 10 Rang 210 (D B).

[9] A permanent lease of land may be made in the course of management (Vol 22) 1935 All 511 (513).

[10] A permanent lease made with the express object of making a large profit or seriously depreciating the value of the security which the mortgagee may be entitled to, cannot be said to have been made in the ordinary course of management. (Vol 15) 1928 Nag 128 (130).

[11] A permanent lease of land would not, independent of the question whether it was made in the ordinary course of management or not, be binding on the mortgagee if the security would be diminished thereby. (Vol 30) 1943 Oudh 407 (408) (D B) ✠ (Vol 18) 1931 Oudh 256 (259) : 6 Luck 546 (D B) ✠ (Vol 15) 1928 Pat 238 (240) (D B).

[12] A lease of a house site by an unregistered document on condition of the lessee building a house thereon and living therein at a rent of Rs. 50 per month as long as the house stands on the site, was held not to be one in the ordinary course of management. (Vol 22) 1935 Rang 420 (422) (D B).

[13] Where the lease of the mortgaged property after the mortgage is not valid and binding against the mortgagee, it is not open to the mortgagee to eject the lessee. His right is merely to cause the mortgaged property to be sold for the payment of his debt. (Vol 32) 1945 Pat 106 (108) (D B).

[14] Where under the terms of the contract of mortgage, the mortgagee was entitled to take possession of the property on default of payment by the mortgagor, a lessee from the mortgagor cannot resist possession being taken by the mortgagee on default. ('12) 15 Oudh Cas 239 (242) (D B).

[15] The lease is not *ipso facto* void, but is good except in so far as it prejudices and is in defeasance of the mortgagee's rights. (Vol 22) 1935 All 511 (512, 513) ✠ ('36) 164 Ind Cas 241 (243) (Cal) ✠ (Vol 2) 1915 Oudh 200 (202) (D B).

[16] A mortgage deed executed by a malguzar contained the following covenant, 'I will not transfer the above mortgaged property to any other person by mortgage, sale, etc.," After the mortgage the malguzar granted leases to occupancy tenants in the ordinary course of the village management: *Held* that the covenant did not prohibit the leasing of the property and consequently the occupancy tenancy created was not in breach of the covenant. (Vol 34) 1947 Nag 210 (213) (DB).

Section 66—Note 1

[1] A mortgagor cannot after the date of the mortgage prejudice the rights of the mortgagee by any dealings with the mortgaged property. ('12) 15 Oudh Cas 239 (241) (DB) ✠ (Vol 4) 1917 Nag 116 (118).

[2] Subject to the duty not to do any act which renders the security insufficient, the mortgagor as owner of the property is entitled to use and enjoy the property in any way he likes. (Vol 4) 1917 Mad 880 (883) (DB) ✠ ('96) 9 C P L R 130 (131) ✠ (Vol 22) 1935 All 511 (512).

[3] The principle of this section has been applied to cases arising in the Punjab. ('02) 1902 Pun Re No. 85, page 348 (350) (DB)

[4] The section deals with waste by the mortgagor. (Vol 13) 1926 Mad 343 (345).

[5] Where the mortgagor included in his mortgage certain items to which he had no title and the security was thus found to be insufficient, it was held that the case was not within the section. (Vol 9) 1922 Bom 217 (218) (DB).

[6] *X* mortgaged to *Y* a house together with a well. *X* afterwards granted an easement right in the well to his neighbour *Z*. The mortgagee *Y*, having purchased the mortgaged property in execution of the mortgage decree, objected to the use of the well by Z It was held that the validity of the easement as against the mortgagee depended upon the question whether the grant of the easement rendered the security insufficient within the meaning of this section. ('02) 1902 Pun Re No. 85, page 348 (350) (DB).

[7] The onus of proof that a particular act of the mortgagor in possession was destructive or permanently injurious to the property and that thereby the value of the security has gone down the statutory minimum is on the mortgagee. (Vol 4) 1917 Mad 880 (883) (DB) ✠ (Vol 1) 1914 Bom 312 (316) (DB) ✠ (Vol 25) 1938 Pat. 189 (191) (DB).

[But see (Vol 3) 1916 Pat 11 (14) 1 Pat L Jour 563 (DB) ✠ ('02) 1902 Pun Re No. 85, page 348 (350) (DB).]

[8] Where acts which are destructive or permanently injurious to the property have been commited the mortgagee can maintain an action in tort for damages against the mortgagor for the depreciation of the mortgage security, if it can be shown that by reason of such acts the value of the mortgage security has been lowered below the statutory minimum. ('05) 28 Mad. 208 (209, 210) (DB) ✠ (Vol. 2) 1915 Mad. 633 (634) (DB).

SECTION 67—SYNOPSIS

1. Scope.
2. Contract to the contrary.
3. "After the mortgage-money has become due."
4. Failure to pay interest.
5. Failure to pay instalments.

money has been paid or deposited as hereinafter provided, a right to obtain from the Court [b][a decree] that the mortgagor shall be absolutely debarred of his right to redeem the property, or [b][a decree] that the property be sold.

A suit to obtain [b][a decree] that a mortgagor shall be absolutely debarred of his right to redeem the mortgaged property is called a suit for foreclosure.

Nothing in this section shall be deemed—

[c][(*a*) to authorize any mortgagee other than a mortgagee by conditional sale or a mortgagee under an anomalous mortgage by the terms of which he is entitled to foreclose, to institute a suit for foreclosure, or an usufructuary mortgagee as such or a mortgagee by conditional sale as such to institute a suit for sale; or]

(*b*) to authorize a mortgagor who holds the mortgagee's rights as his trustee or legal representative, and who may sue for a sale of the property, to institute a suit for foreclosure; or

(*c*) to authorize the mortgagee of a railway, canal or other work in the maintenance of which the public are interested, to institute a suit for foreclosure or sale; or

(*d*) to authorize a person interested in part only of the mortgage-money to institute a suit relating only to a corresponding part of the mortgaged property, unless the mortgagees have, with the consent of the mortgagor, severed their interests under the mortgage.

[a] *Substituted* by the Transfer of Property (Amendment) Act, 1929 (20 [XX] of 1929), S. 31, for "payable." [b] *Substituted, ibid*, for "an order". [c] *Substituted, ibid.*

SECTION 67—SYNOPSIS *(contd.)*

6. "Before the mortgage-money has been paid or deposited as hereinafter provided."
7. Effect of foreclosure.
8. Effect of confirmation of sale under mortgage decree.
9. Remedy of a simple mortgagee.
10. Remedy of a mortgagee by conditional sale.
11. Remedy of a usufructuary mortgagee.
12. Remedy of an English mortgagee.
13. Remedy of a mortgagee by deposit of title deeds.
14. Remedy of an anomalous mortgagee.
15. Sub-mortagee.
16. Benamidar mortgagee.
17. Suit by Government to recover takkavi loan.
18. Clause (d).
19. Partial foreclosure or sale by a sole mortgagee.
20. Mortgagee, whether can enforce his mortgage against a trespasser.
21. Mortgagee obtaining a money decree — Whether can sell the mortgaged property.

1. Scope.—[1] This section defines the rights of a mortgagee as against the mortgagor, so far as the right to maintain a suit for foreclosure or sale is concerned. ('91) 13 All 432 (455) (FB).

[2] The section is retrospective in its operation. ('89) 11 All 367 (371) (DB) ⊛ (Vol 4) 1917 Mad. 232 (233) (DB).

2. Contract to the contrary.—[1] Mortgage deed containing covenant that if mortgagee wanted payment he must give notice to be paid on the day after the beginning of the cultivation in any year and not at other times: *Held* that the covenant in the mortgage deed affected only the mortgagee and not the mortgagor's right to redeem at any time. (Vol 10) 1923 Mad 553 (556 (DB).

[2] Mortgagee entitled under the mortgage to enter into possession of the mortgaged property immediately on the execution of the mortgage deed—Further provision in the deed that the mortgagee would have the right to recall mortgage-money and to sue for foreclosure only in the event of the mortgagor's default in redeeming the mortgage on the expiry of five years—Mortgagee not allowed to enter into possession by the mortgagor—On the question as to when mortgage money became payable, held that the right given by S. 67 was controlled by a contract to the contrary and that according to the stipulation in the mortgage deed, the mortgagee could not recall the mortgage-money and sue for foreclosure before expiry of five years. (Vol 19) 1932 Oudh 178 (179) (DB).

3. "After the mortgage-money has become due".—[1] Right to foreclosure or sale under this section arises simultaneously with the right to redeem under S. 60. *See* (Vol 6) 1919 P C 150 (151): 42 Mad 813: 46 Ind. App. 151 (PC).

[2] Where the mortgage-deed provides for payment of the mortgage money, the mortgagee's right to foreclosure or sale arises after the expiry of the period and not before. ('22) 65 Ind Cas 273 (274) (DB) (Cal) ⊛ ('10) 1910 Pun W R 137 (DB) ⊛ ('07) 29 All 471 (474) (DB) ⊛ (Vol 20) 1933 Oudh 81 (82) (DB) ⊛ (Vol 20) 1933 Oudh 237 (239) : 8 Luck 188.

[3] Where no period is fixed for the payment of the mortgage-money, the mortgage-money becomes due on the date of the mortgage ('93) 20 Cal 269 (272) (DB) ⊛ ('12) 39 Cal 828 (831) (DB) ⊛ (Vol 13) 1926 Lah 225 (226) (DB).

[4] Where no specific time was fixed for payment of the debt, it was held that "on the facts of the case" the money did not become due until a demand was made by the mortgagee and refused by the mortgagor. (Vol 17) 1930 P C 188 (192): 54 Bom 495: 57 Ind App 194 (PC).

[5] Where a mortgage fixing a term for payment, contains also a default clause for payment before the due date, it is settled law that the mortgagee has an option either to enforce his security at once, or to stand by for the full term of the mortgage. (Vol 19) 1932 P C 207 (211) : 7 Luck 442 : 59 Ind App 376 (PC).

[6] The money becomes due when the mortgagee exercises his option. ('21) 1921 Mad W N 384 (384) (DB) ⊛ (Vol 15) 1928 Mad 637 (638, 639) (DB) ⊛ (Vol 20) 1933 Oudh 237 (239) : 8 Luck 488. (*Affirmed* on appeal in (Vol 21) 1934 Oudh 473.)

[7] Where the mortgagee does not exercise his option the money becomes due on the expiry of the period. (Vol 20) 1933 Oudh 66 (67) : 8 Luck 242 (FB) ⊛ (Vol 21) 1934 Mad 227 (228) (DB) ⊛ ('95) 23 Cal 228 (246, 247): 22 Ind App 183 (P C) ⊛ (1900) 27 Cal 938 (942) : 27

Section 67 — Note 3 *(contd.)*

Ind App 98 (P C) ✠ (Vol 18) 1931 Pat 285 (290) : 11 Pat 112 (DB).

[8] Where the mortgage-money is payable under the deed "on demand" and the demand is an integral part of the contract, the money will not become due until a demand is made. ('79) 4 Cal 283 (294) (DB). (Per Garth C. J.) ✠ (.06) 16 Mad L Jour 364 (365) (DB).

[9] The words "on demand" do not by themselves make a demand a term of the contract. (Vol 6) 1919 All 56 (59) : 42 All 70 (DB).

[10] On construction the words "when you require" in the mortgage deed, held to imply a condition and not a mere technical expression. ('99) 22 Mad 20 (22) (DB).

[11] A failure on the part of the mortgagor to perform what was incumbent upon him to do during the term of the mortgage may give rise to a right of foreclosure or sale before the expiry of the term fixed in the mortgage-deed. ('02) 26 Bom. 241 (245) (DB) ✠ (1870) 11 Eq 591 (598) : 40 L J Ch 122, *Seaton v. Twyford* ✠ (Vol 8) 1921 Mad 229 (230) (DB). (Per Wallis, C. J., Sadasiva Aiyar J. contra) ✠ (Vol 2) 1915 Nag 133 (135) : 11 Nag L R 153.

[12] *A*, a trustee executing a mortgage in favour of *B*, the trust temple - Mortgage-debt not to be paid for 20 years — In a suit under S. 92, Civil P. C., mortgage declared to be a breach of trust and the money ordered to be paid immediately to *B*—*Held* that the mortgage-money became due within the meaning of S. 67 and the suit for foreclosure before the expiry of the period, was maintainable. (Vol 8) 1921 Mad 229 (230) (DB)✠ ('97) 24 Cal 382 (384) (DB).

Illustrative cases:

[13] Mortgage deed provided for the repayment of the principal and interest by the month of Chaitra 1305. On default, the mortgagor was to give to the mortgagee the produce of the security for three years succeeding; there was also a provision that the mortgagor would not thrash the produce without the permission of the mortgagee, and that, if he did so, he would realize the principal and interest in Magh 1308. It was held that the mortgage-money did not become due before 1308. (Vol 6) 1919 Cal 520 (521) (DB).

[14] A mortgage deed provided that the mortgagee could not sue unless the entire demand for two instalments for two consecutive years and interest on the principal for two consecutive years remain unpaid, and nothing was paid on account of principal or interest for two consecutive years. It was held that the right to sue did not arise unless nothing had been paid on account of principal or interest. (Vol 2) 1915 Oudh 31 (54) (DB).

[15] Mortgage for period—No right to redeem or sale before expiry of period—But mortgagee entitled to sue for money relief alone before expiry of period — *Held* that suit to enforce mortgage charge could not be brought before expiry of period. (Vol 15) 1928 Oudh 289 (290) : 3 Luck 439 (FB).

4. Failure to pay interest. — [1] Where the principal money has not become due, the mortgagee has no right to demand a sale of the mortgaged lands for the payment of interest alone. (Vol 6) 1919 P C 150 (151) : 42 Mad 813 : 46 Ind App 151 (PC).

[But see (Vol 8) 1921 Mad 229 (230) (DB). (Per Wallis C. J.)]

[2] Mortgagee will be entitled to sell the mortgaged security for the arrears of interest alone, where there is a special stipulation to that effect in the morigage deed. (Vol 6) 1919 P C 150 (151) : 42 Mad 813 : 46 Ind App 151 (PC).

5. Failure to pay instalments.—[1] Instalment mortgage bond — Sale for part of mortgage money allowed under the deed—Mortgagee is free to enforce a portion of mortgage security on default of instalment. (Vol 2) 1915 Nag 133 (135) : 11 Nag L R 153.

[2] Where the mortgagee is restrained from enforcing his security until all the instalments have become due, the mortgagee has no right to sue for sale or foreclosure on default of one instalment. (Vol 2) 1915 Nag 133 (135) : 11 Nag L R 153.

6. "Before the mortgage-money has been paid or deposited as hereinafter provided."—[1] Where the mortgage-money is paid the mortgage is extinguished and no question of foreclosure or sale will arise. (Vol 20) 1933 Mad 879 (882) : 57 Mad 195 (DB)✠('11) 1911 Pun W R 94 (DB).

[2] For provision as to deposit, *see* S. 83.

[3] Deposit under S. 83, as contemplated here means a deposit accepted and acted on by the mortgagee in terms of that section. Where facts showed that the Court could not place the money in the hands of the mortgagee, the deposit would not be legal deposit under S. 83 and the mortgagee would be entitled to obtain a decree for foreclosure. (Vol 28) 1941 Cal 18 (19, 20).

7. Effect of foreclosure.—[1] A decree for foreclosure extinguishes the mortgagor's right to redeem and makes the mortgagee an absolute owner of the property from the date of the decree. (Vol 18) 1931 Sind 107 (109) : 25 Sind L R 405✠(Vol 1) 1914 All 63 (64) : 36 All 327 (DB).

[2] *A* executing a *kabutiat* in favour of *B*—*Kabuliat* containing a covenant that if *A* makes a gift of or sells or otherwise transfers the land then he and the vendee or transferee would be bound to pay *B* ¼th of the price of the land—*A* mortgaging property by conditional sale—*Held*, mortgage by conditional sale followed by decree for foreclosure and taking of possession thereunder constituted a "transfer" contemplated by the *kabuliat*. (Vol 29) 1942 Cal 452 (454) (DB).

[3] Mortgage by a Hindu widow entitled to a life estate of the whole of the proprietary interest in the property — Decree for foreclosure passed in respect of the whole interest—*Held* that the decree could not bind reversioner and that he could redeem. (Vol 18) 1931 Oudh 358 (362) : 6 Luck 715 (DB).

8. Effect of confirmation of sale under mortgage-decree. — [1] Effect of confirmation of sale is to pass to the purchaser the interest both of the mortgagor and the mortgagee. (Vol 17) 1930 Bom 221(222)(DB)✠ ('92) 16 Bom 486 (491)(DB)✠('76) 1 All 240 (245)(FB).

9. Remedy of a simple mortgagee.—[1] Under this section a simple mortgagee can only obtain a decree for sale. (Vol 5) 1918 P C 34 (34):45 Ind App 130 : 40 All 407 (PC) ✠ ('96) 19 Mad 249 (253) : 23 Ind App 32 (PC).

[2] He cannot obtain a decree for foreclosure. (Vol 18) 1931 Mad 626 (628, 629) : 54 Mad 565✠(Vol 18) 1931 Mad 542 (547) (DB).

[3] The provision in a deed of simple mortgage entitling the mortgagee to enter into possession in case of default of payment does not take away mortgagee's right of sale. ('11) 38 Cal 537 : 38 Ind App 80 (PC).

[4] In a suit by a simple mortgagee to enforce his mortgage, order that in case of default in payment of the amount, the mortgagee should be put in possession of the property is wrong. The only decree that can be passed is a decree for sale. ('9€) 19 Mad 249 (253) : 23 Ind App 32 (PC).

10. Remedy of a mortgagee by conditional sale. — [1] The only remedy of a mortgagee by conditional sale is to institute a suit for foreclosure. (Vol 29) 1942 Nag 88 (90) : I L R (1942) Nag 357 (DB) ✠

Section 67—Note 10 *(contd.)*
(Vol 16) 1929 All 421 (425) : 51 All 780 (DB)✠('93) 16 Mad 64 (66) (DB)✠('93) 20 Cal 269 (272) (DB).

[2] A mortgagee by conditional sale of an intangible property has a right of foreclosure. (Vol 2) 1915 Cal 161 (167, 168) : 42 Cal 455 (DB).

11. Remedy of a usufructuary mortgagee.—[1] Under this section a usufructuary mortgagee is not entitled to sue for a decree for foreclosure or for sale. (Vol 3) 1916 P C 169 (172) (PC)✠(Vol 27) 1940 Cal 427 (438) (DB)✠(Vol 28) 1941 Mad 385 (386) (DB).

[2] A mortgagee under an anomalous mortgage which is a combination of a simple and a usufructuary mortgage can bring the property to sale by virtue of the covenant for sale. (Vol 16) 1929 P C 138 (141) : 4 Luck 363 : 56 Ind App 299 (PC).

[3] Where there is no stipulation for sale but only a personal covenant to pay, it has been held that the mortgagee is entitled to ask for sale of the property in the strength of the covenant to repay. (Vol 30) 1943 Sind 59 (61) : I L R (1942) Kar 452 (DB) ✠ ('93) 17 Mad 131 (133) (FB)✠(Vol 20) 1933 Mad 613 (615) : 55 Mad 892 (DB)✠('10) 6 Nag L R 20 (25)✠('10) 34 Bom 462 (466) (DB)✠(Vol 22) 1935 Lah 103 (104) : 16 Lah 616 (DB).

[But see (Vol 29) 1942 All 326 (327) : I L R (1942) All 368 (DB)✠(Vol 25) 1938 All 418 (421) : I L R (1938) All 714 (FB)✠(Vol 20) 1933 Lah 151 (152) (DB)✠('08) 10 Bom L R 615 (617) (DB).]

12. Remedy of an English mortgagee. — [1] English mortgage executed before 1st April 1930 — Right of sale or foreclosure vested in him is not affected by the Amending Act of 1929 — Art. 147 and not Art. 127, Limitation Act, continues to apply to suits thereon. (Vol 33) 1946 Bom 499 (508).

[2] Under this section the only remedy open to an English mortgagee is by way of sale. (Vol 29) 1942 Cal 153 (158) : I L R (1942) 1 Cal 326 (DB).

[3] If the mortgagor binds himself to pay the money personally, the mortgagee will be entitled to get a personal decree also. (Vol 9) 1922 Cal 52 (53) (DB).

13. Remedy of a mortgagee by deposit of title deeds.— [1] The remedy open to a mortgagee by deposit of title deeds is only by way of sale. (Vol 23) 1936 Rang 400 (401) (DB) ✠ (Vol 23) 1936 Rang 290 (292) : 14 Rang 292 (DB).

14. Remedy of an anomalous mortgagee.—[1] An anomalous mortgagee can institute a suit for sale, as well as for foreclosure if the right of sale or foreclosure is given to him by the contract of mortgage. (Vol 23) 1936 Pat 211 (222): 14 Pat 550 (DB). (Sale.)✠ (Vol 28) 1941 All 169 (170) : I L R (1941) All 240. (Foreclosure.)✠('13) 11 All L Jour 793 (795) (DB) (Do.)

[2] Where in an anomalous mortgage the mortgagee is given right of foreclosure and also of sale, and the mortgagee institutes a suit for foreclosure, the Court has a discretion under O. 34, R. 4, sub-r. (3), Civil P. C. to pass a decree for sale instead of foreclosure. (Vol 27) 1940 Nag 156 (157) : I L R (1941) Nag 607 (DB).) (Vol 16) 1929 Nag 254 : 25 Nag L R 187 (FB), *Foll.*) ((Vol 25) 1938 Nag 112 (113) : I L R (1938) Nag 91 (DB).

[3] Anomalous mortgage—Mortgagee put in possession—Mortgage for a fixed term, and in case of non-payment by mortgagor on stipulated date, the mortgagee to continue to be in possession—*Held* that there was no right to bring the property to sale. (Vol15) 1928 Mad 226 (226) (DB).

[4] A *kanom* is a usufructuary mortgage apart from the reservation of the *purapad* and it is well understood in Malabar that it does not confer a right to bring the property to sale. (Vol 1) 1914 Mad 317 (318) (DB).

[5] Mortgagor to repay by instalments with interest or to redeem at any time—Mortgagee to remain in possession — *Held* mortgage was anomalous one and the conclusion to be drawn from its terms was that the parties never contemplated sale. (Vol 6) 1919 P C 121 (123) : 15 Nag L R 134 (P C).

15. Sub-mortgagee. — [1] A sub-mortgagee is entitled to sue for sale of the mortgagee rights of his mortgagor (Vol 30) 1943 Mad 498 (499) (DB) ✠ ('07) 29 All 385 (405, 408) (FB).

[2] The original mortgagor need not be joined as a party to a suit for sale by the sub-mortgagee. ('09) 10 Cal L Jour 470 (472) (DB).

[3] A subsequent mortgagee between the original mortgagor and the mortgagee does not prejudice sub-mortgagee's rights. ('08) 18 Mad L Jour 462 (465) (DB) ✠ (Vol 6) 1919 Mad 1082 (1083) (DB).

[4] A sub mortgagee can sue for a decree for sale of the original mortgagor's interest in circumstances which would have entitled the original mortgagee, on the date of the sub-mortgage, to claim such relief on his own mortgage (Vol 30) 1943 Mad 498 (499) (DB)✠ ('97) 20 Mad 35 (39, 40)✠(Vol 6) 1919 Mad 1082 (1083) (DB) ✠ ('09) 9 Cal L Jour 429 (430) (DB) ✠ ('06) 9 Oudh Cas 233 (234) ✠ (Vol 27) 1940 Pesh 25 (26).

[5] The mortgagor as well as the mortgagee must be impleaded in a suit by the sub-mortgagee against the original mortgagor. ('08) 5 All L Jour 401 (403) (DB).

[6] The fact that the original mortgagee has obtained a decree for sale against the mortgagor which is not however executed within limitation does not operate as a bar to the sub-mortgagee's right of suit against the original mortgagor. ('15) 18 Ind Cas 389 (391) (Oudh).

[7] Where the mortgagor without notice of the sub-mortgage pays the mortgage-money to the original mortgagee, the sub-mortgagee loses his right against the mortgaged property and has the only remedy of proceeding against his transferor personally. (Vol 19) 1932 Mad 115 (116, 117) : 55 Mad 320 (DB) ✠ (Vol 25) 1938 Pesh 73 (76) (DB) ✠ (Vol 27) 1940 Pesh 25 (26)✠ ('13) 18 Ind Cas 389 (390) (Oudh).

[8] Suit by sub-mortgagee for amount less than original amount of mortgage and sale of hypothecated properties — Decree in such suit not making provision for realization of amount due on original mortgage—Suit subsequently on original mortgage—Such suit held maintainable — Decree in suit of sub-mortgagee held did not preclude original mortgagee from asserting his rights under mortgage in subsequent suit. (Vol 24) 1937 Mad 799 (800) (DB).

[9] Original mortgagee can also sue to enforce his mortgage making sub-mortgagee a party to the suit — Giving of a sub-mortgage which does not amount to complete assignment is not a bar to such a suit. (Vol 25) 1938 Lah 145 (148) (DB).

16. Benamidar mortgagee.—[1] A benamidar can sue to enforce the mortgage in his own name without making the real owner a party to the suit. (Vol 5) 1918 P C 140 (143) : 46 Cal 566 : 46 Ind App 1 (P C).

[But see ('08) 12 Cal W N 409 (411) (DB).]

17. Suit by Government to recover takkavi loan. — [1] Where immovable property is mortgaged to the Government to secure the advance of takkavi, it is open to the Government to institute a suit upon the mortgage to recover the same. ('02) 29 Cal 537 (542) (DB).

18. Clause (d). — [1] Section 67 (d) is not mandatory. (Vol 15) 1928 Mad 933 (935) (DB) (Per *Phillips J.*)

[2] The clause is intended to protect the mortgagor from harassment by multiplicity of suits in respect of the different interests which the mortgagees may, as between themselves, possess. (Vol 22) 1935 All 263 (263) (DB)✠(Vol 18) 1931 Cal 806 (807)✠ (Vol 2) 1915 Mad 344 (344) (DB).

Section 67—Note 18 *(contd.)*

[3] Under the clause, one of several mortgagees cannot institute a suit for foreclosure or sale of only a portion of the mortgaged property. (Vol 22) 1935 All 391 (394) (DB).

[4] Where some of the mortgagees cannot be joined as plaintiffs they may be joined as defendants. (Vol 6) 1919 P C 24 (26) : 47 Cal 175 : 46 Ind App 272 (PC).

Suit by one co-mortgagee if should be for whole amount :—

[5] Suit by one of the mortgagees for the recovery of the whole of the mortgage-money is always maintainable when the other mortgagees consent to the institution of such a suit but do not join as plaintiffs for certain reasons. (Vol 17) 1930 Mad 985 (985).

[6] Suit by one co-mortgagee—Consent of other co-mortgagees not obtained—On the question whether the suit must be for the whole amount or may be for the plaintiff's share, following conflicting views are expressed :—

(a) Suit must be for the whole mortgage amount. ('92) 1892 All W N 246 (246) (DB) ✠ ('13) 20 Ind Cas 151 (151) (DB) (All) ✠ ('09) 1 Ind Cas 117 (118) (DB) (All) ✠ (Vol 14) 1927 Cal 425 (426) (DB) ✠ (Vol 18) 1931 Cal 806 (807) ✠ (Vol 24) 1937 Nag 262 (263) : I L R (1937) Nag. 503 ✠ (Vol 23) 1936 Oudh 242 (244): 12 Luck 82 (DB) ✠ (Vol 22) 1935 All 263 (263) (DB) ✠ (Vol 23) 1936 Mad 895 (897).

(b) Suit may be for plaintiff's share : ('05) 15 Mad L Jour 496 (496) (DB) ✠ ('13) 20 Ind Cas 329 (330) (DB) (Cal) ✠ (Vol 30) 1943 Cal 455 (457, 458) : I L R (1943) 1 Cal 59 (DB) ✠ (Vol 22) 1935 All 391 (396) (DB) ✠ (Vol 15) 1928 Mad 933 (935, 938) (DB) ✠ (Vol 17) 1930 Mad 985 (985) ✠ (Vol 29) 1942 Mad 205 (207, 208) : I L R (1942) Mad 438 (DB).

(c) The right of the mortgagee is to add the co-mortgagee as a defendant to the suit and ask for the proper mortgage-decree, which would provide for all the necessary accounts and payments, excepting that there could be no judgment for a sum of money entered as between the mortgagee defendant and the mortgagor. (Vol 6) 1919 P C 24 (26) : 47 Cal 175 : 46 Ind App 272 (P C).

[7] The rule in the clause has no application when the mortgagor allows the integrity of the mortgage to be broken. (Vol 6) 1919 All 275 (276) : 41 All 631 (DB).

[8] Where the integrity of the mortgage is broken one of the mortgagees can institute a suit relating to a portion of the mortgaged property. (Vol 24) 1937 Nag 262 (264) : I L R (1937) Nag 503.

[9] One of the mortgagees cannot sever his interest under the mortgage behind the back of the other co-mortgagees by obtaining the consent of the mortgagor. (Vol 26) 1939 Nag 136 (139) (DB) ✠ (Vol 15) 1928 Mad 933 (938, 940) (DB).

[10] *A* mortgaged his property to *B* and *C*. Subsequently *A* mortgaged the same property to *C* alone and the consideration for this subsequent mortgage was the amount of the prior mortgage in favour of *B* and *C*. It was held that a discharge by *C* of the whole of the prior mortgage operated in respect only of his half share in the mortgage and in law the act of *A* and *C* amounted to severance of the interests of the mortgagees with the consent of the mortgagor within the meaning of this clause. (Vol 6) 1919 All 275 (276) : 41 All 631 (DB).

[11] *A* mortgaged his property to *B* and *C* who had each a half share in the mortgage-money. *B* purchased the equity of redemption in execution of a simple money decree. *C* then sued to recover his share in the mortgage-money by sale of the entire mortgaged property. It was held that *C* in suing only for his share, had practically admitted that somthing had happened which satisfied half the mortgage amount and he could not, therefore, throw the burden of his share on the whole property. (Vol 11) 1924 All 11 (12) : 45 All 46 (DB).

[See however (Vol 15) 1928 Mad 933 (940) (DB) ✠ (Vol 32) 1945 Bom 351 (352).]

[12] Where in a suit by one of the mortgagees there is a decree declaring that there has been a severance of the mortgage, the decree though obtained without the consent of the mortgagor and the other mortgagee is effective legally to create the severance of interests of the mortgagees and a suit by the other mortgagee for the recovery of his share of the mortgage-money on the basis of such severance cannot be resisted by the mortgagor. (Vol 2) 1915 Mad 344 (344) : 39 Mad 17 (DB).

19. Partial foreclosure or sale by a sole mortgagee — [1] Mortgagee is entitled to bring a suit for sale of the entire mortgaged property for the balance due upon his mortgage, although he received half the mortgage debt from one in whom one half of the equity of redemption became vested subsequent to the mortgage. (Vol 10) 1923 Pat 242 (246) : 2 Pat 335 (DB).

[2] Where the mortgaged property is divided among the mortgagor's heirs without mortgagee's consent there is nothing to preclude the mortgagee from proceeding against the share of one only for the whole debt. ('13) 35 All 441 (444) (DB).

[3] The right of a mortgagee to bring any portion of the mortgaged property to sale is not curtailed by the mortgagor, subsequently to the mortgage, selling a portion of the mortgaged property to a third person. ('95) 17 All 434 (435) (DB).

[4] A sole mortgagee who has acquired in whole or in part a share of the mortgaged property can sue for foreclosure or sale of a part of the mortgaged security. (Vol 7) 1920 All 129 (130) : 42 All 544 (DB) ✠ (Vol 19) 1932 Cal 319 (320) : 59 Cal 76 (DB) ✠ (Vol 25) 1938 Cal 618 (622) : I L R (1938) 2 Cal 590 (DB) ✠ (Vol 19) 1932 Mad 18 (19) ✠ ('12) 34 All 474 (478) (FB).

[5] Security bond for Rs. 10,000 by *A* on hypothecation of properties *X* and *Y* in *B*'s favour and personal liability for any loss—Execution under S. 386, Criminal P. C, against *A*—Property *X* sold subject to *B*'s charge —Balance after deducting fine, representing proportionate share of *B*'s charge over property *X* returned to *B*—*B* obtaining decree in suit against *A* on security bond and for recovery of amount embezzled by *A* — Pending appeal by *A*, *B* executing decree against property *Y* and purchasing same : *Held B* himself having broken integrity of mortgage by sale of property *Y*, *B* held not entitled to enforce his charge any further against property *X* and could not proceed against it on basis of *A*'s personal liability since sale of *X* was a valid sale. (Vol 29) 1942 All 104 (107) (DB).

20. Mortgagee, whether can enforce his mortgage against a trespasser. — [1] A mortgagee not entitled to possession under his mortgage can enforce his mortgage against a trespasser even if he has perfected his title by prescription as against the mortgagor. (Vol 3) 1916 Mad 990 (996. 997) : 39 Mad 811 (FB) ✠ (Vol 1) 1914 All 95 (96) : 36 All 567 (FB) ✠ (Vol 5) 1918 Cal 933 (938) : 44 Cal 425 (DB) ✠ (Vol 10) 1923 Mad 160 (161) (DB) ✠ (Vol 16) 1929 Pat 577 (579).

[2] Where the mortgage is created after the trespasser's entry upon the property, the extinguishment of the mortgagor's title by adverse possession will extinguish the mortgage also. ('12) 34 All 640 (645) (DB) ✠ ('95) 18 Mad 342 (347) (DB).

[But see (Vol 4) 1917 Mad 228 (230) : 39 Mad 959 (DB).]

21. Mortgagee obtaining a money-decree — Whether can sell the mortgaged property.—[1] A mortgagee cannot sell the mortgaged property in execu-

*[67A. A mortgagee who holds two or more mortgages executed by the same mortgagor in respect of each of which he has a right to obtain the same kind of decree under section 67, and who sues to obtain such decree on any one of the mortgages, shall, in the absence of a contract to the contrary, be bound to sue on all the mortgages in respect of which the mortgage money has become due.

Mortgagee when bound to bring one suit on several mortgages.

[a] *Inserted* by the Transfer of Property (Amendment) Act, 1929 (20 [XX] of 1929), S. 32.

Section 67 — Note 21 *(contd.)*

tion of his money-decree except by the institution of a suit for sale under this section. ('21) 63 Ind Cas 303 (307, 308) (DB) (Pat)✠('98) 2 Cal W N 320 (321) (DB).

[2] A mortgagee brought a suit for sale on his mortgage—The suit was compromised and the mortgagee took a money-decree in which, however, the property originally hypothecated to him was set out as being charged : *Held* that the mortgagee decree-holder could not bring the mortgaged property to sale in execution of this decree but if he wished to do so he would have to institute a suit under S. 67, on the decree. ('06) 28 All 58 (59).

SECTION 67A — SYNOPSIS

1. Scope.
2. Retrospective operation.
3. Section, if applicable to charges created by operation of law.
4. Mortgages must have been executed by the same mortgagor.
5. "Same kind of decree."
6. Property mortgaged, if need be the same.
7. Money must have been due on all the mortgages.

1. Scope.—[1] Where a mortgagor has executed several mortgages over the same property to the same mortgagee, it will be advantageous to the mortgagor to compel the mortgagee to consolidate his mortgages and sue on all of them at the same time The Legislature has, therefore, in this section given effect to the rule of consolidation, by compelling the mortgagee to sue at the same time, on all his mortgages. (Vol 21) 1934 Cal 325 (326) : 60 Cal 1470 ✠ (Vol 23) 1936 Lah 1020 (1021) (DB).

[2] The question between the mortgagor and the mortgagee about all the mortgages held by the latter ought to be tried once for all in one and the same suit. (Vol 22) 1935 Pat 365 (366).

[3] The section being restrictive of the rights of the mortgagee must be strictly construed. (Vol 21) 1934 Cal 862 (863) : 61 Cal 1047 (DB).

2. Retrospective operation. — [1] This section can have no application to mortgages executed before 1st April 1930. (Vol 22) 1935 Nag 226 (228) : 31 Nag L R (Supp) 1 (FB). ((Vol 20) 1933 Nag 171 : 30 Nag L R 265, *Overruled.*) ✠ (Vol 21) 1934 Cal 325 (327) : 60 Cal 1470 ✠ (Vol 25) 1938 Bom 196 (197) (DB) ✠ (Vol 23) 1936 Lah 1020 (1020) (DB) ✠ (Vol 18) 1931 Rang 208 (208) ✠ (Vol 20) 1933 Rang 377 (378) (DB) ✠ (Vol 27) 1940 Oudh 235 (236) : 15 Luck 399 ✠ (Vol 27) 1940 Pat 65 (70) (DB).

3. Section, if applicable to charges created by operation of law. — [1] It has been held that S. 100 will not enable this section to be applied to statutory charges. (Vol 21) 1934 Cal 862 (864) : 61 Cal 1047 (DB).

4. Mortgages must have been executed by the same mortgagor.—[1] *A* claiming to be the adopted son of *X* deceased, executed a mortgage in favour of *P*. *X*'s widows *B* and *C* also executed a mortgage in respect of the same property to *P*. *P* filed a suit on both the mortgages impleading *A*, *B* and *C* as parties. It was held that the mortgagors being different, S. 67A did not enable the filing of a single suit on both the mortgages. (Vol 21) 1937 Nag 91 (100) : I L R (1937) Nag 349.

[2] *A*, *B* and *C* executed a mortgage to *D*, *E* and *F*. Subsequently, *B* and *C* only executed a mortgage of the same properties in favour of *F*, *G* and *H*. It was held that S 67A did not apply so as to compel a suit to be filed on both the mortgages. (Vol 18) 1931 Rang 208 (208).

[3] *A* made a mortgage in favour of *X* of his share in certain joint property. Subsequently, *A*, *B* and *C* who were all the sharers in the property, mortgaged all their shares to *X*. It was held that a suit on the first mortgage did not prevent a subsequent suit on the later mortgage (Vol 21) 1934 Cal 421 (423) (DB).

[4] A mortgage by *A* and after his death, a mortgage by *B*, his legal representative, cannot be taken as having been executed by different mortgagors. (Vol 18) 1931 Rang 208 (208).

[5] Where a father executes a mortgage as karta of joint Hindu family consisting of the father and his son, and subsequently the father and the son together execute another mortgage, the mortgagor in both the mortgages is the same being the joint family. (Vol 22) 1935 Pat 365 (366).

5. "Same kind of decree."—[1] It has been held that there is nothing in O. 34, R. 1, Civil P. C., to prevent the mortgagee from suing on his later simple mortgage subject to his prior usufructuary mortgage. (Vol 14) 1927 All 341 (342) ✠ (Vol 6) 1919 Pat 129 (129, 130) (DB) ✠ (Vol 3) 1916 Pat 113 (114, 115) (DB) ✠ (Vol 1) 1914 Cal 455 (456) : 41 Cal 727 (DB). *(Obiter.)* ✠ ('08) 31 Mad 530 (530) (DB).

[2] It has been held that the mortgagee cannot sue on his earlier simple mortgage alone without mentioning his second usufructuary mortgage and if he does so a second suit on the later mortgage would be barred. (Vol 6) 1919 Oudh 352 (355).

6. Property mortgaged, if need be the same. — [1] The wording of the section is wide enough to include mortgages over different properties. (Vol 21) 1934 Cal 862 (863) : 61 Cal 1047 (DB) ✠ ('36) 63 Cal 720 (723) (DB).

[2] In case the property subject to one of the mortgages is outside the territorial jurisdiction of the Court this section cannot apply. ('37) 41 Cal W N 854 (866, 867) (DB) ✠ (Vol 26) 1939 Rang 247 (248, 249) : 1939 Rang L R 207.

[3] Where two mortgages executed in favour of the same mortgagee by the same mortgagor related to different properties, each in a different district and hence within the jurisdiction of different Courts, it was held that it was not obligatory upon the mortgagee to bring a consolidated suit on both the mortgages. (Vol 26) 1939 Rang 247 (249) : 1939 Rang L R 207.

7. Money must have been due on all the mortgages. — [1] A mortgagee having several mortgages is bound to sue on all of them at the same time only if the mortgage money has become due on all of them. (Vol 27) 1940 Mad 296 (297) ✠ (Vol 28) 1941 Nag 3 (3) : I L R (1942) Nag 172 (DB).

[2] A mortgage deed provided for the payment of the mortgage amount in instalments with a default clause that if two consecutive instalments were in arrears, the mortgagee could claim the whole. The mortgagee elected to sue on only two of the instalments

Right to sue for mortgage-money.

[a][68. *(1)* The mortgagee has a right to sue for the mortgage money in the following cases and no others, namely : —

(a) where the mortgagor binds himself to repay the same;

(b) where, by any cause other than the wrongful act or default of the mortgagor or mortgagee, the mortgaged property is wholly or partially destroyed or the security is rendered insufficient within the meaning of section 66, and the mortgagee has given the mortgagor a reasonable opportunity of providing further security enough to render the whole security sufficient, and the mortgagor has failed to do so ;

(c) where the mortgagee is deprived of the whole or part of his security by or in consequence of the wrongful act or default of the mortgagor ;

(d) where, the mortgagee being entitled to possession of the mortgaged property, the mortgagor fails to deliver the same to him, or to secure the possession thereof to him without disturbance by the mortgagor or any person claiming under a title superior to that of the mortgagor :

Provided that, in the case referred to in clause *(a)*, a transferee from the mortgagor or from his legal representative shall not be liable to be sued for the mortgage-money.

(2) Where a suit is brought under clause *(a)* or clause *(b)* of sub-section *(1)*, the Court may, at its discretion, stay the suit and all proceedings therein, notwithstanding any contract to the contrary, until the mortgagee has exhausted all his available remedies against the mortgaged property or what remains of it, unless the mortgagee abandons his security and, if necessary, re-transfers the mortgaged property.]

[a] *Substituted* by the Transfer of Property (Amendment) Act, 1929 (20 [XX] of 1929), S. 33.

Section 67A — Note 7 *(contd.)*

that were in arrears. It was held that assuming that this section can be applied to the case, the mortgagee had an option to treat the whole amount as payable and if he waives it, the portion other than that sued for cannot be said to have become payable. (Vol 27) 1940 Mad 296 (297).

SECTION 68 — SYNOPSIS

1. Scope.
2. Clause (a).
3. Clause (b).
4. Clause (c).
5. Clause (d).
6. Acquiescence by mortgagee in disturbance of possession.
7. Dispossession owing to default of mortgagee himself.
8. Transferee from mortgagor.
9. Legal representative of mortgagor.
10. Minor not personally liable.
11. Guardian not personally liable.
12. Anomalous mortgages.
13. Void mortgages.
14. Interest—Personal liability for.
15. Claim under section is an actionable claim.
16. This section and O. 34, R. 5 of the Civil Procedure Code.
17. Mortgagee claiming under this section, if can sue for sale.
18. Sub-section (2).
19. Applicability of the section to the Punjab and North-West Frontier Province.
20. Applicability of section to charges.

1. Scope. —[1] Independently of contractual obligation the personal liability of the mortgagor for mortgage-money may arise under clause (b), (c) or (d). (Vol 3) 1916 P C 119 (120) : 44 Cal 388 : 44 Ind App 87 (P C).

[2] Clause (a) gives the mortgagee a right *ex contractu*; clause (b), a right on equitable grounds and clauses (c) and (d), a right *ex delicto*. (Vol 21) 1934 Cal 73 (76) : 60 Cal 1197 (DB)

[3] The section precludes the mortgagee from maintaining a suit in which his primary relief claimed is a relief against the mortgagor personally, unless the case comes within any of the clauses (a), (b), (c) or (d). ('92) 14 All 513 (519) (DB).

2. Clause (a). — [1] Where the mortgagor binds himself to repay the mortgage-money the mortgagee is obviously entitled to sue on the covenant for recovery of the money personally from the mortgagor. ('11) 15 Cal W N 722 (724) (DB) ✠ ('07) 10 Oudh Cas 14 (16) (DB) ✠ (06) 4 Cal L Jour 246 (248) (DB).

[2] A personal covenant to pay the mortgage-money must be presumed to exist in all mortgages unless there is something in the nature or terms of the mortgage to negative it (1900) 22 All 453 (461) (DB) ✠ (Vol 4) 1917 Pat 200 (201) (DB) ✠ (Vol 19) 1932 Lah 164 (166, 167) : 13 Lah 259 (DB) ✠ (Vol 10) 1923 All 408 (409) ✠ ('12) 15 Cal L Jour 17 (20, 21) (DB) ✠ (Vol 22) 1935 Lah 103 (104) : 16 Lah 612 (DB) ✠ (Vol 22) 1935 Pesh 10 (11) ✠ (Vol 8) 1921 Low Bur 34 (36) : 11 Low Bur Rul 148 (DB) ✠ ('09) 9 Cal L Jour 5 (8) (DB).

[3] The nature of a usufructuary mortgage or a mortgage by conditional sale is such that there is no personal liability to pay implied in it. ('92) 1892 All W N 66 (67) ✠ ('10) 13 Oudh Cas 155 (157) ✠ (Vol 28) 1941 Mad 885 (886) (DB) ✠ ('81) 1881 Pun Re No. 127, page 315 (316) (DB) ✠ ('70) 1870 Pun Re No. 15 page 51 (52) (DB) ✠ (Vol 9) 1922 Nag 98 (99) : 18 Nag L R 145 (DB) ✠ (Vol 25) 1938 Pat 585 (587) : 17 Pat 737 (DB) ✠ (Vol 21) 1934 Pat 624 (626) ✠ (Vol 9) 1922 Nag 119 (119) : 19 Nag L R 67.

[But see (Vol 11) 1924 Nag 97 (98) : 20 Nag L R 46.]

[4] Where the remedy of the mortgagee is intended to be only against the mortgaged property, there is no personal liability even if the mortgagor has stated in the mortgage document that he will pay the money for some such sentence is found almost in all mortgages. (Vol 4) 1917 Oudh 230 (232) : 20 Oudh Cas 155 ✠ ('07) 6 Cal L Jour 639 (649) (DB) ✠ ('84) 10 Cal 740 (743) : 11 Ind App 83 (PC) ✠ (Vol 24) 1937 Oudh 517 (519) (DB) ✠ (Vol 17) 1930 Pat 152 (152) (DB) ✠ (Vol 8) 1921 Mad 636 (636) (DB).

[5] Where in a mortgage bond the mortgagor covenanted to pay the amount in three years in default of which the mortgagee was entitled to sue for foreclo-

Section 68 — Note 2 *(contd.)*

sure, it was held that there was no personal covenant to pay the mortgage debt within the meaning of this section. (Vol 26) 1939 All 260 (269) : I L R (1939) All 313 (DB) ✠ (Vol 3) 1916 Nag 5 (9) : 13 Nag L R 121.

[6] Where in a possessory mortgage, the covenant to repay the mortgage-money within a certain time, is coupled with a stipulation that if the money be not paid within the time fixed, the mortgagee would continue to be in possession and the mortgage bond would remain in force, there is no covenant to repay on the part of the mortgagor. (Vol 17) 1930 Pat 152 (152) (DB). (('97) 24 Cal 677, *Foll.*)

[7] It has been held that cl. (c) refers to an express covenant and not to an implied covenant to pay. (Vol 25) 1938 Pat 585 (587) : 17 Pat 737 (DB)✠(Vol 2) 1915 Nag 63 (64) : 12 Nag L R 19.

[8] The question whether there is a personal covenant to pay in any particular case will depend upon the particular language of the document and the other facts of the case. (Vol 12) 1925 Mad 991 (992).

[9] Provision for redemption at expiry of specified term — In case of non-payment at expiry of term, deed to hold good till payment — No personal covenant. (Vol 28) 1941 Pat 486 (488) (DB).

[10] Where the mortgagor covenanted to pay the mortgage amount in the event of the mortgagee being dispossessed but no possession was delivered to him initially, it was held that the covenant did not come into operation at all and that the mortgagee could not get any relief on the basis of the covenant (Vol 20) 1933 All 97 (98) (DB). (Mortgagee held could sue only for possession and mesne profits.) ✠ (Vol 24) 1937 All 711 (713). ((Vol 20) 1933 All 97, *Foll.*)

[11] It has been held that the rights of a creditor who takes a security in the shape of a mortgage are to some extent curtailed by the provisions of this Act. The mortgagee cannot enforce the personal liability against the other members of the family of which the mortgagor is the manager. (Vol 21) 1934 Cal 73 (76) : 60 Cal 1197 (DB).

[12] Though a mortgage, like that by conditional sale may not import a personal covenant to pay, it necessarily implies a debt within the meaning of the debt relief legislation. (Vol 31) 1944 Nag 289 (291) : I L R (1944) Nag 568 (FB)

3. Clause (b). — [1] Where the property is lost to the mortgagee by its being destroyed by fire or flood, the mortgagee would be entitled to sue for the mortgage money. ('99) 25 Cal 450 (454) (DB) ✠ ('71) 7 Bom H C R 116 (118) (DB) ✠ (Vol 10) 1923 All 433 (435) : 45 All 388 (DB).

[2] It is only after reasonable opportunity for providing further security is given and the mortgagor fails to furnish the additional security that the mortgagee is entitled to sue. ('10) 7 All L Jour 391 (393) (DB) ✠ (Vol 21) 1934 Mad 644 (645) (DB) ✠ ('10) 1910 Pun W R 137 (DB).

[3] The clause does not apply where the destruction of the property is caused by the wrongful act of the mortgagor. ('13) 21 Ind Cas 581 (582) (Oudh).

[4] A destruction of the mortgaged property may be said to take place in the following cases :

(a) Diluvion of the property. (Vol 10) 1923 All 433 (435) : 45 All 388 (DB)

(b) House falling down. (Vol 16) 1929 All 348 (349).

[5] Where the mortgagor being in possession as lessee of the mortgagee applies to the revenue Court and gets the rent reduced, the security becomes insufficient. (Vol 10) 1923 All 584 (585) (DB).

[6] Where the mortgagor obtains a decree for pre-emption of certain properties, and mortgages them, but subsequently the claim for pre-emption is disallowed the security becomes insufficient. (Vol 21) 1934 Oudh 415 (416) (DB).

[7] Where A mortgages certain property to B, who sub-mortgages his right to C and A, thereafter redeems B, and C is not paid his amount, C's security as against B is rendered insufficient and he can proceed against B under this clause. (Vol 16) 1929 Oudh 455 (455) : 5 Luck 369.

[8] Where the mortgaged property is sold away in execution of a decree on a prior mortgage to which the mortgagee is a party, the security becomes insufficient. (Vol 16) 1929 Cal 121 (122) (DB).

[9] Where the mortgaged property is acquired under the provisions of the Land Acquisition Act, there is no "destruction" of the property. ('90) 13 Mad 321 (322) (DB) ✠ (Vol 17) 1930 Oudh 292 (293) : 5 Luck 702 (DB) ✠ '09) 1 Ind Cas 264 (278) (DB) (Cal) ✠ ('13) 1 Upp Bur Rul 164 (165). (Though where the mortgage is one with possession the mortgagee may be entitled to relief under cl. (d).)

[But see (Vol 4) 1917 Oudh 233 (234) : 20 Oudh Ca 256✠(Vol 2) 1915 Cal 699 (700) : 42 Cal 1146 (DB).]

[10] The "insufficiency" in this clause must be such as is contemplated by S 66. A misdescription of the property in the mortgage-deed does not render the security "insufficient" within the meaning of S 66. (Vol 9) 1922 Bom 217 (218) (DB).

4. Clause (c).—[1] A deprivation to any extent will entitle the mortgagee to sue under this clause even though the portion of the mortgaged property of which the mortgagee is not deprived cannot be said to be not sufficient within the meaning of S. 66. (Vol 25) 1938 Oudh 210 (211) (DB).

Wrongful act :

[2] A waste committed by the mortgagor will entitle the mortgagee to sue for the mortgage-money. (Vol 2) 1915 Mad 633 (634) (DB).

[3] Where the mortgagee with possession leases back the property to the mortgagor, and the latter either fails to pay the rent, or gets the rent reduced under the Tenancy Acts, his act cannot be considered a wrongful act of the mortgagor. (Vol 25) 1938 All 188 (190) : I L R (1938) All 218 (DB). (Failure to pay rent.) ✠ (Vol 19) 1932 All 51 (51) (DB). (Reduction of rent.)

[4] A transfer of the equity of redemption by the mortgagor cannot be said to be a wrongful act of the mortgagor by which the mortgagee can be said to be deprived of his security. (Vol 23) 1936 Rang 80 (81, 82) (DB)✠('84) 6 All 298 (302) (DB)✠('04) 6 Bom L R 288 (289) (DB).

[But see ('92) 1892 All W N 66 (67)✠('01) 1901 All W N 52 (52).]

[5] The mortgagor is not guilty of any wrongful act by allowing a sale in execution of a money-decree. ('92) 15 Mad 304 (305) (DB).

[6] Money decree declaring right of A to sell the property in execution thereof — Subsequent mortgage — Mortgagor asking mortgagee in the deed to pay off the decree but subsequently countermanding it — Sale in execution of money decree — *Held*, clause (c) applied ('10) 8 Mad L Tim 223 (224) (DB).

Wrongful default :

[7] A failure by the mortgagor to disclose, or to pay up a prior incumbrance or to disclose a defect in his title would be a wrongful default. ('10) 7 Ind Cas 251 (252) (DB) (Cal). (Non-disclosure.) ✠ ('90) 13 Mad 192 (195) (DB). (Non-payment.)✠(Vol 18) 1931 Oudh 5 (5) : 6 Luck 374 (Non-disclosure or defect in title)✠('86) 10 All 47 (48) (DB). (Do)

[8] Where joint family property is mortgaged by a member of the family for purposes not binding on the family and the mortgagee is deprived of the property in

Section 58 — Note 4 *(contd.)*

a suit by the other members of the family, the mortgagee would be entitled to relief under this clause. ('13) 21 Ind Cas 581 (582) (Oudh).

[9] Where the mortgagee is aware of the defect in the title of the mortgagor to mortgage the property he cannot claim relief under this clause. (Vol 26) 1939 All 260 (263) : ILR (1939) All 313 (DB)✠(Vol 8) 1921 Oudh 47 (47) (DB)✠(Vol 25) 1938 Cal 48 (51).

[10] A failure to pay the Government revenue due on the mortgaged property, resulting in the sale of the property is a wrongful default of the mortgagor. (Vol 21) 1934 Rang 227 (228)✠('09) 14 Cal W N 165 (169) (DB).

[11] Persons deriving title from mortgagor would be liable under this section in respect of their own wrongful act or default. (Vol 26) 1939 Nag 256 (258) : I L R (1940) Nag 63 ✠ (Vol 2) 1915 Mad 633 (634) (DB)✠ (Vol 19) 1932 Pat 273 (274) (DB).

[12] Persons deriving title from the mortgagor are liable under this clause in respect of the default of the mortgagor himself, though only to the extent of the property got by them from the mortgagor. ('10) 8 Mad L Tim 223 (224) (DB).

[13] Where the mortgagee is deprived of the property by the owner of a paramount title the mortgagor's failure to defend his title against the holder of such title is not a wrongful act or default. (Vol 6) 1919 Mad 876 (876) : 42 Mad 578 (DB).

5. Clause (d). — [1] In order that this clause might apply the mortgagee must, under the terms of the mortgage, be entitled to possession. (Vol 8) 1921 Oudh 47 (47) (DB).

[2] Where the mortgagee has been given possession and there has been no disturbance thereof by anybody, this clause will not apply even though it is discovered that the mortgagor has no title to a portion of the property. (Vol 6) 1919 All 292 (292) (DB).

[3] The mortgagor sold the equity of redemption to *X* and the mortgagee pre-empted *X*. It was held that the change in the nature of the possession, from that of a mortgagee to that of a purchaser, did not bring the case within this section so as to entitle the mortgagee to sue for his money. (Vol 3) 1916 Oudh 332 (333).

[4] A failure to deliver or to secure possession of even a portion of the property will entitle the mortgagee to sue for the mortgage-money. (Vol 11) 1924 All 877 (878).

[5] The failure to deliver or to secure possession need not be intentional on the part of the mortgagor. ('01) 4 Oudh Cas 320 (327, 328) (DB).

Failure to deliver possession :

[6] Where the mortgagee is entitled, under the terms of the mortgage, to possession and the mortgagor fails to deliver the same to him, the mortgagee will be entitled to sue under this clause for the mortgage-money. ('12) 13 Ind Cas 336 (336) (Cal)✠(Vol 28) 1941 Pat 301 (302) (DB)✠(Vol 10) 1923 All 584 (585) (DB). (Property not belonging to the mortgagor included in the mortgage-deed.)✠(Vol 12) 1925 All 736 (736). (Sub-mortgagee of occupancy holding can sue his mortgagor for money if the latter fails to put him in possession.)✠ (Vol 8) 1921 Mad 636 (636) (DB) ✠ (Vol 7) 1920 Lah 355 (357) ✠ ('13) 1913 Pun L R No. 21, page 78 (79)✠ ('92-96) 2 Upp Bur Rul 573 (574).

[7] Mortgage with covenant to repay money within 5 years and also to put mortgagee in possession by way of security — Failure to put mortgagee in possession — Right to sue for mortgage money arises immediately under this clause. (Vol 34) 1947 Bom 152 (152, 153).

[8] The mortgagee may sue for damages for breach of the contract to deliver possession and claim as part of the damages, the amount advanced on the mortgage. ('90) 17 Cal 432 (436) (PC).

[9] The mortgagee not obtaining possession as required under the terms of the mortgage may sue for possession of the property. (Vol 8) 1921 Lah 309 (310) (DB)✠('12) 16 Ind Cas 735 (736) (DB) (Cal) ✠ (99) 2 Oudh Cas 24 (25)✠(Vol 29) 1942 Oudh 172 (174) : 17 Luck 362✠('94) 17 Mad 469 (471, 472) (DB) ✠ (Vol 23) 1936 Pesh 38 (39).

[10] When the mortgagee, not entitled to possession at the time of the mortgage becomes subsequently entitled to possession, a failure to deliver possession on such date will entitle the mortgagee to claim relief under this clause. ('08) 30 All 400 (402) (DB) ✠ ('01) 4 Oudh Cas 320 (326) (DB) ✠ ('92) 15 Mad 65 (66) (DB).

[11] The mortgagee was entitled, on failure of the mortgagor to pay the mortgage-money in five years, to take possession of the mortgaged property. But he never demanded possession from the mortgagor. It was held that there was no failure to deliver possession within the meaning of this clause. (Vol 20) 1933 Lah 174 (175).

Failure to secure possession :

[12] A dispossession of the mortgagee by the mortgagor will be a disturbance by the mortgagor and will entitle the mortgagee to sue for the mortgage-money. (Vol 18) 1931 Lah 694 (695) ✠ (Vol 14) 1927 Pat 230 (230) (DB) ✠ ('10) 11 Cal L Jour 136 (137) (DB)✠(Vol 9) 1922 All 197 (199, 200) : 44 All 77 (DB) ✠ (Vol 20) 1933 Oudh 35 (36) : 8 Luck 190 (DB).

[13] Where the mortgagee in possession leased the mortgaged property to the mortgagor, but on the expiry of the lease the latter refused to deliver possession, it was held that there was a failure by the mortgagor to secure possession to the mortgagee. ('94) 16 All 318 (322, 323, 324) (FB).

[14] The following are persons with a superior title to that of the mortgagor.

(a) A cosharer of the mortgagor. ('10) 11 Cal L Jour 136 (138) (DB) ✠ (Vol 23) 1936 Oudh 174 (175) : 11 Luck 711 (DB)✠(Vol 11) 1924 Pat 91 (93) (DB).

(b) A prior incumbrancer. (Vol 9) 1922 All 197 (199): 44 All 77 (DB) ✠ ('05) 27 All 488 (491).

(c) A landlord of the mortgagor who gets the mortgage set aside. (Vol 21) 1934 Lah 853 (857) : 15 Lah 751 (FB). (('21) 61 Ind Cas 604 (Lah), *Overruled.*)

[15] A trespasser with no title is not a person claiming under a title superior to that of the mortgagor and a disturbance by him is not within this clause. ('92) 15 Mad 304 (306) (DB) ✠ ('97) 19 All 191 (193).

[But see (Vol 5) 1918 Pat 316 (317, 318) : 3 Pat L Jour 162 (DB).]

[16] Certain property belonged to two persons *A* and *B*. *A* bequeathed by his will, his share to *C*, who subsequently transferred the same to *B*, so that *B* became full owner. *B* then mortgaged the property with possession to *X*, and delivered possession. Thereafter a creditor of *A* obtained a decree against the assets of *A* in the hands of his widow and *C*, and attached the mortgaged property in execution of his decree *X* preferred a claim which was dismissed but did not file a suit to challenge this order. The creditor brought the property to sale, purchased it and then dispossessed *X*. *X* thereupon sued for relief under this clause. It was held that the creditor was not a person with any title that the disturbance of possession could not therefore be said to be by a person with a title superior to that of the mortgagor, and that therefore this clause did not apply. (Vol 23) 1936 Oudh 263 (264) : 12 Luck 144.

[17] *A* mortgaged property to *X*. *B*, claiming title to the property in himself, mortgaged the same property to *Y* who dispossessed *X*. It was held that this clause applied. (Vol 11) 1924 Rang 143 (144).

Section 68—Note 5 *(contd.)*

[15] *A* and *B* mortgaging land with possession to *C* and *D* — *A* and *B* paying whole mortgage-money to *C* and subsequently mortgaging same land to *D* with possession — Payment to *C* held did not discharge whole mortgage and *D* was entitled to sue for possession of half of the land mortgaged. (Vol 30) 1943 Pesh 1 (3) (DB).

6 Acquiescence by mortgagee in disturbance of possession.— [1] Where the mortgagee acquiesces in the disturbance of possession or in the failure of the mortgagor to give possession, he will lose the right to claim interest or damages for the period he is out of possession ('02) 24 All 521 531, 532 : 29 Ind App 148 (PC) (Disturbance of possession. ⊛ (Vol 14) 1927 Oudh 394 (395) : 2 Luck 67C (DB) (Failure to give possession. ⊛ (Vol 13) 1926 Oudh 224 225 . (Do.) ⊛ (Vol 7) 1920 Nag 26 (27). (Do.) ⊛ ('09) 31 All 325 (328) (DB) (Do.)

[2] In the case of a disturbance of possession, the acquiescence will result in the mortgagee losing his right to sue for the money only in respect of the particular disturbance acquiesced in. (Vol 9) 1922 All 197 (199) : 44 All 77 (DB).

[3] The question whether there has been acquiescence such as would deprive the mortgagee of his rights is a question of fact depending upon the facts and circumstances of each case. (Vol 6, 1919 Pat 227 (229) (D B)

7. Dispossession owing to default of mortgagee himself.—[1] A mortgagee bound to pay assessment on the mortgaged property fails to pay it with the result that the mortgaged property is sold for the recovery of such amount. He cannot sue for the mortgage-money under this section. (Vol 16) 1929 Pat 209 (210) : 8 Pat 569 (DB) ⊛ ('06) 3 Cal L Jour 220 (221, 222) (DB).

[2] A mortgagee entitled to make a valid defence to a suit by a subsequent mortgagee failed to make it with the result that his security was diminished. It was held that he could not sue for the mortgage-money. (Vol 4) 1917 Pat 451 (452) : 2 Pat L Jour 490 (DB).

[3] A simple money creditor of the mortgagor attached the mortgaged property in execution of his decree. The mortgagee objected under O. 21, R 62, Civil P. C., but the objection was dismissed. He failed to file a suit under O 21, R. 63, Civil P. C., within one year of the dismissal of the objection, but filed a suit for the mortgage-money, on his being dispossessed by the auction-purchaser in execution of the money decree. It was held that he was not entitled to do so. (Vol 23) 1936 Oudh 263 (264) : 12 Luck 144.

8. Transferee from mortgagor. — [1] Where a mortgage contains a personal covenant and cl. (a) is applicable, the personal liability can be enforced only against the mortgagor or his legal representative but not against the transferee from the mortgagor or from his legal representative. (Vol 24) 1937 Oudh 517 (520) (D B).

[2] A personal covenant to pay cannot be enforced against the assignee of the property. (Vol 25) 1938 Nag 80 (82) : I L R (1938) Nag 268 (DB) ⊛ (Vol 21) 1934 Pat 1 (2) (DB) ⊛ (Vol 12) 1925 Oudh 593 (594) ⊛ (Vol 24) 1937 Oudh 20 (23) : 12 Luck 313 (DB)

[But see ('87) 1887 All W N 119 (120) (DB).]

[3] The proviso to the section is limited to cl. (a) of the section. So far as the other clauses of the section are concerned, the word "mortgagor" would in view of S. 59A include a transferee from him. (Vol 21) 1934 Pat 1 (2) (DB) ⊛ (Vol 26) 1939 Nag 256 (258) : I L R (1940) Nag 63

[4] The mere agreement by the purchaser with the vendor to pay the mortgage-debt does not, without any communication with the mortgagee, make it the personal debt of the purchaser ('12) 34 All 60 (64) : 5 Ind App 7 (PC) ⊛ (Vol 23) 1936 Oudh 313 (315) : 12 Luck 215 (DB) ⊛ (Vol 22) 1935 Mad 115 (116) (DB) ⊛ (Vol 10) 1923 Lah 459 (460).

[5] A mere agreement by the purchaser with the vendor to pay the mortgage debt is merely considered one for indemnity against the mortgage, on which the transferee may be personally liable to the mortgagor ('09) 31 All 583 (589) : 36 Ind App 203 (PC) ⊛ ('12) 16 Cal W N 1040 (DB) ⊛ (Vol 19) 1932 Pat 270 (274) (DB).

[6] If the transferee from the mortgagor enters into a new contract with the mortgagee, as for different times and modes of payment, he would be personally liable (Vol 23) 1936 Oudh 313 (315) : 12 Luck 215 (DB) ⊛ (Vol 22) 1935 Mad 115 (116) (DB).

[7] The fact that the transferee from the mortgagor pays interest on the mortgage does not render him personally liable for the debt. (Vol 23) 1936 Oudh 313 (315) : 12 Luck 215 (DB).

9. Legal representative of mortgagor. — [1] The word "mortgagor" would include his legal representative ordinarily, but such legal representative will, so far as the act or default of the mortgagor himself is concerned, be liable only in respect of the estate which he has inherited, and so far only as such assets extend. (Vol 19) 1932 Lah 164 (168) : 13 Lah 259 (DB) ⊛ (Vol 9) 1922 Oudh 48 (50).

10. Minor not personally liable.—[1] Where a mortgage of the joint family property is executed by a Hindu father, in which he has bound himself to pay the amount the son who is a minor on the date of the mortgage is not personally liable to pay the mortgage money. (Vol 15) 1928 P C 165 (171) : 24 Nag L R 186 (P C).

11. Guardian not personally liable.—[1] Where a guardian executed a hypothecation bond as a guardian containing a stipulation "I have agreed to pay" it was held that he was not personally liable for the mortgage amount. (Vol 12) 1925 Mad 425 (425).

12. Anomalous mortgages. — [1] This section applies to anomalous mortgages. ('90) 12 All 203 (206) (D B) ⊛ (Vol 22) 1935 Lah 103 (104) : 16 Lah 612 (D B) ⊛ (Vol 30) 1943 Sind 59 (61) : I L R (1942) Kar 452 (D B).

[But see (Vol 11) 1924 Cal 592 (594) (D B) ⊛ ('98) 21 Mad 1 (3) (D B) ⊛ (Vol 29) 1942 Oudh 172 (174) : 17 Luck 362 ⊛ (Vol 19) 1932 Oudh 178 (179) (D B).]

13. Void mortgages.—[1] If there is no valid mortgage no relief can be claimed under any of the clauses of this section. (Vol 29) 1942 All 409 (409) : I L R (1942) All 817 (D B) ⊛ (Vol 24) 1937 Oudh 517 (520) (D B) ⊛ (Vol 24) 1937 All 711 (714) ⊛ (Vol 10) 1923 Lah 357 (359) (D B).

[But see (Vol 11) 1924 Oudh 147 (148, 149) ⊛ ('88) 10 All 47 (48) (D B).]

[2] Different views are held regarding the question whether where a mortgage contains a personal covenant to pay but the mortgage as such is inoperative and void for any reason, a suit can be maintained on the personal covenant.

(a) The following cases hold that a suit can be maintained. ('12) 1912 Pun Re No 21 ⊛ (Vol 2) 1915 Bom 102 (104, 106) : 39 Bom 358 (D B) ⊛ (Vol 16) 1929 Pat 375 (375, 376) : 8 Pat 212 (DB) ⊛ (Vol 13) 1926 Rang 145 (146) ⊛ (Vol 17) 1930 Rang 142 (142) ⊛ (Vol 1) 1914 Bom 141 (142) : 38 Bom 177 (D B) ⊛ ('09) 32 Mad 410 (414) (F B) ⊛ (Vol 15) 1928 Oudh 465 (467) : 4 Luck 107 (D B) ⊛ (Vol 20) 1933 All 468 (472) (D B) ⊛ (Vol 20) 1933 Cal 786 (787) ⊛ (Vol 24) 1937 Cal 347 (350) (D B) ⊛ (Vol 2) 1915 All 254 (255) ⊛ (Vol 14) 1927 Oudh 214 (215) (D B). (The relief granted would not be a decree for sale of the mortgaged property but merely a

Section 68—Note 13 *(contd.)*

decree for money executable by attachment and sale of the mortgagor's properties.)

(b) The following cases hold that if the mortgage is illegal as being prohibited by law or opposed to public policy, even the personal covenant to pay cannot be enforced. (Vol 13) 1926 Rang 186 (187) ✠(Vol 14) 1927 All 499 (501, 502) (F B)✠ (Vol 4) 1917 Oudh 230 (232) : 20 Oudh Cas 155.

[3] Independent of any personal covenant to pay in a mortgage, the mortgagee may be entitled when the mortgage is discovered to be void, to claim from the mortgagor, the amount paid by him under S. 65 of the Contract Act. (Vol 30) 1943 P C 29 (33, 34) : 18 Luck 130 : I L R (1943) Kar (P C) 19 : 70 Ind App 1 (P C). *(Reversing* (Vol 24) 1937 Oudh 410 : 13 Luck 531.) ✠ (Vol 29) 1942 All 409 (409) : I L R (1942) All 817 (D B).

[4] Where a minor makes a mortgage, no relief can be granted to the mortgagee under S. 65 of the Contract Act. ('03) 30 Cal 539 (548) :30 Ind App 114 (P C).

14. Interest — Personal liability for. — [1] The right to sue for the mortgage-money under this section will include the right to sue for the interest, the payment of which is secured by the mortgage contract. (Vol 1) 1914 Nag 16 (18) : 10 Nag L R 9.

[2] Where a usufructuary mortgage contains a covenant to pay interest in the event of loss of possession, and the mortgagee loses possession, the mortgagee can claim the mortgage-money which will include not only the principal amount but the interest payable under the contract during the period he has been out of possession. (Vol 10) 1923 All 457 (457, 458) (D B) ✠ (Vol 12) 1925 Oudh 30 (32).

[3] Where no interest is secured by the mortgage contract the right to sue for the mortgage-money will not include any right to interest as such, but the Court will award interest as damages. (Vol 31) 1944 Oudh 208 (210) ✠ (Vol 19) 1932 Mad 175 (177) ✠ (Vol 19) 1932 Mad 173 (175) ✠ ('32) 4 All 245 (247) (D B) ✠ (Vol 22) 1935 Nag 249 (250). (Unless the mortgagee has acquiesced in his dispossession or has failed to take possession by his own negligence.)

[4] Where the mortgage provides that the mortgagor should pay principal and interest within a particular date and that on default on that date the mortgagee is entitled to take possession of the property, but it is found that the mortgagor could not mortgage the property, it has been held that though the mortgage deed is not enforceable, the mortgagor would be liable as on a personal covenant for the money borrowed but the creditor would be entitled to interest only by way of damages, the rate of which would be within the discretion of the Court. (Vol 14) 1927 Oudh 315 (315) (D B).

[5] As a general rule interest is only an accessory to the principal and cannot be recovered apart from the principal. (Vol 16) 1929 Rang 96 (96) : 6 Rang 743 (D B).

[6] Where the understanding between the parties was that the mortgagee was to liquidate his interest in a particular way, namely, by recovery of the rent under a lease which was executed by the mortgagor in favour of the husband of the mortgagee, it was held that there was no personal liability to pay interest. ('03) 27 Mad 86 (91) (D B).

15. Claim under section is an actionable claim — [1] The claim of a mortgagee against the mortgagor under this section for failure of the mortgagor to give possession being an actionable claim can be transferred as such. ('94) 16 All 315 (317) (F B).

16. This section and O. 34, R. 6 of the Civil Procedure Code. — [1] Different views are held as regards the remedy of the mortgagee when he files a suit on the mortgage and obtains a decree but it is thereafter found that owing to no wrongful act or default on his part, he is deprived of his security within the meaning of this section and the mortgaged property ceases to be available for the satisfaction of his decree.

(a) One view is that the remedy of the mortgagee is to apply for a personal decree under O. 34, R. 6 of the Code of Civil Procedure and not to file a fresh suit for the purpose. (Vol 7) 1920 Oudh 251 (252): 23 Oudh Cas 145 (D B).

(b) According to the other view the remedy of the mortgagee is to apply for a personal decree on general principles of justice and not under O 34, R. 6 of the Code of Civil Procedure. (Vol 15) 1928 All 71 (73) : 50 All 321 (D B).

17. Mortgagee claiming under this section, it can sue for sale. — [1] Where a right to sue for the mortgage-money arises under this section it must be taken that the mortgage-money "has become due" for the purposes of S. 67. (Vol 6) 1919 Mad 1164 (1165) : 41 Mad 259 (F B). ('98) 21 Mad 476 (FB). *Overruled.*) ✠(Vol 6) 1919 Cal 46 (48) :46 Cal 448 (D B) ✠ (Vol 20) 1933 Oudh 35 (36) : 8 Luck 190 (D B).

[2] Different views are held as regards the question whether a usufructuary mortgagee who gets a right to sue for the mortgage-money under S. 68 can sue for sale of the mortgaged property.

(a) A usufructuary mortgagee to whom possession is not delivered or who is deprived of his possession is entitled to sue for sale. (Vol 30) 1943 Sind 59 (60) : I L R (1942) Kar 452 (D B) ✠ (Vol 23) 1936 Pat 439 (441). ((Vol 6) 1919 Mad 1164 : 41 Mad 259 (F B), *Rel. on.*) ✠ (Vol 25) 1938 All 418 (421, 422) : I L R (1938) All 714 (F B) ✠ ('35) 157 Ind Cas 657 (658) (Oudh).

(b) A usufructuary mortgagee can sue for sale where the mortgage also contains a personal covenant to pay. (Vol 20) 1933 Mad 613 (615) : 56 Mad 892 (D B) ✠(Vol 25) 1938 All 188 (191) : I L R (1938) All 218 (D B)✠ (Vol 25) 1938 Pat 585 (588, 589) : 17 Pat 737 (D B) ✠ (Vol 28) 1941 Mad 885 (886) (D B).

(c) A usufructuary mortgagee cannot sue for sale on the basis of a personal covenant to pay, unless such covenant imports also a hypothecation of the property. (Vol 29) 1942 All 326 (327) : I L R (1942) All 368 (D B)✠(Vol 25) 1938 All 418 (420): I L R (1938) All 714 (F B).

(d) A usufructuary mortgage with a personal covenant to pay is really an anomalous mortgage and if the contract of the parties gives the mortgagee a right of sale he can sue for sale. (Vol 30) 1943 Sind 59 (61) : I L R (1942) Kar 452 (D B) ✠ (Vol 29) 1942 Cal 55 (58) (D B) ✠ (Vol 20) 1933 Oudh 35 (36) : 8 Luck 190 (D B).

(e) The only decree that can be passed in a suit under S 68 is a decree for money. (Vol 24) 1937 Oudh 20 (22, 23) : 12 Luck 313 (D B).

18. Sub-section (2). — [1] The personal remedy given by this section is additional to the remedy given by S 67 against the mortgaged property. And although the remedies are concurrent, the policy of the law is that the mortgagee should not enforce the personal liability before exhausting his remedy against the property. ('37) 1937 Mad W N 373 (374) (D B).

[2] In a case falling under cl. (a) or cl. (b), if the mortgagee gives up his security, the Court has no power to stay the suit for the mortgage-money. (Vol 25) 1938 Mad 132 (132).

[3] *A* mortgaged certain property to *B* and then transferred the property to *C*. *B* sued *A* and *C* for sale of the mortgaged property and for a personal decree

69. [a][*(1)*] [b][Notwithstanding anything contained in the Trustees' and Mortgagees' Powers Act, 1936, a mortgagee, or any person acting on his behalf, shall subject to the provisions of this section, have power to sell or concur in selling the mortgaged property, or any part thereof, in default of payment of the mortgage-money, without the intervention of the Court, in the following cases and in no others, namely : —]

Power of sale when valid.

(a) where the mortgage is an English mortgage, and neither the mortgagor nor the mortgagee is a Hindu, Muhammadan or Buddhist [or a member of any other race, sect, tribe or class from time to time specified in this behalf by [d][the Provincial Government], in the [e][Official Gazette]];

(b) where [a][a power of sale without the intervention of the Court is expressly conferred on the mortgagee by the mortgage-deed and] the mortgagee is [f][the Crown] ;

(c) where [a][a power of sale without the intervention of the Court is expressly conferred on the mortgagee by the mortgage-deed] the mortgaged property or any part thereof [g][was, on the date of the execution of the mortgage-deed], situate within the towns of Calcutta, Madras, Bombay, [gg][ ] [h][ ] or in any other [i] town [or area] which the [j][Provincial Government] may, by notification in the [k] [Official Gazette] specify in this behalf.

[l] [*] [a][*(2)*] no such power shall be exercised unless and until—

[a][*(a)*] notice in writing requiring payment of the principal money has been served on the mortgagor, or on one of several mortgagors, and default has been made in payment of the principal money, or of part thereof, for three months after such service; or

[a][*(b)*] some interest under the mortgage amounting at least to five hundred rupees is in arrear and unpaid for three months after becoming due.

[m][*(3)*] When a sale has been made in professed exercise of such a power, the title of the purchaser shall not be impeachable on the ground that no case had arisen to authorize the sale,

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Section 68—Note 18 *(contd.)*

against *A* for the balance that may remain due after the sale of the property. During the progress of the suit, *B* compromised with *C*, received a certain amount from him, gave up his security and claimed to proceed against *A* personally for the balance. It was held that S. 68 had no application to the case and that no personal decree could be granted in a suit for sale under S. 67 until the mortgaged property had been put to sale and had failed to realise the entire amount due. (Vol 24) 1937 Oudh 20 (23, 24) : 12 Luck 313 (D B).

[4] *A* executed a pronote in favour of *X* and *K* executed security bond in respect thereof. *X* filed a suit against *A* and *K*. He claimed against *A* a money decree on the promissory note and against *K*, for sale of the secured property. *A* contended that *X* should exhaust his remedy against the secured property. It was held that *A* was not a mortgagor and that his contention was unsustainable. ('37) 1937 Mad W N 373 (374) (D B).

19. Applicability of the section to the Punjab and North-West Frontier Province.—[1] The principle of this section has been applied to cases arising in the Punjab and the North-West Frontier Province. (Vol 21) 1934 Lah 853 (857) : 15 Lah 751 (F B) ✠ (Vol 23) 1936 Pesh 43 (45) (D B).

20. Applicability of section to charges.—[1] This section will apply to charges. (Vol 2) 1915 Mad 633 (634) (DB).

[2] The privilege conferred by S 68 on a mortgagee to sue for money cannot be availed of by a charge-holder in proceedings in execution of a decree, without resorting to a suit. (Vol 32) 1945 P C 91 (94) : I L R (1945) Lah 411: 72 Ind App 165 :I L R (1945) Kar (P C) 269 (P C).

SECTION 69—SYNOPSIS

1. Scope.
2. Mortgage by manager of joint Hindu family.
3. Default in payment where no time is fixed.
4. Mortgage-money.
5. Default in payment of interest only.
6. Power must be expressly conferred.
7. "Within the town of Bombay."
8. Notice requiring payment — Sub-section (2), clause (a).
9. Sub-section (3).
10. "In professed exercise of such a power."
11. Conduct of sale must be bona fide.
12. Effect of sale.
13. "Improper or irregular exercise of the power."
14. Right to claim damages.
15. Lis pendens.
16. Stopping of sale.
17. Who can purchase.
18. Position of the purchaser
19. Sub-section (4).

1. Scope.—[1] This section deals with the power of a mortgagee to sell the mortgaged property, without the intervention of the Court. ('90) 13 All 28 (48) (DB) ✠(Vol 5) 1918 P C 34 (34) : 40 All 407: 45 Ind App 130 (P C). *(Obiter)*

[2] A mortgagee having a power of sale without the intervention of the Court cannot file a suit for that purpose in a Court of law. (Vol 16) 1929 Rang 71 (72): 6 Rang 771 (DB).

[3] Where the parties were businessmen, and the mortgage was in the English form, the stipulation giving the mortgagee a power of sale without the intervention of the Court was held valid in the Punjab, in the absence of any positive enactment prohibiting such a stipulation. (Vol 10) 1923 P C 114 (117): 4 Lah 284: 50 Ind App 162 (P C).

[4] The power of sale may be conferred on a second mortgagee even where no such power has been conferred on the first mortgagee. (Vol 29) 1942 Mad 232 (236): I L R (1942) Mad 287 (DB).

[5] In exercising the power of sale under this section the mortgagee does not act as the agent of the mortgagor. The mortgagee exercises his right under a totally superior claim which is not under the mortgagor but

or that due notice was not given, or that the power was otherwise improperly or irregularly exercised; but any person damnified by an unauthorized or improper or irregular exercise of the power shall have his remedy in damages against the person exercising the power.

[a][*(4)*] The money which is received by the mortgagee, arising from the sale, after discharge of prior incumbrances, if any, to which the sale is not made subject, or after payment into Court under section 57 of a sum to meet any prior incumbrance, shall, in the absence of a contract to the contrary, be held by him in trust to be applied by him, first, in payment of all costs, charges and expenses properly incurred by him as incident to the sale or any attempted sale; and, secondly, in discharge of the mortgage-money, and costs and other money, if any, due under the mortgage; and the residue of the money so received shall be paid to the person entitled to the mortgaged property, or authorised to give receipts for the proceeds of the sale thereof.

[m][*(5)*] Nothing in this section or in section 69A applies to powers conferred before the first day of July, 1882.]

[n][* * * * *]

[a] *Inserted* by the Transfer of Property (Amendment) Act, 1929 (20 [XX] of 1929), S. 34. [b] *Substituted ibid.* [c] *Inserted* by the Transfer of Property Act (1882) Amendment Act, 1885 (3 [III] of 1885), S. 5. [d] *Substituted* by A. O. for "the Local Government with the previous sanction of the Governor General in Council". [e] *Substituted* by A. O. for "local official Gazette". [f] *Substituted* by A. O. for "the Secretary of State for India in Council". [g] *Substituted* by the Transfer of Property (Amendment) Act, 1929 (20 [XX] of 1929), S. 34, for "is". [gg] The word 'Karachi' was *omitted* by the Indian Independence (Adaptation of Central Acts and Ordinances) Order, 1948 [23-3-1948]. [h] The words "Rangoon, Moulmein, Basse n, Akyab" were *repealed* by A. O [i] *See* S. 58 (i), f.n. (d). [j] *Substituted* by A. O. for "Governor-General in Council". [k] *Substituted* by A. O for "Gazette of India". [l] The word "but" was *repealed* by the Transfer of Property (Amendment) Act, 1929 (20 [XX] of 1929), S. 34. [m] *Substituted ibid.*, for what was originally the fifth paragraph of the section. [n] The last paragraph of the section was *repealed* by S. 34, *ibid.*

Section 69—Note 1 *(contd.)*

against him. (Vol 31) 1944 Bom 156 (158): I L R (1944) Bom 549 (DB).

2. Mortgage by manager of joint Hindu family.—[1] A manager of a joint Hindu family mortgaging for a family purposes immovable property situated in one of the towns mentioned in this section can confer a power of sale on the mortgagee which can be exercised without recourse to Court. (Vol 29) 1942 Mad 232 (235): I L R (1942) Mad 287 (DB).

3. Default in payment where no time is fixed.—[1] There cannot be a default in payment of the mortgage-money unless it has become due. (1888) 38 Ch D 273 (283): 57 L J Ch 609, *Selwyn* v. *Garfit.*

[2] Where the amount due for principal is not repayable at any particular date, nor is anything stated as to when it is to be repaid, then, until there is a demand made for the money, there can be no default in payment of the principal sum due. (Vol 13) 1926 Mad 841 (844) (DB).

[3] Where though a time is fixed for payment, the mortgage money may become due earlier at the option of the mortgagee under specified circumstances, the mere fact that the money has become due earlier is not a default in payment. The mortgagee must make a demand for the amount so as to enable the mortgagor to realise his position and save his equity of redemption if possible. (Vol 28) 1941 Bom 339 (342): I L R (1941) Bom 506.

4. Mortgage money.—[1] Where a mortgage-debt is reduced according to the provisions of any law for the time being in force, it is the reduced amount that represents the mortgage-money and if the mortgagee tries to sell the property for the recovery of more than the reduced amount, he can be restrained by an injunction obtained in a suit for that purpose. (Vol 26) 1939 Mad 4 (5).

5. Default in payment of interest only.—[1] A default in payment of interest is a default in payment of the "mortgage-money" and consequently the mortgagee can exercise the power of sale even though the principal money has not fallen due. (Vol 5) 1918 Low Bur 64 (65): 9 Low Bur Rul 106 (DB).

[But see (Vol 8) 1921 Bom 421 (423) (DB). (Mortgagee cannot exercise such power before both principal and interest have fallen due.)]

6. Power must be expressly conferred.—[1] The words "the mortgagee, his heirs, representatives and assigns shall have all the rights, powers, remedies and privileges conferred upon the mortgagee by Act IV of 1882" (i e., Transfer of Property Act) do not confer the power of sale upon the mortgagee. (Vol 15) 1928 Rang 128 (128): 6 Rang. 134.

[2] The power conferred by the mortgage-deed may be a power to sell by private contract or a power to sell by auction. A sale by private treaty, when the power to sell is by auction, would be invalid. (1841) 3 Moo P C 457 (464): 13 E R 186, *Bronard* v. *Dumareesque.*

[3] A sale by a private contract where a power to sell either by private contract or by auction is given is not bad merely because an attempt is not made first to sell by auction. (1857) 118 R R 213 (227): 26 L J Ch 830, *Davey* v. *Durrant.*

[4] A power to sell necessarily includes the power to postpone the sale. Where the sale is by auction and the highest bid is found to be very inadequate, the mortgagee may postpone the sale. (Vol 29) 1942 Bom 46 (49): I L R (1942) Bom 83.

7. "Within the town of Bombay".—[1] Property situated at Mahim within the island of Bombay and within the local limits of the original civil jurisdiction of the High Court of Bombay is property situated within the town of Bombay. ('99) 23 Bom 348 (358) (DB).

8 Notice requiring payment— Sub-section (2), clause (a).—[1] Where a mortgagee desires to exercise his power of sale for recovery of the principal money, he cannot do so unless and until he complies with the provision as to notice contained in this clause. (Vol 21) 1934 Mad 644 (645) (DB).

[2] The provision is only a direction with regard to the exercise of the power and if a sale is held without a notice under this clause it will only afford a ground for damages, if any, to the mortgagor damnified by the sale. ('88) 11 Mad 201 (203) (DB). (Deed providing for

Section 69 — Note 8 *(cont'd.)*
power of sale after 15 days' notice—Condition invalid but sale is valid.)

[3] The statutory requirement of notice is imperative—Three months' period provided therein cannot be curtailed by agreement of parties. (Vol 28) 1941 Bom 339 (344): I L R (1941) Bom 506.

[4] A sale cannot be held unless, after the service of notice, there has been a default in payment of it, or any part thereof, for a period of three months. (99) 1 Bom L R 273 (275).

[5] Where a sale was held 15 months after the service of the notice, it was held that a fresh notice ought to have been given before the actual sale. (Vol 13) 1926 Mad 841 (843) (DB).

[6] Where interest amounting to Rs. 500 is in arrears and remains unpaid for three months after becoming due, no notice is necessary before the mortgagee can exercise his power of sale. ('99) 1 Bom L R 273 (275) ✠ (Vol 13) 1926 Mad 841 (847) (DB).

[7] A mortgagee giving notice under cl. (a) cannot before the expiry of three months after the service of notice sell the property for arrears of interest under cl. (b). ('99) 1 Bom L R 273 (275).

9. Sub-section (3). — [1] The section permits a distinction between a purchaser with notice and a purchaser without notice of an irregularity and though a sale may not be impeachable on the mere ground that the power was improperly exercised, this protection does not extend to a case when there is the additional ground that the purchaser had notice of the improper exercise of the power. ('04) 6 Bom L R 557 (571) (DB).

[2] When there is fraud there may be a cause of action against the purchaser to have the sale declared void or to have it set aside on the ground of fraud. (Vol 27) 1940 Mad 903 (904).

10. "In professed exercise of such a power." — [1] When there is no valid mortgage the sale cannot be said to be in the professed exercise of the power and cannot give the purchaser an unimpeachable title. (Vol 23) 1936 Bom 94 (97).

[2] Power not validly conferred—Sale cannot be said to be in professed exercise of power. (Vol 15) 1928 Rang 128 (128) : 6 Rang 134.

[3] The words "such a power" do not refer to a power exercised three months after the notice. They refer simply to the power of sale mentioned in the opening part of sub-section (1). ('88) 11 Mad 201 (202) (DB).

[4] Mortgagee parting with the title deeds by way of assignment but getting back the deeds becomes revested with the power of sale which he originally had under the mortgage deed. ('03) 13 Mad L Jour 367 (369) (DB).

11. Conduct of sale must be bona fide. — [1] The power of sale given to the mortgagee is for his benefit and not for the benefit of the mortgagor. (1889) 61 L T 71 (71) : 58 L J Ch 539, *Colson* v. *Williams*.

[2] The mortgagee has a perfect right to hold the sale of the property in such manner as he thinks most conducive to his benefit. He can for this purpose even impose conditions upon the conduct of the sale. ('03) 5 Bom L R 247 (249).

[3] The conditions must be such as an owner will use in the sale of his own property and should not be depreciatory. ('04) 6 Bom L R 557 (568) (DB) ✠ ('03) 5 Bom L R 247 (249, 250).

[4] The mortgagee must act *bona fide* in the conduct of the sale. ('07) 31 Bom 566 (582) : 34 Ind App 179 (PC).

[5] If the mortgagee exercises the power of sale *bona fide* without corruption or collusion with the purchaser the Court will not interfere, even though the sale be very disadvantageous, unless, indeed, the price is so low as in itself to be evidence of fraud. ('12) 13 Ind Cas 261 (264) (PC).

12. Effect of sale.—[1] The effect of a sale under a power of sale is to destroy the equity of redemption in the land, and to constitute the mortgagee exercising the power a trustee of the surplus proceeds, after satisfying his own charge, first for the subsequent incumbrancers, and ultimately for the mortgagor. The estate if purchased by a stranger passes into his hands free from all incumbrances ('80) 5 Cal 198 (211) : 6 Ind App 145 (PC) *(Other)* ✠ (Vol 31) 1944 Bom 156 (158, 159) : I L R (1944) Bom 549 (DB).

[2] A mere contract for sale by the mortgagee which has not yet fructified into a completed sale does not extinguish the mortgagor's right of redemption. (Vol 31) 1944 Bom 156 (158, 159) : I L R (1944) Bom 549 (DB).

13. "Improper or irregular exercise of the power." — [1] Sale under depreciatory condition is improper or irregular exercise of power. ('04) 6 Bom L R 557 (559) (DB).

[2] Sale before mortgagee became entitled to exercise power — Power is improperly exercised. (Vol 13) 1926 Mad 841 (844, 848) (DB).

[3] A sale without serving a notice on the mortgagor under sub-s. (2), cl. (a) when the property is to be sold for recovery of the principal is an improper or an irregular exercise of the power. ('88) 11 Mad 201 (203) (DB).

[4] After the property was duly advertised for sale, the mortgagee verbally agreed with the mortgagor to postpone the sale for four days; but in contravention of this agreement sold the property on the originally advertised day. It was held that the power of sale could not be said to have been exercised in an improper or irregular manner. ('99) 23 Bom 348 (357) (DB).

[5] Even where there is no valid power of sale at all, a sale in the professed exercise of the power would not be void, but only an irregular one governed by sub-s. (3) of the section. ('09) 4 Ind Cas 755 (757) : 1909 Upp Bur Rul 5.

14. Right to claim damages.—[1] In order to be entitled to damages under sub-s (3) the mortgagor must have been damnified by an unauthorised or improper or an irregular exercise of the power of sale. ('09) 4 Ind Cas 755 (756) : 1909 Upp Bur Rul 5.

[2] Mortgagee having two mortgages over same property—Power of sale conferred in first mortgage only—Mortgagee exercising power respecting debt covered by both mortgages — Sale held could not be set aside —Mortgagor held could have his remedy in damages if he was damnified by exercise of power. (Vol 9) 1922 Mad 390 (391) : 45 Mad 774 (DB).

[3] If the mortgagor is damnified by an action of the auctioneer appointed by the mortgagee, the mortgagor can claim damages from the mortgagee. (1889) 43 Ch D 191 (194) : 38 W R (Eng) 323, *Tomlin* v. *Luce*.

15. Lis pendens.—[1] A sale held in exercise of the power is not affected by the doctrine of *lis pendens* even though it is held after the mortgagor has instituted a suit for redemption. (Vol 9) 1922 Mad 390 (391) : 45 Mad 774 (DB).

[2] The validity of a sale is not affected by an attachment of the property by a third party, whether before or after the mortgagee became entitled to the exercise of the power. ('75) 1875 Pun Re No. 68, p. 171 (173).

16. Stopping of sale. — [1] The mortgagor has got a right, which can be exercised up to the moment of sale, to pay up the mortgage amount and stop the sale. ('99) 23 Bom 348 (356) (DB).

71. When the mortgaged property is a lease [a][* * *], and the mortgagor obtains a renewal of the lease, the mortgagee, in the absence of a contract to the contrary, shall, for the purposes of the security, be entitled to the new lease.

Renewal of mortgaged lease.

[a] The words "for a term of years" were *repealed* by the Transfer of Property (Amendment) Act, 1929 (20 [XX] of 1929), S. 36.

Section 70 — Note 1 *(contd.)*

mortgagee would be entitled. (Vol 25) 1938 Rang 108 (108).

[3] Trees planted on the mortgaged property (grove) after the date of the mortgage held to be accession. ('30) 6 Oudh W N 832 (835).

[4] Where after the date of the mortgage of certain zamindari property of zamindar chowkidari chakran lands were released in favour of the zamindar by the Collector, such lands become an accession to the mortgaged property, to the security of which the mortgagee would be entitled. ('11) 13 Cal L Jour 109 (113).

[5] New land added to mortgaged security by alluvion and taken possession of by mortgagor and held by him adversely to co-sharers is accession. (Vol 26) 1939 Cal 275 (277) (DB).

[6] Shop with site on which it was standing mortgaged—Shop destroyed by fire and new one constructed —New shop is accession to mortgaged property. (Vol 32) 1945 Bom 248 (249, 251) (DB).

[7] *A*, the mortgagor acquiring by inheritance, the rights of a prior mortgagee—The acquisition enures to the benefit of the subsequent mortgagee the value of whose security is thereby increased. (Vol 2) 1915 All 242 (243) : 37 All 309 (DB).

[8] The superstructure built on the mortgaged site is an accession to the mortgaged property. (Vol 28) 1941 Pesh 49 (50) (DB).

[9] Acquisitions by purchase or by adverse possession by the mortgagor of property adjacent to the mortgaged property do not constitute accession. (Vol 26) 1939 Cal 275 (277) (DB).

[10] Where *X* leases his property first to *A*, then mortgages the same to *B* and thereafter sells his equity of redemption to *A*, the leasehold interest in the hands of *A* does not merge in the equity of redemption in his hands and the leasehold interest cannot be considered an accession to the mortgaged property. (Vol 26) 1939 Cal 692 (698) : 1 L R (1939) 2 Cal 551 (DB). (Per *Roxburgh J.*)

[11] The accrual of *sir* rights in khudkast land subsequent to the mortgage though ordinarily an accretion to the mortgaged property under this section, would not be so if there is a special enactment to the contrary, e. g., S. 49, C. P. Tenancy Act. (Vol 20) 1933 Nag 104 (106) : 29 Nag L R 142.

[12] Auction-purchaser in execution of prior mortgage decree is representative of mortgagor — Building erected by him on land would be accession. (Vol 18) 1931 All 277 (286) : 53 All 334 (FB).

[But see ('81) 1881 Pun Re No 94, p. 207 (209) (DB). (Building by purchaser of equity of redemption —Mortgagee not entitled—Submitted wrong.)]

[13] First mortgage of *sir* land by *X* in favour of *A* —Second mortgage in favour of *B* — *B* foreclosing his mortgage against *X* and thereafter acquiring by surrender from *X* occupancy rights in land—Acquisition by *B* held was accession. (Vol 16) 1929 Nag 223 (226) : 25 Nag L R 12.

[14] Under S. 70 the mortgagee is entitled to the benefit of accession to the mortgaged property "for purpose of the security" only and, therefore, the section cannot apply to the case of a mortgagee who has purchased a share of the equity of redemption and sues to enforce the mortgage. (Vol 29) 1942 Mad 44 (47) (DB).

[15] The mortgagee can claim the benefit of S. 70 only if the accession is during the subsistence of the mortgage. A mortgage decree for sale does not extinguish the mortgage security and the mortgagee decreeholder is entitled to have his decree satisfied by sale of an accession made to the mortgaged property after the passing of the decree. (Vol 32) 1945 Bom 248 (250) (DB).

[But see (Vol 8) 1921 Pat 188 (189) (DB).]

[16] The accession must have been received before the mortgage becomes extinguished, and the acquisition by the mortgagor after the mortgaged property has been sold in execution of the mortgage decree cannot be considered an "accession" to the mortgaged property to the security of which the mortgagee is entitled. (Vol 8) 1921 Mad 627 (628, 629) (D B).

[17] An accession to the mortgaged property after the date of the mortgage and before the mortgage decree was passed, may be sold in execution of the decree even though such accession is not specifically mentioned in the decree. (Vol 22) 1935 Rang 522 (522, 523).

[18] The words "in the absence of a contract to the contrary" suggest that the parties contemplated by the section are those who are bound by the contractual relations of mortgagor and mortgagee and not independent third parties. (Vol 18) 1931 All 277 (284, 285) : 53 All 334 (F B).

[19] There can be a contract to the contrary within S. 70 in the case of a charge created by a decree based on a compromise. (Vol 33) 1946 Mad 293 (294).

Section 71—Note 1

[1] As a general rule, most acquisitions by a mortgagor enure for the benefit of the mortgagee; and, conversely, many acquisitions by a mortgagee are in a like manner, to be treated as accretions to the mortgaged property, or substitutions for it, and, therefore, subject to redemption. ('79) 5 Cal 198 (210, 211) : 6 Ind App 145 (P C).

[2] After the death of the mortgagor Inamdar, the lands were continued to his representative subject to the payment of assessment, but the right to hold the lands rent free was ruled by Government to have ceased— *Held* that the lands continued chargeable in the hands of the representatives with any valid specific liens created upon the lands by the Inamdar. (1862) 1 Bom H C R 22 (27) (S B).

[3] Lessee of property mortgaging leasehold right by deposit of title deeds in 1910 — Lease expiring in 1917 —Lessee continuing in possession and landlord accepting rent from him—In 1920 lessee obtaining renewal of lease — Mortgagee held was entitled to benefit of lease though renewal was effected after expiry of lease. (Vol 21) 1934 Rang 51 (57)☆ ('02) 24 All 538 (540, 541) (D B).

[4] A lessee cannot voluntarily surrender his holding to the landlord so as to affect the interest of the mortgagee under a mortgage created by him previous to surrender. ('02) 24 All 538 (541) (D B).

[5] Lessee mortgaging part of holding—Lessee collusively suffering decree to be passed against him for eviction—Lien of mortgagee should be held to continue to subsist upon land—Mortgagee would have same right against landlord as he would have against mortgagor lessee. ('05) 32 Cal 283 (286) (D B).

Rights of mortgagee in possession.

72. [a][A mortgagee] may spend such money as is necessary—

[b][* * * * * * * *]

(b) for [c][the preservation of the mortgaged property] from destruction, forfeiture or sale;

(c) for supporting the mortgagor's title to the property;

(d) for making his own title thereto good against the mortgagor; and,

(e) when the mortgaged property is a renewable lease-hold, for the renewal of the lease;

and may, in the absence of a contract to the contrary, add such money to the principal money, at the rate of interest payable on the principal, and where no such rate is fixed, at the rate of nine per cent. per annum: [d][Provided that the expenditure of money by the mortgagee under clause *(b)* or clause *(c)* shall not be deemed to be necessary unless the mortgagor has been called upon and has failed to take proper and timely steps to preserve the property or to support the title.]

Where the property is by its nature insurable, the mortgagee may also, in the absence of a contract to the contrary, insure and keep insured against loss or damage by fire the whole or any part of such property; and the premiums paid for any such insurance shall be [e]added to the principal money with interest at the same rate as is payable on the principal money or, where no such rate is fixed, at the rate of nine per cent. per annum]. But the amount of such insurance shall not exceed the amount specified in this behalf in the mortgage-deed or (if no such amount is therein specified) two-thirds of the amount that would be required in case of total destruction to reinstate the property insured.

Nothing in this section shall be deemed to authorize the mortgagee to insure when an insurance of the property is kept up by or on behalf of the mortgagor to the amount in which the mortgagee is hereby authorized to insure.

[a] *Substituted* by the Transfer of Property (Amendment) Act, 1929 (20 [XX] of 1929), S. 37, for "When during the continuance of the mortgage, the mortgagee takes possession of the mortgaged property, he." [b] Clause *(a)* was *repealed*, *ibid*. [c] *Substituted*, *ibid*, for "its preservation". [d] *Inserted*, *ibid*. [e] *Substituted*, *ibid*.

SECTION 72—SYNOPSIS

1. Preservation of property—Clause (b).
2. Supporting mortgagor's title—Clause (c).
3. Costs of supporting the mortgagee's title — Clause (d)
4. "In the absence of a contract to the contrary."
5. May add such money to the principal money.
6. Charge for expenses—Enforcement of.
7. Expenditure must have been made in the capacity of mortgagee.
8. Interest on amount spent.

1. Preservation of property—Clause (b). — [1] Under the proviso the expenditure under this clause will not be deemed "necessary" unless the mortgagee has called upon the mortgagor to take proper and timely steps to preserve the property and the latter has failed to take them. (Vol 31) 1944 Oudh 208 (208, 209) ✠ (Vol 22) 1935 Rang 473 (479, 480).

[2] What constitutes a proper and necessary expenditure is a question of fact depending upon the circumstances of each case. ('10) 12 Cal L Jour 574 (578) (D B).

[3] In allowing expenses the Court must naturally be on its guard against extravagant and unfounded claims and should enquire strictly into the facts and fairness of the claim in each case. (Vol 17) 1930 Oudh 337 (338, 339) (D B) ✠ (Vol 5) 1918 Bom 84 (85) : 43 Bom 69 (D B).

(a) Preservation from destruction.

[4] This head will include the costs of repairs of the mortgaged property. ('12) 10 All L Jour 124 (126) ✠ ('96) 19 Mad 327 (329) (D B) ✠ (Vol 3) 1916 Mad 859 (862): 38 Mad 18 (D B) ✠ (Vol 10) 1923 Lah 587 (588) (D B)✠('95) 17 All 282 (284).

[5] Where the improvements are not necessary for the preservation of the property, the mortgagee will not be entitled to recover the cost of those improvements. ('96) 19 Mad 327 (329) (D B)✠(Vol 2) 1915 All 99 (100): 37 All 81 (D B)✠ (Vol 26) 1939 Lah 129 (135) (D B)✠ ('08) 1903 Pun L R No. 33, page 143 (145).

[6] A mortgagee cannot claim the expenses of an addition to or new construction upon the mortgaged property under this clause. (Vol 2) 1915 Oudh 177 (180) (D B) ✠ (Vol 2) 1915 All 99 (100): 37 All 81 (D B) ✠ (Vol 16) 1929 Lah 509 (509) (D B).

[7] Where the mortgaged property was dilapidated house and the mortgagee reconstructed it after pulling it down, or an original kachcha house was built into a pucca one of the same pattern, and the amount spent was reasonable, such expenses were allowed to the mortgagee before the introduction of S. 63A. ('68) 9 Suth W R 488 (488) (D B) ✠ (Vol 14) 1927 Lah 815 (817) (D B) ✠ (Vol 10) 1923 Lah 587 (589) (D B)✠ (Vol 17) 1930 Oudh 337 (338) (D B)✠ (Vol 2) 1915 All 99 (99) : 37 All 81 (D B).

[8] Where the mortgaged property is totally destroyed by a "calamity from heaven", such as an accidental fire and the mortgagee builds it again, he is entitled to the costs of such reconstruction. ('69) 5 Bom H C R (A C) 109 (115) (D B)✠('90) 14 Bom 28 (30) (D B).

[9] *A*, a Mahomedan widow selling property to *B* for herself and as guardian for her minor son *C* — On attaining majority, *C* challenging the sale—Decree passed against *B* for delivery of possession to *C* on his depositing certain amount within six months into Court, otherwise suit to stand dismissed — On failure of *C* his mortgagee *D* depositing the money into Court—*Held*, *D* was entitled to deposit money and to protect the property mortgaged to him and to prevent the security from being valueless. (Vol 11) 1924 P C 133 (135) : 48 Bom 404: 51 Ind App 236 (P C).

[10] Mortgagee is not entitled to be reimbursed for ordinary annual repairs. (Vol 6) 1919 Lah 354 (354).

[11] Forced payment of the call by the registered holder of shares who held them as security is not an

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expenditure for the preservation of the security. (Vol 4) 1917 Bom 149 (151): 42 Bom 159 (D B).

(b) Preservation from forfeiture or sale.

[12] This head will include a payment by the mortgagee of Government land revenue. ('67) 11 Moo Ind App 241 (258) (P C) ✠ (Vol 16) 1929 P C 243 (245): 51 All 686: 56 Ind App 339 (P C)✠(Vol 18) 1931 P C 226 (228) : 59 Cal 463 : 58 Ind App 341 (P C) ✠ ('07) 7 Cal L Jour 215 (232) (P C).

[13] The rent of the mortgaged property comes under this head. ('07) 7 Cal L Jour 215 (232) (P C).

[14] This head will include the amount necessary to be deposited in order to set aside a sale of mortgaged property in execution of a decree obtained by a prior mortgagee in a suit to which the mortgagee making such payment was a party. ('07) 4 All L Jour 176 (179) (D B)✠(Vol 11) 1924 Lah 154 (155) (D B)✠(Vol 8) 1921 Mad 480 (481) (D B).

[15] The clause applies only to those sales which endanger the mortgage security and not to the sale of merely the equity of redemption. (Vol 8) 1921 Mad 480 (481) (D B) ✠ (Vol 13) 1926 Oudh 281 (286) : 1 Luck 367: 29 Oudh Cas 336 (D B) ✠ (Vol 6) 1919 Oudh 370 (372): 22 Oudh Cas 32✠(Vol 3) 1916 Pat 96 (96): 1 Pat L Jour 589 (D B) ✠ ('99) 22 Mad 332 (336) (DB)✠('03) 30 Cal 794 (800) (D B).

[16] Though the amount deposited by the mortgagee to set aside sale in execution of a prior encumbrancer's decree is recoverable under this clause, the amount of compensation to be paid to the auction-purchaser under O. 21, R. 89, Civil P. C., will not be allowed to him. (Vol 19) 1932 P C 99 (101) (P C).

[17] Where there is no express agreement making the mortgagor liable for payment of land revenue a mortgagee in possession is bound to pay the same even if it is newly assessed or advanced during the continuance of his mortgage; he cannot recover it from the mortgagor under this clause. (Vol 11) 1924 P C 102 (106) : 46 All 269 : 51 Ind App 157 : 27 Oudh Cas 72 (P C).

[But see (Vol 10) 1923 All 433 (434) : 45 All 388 (D B).]

[18] Where a deed of mortgage is silent on the point as to who is liable for the payment of land revenue, it has been held that a mortgagee in possession contracts for the payment of the assessment existing on the date of mortgage only and not the newly assessed or advanced amount. The liability to pay the same is fixed upon the mortgagor. ('96) 1896 Bom PJ 710 (DB) ✠ (1865) 3 Suth W R 174 (175) (SB) ✠ (1865) 3 Suth W R 6 (7) (DB) ✠ ('04) 14 Mad L Jour 488 (489) (DB) ✠ ('86) 1886 Bom P J 68 (DB).

[But see ('09) 11 Bom L R 318 (325) (DB).]

[19] If the income is sufficient to meet the payment, the mortgagee cannot take advantage of this clause to recover it again from the mortgagor at the time of redemption. In this sense this clause may be said to be subject to the obligation imposed by clause (c) of S. 76. (Vol 6) 1919 Oudh 50 (53) : 22 Oudh Cas 270 (DB).

2. Supporting mortgagor's title—Clause (c).—

[1] A mortgagee may incur expenditure for supporting the mortgagor's title to the mortgaged property where such title has been impeached, and add such expenses to the principal amount of the mortgage-money ('12) 16 Ind Cas 217 (219) (D B) (Mad) ✠ (Vol 6) 1919 Mad 1102 (1103) (D B) ✠ ('98) 21 Mad 32 (34) (DB).

[2] The mortgagor, so long as the equity of redemption remains with him, is bound, under the general law of mortgage, to indemnify the estate against the expenses of protecting his title. ('85) 9 Bom 435 (437) (SB) ✠ (Vol 11) 1924 Bom 264 (266, 267).

[3] The obligation on the mortgagor to indemnify the estate against the expenses of protecting his title exists, independent of any contract between the parties to the mortgage. (Vol 18) 1931 P C 143 (148) : 10 Pat 654 : 58 Ind App 254 (P C) ✠ ('35) 9 Bom 435 (437) (SB).

[4] The mortgagee must act as a prudent owner. The question whether he has so acted is a question of fact. (Vol 6) 1919 Mad 1102 (1103) (DB).

[5] It is the duty of the mortgagee to prove the exact amount of expenses incurred. In the absence of any evidence to show what these expenses actually are, he is not entitled to be given credit for any amount even though it may appear from the facts of the case that he was put to some expense. (Vol 2) 1915 Mad 945 (947) (DB).

3. Costs of supporting the mortgagee's title—Clause (d).— [1] A mortgagee will be entitled to costs in a suit for foreclosure or redemption unless he has forfeited his rights by some improper defence or other misconduct. (Vol 2) 1915 Mad 402 (403, 404) ✠ (Vol 6) 1919 All 297 (299) : 41 All 473 (DB) ✠ ('98) 21 All 4 (9) (D B) ✠ ('84) 8 Bom 190 (193) (D B) ✠ ('84) 1884 Bom P J 44 (DB).

[2] A mortgagee will be entitled to the costs incurred by him in making good his title, otherwise than in a suit for foreclosure or redemption (Vol 29) 1942 Mad 592 (594) : I L R (1943) Mad 205 (DB).

[3] Mortgagee spending money in removing obstruction to his enjoyment created by mortgagor — Suit for that purpose — Costs of suit could be claimed by mortgagee as charge on property. ('04) 28 Bom 181 (188) (D B).

[4] Mortgagee suing mortgagor for possession owing to default of mortgagor to deliver possession — Costs of suit can be claimed by mortgagee. (Vol 28) 1941 Oudh 498 (501) : 16 Luck 812 (D B).

[5] Third person suing mortgagor and mortgagee to recover sum of money—Mortgagee successfully defending suit—Costs of defence could be claimed by mortgagee in suit for redemption by mortgagor. (Vol 13) 1926 Oudh 281 (287) : 1 Luck 367 : 29 Oudh Cas 336 (D B).

[6] The costs of litigation concerning the mortgaged property arising out of the wrongful act of a third person will not be allowed to the mortgagee unless they were incurred in protecting the title to the estate. (Vol 11) 1924 Bom 264 (267).

[7] Where a mortgagee had taken a mortgage with full knowledge of a third person's interest in the property, it was held that he was not entitled, as against the mortgagor, to add the costs incurred by him in opposing the claim of such third person. ('12) 1912 Pun L R No. 190 page 600 (603).

[8] Where the mortgagee is awarded costs he is entitled to recover them as part of the mortgage amount realisable from the mortgaged property. (Vol 12) 1925 Cal 1135 (1135, 1136) (DB) ✠ (Vol 13) 1926 All 424 (425) : 48 All 425 (DB).

[9] There is nothing to prevent the Court, in proper cases, from awarding the costs personally against the mortgagor. (Vol 13) 1926 All 424 (425) : 48 All 425 (DB) ✠ (Vol 22) 1935 Mad 101 (105) : 58 Mad 418 (D B).

[10] Where the decree is ambiguous, it should not be construed in such a manner as to enable the mortgagee to recover the costs personally against the mortgagor. (Vol 12) 1925 Cal 1135 (1136) (DB) ✠ (Vol 5) 1918 All 366 (366, 367) : 40 All 109 (DB) ✠ ('98) 20 All 523 (527) (FB).

[11] Puisne mortgagee is not normally liable for costs of mortgage suit—To make him so liable plaintiff

Section 72— Note 3 *(contd)*

should see that order against him to pay costs is passed and inserted in decree. (Vol 19) 1932 Rang 153 (153) : 10 Rang 308 (DB).

4. "In the absence of a contract to the contrary." —[1] Where a melkanomdar stipulated in the deed of mortgage that he would meet all the expenses of litigation to support the mortgagor's title and he had to incur that expenditure in a suit by a rival jenmi, it was held that he could not add the amount spent, to the mortgage debt as the above stipulation was "a contract to the contrary." (Vol 2) 1915 Mad 1215 (1219) (D B).

[2] Where a mortgagor undertook to effect all the repairs on the mortgaged property, the mortgagee was held not entitled to make them himself and add the amount to the mortgage-debt. (Vol 6) 1919 Lah 354 (354, 355).

[3] To see whether there is a contract to the contrary the document must be considered as a whole. (Vol 19) 1932 Oudh 255 (259) : 8 Luck 40 (DB).

5. May add such money to the principal money. —[1] The rule of English law that the mortgagee can claim the money expended by him only at the time of redemption and no action on a debt lies for its recovery has no application in India. (Vol 6) 1919 Mad 1102 (1104) (DB).

[2] A mortgagee in India has two separate remedies open to him, namely, to sue on his mortgage adding to it the claim for monies expended for necessary purposes or to bring a separate suit to recover only the expenses. (1867) 11 Moo Ind App 241 (259) (P C) ✠ ('66) 5 Suth W R 126 (128) (D B) ✠ ('79) 2 All 193 (195) (D B).

[But see (1852) 8 S D A R 1063 (1065) (S B).]

[3] The expression "the mortgagee may, in the absence of a contract to the contrary, add such money to the principal money," clearly shows that the remedy under this section is only an additional remedy and not the sole remedy. (Vol 6) 1919 Mad 1102 (1103, 1104) (D B) ✠ (Vol 23) 1936 Rang 47 (48) ✠ (Vol 22) 1935 Rang 438 (439) ✠ ('98) 20 All 401 (408) (D B) ✠ (Vol 6) 1919 Mad 59 (61, 62) : 41 Mad 1043 (D B).

[4] The mortgagee is not barred from suing to recover such amounts under S. 69 of the Contract Act. ('90) 1890 All W N 90 (90) (D B) ✠ (Vol 20) 1933 Rang 112 (112) ✠ (Vol 22) 1935 Rang 438 (439) ✠ (Vol 23) 1936 Rang 47 (48) ✠ (Vol 10) 1923 All 127 (127).

[But see ('13) 16 Oudh Cas 48 (50) ✠ ('99) 9 Mad L Jour 177 (179) (D B) ✠ (Vol 12) 1925 Oudh 429 (431) : 28 Oudh Cas 221 (DB) ✠ (Vol 7) 1920 Pat 521 (522) : 5 Pat L Jour 248.]

[5] The mere fact that there is an agreement between the parties allowing the mortgagee to recover his expenses by an independent suit against the mortgagor personally, does not take away the right of the mortgagee to add the amount to the principal money and recover it as such. (Vol 20) 1933 P C 136 (139) (P C).

[But see (Vol 6) 1919 Oudh 50 (53) : 22 Oudh Cas 270 (DB).]

[6] Where the mortgagee adopts one of the two remedies, he does not forfeit the other remedy. (Vol 6) 1919 Mad 59 (61, 62) : 41 Mad 1043 (DB).

[But see ('98) 20 All 401 (408) (DB).]

[7] A mortgagee does not lose his charge for the expenditure given by this section by merely obtaining a personal decree for the same. He can plead it and claim to be paid for it on redemption, provided the claim under the decree is not otherwise barred or does not become unenforceable. ('86) 1 C P L R 66 (67).

6. Charge for expenses — Enforcement of.— [1] A lien for expenses under this section is enforceable only along with the claim under the mortgage and so long as the latter is subsisting; if the latter claim is no longer subsisting, the mortgagee cannot have any remedy under this section. He will be entitled, however, to recover the amount under S. 69 of the Contract Act. (Vol 25) 1938 Nag 459 (461) : I L R (1939) Nag 246 ✠ (Vol 27) 1940 Nag 285 (286) ✠ (Vol 13) 1926 Cal 765 (767) (DB) ✠ ('98) 25 Cal 305 (311) (DB).

[But see ('99) 9 Mad L Jour 177 (179) (DB).]

[2] Mortgagee in possession paying arrears of land revenue payable by mortgagor — Mortgagor depositing principal and interest in Court and mortgagee accepting same — Deed and possession delivered to mortgagor — Mortgagee subsequently suing to recover amount of land revenue by sale of mortgaged property — Charge for expenses held could not be enforced apart from claim under mortgage — Suit disallowed. ('90) 13 All 195 (199) (DB).

[But see (Vol 2) 1915 Cal 369 (370) (DB).]

[3] Costs of defending mortgagor's title incurred during prior mortgage — The mortgage renewed and suit to enforce the latter mortgage brought—The claim for costs cannot be added to the debt under the latter mortgage. (Vol 7) 1920 Mad 746 (747) (D B).

7. Expenditure must have been made in the capacity of mortgagee.— [1] The relationship of mortgagor and mortgagee is not put an end to by the mere passing of a preliminary decree for foreclosure. (Vol 2) 1915 Cal 369 (369) (DB).

[2] Final decree for sale—Execution pending—Relationship of mortgagor and mortgagee does not come to end. (Vol 18) 1931 P C 226 (228) : 59 Cal 463 : 58 Ind App 341 (PC). *(Reversing* (Vol 17) 1930 Cal 151 : 57 Cal 298.) ✠ (Vol 6) 1919 Low Bur 136 (138).

[3] Where a mortgagee spends monies not as a mortgagee, but as owner under a defective purchase which is subsequently declared void by the Court, the expenditure must be held to have been made only in his capacity as mortgagee. (Vol 18) 1931 Pat 325 (326): 10 Pat 210 (DB).

[4] A mortgagee of a tenure purchasing it in execution of his own decree cannot recover the amount which he pays to satisfy the rent decrees held by the landlord for rents due prior to his purchase. (Vol 11) 1924 Pat 235 (236) : 2 Pat 890 (D B).

[5] Sale of equity of redemption in favour of prior mortgagee after creation of second mortgage — Prior mortgagee spending over repairs after purchase — Suit for redemption of prior mortgage — *Held*, prior mortgage still subsisted—Repairs were as a mortgagee and the amount spent for it were recoverable with mortgage-debt. (Vol 3) 1916 Mad 859 (862) : 38 Mad 18 (DB).

8. Interest on amount spent.—[1] A mortgagee is entitled to claim interest also on expenses incurred by him for the purposes mentioned therein, unless there is a contract to the contrary. (Vol 12) 1925 Oudh 678 (681) ✠ ('07) 4 All L Jour 176 (180) (DB).

[2] Whether there is a contract to the contrary must in each case, depend upon its own facts. ('12) 10 All L Jour 124 (126) ✠ (Vol 16) 1929 All 777 (778) (DB).

[3] Interest on costs was disallowed even though parties had specifically stipulated for interest. (Vol 8) 1921 Lah 53 (55) (DB).

[4] The rate of interest to be allowed on expenses is the same as that payable on the principal money and where no such rate is fixed by the deed, the section prescribes nine per cent. per annum. (Vol 12) 1925 Oudh 678 (681).

[5] Compound interest is not allowed on expenses. ('96) 23 Cal 228 (247) : 22 Ind App 183 (PC).

Right to proceeds of revenue sale or compensation on acquisition.

[a][73. *(1)* Where the mortgaged property or any part thereof or any interest therein is sold owing to failure to pay arrears of revenue or other charges of a public nature or rent due in respect of such property, and such failure did not arise from any default of the mortgagee, the mortgagee shall be entitled to claim payment of the mortgage-money, in whole or in part, out of any surplus of the sale proceeds remaining after payment of the arrears and of all charges and deductions directed by law.

(2) Where the mortgaged property or any part thereof or any interest therein is acquired under the Land Acquisition Act, 1894, or any other enactment for the time being in force providing for the compulsory acquisition of immoveable property, the mortgagee shall be entitled to claim payment of the mortgage-money, in whole or in part, out of the amount due to the mortgagor as compensation.

(3) Such claims shall prevail against all other claims except those of prior encumbrancers, and may be enforced notwithstanding that the principal money on the mortgage has not become due.]

[a] *Substituted* by the Transfer of Property (Amendment) Act, 1929 (20 [XX] of 1929), S. 38.

SECTION 73 — SYNOPSIS.

1. Scope.
2. Section, whether retrospective.
3. "Is sold owing to failure to pay arrears of revenue," etc.
4. "Arrears."
5. "Other charges of a public nature."
6. Sale by reason of mortgagee's default—Effect.
7. "In whole or in part."
8. "All charges and deductions directed by law."
9. Sub-section (2).
10. Sub-section (3).
11. Mortgagee, if entitled to proceed against property also.
12. Revenue sale set aside—Right of mortgagee to proceed against the property.
13. Surplus proceeds or compensation money withdrawn by mortgagor or other person—Remedy of mortgagee.

1. Scope.—[1] This section is a particular application of the doctrine of substituted securities. (Vol 3) 1916 Mad 323 (325) : 39 Mad 283 (D B) ✠ (Vol 25) 1938 All 221 (224, 225): I L R (1938) All 513 (FB).

[2] According to the doctrine of substituted securities a mortgagee is entitled to a charge upon property which, through no fault of the mortgagee, has taken the place of the mortgaged property. ('10) 33 Mad 429 (434) (DB)✠('71) 16 Suth W R 222 (223) (D B)✠ ('80) 6 Cal 142 (147, 148) (DB).

[3] Where the subject of a mortgage is an undivided share in property and the joint sharers effect a partition, the security of the mortgagee will attach to the share allotted in severalty to his mortgagor. ('74) 1 Ind App 106 (120, 122) (PC) ✠ (Vol 25) 1938 All 221 (225): I L R (1938) All 513 (FB)✠(Vol 27) 1940 P C 11 (14): I L R (1940) Kar (P C) 33 : 67 Ind App 11 : I L R (1940) 1 Cal 255 (PC)✠(Vol 19) 1932 PC 235 (236, 237): 59 Ind App 405 : 13 Lah 702 (P C)✠(Vol 32) 1945 Pat 400 (403) (DB).

[4] The right of a puisne mortgagee to the surplus proceeds on a sale under the first mortgage is based on the doctrine of substituted securities. ('14) 41 Cal 654 (660): 41 Ind App 45 (PC)✠(Vol 25) 1938 All 221 (225): I L R (1938) All 513 (FB).

[5] Where a mortgaged house was pulled down by the mortgagor and the materials were utilised by him for building another house, it was held that the mortgage lien attached, on the principle of substituted securities, to the new building. (Vol 13) 1926 Mad 343 (345) ✠(Vol 13) 1926 Mad 101.

[6] A hypothecatee of chattels cannot recover the proceeds of the sale of the chattel in the hands of the hypothecator, or claim a lien on the property substituted in place of the hypothecated property on the principle of substituted security in the absence of a contract to that effect. (Vol 12) 1925 Mad 275 (278).

[7] Pre-emption sale free of mortgage — Mortgagee was allowed to claim the sale proceeds. (Vol 3) 1916 Nag 84 (85, 86) : 12 Nag L R 90.

[8] Previous decrees for rent are charge enforceable against surplus sale proceeds of patni at sale in execution of decree for rent under Bengal Tenancy Act—The principle of S. 73 applies. (Vol 5) 1918 Cal 265 (270, 271) (DB).

[9] Sale of patni tenure in execution of decree for arrears of rent— Mortgagee has charge on the surplus sale proceeds. (Vol 2) 1915 Cal 24 (27) (DB).

[10] Principle of substituted security applies to pre-emption price obtained on sale of the mortgaged holding under the provisions of C. P. Tenancy Act. (Vol 17) 1930 Nag 139 (142) : 26 Nag L R 312.

[11] The doctrine of substituted security rests on the fact that the mortgagee has lost his mortgage right on the property sold or acquired, through no fault of his own and has, therefore, to be given a right to proceed against the substituted property. ('97) 24 Cal 746 (749) (DB).

[12] The doctrine of substituted security and therefore this section applies where the property has been sold or acquired free of the mortgage (Vol 15) 1928 Oudh 442 (448) : 3 Luck 119 (DB)✠('97) 24 Cal 746 (749) (DB)✠ (Vol 12) 1925 Cal 1145 (1145, 1146) ✠ (Vol 22) 1935 Rang 409 (411) (D B) ✠ (Vol 21) 1934 Pat 209 (209) (DB) ✠ (11) 34 Mad 493 (494) (DB).

[13] The section does not apply where the mortgage has not been extinguished by the sale or acquisition or other transaction. (Vol 25) 1938 Pat 179 (180) : 16 Pat 299 (D B) ✠ (Vol 15) 1928 Oudh 442 (448) : 3 Luck 719 (D B) ✠ (Vol 27) 1940 Nag 149 (154) : I L R (1941) Nag 677.

[14] Where mortgaged property is sold for arrears of revenue or rent but the sale does not by virtue of special provisions of law, extinguish the encumbrance, the mortgagee will not be entitled to the surplus sale proceeds under this section. (Vol 25) 1938 Pat 179 (180) : 16 Pat 299 (D B) ✠ (Vol 30) 1943 Mad 138 (138) ✠ ('88) 15 Cal 546 (552, 553) (D B) ✠ ('99) 26 Cal 966 (970) (DB) ✠(Vol 16) 1929 Pat 209 (210) : 8 Pat 569 (D B) ✠ ('83) 7 Mad 31 (36) (F B) ✠ (Vol 15) 1928 Oudh 442 (447, 448) : 3 Luck 719 (D B).

[But see (Vol 21) 1934 Pat 209 (209, 210) (DB) ✠ (Vol 16) 1929 Cal 392 (394) (D B).]

[15] Where the mortgaged property is sold for arrears of rent and the sale is subject to the encumbrance, but such encumbrance could, by virtue of S. 167 of the Bengal Tenancy Act, 1885, be annulled by the purchaser of the property, it has been held that the

Section 73 — Note 1 *(contd.)*

mortgagee can, by giving up his lien on the property, claim the sale proceeds under this section. ('04) 9 Cal W N 117 (118, 119) (D B).

[16] The purchaser cannot compel the mortgagee to give up his lien and claim the surplus proceeds. ('97) 24 Cal 746 (748, 749) (D B) ✠ ('11) 9 Ind Cas 248 (250) (Cal).

[17] It is not necessary that all the incumbrances on the property which the mortgagee or any other person may have on the property should be extinguished. It is enough if the particular mortgage in respect of which a claim under this section is made, has been extinguished. ('06) 3 Cal L Jour 52 (55, 56) (DB).

[See however (Vol 30) 1943 Mad 138 (138).]

[18] The right under this section to claim surplus proceeds or the compensation money, as the case may be, is over and above the rights which the mortgagee may have under the law to enforce payment of the mortgage-money. (Vol 25) 1938 All 221 (225, 226): I L R (1938) All 513 (F B) ✠ (Vol 11) 1924 Pat 586 (589) : 3 Pat 581 (D B) ✠ (1900) 28 Cal 12 (16, 17) (D B).

2. Section, whether retrospective.—[1] Where a portion of the mortgaged property was acquired under the Land Acquisition Act before the amendment and the compensation amount was received by the mortgagor the mortgagee was held entitled to a personal decree for that amount against the mortgagor by virtue of the provisions of this section. (Vol 25) 1938 All 221 (223, 227) : I L R (1938) All 513 (FB).

3. "Is sold owing to failure to pay arrears of revenue," etc.—[1] When property is sold for failure to pay dues which are not arrears of revenue or other public charges, but which are under the law to be recovered as if they are arrears of revenue, the purchaser does not take it free of incumbrances. (Vol 14) 1927 Rang 289 (293) : 5 Rang 458 (D B) ✠ ('05) 28 Mad 420 (422) (DB) ✠ (Vol 20) 1933 Mad 649 (650, 651) ✠(1900) 22 All 321 (322) (D B).

4. "Arrears." —[1] "Arrears" must be read not only with "revenue" but also with "charges of a public nature or rent." (Vol 22) 1935 Rang 409 (411) (D B).

5. "Other charges of a public nature."—[1] Arrears of loan advanced by the Government under the Agriculturists' Loans Act, XII of 1884, cannot be said to be arrears of charges of a public nature. (Vol 22) 1935 Rang 409 (411) (DB)

6. Sale by reason of mortgagee's default—Effect. —[1] Mortgagee in possession—Contract that mortgagee was not to pay the arrears of revenue — S. 76 (c) does not apply — Sale for such arrears and purchase by mortgagee — Mortgagor cannot redeem. (Vol 3) 1916 Mad 1069 (1070) (D B).

[2] Mortgagee in possession—Income insufficient to meet revenue demands—S. 76 (c) will not apply—Sale for arrears of revenue and purchase by mortgagee—Mortgagor cannot redeem. (Vol 14) 1927 Bom 540 (541, 542) (DB).

[3] If mortgagor purchases the property in a sale for arrears of revenue in his own name or in the name of another, the mortgagee can, in addition to his right to claim surplus sale proceeds under this section, proceed against the mortgaged property for any balance due on the mortgage. ('03) 25 All 371 (374) (DB) ✠ (Vol 14) 1927 Rang 289 (293, 294) : 5 Rang 458 (DB) ✠ (Vol 7) 1920 Cal 26 (33) (DB) ✠ (Vol 2) 1915 Mad 760 (762) (D B) ✠ (Vol 6) 1919 Low Bur 119 (120).

7. "In whole or in part"—[1] Landlord creating mortgage on his land and then patni interest therein—Mortgagee obtaining decree upon mortgage binding even patni interest — Subsequently property sold for arrears of revenue subject to patni interest—Mortgagee taking surplus sale proceeds and claiming to proceed against patni interest for balance — Mortgagee held could proceed against patni interest. ('10) 14 Cal W N 186 (190) (D B).

8. "All charges and deductions directed by law." —[1] The word "charges" means "costs". (Vol 22) 1935 Rang 409 (411) (D B).

[2] When the property is sold under a rent decree under the Bengal Tenancy Act, 1885, the landlord decree-holder is entitled under S. 169 of that Act to recover from the total sale proceeds not only the decretal amount but also the amount of rent that has accrued due, in respect of that tenure, from the date of suit till the date of confirmation of sale; and the mortgagee can take the proceeds only after his amount also is deducted therefrom. ('07) 34 Cal 724 (727, 728) (D B) ✠ (Vol 20) 1933 Pat 257 (258).

9. Sub-section (2).— [1] Sub-section (2) gives the mortgagee rights with respect to the compensation money similar to those given to him with respect to the surplus sale proceeds under sub-section (1). (Vol 25) 1938 All 221 (224) : I L R (1938) All 513 (F B)

[2] Usufructuary mortgage—If property is converted into cash, encumbrance is transferred from original property mortgaged to one substituted to which mortgagee is entitled. (Vol 22) 1935 All 497 (498).

[3] When only a portion of the mortgaged property is acquired, the mortgagee is entitled to claim the whole of the compensation money awarded if such amount is less than the amount due under the mortgage. ('40) 42 Pun L R 40 (40)✠('07) 1907 Pun Re No. 17, p. 81 (84).

10. Sub-section (3).— [1] Amount taken away by subsequent mortgagee — Prior mortgagee can sue him for recovery of same. (Vol 22) 1935 All 497 (498) ✠ ('11) 15 Cal W N 404 (407) (D B)

[But see ('98) 21 All 137 (139, 140) (D B).]

[2] Amount taken away by creditor having personal remedy against mortgagor—Mortgagee can sue him for recovery of amount. (Vol 24) 1937 Pat 307 (311) ✠ ('06) 33 Cal 878 (880) (DB).

[3] A Crown in the position of a subsequent mortgagee is in no better position than any other person who has taken a subsequent mortgage. (Vol 22) 1935 Rang 409 (412) (DB). (Crown was a mortgagee under Agriculturists Loans Act, 1884)

[4] The object of the sub-section is to protect the mortgagee from the loss that may accrue to him by the withdrawal of money by the mortgagor in case the sale or acquisition, as the case may be, takes place before the mortgage-debt becomes due. (Vol 25) 1938 All 221 (225) : I L R (1938) All 513 (F B).

11. Mortgagee, if entitled to proceed against property also. — [1] Portion of mortgaged property sold for Government revenue — Mortgagee can follow properties in hands of purchaser besides balance of sale proceeds. (Vol 21) 1934 Pat 209 (209, 210) (D B)✠ (Vol 24) 1937 Pat 307 (309) ✠ ('06) 33 Cal 878 (880) (D B).

[But see (Vol 25) 1938 Pat 179 (180) : 16 Pat 299 (D B).]

[2] Where a part of the mortgaged property or a particular interest in such property is sold and the sale is, in respect of that part, free from the mortgage, the mortgagee can claim the surplus sale proceeds and for the balance due on the mortgage he can proceed against the remaining property not sold. ('10) 14 Cal W N 186 (190) (DB) ✠ ('80) 6 Cal 142 (147, 148) (DB).

12. Revenue sale set aside—Right of mortgagee to proceed against the property — [1] Where the sale for arrears of revenue is set aside and the property revests in the mortgagor, the mortgagee cannot claim the sale proceeds but can enforce his mortgage against the property. (Vol 12) 1925 Cal 1145 (1146).

74. [Right of subsequent mortgagee to pay off prior mortgagee.] *Repealed by the Transfer of Property (Amendment) Act, 1929 (20 [XX] of 1929), S. 39.*

75. [Rights of mesne mortgagee against prior and subsequent mortgagees.] *Repealed by the Transfer of Property (Amendment) Act, 1929 (20 [XX] of 1929), S. 39.*

Liabilities of mortgagee in possession.

76. When, during the continuance of the mortgage, the mortgagee takes possession of the mortgaged property,—

(a) he must manage the property as a person of ordinary prudence would manage it if it were his own ;

(b) he must use his best endeavours to collect the rents and profits thereof ;

(c) he must, in the absence of a contract to the contrary, out of the income of the property, pay the Government revenue, all other charges of a public nature [a][and all rent] accruing due in respect thereof during such possession, and any arrears of rent in default of payment of which the property may be summarily sold ;

(d) he must, in the absence of a contract to the contrary, make such necessary repairs of the property as he can pay for out of the rents and profits thereof after deducting from such rents and profits the payments mentioned in clause *(c)* and the interest on the principal money ;

(e) he must not commit any act which is destructive or permanently injurious to the property ;

(f) where he has insured the whole or any part of the property against loss or damage by fire, he must, in case of such loss or damage, apply any money which he actually receives under the policy or so much thereof as may be necessary, in reinstating the property, or, if the mortgagor so directs, in reduction or discharge of the mortgage-money ;

Section 73 *(contd.)*

13. Surplus proceeds or compensation money withdrawn by mortgagor or other person—Remedy of mortgagee.—[1] Compulsory acquisition of property —Compensation money withdrawn by mortgagor or other person—Mortgagee can enforce by suit his mortgage security against the fund withdrawn. (Vol 25) 1938 All 221 (226) : I L R (1938) All 513 (F B) ✠ (Vol 29) 1942 Pat 185 (187).

[2] It may be that in the event of the withdrawal of the surplus sale proceeds or compensation money by the mortgagor the mortgagee has a cause of action based on the provisions of S. 73 to sue for the recovery of money withdrawn but even then his right as a mortgagee remains intact. (Vol 25) 1938 All 221 (226) : I L R (1938) All 513 (FB).

SECTION 76 — SYNOPSIS.

1. Scope.
2. "During the continuance of the mortgage."
3. "Takes possession."
4. Clause (a).
5. Clause (b).
6. Clause (c)
7. Clause (d).
8. Clause (e).
9. Clause (f)—Insurance.
10. Clause (g)—Mortgagee must keep accounts.
11. Accounts when to be taken.
12. Proof of accounts.
13. Failure to keep accounts—Effect of.
14. Clause (h)—Mode of taking accounts.
15. "Fair occupation rent."
16. Expenses of management and collection of rents and profits.
17. "Surplus, if any, shall be paid to the mortgagor."
18. Clause (i).
19. Last paragraph.

1. Scope.—[1] This section enumerates the duties of a mortgagee who takes possession of the mortgaged property during the continuance of the mortgage. (Vol 16) 1929 P C 256 (259) (P C).

[2] The duties enumerated are between the mortgagee and the mortgagor and not as between himself and third parties. ('38) I L R (1938) 1 Cal 21 (24) (DB) ✠(Vol 28) 1941 Mad 401 (401).

[3] The section deals mainly with the debit side of the mortgagee's account, while S. 72 deals with the credit side ('38) I L R (1938) 1 Cal 21 (24) (DB) ✠(Vol 10) 1923 Mad 533 (535) 47 Mad 7 (DB).

[4] The section does not lay down any new principles; the rules laid down in the section were recognised even before the passing of the Transfer of Property Act (Vol 11) 1924 P C 102 (106): 46 All 269: 27 Oudh Cas 72: 51 Ind App 157 (P C). (Clauses (a) and (c)) ✠(Vol 22) 1935 Pat 148 (149) (D B). (Clauses (g) and (h))

2. "During the continuance of the mortgage."—[1] The expression "during the continuance of the mortgage" means "from the time the contract establishing the relationship of mortgagor and mortgagee has been entered into and till the time the mortgage comes to an end or is extinguished. (Vol 19) 1932 Oudh 123 (132): 7 Luck 454 (DB).

[2] It applies to usufructuary mortgages. (Vol 16) 1929 P C 256 (259) (P C).

[But see (Vol 16) 1929 All 348 (349).]

[3] Simple mortgage — Decree upon — Mortgagee obtaining under decree possession of mortgaged property instead of judicial sale—Decree held did not import foreclosure and possession obtained thereunder was as mortgagee and involved liability to account. ('96) 19 Mad 249 (254) : 23 Ind App 32 (P C) ✠('11) 35 Bom 204 (211, 212) (DB).

[4] The section does not apply where the mortgagee enters into possession when the mortgage has become extinct. (Vol 5) 1918 Pat 421 (422) (DB).

3. "Takes possession."—[1] A mortgagee holding possession through an agent, will be liable for the acts of the agent. (Vol 24) 1937 Bom 483 (486) (D B) ✠('81) 1881 All W N 10 (10) (DB).

(g) he must keep clear full and accurate accounts of all sums received and spent by him as mortgagee, and, at any time during the continuance of the mortgage, give the mortgagor, at his request and cost, true copies of such accounts and of the vouchers by which they are supported;

(h) his receipts from the mortgaged property, or, where such property is personally occupied by him, a fair occupation-rent in respect thereof, shall, after deducting the expenses [a][properly incurred for the management of the property and the collection of rents and profits and the other expenses] mentioned in clauses *(c)* and *(d)*, and interest thereon, be debited against him in reduction of the amount (if any) from time to time due to him on account of interest [b][*] and, so far as such receipts exceed any interest due, in reduction or discharge of the mortgage-money, the surplus, if any, shall be paid to the mortgagor;

(i) when the mortgagor tenders, or deposits in manner hereinafter provided, the amount for the time being due on the mortgage, the mortgagee must, notwithstanding the provisions in the other clauses of this section, account for his [c][*] receipts from the mortgaged property from the date of the tender or from the earliest time when he could take such amount out of Court, as the case may be [a][and shall not be entitled to deduct any amount therefrom on account of any expenses incurred after such date or time in connection with the mortgaged property].

If the mortgagee fail to perform any of the duties imposed upon him by this section, he may, when accounts are taken in pursuance of a decree made under this chapter, be debited with the loss, if any, occasioned by such failure.

Loss occasioned by his default.

[a] *Inserted* by the Transfer of Property (Amendment) Act, 1929 (20 [XX] of 1929), S. 40. [b] The words "on the mortgage-money" were *repealed*, *ibid.* [c] The word "gross" was *repealed*, *ibid.*

Section 76—Note 3 *(contd.)*

[2] Where the mortgagor had, as a condition of the mortgage, to appoint the mortgagee's nominee as manager, the possession of the manager is as an agent of the mortgagor and not of the mortgagee. (Vol 8) 1921 P C 118 (122, 123): 47 Ind App 265 (P C).

[3] Where the mortgagee, entitled to possession under the mortgage, leases the property back to the mortgagor, it is the mortgagee who is in possession. (Vol 20) 1933 P C 178 (179, 180): 14 Lah 466: 60 Ind App 273 (P C).

[4] In order that the section must apply the mortgagee's possession must be *qua* mortgagee. (Vol 28) 1941 Pat 296 (298) (D B) ✠(Vol 4) 1917 Oudh 42 (44): 19 Oudh Cas 328.

[5] The Courts are slow to decide that possession *qua* mortgagee has been taken. (Vol 15) 1928 Cal 158 (162) (DB).

[6] Where the mortgagee takes possession as auction-purchaser, he is not liable to account. (Vol 23) 1936 Nag 293 (294): I L R (1936) Nag 19.

[7] Where the mortgagee is in possession as lessee, he cannot be charged as a mortgagee in possession. (Vol 28) 1941 Pat 296 (298) (DB) ✠(Vol 7) 1920 Pat 485 (486): 5 Pat L Jour 492 (DB)

[8] Where the mortgage and the lease form part of the same transaction, the mortgagee's possession is as mortgagee. (Vol 1) 1914 Mad 661 (661) (DB).

[9] Where the mortgagees were placed in possession under a sudbharna bond but no consideration was paid by the mortgagee, he was held in possession *qua* mortgagee. (Vol 28) 1941 Pat 452 (455).

[10] Mortgage by conditional sale — Mortgagee on failure of the mortgagor to pay mortgage-money on due date, taking possession with the consent of the morgagor— *Held* that the arrangement did not change the relationship between the parties but was merely a mode of satisfaction of the debt. (Vol 4) 1917 Cal 217 (218) (DB).

[11] Where the mortgagee, during the continuance of the mortgage, enters into possession wrongfully, the law will treat his possession as that of a mortgagee and the principle of this section has been applied. (Vol 4) 1917 Nag 33 (35, 36) ✠('06) 2 Nag L R 92 (93, 94) ✠(Vol 13) 1926 S nd 145 (148): 20 Sind L R 277.

[12] Section 76 is not in terms restricted to mortgagee who takes possession as mortgagee. The principle of it applies to all mortgagees who get into possession by way of further security for the payment of their debt. (Vol 14) 1927 Mad 964 (965).

4. Clause (a). — [1] The duty of the mortgagee under cl. (a) is similar to the care required from a trustee. *See* ('09) 7 Mad L Tim 148 (150) (D B) ✠('10) 15 Cal W N 776 (780) (DB).

[2] The mortgagee in possession is not a trustee for the mortgagor's cultivable land, though it must be put to the best use. (Vol 27) 1940 Bom 287 (288): I L R (1940) Bom 645 (DB).

[3] The mortgagee is free to enter into any arrangement for the right and profitable administration of the estate. (Vol 14) 1927 All 552 (553, 554): 49 All 658 (DB).

[4] The mortgagee may occupy the land himself and cultivate it to the best advantage. (Vol 6) 1919 Pat 392 (394, 395).

[5] The mortgagee may lease out the mortgaged property. (Vol 14) 1927 All 552 (554): 49 All 658 (DB) ✠(Vol 6) 1919 Pat 392 (394, 395) ✠(Vol 24) 1937 Cal 763 (764): I L R (1937) 2 Cal 181 (DB).

[6] If the mortgaged property is in the possession of an annual tenant, the mortgagee can, in exercise of his power of management, eject the tenant without the consent of the mortgagor. (Vol 14) 1927 Bom 145 (148) (DB).

[7] Mortgagee in possession cannot settle the land beyond the term of the mortgage. (Vol 16) 1929 Pat 630 (632) (DB) ✠('10) 8 Ind Cas 466 (467, 468): 1 Upp Bur Rul 14 ✠('11) 8 All L Jour 802 (803) ✠(Vol 24) 1937 Cal 763 (764): I L R (1937) 2 Cal 181 (DB) ✠(Vol 3) 1916 Mad 911 (911, 912) (DB).

5. Clause (b). — [1] Under this clause, the law requires a mortgagee to be diligent in realizing the rents and profits. (Vol 24) 1937 Bom 483 (486) (DB).

[2] The mortgagee is not chargeable for the gross rentals as shown in the jamabandi. ('03) 25 All 287 (295): 30 Ind App 66 (P C).

Section 76 — Note 5 *(contd.)*

[3] Mortgagee in possession is only liable for what he received, unless it be proved that, but for his wilful default, he might have received more (Vol 4) 1917 Oudh 190(192)✠(Vol 24)1937 Bom 483 (486 487) (DB).

[4] The fact that the mortgagee could have got a better rent does not necessarily make out a case of wilful default. ('07) 3 Nag L R 106 (109, 110).

[5] Where the mortgagee fails to recover rent from tenants and allows it to become irrecoverable he is liable for wilful default. (Vol 14) 1927 Oudh 170 (173) (DB) ✠(Vol 6) 1919 Mad 59 (61): 41 Mad 1043.

[6] A mortgagor of land on which there are sindi trees cannot claim any profits on account of tadi, which it is possible to tap from the trees, though he can claim the lease money if the trees were leased in any year, or the income, if mortgagee tapped them personally. (Vol 10) 1923 Nag 137 (139).

[7] Where the mortgagor is in occupation as lessee or as agent and obstructs the mortgagee from making the best use of the property, the mortgagee is not accountable on the basis of wilful default (Vol 30) 1943 Mad 62 (64): I L R (1943) Mad 430 (D B) ✠(Vol 24) 1937 All 762 (763) (DB) ✠(Vol 27) 1940 Lah 333 (334): I L R (1940) Lah 658 (D B) ✠(Vol 24) 1937 Bom 483 (488) (DB).

[8] A mortgagee is not liable for his failure to make illegal collections. (Vol 4) 1917 Oudh 141 (142).

6. Clause (c).—[1] Where the mortgagor agrees to make payments referred to in cl. (c) this clause has no application. (Vol 3) 1916 Mad 1069 (1070) (DB) ✠(Vol 21) 1934 All 888 (889) ✠(Vol 3) 1916 Mad 859 (861, 862): 38 Mad 18 (DB).

[2] Where the obligation to pay the Government revenue is, under the instrument, on the mortgagor, if the mortgagor does not pay it, and the mortgagee had to pay it in order to protect the mortgaged property, the mortgagee is competent under S. 72 to add the money so paid to the principal money—But where the mortgagee under such circumstances is also entitled to sue the mortgagor on his covenant in the deed of mortgage for the amount paid for the mortgagor and the mortgagee elects to pursue this remedy, the remedy given to him by S. 72 is not available, the two remedies not being concurrent. ('98) 20 All 401 (408) (DB)✠('81) 1881 All W N 66 (66, 67) (DB).

[3] Under the mortgage receipts of property to be taken in lieu of interest or interest and a defined portion of the principal—Mortgagee is still liable to make payments under this clause. (Vol 27) 1940 Pat 579 (580).

[But see (Vol 10) 1923 All 433 (434): 45 All 388 (DB).]

Government revenue and other public charges.

[4] Government revenue due upon other lands but covered by the same pattah as the mortgaged property is revenue due upon the mortgaged land. (Vol 2) 1915 Mad 481 (482) (DB).

[But see ('90) 1890 Bom P J 211 (DB). (Case before the Act was extended to Bombay—Payment of cesses on land other than those included in the mortgage — Mortgagee is not entitled to debit it against the mortgagors.)]

[5] Where a mortgage-deed provided that the income of the property after deducting the revenue should be taken in lieu of interest, held that the mortgagee was bound to pay the revenue by the terms of the mortgage whether there was profit or loss. (Vol 1) 1914 Nag 16 (17): 10 Nag L R 9.

[6] The mortgagee is bound to pay the revenue that might be imposed for the first time during his possession. (Vol 6) 1919 Oudh 50 (53): 22 Oudh Cas 270 (DB).

[7] Government revenue enhanced during mortgagee's possession — Burden of enhancement is to fall on mortgagee in the absence of contract to the contrary. (Vol 30) 1943 Mad 627 (629) (DB) ✠ (Vol 13) 1926 Mad 405 (405)✠(Vol 6) 1919 Oudh 50 (52, 53): 22 Oudh Cas 270 (DB)✠(Vol 12) 1925 Oudh 678 (681).

[But see ('06) 8 Bom L R 350 (353, 354) (DB (Apart from special stipulation, a mortgagee is under no liability to pay assessment as between himself and his mortgagor.)]

[8] Mortgage deed providing that the mortgagee should pay a specified sum as Government revenue and appropriate the balance towards interest — Revenue increased during his possession — *Held* there was a contract to the contrary and the mortgagor was liable to pay the enhanced portion of the revenue. ('10) 8 Ind Cas 845 (846) (DB) (Mad)✠(Vol 2) 1915 Mad 100 (101).

[9] Where a condition in a usufructuary mortgage deed was that if owing to an enhancement of Government revenue the profits of the mortgaged property became less than Rs. 252, the mortgagor must make good the deficiency in profits at the time of redemption it was held that the mortgagee was entitled to claim the difference between original revenue and the enhanced revenue only if the mortgagee could show that the profits had become less than Rs. 252 but not otherwise. (Vol 4) 1917 Oudh 16 (18) (DB).

[10] Where the rents and profits are previously ascertained and their appropriation is definitely arranged by the deed of mortgage, any other payment out of them which would vary that method of appropriation is to be inferred not to have been contemplated; in other words, there is as regards such other payments (increase in the land revenue) a contract to the contrary. ('31) 1931 Mad W N 595 (599).

[11] Where the mortgagee agreed to pay the Government revenue and take the balance himself but the amount of revenue was not specified and the possibility of the enhancement of revenue was within the contemplation of the parties, it was held that the mortgagee was liable to pay the enhanced revenue. (Vol 4) 1917 Oudh 186 (187).

[12] Under a kanom the kanomdar agreed to pay the jenmi a certain fixed rent after deducting the interest on the kanom amount and the Government revenue payable — The Government revenue was increased — *Held* that the kanomdar must pay the increased assessment himself as the kanom deed gave him a right to the increase in the income of the property. (Vol 1) 1914 Mad 151 (151) (DB).

[13] Under the terms of a mortgage the mortgagee was to pay the Government revenue — The bond provided that if the Government revenue be enhanced or decreased the mortgagor would be liable for it — *Held* the mortgagor by this clause had not agreed to pay the enhanced revenue year by year separately — But the intention of the parties was that if the Government revenue was increased the mortgagor would be entitled to less by way of malikana. ('10) 32 All 612 (619): 37 Ind App 182 (P C).

[14] Takavi advance granted to the mortgagor—Mortgagee during whose possession it accrues due is bound to pay it. (Vol 3) 1916 Bom 108 (109): 40 Bom 483 (DB)✠(Vol 25) 1938 Pat 196 (198) (DB).

Rent.

[15] Mortgage with possession of lease-hold—Duty of mortgagee to pay rent under this clause, does not give lessor right to recover rent directly from mortgagee. ('38) I L R (1938) 1 Cal 21 (33) (DB)✠(Vol 12) 1925 Bom 330 (330) ✠ (Vol 28) 1941 Mad 401 (401) ✠ (Vol 15) 1928 Nag 147 (148) ✠ (Vol 5) 1918 Mad 425 (426): 40 Mad 1111 (DB)✠(Vol 14) 1927 Cal 725 (729): 54 Cal 813 (DB).

Section 76 — Note 6 *(contd.)*

[But see ('05) 29 Bom 391 (399) (DB) ✠ (Vol 25) 1938 Pat 196 (198) (DB).]

Arrears of rent.

[16] The word "summarily" indicates that the proceedings for realization of rent by sale of the property are of a summary nature as, for instance, in the case of a certificate proceeding under the Public Demands Recovery Act. It is not meant to apply to cases where sales are held under the provisions of the tenancy law according to which the property itself and not merely the right, title and interest of the mortgagor will pass. (Vol 25) 1938 Pat 196 (198) (DB).

[17] The mortgagee in possession is liable to pay not only the arrears of rent that have accrued due during his possession but also the arrears of rent accrued due before his taking possession. (Vol 6) 1919 Cal 309 (311) (DB). (('88) 11 Mad 234, *Rel on.*)

[But see (Vol 25) 1938 Pat 196 (198) (DB)]

Failure to make payments.

[18] Where the mortgagee in possession who is bound to pay the rent or the revenue fails to pay the same and the mortgagor is obliged to pay it himself, the mortgagor, in the redemption suit can ask for the account which would debit the mortgagee with the amount paid by the mortgagor. (Vol 30) 1943 Oudh 433 (434)✠(Vol 14) 1927 All 713 (713)✠(Vol 14) 1927 Mad 59 (59).

[19] Where mortgagor is compelled to make payments, he can recover them by a suit based on S. 69, Contract Act. (Vol 14) 1927 All 713 (713).

[20] Where the mortgagor voluntarily pays the rent to the lessor, the mortgagor would be entitled to obtain a money decree for three years' rent only, against the mortgagee under S. 70, Contract Act. But he cannot claim an account under the last paragraph of this section there being no loss occasioned to him. (Vol 27) 1940 Pat 579 (580, 581).

[21] Where the mortgage provided that the mortgagee was to appropriate, in lieu of interest, the balance of the profits remaining after payment of rent to the lessor, and that the mortgagor was to redeem on payment of the principal, and the mortgagee escaped paying rent for several years, it was held that the mortgagee, and not the mortgagor, was entitled to the benefit of such non-payment and that the mortgagor could not claim a reduction of the principal. ('11) 10 Ind Cas 113 (113, 114) (All) ✠ (Vol 16) 1929 Pat 37 (39) : 7 Pat 44 (DB). (Malikana.) ✠(Vol 28) 1941 Mad 549 (550) (DB). ((Vol 27) 1940 Mad 686, *Reversed.*) ✠ (Vol 7) 1920 Pat 66 (67)✠(Vol 21) 1934 Cal 149 (150) (DB).

7. Clause (d). — [1] Where loss is caused to the mortgagor by the mortgagee's failure to make the necessary repairs referred to in this clause it may be debited against the mortgagee in the accounts to be taken in the settlement of the mortgage. ('92) 15 Mad 290 (291) (DB).

[2] Where mortgagee spends money out of his own pocket he cannot claim repayment from the mortgagor under this clause but will be allowed to add the expenditure to the principal money under S 72, clause (b) if it is incurred for the preservation of the property from destruction. (Vol 16) 1929 All 777 (778) (DB).

[3] Expenditure incurred in laying water-pipes in the house mortgaged was held not for necessary repair. (Vol 1) 1914 Mad 151 (152) (DB).

[4] Expenditure incurred in preserving the irrigation system of a zamindari has been held to be for keeping the property under repairs. (Vol 3) 1916 Pat 96 (96) : 1 Pat L Jour 589 (DB).

8. Clause (e).— [1] Mortgagee in possession must not commit waste on the property. (Vol 19) 1932 All 500 (502) (DB).

[2] A duty is cast on the mortgagee to see that the property is not lost by any encroachment. (Vol 12) 1925 All 576 (577).

[3] Mortgagee granting occupany rights on mortgaged land—Land cannot be so valuable to mortgagor-landlord as it was before those rights came into existence. (Vol 11) 1924 All 153 (155) : 46 All 115 (DB).

[4] Mortgagee in possession can grow any crop on the land and cut it away before the land is handed over to the mortgagor. (Vol 12) 1925 All 794 (794).

[5] Where the mortgagee in possession has planted trees he is entitled to remove them before handing over the land to the mortgagor. (Vol 13) 1926 Bom 595 (596) : 50 Bom 692 (DB)✠ (Vol 12) 1925 All 794 (794).

[6] Mortgagee in possession commits waste if he cuts down existing trees. (Vol 13) 1926 Bom 595 (596) 50 Bom 692 (DB) ✠ (Vol 6) 1919 Oudh 125 (125, 126)

[*See also* (Vol 33) 1946 Oudh 106 (108) : 21 Luck 48. (Cutting of babul trees standing on mortgaged property amounts to waste.)]

[7] Mortgagee in possession does not commit waste by cutting bamboo clumps provided the bamboos were, at the time when they were cut, ripe for cutting. (Vol 16) 1929 Oudh 124 (124).

[8] Where the land mortgaged is not agricultural land its utility is not injured by the roots or stumps of trees planted by the mortgagee. (Vol 13) 1926 Bom 595 (596) : 50 Bom 692 (DB).

[8a] In cases of possessory mortgages, the mortgagee is invested with the right to build upon the land provided it does not amount to waste : (Vol 33) 1946 Oudh 101 (102) : 21 Luck 43 (DB). (Amount spent on constructions constitutes a loan and is recoverable as mortgage money at the time of redemption)

[9] House with common partywall—Owner mortgaging two portions to separate mortgagees *A* and *B* —*A* interfering with common wall — *B* held could institute suit against *A* to compel him to repair interference ('94) 16 All 386 (387) (DB).

[10] Where the mortgagee in possession commits waste he may, when accounts are taken in pursuance of a decree for redemption, be debited with the loss occasioned. (Vol 16) 1929 Oudh 125 (125, 126) ✠ (Vol 11) 1924 All 153 (154) : 46 All 115 (DB).

9. Clause (f)—Insurance.—[1] Mortgaged property insured by mortgagor — Damage by fire — To entitle the mortgagee to a claim on the insurance money there must be a covenant not only to insure but to insure for the benefit of the mortgagee or the policy must be properly assigned to the mortgagee by the mortgagor. (Vol 10) 1923 Rang 6 (7, 8) : 11 Low Bur Rul 294 (DB).

[2] Agreement by mortgagor to keep mortgaged property insured against fire— Insurance money received under policy to be applied for reinstating property — Failure by mortgagor to insure— Insurance by Receiver in mortgage suit —Money received under insurance held was not governed by terms of mortgage. (Vol 5) 1918 Cal 450 (451) (DB).

10. Clause (g)—Mortgagee must keep accounts.— [1] Mortgagee in possession is under a statutory duty to keep and render accounts of all the sums received and spent by him as a mortgagee. (Vol 7) 1920 P C 8 (10,12) : 16 Nag L R 94 (PC) ✠ (Vol 28) 1941 Oudh 84 (86).

[2] The Courts are loath to exonerate the mortgagee from the liability to account under S. 76 (g). (Vol 19) 1932 Oudh 123 (132) : 7 Luck 454 (DB).

[3] The usufruct of the property represents the mortgagor's money in the hands of the mortgagee who is bound to render account at the time of redemption

Section 76 — Note 10 *(contd.)*

(Vol 27) 1940 Mad 686 (687) (*Reversed on another point in* (Vol 28) 1941 Mad 549.)

[4] Mortgagee in possession cannot contract himself out of the obligation under this clause. (Vol 30) 1943 Oudh 38 (40) : 18 Luck 273 (DB) ✠ (Vol 18) 1931 All 562 (566, 567) : 54 All 205 (FB) ✠ (Vol 22) 1935 Pat 148 (148, 149) (DB).

[But see ('11) 9 Ind Cas 978 (978) (DB) (All).]

[5] Mortgagee can be exonerated from the liability to account if his case falls under S. 77. (Vol 18) 1931 All 562 (566, 567): 54 All 205 (FB). (('10) 7 All L Jour 787, *Overruled.*)✠(Vol 19) 1932 Oudh 123 (132): 7 Luck 454 (DB) ✠ (Vol 29) 1942 Oudh 203 (204) : 17 Luck 727 (DB) ✠ (Vol 22) 1935 Pat 148 (148, 149) (DB) ✠ (Vol 16) 1929 Pat 571 (572, 573) (DB).

[6] Usufruct to be set off against interest — No burden on mortgagee to keep accounts—Covenant that not mortgagee but mortgagor would be liable for increase in assessment would not require mortgagee to keep accounts— But the question of such mortgagee accounting for profits may arise under the U. P. Debt Redemption Act. (Vol 31) 1944 All 232 (233) : I L R (1944) All 349 (DB).

[7] Whether S. 76 (b) or S. 77 applies to a particular case is to be determined upon the facts of that case. —It is not a question of public importance or of private importance which will serve as a precedent for cases likely to arise in future, for the purpose of S. 109 (c), Civil P. C. (Vol 31) 1944 Oudh 238 (239) (DB).

[8] Fact that the mortgagee in possession besides the income of the mortgaged property is to receive fixed annual sum from the mortgagor in lieu of interest cannot alter the position To both cases, namely where the mortgagee is to take income in lieu of interest and where he is to receive fixed annual sum from mortgagor in addition, S. 76 (b), T. P. Act, does not apply and the receipt by the mortgagee in lieu of interest cannot be said to be a payment so as to attract S. 8 (2), Madras Agriculturists' Relief Act. (Vol 30) 1943 Mad 100 (103): I L R (1943) Mad 195 (DB).

[9] Whether S. 77 or S. 76 (b) applies is question of law—Mention of rate of interest in deed held not conclusive as to liability to account on mortgagee's part. (Vol 29) 1942 Oudh 499 (501) : 18 Luck 484 (DB).

[10] Usufructuary mortgage — Mortgagee entitled to appropriate rents and profits in lieu of interest — Subsequent simple mortgagee redeeming prior mortgagee— *Held* simple mortgagee was not liable to account. (Vol 29) 1942 Oudh 189 (191) : 17 Luck 297 (DB).

[11] Usufructuary mortgage of certain villages— Interest fixed at 6 per cent. per annum — Out of gross rentals, which was stated at fixed sum, mortgagee to pay revenue and interest due to prior mortgagee — Net profits to be appropriated by mortgagee towards interest on his mortgage and collection charges and balance to be paid over to mortgagor as surplus profits — Stipulation in supplementary deed that nazarana and saer income not to be accounted for but appropriated by the mortgagee as his own income : *Held*, mortgage did not fall under S. 77 and mortgagee was therefore liable to account for saer and nazarana income to mortgagor, in spite of the stipulation in the supplementary agreement to the contrary. (Vol 30) 1943 Oudh 38 (40) : 18 Luck 273 (DB).

[12] The accounts to be kept by the mortgagee must be clear, full and accurate. They must be detailed and supported by the vouchers (Vol 20) 1933 P C 85 (87) P C ✠ (Vol 14) 1927 Oudh 199 (201) : 2 Luck 564 (DB).

[13] The accounts produced by mortgagee showing simply in one lump sum the alleged income from the zamindari for each year or part of the year, but no detailed account of all the incomings and all the outgoings —*Held* no account. (Vol 8) 1921 All 197 (197) (DB).

[14] The fact that the realisations made by the mortgagee are unauthorised or wrongful does not qualify the mortgagee's liability to render account in respect of such realisations. (Vol 14) 1927 Oudh 199 (202) : 2 Luck 564 (DB) ✠ (Vol 19) 1932 Oudh 255 (261) : 8 Luck 40 (DB)✠('11) 14 Cal L Jour 507 (513, 514) (DB).

[15] The account required of the mortgagee is independent of those to be kept by any one else, such as a patwari of the village and cannot be dispensed with on the ground that the latter is keeping them. (1864) 1864 Suth W R (Gap. No) 177 (178) (DB) ✠ (Vol 19) 1932 Oudh 255 (261) : 8 Luck 40 (DB) ✠ (Vol 19) 1932 Oudh 123 (133) : 7 Luck 454 (DB).

[16] Mortgagee is required to keep and render accounts only in respect of that portion of the property of which he has taken possession. (Vol 24) 1937 Bom 483 (486) (DB).

11. Accounts when to be taken.—[1] Accounts between the mortgagor and mortgagee are to be settled at the time of redemption. (Vol 4) 1917 Oudh 200 (202): 20 Oudh Cas 25 (DB).

[2] A suit merely for accounts is not maintainable. (Vol 30) 1943 All 109 (110, 111)✠('81) 5 Bom 614 (616) (DB).

[3] A direction for taking accounts in accordance with this section must be made in the decree and not be left to the commissioner. (Vol 27) 1940 Bom 287 (287) :IL R (1940) Bom 645 (DB)✠(Vol 28) 1941 Bom 28 (29).

12. Proof of accounts. — [1] It is for the mortgagee to explain the accounts put forward and to support them in such a way as to make it reasonable for a prudent man to accept them. ('02) 26 Bom 363 (372) (DB)✠(Vol 13) 1926 Mad 955 (957) (DB).

13. Failure to keep accounts—Effect of. — [1] Mortgagee in possession failing to keep accounts — Court will draw general presumption against him. (Vol 14) 1927 Oudh 199 (201) : 2 Luck 564 (DB) ✠ (Vol 28) 1941 Oudh 84 (87).

[2] Mortgagee in possession failing to keep accounts —Presumption against mortgagee should not be carried beyond reasonable limits. (Vol 21) 1934 Oudh 104 (106): 9 Luck 456 (DB)✠('69) 2 Beng L R (P C) 44 (58) (P C).

[3] Mortgagee in possession failing to keep accounts —Presumption against mortgagee must not be conjectures and not grounded on data which the evidence shows to be inexact. (Vol 11) 1924 Oudh 92 (96): 27 Oudh Cas 250 (DB).

[4] Mortgagee in possession failing to keep accounts —All statements of mortgagor against mortgagee must not be taken as true — Court must take best evidence and decide upon it. ('68) 9 Suth W R 275 (275, 276) (DB)✠('21) 63 Ind Cas 598 (600) (DB) (Lah).

[5] It cannot be laid down as a hard and fast rule that whenever a mortgagee has failed in the obligation imposed on him by S. 76 (g) he must necessarily be made liable on the basis of the gross rental. It is conceivable that there may be cases in which the raising of the presumption that all the tenants have paid their rents may not be justified (Vol 21) 1934 Oudh 104 (105, 106) : 9 Luck 456 (DB) ✠ (Vol 20) 1933 P C 85 (87) (PC). (It was presumed that rent recovered by mortgagee was equal to interest due to him.) ✠ (Vol 32) 1945 All 48 (52) : I L R (1945) All 42 (DB). (Complete failure on mortgagee's part to maintain accounts of some sort not shown — Point not raised on behalf of mortgagor—Mortgagee not deprived of interest entirely.)

14. Clause (h)—Mode of taking accounts.—[1] The method followed in taking accounts between mort-

Section 76 — Note 14 *(contd.)*

gagor and mortgagee is to ascertain the gross collections at the end of a certain period, usually a year, and after deducting the necessary outlay on account of revenue, expenses of collection and the preservation of estate, the balance goes to reduce the interest, and if there is a surplus over, it goes to the reduction of the principal, the account being closed at the end of each period. ('84) 6 All 303 (309) (DB) ✠ ('21) 63 Ind Cas 598 (600) (DB) (Lah)✠('72) 10 Beng L R 386 (393) (PC).

[But see ('10) 8 Mad L Tim 420 (424) (DB). (The rents and profits have first to be applied towards principal and then towards interest.)]

[2] The practice of the Courts is to make rests at the end of each year. (Vol 22) 1935 Pat 148 (149) (DB)✠ ('21) 63 Ind Cas 598 (600) (DB) (Lah).

[*See* ('86) 6 Cal 377 (380) (DB). (Half yearly rests made.)]

[3] Usufructuary mortgage — Rents and profits to be taken in lieu of interest—Rate of interest not specified — Full amount of consideration not advanced — Redemption suit — Contention on behalf of mortgagor that mortgagee not having advanced full consideration, mortgagee was entitled to appropriate only proportionate amount of rents and profits towards interest and balance had to be applied towards principal amount—Principle of S. 76 (b) *held* had no application — Case was more governed by S. 77. (Vol 34) 1947 Mad 197 (200) (DB).

15. "Fair occupation rent." — [1] There is no question of occupation rent if the mortgagee lets the property to tenants. (Vol 16) 1929 Pat 571 (573) (DB).

[2] A mortgagee personally occupying and cultivating the land may be charged with either an occupation rent or with the net profits of his cultivation as, under the circumstances of the case may seem just. ('10) 6 Nag L R 109 (112, 113).

16. Expenses of management and collection of rents and profits.—[1] The expenses incurred in digging a new well held could be allowed under the head of management expenses. ('95) 17 All 282 (284). (The well was built with the permission of the mortgagor)

[2] The general practice is to allow a commission of ten per cent. on the gross rental to cover the cost of collection (Vol 28) 1941 Oudh 498 (503) : 16 Luck 812 (DB)✠(Vol 28) 1941 Oudh 380 (383) (DB).

[3] A mortgagee is allowed expenses *bona fide* incurred by him for realizing rent from the tenants through Court. (Vol 1) 1914 Oudh 330 (331) : 17 Oudh Cas 47 ✠ (Vol 28) 1941 Oudh 498 (502) : 16 Luck 812 (DB).

[But see (98) 21 Mad 32 (33) (DB).]

[4] A mortgagee in possession cannot charge anything by way of salary or allowance for his personal services. (04) 6 Bom L R 590 (592) (DB) ✠ ('11) 13 Bom L R 162 (183).

[5] Where one of the co-mortgagees resided on the mortgaged property and managed it for the benefit of himself and his co-mortgagees, *held* that he could not charge anything, for those services. ('99) 26 Cal 1 (10): 25 Ind App 241 (P C).

[6] Mortgagee in possession may, in the deed itself, stipulate for a payment for his personal work and effect will be given to the stipulation if it is free from any circumstance of oppression or unfair dealing. ('11) 13 Bom L R 162 (191, 193).

17. "Surplus, if any, shall be paid to the mortgagor."—[1] As a general rule, interest will be allowed on the surplus retained in the hands of the mortgagee after the discharge of interest and principal on equitable grounds. (Vol 32) 1945 Mad 297 (298): ILR (1946) Mad 255 (DB)✠('09) 1 N W P H C R 111 (113, 114) (DB) ✠ (Vol 19) 1932 Oudh 123 (134) : 7 Luck 454 (DB) ✠ ('27) 3 Oudh W N (Supp) 277 (281) (DB) ✠ ('96) 16 Bom 141 (145).

[2] Surplus in the hands of mortgagee—Interest runs from the date of the institution of a suit for redemption. (Vol 11) 1924 All 881 (883, 884): 46 All 897 (DB)✠('83) 7 Bom 185 (187) (DB).

[But see (Vol 32) 1945 Mad 297 (298) : I L R (1946) Mad 255 (DB)✠(Vol 7) 1920 Nag 55 (59, 60). (Interest runs from time when debt stands discharged.)✠('96) 16 Bom 141 (147).]

18. Clause (i). — [1] The liability of the usufructuary mortgagee to account for the *mesne profits* arises only when money is tendered to him. The money must actually be tendered and a notice sent by the mortgagor asking the mortgagee to come to his place and take the money cannot be a tender of money and no liability of the mortgagee arises to account for the profits of the land. (Vol 16) 1929 Rang 271 (271).

[2] Decree for redemption directing mortgagee to pay *mesne profits* — After amount due under redemption decree was tendered, mortgagee *held* was not entitled to credit for public taxes paid after the tender. (Vol 33) 1946 Mad 464 (464).

[3] The word "expenses" is not limited to what has to be spent in connection with the management and in respect of the collection of rents and profits. It includes public taxes. (Vol 33) 1946 Mad 464 (464).

[4] Filing of a suit for redemption amounts to an offer to redeem and, therefore, a mortgagee who contests the redemption suit unsuccessfully is liable to account for what he receives after the institution of the suit. (Vol 4) 1917 Low Bur 122 (123) : 9 Low Bur Rul 18.

19. Last paragraph.—[1] The section provides a cumulative remedy and does not bar any other remedy which the mortgagor may have under the law. ('09) 33 Mad 71 (73) (DB) ✠ (Vol 16) 1929 Oudh 124 (125).

[*See* (Vol 33) 1946 Pat 36 (38) : 24 Pat 545 (DB). (*Per* Shearer J. — "Doubt has been expressed as to whether a mortgagor who has made payments which the mortgagee is obliged to make is entitled to recover the money from the mortgagee immediately and is not bound to wait until he is in a position to sue for redemption of mortgage and then seek for a set-off: *see* 14 Mad L Jour 488.")]

[2] Under S. 76, the estimate of loss caused to the mortgagor by mortgagee's failure to perform the obligations under this section, is an item which must be considered in determining the account in settlement of the mortgage. Mortgagor cannot be compelled to file separate suit. ('92) 15 Mad 290 (291) (DB) ✠ (Vol 33) 1946 Pat 36 (38) : 24 Pat 545 (DB) ✠ (Vol 12) 1925 Oudh 654 (656) (DB) ✠(Vol 7) 1920 Oudh 24 (24).

[3] Where a mortgagor fails to get the matter of the loss caused due to mortgagee's failure to perform the obligations imposed by this section, settled at the time of the preparation of the decree for redemption, a separate suit for the recovery of such loss is barred. (Vol 12) 1925 Oudh 654 (656) (DB).

[4] A mere failure of the mortgagee to perform any of the duties under the section is not sufficient but a loss must have been caused to the mortgagor by such failure. (Vol 27) 1940 Pat 579 (580).

[5] Part of the mortgaged security acquired under the Land Acquisition Act, and the mortgagee unable to put the mortgagor in possession of the whole of the mortgaged property : *Held*, that the proper course was to debit the mortgagee with the value of the land in taking the mortgage accounts under this section, if the property could not be identified. (Vol 5) 1918 Mad 888 (888) (DB).

77. Nothing in section 76, clauses *(b)*, *(d)*, *(g)* and *(h)*, applies to cases where there is a contract between the mortgagee and the mortgagor that the receipts from the mortgaged property shall, so long as the mortgagee is in possession of the property, be taken in lieu of interest on the principal money, or in lieu of such interest and defined portions of the principal.

Receipts in lieu of interest.

Section 77 — Note 1

[1] Where the parties have contracted that the receipts from the mortgaged property shall be taken in lieu of interest on the principal money, or in lieu of interest and defined portions of the principal, it is no concern of the mortgagor, whether the mortgagee collects the rents and profits under S. 76, cl. (b) or keeps an accurate account under cl. (g), or applies the receipts properly under cl. (h). If the usufruct exceeds the interest or the interest and the portion of the principal as the case may be, towards which the usufruct is to be appropriated, the mortgagee will be benefited thereby. If there is a loss, it is the mortgagee who must bear it. (Vol 1) 1914 Nag 16 (17) : 10 Nag L R 9.

[2] The section does not apply where the mortgagee has to hand over a fixed portion of the rents and profits to the mortgagor, or where the mortgagee is to appropriate the rents and profits in lieu of a portion of the interest. (Vol 30) 1943 Oudh 38 (41) : 18 Luck 273 (DB) ✠ (Vol 23) 1936 Pat 583 (584) (DB) ✠ (Vol 22) 1935 Pat 148 (149) (DB) ✠ (Vol 29) 1942 Oudh 203 (204) : 17 Luck 727 (DB).

[3] The question whether the mortgagee is or is not liable to account has to be decided with reference to facts of each case upon a consideration of the mortgagee-deed. (Vol 31) 1944 Oudh 238 (238) (DB).

[4] If the parties agree that the rents and profits are to be taken in lieu of interest, it is wholly unnecessary to mention the rate of interest. But it does not necessarily follow that simply because the rate of interest is mentioned, the parties must have intended that there is to be accounting between them. (Vol 29) 1942 Oudh 499 (501) : 18 Luck 484 ✠ (Vol 21) 1934 Oudh 220 (221, 222) : 10 Luck 70 (DB).

[5] Where the mortgage-deed provided: "The mortgagee shall appropriate the surplus profits towards interest, we, the mortgagors having no claim for profits and the mortgagee having no claim for interest", it was held that the mortgage-deed was "a contract" within the meaning of S. 77 and that the mortgagees were not liable to account. (Vol 20) 1933 P C 136 (141) (PC).

[6] A usufructuary mortgage-deed of an occupancy holding provided that the mortgagee was to take the profits in lieu of interest after payment of rent to the zamindar. The mortgagor was to redeem on payment of the mortgage-money in a lump sum. During the subsistence of the mortgage the mortgagee escaped the payment of the rent to the zamindar for some years. It was held that the mortgagee was entitled to the benefit of such non-payment ('11) 10 Ind Cas 113 (113) (All) ✠ (Vol 28) 1941 Mad 549 (550) (DB). (*Reversing* (Vol 27) 1940 Mad 686.)

[7] Where a mortgage-deed provided that after payment of Government revenue and malikana to a third person all the profits should go to the mortgagee, the mortgagors having no concern with them, it was held that the mortgagee's failure to pay the malikana did not render him, liable to account, and that the utmost that the mortgagors could be allowed to claim was that they should be indemnified against the contingency of a valid claim for arrears of malikana being made against them after their recovery of possession. (Vol 16) 1929 Pat 37 (39) : 7 Pat 44 (DB).

[8] The principal terms of a mortgage-deed were that the mortgagees were to take possession and to receive the profits in lieu of interest. They were, however, to pay malikana to the mortgagors. The malikana was not paid. It was held that the mortgagees were liable to account and that the mortgagors were entitled to redeem on payment of the principal after deducting the malikana for the years for which it was not paid. (Vol 11) 1924 All 591 (592) : 46 All 633 (DB) ✠ ('80) 2 All 455 (460) (DB).

[9] A sub-mortgage deed recited that the sub-mortgagor would repay the mortgage-money with interest at a certain rate, that the sub-mortgagee was to be in possession, and that after paying the annual Government revenue, the balance was to be appropriated towards the interest. It was held that the sub-mortgagor was not entitled to ask for an account (Vol 21) 1934 Oudh 220 (221, 222) : 10 Luck 70 (DB).

[10] Mortgage with possession—Mortgagee to set off usufruct towards interest — *Held*, mortgagee was not liable to keep accounts — Fact that the mortgagee was liable for payment of revenue then assessed on the property but that the mortgagor was liable for any further assessment made during the period of mortgage would not render the mortgagee liable to keep accounts. (Vol 31) 1944 All 232 (233) : I L R (1944) All 348 (DB).

[11] Usufructuary mortgage for Rs. 625 with interest at the rate of 8 per cent. per year which would amount to Rs. 50 per year — Mortgagee to remain in possession for a period of 60 years and to enjoy the rents of the mortgaged lands which were fixed at Rs. 50 in lieu of interest on the principal — After expiry of period mortgagee to deliver possession on payment of principal amount — Suit for redemption by mortgagor before the expiry of the period on the ground that debt was discharged by operation of Madras Agriculturists' Relief Act (IV of 1938)—*Held* that though interest at a particular rate was mentioned, there being no provision in the deed that if the yield of the property was less than the estimated rent of Rs. 50 the mortgagor was liable to make good the deficiency or if the yield was more, the mortgagees were accountable to the mortgagor for the excess over such rent the receipt of the profits by the mortgagees could not be regarded as payments by the debtor for the purpose of S. 8 (2) of Act IV of 1938. Hence the debt was not discharged. (Vol 31) 1944 Mad 501 (502).

[12] Usufructuary mortgage — Mortgagee to remain in possession in lieu of principal and interest for a term of years — Simple money decree passed in his favour under S. 14, U. P. Encumbered Estates Act (25 of 1934) before expiry of term — Suit by mortgagors for profits realised by mortgagee for date of application under S. 4 to date of decree—Burden of proving amount of profits realised by mortgagee lies on mortgagor as mortgagee was exempt from keeping accounts under S. 77. (Vol 33) 1946 Oudh 83 (86) : 21 Luck 124 (DB).

[13] Combination of usufructuary and simple mortgage — Mortgagee to appropriate usufruct in lieu of interest after paying rent to landlord Decree for arrears of rent — Landlord purchasing tenure in execution and bringing suit for redemption : *Held*, under S. 77 mortgagee was not liable to render accounts — Plaintiff was not entitled to possession unless principal amount was paid. (Vol 33) 1946 Pat 36 (39) : 24 Pat 545 (DB).

[14] Usufructuary mortgagor parting with possession but not receiving full amount of consideration cannot

Priority.

78. Where, through the fraud, misrepresentation or gross neglect of a prior mortgagee, another person has been induced to advance money on the security of the mortgaged property, the prior mortgagee shall be postponed to the subsequent mortgagee.

Postponement of prior mortgagee.

Section 77—Note 1 *(contd.)*

claim a return of proportionate extent of land and mesne profits for such proportion. (Vol 34) 1947 Mad 197 (200) (DB).

[15] It is not inconsistent with the provisions of S. 77 that the mortgagor should impose upon himself a liability to make good certain possible deficiencies in profits, although the mortgagee is not liable to account. (Vol 28) 1941 Oudh 380 (382, 383) (DB).

SECTION 78 — SYNOPSIS

1. Scope.
2. "Fraud."
3. "Misrepresentation."
4. "Gross neglect."
5. Prior mortgagee failing to obtain or parting with title-deeds whether guilty of gross neglect.
6. A prior mortgagee by deposit of title-deeds not obtaining all the title-deeds, whether guilty of gross neglect.
7. Laches by prior mortgagee in instituting suit.
8. "Fraud, misrepresentation or gross neglect" must be the proximate cause of the inducement.
9. Subsequent mortgagee having notice of the prior mortgage cannot obtain priority.
10. Section applies to mortgagees.
11. Prior mortgagee losing priority — Mortgagor's liability to him is not affected.
12. Burden of proof.
13. Law in the Punjab.

1. Scope. — [1] This section provides an exception to the general rule laid down in S. 48. (Vol 23) 1936 Cal 283 (284) : 63 Cal 880 (DB) ✠ (Vol 15) 1928 Sind 179 (186) : 23 Sind L R 97 (DB) ✠ (Vol 17) 1930 Lah 920 (927) : 11 Lah 564 (DB) ✠ (Vol 17) 1930 Cal 22 (23): 56 Cal 868✠ (Vol 22) 1935 Lah 887 (888) (DB).

[2] The section is based on the law of estoppel. (Vol 5) 1918 Cal 411 (411) (DB).

[3] A subsequent mortgagee who is, in fact, misled by the mortgagor taking advantage of the conduct of the prior mortgagee can, as against the prior mortgagee, take advantage of his conduct. (Vol 19) 1932 Cal 589 (593) : 59 Cal 781 (DB) ✠ (Vol 14) 1927 Cal 538 (542) (DB).

[4] The words "fraud, misrepresentation or gross neglect" are disjunctive. Not being co-extensive in their meaning one cannot be defined in terms of the other. (Vol 3) 1916 Cal 33 (39) : 43 Cal 1052 (DB) ✠ (Vol 19) 1932 Cal 589 (594) : 59 Cal 781 (DB) ✠ (Vol 21) 1934 Nag 29 (31) : 30 Nag L R 196.

2. "Fraud."—[1] A subsequent mortgagee claiming relief against the prior mortgagee on the ground of fraud must plead fraud and must specifically set out the particulars of the fraud alleged. (Vol 17) 1930 Cal 22 (28) : 56 Cal 868.

3. "Misrepresentation." — [1] The word "misrepresentation" must be taken to have been used in this section in the sense in which it is defined in S. 18 of the Contract Act. (Vol 3) 1916 Cal 33 (39) : 43 Cal 1052 (DB) ✠ (Vol 21) 1934 Nag 29 (30, 31) : 30 Nag L R 196.

[2] A prior mortgagee endorsed an acknowledgment of full satisfaction on the back of the mortgage-deed and handed over the deed to the mortgagor. The amounts paid by the mortgagor were, in fact, paid not towards the satisfaction of the mortgage in question, but towards the satisfaction of a different mortgage and this fact ought to have been within the knowledge of the prior mortgagee. It was held that the prior mortgagee had made a "misrepresentation" within the meaning of S. 18, cl. (1) of the Contract Act ; and that he must be postponed to the subsequent mortgagee, who advanced money on the security of the mortgaged property under the belief that the prior mortgage was discharged (Vol 21) 1934 Nag 29 (30, 31) : 30 Nag L R 196.

4. "Gross neglect." — [1] The term "gross neglect" as used in this section, may be said to mean a failure on the part of the prior mortgagee to take such reasonable precautions against the risk of a subsequent mortgagee being deceived as in the circumstances renders it unjust that the prior mortgagee should retain his priority. (Vol 17) 1930 Cal 22 (28, 29) : 56 Cal 868✠ (Vol 25) 1938 Mad 87 (89) ✠ (Vol 21) 1934 Nag 29 (31): 30 Nag L R 196.

[2] A definition of the term "gross neglect" in any precise words is not practicable, nor desirable, and each case must depend upon its particular circumstances. (Vol 17) 1930 Cal 22 (29) : 56 Cal 868 ✠ ('08) 31 Mad 7 (10) (DB) ✠ (Vol 17) 1930 Rang 246 (247) (DB) ✠ (Vol 27) 1940 Lah 269 (271) ✠ (Vol 23) 1936 Cal 283 (284) : 63 Cal 880 (DB) ✠ (Vol 20) 1933 All 299 (300, 301) (DB) ✠ (Vol 15) 1928 Rang 136 (137) : 6 Rang 423 (DB) ✠ (Vol 30) 1943 Lah 113 (117) (DB).

[3] An act or omission in order to amount to gross neglect must be such as will be sufficient to create an estoppel. (Vol 21) 1934 Nag 29 (32) : 30 Nag L R 196 ✠ (Vol 17) 1930 Cal 22 (28, 29) : 56 Cal 868.

[4] Gross neglect by itself and apart from any element of fraud or misrepresentation is sufficient to postpone a prior mortgagee to a subsequent mortgagee under the section. (Vol 30) 1943 Lah 113 (117) (DB)✠ ('92) 15 Mad 268 (274, 275) (DB) ✠ (Vol 19) 1932 Cal 589 (594): 59 Cal 781 (DB)✠(Vol 15) 1928 Sind 179 (183) : 23 Sind L R 97 (DB) ✠ (Vol 23) 1936 Cal 283 (287, 288) : 63 Cal 880 (DB)✠(Vol 21) 1934 Nag 29 (31) : 30 Nag L R 196✠ ('89) 12 Mad 424 (428).

[See however (Vol 16) 1929 Lah 314 (314)]

[5] A slight negligence on the part of the prior mortgagee is not sufficient to postpone him. (Vol 23) 1936 Cal 283 (284, 287, 288) : 63 Cal 880 (DB) ✠ ('89) 8 Mad 200 (202) (DB). (Case before the Act) ✠ (Vol 19) 1932 Cal 589 (594) : 59 Cal 781 (DB).

5. Prior mortgagee failing to obtain or parting with title-deeds whether guilty of gross neglect. — [1] A failure to obtain possession of, or parting with the title-deeds by the prior mortgagee is not necessarily such a "gross neglect" as would postpone him to the subsequent mortgagee under this section. (Vol 30) 1943 Lah 113 (117) (DB). (Failure to obtain possession. (Vol 27) 1940 Lah 269, *Reversed.*) ✠ ('08) 31 Mad 7 (11, 12) (DB). (Do.)✠(Vol 17) 1930 Rang 246 (247) (DB). (Do.)✠ (Vol 3) 1916 Cal 33 (41): 43 Cal 1052 (DB). (Do.) ✠ (Vol 25) 1938 Mad 87 (89). (Do.) ✠ (Vol 13) 1926 Rang 195 (196, 197) : 4 Rang 238. (Parting with.) ✠ ('98) 2 Cal W N 750 (754). (Do.)

[2] If the circumstances show that the prior mortgagee had made an enquiry about the title-deeds at the time of taking his mortgage, that an explanation was given by the mortgagor and that the explanation was a reasonable one, the prior mortgagee cannot be charged

Section 78 — Note 5 *(contd.)*

with "gross neglect," for the failure to obtain possession of the title-deeds. ('10) 37 Cal 239 (248) : 37 Ind App 19 (PC).

[3] Where the relation between the prior mortgagee and the person in possession of the title-deeds, is not merely that of mortgagor and mortgagee, but of a fiduciary nature the prior mortgagee cannot be held guilty of gross neglect by reason of the improper act of the mortgagor so long as the mortgagee has no ground to suppose that there has been any want of good faith on the part of the mortgagor. (Vol 17) 1930 Cal 22 (29) : 56 Cal 868.

[4] Where the mortgagee is induced by the mortgagor to part with the deeds for the specific purpose of effecting of the mutation of names in the Land Revenue Registers, he cannot be charged with gross neglect under this section. (Vol 13) 1926 Rang 195 (197) : 4 Rang 238.

[5] A mortgagee handing over the deeds to the mortgagor for the purpose of raising money by another mortgage is guilty of gross neglect unless he takes precautions that the person advancing money on the security of the deeds knows of his mortgage. ('89) 12 Mad 424 (428) ✠ (Vol 15) 1928 Sind 179 (188) : 23 Sind L R 97 (DB) ✠ (Vol 25) 1938 Mad 87 (89) ✠ (Vol 17) 1930 Cal 22 (28, 31) : 56 Cal 868.

[6] In the case of a mortgage by deposit of title-deeds if the possession of the title-deed is an essential part of the prior mortgagee's security then if, he having got them, allows them to pass again into the possession of the mortgagor without any sufficient reason he would be postponed to the subsequent mortgagee to whom they are delivered. (Vol 23) 1936 Cal 283 (289) : 63 Cal 880 (DB).

[7] A prior mortgagee registering his mortgage within the period of four months allowed to him under S 23, Registration Act, cannot be said to be guilty of gross neglect on the ground of delay in registration. (Vol 20) 1933 Cal 398 (400) : 60 Cal 225.

[See however ('89) 12 Mad 424 (428).]

6. A prior mortgagee by deposit of title-deeds not obtaining all the title-deeds, whether guilty of gross neglect.—[1] If some of the material documents of title are deposited with one creditor and some with another, valid mortgages by deposit of title-deed will be created in favour of both the creditors. (Vol 19) 1932 Cal 589 (592) : 59 Cal 781 (DB).

[2] The mortgagor deposited with the creditor, the original probate of the will by which his grandfather bequeathed his property to him. Along with the probate he also deposited a certified copy of the redemption certificate relating to the property standing in the name of his grandfather. The mortgagor told the creditor that the original had been lost. In fact the original was deposited with another creditor. It was held that the deposit of the certified copy of the redemption certificate, taken along with the probate, clearly indicated an intention to create a security on the property and a valid mortgage by deposit of title-deeds was created, and that the creditor was not guilty of gross neglect within the meaning of S. 78 in relying on the word of the mortgagor as to the loss of the original redemption certificate and in not taking an affidavit from him. (Vol 19) 1932 Cal 589 (593, 594): 59 Cal 781 (DB).

[3] The documents relating to the sale of the property in favour of the mortgagor were deposited by him with the creditor but the sanads granted by Bombay Government to his predecessors-in-interest were not deposited. It was held that the mortgagee was not guilty of gross neglect in not demanding the sanads. (Vol 17) 1930 Lah 920 (927) : 11 Lah 564 (DB).

[4] One *S* held two plots under a registered sale-deed. He also had with him the two original lease-deeds under which the plots were held by his vendor. There was an endorsement on each of the lease-deeds that the property was sold to *S* — *S* deposited the sale-deed and the lease deed with regard to one of the plots with *A* and subsequently deposited the lease-deed with regard to the other plot with *B* It was held that a mortgage by deposit of title-deeds on the whole of the property was created in favour of *A* and the mere fact that he did not insist on obtaining the lease-deed subsequently deposited with *B* did not amount to gross neglect so as to postpone him to *B* as the lease-deed on the face of it must clearly have shown the existence of the sale-deed. (Vol 16) 1929 Rang 65 (66) : 7 Rang 28 (DB).

7. Laches by prior mortgagee in instituting suit. — [1] A delay in filing a suit on the mortgage cannot be a gross neglect ('05) 1 Nag L R 158 (161, 162).

8. "Fraud, misrepresentation or gross neglect" must be the proximate cause of the inducement. — [1] The fraud, misrepresentation or gross neglect on the part of the prior mortgagee must be the proximate cause of the inducement for the advancement of money by the subsequent mortgagee If it is only one of the various contributory factors that led the subsequent mortgagee to advance the money, the section has no application. (Vol 30) 1943 Lah 113 (117) (DB) ✠ (Vol 20) 1933 All 299 (300) (DB) ✠ (Vol 17) 1930 Cal 22 (28) : 56 Cal 868 ✠ (Vol 21) 1934 Nag 29 (32) : 30 Nag L R 196.

[2] Where the prior mortgagee is guilty of gross neglect, but the subsequent mortgagee is also guilty of contributory negligence, the prior mortgagee cannot be postponed to the subsequent mortgagee under this section. (Vol 20) 1933 All 299 (301) (DB) ✠ ('13) 18 Ind Cas 487 (487) (DB) (Low Bur) ✠ ('91) 15 Mad 268 (279, 280) (DB).

9. Subsequent mortgagee having notice of the prior mortgage cannot obtain priority. — [1] The section does not apply if the subsequent mortgagee has notice of the prior mortgage at the time of taking his mortgage. (Vol 30) 1943 Lah 113 (117) (DB) ✠ (Vol 23) 1936 Cal 283 (289) : 63 Cal 880 (DB) ✠ ('91) 15 Mad 268 (277, 278) (DB) ✠ (Vol 14) 1927 Cal 538 (543) (DB) ✠ (Vol 25) 1938 Mad 161 (163, 164) (DB) ✠ ('94) 18 Bom 444 (446, 447) (DB).

[2] In places where one knows that mortgages by deposit of title-deeds are legal and usual, abstention from inquiry as to whether the title-deeds were already pledged amount to constructive notice, under S. 3, of the prior mortgage. (Vol 10) 1923 PC 211 (216) : 51 Cal 86 : 1 Rang 837 : 50 Ind App 283 (PC).

[3] It is in favour of a person in possession of the title-deeds that the doctrine of constructive notice can be invoked on the ground of the omission of the other party to call for them and not in favour of a person who has not got them. (Vol 25) 1938 Mad 161 (163, 164) (DB).

[4] It has been held that where the prior mortgagee induces the subsequent mortgagee to advance money by false representations, he cannot avoid the consequences resulting from his conduct on the ground of constructive notice on the part of the subsequent mortgagee. ('94) 18 Bom 444 (446) (DB).

10. Section applies to mortgagees. — [1] The section will not apply where both the prior and the subsequent transferees are not mortgagees. (Vol 21) 1934 Oudh 283 (283) (DB).

[2] Where through the gross neglect of a prior mortgagee, a person is induced to purchase the mortgaged property as unencumbered, the prior mortgagee is precluded from setting up his rights under the mortgage as against the purchaser and the purchaser obtains

79. If a mortgage made to secure future advances, the performance of an engagement or the balance of a running account, expresses the maximum to be secured thereby, a subsequent mortgage of the same property shall, if made with notice of the prior mortgage, be postponed to the prior mortgage in respect of all advances or debits not exceeding the maximum, though made or allowed with notice of the subsequent mortgage.

Mortgage to secure uncertain amount when maximum is expressed.

Illustration.

A mortgages Sultanpur to his bankers, B & Co, to secure the balance of his account with them to the extent of Rs. 10 000. *A* then mortgages Sultanpur to *C*, to secure Rs 10,000, C having notice of the mortgage to B & Co, and C gives notice to B & Co. of the second mortgage. At the date of the second mortgage, the balance due to B & Co. does not exceed Rs. 5,000. B & Co. subsequently advance to *A* sums making the balance of the account against him exceed the sum of Rs. 10,000. B & Co. are entitled, to the extent of Rs. 10,000, to priority over C.

80. [Tacking abolished.] *Repealed by the Transfer of Property (Amendment) Act, 1929 (20 [XX] of 1929), S. 41.*

Marshalling and Contribution.

[a][**81.** If the owner of two or more properties mortgages them to one person and then mortgages one or more of the properties to another person, the subsequent

Marshalling securities.

Section 78—Note 10 *(contd.)*

absolute title to the property. (Vol 14) 1927 Cal 538 (542) (DB) ✠ (Vol 5) 1918 Cal 411 (411) (DB)✠(Vol 24) 1937 Mad 195 (199) (DB) ✠ (Vol 21) 1934 Mad 302 (302) (DB).

11. Prior mortgagee losing priority — Mortgagor's liability to him is not affected.—[1] The fact that a mortgagee loses, for some reason his priority as against a subsequent mortgagee cannot affect him prejudicially as against the mortgagor. (Vol 2) 1915 P C 21 (24) : 37 All 474 : 42 Ind App 163 (PC).

12. Burden of proof.—[1] This section being an exception to the general rule laid down in S. 48 the burden of proving this exception lies on the party who asserts it. (Vol 23) 1936 Cal 283 (284): 63 Cal 880 (DB) ✠ (Vol 21) 1934 Nag 29 (30) : 30 Nag L R 196 ✠ (Vol 16) 1929 Rang 298 (300) ✠ (Vol 20) 1933 All 299 (301) (DB).

13. Law in the Punjab. — [1] The principle enunciated in this section is applicable to cases arising in the Punjab. (Vol 30) 1943 Lah 113 (117) (DB)✠ (Vol 27) 1940 Lah 308 (308, 309).

Section 79 — Note 1

[1] This section is an exception to the general rule stated in S. 48. (Vol 7) 1920 Pat 251 (254) (DB)✠('12) 16 Cal L Jour 394 (399) (DB).

[2] A partition deed provided that the common family debts should be discharged by the respective sharers to whom they fell as per schedule of the deed, and that if any sharer failed to discharge the debts falling to his share, his properties should be liable for such debts and for the losses that might happen to the family. It was held that the provision was a mortgage for securing the performance of an engagement. (Vol 8) 1921 Mad 459 (460) (DB).

[3] It will depend on the construction of the mortgage bond and the circumstances in each case whether the mortgage is to secure the balance due on the date of the mortgage or the balance that may be found due from time to time up to a certain limit. *See* (Vol 30) 1943 Pat 301 (303, 304) : 22 Pat 213 (DB).

[4] The section has no application unless the prior mortgage expresses a maximum amount up to which the advances are to be made. (Vol 25) 1938 All 473 (476) (DB).

[5] The words 'to secure future advances', etc., denominate the different classes of mortgages, but to bring them under S. 79 they must have the common feature of a maximum expressed. It is not, however, necessary that a definite figure should be expressly mentioned as the maximum to be secured by the mortgage; it is sufficient if the maximum is expressed in such terms that the definite figure can be determined when required. (Vol 10) 1923 P C 211 (215): 51 Cal 86: 1 Rang 637: 50 Ind App 283 (P C) ✠('12) 16 Cal L Jour 401 (403) (DB).

[6] A partition deed between brothers, *A* and *B*, provided as follows: "The common family debts should be discharged by the respective sharers to whom they fell, as per schedule of the document, and that, if any sharer failed to discharge accordingly, such sharer's properties should be liable for such debts and for the losses that might happen to the family." It was held that the document read with the schedule specified the maximum secured by the document and that the reference to losses would not impair the adequency of the specification of the maximum. (Vol 8) 1921 Mad 459 (460, 461) (DB).

[7] This section has been enacted with a view to protect a prior mortgagee by giving him priority over a subsequent mortgage with respect to advances made to him after the subsequent mortgage and it has no application where no advances are made by the prior mortgagee after the creation of the subsequent mortgage. (Vol 25) 1938 All 473 (476) (DB) ✠(Vol 7) 1920 Pat 251 (254) (DB).

[8] If a mortgagee taking a mortgage in a place where he knows that mortgages by deposit of title-deeds are legal and usual, does not ascertain whether the title deeds were already pledged, his failure to so ascertain is such abstention from an inquiry which he ought to have made or such negligence as to infer notice in terms of section 3. (Vol 10) 1923 P C 211 (216) : 51 Cal 86 : 1 Rang 637: 50 Ind App 283 (P C).

[9] This section is held applicable to the case of a charge created by a partition deed executed between brothers. (Vol 8) 1921 Mad 459 (461) (DB).

[10] If *A* is the mortgagee and *B* the mortgagor, and *B* himself sells away his equity of redemption, or his equity of redemption is sold in court auction to *C*, and then *A* makes a further advance to *B*, he cannot get any priority or other right in respect of advance as against *C*. ('09) 3 Ind Cas 44 (45) (DB) (All)✠ ('01) 23 All 429 (431) (DB) ✠('85) 12 Bom 33 (35, 36) (DB). (Unless the conduct of *C* were such as to operate as an estoppel.)

Section 81—Note 1

[1] The right of the subsequent mortgagee under this section is enforceable only against the mortgagor and not against the mortgagee. (Vol 15) 1928 Mad 500 (502) : 51 Mad 648 (DB).

[2] As between the tranferees of the different items of the mortgaged properties there is no right of

mortgagee is, in the absence of a contract to the contrary, entitled to have the prior mortgage-debt satisfied out of the property or properties not mortgaged to him, so far as the same will extend, but not so as to prejudice the rights of the prior mortgagee or of any other person who has for consideration acquired an interest in any of the properties.]

[a] *Substituted* by the Transfer of Property (Amendment) Act, 1929 (20 [XX] of 1929), S. 42.

Contribution to mortgage-debt.

82. [a][Where property subject to a mortgage belongs to two or more persons having distinct and separate rights of ownership therein, the different shares in or parts of such property owned by such persons are, in the absence of a contract to the contrary, liable to contribute rateably to the debt secured by the mortgage, and, for the purpose of determining the rate at which each such share or part shall contribute, the value thereof shall be deemed to be its value at the date of the mortgage after deduction of the amount of any other mortgage or charge to which it may have been subject on that date.]

Where, of two properties belonging to the same owner, one is mortgaged to secure one debt and then both are mortgaged to secure another debt, and the former debt is paid out of the former property, each property is, in the absence of a contract to the contrary, liable to contribute rateably to the latter debt after deducting the amount of the former debt from the value of the property out of which it has been paid.

Nothing in this section applies to a property liable under section 81 to the claim of the [b][subsequent] mortgagee.

[a] *Substituted* by the Transfer of Property (Amendment) Act, 1929 (20 [XX] of 1929), S. 43. [b] *Substituted ibid*, for "second".

Section 81—Note 1 *(contd.)*

marshalling. (Vol 18) 1931 Mad 199 (200) : 54 Mad 59 (DB) ✠ ('98) 2 Cal W N 397 (402) (DB) ✠ (Vol 19) 1932 Mad 196 (198).

[But see (Vol 24) 1937 Rang 220 (223) : 1937 Rang L R 13 (DB)]

[3] This section applies only to mortgages of immoveable property and not to hypothecation of moveable property. (Vol 23) 1936 Rang 266 (267) : 14 Rang 198 (DB).

[4] The section cannot apply to cases where the prior mortgage is of both immovable and movable properties. (Vol 23) 1936 Rang 266 (267) : 14 Rang 198 (DB).

[5] When *A* and *B* execute a mortgage of properties *X* and *Y* in favour of *C* and then *A* alone executes a mortgage of property *Y* in favour of *D*, the doctrine of marshalling cannot be applied and *D* cannot compel *C* to proceed first against property *X*. (Vol 4) 1917 Mad 372 (372) (DB) ✠ ('89) 12 Mad 255 (259) (DB).

[6] An attaching creditor cannot claim any right of marshalling. ('81) 6 Cal 142 (148) (DB).

[7] A lessee of the property has no right of marshalling. (Vol 13) 1926 Cal 525 (527) (DB).

[8] A subsequent mortgagee does not cease to be so, for the purposes of this section by reason merely of the fact that he purchases the equity of redemption in the property mortgaged to him. (Vol 11) 1924 Pat 459 (463) : 3 Pat 522 (DB) ✠(Vol 17) 1930 Mad 178 (180) ✠(Vol 24) 1937 Rang 220 (223) : 1937 Rang L R 13 (DB).

[9] A purchaser at a sale in execution of the second mortgage, purchases not only the right of the mortgagor, but all the rights of the mortgagee acquired up to the sale, including the right of marshalling which the second mortgagee might have had, and such purchaser can exercise the right of marshalling under this section: ('96) 23 Cal 790 (794) (DB) ✠ (Vol 11) 1924 Pat 459 (463, 464) : 3 Pat 522 (DB) ✠(Vol 17) 1930 Mad 178 (179).

[10] *A* mortgaging to *B*—Suit by subsequent mortgagee but *B* not party—Purchase by *C* in execution of certain property mortgaged to *B*—Sale of mortgaged property by *A* to *B* in satisfaction of first mortgage—Suit by *B* on the mortgage for sale stating that he did not desire to avail himself of sale in his favour—Held, *B* should first proceed against property not purchased by *C*, as a matter of equity. ('12) 16 Ind Cas 779 (779) (DB) (Mad).

[11] The right of marshalling continues so long as the properties mortgaged to the second mortgagee are available to be sold in execution of a prior mortgage. (Vol 11) 1924 Pat 459 (463) : 3 Pat 522 (DB).

[12] Properties *A*, *B* and *C* mortgaged to *X*—Property *A* subsequently mortgaged to *Y*—*X* obtaining decree and in execution selling *B* and *C*—*X* proceeding against *A* for balance—Y held had no defence to the claim based on doctrine of marshalling. ('10) 4 Sind L R 224 (224, 225) (DB).

[13] Mortgage of property *A* stipulating that if debt not recovered from *A*, the mortgagee may realize from other property *B*—Subsequent mortgage to another—The mortgagee of *B* cannot claim that the prior mortgagee should first proceed against *A*. ('87) 1887 All W N 192 (192) (DB).

[14] Where the prior mortgagee of items *A*, *B* and *C* could not include in his suit on the mortgage, item *C* owing to the conduct of the subsequent mortgagee of *A* and *B*, and, therefore, proceeded to enforce his mortgage only against *A* and *B*, it was held that the puisne mortgagee could not be allowed to claim as against the prior mortgagee that the latter should first proceed against *C*. (Vol 2) 1915 Mad 1203 (1204) (DB).

[15] Where the mortgaged properties consisted of over two hundred items almost all of which were subject to incumbrances or alienations and many of which were complicated by the existence of rights to compensation for improvements in the alienees, it was held that it would almost be impossible to try and work out the equities of all the incumbrancers and alienees in such circumstances by arranging the order of sale without prejudice to the first mortgagee and that therefore the puisne incumbrancers should be directed to work out their own rights by way of suits for contribution. (Vol 30) 1943 Mad 705 (706) (DB).

SECTION 82—SYNOPSIS

1. Scope.
2. Common and equal liability.
3. Valuation.
4. Rate of contribution.
5. "In the absence of a contract to the contrary."

SECTION 82 — SYNOPSIS *(contd.)*

6. Second paragraph.
7. Property sold in particular order—Right of contribution.
8. Marshalling, exception to rule of contribution.
9. Right of contribution is not a right to obtain apportionment in a mortgage suit.
10. A claim for contribution is a charge on the property.
11. Liability to contribute, whether personal.
12. Mortgage-debt not fully discharged—Claim for contribution.
13. Contribution arises both on voluntary and involuntary payments.
14. Right of redeeming co-mortgagor to claim contribution.
15. Effect of acquisition of a portion of equity of redemption by mortgagee.
16. Effect of release by mortgagee of a portion of equity of redemption.
17. Effect of negligence or laches on the part of the mortgagee.
18. Parties to suit for contribution.
19. Properties liable to contribute.
20. Failure to claim contribution in redemption suit, whether bars subsequent suit for contribution.
21. Plea that the plaintiff has no interest left in the property is no defence to the claim for contribution.
22. Interest on contribution amount.
23. Contribution suit is not cognizable by Small Cause Court.

1. Scope. — [1] No contribution can be claimed against a person who has paid more than his share of the liability. (Vol 2) 1915 Cal 334 (336) (DB) ✠ (Vol 13) 1926 Cal 657 (658) (DB).

[2] As the section prescribes the conditions in which contribution is payable, the Courts cannot introduce any extraneous equitable principles to modify the liability to contribute, imposed by this section. (Vol 17) 1930 P C 183 (185) : 52 All 358 : 57 Ind App 189 (P.C).

[3] The fact that the mortgage-debt has passed into a decree does not prevent the application of the rule in the section. (Vol 19) 1932 P C 99 (101) (PC).

[4] Sale of mortgaged property set aside under O. 21, R. 89—Compensation payable to auction-purchaser and poundage fee chargeable from mortgagor are not expenses properly incurred within S. 95—No claim for contribution can be made in respect of these amounts. (Vol 30) 1943 Mad 429 (433) : I L R (1943) Mad 531 (F B).

[5] Though the Act is not extended to the Punjab, the general principles underlying the section are applied to cases arising in the province. (Vol 20) 1933 Lah 374 (375) (DB).

[6] The principle underlying this section can be applied in cases under the U. P. Encumbered Estates Act (XXV of 1934). (Vol 30) 1943 All 334 (336) : I L R (1943) All 669 (DB).

[7] The amendment of the section in 1929 is not retrospective. (Vol 19) 1932 P C 74 (75) : 54 All 199 : 59 Ind App 106 (P C).

[8] The section covers all cases, whether of a mortgage of several properties owned by several owners or of one property the title to which becomes severed after the mortgage. (Vol 30) 1943 Mad 429 (434) : I L R (1943) Mad 531 (F B) ✠ (Vol 29) 1942 Mad 685 (686) : I L R (1943) Mad 96 (FB).

2. Common and equal liability.—[1] The section presupposes the existence of a common liability in the form of the mortgage-debt equally secured by all the properties. (Vol 23) 1936 Mad 500 (502) ✠ (Vol 20) 1933 All 929 (932) (D B) ✠ (Vol 15) 1928 Cal 593 (596 : 55 Cal 1193 (DB).

[2] It is necessary to prove that a common liability exists in respect of the property from which contribution is claimed. (Vol 21) 1934 P C 98 (100) : 61 Ind App 185 : 13 Pat 310 (PC).

[3] If no such common liability exists, there can be no contribution. (Vol 12) 1925 Oudh 215 (219) (D B).

[4] Even if there exists a common liability to pay, contribution cannot be claimed unless each of the properties is liable in equal degree to pay the common liability. (Vol 16) 1929 Pat 664 (675) : 8 Pat 585 (D B).

[5] Where a mortgagor of properties X and Y transfers, by way of a lease or a mortgage, property X and retains property Y, the latter is primarily liable to discharge the mortgage-debt on both X and Y. Hence, if the mortgagor himself or his personal representative pays the entire debt, there can be no contribution from X. (Vol 6) 1919 Oudh 241 (244) : 21 Oudh Cas 360 (D B).

[6] A mortgages X and Y to B. A then mortgages X alone to C. The property X is sold under B's mortgage and the mortgage is completely discharged. C can claim contribution from Y in order to realise the mortgage-money due to him. (Vol 31) 1944 Mad 276 (276) ✠ (Vol 29) 1942 Mad 685 (687) : I L R (1943) Mad 96 (F B).

3. Valuation.—[1] The material date for assessing the value of the property is the date of the mortgage and not the date of the subsequent transfer. (Vol 30) 1943 Mad 429 (434) : I L R (1943) Mad 531 (F B) ✠ (Vol 26) 1939 All 86 (87) ✠ (Vol 29) 1942 Mad 44 (47) (D B).

[2] Where the person claiming contribution adduces evidence to show the value of the property at the time he purchased it, it lies on the other side to prove that the value of the property at the date of the mortgage was different. (Vol 3) 1916 All 190 (191) (DB).

4. Rate of contribution.—[1] The value referred to in the section is the actual market-value of the property. ('70) 13 Moo Ind App 404 (408) (PC).

[2] The value referred to in the section is not the price paid for the property by any subsequent purchaser whether in a private or in an execution sale. (Vol 4) 1917 All 357 (358) (DB).

[3] Where the mortgaged property is land, the Government revenue may be taken as a measure of profits yielded every year and may thus afford a measure for calculating the value of the property. ('97) 19 All 545 (550) (DB).

[4] Government revenue of land is not always a correct criterion of actual value and cannot be accepted, without more, as the only method for ascertaining the market-value of the property. ('70) 13 Moo Ind App 404 (408) (P C) ✠ ('75) 20 Suth W R 163 (163) (D B).

[5] Where any of the properties mortgaged is already subject to a prior mortgage or charge, the mode of ascertaining its share of liability is to deduct the amount of such mortgage or charge from the market-value of that particular property and to treat the remaining sum as the market-value of that item for the purpose of finding out the rate of contribution. (Vol 4) 1917 All 357 (358) (DB).

[6] Properties X and Y of market-value of Rs. 1000 and Rs. 1500 respectively mortgaged to secure debt of Rs. 1000 — Property X already subject to prior mortgage for Rs. 600 along with another property Z of market-value of Rs. 300 — Value of Y for contribution towards second mortgage will be Rs. 1000 and X and

Section 82 — Note 4 *(contd.)*

Y each will have to contribute Rs. 500. ('37) 19 All 545 (554, 556) (DB).

[7] Where the amount payable by the property under the prior mortgage or charge exceeds its market-value, the value of such property for the purpose of contribution under the second mortgage is nil and the entire burden of the latter debt rests on the remaining properties. ('11) 33 All 387 (390) (DB) ✠ (Vol 18) 1931 All 625 (627) (DB).

[8] Properties *X* and *Y* of the admitted market-values of Rs. 20,000 and Rs. 6000 respectively were mortgaged for Rs. 8000. The properties were subsequently sold to *A* and *B* respectively. The mortgagee obtained a decree on his mortgage and sold property *Y* in execution for Rs. 21000 for which it was purchased by *A*. This amount completely satisfied the mortgage. *B* sued *A* for contribution. It was held that Rs. 6000 was the value of the property *Y*, the liability assessed rateably on this basis on *Y* was Rs. 5000 and therefore the real excess paid by *Y* was only Rs. 1000. This was the amount which *B* could claim from *A*. ('04) 31 Cal 95 (104) (DB).

5. "In the absence of a contract to the contrary." —[1] It is open to the parties to contract that there shall be no contribution in the particular case or that they should contribute in a particular manner. (Vol 15) 1928 All 241 (247) : 50 All 569 (D B) ✠ (Vol 23) 1936 Mad 901 (903).

[2] *A* mortgaged properties *X* and *Y* to *B*. He then sold *X* to *C*, directing him to pay off the mortgage from out of the sale consideration. Subsequently, *Y* was sold in court auction in execution of a money decree against *A* and was purchased by *D*—Thereafter *C* paid off the mortgage and sued *D* for contribution—It was held that *D* was liable to contribute. (Vol 17) 1930 PC 183 (185) : 57 Ind App 169 : 52 All 358 (P C). (On appeal from (Vol 13) 1926 All 352.)

[3] The "contract to the contrary" must be one between the mortgagor and the mortgagee. (Vol 30) 1943 Mad 429 (437) : I L R (1943) Mad 531 (F B). ((Vol 23) 1936 Mad 106 : 59 Mad 121 ; (Vol 23) 1936 Mad 898 ; (Vol 23) 1936 Mad 901 and (Vol 28) 1941 Mad 66, *Overruled.*) ✠ (Vol 18) 1931 Nag 172 (172) : 27 Nag L R 258 ✠ (Vol 18) 1931 All 546 (547) ✠(Vol 19) 1932 Mad 218 (219) ✠ (Vol 23) 1936 Mad 113 (115).

[But see (Vol 24) 1937 Pat 628 (630) : 16 Pat 557 (DB). ((Vol 23) 1936 Mad 106 : 59 Mad 121 and (Vol 23) 1936 All 258 : 58 All 548, *Rel. on.*)]

[4] A contract excluding the right of contribution will be personally binding on the actual parties to the contract even though the mortgagee is not a party to the contract. (Vol 30) 1943 Mad 429 (436) : I L R (1943) Mad 531 (FB). (('02) 24 Mad 85, *Foll.*)

[5] There will be an implied contract to the contrary in the following cases:

(a) A contract between the mortgagor and his transferee of a portion of the property that the latter should pay off the entire mortgage implies contract that the vendor's property is not liable to contribute towards the mortgage. (Vol 28) 1941 Mad 66 (66). (*Overruled* in (Vol 30) 1943 Mad 429: I L R (1943) Mad 531 (FB) on another point.) ✠ ('13) 25 Mad L Jour 24 (26) (DB) (Mad).

[But see (Vol 5) 1918 Mad 1012 (1014) (DB).]

(b) An undertaking by the transferor-mortgagor that he will himself discharge the mortgage, implies a contract that the property transferred is not liable to contribute to the mortgage-debt. (Vol 23) 1936 Mad 901 (903). (*Overruled* in (Vol 30) 1943 Mad 429 : I L R (1943) Mad 531 (F B) on another point.)

(c) Where, of the two mortgagors *A* and *B*, *B* takes the whole of the mortgage money, there is an implied contract that *A*'s property is not liable to contribute towards the debt. (Vol 23) 1936 Mad 106 (111) : 59 Mad 121 (D B). (*Overruled* in (Vol 30) 1943 Mad 429 : I L R (1943) Mad 531 (FB) on another point.)

(d) Where one of the mortgagors is merely a surety for the others, there is an implied contract that the former is not liable to contribute towards the debt. (Vol 23) 1936 All 258 (264) : 58 All 548 (DB).

(e) Where the mortgagor sells a part of the mortgaged property free of incumbrances, there is an implied contract that that part is not liable to contribute. (Vol 16) 1929 Pat 664 (675) : 8 Pat 585 (DB) ✠ (Vol 11) 1924 Mad 749 (753) (DB).

[6] Several properties mortgaged to secure one debt —Contract exempting owner of one property from liability — Other parties are bound to exempt that property. (Vol 14) 1927 Mad 1086 (1088) (DB).

6. Second paragraph. — [1] Under this paragraph it is not necessary that the two mortgages must have been executed by the same person. (Vol 31) 1944 Mad 276 (278).

7. Property sold in particular order — Right of contribution.—[1] Where in execution of a mortgage-decree against several items of the mortgaged property, the Court, in the exercise of its discretion under O. 34 of the Civil Procedure Code, orders that the items should be sold in a particular order, such order does not affect the right of contribution between the various items. (Vol 6) 1919 Pat 533 (534) (DB).

[*See also* (Vol 22) 1935 Mad 456 (458).]

[2] Where the order of sale is in pursuance of an arrangement between the parties that some of the items are primarily liable for the entire debt, the arrangement will be a "contract to the contrary" and consequently there may be no right to contribution. ('02) 6 Cal W N 583 (584, 585) (DB).

8. Marshalling, exception to rule of contribution. — [1] *A* the owner of properties *X* and *Y*, mortgages them both to *B*, and then mortgages *Y* alone to *C*. In such a case, *C* is entitled by virtue of the last paragraph to have the mortgage-debt to *B* satisfied out of property *X* so far as it will extend. In the absence of such a provision, properties *X* and *Y* would be both liable to pay rateably to the mortgage-debt under this section and thus prejudice the rights of the subsequent mortgagee *C*, whose security comprises only of property *Y*. (Vol 23) 1936 Mad 106 (111) : 59 Mad 121 (DB).

9. Right of contribution is not a right to obtain apportionment in a mortgage suit. — [1] The section merely determines the liability of the mortgagors *inter se*. It does not operate so as to split up the mortgage security. ('91) 18 Cal 320 (321) (D B) ✠ (Vol 22) 1935 Rang 26 (29) (DB) ✠ (Vol 27) 1940 Cal 60 (64)✠ (Vol 5) 1918 Bom 181 (181) (DB) ✠ ('98) 1898 Bom P J 213 (DB) ✠ ('09) 10 Cal L Jour 150 (175) (DB).

[2] In a suit on the mortgage, the owners of the different portions of the mortgaged properties are not entitled to claim as a matter of right, on the strength of the liability to contribute under this section, that the mortgage-debt should be apportioned between the various mortgaged properties and each of them should be allowed to redeem on payment of his rateable share thereon. ('91) 18 Cal 320 (321) (DB) ✠ (Vol 27) 1940 Cal 60 (64) ✠ (Vol 14) 1927 Pat 117 (122) (DB) ✠ ('95) 1895 Pun Re No. 75, page 366 (368) (DB) ✠ (Vol 27) 1940 Lah 370 (371) : I L R (1941) Lah 1 (FB) ✠ (Vol15) 1928 Sind 101 (103) : 22 Sind L R 243 ✠ (Vol 11) 1924 Pat 174 (175) (DB) ✠ (Vol 5) 1918 Bom 181 (181)

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(DB) ✠ ('06) 29 Mad 217 (221) (DB) ✠ ('09) 10 Cal L Jour 150 (175, 176) (DB).

[But see ('83) 9 Cal 406 (410) (DB).]

[3] The owner of the part of the equity of redemption cannot sue for partial redemption. ('13) 16 Oudh Cas 199 (201, 202).

[4] The mortgagee is entitled to execute his mortgage decree against any of the mortgaged properties he pleases, and if any question of equity arises between the different owners of the mortgaged properties, that equity can only be enforced in an independent suit for contribution and not in proceedings for execution. (Vol 30) 1943 Mad 637 (639) ✠ (Vol 10) 1923 Pat 44 (45) (DB) ✠ ('07) 34 Cal 13 (17, 18) (DB).

10. A claim for contribution is a charge on the property. — [1] The provisions of S. 82 read with S. 100 clearly give rise to a charge against such portions of the mortgaged property as have not discharged their proportionate share of the liability. (Vol 29) 1942 Mad 685 (686) : I L R (1943) Mad 96 (FB) ✠ (Vol 29) 1942 Oudh 449 (457) : 19 Luck 70 (FB) ✠ (Vol 17) 1930 Oudh 260 (262) : 5 Luck 727 (DB) ✠ ('11) 33 All 708 (722) (FB). (Per *Banerji J.*) ✠ ('04) 26 All 407 (444) (FB).

[2] A suit for contribution is a suit to enforce a charge and the limitation applicable to such a suit will be as provided by Art. 132, Limitation Act. ('11) 33 All 708 (723) (FB).

11. Liability to contribute, whether personal. — [1] The owner of the part or share, who pays in excess of his share, towards the mortgage-debt, can claim apart from the provisions of this section, a personal relief under S. 69 of the Contract Act against those who have escaped payment. (Vol 1) 1914 Cal 208 (209) (DB) ✠ (Vol 1) 1914 Cal 672 (673) (DB) ✠ (Vol 15) 1928 All 298 (298) : 50 All 428.

[But see (Vol 16) 1929 All 696 (698) (DB) ✠ (Vol 3) 1916 Mad 980 (981, 982) : 39 Mad 795 (DB) ✠ (Vol 5) 1918 Mad 1012 (1015) (DB).]

[2] Where a co-mortgagor pays off the decretal amount and sets aside the execution sale he cannot get personal decree for contribution under S. 69, Contract Act. But where a co-mortgagor prevents the sale of the mortgaged property in execution he is entitled to it. ('10) 14 Cal W N 361 (363) (DB).

[3] Whether S. 69 of the Contract Act applies or not, a suit for contribution would fall within the scope of S. 70 of the Contract Act. (Vol 18) 1931 Pat 394 (399) : 10 Pat 528 (DB).

[4] Where the mortgagee threatened to sell the land mortgaged to him and one of the cosharers paid up the mortgage-debt to prevent the property from being sold, it was held that his suit for contribution fell within the scope of S. 70 of the Contract Act and that he was entitled to a personal relief against the owner of the property liable to contribute. ('88) 1888 All W N 10 (10) (DB).

[5] Though a personal decree for contribution may be passed against any of the persons who are themselves mortgagors, it cannot be passed against an auction-purchaser of the title of one of the mortgagors. (Vol 11) 1924 Nag 238 (240).

12. Mortgage-debt not fully discharged — Claim for contribution. — [1] A suit for contribution by enforcing the charge is maintainable even if the whole mortgage is not discharged in full. (Vol 17) 1930 Oudh 260 (263) : 5 Luck 727 (DB) ✠ ('03) 26 Mad 686 (716, 717) (FB) ✠ (Vol 29) 1942 Bom 95 (97) (DB) ✠ (Vol 34) 1947 Mad 86 (87).

[But see ('04) 26 All 407 (433, 445) (FB) ✠ ('09) 31 All 65 (66, 67) (DB) ✠ (Vol 21) 1934 Pat 612 (614) : 13 Pat 356 (DB).]

[2] A mortgage decree was passed against an agriculturist and a non-agriculturist defendant holding one-fifth and four-fifth share in the mortgaged property respectively. The decree was scaled down as against the agriculturist defendant who paid off the decretal amount as scaled down and as that was more than he was liable to pay for his share he claimed contribution. *Held* that the common mortgage-debt extended to the amount of decree as scaled down and as the common liability was fully discharged, the agriculturist defendant was entitled to claim contribution. (Vol 34) 1947 Mad 86 (88).

13. Contribution arises both on voluntary and involuntary payments.— [1] The right of contribution arises, with equal force and validity, both in the case where the claimant has himself paid the amount to avert a legal process, and in the case where such payment has been enforced by an execution sale of the claimant's property. In both the cases the claim is based on the ground that the claimant's property has paid more than what it was liable for and that the defendant has been benefited by the payment. (Vol 29) 1942 Mad 685 (687) : I L R (1943) Mad 96 (FB). (('02) 24 Mad 96, *Overruled.*) ✠ (Vol 29) 1942 Oudh 449 (457) : 19 Luck 70 (FB) ✠ (Vol 3) 1916 All 130 (131) : 38 All 92 (DB) ✠ (Vol 2) 1915 Cal 759 (762) (DB) ✠ ('03) 26 Mad 686 (693) (FB).

[2] The fact that the puisne mortgagee did not redeem the earlier mortgage cannot preclude him from suing for contribution when the earlier mortgage was satisfied by execution sale of the property mortgaged to him. (Vol 31) 1944 Mad 276 (276).

14. Right of redeeming co-mortgagor to claim contribution.— [1] There is nothing to prevent a redeeming co-mortgagor, from claiming at his option rights given to him under S. 95 or those given to him by this section. (Vol 29) 1942 Oudh 449 (457, 458) (FB). (Per Agarwala J.) ✠ (Vol 32) 1945 Pat 192 (195) (DB).

[2] Co-mortgagor by paying mortgage-money gets rights of original mortgagee under S. 92 and also acquires a fresh charge—Limitation for suit by co-mortgagor for contribution is 12 years from date of payment and not from date when original mortgage-money became payable. (Vol 29) 1942 Oudh 449 (458) : 19 Luck 70 (FB).

[3] When a co-mortgagor in order to set aside a sale in execution of the mortgage decree pays the requisite amount and gets the sale set aside such co-mortgagor becomes an equitable assignee of the mortgage bond, but if the suit on the mortgage bond is barred, he can sue for contribution the other co-mortgagors and obtain a charge on their share. (Vol 32) 1945 Pat 192 (196) (DB).

15. Effect of acquisition of a portion of equity of redemption by mortgagee.— [1] Where the mortgagee himself purchases a portion of the mortgaged property, such purchase will extinguish that portion of the mortgage-debt which is chargeable by way of contribution on the portion purchased by him, that is to say, the portion of the debt which bears the same ratio to the whole amount of the debt as the value of the portion purchased bears to the whole of the property mortgaged. (Vol 31) 1944 Pat 179 (182) : 22 Pat 637 (DB) ✠ (1900) 22 All 284 (293) (FB) ✠ ('97) 20 All 23 (31, 32) (FB) ✠ ('01) 26 Bom 88 (95) (DB) ✠ (Vol 19) 1932 Cal 319 (320) : 59 Cal 76 (DB) ✠ (Vol 7) 1920 Mad 375 (378) : 43 Mad 372 (FB) ✠ (Vol 34) 1947 Mad 277 (278) (DB) ✠ (Vol 24) 1937 Oudh 284 (285) : 13 Luck 122 ✠ (Vol 27) 1940 Pat 420 (422) : 19 Pat 524 (DB) ✠ (Vol 15) 1928 Rang 266 (266) : 6 Rang 417 (DB) ✠ (Vol 20) 1933 Lah 374 (375) (DB).

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[2] Purchase by mortgagee, whether at Court sale or by private treaty, of part of mortgaged properties discharges portion of mortgage-debt which is chargeable on items purchased. (Vol 30) 1943 Mad 637 (638) ✠ (Vol 34) 1947 Mad 277 (278) (DB) ✠ ('08) 8 Cal L Jour 92 (93) (DB) ✠ (Vol 29) 1942 Mad 44 (46, 47) (DB).

[3] The mortgagee need not abate any portion of his debt where he has paid the full market-value of the portion purchased and not merely the value of the equity of redemption in it. (Vol 31) 1944 Pat 179 (182): 22 Pat 637 (DB) ✠ ('01) 24 Mad 96 (111, 112, 113) (DB) ✠ ('95) 18 All 31 (33) ✠ ('10) 4 Sind L R 224 (225) (DB).

[4] Where the mortgagee acquired a portion of equity of redemption and sued for sale of the remaining property for the balance of the debt, it was held that the decree ordering the sale of the property without fixing the proportionate liability on the property under this section was improper. (Vol 3) 1916 Pat 249 (249): 1 Pat L Jour 228 (DB).

[5] In case a mortgagee purchases a portion of equity of redemption after the passing of decree on his mortgage, he cannot execute his decree for the recovery of the entire debt. All that the executing Court can do is to proceed against the remaining property for the amount remaining due after the proportionate abatement of the debt. (Vol 10) 1923 Pat 490 (491) : 2 Pat 715 (DB) ✠ (Vol 19) 1932 Cal 319 (320) : 59 Cal 76 (DB) ✠ (Vol 7) 1920 All 129 (131) : 42 All 544 (DB) ✠ (Vol 21) 1934 Mad 250 (251).

[But see (Vol 23) 1936 Cal 537 (540)]

[6] First mortgage in favour of *A* of three items and second of item one alone—*A* obtaining decree on second mortgage and purchasing item in execution — On date of sale suit on first mortgage pending and decree passed after sale — *A* held liable to contribute proportionately towards mortgage-debt in respect of item one—Question of adjustment held could not be gone into in execution proceedings. (Vol 30) 1943 Mad 637 (639).

16. Effect of release by mortgagee of a portion of equity of redemption. — [1] Mortgagee releasing from his mortgage security part of mortgaged property without abating any portion of his mortgage-debt — Owners of parts of equity of redemption cannot be deprived of their right of contribution by such release. (Vol 5) 1918 Mad 1030 (1033) : 40 Mad 968 (FB) ✠ (Vol 29) 1942 P C 50 (53) : 69 Ind App 98 : I L R (1942) All 608 : I L R (1942) Kar P C 99 (PC) ✠ (Vol 34) 1947 Oudh 122 (126).

[But see (Vol 18) 1931 All 625 (627) (DB).]

17. Effect of negligence or laches on the part of the mortgagee.— [1] A mortgagee or charge-holder who has got a charge on two properties, but who allows by his negligence or laches, his remedy against one of the properties to be barred, cannot claim to recover the whole amount from the other property. (Vol 28) 1941 Oudh 203 (204). (Case of maintenance charge.) ✠ (Vol 7) 1920 Bom 306 (307) : 44 Bom 223 (DB).

[2] Where the mortgagee has recovered the whole of the debt from some of the properties only, the owners of those properties can recover contribution from the properties even though the mortgagee may have lost his remedy against them by reason of limitation. (Vol 2) 1915 Mad 675 (678) : 39 Mad 288 (DB) ✠ (Vol 14) 1927 Cal 665 (667) (DB).

[3] Person interested in mortgaged property satisfying prior mortgagee's decree when prior mortgagee's claim to enforce his mortgage was barred by limitation —Subsequent mortgagee is not liable to contribute. (Vol 16) 1929 Pat 94 (95) (DB).

18. Parties to suit for contribution.— [1] In a suit for contribution, all the persons liable to contribute should be made parties. (Vol 3) 1916 All 190 (191) (DB).

[But see ('73) 5 N W P H C R 215 (216) (DB).]

[2] It is only when persons liable to contribute are properly before the Court that the value of the different items of property can be ascertained and a decree finally settling all disputes can be made. (Vol 3) 1916 All 190 (191) (DB) ✠ (Vol 27) 1940 Pat 119 (121) (DB).

[3] Where the plaintiff deliberately left out one of the contributors, the suit was dismissed. (Vol 27) 1940 Pat 119 (121) (DB).

[4] In a suit for contribution the liability of each party must be determined in proportion to his interest and provided for separately. (Vol 2) 1915 Cal 334 (336) (DB) ✠ (Vol 18) 1931 All 625 (626) (DB).

19. Properties liable to contribute.—[1] Where properties *a*, *b*, *c* and *d* are mortgaged to secure a debt, and properties *a* and *b* are sold for the realisation of the debt the owner of *a* can claim contribution only from the properties *c* and *d*. ('97) 19 All 545 (548) (DB).

[2] Where some of the properties mortgaged to secure the common debt, are already subject to a prior mortgage, and such properties are sold in execution of the decree obtained on that mortgage the sale is free of the second mortgage, and such properties are not liable for contribution as far as the claim arising under the second mortgage is concerned; the burden of satisfying the whole mortgage-debt falls entirely on the remaining mortgage properties. ('97) 19 All 545 (549) (DB) ✠ ('10) 32 All 612 (618): 37 Ind App 182 (P C).

[3] The burden of proof that some of the mortgaged properties have been completely absorbed in satisfaction of the prior mortgages is upon the plaintiff suing for contribution. If the plaintiff fails to prove that some of the properties are so absorbed, he is bound to bring each and every item of the property into the hotchpot in order to enable the liability of each of the properties to be determined. (Vol 18) 1931 All 625 (627, 628) (DB).

[4] If the plaintiff voluntarily relinquishes his claim for contribution from some of the properties he cannot thereby seek to enhance the burden on the other properties. Though a claim for contribution is lost against those properties which are absorbed in satisfaction of prior mortgage, it is not lost against those portions of the properties which are sold in execution of a decree obtained on a subsequent mortgage or in execution of a simple money decree against mortgagors. (Vol 18) 1931 All 625 (627, 628) (DB) ✠ (Vol 31) 1944 Pat 179 (182): 22 Pat. 637 (DB) ✠ (Vol 16) 1929 All 309 (311) : 51 All 606 (DB) ✠ ('95) 20 Bom 615 (617) (DB).

20. Failure to claim contribution in redemption suit, whether bars subsequent suit for contribution.—[1] The failure to claim contribution in a suit for redemption will not bar a subsequent suit for contribution on the principle of *res judicata*. (Vol 16) 1929 All 696 (697) (DB).

[2] Direction for sale of properties in particular order—Decree satisfied on sale of some items—Liability of the remaining properties to contribute, held not barred. (Vol 22) 1935 Mad 456 (458) ✠ (Vol 6) 1919 Pat. 533 (534) (DB).

[3] A suit for contribution on the failure to claim contribution in a redemption suit is not barred by the provisions of O. 2, R. 2 of the Code of Civil Procedure. (Vol 16) 1929 All 696 (697) (DB).

21. Plea that the plaintiff has no interest left in the property is no defence to the claim for contribution.—[1] Where the properties of both *A* and *B* were subject to one mortgage-debt and *A* paid Rs. 3,700 towards the discharge of that common liability, the

Deposit in Court.

Power to deposit in Court money due on mortgage.

83. At any time after the principal money [a][payable in respect of any mortgage has become due] and before a suit for redemption of the mortgaged property is barred, the mortgagor, or any other person entitled to institute such suit, may deposit, in any Court in which he might have instituted such suit, to the account of the mortgagee, the amount remaining due on the mortgage.

Right to money deposited by mortgagor.

The Court shall thereupon cause written notice of the deposit to be served on the mortgagee, and the mortgagee may, on presenting a petition (verified in manner prescribed by law[b] for the verification of plaints) stating the amount then due on the mortgage, and his willingness to accept the money so deposited in full discharge of such amount, and on depositing in the same Court the mortgage-deed [c][and all documents in his possession or power relating to the mortgaged property], apply for and receive the money, and the mortgage-deed [d][and all such other documents] so deposited shall be delivered to the mortgagor or such other person as aforesaid.

[d][Where the mortgagee is in possession of the mortgaged property, the Court shall, before paying to him the amount so deposited, direct him to deliver possession thereof to the mortgagor and at the cost of the mortgagor either to re-transfer the mortgaged property to the mortgagor or to such third person as the mortgagor may direct or to execute and (where the mortgage has been effected by a registered instrument) have registered an acknowledgment in writing that any right in derogation of the mortgagor's interest transferred to the mortgagee has been extinguished.]

[a] *Substituted* by the Transfer of Property (Amendment) Act, 1929 (20 [XX] of 1929), S. 44, for "has become payable". [b] *See* the Code of Civil Procedure, 1908 (Act 5 [V] of 1908), Sch. I, Order 6, Rule 15. [c] *Substituted* for "if then in his possession or power," by Act 20 of 1929, S. 44. [d] *Added, ibid.*

Section 82—Note 21 *(contd.)*

fact that *A* had subsequently, i. e, after th epayment was made, sold his property was held not to be a bar to *A*'s claiming contribution from *B* in respect of the amount paid by him. (Vol 17) 1930 Oudh 260 (264): 5 Luck. 727 (DB).

22. Interest on contribution amount.—[1] Interest on the contribution amount can be awarded on equitable considerations. (Vol 23) 1936 Mad 910 (912): ILR (1937) Mad. 35.

23. Contribution suit is not cognizable by Small Cause Court.—[1] A suit by mortgagor who has paid more than his shares of the mortgage amount for personal reimbursement from the other mortgagors is not a "suit for contribution" within the meaning of Article 42 of the said Act and is therefore cognizable by a Court of Small Causes. (Vol 15) 1928 All 298 (298): 50 All 428 ✠ (Vol 15) 1928 Cal 593 (594, 596): 55 Cal 1193 (DB).

[But see (Vol 2) 1915 All 143 (144).]

SECTION 83—SYNOPSIS

1. Scope.
2. Nature of procedure under the section.
3. Section applies to charges.
4. "At any time after . . . become due."
5. "The mortgagor, or any other person entitled to institute such suit."
6. Deposit must be unconditional.
7. Deposit after suit.
8. Deposit in redemption suit.
9. Suit for redemption without previous deposit.
10. Title to money deposited until withdrawal by mortgagee.
11. "To the account of the mortgagee."
12. Minor mortgagee.
13. "The amount remaining due on the mortgage."
14. "The Court shall thereupon cause written notice of the deposit to be served on the mortgagee."
15. "Verified in manner prescribed by law for the verification of plaints."
16. Mortgagee must accept deposit in full discharge of amount due.
17. Security bond, if can be taken under the section.

1. Scope.—[1] There are three remedies open to a mortgagor in respect of the redemption of the mortgaged property, (a) he may tender the mortgage-money privately to the mortgagee under S. 60; (b) he may deposit the money in Court under this section; or (c) he may institute a suit for redemption under S. 91. He can avail himself of any of these remedies and cannot be compelled to resort to any one remedy in particular. (Vol 8) 1921 All 358 (360): 43 All 95 (DB) ✠ ('01) 4 Oudh Cas 387 (394, 395) (DB).

[2] The provision for making a deposit in Court is intended to remove the inconveniences that may result from a tender out of Court. The deposit makes available to the mortgagor a sure mode of proof that he had made a tender. (Vol 13) 1926 Mad 601 (604): 49 Mad. 609 (FB).

[3] The mortgagor must strictly comply with the provisions of the section in order to claim benefit under it. (Vol 15) 1928 All 311 (313): 50 All 655 (DB) ✠ ('04) 26 All 291 (294) (DB) ✠ (Vol 5) 1918 Mad 88 (91) (DB).

[4] The provisions of the Act as to tender and deposit are not intended to apply to cases where there are disputes between the parties as to the extent of the subsisting interest of the mortgagor in the equity of redemption, so as to compel the mortgagee to take upon himself the task of deciding such disputes rightly for himself at the risk of losing interest on the money due to him. ('12) 1912 Mad W N 1175 (1176).

[But see (Vol 1) 1914 All 86 (99) : 36 All 26.]

2. Nature of procedure under the section:—[1] The procedure provided by the section is a summary one. ('90) 13 All 195 (199, 200) (DB).

[2] The functions of the Court under the section are merely ministerial and not judicial. ('95) 1895 All W N 145 (146, 147).

[3] Order 23, R 3, Civil P. C., does not apply to a compromise entered into pending proceedings under

Section 83—Note 2 *(contd.)*

this section. ('90) 13 Mad 316 (318) (DB). (S 375 of the Code of 1882.)

[4] It has been held that it is not competent for a District Munsif dealing with proceedings under this section to make a reference to the High Court. ('13) 36 Mad 16 (17) (DB).

3. Section applies to charges.—[1] The section would apply to a charge created on immovable property. (Vol 22) 1935 Oudh 93 (94): 10 Luck 350 (DB).

4. "At any time after . . . . . become due."—[1] The section presupposes that a person who proposes to take action under the section has a valid right to redeem and is not attempting to exercise his right of redemption in a manner contrary to the provisions of the contract between himself and the mortgagee. ('12) 35 Mad 209 (215) (D B).

[2] A consent decree passed between the parties provided that if the mortgagor made default in payment of the amount fixed by the decree on a certain date, the mortgagee would be entitled to take possession of the mortgaged property. The mortgagor made default but the mortgagee was not given possession. Before the mortgagee could recover possession, the mortgagor deposited the mortgage-money in Court. It was held that according to the consent decree the right to redeem could accrue, when default was made, only after the mortgagor had given possession to the mortgagee and as he did not give such possession, the deposit was premature. ('02) 26 Bom 312 (316) (D B).

[3] A mortgage-deed provided that it should be a simple mortgage for five years, that after that period the mortgagee was to have the option of retaining the deed as a simple mortgage deed or of obtaining possession of the mortgaged property, and that if he entered into possession there was to be no redemption for ten years after he had obtained possession. The mortgagor did not redeem within five years but as soon as the mortgagee sued for possession soon after five years had expired, the mortgagor made a deposit under this section. It was held that he could do so. (Vol 7) 1920 Oudh 311 (311).

[4] There was a stipulation in the mortgage deed that the mortgage could be discharged only by payment beyond the fruit season. The mortgagor deposited the amount while the fruit season was on. It was held that the deposit was not invalid and that it was open to the mortgagee to wait till the fruit season was over before he withdrew the amount. (Vol 28) 1941 Cal 18 (18, 19).

5. "The mortgagor, or any other person entitled to institute such suit." — [1] The persons, other than the mortgagor, who are entitled to institute a suit for redemption of the mortgaged property are enumerated in S. 91. Such persons also will be entitled to make the deposit under this section. (Vol 10) 1923 Mad 533 (534) : 47 Mad 7 (D B) ✠ (Vol 2) 1915 Lah 228 (231) : 1915 Pun Re No. 83 (D B) ✠ ('05) 27 All 178 (179, 180) (D B) ✠ (Vol 4) 1917 All 401 (401) : 39 All 719 (D B).

[2] A person in whose favour there is a mere agreement to sell the mortgaged property, is not entitled to make a deposit under this section. (Vol 13) 1926 Mad 597 (598, 600). ((Vol 4) 1917 Mad 517, *Dissent.*)

[3] A mortgagee accepting and taking out the money deposited without any objection cannot subsequently dispute the right of the person making such deposit, to redeem the property mortgaged. ('04) 1 All L Jour 590 (592, 593).

[4] Where the mortgagor or other person is a minor the person entrusted with the care of such minor desiring to take the benefit of this section should get a guardian ad litem appointed by the Court to take proceedings under the section on behalf of the minor. ('03) 27 Bom 23 (30) (D B). *(Obiter.)*

6. Deposit must be unconditional.—[1] Deposit under this section is only a special kind of tender. (Vol 13) 1926 Mad 601 (604) : 49 Mad 609 (F B) ✠ (Vol 5) 1918 Mad 1360 (1362) : 40 Mad 804 (F B).

[2] A valid deposit must be unconditional. ('91) 14 Mad 49 (50) (D B)✠(Vol 27) 1940 Pat 18 (19).

[3] A deposit is conditional if the person depositing money under this section denies the right of the person claiming the money to withdraw it. ('98) 22 Bom 761 (764) (D B).

[4] Where a mortgagor deposits money in Court but states in his petition that some money, on a different transaction, is due to him from the mortgagee and that he reserves his right to recover that money by a suit after the proceedings under this section are over, the deposit is not conditional. ('01) 4 Oudh Cas 355 (359).

[5] A deposit accompanied with a requisition for the return of the documents which the mortgagee is under a duty to deposit in Court, under this section, before he takes out the money deposited, is not conditional. ('94) 17 Mad 267 (268) (D B)✠ (Vol 11) 1924 Mad 559 (559, 560) (D B).

[6] A deposit is conditional if the mortgagee is required to return documents which he is not bound to deposit under the section. (Vol 3) 1916 Mad 1143 (1144).

[7] A deposit will not be considered conditional when the person making the deposit in his petition, prays for an issue of notice to the mortgagee, for cancellation of the mortgage deed and for a direction that the mortgagee should take the money deposited out of Court. (Vol 11) 1924 Mad 559 (559, 560) (D B).

[8] Where an application for making a deposit was made on 3-8-1910 but the actual desposit was made on 10-8-1910 and interest on the principal money was calculated up to 3-8-1910 only, it was held that the deposit was not valid on the ground that it was insufficient and that interest ought to have been calculated up to 10-8-1910 when the actual deposit was made. (Vol 3) 1916 Mad 382 (384) (D B).

7. Deposit after suit. — [1] This section applies only to deposits made before a suit has been instituted on the mortgage. Deposits into Court after the institution of a suit by the creditor to recover a debt are governed by the provisions of O. 24, Civil P. C. ('12) 35 Mad 209 (212, 213) (D B) ✠ (Vol 22) 1935 Oudh 93 (94): 10 Luck 350 (D B)✠(Vol 26) 1939 Mad 200 (201).

[2] Where a suit has been instituted on the mortgage in one Court, the fact that a deposit of the amount is thereafter made in another Court having jurisdiction over the mortgaged property will not be a valid deposit under this section. The fact that the mortgagor had no notice of the institution of the suit will not affect the right of the mortgagee to proceed with the suit as instituted. ('12) 35 Mad 209 (213) (D B) ✠ (Vol 6) 1919 Mad 948 (948, 949) (D B).

[3] A mortgagee filed a suit for recovery of the interest due on a mortgage document and pending the final decision of that suit, the mortgagor made a deposit of the principal money which was due according to him, under this section. It was held that the amount deposited was insufficient and that therefore, interest did not cease to run. (Vol 16) 1929 P C 243 (244, 246): 56 Ind App 339: 51 All 686 (P C).

8. Deposit in redemption suit. — [1] Where a mortgagor or other person mentioned in S. 91 institutes a suit for redemption and then deposits the mortgage-money in Court neither this section nor O. 24, Civil P. C., will apply to such a deposit. ('99) 1 Bom L R 381 (383) (D B).

Section 83 *(contd.)*

9. Suit for redemption without previous deposit. — [1] A deposit under this section is not a condition precedent to a suit for redemption of the mortgaged property. (Vol 8) 1921 All 353 (355): 43 All 638 (F B).

[2] Court cannot dismiss the suit for redemption on the ground that there was no previous deposit or that the deposit was insufficient. (Vol 17) 1930 All 523 (524) (DB).

10. Title to money deposited until withdrawal by mortgagee. — [1] The money deposited under this section remains the property of the person making the deposit until it has been accepted by the mortgagee under the provisions of this section. ('05) 29 Mad 232 (233) (D B)✠(Vol 27) 1940 Pat 18 (19) ✠ (Vol 24) 1937 Pat 253 (254, 255). (Fact that such person has, after the deposit, sued for redemption or that a decree has been passed in such suit will not make any difference.) ✠('03) 25 All 179 (183) (D B).

[2] A mortgagor deposited the mortgage amount under S. 83. The mortgagee refused to accept it and the mortgagor thereupon brought a suit for redemption. The suit was decreed, but there was no direction in the decree that the mortgagee should withdraw the amount. The mortgagee appealed from the decree and pending the appeal, he applied to withdraw the amount deposited. It was held that the withdrawal having been made under S. 83, and not in execution of the decree, the mortgage was extinguished and that the appeal by him became thereby incompetent. ('03) 25 All 179 (181, 182) (D B).

[3] The mortgagor had sued for redemption, after a deposit under this section, and had obtained a decree. But the decree contained a direction that the mortgagee may withdraw the amount. The mortgagee withdrew the amount subsequent to his filing an appeal against that decree. It was held that the withdrawal was in execution of the decree and did not affect the right of appeal from the decree. (Vol 10) 1923 Mad 533 (539): 47 Mad 7 (D B).

11. "To the account of the mortgagee." — [1] If the person making the deposit associates with the real mortgagee a third person who is not entitled to any share in the mortgage-money the deposit is invalid. (Vol 15) 1928 All 311 (313): 50 All 655 (D B)✠('04) 26 All 291 (294) (D B)✠(Vol 26) 1939 Pat 415 (416) (D B)✠ (1900) 23 Mad 510 (512) (D B).

[2] The fact that the depositor acted in good faith in assuming that the third person was entitled to a share in the mortgage-money does not make the deposit valid. (Vol 15) 1928 All 311 (313): 50 All 655 (D B).

[3] Where a deposit is made after the mortgagee is dead, to the account of his legal representatives, or where the mortgage has been transferred to the account of the transferee, the mere fact that the legal representatives or the mortgagee and his assignee dispute each other's title does not render the deposit invalid. (Vol 11) 1924 Mad 559 (560) (D B). (Legal representatives.)✠ (Vol 10) 1923 Mad 354 (354) (DB). (Do.)✠(Vol 25) 1938 All 423 (425, 426) : I L R (1938) All 767 (FB). (Do.)✠ (Vol 11) 1924 Mad 453 (454, 455) (D B). (Mortgagee and his assignee) ✠ (Vol 3) 1916 Oudh 292 (294) : 19 Oudh Cas 145. (Do.)

[4] Where owing to dispute among the legal representatives or the assignees the person desiring to make the deposit is not in a position to find out the real person entitled to the mortgage-money a deposit in Court to the account of the estate of the original mortgagee with a request that the Court should pay it to the person who is entitled to recover it will be valid. (Vol 25) 1938 All 423 (425) : I L R (1938) All 767 (F B) ✠ (Vol 13) 1926 Mad 1087 (1087, 1088) ✠ (Vol 3) 1916 Oudh 292 (294): 19 Oudh Cas 145 ✠ (Vol 21) 1934 Pat 622 (623) (D B).

[5] If instead of making the deposit to the account of the estate, it is made to the account of certain named persons and if ultimately it is found out that some one of them had no title to the money, the deposit will not be valid. (Vol 25) 1938 All 423 (426) : I L R (1938) All 767 (F B).

[6] Where a deposit was made to the account of certain co-mortgagees it was held that if there was no dispute between the mortgagees, it was not open to the mortgagor to ask the Court to determine who should receive the amount deposited. (Vol 13) 1926 Mad 1087 (1087, 1088).

[7] Money was deposited in the name of two mortgagees. One of the mortgagees made an application to the Court that the other mortgagee was not heard of for more than seven years and must be presumed to be dead and that he, the applicant, was entitled to the money. It was held that the Court was competent to decide the question. (Vol 16) 1929 All 754 (755): 51 All 1016 (DB).

12. Minor mortgagee. —[1] Where the mortgagee is a minor, the deposit will be bad unless some person is appointed guardian *ad litem* for the minor. ('03) 27 Bom 23 (28, 29) (DB) ✠(Vol 12) 1925 Mad 1017 (1018, 1019) ✠(Vol 1) 1914 Oudh 107 (108): 16 Oudh Cas 261 ✠(Vol 17) 1930 All 609 (610) (DB) ✠(Vol 13) 1926 All 665 (666): 48 All 611 (DB) ✠(Vol 25) 1938 Mad 405 (408) (DB).

[2] Section 103 provides for preliminary proceedings to be adopted by a person before making a tender or deposit when the mortgagee is a minor. (Vol 10) 1923 All 183 (184): 45 All 273 (D B) ✠('03) 27 Bom 23 (27, 28) (D B) ✠(Vol 1) 1914 Oudh 107 (108): 16 Oudh Cas 261.

[See however (Vol 15) 1928 All 311 (312): 50 All 655 (DB).]

[3] It is necessary for a person not only to apply for the appointment of a guardian *ad litem* but also to see that one is appointed where the mortgagee is minor. ('03) 27 Bom 23 (28, 29) (DB) ✠(Vol 10) 1923 All 183 (184): 45 All 273 (DB).

[4] The guardian *ad litem* must be appointed by an order of the Court and the person making the deposit cannot assume to himself the function of the Court. (Vol 1) 1914 Oudh 107 (108): 16 Oudh Cas 261 ✠(Vol 15) 1928 All 311 (312): 50 All 655 (DB).

[5] If a guardian *ad litem* is not appointed, the minor mortgagee is not bound by any proceedings taken against him. (Vol 9) 1922 All 355 (355) : 44 All 64 (DB).

[6] Where a guardian *ad litem* is appointed by the Court in a proceeding under S. 83 it is open to the person making the deposit to pay up the difference of interest between the date of the original deposit and the date of the appointment of the guardian *ad litem*. On payment thereof the deposit will be valid from the latter date. (Vol 10) 1923 All 183 (184) : 45 All 273 (DB).

13. "The amount remaining due on the mortgage." — [1] A deposit under the section must be of the whole amount remaining due on the mortgage. (Vol 16) 1929 P C 243 (246): 51 All 686 : 56 Ind App 339 (P C).

[2] If the amount deposited is less even by a small amount the deposit is not proper. (Vol 8) 1921 All 280 (281) (D B) ✠(Vol 4) 1917 Mad 922 (924) (D B) ✠(Vol 19) 1932 Nag 169 (170): 28 Nag L R 149 (D B) ✠('03) 6 Oudh Cas 135 (140). (Interest will not cease to run *pro tanto*.) ('86) 8 All 502 (508) (DB). (Do.)

[3] Even a *bona fide* mistake in calculation will not excuse the person making a deposit from a strict compliance with the provisions of the section. (Vol 4)

Section 83—Note 13 *(contd.)*
1917 Mad 922 (923, 924) (D B) ✠(Vol 3) 1916 Oudh 279 (281).

[4] If a person first makes an insufficient deposit and then as soon as he discovers his mistake makes a further deposit which covers the difference between the amount due on the date of second deposit and the amount of the original deposit, the provisions of the section are complied with on the date of the second deposit, and the deposit is effective from that date ('04) S Cal W N 216 (218) (DB) ✠('86) 8 All 502 (508) (DB).

[5] Where the mortgagor paid into Court the amount determined by the Court to be due, it was held that it was a good tender although it was ultimately found on appeal that the mortgagee was entitled to a larger amount. ('12) 16 Ind Cas 374 (375) (Cal).

[6] The deposit of a larger sum than that due does not render the deposit invalid. (Vol 10) 1923 Mad 533 (534): 47 Mad 7 (DB) ✠(Vol 5) 1918 Mad 88 (90) (DB).

[7] The amount remaining due includes not only the principal sum but also the whole of the interest which has become due. ('89) 16 Cal 307 (309) (PC).

[8] It is a sufficient compliance with the section if interest is paid first up to the date of the deposit and then, after service of notice, further interest is paid from the date of the deposit up to the date of service of notice. (Vol 24) 1937 All 706 (707, 708).

[9] In the absence of any local custom or usage, a mortgagee is not entitled to interest both for the day on which the money was advanced and the day on which the deposit is made. He can claim interest for one of the two days. ('03) 8 Cal W N 216 (217, 218) (DB) ✠(Vol 4) 1917 Mad 922 (923) (DB).

[10] In the calculation of interest a fraction of a day will be treated as a whole day. (Vol 4) 1917 Mad 922 (923, 924) (DB).

[11] Where a mortgage-deed contains a penal clause in case of default of payment of the mortgage-debt within the prescribed period, the amount remaining due in case of default would be the amount which the Court ultimately considers as reasonable. Therefore the person, making a deposit, in such cases, and the mortgagee in refusing a deposit as being insufficient always act in peril and one or the other may suffer by an adverse decision of the Court. (Vol 26) 1939 Mad 503 (504, 505) ✠(Vol 9) 1922 Nag 199 (200): 18 Nag L R 47 ✠(Vol 22) 1935 Mad 1072 (1073) (DB).

[12] Money paid by a mortgagee under S. 171, Bengal Tenancy Act, to protect the mortgaged property from a sale which is advertised to take place at the instance of the landlord in execution of a decree for rent does not become part of the mortgage-money so as to entitle the mortgagee to treat it as included in the amount remaining due on his mortgage. (Vol 2) 1915 Cal 498 (500) (DB)

[13] A mortgagee who is entitled to possession under the terms of his mortgage is entitled to include, in the amount remaining due, costs of the suit to obtain possession. ('88) 1 C P L R 154 (155).

[14] A prior mortgagee obtained a decree on his mortgage without impleading the subsequent mortgagee. The subsequent mortgagee deposited money under this section and claimed redemption. The prior mortgagee claimed the costs of his suit, the costs of the final decree proceedings and the costs of execution. It was held that since the subsequent mortgagee was not added as a party by the mortgagee to his suit, he could not be made liable for costs and that the deposit without the costs was sufficient. (Vol 23) 1936 Nag 128 (129, 130): I L R (1936) Nag 9.

[15] A mortgagor made a deposit but the mortgagee in possession refused to accept the deposit as being insufficient but without making any statement as to the realisations from the property. It was held that the mortgagee could not keep the mortgagor guessing as to the income he derived from the mortgaged property and that the deposit was therefore valid for the purpose of stopping the running of interest. (Vol 14) 1927 Nag 138 (138).

[16] A usufructuary mortgage-deed provided that the mortgagee should take the income of the land in lieu of interest but that, if he was prevented from getting possession, interest would be charged at a certain rate. The morgagee got possession only of a portion of the land. The mortgagor subsequently sold the property to a third person and the purchaser deposited only the principal amount. The mortgagee claimed proportionate interest for the portion of the land of which he did not get possession. It was held that when the stipulation about delivery of possession was broken, the mortgagee's right was to claim the whole of the interest agreed upon. The mortgagee was bound to give an account of the income he received from the mortgaged property. Till this was done it was impossible for the purchaser to know whether any interest was due. The deposit was, therefore, under the circumstances, valid. (Vol 16) 1929 Cal 304 (306) (DB).

[17] The Court in which proceedings under this section are taken cannot decide the question of the sufficiency of insufficiency of the deposit. (Vol 5) 1918 Mad 88 (92) (DB) ✠(Vol 13) 1926 Oudh 113 (115, 116) ✠(Vol 32) 1945 Mad 46 (46).

14. "The Court shall thereupon cause written notice of the deposit to be served on the mortgagee".—[1] When a deposit is made under this section, it is no part of the duty of the person making the deposit to get the service of notice effected on the mortgagee. That duty is cast on the Court. (Vol 10) 1923 All 24 (25) (DB) ✠('21) 35 Cal L Jour 202 (203) (DB).

[2] The duty of the person is over when, after making the deposit, he applies for issue of notice giving the correct address of the mortgagee, and paying process fees. (Vol 10) 1923 All 24 (25) (D B) ✠ (Vol 4) 1917 Mad 922 (924) (DB) ✠ ('10) 35 Mad 44 (45) (DB).

[3] A mortgage deed provided that the redemption thereof shall take place in the fallow season. The mortgagor deposited money in Court in the fallow season but when notice of the deposit was served on the mortgagee crops had been raised on the land. It was held that the deposit was valid and that the time taken in the service of notice would not affect its validity unless the mortgagor himself was responsible for the delay caused in the service of the notice. (Vol 9) 1922 Oudh 17 (17).

15. "Verified in manner prescribed by law for the verification of plaints."—[1] The provision that the petition should be verified in the manner prescribed for verification of plaints, does not warrant the inference that the proceedings under the section are proceedings in a regular suit or that the order made upon the petition has the force of a decree in a suit. ('90) 13 Mad 316 (318) (D B).

16. Mortgagee must accept deposit in full discharge of amount due. — [1] Whatever may be the amount of the debt due according to the calculations of the mortgagee, he will have to accept the amount deposited, if he wishes to accept it at all, in full and not in partial discharge of the liability. ('09) 36 Cal 840 (853, 855) : 36 Ind App 85 (P C) ✠ (Vol 29) 1942 Mad 592 (594) (D B).

[2] The mere fact that the mortgagee has stated in his petition for withdrawal of the amount, that he reserves his right to recover further amounts due on the mortgage will not have the effect of preventing the

84. When mortgagor or such other person as aforesaid has tendered or deposited in Court under section 83 the amount remaining due on the mortgage, interest on the principal money shall cease from the date of the tender or [a][in the case of a deposit, where no previous tender of such amount has been made] as soon as the mortgagor or such other person as aforesaid has done all that has to be done by him to enable the mortgagee to take such amount out of Court, [b][and the notice required by section 83 has been served on the mortgagee :

Cessation of interest.

Provided that where the mortgagor has deposited such amount without having made a previous tender thereof and has subsequently withdrawn the same or any part thereof, interest on the principal money shall be payable from the date of such withdrawal].

Nothing in this section or in section 83 shall be deemed to deprive the mortgagee of his right to interest when there exists a contract that he shall be entitled to reasonable notice before payment or tender of the mortgage-money [a][and such notice has not been given before the making of the tender or deposit, as the case may be].

[a] *Inserted* by the Transfer of Property (Amendment) Act, 1929 (20 [XX] of 1929), S. 45. [b] *Substituted ibid.*, for "as the case may be".

Section 83 — Note 16 *(contd.)*

mortgage-debt from being discharged in full. ('90) 13 All 195 (200) (D B).

[3] The Court has not, save with the consent of the mortgagor or his representatives, any jurisdiction to permit the money deposited to be drawn out of Court on any terms other than those imposed by the section. ('09) 36 Cal 840 (852, 853) : 36 Ind App 85 (P C).

[4] Where the person making the deposit consents to the mortgagee drawing out the money deposited in part satisfaction of the amount due under the mortgage, the withdrawal by the mortgagee will not operate as an extinguishment of the mortgage. ('10) 32 All 142 (144) (D B).

[5] A mere deposit by itself does not extinguish the mortgage. It will be extinguished only by the mortgagee accepting the deposit in full satisfaction of the claim or by redemption of the mortgage by the mortgagor or other persons mentioned in S. 91 in a suit for redemption. (Vol 11) 1924 All 26 (28) : 45 All 592 ✠ ('07) 34 Cal 223 (228) (D B) ✠ ('07) 31 Bom 527 (533) (D B) ✠ (Vol 28) 1941 Cal 18 (19) ✠ (Vol 32) 1945 Cal 370 (374) (DB).

[But see ('05) 27 All 178 (181, 182) (D B).]

[6] Refusal by the mortgagee to accept the deposit in full discharge of the mortgage will not make him, where the mortgage is one with possession, a trespasser from the date of such refusal. The only effect of the refusal is to render him liable to the consequences referred to in Ss. 76 (i) and 84. ('07) 31 Bom 527 (533) (D B) ✠ ('07) 34 Cal 223 (228) (D B) ✠ (Vol 12) 1925 Rang 13 (14) : 2 Rang 382 ✠ (Vol 23) 1936 Cal 200 (202) ✠ (Vol 3) 1916 Oudh 279 (281).

[7] The mortgagor is not estopped from applying for relief under the Bengal Money-lenders Act (1940), merely by reason of his deposit under this section. (Vol 31) 1944 Cal 288 (289) : I L R (1944) 1 Cal 321.

[8] The refusal by the mortgagee to accept the deposit puts an end to the proceedings under this section. The Court has no jurisdiction to pay the money to the mortgagee subsequently unless there is a fresh tender by the mortgagor. (Vol 11) 1924 Pat 41 (41, 42) (D B) ✠ (Vol 27) 1940 Pat 18 (19).

17. Security bond, if can be taken under the section.—[1] This section does not authorise a Court to take a security bond from any party to the proceedings thereunder. (Vol 11) 1924 Pat 41 (42) (D B).

SECTION 84 — SYNOPSIS

1. "Mortgagor or such other person as aforesaid."
2. "Mortgagee."
3. "Has tendered."
4. "Deposited in Court."
5. "The amount remaining due on the mortgage."
6. When interest ceases in case of tender.
7. "Has done all that has to be done . . . out of Court."
8. Service of notice on mortgagee.
9. Deposit is only a kind of tender.
10. Withdrawal of deposit by the mortgagor.
11. Notice before payment or tender.
12. Notice before payment not necessary when mortgagee demands mortgage-money.
13. Refusal of tender and costs.
14. Plea as to insufficiency of tender or deposit.
15. Section 14 of Bombay Regulation V of 1827.
16. Tender and deposit in possessory mortgages.

1. "Mortgagor or such other person as aforesaid." —[1] A tender or deposit must in order to have the effect of stopping the interest, be made only by the mortgagor or any other person who is entitled to institute a suit for redemption or their authorised agents. (Vol 5) 1918 Mad 490 (490) (D B) ✠ (Vol 16) 1929 Mad 230 (233) : 52 Mad 322 (D B).

[2] A tender of the mortgage-money was made by the mortgagor and was refused by the mortgagee. A subsequent mortgagee thereafter sued to redeem the mortgage. It was held that the subsequent mortgagee could claim the benefit of the tender by the mortgagor and that he was not liable to pay interest after the date of the tender. (Vol 17) 1930 Rang 255 (257).

[3] It has been held that where an Official Assignee in insolvency of the mortgagor sells the mortgaged property and holds the purchase-money realised from the sale, he does so as an administrator of the estate of the mortgagor and not as an agent of the mortgagee. Interest on the mortgages not paid off by him runs, therefore, until the date of payment. (Vol 22) 1935 Lah 906 (907).

2. "Mortgagee." — [1] The term "mortgagee" would include an assignee of the mortgage from the original mortgagee. (Vol 11) 1924 Mad 453 (454) (DB).

[2] "Mortgagee" will include where the original mortgagee dies, his heir or successor-in-interest, or the executor or administrator, or a person holding a succession certificate in respect of the debt. (Vol 25) 1938 All 423 (425) : I L R (1938) All 767 (FB).

3. "Has tendered." — [1] A tender must not be accompanied by any condition. (Vol 9) 1922 P C 347 (349) (PC).

[2] Tender on condition of delivery of title deeds to which the party tendering is not entitled is not valid. (Vol 3) 1916 Mad 1143 (1144) ✠ (Vol 2) 1915 Mad 402 (404).

[3] Tender on condition that the creditor should accept it as the whole of the balance due is not valid. (Vol 18) 1931 Nag 91 (93).

Section 84 — Note 3 *(contd.)*

[4] Tender of a part of an entire demand is not valid. (Vol 1) 1914 Cal 740 (741).

[5] A tender under protest has been held not bad in law. (Vol 23) 1936 Lah 168 (175) (DB).

[6] A tender reserving a right in the party to dispute the amount due was held not to be a conditional tender. ('01) 4 Oudh Cas 355 (359). (Case of deposit in Court)

[7] The asking for a receipt does not vitiate the tender. ('07) 34 Cal 305 (320) (DB).

[8] A tender before the mortgage money becomes due is premature and does not stop the running of interest. (Vol 5) 1918 Upp Bur 32 (34) : 2 Upp Bur Rul 141 ✠('02) 31 Cal 183 (185) (DB) ✠ (Vol 1) 1914 Oudh 140 (142)✠('02) 26 Bom 312 (316) (DB).

[9] It has been held that rule laid down in S. 49 of the Contract Act is intended to apply both to the delivery of goods and to the payment of money where no place is fixed by the contract. (Vol 14) 1927 P C 156 (158) : 54 Ind App 265 : 5 Rang 451 (PC).

[10] A mere readiness or willingness on the part of the mortgagor to pay is not a valid tender. (Vol 5) 1918 Mad 219 (220) (DB)✠(Vol 16) 1929 Pat 397 (398) (DB) ✠(Vol 16) 1929 Rang 271 (272)✠(Vol 10) 1923 Lah 632 (634) : 4 Lah 406 (DB)✠('98) 22 Bom 440 (446) (DB)✠ (Vol 5) 1918 Nag 217 (218).

[11] It must be shown that the mortgagor was actually ready and willing to pay the money then and there if it could be received by the mortgagee. (Vol 16) 1929 Pat 397 (398) (DB) ✠ (Vol 24) 1937 All 122 (123) (DB)✠(Vol 5) 1918 Nag 217 (218).

[12] Money should be actually produced. (Vol 1) 1914 All 53 (53) : 36 All 139 (DB) ✠ (Vol 7) 1920 All 204 (204) : 42 All 420 (DB)✠('03) 5 Bom L R 387 (389) ✠(Vol 10) 1923 Mad 284 (287) : 46 Mad 148 (DB.)

[13] Actual production of money is not necessary where the creditor has refused to receive it. (Vol 10) 1923 P C 26 (28) : 50 Ind App 41 : 46 Mad 108 (PC).

[14] Where there has been an unequivocal refusal to accept a tender in redemption of a mortgage, the law does not require a tender to be made. (Vol 28) 1941 Mad 484 (485) : I L R (1941) Mad 767 (FB).

[14a] Application under S. 83—Principal only deposited in Court—Mortgagor offering to pay cost of repairs and interest pending application — Mortgagee refusing to accept tender and to allow mortgage to be redeemed on ground that mortgage was not then redeemable — Mortgagee held must be deemed to have waived condition of actual production of money. (Vol 34) 1947 All 68 (70) (DB).

[15] A tender must be in the current coin of the realm. ('07) 34 Cal 305 (319) (DB).

[16] Where the debt is contracted in a particular currency other than the current one, the tender may be made in the same currency or in its equivalent in the current currency. ('92) 16 Bom 599 (602, 603) (DB).

[17] A tender by a cheque is not legal. ('01) 24 All 85 (88) (DB).

[18] A tender to a person who disclaims authority to accept it is made at the tender's risk. ('08) 32 Bom 521 (531) (DB).

[19] Where a creditor waives his objection to an irregularity of the tender, the tender is good. A specific objection to a tender will amount to a waiver of other objections. (Vol 28) 1941 Mad 484 (485) : I L R (1941) Mad. 767 (FB).

[20] Where the creditor rejects the tender not on the ground of its nature of form, but on some other ground the objection as to form would be deemed to be waived. ('07) 34 Cal 305 (319) (DB)✠(Vol 16) 1929 Mad 230 (232) : 52 Mad 322 (DB) ✠ (Vol 18) 1931 Bom 118 (120): 55 Bom 525 (DB)✠ (Vol 23) 1936 Lah 168 (175) (DB).

4. "Deposited in Court." — [1] The deposit in this section is one which is made in Court under S. 85 and to be valid, must comply with all the provisions laid down in that section. (Vol 24) 1937 All 706 (708).

[2] Where a mortgagor presented a petition for deposit without paying actual money and after some days deposited the amount including interest only up to the date of the application, it was held that it was not a valid deposit under S. 83 and could not stop the running of interest. (Vol 3) 1916 Mad 383 (384) (DB).

5. "The amount remaining due on the mortgage." — [1] The expression "the amount remaining due on the mortgage" covers any just allowances or costs which can be tacked on to the mortgage-money under the ordinary law of mortgage. (Vol 11) 1924 Bom 264 (266).

[2] A tender or deposit in Court must include the whole of the balance that is due on the mortgage. (Vol 24) 1937 All 328 (333) (DB)✠('86) 8 All 502 (508) (DB)✠(Vol 10) 1923 Oudh 241 (242) : 26 Oudh Cas 59.

[3] The lender is entitled to claim the whole of the amount due to him at once and to decline to accept payment in instalments in the absence of a stipulation to the contrary. ('02) 24 All 461 (463) (DB) ✠ ('87) 1 C P L R 154 (156)✠(Vol 3) 1916 Oudh 279 (281).

[4] A tender of larger amount than what is actually due will be valid. (Vol 6) 1919 Cal 234 (235) (DB)✠ (Vol 23) 1936 Lah 168 (175) (DB) ✠ (Vol 5) 1918 Mad 88 (90) (DB).

[5] A tender or deposit of an amount which falls short of the balance due is invalid and will not stop the running of interest. (Vol 16) 1929 P C 243 (246) : 56 Ind App 339 : 51 All 686 (PC).

[6] The maxim *de minimis non curat lax* does not apply to tenders. (Vol 28) 1941 Mad 484 (485) : I L R (1941) Mad 767 (FB). ((Vol 5) 1918 Mad 88 and (Vol 26) 1939 Mad 503, *Dissent.*)

[7] Where the mortgage bond contained a penal clause and the mortgagee was consequently entitled only to a reasonable compensation, it was held that such a compensation could not be determined with great accuracy and hence a tender falling short by Rs. 2-3-0 of the amount was valid for the purpose of stopping interest. (Vol 19) 1932 Nag 169 (170) : 28 Nag L R 149 (DB).

[8] *A* executed a usufructuary mortgage in favour of *B*, on condition that *B* should take the income of the land in lieu of interest and should deliver possession on repayment of the principal. A certain amount was also fixed as the annual interest, in case *A* failed to deliver possession to *B*. *B* was, however, given possession of only half the land mortgaged and later on, the whole was sold to *C*, who obtained possession also from *B*, after the latter had been in possession for two years. *C* tendered the principal to *B* who refused to accept it and, thereupon *C* deposited the same in Court. It was held that the deposit of the principal only was sufficient inasmuch as the mortgagee was bound to account for the profits of the period of two years and as until he did so, it was not possible for *C* to know whether there was any interest due on the amount. (Vol 16) 1929 Cal 304 (306) (DB).

[9] A tender or a deposit of a part of the amount due, even though under *bona fide* belief that it is the real amount due, or under an honest mistake in calculation is not sufficient to stop interest running, even on the amount so tendered or deposited. (Vol 4) 1917 Mad 922 (924) (DB) ✠ (Vol 3) 1916 Oudh 279 (281) ✠('03) 6 Oudh Cas 135 (140, 141)✠('86) 8 All 502 (508) (DB).

[See however ('92) 16 Bom 141 (149).]

6. When interest ceases in case of tender.—[1] It is necessary that the amount tendered should be kept unemployed and that the mortgagor should not profit by

Section 84 — Note 6 *(contd.)*

the refusal of the tender by the mortgagee. ('07) 34 Cal 223 (229) (DB) ✠ (Vol 5) 1918 Mad 219 (221, 222) (DB) ✠(Vol 13) 1929 Mad 230 (233) : 52 Mad 322 (DB).

[But see ('10) 33 Mad 100 (101) (DB)]

[2] A plea of tender must be accompanied by a deposit in Court in order to stop the running of interest. (Vol 21) 1934 Rang 316 (317) : 13 Rang 22.

[But see (Vol 19) 1932 Mad 109 (111) : 55 Mad 458 (DB).]

[3] The executors of a deceased mortgagee demanded by notice the payment of the mortgage-debt within three months. The mortgagors were ready with the money but could not pay the same to the executors as they had not obtained probate. Before the expiry of the period in the notice, the mortgagors intimated by notice that money was kept ready for payment. It was held that it was a valid tender and that interest ceased to run from the date of expiry of period stated in the notice of demand. ('02) 26 Bom 643 (648).

7. "Has done all that has to be done ..... out of Court."—[1] When mortgagor deposits the amount to the account of the adult mortgagee gives his correct address and pays batta for the issue of notice to him, he has done all that is necessary to enable the mortgagee to take money out of Court. (Vol 9) 1922 All 147 (148, 151) : 44 All 102 (DB)✠(Vol 10) 1923 All 24 (25) (DB) ✠(Vol 4) 1917 Mad 922 (924) (DB).

[2] Where the mortgagee is incompetent to contract it is necessary that a guardian *ad litem* should be appointed for him to act on his behalf and to take the money out of Court. (Vol 10) 1923 All 183 (184) : 45 All 273 (DB).

[3] It is only after the appointment of the guardian that the mortgagor can be said to have done all that is required of him to enable the mortgagee to take the money out of Court under this section. ('03) 27 Bom 23 (29) (DB) ✠ (Vol 10) 1923 All 183 (184) : 45 All 273 (DB) ✠ (Vol 12) 1925 Mad 1017 (1018, 1019) ✠ (Vol 17) 1930 All 609 (610) (DB).

[4] The mortgagor made an application under section 83 with the necessary deposit and notice was issued to the minor mortgagee "under the guardianship of" his father. There was no separate application for the appointment of a guardian and in fact no guardian was appointed. The notice was not served and the application was dismissed. In the subsequent suit for redemption it was held that the procedure was irregular and could not bind the minor mortgagee. (Vol 9) 1922 All 355 (355) : 44 All 64 (DB).

[5] Where the original mortgagee is dead and the mortgagor is unable to find out who the real legal representative of the mortgagee is owing to disputes between the rival claimants to the mortgagee's estate, he may deposit the money into Court with the request that the Court should pay it to the person who is entitled to recover it. If he does that, he has done all that is required of him to enable that person to recover the money. (Vol 11) 1924 Mad 559 (560) (D B) ✠ (Vol 25) 1938 All 423 (425): I L R (1938) All 767 (FB). (In such a case it is for the person entitled to take steps to satisfy the Court that he is the person to whom money should be paid.)✠(Vol 11) 1924 Mad 453 (454) (DB).

[6] The fact that there is a dispute among the claimants to the estate of the deceased mortgagee does not affect the validity of the deposit, nor can the mortgagor be made to suffer for no fault of his. (Vol 11) 1924 Mad 559 (560) (DB)✠(Vol 25) 1938 All 423 (425): I L R (1938) All 767 (F B) ✠ (Vol 3) 1916 Oudh 292 (294) : 19 Oudh Cas 145✠(Vol 11) 1924 Mad 453 (454, 455) (DB).

[7] Where a mortgagor deposits money into Court to the account of certain named persons, by so naming the persons, the mortgagor really prevents the rightful claimants from recovering the money due to them, and cannot, therefore, be said to have done all that was necessary to enable the mortgagee to take the amount out of Court. (Vol 25) 1938 All 423 (426): I L R (1938) All 767 (F B) ✠ ('04) 1904 All W N 20 (21) (DB).

[8] Where a mortgagor had deposited money in Court to the account of *A* and *B*, two sons of the deceased mortgagee, and it was found out that by the custom of primogeniture in the mortgagee's family, only *A* was entitled to the amount, it was held that the deposit was not valid so as to stop the running of interest. (Vol 15) 1928 All 311 (313): 50 All 655 (DB).

[9] The deposit to the account of the deceased mortgagee's estate with the request that it should be paid to anyone who can establish his title to it, is a valid one even if some of the persons named in the petition are found to have no title to the money as the mortgagor had done all he has to do to enable the rightful claimants to take the money out of Court. (Vol 25) 1938 All 423 (426) : I L R (1938) All 767 (FB).

8. Service of notice on mortgagee. — [1] It is essential under this section that all the persons who are entitled to recover the money must be served with notice, although it may happen that those who are not so entitled may be served with the notice. Interest in such cases ceases from the date of service of notice on those who are entitled to the money. (Vol 25) 1938 All 423 (426) : I L R (1938) All 767 (FB).

[2] A mortgagor deposited in Court an amount sufficient to cover the principal and interest up to the date of deposit. The mortgagee was served with notice after some time, but refused to withdraw the amount. The mortgagor thereupon brought a suit for redemption. It was held that it was not contemplated by this section that the deposit would become an invalid deposit under S. 83, if interest up to the date of the service of the notice was not included in the deposit. If the deposit was a valid deposit on the date on which it was made, namely, that if interest had been calculated up till the date of deposit, then all that the defendant could say when notice was served on him was that interest up to the date of service of notice should be allowed to him and that that amount should also be paid to him. (Vol 24) 1937 All 706 (708).

9. Deposit is only a kind of tender.—[1] A deposit in Court under S. 83 is only a special form of tender. (Vol 25) 1938 Mad 405 (408) (DB).

[2] A deposit is a tender through Court and consists of two things—an actual deposit in Court and notice to the person entitled to withdraw it from the Court. (Vol 3) 1916 Mad 503 (504) (D B) ✠ (Vol 5) 1918 Mad 490 (490) (DB).

[3] Where there is both a deposit in Court and notice to the mortgagee and the mortgagee refuses to accept the same, the natural consequences of refusal of a valid tender follow and interest ceases to run on the principal if the deposit is kept in Court. (Vol 5) 1918 Mad 490 (490) (D B)✠ (Vol 5) 1918 Mad 1360 (1362) : 40 Mad 804 (SB).

[4] Where a mortgagor deposits money in Court but withdraws the application before the notice of the deposit has been served on the person entitled to withdraw it, it is not a proper tender and hence interest will not cease to run even if the money is kept in Court. (Vol 3) 1916 Mad 503 (504) (DB).

10. Withdrawal of deposit by the mortgagor.—[1] The amendment of the section by the introduction of second paragraph is not retrospective. (Vol 27) 1940 All 65 (66) : I L R (1940) All 79 (DB).

11. Notice before payment or tender.—[1] Where there is a contract by the parties stipulating for a notice to the mortgagee by the mortgagor of his intention to

[a]*Suits for Foreclosure, Sale or Redemption.*

85. [Parties to suits for foreclosure, sale and redemption.] *Repealed by the Code of Civil Procedure, 1908 (Act 5 [V] of 1908), S. 156 and Sch. V.*

[a] For the repealed provisions as re-enacted, *see* the Code of Civil Procedure, 1908 (Act 5 [V] of 1908), Sch. I Order XXXIV.

[a]*Foreclosure and Sale.*

[86 to 90.] *Repealed by the Code of Civil Procedure, 1908 (Act 5 [V] of 1908), S. 156 and Sch. V.*

[a] For the repealed provisions as re-enacted, *see* the Code of Civil Procedure, 1908 (Act 5 [V] of 1908), Sch. I, Order XXXIV.

Redemption.

Persons who may sue for redemption.

[a][**91.** Besides the mortgagor, any of the following persons may redeem, or institute a suit for redemption of, the mortgaged property, namely :—

(*a*) any person (other than the mortgagee of the interest sought to be redeemed) who has any interest in, or charge upon, the property mortgaged or in or upon the right to redeem the same ;

(*b*) any surety for the payment of the mortgage-debt or any part thereof ; or

(*c*) any creditor of the mortgagor who has in a suit for the administration of his estate obtained a decree for sale of the mortgaged property.]

[a] *Substituted* by the Transfer of Property (Amendment) Act, 1929 (20 [XX] of 1929), S. 46.

Section 84 — Note 11 *(contd.)*

pay the mortgage money before he makes a tender or deposit this section recognises the liability of the mortgagor to pay interest in lieu of notice in case he fails to give such notice before a tender or deposit in Court. (Vol 11) 1924 Bom 264 (269)✠(Vol 10) 1923 All 24 (25) (DB). (*Held*, there was no contract in this case.)

12. Notice before payment not necessary when mortgagee demands mortgage-money. — [1] The parties agreed to give three months' notice before payment of the mortgage-money. The mortgagee gave the mortgagor a notice demanding his money within three months but due to some pending suits no action was taken upon this notice by mutual consent of the parties. A tender was made two years after the expiry of the period fixed in the notice and it was held, that in the circumstances of the case, the delay was excusable and that it did not render the mortgagor liable to pay three months' additional interest in lieu of notice. (Vol 11) 1924 Bom 264 (270).

13. Refusal of tender and costs.—[1] A mortgagee is entitled to his general costs in a suit for redemption or foreclosure, unless he forfeits the right by some improper defence or other misconduct. (Vol 29) 1942 Mad 307 (310) : I L R (1942) Mad 550 (D B) ✠ (Vol 3) 1916 Oudh 279 (281)✠('12) 35 Mad 44 (46) (DB).

[2] The mortgagee's right to costs rests substantially on contract between the parties and can only be lost or curtailed by such inequitable conduct on the part of the mortgagee as may amount to a violation or neglect of his duty under the contract. (Vol 29) 1942 Mad 592 (593) : I L R (1943) Mad 205 (DB).

[3] An improper refusal of a valid tender which renders a suit for redemption necessary deprives a mortgagee of his costs. ('99) 1 Bom L R 381 (383) (DB).

[4] A suit for foreclosure by a mortgagee who has refused a proper tender will disentitle him to his costs. (Vol 16) 1929 Pat 397 (399) (DB).

[5] The mere fact that a mortgagee claims more than what he is entitled to will not deprive him of his costs. ('12) 35 Mad 44 (46) (D B) (Vol 3) 1916 Oudh 279 (281).

14. Plea as to insufficiency of tender or deposit. —[1] If a mortgagee denies the fact of a tender, he cannot subsequently raise a plea that the amount tendered was not sufficient or that it was not legally valid. (Vol 1) 1914 Cal 823 (824, 825) (DB).

[2] Where a mortgagee admits that the amount deposited was the amount due on the date of deposit but was refused by him on some other ground, he cannot, in a subsequent suit on the mortgage, allege that the amount deposited was insufficient. (Vol 9) 1922 Nag 174 (175).

[3] The question of sufficiency or insufficiency is a question of fact, which cannot be determined without going into evidence and, hence, cannot be raised for the first time in second appeal. (Vol 9) 1922 Pat 167 (169): 1 Pat 350 (DB).

[4] The finding that there was a valid tender of money by the mortgagor is a finding of fact and cannot be attacked in second appeal. (Vol 12) 1925 Lah 353 (354).

15. Section 14 of Bombay Regulation V of 1827. —[1] It has been held that in the Bombay Presidency a tender by a mortgagor even of a partial amount due will stop the running of interest under S. 14 of the Bombay Regulation V of 1827. But a conditional tender asking the mortgagee to accept the partial tender in full discharge of the mortgage-debt is invalid and inoperative to stop interest. (Vol 11) 1924 Bom 264 (270) (DB).

16. Tender and deposit in possessory mortgages. —[1] Where the mortgage is one with possession, and a valid tender or deposit is made of the mortgage amount, interest will cease to run on the mortgage amount from the date of the tender or in the case of a deposit from the date of service of notice on the mortgagee. The mortgagee will be liable to the mortgagor from such date for mesne profits. (Vol 10) 1923 Mad 354 (354) (DB)✠(Vol 25) 1938 Mad 405 (413) (DB)✠(Vol 17) 1930 All 609 (610) (DB)✠(Vol 15) 1928 All 156 (157)✠(Vol 16) 1929 Rang 271 (271)✠(Vol 11) 1924 Nag 285 (286).

[2] If the mortgagor withdraws the money from Court, he will, from that date, be disentitled to mesne profits. (Vol 25) 1938 Mad 405 (413) (DB).

SECTION 91—SYNOPSIS

1. Scope.
2. "Besides the mortgagor."
3. Clause (a)—General.
   4. Puisne mortgagee.
   5. Sub-mortgagee of puisne mortgagee.
   6. Prior mortgagee.
   7. Purchaser of equity of redemption.

SECTION 91—SYNOPSIS *(contd.)*

8. Person contracting to purchase mortgaged property.
9. Transferee pendente lite.
10. Donee.
11. Lessee of mortgaged property.
12. Landlord, if can redeem mortgage by tenant.
13. Superior proprietor under C. P. Land Revenue Act.
14. Remainderman.
15. Reversioner under Hindu law.
16. Surrender of mortgaged property by Hindu widow to next reversioner.
17. Transfer from limited owner under Hindu law.
18. Crown acquiring mortgagor's interest by escheat.
19. Heirs of mortgagor.
20. Son under Mitakshara law.
21. Mortgage by manager of joint Hindu family.
22. Member of Malabar tarwad.
23. Tenants-in-common.
24. Attaching judgment-creditor.
25. Government attaching property under S. 88, Criminal P. C.
26. Judgment-creditor obtaining order for appointment of Receiver under S. 51, clause (d), Civil P. C.
27. Person holding decree for sale of mortgaged property.
28. Trustee
29. Benamidar.
30. Trespasser.
31. Person with imperfect title to equity of redemption.
32. Persons entitled to maintenance from an estate.
33. Mortgage by occupancy tenant—Right of person recognised by landlord as tenant to redeem.
34. Clause (b) —Surety.
35. "May redeem."
36. Partial redemption.
37. Order of redemption.
38. Onus of proof.
39. Whether section applies to redemption of charges.

1. Scope.— [1] This section enumerates the persons who, in addition to the mortgagor, are entitled to redeem or institute a suit for redemption of the mortgaged property. (Vol 4) 1917 All 110 (110) : 39 All 536 (D B) ✠ ('91) 13 All 432 (454) (F B).

[2] The right of redemption conferred by the section on other persons is the same right which the mortgagor possesses under S. 60 and not a different kind of right. (Vol 4) 1917 All 110 (110) : 39 All 536 (D B).

[3] The persons who are given the right of redemption under the section may be broadly grouped under two heads, i. e., persons having an interest in or charge upon the mortgaged property or in or upon the right to redeem the same (cl. (a)); and persons who have no interest or charge upon the mortgaged property or in or upon the right to redeem it but who are given a personal right to redeem on some special grounds (clauses (b) and (c).) (Vol 23) 1936 Nag 209 (213) : I L R (1936) Nag 127 (D B) ✠ (Vol 26) 1939 Pat 7 (11) : 18 Pat 155 (D B).

2. "Besides the mortgagor."— [1] This section deals with the right of redemption of persons other than the mortgagor though it recognises the mortgagor's right of redemption, as is shown by the words "besides the mortgagor," ('11) 34 Mad 115 (117) (D B) ✠ (Vol 8) 1921 Mad 51 (52).

[2] This section is one of the express provisions contemplated by S. 59A. Consequently, a purchaser from the mortgagor, for instance, is entitled to redeem, not by virtue of S. 60 but by virtue of this section. (Vol 29) 1942 Bom 98 (99) : I L R (1942) Bom 169 (D B).

[3] The mortgagor must, in order to be entitled to redeem, have an existing right in the equity of redemption. If he absolutely and entirely parts with it, his right to redeem comes to an end. (Vol 8) 1921 Mad 51 (53, 54) (D B) ✠ ('04) 27 Mad 428 (429) (D B) ✠ (Vol 3) 1916 Pat 375 (380) (D B).

[4] If, even after the mortgagor has absolutely parted with his equity of redemption, he is sued by the mortgagee upon his covenant to pay the mortgage-debt he acquires a new right to redeem and is entitled to a reconveyance to himself subject of course to any equity of redemption that may have vested in any other person. This principle will apply not only when the mortgagee sues the mortgagor on the covenant but also on the mortgage-debt. (Vol 17) 1930 Pat 570 (572, 573) : 10 Pat 197 (D B).

3. Clause (a)—General. — [1] No person whose interests are not affected by a mortgage can redeem the mortgage. (Vol 34) 1947 Nag 210 (215) (D B).

[2] The interest that enables a person to claim redemption must be an interest in the "property mortgaged" or the "right of redemption." The matter cannot be judged by referring to O. 34, R. 1, Civil P. C. The two phrases in S. 91 (a) refer to different stages. The words "property mortgaged" indicate the rights existing prior to the mortgage and the words "the right to redeem" indicate the rights left in the mortgagor subsequent to the mortgage. (Vol 34) 1947 Nag 210 (222) (D B).

[3] The interest of any person which is not bound by the contract of mortgage is not an interest in the "property mortgaged" or in the right to redeem the same and the owner of such interest is not entitled to redeem the mortgage under this clause. ('08) 4 Nag L R 9 (11) ✠ (Vol 2) 1915 Lah 199 (200) (D B) ✠ ('01) 5 Cal W N 83 (85) (D B) ✠ ('07) 29 All 679 (682) ✠ ('91) 13 All 432 (454) (F B) ✠ (Vol 17) 1930 Nag 173 (175, 176) : 26 Nag L R 208.

[See however (Vol 13) 1926 Nag 496 (498) : 23 Nag L R 128.]

[4] It is not necessary that in order that a person may have an interest in the "property mortgaged", he should have derived his title from or should have claimed through the mortgagor, though it is necessary that such interest is bound by the mortgage. ('08) 4 Nag L R 9 (11) ✠ (Vol 21) 1934 Bom 32 (33) : 58 Bom 75.

[See however (Vol 2) 1915 Lah 199 (200) (DB).]

[5] This clause gives a right of redemption not only to a person having an interest in the property mortgaged or in the right to redeem the same, but also to a person having a charge upon such property or right to redeem. ('96) 19 Mad 151 (153) (DB) ✠ ('37) I L R (1937) 1 Cal 65 (67) ✠ ('98) 11 C P L R 95 (96, 101, 102) ✠ (Vol 7) 1920 Lah 480 (481) (DB).

[6] *A* mortgages property *X* to *B* and then sells his equity of redemption to *C* for a consideration of Rs. 4000 which, however, is not paid. Under S. 55, sub-s. (4), cl. (b) *A* has got a charge on the equity of redemption transferred to *C*, i. e., has a charge on the "right to redeem" and so can redeem *B*. (Vol 12) 1925 Mad 778 (778).

[7] The "interest" is not confined to the right of ownership but may be any interest in the property, however small it may be. ('96) 19 Mad 151 (153) (DB) ✠ (Vol 16) 1929 Bom 139 (140, 141) : 53 Bom 353 ✠ (Vol 14) 1927 Cal 479 (480) ✠ (Vol 13) 1926 Nag 496 (498) : 23 Nag L R 128 ✠ ('81) 6 Cal 663 (664).

[8] The "interest" contemplated by the clause may accrue by succession, conveyance or contract. (Vol 19) 1932 All 643 (647) (DB).

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[9] The "interest" must be a present interest and not a mere contingent or future interest, i.e., it must be an interest actually in existence at the time when the right of redemption is claimed. ('08) 30 All 497 (498, 499) (DB) ✠ (Vol 17) 1930 Oudh 294 (296) : 5 Luck 691 (DB) ✠ (Vol 1) 1914 Upp Bur 45 (49) ; 2 Upp Bur Rul 46 ✠ (Vol 22) 1935 Oudh 139 (141) : 10 Luck 531 (DB)✠('02) 15 C P L R 175 (177).

[10] Although it is necessary that the person should have a present interest in the property or in the right to redeem it, a present right to the possession and enjoyment of the property is not essential. (Vol 16) 1929 Nag 27 (28, 29).

[11] Discharge of mortgages and execution of sale parts of same transaction—Purchaser, though having no title, *bona fide* believing that he had legal interest —Purchaser held had sufficient interest within this section. (Vol 32) 1945 Mad 175 (175, 176).

4. Puisne mortgagee. — [1] A puisne mortgagee is a person who has an interest in the "right to redeem" the mortgage property under the prior mortgage. ('95) 22 Cal 33 (39) (DB) ✠ ('04) 28 Bom 153 (162, 163) (DB) ✠ (Vol 11) 1924 Nag 191 (194) ✠ ('97) 20 Mad 35 (37, 38) (DB).

[2] A puisne mortgagee is entitled to redeem or to institute a suit for redemption of the prior mortgage. (Vol 17) 1930 All 869 (871) (DB) ✠ (Vol 21) 1934 All 946 (948)✠(Vol 1) 1914 Bom 259 (259) (DB) ✠ (Vol 15) 1928 Cal 116 (117) : 55 Cal 602 (D B) ✠ ('11) 21 Mad L Jour 213 (225, 226) (FB) ✠ (Vol 20) 1933 Mad 583 (583) : 56 Mad 846 (FB) ✠ (Vol 10) 1923 Nag 24 (25) ✠ (Vol 22) 1935 Oudh 139 (141) : 10 Luck 531 (DB) ✠ (Vol 2) 1915 Sind 9 (9) : 9 Sind L R 86 (DB)✠ (Vol 29) 1942 Oudh 260 (267) : 17 Luck 755 (FB).

[3] Even when the puisne mortgagee's right to enforce payment of his mortgage is barred under Art. 132, his right as mortgagee is not extinguished under S. 28, Limitation Act, and he can, therefore, redeem under Art. 148 within the period of 60 years. (Vol 20) 1933 Bom 25 (25, 26) (DB) ✠ (Vol 24) 1937 Nag 205 (207) : I L R (1937) Nag 367✠(Vol 6) 1919 Nag 93 (94).

[But see (Vol 22) 1935 Oudh 139 (141) : 10 Luck 531 (DB)✠(Vol 12) 1925 Mad 76 (77).]

[4] Puisne mortgagee is allowed to redeem if his suit is not barred by limitation—Art. 144 and not Art. 132, Limitation Act, applies. (Vol 16) 1929 Cal 609 (610) : 57 Cal 704 (FB).

[5] Subsequent mortgagee is only representative in interest of mortgagor to the extent that he can redeem prior mortgage — He is not absolute owner — If prior mortgage is valid he cannot challenge the terms thereof as penal though he is entitled to equitable considerations. (Vol 21) 1934 Lah 799 (800).

[6] Puisne mortgagee's right to redeem is not absolute but arise when he comes to Court to obtain remedy on his mortgage. (Vol 11) 1924 Oudh 56 (59) (DB).

[7] Where there are successive mortgages a puisne mortgagee can redeem any of the prior incumbrances and is not required to redeem only the mortgage immediately prior to him. ('13) 14 Mad L Tim 390 (391) (DB) ✠ (Vol 11) 1924 Oudh 56 (59) (DB) ✠ ('91) 13 All 432 (488) (FB).

[8] A puisne mortgagee is in no way personally liable to discharge the prior mortgage. (Vol 23) 1936 P C 65 (68) (P C).

5. Sub-mortgagee of puisne mortgagee. — [1] A sub-mortgagee of the rights of a puisne mortgagee is entitled to redeem or to institute a suit for redemption of the prior mortgage. ('13) 14 Mad L Tim 390 (391) (DB)✠('05) 27 All 472 (478) (DB).

[But see (1900) 1900 Pun L R No. 23, p. 62 (65) (DB).]

6. Prior mortgagee. — [1] A prior mortgagee is not bound by the second mortgage. (Vol 7) 1920 Pat 630 (631) (DB). (Prior mortgagee is not affected by decree on subsequent mortgage)

[2] A prior mortgagee cannot redeem the second mortgage under this section. This is in accordance with the well known principle of law "redeem up and foreclose down," which means that of any number of mortgagees, the later can always redeem the earlier but cannot be compelled to do so and the earlier cannot redeem the later except by consent. (Vol 13) 1926 Nag 21 (23) : 23 Nag L R 86 ✠ (Vol 8) 1921 Mad 612 (614) (DB)✠(Vol 4) 1917 Mad 751 (752) : 40 Mad 778 (DB)✠ ('08) 4 Nag L R 9 (11).

[3] There is no prohibition against joining a prior mortgagee as a party to suits relating to the mortgage and where he is so joined he is entitled to pay off the puisne mortgage. ('10) 37 Cal 282 (283, 284) (DB)✠ (Vol 16) 1929 Nag 135 (136) : 25 Nag L R 171.

[4] A prior mortgagee purchasing mortgagor's equity of redemption privately can redeem a subsequent mortgage. ('07) 10 Oudh Cas 356 (358) (DB) ✠ (Vol 2) 1915 All 299 (300)✠(Vol 11) 1924 Pat 452 (453) : 3 Pat 114 (DB)✠('10) 37 Cal 282 (283) (DB).

[5] A prior mortgagee who has purchased the mortgagor's equity of redemption in execution of a decree can redeem a subsequent mortgage. ('07) 10 Oudh Cas 356 (358) (DB)✠(Vol 4) 1917 All 237 (238) (DB)✠(Vol 2) 1915 All 299 (300) ✠ ('97) 20 Mad 120 (123) (DB) ✠ (Vol 8) 1921 Mad 648 (649) (DB) ✠ (Vol 11) 1924 Pat 484 (486) : 3 Pat 435 (DB) ✠ ('10) 14 Cal W N 675n (676n) (DB)✠(Vol 13) 1926 Nag 135 (136).

[6] Where the prior mortgagee forecloses behind the back of the subsequent mortgagee and acquires the mortgagor's equity of redemption he will be entitled to redeem the subsequent mortgage. ('04) 28 Bom 153 (163, 170) (DB).

7. Purchaser of equity of redemption. — [1] A purchaser of the equity of redemption is entitled to redeem or to institute a suit for redemption of the mortgaged property. ('06) 28 All 638 (640) (DB)✠(1900) 4 Cal W N 266 (268) (DB) ✠ (Vol 4) 1917 Nag 137 (138) : 14 Nag L R 184 ✠ (Vol 9) 1922 Cal 23 (24) : 49 Cal 626 (DB)✠(Vol 14) 1927 Pat 25 (26) (DB)✠(Vol 13) 1926 Rang 183 (184) : 4 Rang 96 (DB) ✠ (Vol 18) 1931 Mad 542 (547, 548) (DB) ✠ (Vol 23) 1936 Mad 70 (74, 78) : 59 Mad 312 (DB) ✠ ('01) 4 Oudh Cas 100 (103) (DB)✠(Vol 23) 1936 Nag 207 (208) : I L R (1936) Nag 183✠('92) 16 Bom 705 (707) (DB).

[2] A purchaser of the equity of redemption is entitled to redeem or sue for redemption even if he has purchased only a portion of the equity of redemption. (Vol 20) 1933 Pat 33 (35) (DB)✠(Vol 16) 1929 Bom 139 (140, 141) : 53 Bom 353 ✠ ('98) 21 Mad 64 (66) (DB)✠ ('04) 27 All 178 (182) (DB) ✠ (Vol 20) 1933 Rang 392 (393) (DB)✠(Vol 14) 1927 Cal 559 (561) (DB)✠(Vol 10) 1923 Mad 533 (534) : 47 Mad 7 (DB) ✠ (Vol 4) 1917 Oudh 415 (415, 416)✠(Vol 15) 1928 Lah 105 (105) (DB).

[3] A purchaser of equity of redemption can redeem or sue for redemption even if he has purchased the same in execution of a decree. (Vol 24) 1937 Oudh 493 (497) : 13 Luck 484 (DB) ✠ ('12) 15 Oudh Cas 211 (217, 218)✠(Vol 24) 1937 Nag 205 (208) : I L R (1937) Nag 367 ✠ (Vol 16) 1929 Nag 246 (250) : 25 Nag L R 19 ✠ (Vol 9) 1922 Cal 32 (34) (DB) ✠ (Vol 10) 1923 All 232 (232) (DB) ✠ (Vol 7) 1920 Mad 389 (390) (DB)✠ ('91) 16 Bom 486 (491) (DB) ✠ ('04) 26 All 464 (466) (DB) ✠ ('01) 3 Bom L R 92 (94) (DB) ✠ (Vol 20) 1933 Cal 728 (731) : 60 Cal 948 (DB).

8. Person contracting to purchase mortgaged property.—[1] A person who has merely entered into a contract to purchase the mortgaged property cannot redeem or institute a suit for redemption of such pro-

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perty on the basis of the contract. (Vol 13) 1926 Mad 597 (598)✠('02) 15 C P L R 175 (177) ✠ (Vol 23) 1936 Nag 209 (213) : I L R (1936) Nag 127 (DB).

[2] *N* was claiming certain rights in a certain estate —He having no money with which to prosecute his claim executed an agreement in favour of *D* whereby *D* undertook to finance his litigation and to recoup himself by retaining half of anything that the Courts awarded — On the strength of this agreement *D* instituted a suit for redemption of a two annas share in a village in which *N* had the right to redeem four annas —*Held* that *D* had no right to redeem, as the agreement was neither a sale nor a transfer. (Vol 15) 1928 Oudh 298 (299) (DB).

9. Transferee pendente lite.— [1] A transferee from the mortgagor during the pendency of a suit for sale, foreclosure or redemption of the mortgage is bound by the decree or order made in the suit. (Vol 2) 1915 Nag 28 (28) : 12 Nag L R 50 ✠ (Vol 13) 1926 Nag 21 (23) : 23 Nag L R 86✠('07) 29 All 76 (80, 81).

[2] A transferee from the mortgagor pending mortgage suit will be entitled to redeem the mortgage. (Vol 20) 1933 Nag 171 (173) : 30 Nag L R 265 (DB).

[3] A transferee from the mortgagor pending a mortgage suit can redeem only before a final decree debarring the mortgagor from redeeming the mortgaged property under O. 34, R. 3 or R. 8, Civil P. C., is passed, or before the confirmation of sale made in pursuance of a final decree under O. 34, R. 5 or R 8, Civil P. C. (Vol 2) 1915 Nag 28 (28) : 12 Nag L R 50✠ (Vol 33) 1946 Mad 51 (52)✠(Vol 13) 1926 Nag 21 (22, 23) : 23 Nag L R 86✠('99) 26 Cal 966 (970, 971) (DB)✠ ('01) 23 All 331 (334) (DB).

[4] Suit for foreclosure—Six months' period granted for redemption—Transfer by mortgagor after the period — Subsequent order absolute for foreclosure — Suit by purchaser for redemption untenable. ('07) 29 All 76 (81).

[5] Mortgage after preliminary decree which provided for foreclosure in case of default within certain period—No redemption during the period—The mortgagee is bound by foreclosure. ('07) 10 Oudh Cas 356 (358) (DB).

[6] Suit on mortgage by one creditor — During pendency attachment and sale of property by another creditor—No claim by latter creditor for redemption— Former creditor can work out his decree unaffected by attachment and sale. (Vol 24) 1937 Nag 400 (401, 402): I L R (1937) Nag 452.

10. Donee.—[1] A person to whom a gift has been made of the equity of redemption can redeem or institute a suit for redemption of the mortgaged property. (Vol 8) 1921 Bom 413 (413) : 45 Bom 105 (DB).

11. Lessee of mortgaged property.—[1] A lessee is entitled to redeem the mortgage, as a person having an interest in the right to redeem. ('12) 17 Cal L Jour 384 (387) (DB)✠(Vol 13) 1926 Nag 496 (498) : 23 Nag L R 128✠(01) 4 Oudh Cas 100 (103) (DB) (*Obiter.*) ✠ ('96) 19 Mad 151 (153) (DB) ✠ (Vol 10) 1923 All 140 (141) (DB) ✠ (Vol 27) 1940 Bom 15 (16, 17) : I L R (1939) Bom 713.

[2] Following persons have been held to have an "interest" within this clause :

(a) A perpetual lessee. (Vol 12) 1925 Oudh 270 (271) ✠(Vol 10) 1923 Nag 273 (273, 274) : 19 Nag L R 18 ✠ ('07) 29 All 679 (682)✠(Vol 16) 1929 All 616 (617).

(b) A lessee for a term of years. (Vol 13) 1926 Nag 496 (498) : 23 Nag L R 128✠(Vol 24) 1937 Oudh 146 (148) : 12 Luck 161 ✠ (Vol 20) 1933 Nag 44 (46) : 29 Nag L R 77.

(c) An ex-proprietary tenant. (Vol 5) 1918 All 392 (392) (DB).

(d) A *Verumpattom* tenant in Malabar claiming under a lease from the *ottidar*. ('96) 19 Mad 151 (153) (DB).

(e) A holder of a *zuripeshgi* lease. ('80) 6 Cal 317 (319) (DB) ✠ (Vol 24) 1937 Oudh 146 (148) : 12 Luck 161 ✠ (Vol 7) 1920 Nag 176 (176) : 16 Nag L R 180✠('82) 8 Cal 79 (87) (DB).

(f) A patnidar. ('82) 8 Cal 79 (87) (DB)✠('92) 21 Cal 116 (120) (DB).

(g) A derpatnidar. (Vol 9) 1922 Cal 23 (24) : 49 Cal 626 (DB).

[3] A year-to-year lessee is not a person entitled to redeem under cl. (a). (Vol 12) 1925 Oudh 270 (271).

[4] Where *A* mortgages property to *B* usufructuarily and *B* leases back the property to *A* who sub-leases the same to *C*, *C* is not entitled to redeem this mortgage. (Vol 22) 1935 Mad 813 (814).

[5] After mortgage, mortgagor granting lease of mortgaged property — Lease binding on mortgagee — Lessee is not entitled to redeem. (Vol 34) 1947 Nag 210 (215, 222) (DB).

[6] Lease by mortgagor subsequent to mortgage — Lease binding on mortgagor but not on mortgagee — Lessee is entitled to redeem. (Vol 32) 1945 Pat 106 (107) (FB).

[7] Where the lease of the property executed by the mortgagor subsequent to the mortgage is void, the lessee has no right to redeem. (Vol 32) 1945 Pat 106 (108) (DB).

12. Landlord, if can redeem mortgage by tenant.—[1] Where the landlord is not entitled to the reversion except on failure of all the heirs of the tenant, his interest is really not a subsisting interest at all but merely a *spes successionis* and he cannot be said to have any "interest" such as will entitle him to claim redemption of a mortgage by the tenant of his holding. ('09) 12 Oudh Cas 201 (204) (DB) ✠ ('02) 15 C P L R 175 (178).

[2] Tenant dying without heirs — Holding reverting to landlord — Landlord is entitled to redeem. ('11) 33 All 111 (116) (FB). (('08) 30 All 488, *Overruled.*) ✠ ('09) 12 Oudh Cas 201 (204) (DB). (('98) 1 Oudh Cas 42, *Overruled.*) ✠ (Vol 20) 1933 Bom 97 (99) : 57 Bom 194 (DB) ✠ (Vol 12) 1925 Pat 57 (59) : 3 Pat 818 (DB) ✠ (Vol 19) 1932 All 437 (438) (DB) ✠ (Vol 14) 1927 Lah 75 (77).

[3] Tenant abandoning village — Holding reverting to landlord — Landlord can redeem. ('09) 12 Oudh Cas 197 (200) (DB). (*Overruling* ('98) 1 Oudh Cas 42.)

[4] Ejectment of ex-proprietary tenant — Holding reverting to landlord — Landlord is entitled to redeem. (Vol 19) 1932 All 53 (55) (DB).

[5] On the relinquishment of the holding by the tenant, the landlord would be entitled to redeem. (Vol 10) 1923 All 263 (263) (DB) ✠ ('11) 10 Ind Cas 307 (308) (DB) (Cal).

13. Superior proprietor under C. P. Land Revenue Act.—[1] Where a superior proprietor holds a decree against the inferior proprietor on account of the sum payable under the sub-settlement he is entitled to redeem a mortgage on the land comprised in the sub-settlement. ('98) 11 C P L R 95 (101, 102). (Case under S. 65, C. P. Land Revenue Act XVIII of 1881.)

14. Remainderman. — [1] *A*, a holder of a life estate, mortgaged the entire proprietary interest in the land to *B*. The life-estate holder died and thereafter *C*, the remainderman, accepted the mortgage as binding on him and claimed redemption. It was held that he could do so. (Vol 18) 1931 Oudh 358 (362) : 6 Luck 715 (DB).

15. Reversioner under Hindu law.—[1] Following views have been expressed on the question whether

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a reversioner under Hindu law is entitled to redeem a mortgage during the life of the limited owner.

(a) During the life-time of the limited owner the reversioner has no present interest in the property held by the limited owner so as to entitle him to redeem the mortgage. (Vol 6) 1919 Oudh 217 (220) (DB) ✠ (Vol 17) 1930 Oudh 294 (296) : 5 Luck 691 (DB) ✠ ('08) 30 All 497 (498, 499) (DB).

(b) Ordinarily, a reversioner cannot redeem, but he can do so where it is necessary to preserve the property from loss. (Vol 8) 1921 Mad 272 (276) : 44 Mad 951 (DB) ✠ ('13) 36 Mad 426 (435, 436)

(c) Irrespective of the question of the necessity of preserving the property from loss, a reversioner has sufficient interest in the property held by the limited owner so as to entitle him to redeem the mortgage. (Vol 12) 1925 Oudh 30 (33) ✠ (Vol 2) 1915 Oudh 177 (180) (DB) ✠ (Vol 16) 1929 Nag 27 (29) ✠ (Vol 12) 1925 Mad 95 (105) (DB). (Per *Spencer, J.—Obiter.*)

16. Surrender of mortgaged property by Hindu widow to next reversioner. — [1] A Hindu widow mortgaged the estate of her husband and then by a compromise surrendered the possession of the estate to the next reversioner who agreed to hold the estate for her and pay her a fixed sum in cash and grain for her maintenance. It was held that the next reversioner could redeem. (Vol 6) 1919 Lah 109 (110).

17. Transfer from limited owner under Hindu law. — [1] Where a Hindu widow or other limited owner mortgages the estate to *A* and then transfers her equity of redemption to *B*, the mortgagee *A* has no *locus standi* to resist the claim of *B* for redemption on the ground that the transfer to *B* is beyond the powers of the limited owner. (Vol 8) 1921 Bom 413 (413) : 45 Bom 105 (DB) ✠ (Vol 19) 1932 Oudh 342 (343) : 6 Luck 710.

18. Crown acquiring mortgagor's interest by escheat. — [1] Property escheating to Crown—Crown takes property subject to mortgage, if any. (1861) 8 Moo Ind App 500 (525, 526, 527) (PC). (Property of Hindu Brahman.) ✠ ('66) 11 Moo Ind App 619 (635, 636) (PC) ✠ ('75) 1 Cal 391 (401) : 3 Ind App 92 (PC).

[2] Property subject to mortgage escheating to Crown—Crown is entitled to redeem mortgage. ('66) 11 Moo Ind App 619 (636) (PC).

19. Heirs of mortgagor. — [1] A person who succeeds to the original mortgagor as his heir can redeem the mortgaged property. (Vol 7) 1920 Pat 67 (69, 70) : 5 Pat L Jour 644 (DB) ✠ (1900) 24 Bom 556 (561) : 27 Ind App 86 (PC) ✠ (Vol 12) 1925 All 707 (710) : 47 All 803 (DB).

20. Son under Mitakshara law.—[1] Under the Mitakshara law, the son takes by birth an interest in the ancestral property of the family, and has a right to redeem the mortgage. (Vol 29) 1942 Nag 39 (41) : ILR (1942) Nag 543 (DB) ✠ (Vol 20) 1933 Nag 44 (46) : 29 Nag L R 77 ✠ ('84) 8 Bom 481 (488) (DB) ✠ (Vol 3) 1916 Pat 375 (380) (DB).

[2] Self-acquired property of father — Son cannot redeem during father's lifetime — After father's death, son is entitled to redeem. (Vol 3) 1916 Pat 375 (380) (DB).

21 Mortgage by manager of joint Hindu family. —[1] Where the manager of a joint Hindu family mortgages the family property for a binding purpose, and subsequently the family gets divided in status, each of the members has a righs to redeem the mortgage. ('13) 13 Mad L Tim 145 (147) (DB).

22. Member of Malabar tarwad.—[1] Only under very special circumstances (the onus of proving which is on the junior members) can the junior members of a Malabar Tarwad be allowed to maintain a suit for redemption of a kanom granted by their karnavan. (Vol 7) 1920 Mad 401 (401) : 43 Mad 393 (DB).

[2] Collusion between karnavan and kanomdar or prejudice to the tarwad interest by the continuance of the kanom will entitle the junior members of a tarwad to redeem the mortgage. (Vol 10) 1923 Mad 706 (706, 707) (DB).

23. Tenants-in-common. — [1] One tenant-in-common has no right to redeem a mortgage created by another tenant-in-common of his share in the common property. (Vol 17) 1930 Nag 173 (176) : 26 Nag LR 208.

24 Attaching judgment-creditor.—[1] The attaching creditor does not obtain by reason of the attachment any interest in or charge or lien upon the attached property. ('98) 25 Cal 179 (185) : 24 Ind App 170 (PC) ✠ ('02) 29 Cal 428 (431) (FB) ✠ (Vol 17) 1930 Mad 801 (807) : 53 Mad 881 (FB). (*Confirming* (Vol 12) 1925 Mad 266 on Letters Patent appeal and *overruling* (Vol 1) 1914 Mad 439 : 37 Mad 418.)

[But see ('03) 25 All 446 (452, 453) (DB).]

[2] The attaching creditor is not a person who may redeem the mortgaged property. (Vol 23) 1936 All 512 (513).

25. Government attaching property under section 88, Criminal P. C. — [1] Government attaching property under S. 88, Criminal P. C.—Government comes within category of persons who may redeem or institute suit for redemption of mortgaged property under S. 91. (Vol 17) 1930 Mad 1017 (1020) (DB).

26. Judgment-creditor obtaining order for appointment of Receiver under S. 51, Cl (d), Civil P. C.— [1] A judgment-creditor who has obtained an order for the appointment of a Receiver of the judgment-debtor's property under S. 51, cl. (d), Civil P. C., in execution of a decree cannot be said to have an interest in the property. ('37) I L R (1937) 1 Cal 65 (68, 69).

27. Person holding decree for sale of mortgaged property.—[1] Prior mortgagee bringing suit for sale on his mortgage — Subsequent mortgagee impleaded— Suit decreed against mortgagee but dismissed against subsequent mortgagee—Subsequent mortgagee suing on his mortgage— *A* held was entitled to be impleaded as party as he had right to redeem subsequent mortgage. (Vol 25) 1938 Oudh 10 (10, 11) : 13 Luck 625 (D B).

28. Trustee.—[1] A person holding property as a trustee has an interest in the property which would entitle him to redeem a valid mortgage on the property. (Vol 7) 1920 Lah 480 (481) (DB).

[2] Where there are more trustees than one, so far as the question of redemption of a mortgage is concerned the wide language of S. 91 entitles one of several trustees to bring a suit to redeem a mortgage of the trust property without averring or proving that the other trustees were asked to join as plaintiff's in the suit. ('03) 26 Mad 649 (653) (FB). (*Overruling* ('01) 24 Mad 296.) ✠ (Vol 7) 1920 Mad 746 (747) (DB).

[See however (Vol 7) 1920 Mad 965 (967) (DB)]

[3] Where *A*, *B*, *C* and *D* are the trustees, and *A* and *B* alone grant a mortgage of the trust property without consulting the others, the mortgage is invalid and not binding on the trust, and even *A* and *B* cannot on behalf of the trust claim to redeem the mortgage. ('12) 16 Ind Cas 435 (435) (DB) (Mad).

29. Benamidar. — [1] A benamidar executing a mortgage on the property which he holds benami for the real owner can maintain a suit for redemption of the mortgaged property. (Vol 20) 1933 Mad 635 (635) ✠ (Vol 7) 1920 Pat 21 (24).

[2] A person purchasing the mortgaged property from a mortgagor, benami for another person, is entitled to maintain the suit for redemption in his own

Section 91 — Note 29 *(contd.)*
name. (Vol 7) 1920 Pat 21 (24) ✠ (Vol 20) 1933 Mad 635 (636).

30. Trespasser. — [1] A mere trespasser who has not perfected his title by adverse possession has no right to redeem; and if the mortgagee allows such a person to redeem, the true owner can treat the transaction as a nullity. But when he acquires the interest of the mortgagor by adverse possession he is entitled to redeem. The fact that the trespasser acquires, by adverse possession, the interest of the mortgagor, subsequent to the act of redemption by him, cannot validate such redemption. (Vol 6) 1919 Oudh 217(219, 222)(DB).

[2] Holding mortgaged—Sale of holding in execution of rent decree—Decree and sale both void — Purchaser at sale held entitled to redeem. (Vol 32) 1945 Pat 289 (291) (DB).

31. Person with imperfect title to equity of redemption.—[1] Suit for redemption—Plaintiff having imperfect title to mortgaged property at time of filing suit — During hearing of case plaintiff proving perfect title — Plaintiff is entitled to decree for redemption. ('82) 6 Bom 139 (142, 143) (DB)✠(1900) 1900 Pun L R No. 23, page 93 (95) (DB).

[2] *A* purchasing mortgaged property in execution of mortgage decree — *A* filing suit for redemption — Sale certificate in *A's* favour not instituted when suit was filed—Sale certificate subsequently issued and *A* producing same at hearing of suit—*A* held was entitled to decree for redemption. ('82) 6 Bom 139 (142, 143) (DB).

[3] If a person, at the hearing of the case, sets up a new title, based upon purchase of rights made after the institution of the suit and not the ripening of the prior imperfect title, the suit for redemption cannot succeed. (1900) 1900 Pun LR No. 23, page 93 (95) (DB).

[4] A person with an imperfect title to the equity of redemption can make a tender under O. 21, R. 69, clause (3) of the Civil P. C. and have the sale in execution of a mortgage decree stopped. ('07) 11 Cal W N 495 (496) (DB) ✠ ('99) 26 Cal 966 (972) (DB).

32. Persons entitled to maintenance from an estate.—[1] A mere right to receive maintenance from an estate does not amount to an interest in or charge upon property mortgaged and the person entitled to such maintenance cannot redeem a mortgage on the estate (1900) 22 All 191 (199) : 27 Ind App 51 (PC)✠ ('09) 12 Oudh Cas 37 (39).

33. Mortgage by occupancy tenant—Right of person recognised by landlord as tenant to redeem. —[1] Where an occupancy tenant mortgaged his land to *X* and after the death of the tenant, *Y* claimed to redeem the mortgage on the ground that he had been recognised by the landlord as the occupancy tenant, it was held that such recognition was not sufficient to give him a right to redeem a mortgage held by a third party in the absence of evidence that he acquired the rights as heir of the mortgagor. (Vol 12) 1925 All 15 (15, 16).

34. Clause (b) — Surety.— [1] Clause (b) gives a surety for the payment of the whole or part of a mortgage-debt a right to redeem or to institute a suit for redemption of the mortgaged property. (Vol 19) 1932 Nag 171 (171) : 28 Nag L R 214.

[2] A surety who covenants to pay only the interest on the principal amount is entitled to redeem the mortgage. (1869) 4 Ch App 204 (207) 38 L J Ch 220, *Green* v. *Wynn* ✠ (1882) 19 Ch D 615 (622) : 51 L J Ch 690, *Forbes* v *Jackson*.

[3] A surety for a part only of a debt is on payment of that debt entitled *pro tanto* to the security held by the creditor as cover for the debt as a whole. (Vol 31) 1944 Mad 195 (206) : I L R (1944) Mad 340 (DB).

[4] A surety has no right to redeem if the suretyship is for another debt or for a part of the debt which is not covered by the mortgage. (1827) 57 E R 747 (749) : 2 Sim 155 *Wade* v. *Coope*.

[5] Person standing surety for another's debt — Debtor also executing mortgage as additional security — Surety is not entitled to redeem mortgage. (Vol 31) 1944 Mad 195 (206) : I L R (1944) Mad 340 (DB).

35. "May redeem."—[1] Redemption is a right and not a liability. A person having that right cannot, therefore, be forced to exercise it against his will. ('11) 21 Mad L Jour 213 (226) (FB) ✠ (Vol 13) 1926 All 480 (487) (DB) ✠ (Vol 22) 1935 Cal 139 (141) : 62 Cal 75 (DB) ✠ (Vol 8) 1921 Low Bur 61 (63) : 11 Low Bur Rul 119 (DB) ✠ (Vol 18) 1931 Mad 542 (548) (DB) ✠ (Vol 28) 1941 Cal 484 (488) : I L R (1941) 1 Cal 514 (DB)

[2] A subsequent mortgagee who is entitled to redeem a prior mortgage under cl. (a) of this section cannot be compelled to redeem the prior mortgage before he can sue on his own mortgage. ('11) 21 Mad L Jour 213 (226) (FB)✠ (Vol 13) 1926 All 480 (486 487) (DB) ✠ (Vol 3) 1916 Nag 120 (122) : 13 Nag L R 69 ✠ ('98) 11 C P L R 75 (78, 79) ✠ ('04) 7 Oudh Cas 330 (332, 333) ✠ (Vol 28) 1941 Cal 484 (488) : I L R (1941) 1 Cal 514 (DB).

[3] A second mortgagee owes no duty to the mortgagor to redeem the prior mortgage — He is entitled to do so if he thinks it desirable to protect his own interest. (Vol 29) 1942 Cal 290 (291) : I L R (1941) 2 Cal 551.

36. Partial redemption. — [1] The very general words of this section "any person having an interest in or charge on a property can institute a suit for the redemption of the mortgaged property" cannot be construed to mean that a plaintiff who owned only a fractional share can redeem other shares than his own when the owners of those other shares object to his redeeming their fractions or contend that their shares have already been redeemed by them. (Vol 3) 1916 Mad 863 (865. 869) : 38 Mad 310 (DB).

37. Order of redemption. — [1] Where a subsequent mortgagee had obtained a decree for redemption against the prior mortgagee, it was held that so long as the decree remained in force and executable, the right to redeem the prior mortgage, as between the mortgagor and the second mortgagee, was preferentially in the latter. ('12) 35 Mad 42 (43) (DB).

[2] Prior mortgagee obtaining decree for foreclosure — Subsequent mortgagee not impleaded in mortgage suit — Prior mortgagee becomes owner of equity of redemption and is entitled to redeem subsequent mortgage (Vol 9) 1922 All 135 (137) : 44 All 462 (DB) ✠ (Vol 11) 1924 Nag 198 (199) ✠(Vol 6) 1919 Nag 93 (94).

[3] Suit for redemption of prior mortgage — Subsequent mortgagee not made party—Decree for foreclosure in prior mortgagee's favour — He is entitled to redeem subsequent mortgage. ('04) 28 Bom 153 (170) (DB).

[4] A prior mortgagee who, having obtained a decree for sale on his mortgage without impleading the subsequent mortgagee, himself purchases the property in execution of the decree for sale, he is entitled to redeem subsequent mortgage. ('90) 18 Cal 164 (179, 181) : 17 Ind App 201 (PC).

[But see ('09) 1 Ind Cas 505 (506) (All) ✠ ('92) 16 Mad 121 (125, 126) (DB)]

[5] Prior mortgagee foreclosing without impleading puisne mortgagee and then claiming to redeem latter— Puisne mortgagee himself claiming to redeem prior mortgage—Prior mortgagee should in equity be allowed to redeem subsequent mortgagee (Vol 12) 1925 All 804 (807) : 47 All 751 (DB) ✠ ('04) 28 Bom 153 (170) (DB)

[a][92. Any of the persons referred to in section 91 (other than the mortgagor) and any co-mortgagor shall, on redeeming property subject to the mortgage, have, so far as regards redemption, foreclosure or sale of such property, the same rights as the mortgagee whose mortgage he redeems may have against the mortgagor or any other mortgagee.

Subrogation.

The right conferred by this section is called the right of subrogation, and a person acquiring the same is said to be subrogated to the rights of the mortgagee whose mortgage he redeems.

A person who has advanced to a mortgagor money with which the mortgage has been redeemed shall be subrogated to the rights of the mortgagee whose mortgage has been redeemed, if the mortgagor has by a registered instrument agreed that such persons shall be so subrogated.

Nothing in this section shall be deemed to confer a right of subrogation on any person unless the mortgage in respect of which the right is claimed has been redeemed in full.]

[a] Ss. 92 to 94 were *inserted* by the Transfer of Property (Amendment) Act, 1929 (20 [XX] of 1929), S. 46.

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☆ (Vol 20) 1933 Cal 181 (182) ☆ (Vol 6) 1919 Nag 93 (94) ☆ (Vol 8) 1921 Mad 648 (649)

[But see (Vol 11) 1924 Nag 198 (199) ☆ (08) 8 Cal L Jour 173 (176) (DB) ☆ ('03) 13 Mad L Jour 72 (74) (DB).]

38. Onus of proof.—[1] If a person other than the mortgagor claims to redeem, he must prove that he is one of the persons described in S. 91. (Vol 13) 1926 All 725 (726) (DB) ☆ ('02) 15 C P L R 175 (176, 177) ☆ ('09) 12 Oudh Cas 37 (39) ☆ ('91) 1891 Pun Re No 101, p. 478 (482) (DB) ☆ (Vol 1) 1914 Mad 23 (23) (DB).

[2] Where a person claims to redeem in the capacity of a puisne mortgagee he must prove the due execution of the puisne mortgage, and this is so even when the mortgagor admits the due execution of the mortgage. (Vol 13) 1926 All 725 (726) (DB) ☆ ('92) 15 Mad 54 (55) (DB).

[3] It is not necessary for a subsequent mortgagee or a purchaser claiming to redeem to prove the passing of consideration for the mortgage or transfer. ('92) 15 Mad 54 (55, 56) (DB)

[4] Mortgagor effecting mortgage and dying — Second mortgage by his major son acting for minors — Third mortgage by widow acting for minor sons — Suit for redemption by second mortgagee — Sons supporting his claim — Plea by first mortgagee of incapacity of major son effecting second mortgage was disallowed. (Vol 14) 1927 Lah 81 (81).

[5] Where property belonging to a minor was by his guardian first mortgaged to one person and then sold to another, the mortgagee could not in a suit to redeem his mortgage by the vendee, impugn the sale and contend that it was not made for the benefit of the minor. ('91) 4 C P L R 128 (129).

[6] When a person claims to redeem as the heir of the mortgagor under the Muhammadan law and there are several collaterals of the mortgagor, he must prove that he has a preferential right of succession. (Vol 10) 1923 Lah 222 (223).

39. Whether section applies to redemption of charges.—[1] Charge for maintenance was given in perpetuity to *X* and his heirs — Charge is not capable of redemption — All that can be done is to pay up arrears of maintenance and prevent sale of property. (Vol 20) 1933 All 934 (938) (DB).

[2] Hindu widow obtaining decree for maintenance charging certain properties — Execution for arrears — Third party purchasing properties subject to charge for further maintenance — Subsequent mortgagee of property could redeem purchaser by paying arrears. (Vol 22) 1935 Mad 867 (869) : 59 Mad 101 (DB).

[3] Money-decree on mortgage by father paid off by one of his heirs who remained in possession by consent of others — Payment held created charge and other co-heirs were entitled to redeem. (Vol 6) 1919 Low Bur 143 (144) : 9 Low Bur Rul 169 (DB).

SECTION 92 — SYNOPSIS

1. Scope.
2. Applicability to charges.
3. Right of subrogation arises on redemption.
4. There must be relationship of mortgagor and mortgagee.
5. "Other than the mortgagor."
6. Covenant to pay mortgage—Effect of.
7. Redemption by subsequent mortgagee.
8. Redemption by prior mortgagee.
9. Redemption by purchaser.
10. Redemption by surety.
11. Redemption by co-mortgagor.
12. Redemption by volunteer.
13. Redemption by a person claiming under a void or voidable title.
14. Redemption by trespasser.
15. Third paragraph.
16. Person who has advanced money to a mortgagor.
17. "Mortgage has been redeemed."
18. Sale or mortgage to pay off prior mortgage — Whether the first or the third paragraph applies.
19. Fourth paragraph — Mortgage must be redeemed in full.
20. Rights of subrogee.
21. Right of subrogation is available to successors-in-interest.
22. Purchaser entitled to subrogation—Pre-emptor whether can claim that right.
23. Enforcement of rights acquired by subrogation.
24. Defence of subrogation is not barred even if suit to enforce it is time-barred.
25. Plea of subrogation.

1. Scope.—[1] Subrogation means that one person is substituted for another in regard to the latter's rights and liabilities in a certain matter. (Vol 32) 1945 P C 23 (28, 29) (P C) ☆ (Vol 30) 1943 Bom 191 (192) (DB) ☆ (Vol 29) 1942 Nag 111 (112) : I L R (1942) Nag 393.

[2] The first paragraph deals with legal subrogation and the third paragraph with conventional subrogation. (Vol 23) 1936 Mad 171 (174) : 59 Mad 359 (F B) ☆ (Vol 23) 1936 Nag 32 (33) : 31 Nag L R (Sup) 169 ☆ (Vol 29) 1942 Oudh 260 (261) : 17 Luck 755 (FB).

[3] Apart from the right given by this section a right of subrogation cannot be granted on equitable grounds in the case of mortgages. (Vol 26) 1939 All 141 (151, 153) : I L R (1939) All 24 (D B) ☆ (Vol 32) 1945 Mad 500 (502)

[4] A person paying off a prior mortgage may have two remedies: (a) to proceed against the mortgagor under S. 69 of the Contract Act; and (b) to exercise his right of subrogation. (Vol 9) 1922 Pat 499 (501) : 1 Pat 780 (D B) ☆ (Vol 14) 1927 Cal 393 (394) : 54 Cal 424 (D B) ☆ (Vol 21) 1934 Nag 84 (87) : 30 Nag L R

Section 92 — Note 1 *(contd.)*

148 (D B) ✠(Vol 29) 1942 Nag 111 (113); I L R (1942) Nag 393 ✠ (Vol 32) 1945 Mad 500 (502).

[5] Section 69 of the Contract Act confers only a personal right. The party claiming it can enforce it in his own right and not in the right of the prior mortgagee. By the right of subrogation, on the other hand, the person paying off a mortgage acquires the rights and powers of the mortgagee whom he pays off (Vol 9) 1922 Pat 499 (501) : 1 Pat 780 (D B). *(Dissenting from* (Vol 9) 1922 All 153 : 44 All 67)✠(Vol 24) 1937 Nag 402 (406) ✠(Vol 24) 1937 All 588 (591) : I L R (1937) All 880 (F B) ✠ (Vol 29) 1942 Nag 111 (113) : I L R (1942) Nag 393

[6] The principle underlying this section has been applied to the Punjab and the North-West Frontier Province. (Vol 28) 1941 Lah 53 (55) ✠ (Vol 23) 1936 Lah 390 (392) (D B) ✠ (Vol 26) 1939 Pesh 34 (37) (DB) ✠(Vol 24) 1937 Pesh 5 (5).

[7] The technicality in the third paragraph requiring the agreement to be by a registered instrument is not adhered to in Punjab and North-West Frontier Province. Such an agreement may be either express or implied. (Vol 23) 1936 Lah 390 (392) (D B) ✠ (Vol 24) 1937 Pesh 5 (5) ✠ (Vol 28) 1941 Lah 53 (55). (Agreement may be implied from intention of parties.)

[8] The section has a retrospective effect except in proceedings pending on the 1st of April 1930 (Vol 24) 1937 All 588 (597) : I L R (1937) All 880 (F B) ✠ (Vol 32) 1945 All 239 (243) : I L R (1945) All 733 (F B) ✠ (Vol 25) 1938 Bom 115 (119) (DB)✠ (Vol 29) 1942 Bom 227 (229) (D B) ✠ (Vol 32) 1945 Cal 194 (197) (DB) ✠ (Vol 27) 1940 Pat 385 (393) : 19 Pat 752 (FB). (Manohar Lall J. *dissenting*; (Vol 21) 1934 Pat 127 : 13 Pat 111, *Overruled*)✠(Vol 25) 1938 Oudh 127 (132): 14 Luck 71 (FB) ✠ (Vol 29) 1942 Oudh 449 (451) : 19 Luck 70 (F B).

[But see (Vol 23) 1936 Mad 171 (173) : 59 Mad 359 (F B) ✠ (Vol 25) 1938 Rang 306 (310) : 1938 Rang L R 430 (FB).]

2 Applicability to charges. — [1] By virtue of S. 100, a person who pays off a charge on a property is subrogated to the rights of the charge-holder. (Vol 31) 1944 P C 96 (100) : 24 Pat 89 : I L R (1945) Kar (P C) 28 (P C) ✠ (Vol 24) 1937 Pesh 5 (5) ✠ (Vol 34) 1947 Nag 43 (45) (D B) ✠ (Vol 21) 1934 Nag 84 (87) : 30 Nag L R 148 (DB)✠(Vol 21) 1934 Mad 353 (354) (DB).

[2] It has been held that a charge which a landlord has for rent under S. 65 of the Bengal Tenancy Act of 1885 or under S. 9 of the C. P. Tenancy Act of 1920 is peculiar to himself. A person other than the tenant who pays rent to the landlord is not subrogated to the rights of the landlord. (Vol 21) 1934 Pat 70 (72) (S 65, Bengal Tenancy Act) ✠ (Vol 27) 1940 Nag 156 (158). (S. 9, C. P. Tenancy Act.)

[3] The section does not apply to a statutory charge which the Government has under S. 7 of the Land Improvement Loans Act (XIX of 1883) for tagai advance. (Vol 28) 1941 Bom 153 (155) (DB).

3. Right of subrogation arises on redemption.— [1] Where there has been no redemption no question of subrogation can arise (Vol 31) 1944 Mad 195 (206) : I L R (1944) Mad 340 (DB) ✠ (Vol 11) 1924 Rang 204 (205) : 1 Rang 714 (D B) ✠ (Vol 27) 1940 All 540 (543) ✠ (Vol 21) 1934 All 1035 (1037) (D B) ✠ (Vol 24) 1937 Cal 336 (337) ✠ (Vol 14) 1927 Nag 150 (153) ✠ (Vol 9) 1922 Pat 92 (94) (D B). *(Per Das J.)* ✠ ('01) 4 Oudh Cas 273 (275).

[2] A payment made before the date of confirmation of a sale held in pursuance of a mortgage decree will be a redemption of the mortgage entitling the person paying to claim subrogation. (Vol 30) 1943 Pat 305 (308) : 22 Pat 187 (D B) ✠ (Vol 24) 1937 Nag 196 (196, 197) : I L R (1939) Nag 310 ✠ (Vol 23) 1936 All 33 (42) : 58 All 602 (F B).

[3] Decree on prior mortgage obtained—Prior mortgage can be redeemed until sale under decree is confirmed or final decree for foreclosure is passed. (Vol 32) 1945 Cal 194 (198) (D B).

[4] Suit upon mortgage — Passing of decree or sale in execution does not negative right of subrogation — Discharge of mortgage is necessary. (Vol 34) 1947 Mad 18 (31) (D B).

[5] From S. 92, it is impossible to differentiate between the redemption, i. e., the payment of a prior mortgage and the discharge of a decree obtained on the prior mortgage by a subsequent mortgagee. The right of subrogation acquired by the subsequent mortgagee in either case is identical (Vol 32) 1945 All 239 (242) : I L R (1945) All 733 (F B).

4. There must be relationship of mortgagor and mortgagee.— [1] If the relation of mortgagor and mortgagee does not exist between the person who is primarily liable for the payment and the person to whom the payment was made no right of subrogation will arise in favour of any person. (Vol 3) 1916 All 44 (46) (D B).

[2] *A* mortgaged his property to *B* and then to *C*; *B* sued on his mortgage, obtained a decree and purchased the property himself. *B* then sold the property to *D*. *A* sued *D* for possession of the property contending that *D*'s purchase was on his behalf. The claim was decreed on condition that *A* should pay to *D* certain amount. In order to pay that amount *A* raised money on mortgage from *E* and discharged the claim. In a suit by *C*, the subsequent mortgagee *E* claimed a right of subrogation on the basis of the advance to *A* for discharging *D*'s claim It was held that there was no relation of mortgagor and mortgagee between *A* and *D* and consequently no prior mortgage in discharge of which the payment was utilised. (Vol 16) 1929 Mad 890 (892) (DB).

5. "Other than the mortgagor."—[1] A mortgagor who has created more encumbrances than one cannot set a prior encumbrance which he has discharged against a later encumbrance. (Vol 26) 1939 Mad 949 (951) (DB).

[2] When a mortgagor pays off a prior encumbrance created by himself, he does nothing but perform his own obligation. (Vol 18) 1931 All 40 (42) : 52 All 1037 (DB) ✠ (Vol 23) 1936 Cal 42 (43) : 62 Cal 677 ✠ (Vol 25) 1938 Mad 779 (783) (DB) ✠ (Vol 7) 1920 Oudh 204 (208, 209) (DB).

[3] A mortgagor cannot claim the right of subrogation. (Vol 25) 1938 Bom 508 (509) (DB)✠(Vol 26) 1939 Mad 949 (951) (D B) ✠ (Vol 29) 1942 Oudh 465 (472) : 18 Luck 366 (F B) ✠ (Vol 2) 1915 All 242 (243) : 37 All 309 (D B).

[4] Whenever a mortgagor pays off a prior mortgage, the payment enures for the benefit of a subsequent mortgagee and enlarges his security by rendering it more valuable. ('07) 5 Cal L Jour 95 (101) (DB) ✠ (Vol 18) 1931 Mad 642 (643) (DB) ✠ (Vol 16) 1929 Mad 890 (891, 894, 895) (DB).

[5] A mortgagor whose right to redeem a prior mortgage is extinguished can again acquire that right by subrogation if he redeems a subsequent mortgagee whose right to redeem the prior mortgage had not been so extinguished. (Vol 19) 1932 Nag 154 (155) : 28 Nag L R 247.

[6] "Mortgagor" includes his successor-in-interest. (Vol 6) 1919 Oudh 150 (151) : 22 Oudh Cas 72.

[7] 'Mortgagor' includes his agent. (Vol 18) 1931 All (40) (42) : 52 All 1037 (D B).

6. Covenant to pay mortgage—Effect of.—[1] A person who has covenanted with the mortgagor to pay

Section 92—Note 6 *(contd.)*

off a liability and who makes the payment in pursuance of the covenant cannot claim any right of subrogation. ('05) 2 Cal L Jour 288 (298, 299) (DB) ✠ (Vol 14) 1927 Nag 150 (153) ✠ (Vol 21) 1934 Oudh 129 (130) ✠ (Vol 23) 1936 Cal 42 (43) : 62 Cal 677 ✠ (Vol 19) 1932 P C 99 (101) (P C) ✠ (Vol 23) 1936 Mad 901 (904).

[2] A purchaser of mortgaged property subject to the mortgage cannot be said to have covenanted to pay the mortgage debt, and can, if he pays off the mortgage, claim to be subrogated to the rights of the mortgagee. (Vol 11) 1924 P C 36 (38) : 47 Mad 190 : 51 Ind App 140 (P C). (Auction-purchaser.) ✠ ('84) 10 Cal 1035 (1044) : 11 Ind App 126 (P C). (Do.)

[3] Where a vendee or mortgagee from the owner covenants to pay a puisne mortgagee, he cannot claim subrogation against such mortgagee, in respect of any prior mortgage which he might have paid off even though he might not have covenanted to pay off the prior mortgage. ('07) 6 Cal L Jour 134 (137, 139) (DB) ✠ (Vol 11) 1924 P C 36 (38) : 47 Mad 190 : 51 Ind App 140 (PC).

[4] Where a vendee or a mortgagee from a person covenants to pay off two mortgages on the property but pays off only the earlier of the two, he cannot as against the second, claim to be subrogated to the rights of the mortgagee who has been paid off. ('11) 33 All 101 (104) (FB) ✠ (Vol 13) 1926 Nag 321 (322) (DB) ✠ (Vol 14) 1927 Nag 150 (153) ✠ ('07) 6 Cal L Jour 134 (138, 139) (DB)✠(Vol 23) 1936 Mad 171 (172):59 Mad 359 (FB). (Overruling (Vol 21) 1934 Mad 227.) ✠ (Vol 34) 1947 Mad 18 (24) (DB).

7. Redemption by subsequent mortgagee. — [1] On redemption by a subsequent mortgagee of a prior mortgage he is subrogated to the rights of the mortgagee whom he redeems under paragraph 1 of this section. (Vol 27) 1940 Lah 269 (270, 271). (Reversed on a different point in (Vol 30) 1943 Lah 113.) ✠ ('37) 1937 Oudh W N 1107 (1109).

8. Redemption by prior mortgagee. — [1] *A* mortgaged his property to *B* and then to *C*. *C* brought a suit on his mortgage and impleaded *B*. *B* stated that he was a prior mortgagee and was willing to redeem *C's* mortgage. A preliminary decree for foreclosure was passed and *B* paid the decretal amount. *B* then filed a suit against *A* and sought to recover the amount paid in satisfaction of the mortgage in favour of *C* and the amount due on his own mortgage. It was held that explanation to O. 34, R. 1, Civil P. C. did not prohibit the subsequent mortgagee from joining the prior mortgagee as a party to his suit if he chose; after the prior mortgagee had decided that it was convenient for him to be joined in the suit on the subsequent mortgage and had allowed himself to be so joined, he was entitled to claim subrogation after redemption of the subsequent mortgage. (Vol 16) 1929 Nag 135 (136):25 Nag L R 171.

9. Redemption by purchaser.—[1] A purchaser or an auction-purchaser of mortgaged property is not the "mortgagor" for the purposes of this section and has, therefore, a right of subrogation under the first paragraph. (Vol 29) 1942 Bom 98 (99) : I L R (1942) Bom 169 (DB) ✠ (Vol 21) 1934 All 1035 (1036) (DB)✠ (Vol 20) 1933 Pat 33 (35) (DB) ✠ (Vol 24) 1937 Nag 402 (406) ✠ (Vol 24) 1937 Oudh 493 (497) : 13 Luck 484 (DB) ✠ (Vol 23) 1936 Nag 207 (209) : I L R (1936) Nag 183 ✠ ('33) 14 Pat L Tim 371 (373) (DB).

[But see (Vol 27) 1940 Lah 201 (201) ✠ (Vol 26) (1939) All 190 (192) : I L R (1939) All 185 (DB)✠(Vol 24) 1937 Nag 372 (374) : I L R (1938) Nag 206 (FB) ✠ (Vol 5) 1918 Mad 103 (104) : 41 Mad 513 (DB).]

[2] Where a person does not purchase only the equity of redemption but purchases the property free from encumbrances and then pays off the prior mortgage to protect his own interest, he is subrogated to the rights of the mortgagee whom he redeems. (Vol 26) 1939 Nag 217 (219) : I L R (1939) Nag 690.

10. Redemption by surety. — [1] A surety for the payment of the mortgage-debt has a right of subrogation under the first paragraph. (Vol 19) 1932 Nag 171 (171, 172) : 28 Nag L R 214

11. Redemption by co-mortgagor. — [1] A redeeming co-mortgagor is subrogated to the rights of the mortgagee whom he redeems. (Vol 30) 1943 Cal 330 (332) : I L R (1943) 2 Cal-180 (DB) ✠ (Vol 32) 1945 Bom 409 (413) (DB). (Auction purchaser stepping into the shoes of a co-mortgagor.) ✠ (Vol 29) 1942 Lah 135 (136) ✠ (Vol 23) 1936 Mad 752 (764) (DB) ✠ (Vol 28) 1941 Pat 147 (148) : 19 Pat 938 (DB) ✠ (Vol 21) 1934 All 946 (947) ✠ (Vol 20) 1933 All 228 (229) (DB) ✠ (Vol 17) 1930 Nag 300 (300, 304) : 27 Nag L R 152 ✠ (Vol 21) 1934 Nag 97 (100) : 30 Nag L R 1 (DB) ✠ (Vol 25) 1938 Oudh 127 (133, 134) : 13 Luck 761 (DB) ✠ (Vol 25) 1938 Lah 184 (185) : I L R (1938) Lah 103 (DB) ✠ (Vol 18) 1931 Cal 251 (252) : 58 Cal 1167 (FB) ✠ (Vol 27) 1940 Oudh 97 (101) : 15 Luck 175 (DB) ✠ (Vol 27) 1940 Pat 620 (621) (DB).

[2] Apart from the right of subrogation, the redeeming co-mortgagor has a charge for contribution under S. 82 enforceable within 12 years from the date of payment in excess of his share. (Vol 29) 1942 Oudh 449 (457, 458) : 19 Luck 70 (FB).

[3] It has been held that co-mortgagor's charge for contribution under S. 82 relates back to the date of the mortgage redeemed, for purposes of priority, though not for purposes of limitation. (Vol 31) 1944 Oudh 114 (116) (DB).

[4] Co-mortgagor paying requisite sum to set aside sale in execution of mortgage-decree — Suit on mortgage barred — Co-mortgagor can sue for contribution. (Vol 32) 1945 Pat 192 (196) : 23 Pat 953 (DB).

12. Redemption by volunteer. — [1] A volunteer cannot claim the right of subrogation by paying off a mortgage-debt. ('09) 36 Cal 193 (219) (DB) ✠ (Vol 24) 1937 Mad 451 (453, 454) (DB)✠(Vol 23) 1936 Mad 264 (265)✠ (Vol 18) 1931 All 40 (42) : 52 All 1037 (DB) ✠ (Vol 18) 1931 Pat 33 (36, 37):9 Pat 816 (DB)✠(Vol 28) 1941 Oudh 226 (229) (DB) ✠ (Vol 11) 1924 Oudh 302 (303) : 27 Oudh Cas 56 (DB)✠(Vol 22) 1935 Lah 523 (525) : 16 Lah 1065 (DB) ✠ ('37) 20 Nag L Jour 159 (171, 172) (DB).

[But see (Vol 3) 1916 Bom 302 (304) : 40 Bom 646 (DB) ✠ (Vol 18) 1931 Mad 720 (723) ✠ (Vol 16) 1929 Bom 139 (140) : 53 Bom 353 ✠ (Vol 13) 1926 Cal 231 (232) (DB).

13. Redemption by person claiming under a void or voidable title.—[1] A person claiming under a title which is void *ab initio* and discharging a prior mortgage, cannot claim to be subrogated to the rights of the mortgagee, whom he has discharged (Vol 23) 1936 Mad 264 (265, 266)✠(Vol 18) 1931 Mad 110 (111, 112) ✠ ('10) 32 All 25 (27, 30) (DB) ✠ (Vol 28) 1941 Oudh 226 (229) (DB) ✠ (Vol 23) 1936 Oudh 280 (285) : 12 Luck 185 (DB).

[See however (Vol 3) 1916 Low Bur 113 (114).]

[2] Where a person claims under a voidable title which is good for the time being, and pays off a prior mortgage he can claim the right of subrogation, though afterwards the transaction under which he claims is declared invalid and set aside. (Vol 13) 1926 P C 109 (110) (P C) ✠ (Vol 13) 1926 P C 68 (72) : 48 All 443 : 53 Ind App 142 (P C)✠(Vol 34) 1947 Mad 18 (30) (DB).

[3] A person claiming under a sham or nominal transfer cannot claim the right of subrogation. (Vol 15) 1928 Mad 541 (542)✠(Vol 10) 1923 Mad 392 (399) (DB).

[4] Where a person enters into possession by virtue of the transfer in his favour and the mortgage which he pays off does not give him any right to possession,

Section 92 — Note 13 *(contd.)*
he cannot use the payment of the mortgage-money as a shield to a suit for possession by the real owner. He can, however, enforce his right under the mortgage in proper proceedings taken for that purpose. (Vol 24) 1937 All 119 (121) : I L R (1937) All 225 (DB) ✠ ('32) 1932 All L Jour 1116 (1117) (DB).

14. Redemption by trespasser.—[1] Mere possession is not sufficient to support a claim of subrogation unless that possession is accompanied by some interest in the property which the person in possession is entitled to protect. (Vol 23) 1936 Mad 264 (265).

[2] A trespasser who is in wrongful possession of the mortgaged property, paying off a mortgage-debt cannot claim subrogation. (Vol 24) 1937 Mad 451 (453) (DB).

15. Third paragraph. — [1] The first paragraph refers to a person redeeming property and the third paragraph to a person who advances money with which a mortgage is redeemed. (Vol 24) 1937 All 588 (594, 595) : I L R (1937) All 880 (FB).

[2] Under this section, there can be no conventional subrogation unless there is an agreement therefor, evidenced by a registered instrument. (Vol 32) 1945 P C 23 (30) : 72 Ind App 39 : I L R (1945) Kar (P C) 78 (P C) ✠ (Vol 33) 1946 Mad 145 (146) ✠ (Vol 29) 1942 Mad 751 (752, 753).

[3] Where the person advancing money takes a mortgage or sale of the mortgaged property for the amount he has advanced, an agreement to subrogate can be effected by the same deed of mortgage or sale, by introducing a recital to that effect. (Vol 27) 1940 P C 38 (44) : I L R (1940) 1 Cal 291 : I L R (1940) Kar (P C) 82 : 67 Ind App 82 (PC)✠ (Vol 29) 1942 Pat 166 (168, 169) (DB).

16. Person who has advanced money to a mortgagor. — [1] The words "who has advanced to a mortgagor money" will include not only a simple creditor but also a mortgagee or a vendee who has advanced money to the mortgagor in consideration of his mortgage or sale as the case may be. (Vol 24) 1937 All 588 (595) : I L R (1937) All 880 (FB) ✠ (Vol 26) 1939 Mad 949 (956) (DB) ✠ (Vol 23) 1936 Mad 171 (172) : 59 Mad 359 (FB).

[But see (Vol 24) 1937 Nag 372 (375) : I L R (1938) Nag 206 (FB). (The expression does not apply to a vendee.)]

[2] The words "who has advanced to a mortgagor money" do not refer to mortgagee who has advanced money on a subsequent mortgage for the purposes of redeeming a prior mortgage in his own favour. (Vol 27) 1940 Pat 64 (65).

[But see (Vol 20) 1933 Oudh 9 (12) : 7 Luck 655 (DB).]

[3] The word 'mortgagor' used in the expression, "A person who has advanced to a mortgagor money" must be understood to mean the original mortgagor and his legal heir. If an assignee from the original mortgagor or a court-auction purchaser of his interest or a subsequent mortgagee sells his right to another and directs his vendee to pay the earlier mortgage and the vendee payed it in pursuance of such a covenant, he cannot be denied the right of subrogation. (Vol 34) 1947 Mad 18 (27, 28) (DB).

17. "Mortgage has been redeemed."—[1] The words "mortgage has been redeemed," refer merely to the payment of the mortgage-money, and not to an extinction of the mortgagees' rights over the mortgaged property. (Vol 27) 1940 P C 38 (44) : I L R (1940) 1 Cal 291 : I L R (1940) Kar (PC) 82 : 67 Ind App 82 (PC).

18. Sale or mortgage to pay off prior mortgage —Whether the first or the third paragraph applies. —[1] *A* mortgages property worth Rs. 2000 to *B* for Rs. 1800 and then sells the same to *C* for Rs. 2000, free of incumbrance but leaves Rs. 1800 in the hands of *C* for paying off *B* and *C* accordingly pays him off. There can be no question of subrogation under the first paragraph. But *C* will be entitled to claim subrogation under the third paragraph, only if *A* has, by a registered instrument, agreed that *C* shall be so subrogated. (Vol 24) 1937 All 588 (595) : I L R (1937) All 880 (FB) ✠ (Vol 26) 1939 Mad 949 (956) (DB) ✠ (Vol 24) 1937 Nag 372 (375) : I L R (1938) Nag 206 (FB). (*Overruling* (Vol 23) 1936 Nag 32 : 31 Nag L R (Sup) 154.)✠(Vol 25) 1938 Pat 532 (533) : 17 Pat 666 (DB),✠ (Vol 28) 1941 Bom 153 (155) (DB).

[2] *A* mortgages property worth Rs. 2000 to *B* for Rs. 1800 and then mortgages the same to *C* for Rs. 2000, *A* receiving only Rs. 200, and leaving the balance with *C* himself who pays off *B* with that amount. The question of subrogation under the first paragraph will not arise. *C*, however, may, as a person advancing money to *A*, be entitled to claim the right of subrogation under the third paragraph, if *A* has agreed by a registered instrument that *C* shall be so subrogated. (Vol 24) 1937 All 588 (594, 595) : I L R (1937) All 880 (FB). ((Vol 19) 1932 All 489 : 54 All 897 (FB), *Overruled.*)✠ (Vol 26) 1939 Mad 949 (956) (DB) ✠ (Vol 29) 1942 Bom 98 (100) : I L R (1942) Bom 169 (DB) ✠ (Vol 28) 1941 Lah 53 (55) ✠ (Vol 23) 1936 Mad 171 (172, 174) : 59 Mad 359 (FB).

[But see (Vol 29) 1942 Oudh 260 (261) : 17 Luck 755 (FB) ✠ ('37) 1937 Oudh W N (1107) (1110). *(Overruled* in (Vol 28) 1941 Oudh 226 on different ground.)✠ (Vol 20) 1933 Nag 155 (157) : 30 Nag L R 164 ✠ (Vol 18) 1931 Nag 138 (141).]

[3] *A* who was a mortgagee in possession of some lands of *B*, sued *B* on a money claim and attached before judgment the above lands amongst others. Subsequently, *B* mortgaged the above lands to *C* and left a part of the consideration with *C* to redeem *A*'s mortgage. On such redemption, *C* was himself to take possession of the mortgage lands. *C* deposited the amount in Court and presented an application under S. 83. *A* accepted the amount in full satisfaction of the mortgage-debt and delivered possession to *C*. Subsequently, *A* obtained a decree in his money suit and wanted to sell the mortgaged lands in execution. *C* claimed that the property should be sold subject to the prior charge acquired by subrogation under the first paragraph. It was held that as *A* accepted the deposit from *C* as made by a person entitled under S. 91 to sue for redemption, he could not be permitted to say that the deposit was not by *C* on his own behalf but as an agent of the mortgagor. *C* was therefore entitled to subrogation under the first paragraph. (Vol 29) 1942 Bom 227 (231) (DB).

19. Fourth paragraph — Mortgage must be redeemed in full.—[1] The right of subrogation cannot be claimed unless the mortgage in respect of which the right is claimed has been redeemed in full. (Vol 31) 1944 P C 96 (100) : 24 Pat 89 : I L R (1945) Kar (P C) 28 (P C) ✠ (Vol 30) 1943 Oudh 407 (409) : 19 Luck 260 (DB) ✠ (Vol 27) 1940 P C 38 (44): 67 Ind App 82: I L R (1940) 1 Cal 291 : I L R (1940) Kar (P C) 82 (P C).

[2] Where a mortgage is split up, the mortgage has to be looked upon as several distinct mortgages. Consequently if there is a redemption of one independent portion in full, then the provisions of this paragraph are complied with so far as that part is concerned. (Vol 26) 1939 Nag 215 (216) (DB) ✠ (Vol 13) 1926 Nag 21 (24) : 23 Nag L R 86.

[3] Where the mortgagee agrees to let the mortgage be redeemed on payment of a lesser amount, such payment will give rise to the right of subrogation. (Vol 23) 1936 All 62 (63) ✠ (Vol 21) 1934 Mad 31 (37, 38) (FB).

Section 92 — Note 19 *(contd.)*

[4] Where a mortgage is redeemed by giving a hundee in favour of the mortgagee, the mortgage has been redeemed in full. (Vol 7) 1920 Pat 678 (684) (DB).

[5] The redemption need not be by only one person. *A, B, C* can join together in redeeming the mortgage and when they do so each will be entitled to subrogation to the extent of the amount each has contributed towards redemption. (Vol 24) 1937 All 588 (598) : I L R (1937) All 880 (FB) ✠ (Vol 9) 1922 Mad 249 (251, 252) (DB).

[6] Where the redemption is by more persons than one, it is not necessary that all must pay simultaneously nor can it be said that it is only the person who paid last that has redeemed the mortgage and that he alone is entitled to subrogation. (Vol 28) 1941 Mad 563 (563, 564) : I L R (1941) Mad 924.

[7] Where a person advances money to the mortgagor to redeem a mortgage and the money advanced forms only a part of the amount that went towards redemption, the person advancing the money will be entitled to claim subrogation to the extent of the amount he advanced. (Vol 20) 1933 Mad 715 (718) (DB) ✠ (Vol 16) 1929 All 621 (623) : 51 All 920 (DB) ✠ (Vol 26) 1939 Pat 375 (380) : 18 Pat 342.

[8] Though a right of subrogation under this section may not arise unless the surety has redeemed the mortgage in full, this principle will not apply where the circumstances of the case do not give rise to a right of subrogation but to a right under S. 140, Contract Act— Under the latter section, the surety who has paid off a part of the mortgage debt may nevertheless claim the benefit of the security in respect of the amount paid by him (Vol 31) 1944 Mad 195 (200) : I L R (1944) Mad 340 (DB).

[See however (Vol 14) 1927 All 538 (540) : 49 All 640 (DB).]

20. Rights of subrogee.—[1] A subrogee will not acquire any rights which the prior mortgagee might have acquired otherwise than as such mortgagee. ('02) 24 All 185 (188) (DB).

[2] This section only confers on the subrogee the rights of the mortgagee whom he redeems. The subrogee is not necessarily entitled to the remedies of the mortgagee whom he redeems. (Vol 26) 1939 Pat 375 (378) : 18 Pat 342 (DB) ✠ (Vol 30) 1943 Pat 305 (309) : 22 Pat 187 (DB).

Rights against mortgaged properties.

[3] If *A* mortgages properties *X* and *Y* to *B* and then mortgages *Y* alone to *C*. *C*, on redeeming *B*, can foreclose or sell both the properties *X* and Y in enforcement of his right of subrogation. (Vol 28) 1941 Pat 276 (277) (DB).

[4] Where *A* and *B* owning property *X* jointly, mortgage it to *C* and subsequently *A* alone mortgages his share to *D*. *D*, on redeeming *C*, can exercise his right of subrogation by foreclosure or sale of the entire property *X*. (Vol 14) 1927 Pat 379 (381) (DB).

[5] *A* mortgages his properties *X*, *Y* and *Z* to *B*. *B* releases property *X* from his mortgage. Subsequently, *A* mortgages property *Z* to *C* who redeems *B*. *C*, as a subrogee, can proceed only against properties *Y* and *Z* as these alone were subject to mortgage on the date of redemption by *C* and not *X*, *Y* and *Z* originally comprised in *B*'s mortgage. ('96) 18 All 189 (193, 194) (DB).

[6] A subrogee, who is also entitled to contribution, instead of enforcing his right of subrogation in respect of the entire mortgage as an indivisible whole, may split up the mortgage and distribute the mortgage liability over different portions of the mortgaged property in the respective possession of different subsequent transferees. (Vol 30) 1943 Pat 305 (307) : 22 Pat 187 (DB).

Right to possession.

[7] Where the mortgagee who is redeemed is entitled to remain in possession under his mortgage, the subrogee is also entitled to retain possession of the property until he is paid off. (Vol 30) 1943 Bom 191 (192) (DB) (Redemption by co-mortgagor.) ✠ (Vol 32) 1945 Bom 69 (71, 72). (Do.) ✠ (Vol 18) 1931 Oudh 144 (145) (DB) ✠ ('13) 16 Oudh Cas 119 (121) (DB).

[8] Where the prior mortgage is a simple one and a subsequent usufructuary mortgagee redeems him, the latter cannot, when he is himself redeemed, resist delivery of possession on the ground of subrogation. (Vol 22) 1935 Mad 390 (393).

[9] A person who claims to be subrogated to the rights of mere charge-holder cannot claim possession of the property charged, if the charge-holder has merely a right to put the property charged to sale and has no right to possession (Vol 31) 1944 PC 96 (100) : 24 Pat 89 : I L R (1945) Kar (PC) 28 (PC).

[10] A usufructuary mortgagee paid off a prior simple mortgage after the latter had obtained a decree for sale, and sought to bring the property mortgaged to sale for the purpose of recovering the amount of the simple mortgage, re aiming his own lien as a usufructuary mortgagee It was held that he was entitled to retain possession, under S. 72, of the mortgaged property as a usufructuary mortgagee until the amount due on both mortgages was discharged. ('05) 27 All 403 (405) (DB).

Right to prior mortgagee's lease-hold rights.

[11] A subrogee cannot get the prior mortgagee's rights as a landlord as against the tenants. (Vol 8) 1921 Mad 393 (393) (DB))

[But see (Vol 12) 1925 Nag 90 (95).]

Extent of subrogation.

[12] The subrogee can claim subrogation only to the extent to which his money has been utilised in relieving the burden of the prior mortgage. (Vol 30) 1943 Lah 113 (116) (DB) (And not to the extent of the debt due under the puisne mortgage where subrogation is claimed by the puisne mortgagee.)

[13] If the whole of the prior mortgage has been discharged with money of the subrogee he will be subrogated to the entire mortgage rights of the prior mortgagee. (Vol 13) 1926 Nag 214 (214, 215) : 21 Nag L R 165 ✠ (Vol 21) 1934 All 1035 (1037) (DB) ✠ (Vol 26) 1939 Pat 375 (378) : 18 Pat 342 (DB).

[14] If the amount advanced or paid by the subrogee has gone only in part satisfaction of the prior mortgage, the balance being paid by the mortgagor himself, he will be subrogated only to the extent of the amount paid by him which has gone in satisfaction of the prior mortgage. (Vol 13) 1926 All 744 (745) (DB) ✠ (Vol 18) 1931 Bom 545 (547) (DB) ✠ (Vol 3) 1916 Mad 637 (637, 638) : 38 Mad 548 (DB) ✠ ('93) 16 Mad 94 (96) (DB).

[15] Where under the terms of the mortgage, a mortgagee is entitled to recover at the time of redemption any amount spent by him on improvement of the mortgaged property, a subrogee to his rights making improvements is entitled to claim under the terms of the mortgage, the amount spent by him over improvements. (Vol 13) 1926 Lah 430 (431) : 7 Lah 212 (DB)

[16] Where out of the consideration of a sale a portion was left with the buyer to pay off a prior mortgage decree and owing to the delay on the part of the buyer the property was sold but the sale was set aside on payment of the decretal amount together with the

[a][93. No mortgagee paying off a prior mortgage, whether with or without notice of an inter-
Prohibition of tacking. mediate mortgage, shall thereby acquire any priority in respect of his original security; and, except in the case provided for by section 79, no mortgagee making a subsequent advance to the mortgagor, whether with or without notice of an intermediate mortgage, shall thereby acquire any priority in respect of his security for such subsequent advance.]

[a] *See* S. 92, foot note [a].

Section 92 — Note 20 *(contd.)*

auction-purchaser's solatium under O 21, R. 89 of the Civil Procedure Code, it was held that the buyer could not, as a subrogee, claim subrogation in respect of the auction-purchaser's solatium. (Vol 19) 1932 P C 99 (101) (PC).

Right to claim interest.

[17] A subrogee on redemption of a prior mortgagee can claim interest on the amount paid by him to discharge the mortgage, in the circumstances in which the prior mortgagee could have claimed it (Vol 30) 1943 Lah 113 (116) (DB)✠(Vol 9) 1922 Nag 155 (156): 17 Nag L R 200 ✠ (Vol 26) 1939 Pat 375 (380) : 18 Pat 342 (DB) ✠ (Vol 22) 1935 Mad 660 (662) (DB).

[18] Following views are held as to whether where the purchaser of the equity of redemption redeems a prior simple mortgage and is in possession, interest should be allowed to the subrogee on the amount spent by him towards redemption.

(a) As he enjoys the usufruct, he cannot be allowed interest for the period of possession. (Vol 9) 1922 All 185 (187) : 44 All 9 (DB) ✠ (Vol 21) 1934 All 1035 (1038) (DB).

(b) An account of the profits enjoyed by the purchaser must be taken and if the profits fall short of the interest, only then should the balance of interest be allowed. (Vol 22) 1935 Mad 360 (362) (DB) ✠ (Vol 5) 1918 Mad 103 (105, 109) : 41 Mad 513 (DB).

(c) The purchaser is entitled to interest even though he is in possession. (Vol 7) 1920 Mad 389 (390, 391) (DB) ✠ (Vol 21) 1934 Mad 268 (269) (DB).

21. Right of subrogation is available to successors-in-interest — [1] Every person, who succeeds to the entire right possessed by the subrogee by redemption, transfer or otherwise, will also be clothed with the right of subrogation. (Vol 30) 1943 Lah 113 (116) (DB). (Reversing (Vol 27) 1940 Lah 269 on a different point.) ✠ (Vol 13) 1926 Nag 214 (214 215) : 21 Nag L R 165 ✠ (Vol 21) 1934 Mad 256 (257) (DB) ✠ (Vol 9) 1922 Mad 249 (253) (DB).

[2] A certain land was mortgaged to *A*, then to *B* and then to *C*. *C*'s mortgage was effected to satisfy *A*'s mortgage decree. *C* thus became subrogated to *A*'s rights In order to pay off *C*'s mortgage decree, the land was sold to *D* who borrowed the purchase money from *P* to whom he mortgaged it on the day of the sale. It was held that *P*'s mortgage was entitled to priority over *B*'s mortgage to the extent to which the loan secured thereby had gone to discharge *A*'s mortgage. ('93) 16 Mad 94 (96) (DB).

22. Purchaser entitled to subrogation—Pre-emptor whether can claim that right.— [1] Where a purchaser has, by redeeming a prior mortgage, obtained a right of subrogation, the person who obtains the property from him by pre-emption is also entitled to the right of subrogation. (99) 1899 Pun Re No. 67, page 303 (304)

23. Enforcement of rights acquired by subrogation. — [1] The right of subrogation can be set up by way of defence. (Vol 19) 1932 P C 99 (101) (PC) ✠ (Vol 27) 1940 PC 38 (44) : I L R (1940) 1 Cal 291 : 1 L R (1940) Kar (PC) 82 : 67 Ind App 82 (PC).

[2] The right of subrogation can be enforced by a suit. (Vol 27) 1940 Pat 385 (393) : 19 Pat 752 (FB) ✠ (Vol 6) 1919 Mad 818 (819) (DB) ✠ ('12) 34 All 102 (104) (DB).

[3] Where a mortgage has been redeemed before a decree has been obtained on it, the subrogee can enforce his right by way of a suit based on the redeemed mortgage. (Vol 30) 1943 Pat 305 (309) : 22 Pat 187 (DB) ✠ (Vol 32) 1945 Cal 194 (198) (DB) ✠ (Vol 23) 1936 Mad 814 (815 816) : 59 Mad 1042 (DB) ✠ (Vol 21) 1934 All 1035 (1037) (DB).

[4] Where payment is made, after a preliminary decree has been passed on the mortgage, by a person competent to redeem under S 91 who is a party to the suit, the subrogee is entitled to be substituted for the plaintiff mortgagee and can apply for a final decree to be passed in his name. (Vol 15) 1928 Nag 145 (146) : 24 Nag L R 119 ✠ (Vol 20) 1933 Nag 163 (164) : 29 Nag L R 183 ✠ ('02) 24 All 179 (183, 184) (DB).

[5] Where a final decree has been passed on a mortgage a payment of such a decree satisfies it. The only remedy for the subrogee in such a case is by way of a suit. (Vol 30) 1943 Pat 305 (309) 22 Pat 187 (DB) ✠ (Vol 32) 1945 Cal 194 (199) (DB) ✠ (Vol 12) 1925 Mad 80 (83, 84) (Such a suit is not barred by S 11 or S. 47 or O. 2, R. 2 Civil P C.) ✠(Vol 12) 1925 Mad 129 (129, 130) (Do) ✠ (Vol 9) 1922 All 153 (154) : 44 All 67 (DB) (Do.) ✠ (05) 27 All 325 (332, 333) : 32 Ind App 123 (PC) (Do.)✠(Vol 21) 1934 Lah 248 (249) : 15 Lah 746 (Do.)

[6] Where a subsequent mortgagee pays off a prior mortgage and steps into the shoes of the prior mortgagee by subrogation, if such a mortgagee has a right to obtain the same kind of decree in respect of both the mortgagees, he will be bound to sue on both the mortgages together. (Vol 4) 1917 Lah 396 (397) : 1917 Pun Re No. 1 (DB).

[7] A person advancing money on a mortgage to pay off a prior mortgage, can claim priority for his advance in a suit based on his own mortgage ('12) 34 All 102 (104) (DB)✠('06) 28 All 778 (781) (DB) ✠ ('93) 16 Mad 94 (96) (DB)✠(Vol 29) 1942 Pat 166 (168, 169) (DB)✠ ('97) 20 Mad 486 (487) (DB).

24. Defence of subrogation is not barred even if suit to enforce it is time-barred. — [1] A person who is subrogated to the rights of a mortgagee may set up the mortgage as a shield although a suit for enforcing such mortgage may be barred by limitation. (Vol 23) 1936 All 578 (581) : 58 All 1056 (FB)✠(Vol 6) 1919 Oudh 370 (373) : 22 Oudh Cas 32 ✠ (Vol 13) 1926 Nag 21 (23) : 23 Nag L R 86.

[But see (Vol 26) 1939 Mad 673 (680, 681).]

25. Plea of subrogation.—[1] A transferee from the mortgagor who claims a right of subrogation against the plaintiff mortgagee by virtue of payment of certain prior mortgages must aver that the mortgagor in the prior mortgages was the mortgagor of the plaintiff, that the properties mortgaged were the same and that the payment had been made by or on behalf of himself. (Vol 29) 1942 Cal 153 (154) : I L R (1942) 1 Cal 326 (DB).

Section 93 — Note 1

[1] Notice of the existence of an intermediate mortgage is immaterial under this section except in cases falling under section 79. (Vol 10) 1923 P C 211 (216) : 51 Cal 86 : 1 Rang 637 : 50 Ind App 283 (P C).

[a][94. Where a property is mortgaged for successive debts to successive mortgagees, a mesne mortgagee has the same rights against mortgagees posterior to himself as he has against the mortgagor.]

Rights of mesne mortgagee.

[a] *See* S. 92, foot-note [a].

[a][95. Where one of several mortgagors redeems the mortgaged property, he shall, in enforcing his right of subrogation under section 92 against his co-mortgagors, be entitled to add to the mortgage-money recoverable from them such proportion of the expenses properly incurred in such redemption as is attributable to their share in the property.]

Right of redeeming co-mortgagor to expenses.

[a] Ss. 95 and 96 were *substituted* by the Transfer of Property (Amendment) Act, 1929 (20 [XX] of 1929), S. 48.

Section 93 — Note 1 *(contd.)*

[2] Though the section, in terms, applies to the case of priority of an intermediate mortgagee only, the principle of the section is applicable even to intermediate *purchasers* of the property. ('01) 23 All 429 (431) (DB).

[3] "Subsequent" means subsequent to an intermediate mortgage and an advance made after another mortgage is granted becomes a "subsequent advance". (Vol 10) 1923 P C 211 (215) : 51 Cal 86 : 1 Rang 637 : 50 Ind App 283 (P C).

[4] *A* mortgaged his property to *B* in 1874 and to *C* in 1877, and thereafter again to *B*. *B* obtained a decree on both his mortgages without impleading *C*, got the property sold and took the sale proceeds in satisfaction of both the mortgages : *Held* that *C* could claim to recover the surplus proceeds of the sale after satisfying the mortgage of 1874. ('90) 12 All 546 (547) (DB).

Section 94 — Note 1

[1] This section is an enactment in part of the principle "redeem up and foreclose down". See clause 46 of the Report of the Special Committee.

[2] The section, in terms, deals with the rights of mesne mortgagees. But the same principle is applicable to the rights of first mortgagee against subsequent mortgagees. (Vol 16) 1929 Lah 207 (208) ✠ (1900) 23 All 1 (4) (DB).

[3] A prior mortgagee can require the subsequent mortgagee to redeem him or, in default, to submit to a foreclosure or sale of the property. ('08) 31 Mad 425 (428) (DB) ✠ ('12) 22 Mad L Jour 129 (135) (DB).

[4] Where, under the terms of the prior mortgage, the mortgagee is entitled to possession under certain circumstances, he can, on the happening of such circumstances, sue a subsequent usufructuary mortgagee for possession. ('12) 14 Ind Cas 735 (736) (Oudh) ✠ (Vol 16) 1929 Lah 207 (208).

[5] A prior mortgagee will not be entitled to a personal decree for the mortgage-money, against the subsequent mortgagee, though he may be entitled to such a decree against the mortgagor. (Vol 17) 1930 Lah 791 (792) (DB).

Section 95 — Note 1

[1] Apart from the right of subrogation, a redeeming co-mortgagor has also a right to a charge for contribution against his co-mortgagors. (Vol 29) 1942 Oudh 449 (457) : 19 Luck 70 (FB) ✠ (Vol 32) 1945 Pat 192 (195) : 23 Pat 953 (DB). (Suit on mortgage barred by limitation. Co-mortgagor can rely on charge.) ✠ (Vol 29) 1942 Nag 111 (113) : I L R (1942) Nag 393.

[2] The charge of a redeeming mortgagor against other co-mortgagors relates back to the date of the mortgage redeemed for purpose of priority against subsequent mortgagee though not for the purpose of limitation. (Vol 31) 1944 Oudh 114 (116) (DB).

[3] One of co-mortgagors redeeming usufructuary mortgage—Other co-mortgagors must sue for redemption and not merely for possession. (Vol 30) 1943 Bom 191 (193) (DB).

[4] Where one of several co-mortgagors pays off the balance due on the mortgage he would be entitled to the rights given by this section. (Vol 5) 1918 Pat 322 (323) : 3 Pat L Jour 490 (DB). (Case under old section.)

[5] The solatium of five per cent. on the purchase-money paid to the auction-purchaser in order to set aside a sale under O. 21, R. 89, Civil Procedure Code, is not an expense that can be said to have been properly incurred. (Vol 30) 1943 Mad 429 (433) : I L R (1943) Mad 531 (FB). (Per Patanjali Sastri J., in Order of Reference.) ✠ (Vol 32) 1945 Pat 192 (196) : 23 Pat 953 (DB).

[6] The poundage fee chargeable from the mortgagor who seeks to set aside a sale under O. 21, R 89, Civil P. C., is not an expense properly incurred in redeeming the mortgage. (Vol 30) 1943 Mad 429 (433) : I L R (1943) Mad 531 (FB).

[7] Co-mortgagor paying requisite amount to set aside sale in execution of mortgage decree — Suit for contribution—Suit on mortgage barred by limitation at that time—Interest prior to date of suit cannot be claimed. (Vol 32) 1945 Pat 192 (196) : 23 Pat 953 (DB).

[8] The redeeming co-mortgagor has to contribute *pro tanto* to the extent of the value of his share and can recover only the balance from the other co-mortgagors. (Vol 19) 1932 All 250 (251, 252) (DB).

[9] The claim to recover from the other co-mortgagors must be split up into a claim against each co-mortgagor in consonance with S. 82. (Vol 18) 1931 Cal 251 (255) : 58 Cal 1167 (FB) ✠ (Vol 15) 1928 All 241 (245) : 50 All 569 (DB).

[10] The redeeming co-mortgagor is entitled to separate decrees against each co-mortgagor in default of payment of their proportionate shares. ('01) 4 Oudh Cas 273 (276).

[11] A co-mortgagor satisfying a mortgage decree and obtaining an assignment of the decree is entitled to execute the decree against the other co-mortgagors and, in the execution proceedings, the matter relating to contribution based upon the value of their respective property cannot be urged. (Vol 26) 1939 Cal 425 (427) (DB).

[12] Mortgage by one person—Transfer of equity of redemption in favour of several persons—Such persons constitute "several co-mortgagors". (Vol 23) 1936 Oudh 47 (49) (DB).

[13] A lessee or an assignee of a mokurrari interest of one of several mortgagors is not "one of several mortgagors". ('06) 4 Cal L Jour 79 (85) (DB).

[14] A vendee of a sham title from the mortgagor cannot claim any rights under this section. (Vol 10) 1923 Mad 392 (396) (DB).

Mortgage by deposit of title-deeds.

[a][96. The provisions hereinbefore contained which apply to a simple mortgage shall, so far as may be, apply to a mortgage by deposit of title-deeds.]

[a] *See* S. 95, foot-note [a].

[a]97. [Application of proceeds.] *Repealed by the Code of Civil Procedure, 1908 (Act 5 [V] of 1908), S. 156 and Sch V.*

[a] For the repealed provisions as re-enacted, *see* the Code of Civil Procedure, 1908 (Act 5 [V] of 1908), Sch. I, Order XXXIV, rules 12 and 13.

Anomalous Mortgages.

Rights and liabilities of parties to anomalous mortgages.

98. In the case of [a][an anomalous mortgage] the rights and liabilities of the parties shall be determined by their contract as evidenced in the mortgage deed, and, so far as such contract does not extend, by local usage.

[a] *Substituted* by the Transfer of Property (Amendment) Act, 1929 (20 [XX] of 1929), S. 49, for "a mortgage, not being a simple mortgage, a mortgage by conditional sale, an usufructuary mortgage or an English mortgage or a combination of the first and third, or the second and third, of such forms."

SECTION 98 — SYNOPSIS

1. Scope.
2. Applicability of other provisions of Act where contract is silent on the point.
3. Applicability of general provisions of law.
4. Combination of a simple mortgage and a usufructuary mortgage.
5. Combination of a usufructuary mortgage and a mortgage by conditional sale.
6. Kanom.
7. Peruarthum.
8. Iladarawara.

1. Scope.—[1] Whether an anomalous mortgagee has a right to claim a decree for sale or for foreclosure or for both, or a personal decree for the mortgage-money, will depend upon the terms of the particular mortgage. ('10) 6 Ind Cas 795 (796) (DB) (All) ✠ (Vol 14) 1927 Cal 836 (840) : 54 Cal 687 (DB). (Foreclosure.) ✠(Vol 24) 1937 Pat 261 (262) (DB). (Personal decree.)

[2] An anomalous mortgagee cannot claim any right expressly or impliedly negatived by the contract (Vol 6) 1919 P C 121 (123) : 15 Nag L R 134 (PC) ✠ ('03) 6 Oudh Cas 167 (173, 174)✠(Vol 15) 1928 Mad 226 (226) (DB).

[2a] However, the parties cannot contract themselves out of statutory rights, such as right of redemption under S. 60. (Vol 9) 1922 P C 17 (19) : 44 All 185: 25 Oudh Cas 8 : 49 Ind App 60 (PC).

[3] Where the rights of an anomalous mortgagee are controlled or limited by the contract, he will be entitled to claim those rights only subject to such limitations. (Vol 6) 1919 Oudh 418 (419) : 21 Oudh Cas 341 ✠ (Vol 11) 1924 Cal 592 (594) (DB)✠(Vol 9) 1922 P C 17 (19): 44 All 185 : 25 Oudh Cas 8 : 49 Ind App 60 (PC).

2. Applicability of other provisions of Act where contract is silent on the point. — [1] In an anomalous mortgage there was a covenant to pay, but the contract was silent about the mode of enforcing such covenant : *Held* that it could be enforced under S. 68 (1) (a). (Vol 22) 1935 Lah 103 (104) : 16 Lah 612 (DB).

[But see (Vol 11) 1924 Cal 592 (594) (DB). (Sections 67 and 68 cannot be applied to anomalous mortgages.)]

3. Applicability of general provisions of law.—[1] General principles of law, such as the doctrine of substitution of securities can be applied to anomalous mortgages when there is nothing in the mortgage inconsistent with the application of the doctrine. (Vol 24) 1937 Pat 345 (347).

4. Combination of a simple mortgage and a usufructuary mortgage.—[1] The substitution in this section, in 1929, of the words "an anomalous mortgage" makes it clear that a combination of a usufructuary and a simple mortgage would be governed by this section. (Vol 21) 1934 Rang 159 (159).

[2] The amendment of this section in 1929, does not operate retrospectively. (Vol 21) 1934 Oudh 255 (256) : 10 Luck 10 (DB)✠(Vol 26) 1939 Pat 540 (542) (DB).

[3] A mortgagee under such a combination of mortgage has a right of sale. (Vol 14) 1927 P C 32 (36) : 50 Mad 180 : 54 Ind App 68 (PC) ✠ (Vol 21) 1934 Oudh 255 (256) : 10 Luck 10 (DB) ✠ (Vol 8) 1921 Pat 403 (405) (DB)✠('04) 27 Mad 526 (528) (FB)✠(Vol 22) 1935 Lah 103 (104) : 16 Lah 612 (DB).

[4] A mortgagee under such a combination of mortgage can obtain a decree for the mortgage-money on the basis of the personal covenant in the mortgage. ('04) 27 Mad 526 (528) (FB)✠(Vol 22) 1935 Lah 103 (104) : 16 Lah 612 (DB).

5. Combination of a usufructuary mortgage and a mortgage by conditional sale. — [1] A mortgagee under such combination of mortgages has a right of foreclosure. ('13) 11 All L Jour 793 (795) (DB).

6. Kanom. — [1] A kanom is a combination of a usufructuary mortgage and a lease prevalent in Malabar. (Vol 6) 1919 Mad 320 (320) (DB). (Kanom is an anomalous mortgage.)✠(Vol 13) 1926 Mad 650 (651).

[2] A kanom is an anomalous mortgage. (Vol 13) 1926 Mad 650 (651) ✠ (Vol 8) 1921 Mad 243 (245) : 44 Mad 344 (DB).

[3] The kanomdar has no right to bring the property to sale. ('99) 22 Mad 350 (351) (DB) ✠ (Vol 13) 1926 Mad 650 (651).

[But see ('92) 15 Mad 366 (370) (DB).]

[4] The kanomdar can remain in possession for the period of twelve years and thereafter until he is paid the kanom amount together with the value of improvements, if any, effected by him. (Vol 13) 1926 Mad 650 (651).

[5] The kanomdar does not forfeit his right to hold for twelve years by allowing the rent to fall into arrears. (1862) 1 Mad H C R 112 (112) (DB).

[6] An ubhayapattam is equivalent to a kanom mortgage. ('07) 30 Mad 61 (65) (DB).

7. Peruarthum. — [1] Under the local usage, a Peruarthum mortgage, which is prevalent in Malabar, is redeemable on payment, not of the amount for which the land is mortgaged, but of its market-value. ('78) 1 Mad 57 (59) (DB).

8. Iladarawara.—[1] An iladarawara mortgage in South-Kanara, is usually for a long term of years and consists also a lease of the property for the term agreed upon. Repayment of the loan is not permissible under the custom before the expiry of the term. ('82) 4 Mad 113 (118) (DB).

[a]99. [Attachment of mortgaged property.] *Repealed by the Code of Civil Procedure, 1908 (Act 5 [V] of 1908), S. 156 and Sch V.*

[a] For the repealed provisions as re-enacted, *see* Act 5 [V] of 1908, Sch. I, Order XXXIV, Rule 14.

Charges.

Charges.

100. Where immoveable property of one person is by act of parties or operation of law made security for the payment of money to another, and the transaction does not amount to a mortgage, the latter person is said to have a charge on the property; and all the provisions hereinbefore contained [a][which apply to a simple mortgage shall, so far as may be, apply to such charge.]

Nothing in this section applies to the charge of a trustee on the trust-property for expenses properly incurred in the execution of his trust, [b][and, save as otherwise expressly provided by any law for the time being in force, no charge shall be enforced against any property in the hands of a person to whom such property has been transferred for consideration and without notice of the charge.]

[a] *Substituted* by the Transfer of Property (Amendment) Act, 1929 (20 [XX] of 1929), S. 50, for "as to a mortgagor shall, so far as may be, apply to the owner of such property, and the provisions of Ss. 81 and 82 shall, so far as may be, apply to such charge." [b] *Inserted, ibid.*

SECTION 100—SYNOPSIS

1. Scope.
2. Charge on moveables.
3. Charge on future property.
4. "Made security."
5. Property must be specified.
6. "By act of parties."
7. Security bond charging immovable property.
8. Contingent charge.
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11. Charge under Rent Acts.
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13. Transfer invalid as a mortgage, whether operates as a charge.
14. Mortgage or charge.
15. Creation of charge—Writing and registration.
16. Rights and liabilities of a charge-holder.
17. Priority as amongst several charges.
18. Assignment of a charge.
19. "Save as . . . . in force."
20. Transferee for consideration without notice.
21. Subsequent transferee from a transferee, if protected.
22. Charge, whether binds auction-purchaser.
23. Enforcement of charge.
24. Personal liability.
25. Sale in execution of a charge decree—Whether extinguishes the charge.
26. Charge created by a decree.
27. Payments in the nature of salvage.
28. Hindu widow's right of maintenance.
29. Debts of a deceased Muhammadan.
30. Nankar and dahyak rights.

1. Scope.— [1] In the case of a mortgage as well as in a charge, the property of another person is made security for a loan or debt; but whereas a mortgage is a transfer of an interest in property, a charge does not involve the transfer of any interest in property. (Vol 24) 1937 Oudh 217 (219) : 13 Luck 101 (F B).

[2] The section is not exhaustive and there are certain kinds of charges which are not included within the purview of this section (Vol 27) 1940 Nag 163 (166) : I L R (1941) Nag 513 (D B) ✠ (Vol 26) 1939 All 579 (580) (D B).

[But see (Vol 13) 1926 Mad 55 (56, 57) : 48 Mad 821 (D B). (The Act is intended to be exhaustive and the Courts are not at liberty to follow English common law rules.)]

[3] The section as amended in 1929 is retrospective. (Vol 32) 1945 Pat 426 (427) (D B) ✠ (Vol 32) 1945 Pat 434 (443) (D B) ✠ (Vol 26) 1939 All 687 (688) : I L R (1939) All 885 (D B).

[But see (Vol 21) 1934 Bom 189 (192) (D B) ✠ (Vol 24) 1937 Mad 92 (94)]

2. Charge on moveables.—[1] This section does not apply to a charge created on moveable property. (Vol 16) 1929 Lah 274 (275) (D B).

[2] A charge on moveables made orally is as effectual (except in cases provided by S. 48 of the Registration Act) as if it were effected by an instrument in writing. (Vol 3) 1916 Lah 54 (55). 1916 Pun Re No. 32 (D B).

[3] For creating a charge on moveables the property must be specifically indicated. (Vol 11) 1924 Nag 360 (361) *(Obiter.)*

[4] A charge on moveable property which might come into existence at a future date is valid as an agreement to charge such property. ('86) 13 Cal 262 (264) (D B) ✠ (Vol 16) 1929 Lah 274 (275) (D B) ✠ (Vol 20) 1933 Cal 154 (159) : 59 Cal 1372 (D B).

3. Charge on future property. — [1] Lease providing that on lessee-company's delay in payment of rent landlord would recover arrears from buildings erected on land—*Held* charge was created on buildings when they came into existence. (Vol 1) 1914 Bom 267 (268) (D B)

[2] Mortgage of a share in immovable property for which mortgagor had sued for pre emption—Mortgagee also aware that property did not belong to mortgagor at that time but would be mortgagor's in future—*Held* transaction did not amount to a mortgage but created a charge on the share to be subsequently acquired by the mortgagor. (Vol 25) 1938 All 22 (25): I L R (1938) All 63 (D B).

4. "Made security." — [1] In order to create a charge it is not necessary to employ any technical or any particular form of words. All that is required is that there must be a clear intention to make a particular property, a security for the payment of money. (Vol 27) 1940 Cal 93 (95) (D B) ✠ (Vol 26) 1939 Nag 118 (119) I L R (1941) Nag 356 ✠(Vol 16) 1929 Oudh 539 (540) (D B) ✠ (Vol 2) 1915 Mad 664 (672) (D B) ✠ (Vol 18) 1931 All 62 (64) : 52 All 985 (D B).

[2] Where the property is not intended to serve as security, there can be neither a mortgage nor a charge. ('92) 19 Cal 584 (593) : 19 Ind App 95 (P C) ✠ (Vol 5) 1918 Cal 557 (566) (D B) ✠(Vol 23) 1936 Mad 709 (712, 713) (D B).

Section 100—Note 4 *(contd.)*

[3] In considering whether a particular deed or document does or does not create a charge, cases as regards other deeds are not always a good guide. (Vol 13) 1926 All 171 (171) (D B) ✠ (Vol 28) 1941 Nag 102 (103) : I L R (1942) Nag 263 (D B).

[4] Ordinarily, when the parties refer in a document to particular properties as the source from which a debt is to be paid or by the sale of which a debt is to be realized, there is some indication of an intention to make the property more directly liable than on a mere enforcement of a personal liability. (Vol 22) 1935 Mad 17 (19) ✠ ('85) 1885 All W N 19 (21) (D B).

[5] In maintenance cases, where in the absence of a specific agreement the maintenance will only be a kind of indefinite charge upon the family property, even a slight indication to convert it into a definite charge may suffice (Vol 22) 1935 Mad 17 (19) ✠(Vol 27) 1940 Cal 93 (95) (D B)✠(Vol 19) 1932 Oudh 168 (170) (D B) ✠ (Vol 23) 1936 Sind 16 (18) (D B) ✠ (Vol 10) 1923 Cal 27 (30) : 50 Cal 266 (D B).

[6] Where the party claims to be entitled to succeed to or to share in a certain property and that claim is settled by a provision for maintenance payable out of that property, a slight indication to convert it into a definite charge may suffice. ('83) 9 Cal 945 (950, 951): 10 Ind App 45 (P C) ✠ (Vol 5) 1918 P C 156 (157) : 42 Mad 581 :46 Ind App 64 (P C) ✠(Vol 22) 1935 Mad 17 (19).

[7] Property subject to mortgage — Later document relating to fresh advance providing that mortgage shall not be redeemed before payment of later debt— Parties held must have intended that the security under the first mortgage should be available for the fresh advance as well. (Vol 22) 1935 Mad 17 (19) ✠ (Vol 17) 1930 P C 176 (177) 5 Luck 365 : 57 Ind App 173 (P C).

[See however (Vol 10) 1923 Oudh 24 (25)✠(Vol 12) 1925 Oudh 593 (594) ✠ (Vol 21) 1934 Lah 938 (940) (D B) ✠ ('04) 26 All 559 (564) (D B) ✠ ('05) 27 All 178 (181) (D B)]

[8] Where the parties entering into a partition arrangement say that if the parties thereto do not carry out their respective obligations, any loss incurred by one of them shall be recovered out of the properties of the others, no other connection between the properties and the enforcement of the liability can be thought of except that the properties are intended to be security. (Vol 22) 1935 Mad 17 (19)✠(Vol 13) 1926 All 527 (529) (D B).

[9] A mere direction in a partition decree asking one to pay some compensation to the other sharer in order to equalize the share does not create a charge over his share. (Vol 13) 1926 Oudh 230 (231).

[10] A document under which a sum of money is payable out of the profits of a particular property constitutes a charge upon that property. (Vol 30) 1943 Bom 414 (415) ✠ (Vol 24) 1937 Oudh 420 (421) : 13 Luck 35 (D B) ✠ ('82) 5 All 11 (14) (D B) ✠ (Vol 23) 1936 Oudh 52 (54) : 11 Luck 575 (D B) ✠ ('83) 7 Mad 23 (24, 26) (D B).

[11] A mere covenant by a party not to alienate the property was held not by itself sufficient to create a charge. (Vol 21) 1934 Mad 713 (714) (D B) ✠ ('81) 7 Cal 196 (198) (D B) ✠ (Vol 15) 1928 Lah 440 (441) (D B) ✠ ('80) 2 All 449 (451) (D B).

[See however (Vol 16) 1929 Oudh 539 (540) (D B)✠ (Vol 1) 1914 All 187 (188) : 36 All 201 (D B) ✠(Vol 26) 1939 Nag 118 (119) : I L R (1941) Nag 356.]

[12] An agreement between *A* and *B* that *A* should give a regular mortgage of his immovable property for money advanced by *B*, does not constitute a mortgage or charge upon such property. (Vol 17) 1930 P C 76 (78) (P C).

[13] Agreement between two brothers, *A* and *B*— *B* to waive his right to succeed to his father's estate and to withdraw suit filed by him against *A* for maintenance —*A* to pay certain monthly allowance to *B* in perpetuity — If *A* mortgaged *muafi* villages, allowance to be paid out of *A*'s other property — Deed held created charge for allowance on property. ('83) 9 Cal 945 (951): 10 Ind App 45 (PC).

[14] In a partition dispute, the arbitrator awarded to the defendant property of greater value than that awarded to the plaintiff. In order to equalize the division, the arbitrator awarded a certain sum to be paid to the plaintiff by the defendant and further added that the property awarded to the defendant should be treated as makphul for the sum. It was held that a valid charge for the sum was created on the defendant's property (Vol 13) 1926 All 527 (529) (DB).

[15] A stipulation in a lease deed that the lessee should deduct a certain portion of the annual rent in repayment of a sum of money already borrowed by the lessor from him, creates a charge on the property leased and not merely a personal obligation. (Vol 18) 1931 All 62 (64) : 52 All 985 (DB).

[16] *A* sold certain property to *B*. The sale-deed contained the following provision : "The said vendee . . . . . is to pay Rs. 25 . . . . . to me annually (as malikana) which he has agreed to pay." It was held that the words "as malikana" showed an intention that the payment of Rs. 25 should be an annual charge upon the property. ('87) 9 All 591 (600) (FB).

[17] By a deed, *J* admitted liability. In respect of that liability, he undertook to execute a charge bond over specified share and rights in a village together with sir land. *J* undertook to get the sanction of the Court for transfer of sir, and not to assign the property until he carried out the above undertaking. It was held that the property was made security for the liability and that a charge was created. (Vol 28) 1941 Nag 102 (105): I L R (1942) Nag 263 (DB).

[18] Partition suit—Immovable property divided—Certain amount found to be payable by plaintiff to defendant—Judge refusing to make money allotted to defendant—Charge on immovable property allotted to plaintiff but directing latter not to transfer property so long as money due to defendant was not paid : Held Judge's order did not create charge. (Vol 33) 1946 Oudh 99 (101) (DB).

5. Property must be specified. — [1] It is not necessary that the properties charged should be described with that amount of definiteness as is necessary in the case of a mortgage. (Vol 6) 1919 Mad 528 (530) (DB)✠('90) 13 All 28 (43) (DB)✠(Vol 27) 1940 All 456 (457) : I L R (1940) All 669 (DB). (*Overruled* on another point in (Vol 30) 1943 All 115 : I L R (1943) All 453 (F B)) ✠ (Vol 24) 1937 Oudh 217 (219) : 13 Luck 101 (FB).

[2] There should be some expression to signify what properties exactly are to be charged. (Vol 19) 1932 Cal 451 (453) (DB)✠(Vol 11) 1924 Nag 360 (361) ✠(Vo 13) 1926 Oudh 230 (231)✠ (Vol 5) 1918 Cal 557 (565, 566) (DB)✠(Vol 28) 1941 Mad 794 (794) (DB).

[3] A general description of the property would be sufficient if, from the facts and circumstances the property to be charged can be ascertained. (Vol 5) 1918 Cal 557 (565, 566) (D B)✠(Vol 28) 1941 Mad 794 (794) (D B)✠('87) 9 All 158 (164) (D B)✠(Vol 3) 1916 Oudh 329 (330)✠(Vol 25) 1938 Mad 767 (769).

[4] Where the description given is too vague and indefinite the charge will be void for uncertainty. (Vol 19) 1932 Cal 451 (453) (D B)✠('81) 3 Mad 35 (36, 37) (D B) ✠ (Vol 16) 1929 Oudh 539 (540) (D B)✠(Vol 11) 1924 Nag 360 (361)✠(Vol 20) 1933 All 934 (937) (DB).

Section 100—Note 5 *(contd.)*

[5] A valid charge can be created upon what could be defined to be the whole of a man's property at the date of the charge. (Vol 28) 1941 P C 16 (19) : I L R (1941) 1 Cal 468 : 68 Ind App 34 (P C).

[6] A charge on villages granted to a person by Government in lieu of loyal services rendered by him is on a specified property. ('82) 5 All 11 (14) (D B).

[7] Property is specified where "my share in the Premier Aerated Company at Hazaratganj" is charged. (Vol 16) 1929 Oudh 539 (540, 541) (DB).

[8] Partition suit—Decree directing payment by one sharer to others as compensation for excess portion —Nothing on record to show excess area— Held there was no charge. (Vol 13) 1926 Oudh 230 (231).

6. "By act of parties." — [1] A charge created by will was held to be a charge by act of parties. (Vol 1) 1914 Oudh 349 (350) ✠ (Vol 19) 1932 Oudh 336 (338, 340) : 8 Luck 168 (DB).

7. Security bond charging immovable property. — [1] Where, by a security bond, a person besides making himself personally liable under S. 145 of the Civil P. C. gives his immovable property as security, the question whether the transaction amounts to a mortgage or a charge will depend on the terms of the document and the intention of the parties. It is therefore a question of construction of the particular document. (Vol 21) 1934 Mad 1 (3) : 57 Mad 218 (D B) (Charge.)✠(Vol 4) 1917 All 104 (105): 39 All 225 (DB) (Mortgage.)

[2] Where a security bond purporting to charge immovable property is given to the Court and not to any named person there is no charge. (Vol 6) 1919 PC 55 (57, 59) : 42 All 158 : 22 Oudh Cas 212 : 46 Ind App 228 (PC) ✠ (Vol 16) 1929 All 834 (835, 836) (DB) ✠(Vol 23) 1936 Rang 303 (304).

[3] No person named in security bond as mortgagee— Bond held did not create mortgage but created charge. (Vol 17) 1930 Sind 159 (161).

8. Contingent charge. — [1] A contingent charge, that is to say, a present charge as security for discharging a contingent liability can be validly created. (Vol 5) 1918 Mad 674 (675) (DB)✠(Vol 15) 1928 Pat 587 (588): 7 Pat 584 (DB)✠(Vol 18) 1931 Mad 120 (121)✠(Vol 21) 1934 Lah 765 (767, 768) : 16 Lah 137 (D B)✠ (Vol 24) 1937 Pesh 76 (78) (D B)✠('06) 28 All 655 (658)✠(Vol 25) 1938 Rang 145 (148).

[But see ('87) 14 Cal 687 (690, 691) (D B) ✠ ('06) 3 All L Jour 221 (223) (D B) ✠ (Vol 19) 1932 Cal 451 (453) (DB).]

[2] Section 5 and S. 21 recognise the principle of a contingent charge. ('11) 21 Mad L Jour 562 (568) (DB) ✠(Vol 24) 1937 Pesh 76 (78) (DB).

[3] In the case of a contingent charge as soon as the contract is entered into, the promisee is entitled to look to the specified property as security for the due performance of the contract. (Vol 21) 1934 Lah 765 (767): 16 Lah 137 (DB).

[4] It cannot be said that whenever there is a charge to secure a liability which will arise only, if at all in the future, there is no present charge. (Vol 12) 1925 Pat 288 (290) (DB)✠(Vol 15) 1928 Pat 587 (588): 7 Pat 584 (DB)✠(Vol 5) 1918 Mad 674 (675) (D B).

9. Floating charge. — [1] The whole basis of a floating charge is that even after the creation of the charge, the business goes on and the person who creates the charge can dispose of the assets in the ordinary course of business till the charge becomes a fixed charge. (Vol 20) 1933 Cal 154 (157): 59 Cal 1372 (DB).

[2] A floating security is not a future security ; it is a present security. It is not a specific security ; the assets are mortgaged in such a way that the mortgagor can deal with them without the concurrence of the mortgagee. (Vol 18) 1931 Cal 223 (231, 232) : 58 Cal 136 (D B) ✠ (Vol 14) 1927 Cal 682 (685) : 54 Cal 513 (DB).

[3] A floating charge is shifting in its nature, until some event occurs or some act is done which causes it to settle and fasten on the subject of the charge within its reach and grasp. (Vol 18) 1931 Cal 223 (230, 231) : 58 Cal 136 (D B) ✠ (Vol 13) 1926 Bom 427 (429, 430) : 50 Bom 547 (DB).

[4] In a floating charge the property is constantly changing from time to time ; the charge does not of itself fasten even on the property existing at the moment of the creation of the charge. (Vol 13) 1926 Bom 427 (430) : 50 Bom 547 (DB).

[5] A floating charge becomes a fixed charge or specific charge on the intervention of the charge-holder or the undertaking charged ceasing to be a going concern. (Vol 18) 1931 P C 245 (247) : 58 Ind App 323 : 59 Cal 377 (P C).

[6] Where leasehold property and the machinery, engine, boilers, etc., were charged, it was held that there was no floating charge but a fixed charge. (Vol 20) 1933 Cal 154 (157) : 59 Cal 1372 (DB).

[7] Where assets were given in the possession of the lender company it was held that there was no floating charge. (Vol 14) 1927 Cal 682 (685, 686): 54 Cal 513 (DB).

[8] Where the borrower company handed over the keys of the godowns to the lender company and further agreed to keep in the godowns stock fetching a certain fixed price and it was also agreed that whenever the borrower company wanted to take out any stock from the godowns it must do so only with the consent of the lender company, it was held that the document did not create a floating charge but a specific charge. (Vol 13) 1926 Bom 427 (430): 50 Bom 547 (DB).

[9] The mere element of uncertainty as to what the amount of the charge, or what the object charged would be are not sufficient to satisfy the requirements of a floating charge. (Vol 20) 1933 Cal 154 (158): 59 Cal 1372 (DB).

[10] Where it was agreed that the borrower company could dispose of the stock with the permission of the lender company and thus carry on its business it was held that the nature of the fixed charge could not be altered so as to become a floating charge merely because, in spite of the charge the business of the borrower company continued to be carried on. (Vol 13) 1926 Bom 427 (430): 50 Bom 547 (DB).

[11] Debentures of companies afford the most ordinary example of a floating charge but they are not the only instances of it; a floating charge may be created even by an individual and by means other than the issue of debentures. (Vol 20) 1933 Cal 154 (156, 157): 59 Cal 1372 (D B).

[12] In the case of both a fixed charge and a floating charge, there is an agreement to transfer an interest in property when a certain contingency arises. The only difference is that where the charge is fixed it is secured on specific property and where it is floating it is secured on such assets as may be available when the contingency arises. (Vol 30) 1943 Oudh 338 (353): 18 Luck 683 (FB).

[13] In the absence of stipulation to the contrary, a floating charge leaves the person or the company creating the charge at liberty to create specific charges in priority to itself. (Vol 18) 1931 Cal 223 (232): 58 Cal 136 (DB).

[14] A floating charge on the undertaking or property of a company, requires registration under S. 109 of the Indian Companies Act (VII [7] of 1913). Otherwise it is void under that section. (Vol 13) 1926 Bom 28 (30) (DB) ✠(Vol 26) 1939 Sind 100 (106) ✠(Vol 14)

Section 100—Note 9 *(contd.)*
1927 Cal 682 (684): 54 Cal 513 (D B) ✠(Vol 29) 1942 All 119 (120): I L R (1942) All 242 (FB).

[15] A document creating a floating charge will also require registration under S. 17 of the Registration Act if it concerns immovable property of the value of Rs. 100 and upwards and will not affect the immovable property if not so registered. (Vol 18) 1931 P C 245 (247): 58 Ind App 323: 59 Cal 377 (P C).

10. "By operation of law." — [1] The words "by operation of law" are more extensive than the words "by law" and a charge created "by operation of law" includes a charge directly created by the provisions of an Act as well as other charges created indirectly as a legal consequence of certain conditions. ('03) 26 Mad 686 (726) (DB).

[2] The expression "operation of law" only means working of the law and is not restricted in its application to such cases as fall under S. 55 or S. 73. (Vol 30) 1943 Oudh 354 (359): 19 Luck 1 (FB).

[3] Charges by operation of law created directly by the provisions of Acts:

(a) Charge in favour of Government in respect of the amount due under a certificate issued by Collector by virtue of S. 8, Bihar and Orissa Pubic Demands Recovery Act (IV [4] of 1914). (Vol 21) 1934 Pat 648 (649, 650): 13 Pat 364 (DB).

(b) Charge in favour of Municipal Boards in United Provinces for the amount of taxes due to them under S. 177 of the U. P. Municipalities Act of 1916. (Vol 27) 1940 All 456 (456): I L R (1940) All 669 (D B). (*Overruled* on another point in (Vol 30) 1943 All 115: I L R (1943) All 453 (FB)) ✠(Vol 24) 1937 Oudh 31 (31): 12 Luck 353. (*Reversed* on another point in (Vol 28) 1941 Oudh 305: 16 Luck 607 (DB).)

(c) Charge in favour of Calcutta Corporation for consolidated rates under the Calcutta Municipal Act of 1923. (Vol 21) 1934 Cal 862 (863, 864): 61 Cal 1047 (DB). (*Reversing* (Vol 21) 1934 Cal 325: 60 Cal 1470.)

(d) Charge under S. 87, Bombay District Municipal Act of 1901 in favour of Municipal Boards in respect of house tax and sanitary cess imposed under that Act. (Vol 30) 1943 Bom 21 (22).

(e) Charge in favour of Government for a loan advanced under the Land Improvement Loans Act (XIX [19] of 1883) by S. 7 (c) of the Act. (Vol 26) 1939 Bom 183 (187) ✠(Vol 6) 1919 Mad 590 (593): 41 Mad 691 (DB).

(f) Charge for the arrears of property tax under S. 212 of the Bombay City Municipal Act (Bombay Act (III [3] of 1888). (Vol 22) 1935 Bom 347 (350): 59 Bom 681 (DB).

[4] The appointment of a Receiver does not amount to a charge on the property for which the Receiver is appointed (Vol 22) 1935 Mad 146 (149).

11. Charge under Rent Acts.—[1] A charge for the payment of rent under the Bengal Tenancy Act, is not such a charge as is defined by this section. ('88) 15 Cal 492 (496) (D B) ✠(Vol 5) 1918 Cal 265 (270) (DB). (*Per* Chatterjea, J.)

[2] A charge for the payment of rent under the Madras Estates Land Act is not a charge within this section. (Vol 6) 1919 Mad 733 (734): 42 Mad 114 (DB) ✠(Vol 19) 1932 Mad 189 (192): 55 Mad 468 (D B).

[But see (Vol 7) 1920 Mad 183 (185, 186): 43 Mad 786 (DB).]

[3] The charge created by the tenancy law in the Central Provinces is a charge arising by operation of law within the meaning of this section. (Vol 27) 1940 Nag 156 (158): I L R (1941) Nag 607 (DB) ✠('07) 3 Nag L R 164 (168).

[But see ('97) 10 C P L R 48 (49, 51).]

12. "And the transaction does not amount to a mortgage." — [1] In its ordinary sense, the word "charge" means an obligation imposed on property or a claim on property. In this sense every mortgage would create a charge, but every charge would not be a mortgage. (Vol 21) 1934 Bom 189 (190) (D B) ✠(Vol 6) 1919 Mad 528 (530) (DB).

[2] This Act draws a clear distinction between a mortgage and a charge. (Vol 6) 1919 Cal 634 (635): 46 Cal 111 (DB) ✠(Vol 28) 1941 Lah 274 (275) (DB).

[3] The main distinction between a "charge" and a mortgage is that a mortgage involves a transfer of an interest in specific immovable property, while in a charge, there is no such transfer of interest. (Vol 30) 1943 Oudh 354 (356): 19 Luck 1 (FB) ✠(Vol 30) 1943 Oudh 338 (352, 353): 18 Luck 683 (F B) ✠(Vol 19) 1932 Lah 465 (466): 13 Lah 660 (FB) ✠(Vol 21) 1934 Bom 189 (190) (D B) ✠(Vol 13) 1926 Mad 903 (904) ✠('06) 33 Cal 985 (992) (DB) ✠(Vol 9) 1922 Pat 529 (532): 1 Pat 387 (DB) ✠(Vol 18) 1931 All 62 (64): 52 All 985 (D B) ✠(Vol 28) 1941 Lah 274 (275) (D B) ✠(Vol 18) 1931 Cal 223 (228): 58 Cal 136 (D B) ✠(Vol 26) 1939 Nag 118 (119): I L R (1941) Nag 356 ✠(Vol 3) 1916 Low Bur 67 (67) ✠(Vol 28) 1941 Nag 102 (103, 104): I L R (1942) Nag 263 (DB) ✠(Vol 27) 1940 All 456 (457): I L R (1940) All 669 (D B). (*Overruled* on another point in (Vol 30) 1943 All 115: I L R (1943) All 453 (FB).)

[See however (Vol 28) 1941 All 345 (347): I L R (1941) All 691 (F B) ✠(Vol 1) 1914 Nag 32 (34): 10 Nag L R 81).]

[4] A charge can be created by act of parties or by operation of law. A mortgage, however, can only be created by act of parties. ('11) 21 Mad L Jour 562 (568) (DB) ✠('08) 35 Cal 837 (844) (DB).

[But see (Vol 2) 1915 Cal 478 (480): 42 Cal 625 (DB).]

[5] In a simple mortgage, there is always a personal covenant to pay, while there may or may not be a personal covenant in a charge. (Vol 18) 1931 All 99 (100): 52 All 901 (DB) ✠(Vol 20) 1933 All 934 (937) (D B) ✠(Vol 22) 1935 Oudh 309 (313) ✠(Vol 21) 1934 Bom 189 (190) (D B) ✠(Vol 5) 1918 Mad 997 (997) (DB) ✠(Vol 6) 1919 Mad 528 (530) (DB).

[6] A mortgage can be redeemed but that is not necessarily the case with a mere charge. (1866) 13 L T (NS) 783 (784): 14 W R (Eng) 298, *Caulett* v. *Hood*.

[7] A charge may be created in perpetuity, while a mortgage must necessarily be for a limited period. (Vol 7) 1920 Oudh 5 (6, 7) ✠ (Vol 20) 1933 All 934 (938) (DB).

13. Transfer invalid as a mortgage, whether operates as a charge. — [1] A transaction which is intended to be a mortgage but which fails as a mortgage by reason of not fulfilling the requirements of law does not operate as a charge. (Vol 3) 1916 P C 169 (171) (PC). (Mortgage not attested by two witnesses.) ✠ ('13) 35 All 164 (166) (FB).

[But see ('12) 39 Cal 810 (820).]

[2] Instrument creating charge — Erroneous belief of parties that they had created mortgage would not affect true nature of transaction. (Vol 1) 1914 Nag 32 (36): 10 Nag L R 81.

14. Mortgage or charge. — [1] The line of demarcation between a charge and a simple mortgage is very thin and sometimes hardly distinguishable. (Vol 20) 1933 All 934 (937) (DB).

[2] Whether parties intended to transfer interest in property must be gathered by looking at substance

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and not form of deed. (Vol 23) 1936 Lah 482 (484) (DB) ✠ (Vol 20) 1933 All 934 (936) (DB)

[3] Parties intending to transfer interest in property in order to make it security — Transaction amounts to mortgage. (Vol 30) 1943 Mad 100 (103) : I L R (1943) Mad 195 ✠ (Vol 21) 1934 Pat 217 (219, 221) (DB) ✠ (05) 9 Cal W N 1001 (1002) (DB) ✠ (Vol 24) 1937 Mad 148 (149) ✠ ('91) 15 Bom 183 (185, 186) (DB) ✠ (Vol 2) 1915 All 15 (15) (DB) ✠ (Vol 28) 1941 Lah 274 (275) (DB)

[4] Parties intending to make property security without transferring any interest — Transaction amounts to charge. (1900) 27 Cal 194 (196) (DB) ✠ (Vol 3) 1916 Mad 1219 (1219) (DB) ✠ (Vol 26) 1939 Nag 132 (134) ✠ (Vol 17) 1930 All 136 (147) : 52 All 281 (FB) ✠ ('07) 10 Oudh Cas 17 (20).

[5] The presence of a clause giving the other party a right to sell the property in order to recover his debt indicates a transfer of an interest in the property and is, therefore, a distinguishing factor between a simple mortgage and a charge. ('08) 35 Cal 837 (843, 844) (DB) ✠ ('85) 7 All 258 (265, 266) (FB) ✠ (Vol 4) 1917 All 439 (441) : 38 All 361 (DB) ✠ (Vol 23) 1936 Lah 482 (485) (DB) ✠ (Vol 1) 1914 Nag 32 (34) : 10 Nag L R 81 ✠ (Vol 23) 1936 Oudh 196 (200) (DB).

[6] Compromise decree—Defendants to pay plaintiff certain sum of money – Certain immovable property to be hypothecated for realization of said money — Defendants not to create any encumbrance on same — Decree held was not simple mortgage — Hypothecation clause held created lien. ('08) 35 Cal 837 (844) (DB).

[7] Deed of adjustment — *A* to pay *B* certain amount on certain day — On default *A* to pay larger amount — *B* to be at liberty to recover amount by sale of property in execution — Deed held to be charge. (Vol 14) 1927 Sind 66 (75).

[8] Property stated to be *nazar gahan* — Transferee granted right to cause property to be sold through Court — Transaction held was mortgage. ('90) 14 Bom 577 (580) (DB).

[9] Document written in provincial language—Name given to document or words implying power of sale are not sufficient to determine character of transaction. (Vol 1) 1914 Nag 32 (35) : 10 Nag L R 81.

[10] Ikrarnama executed by *A* in his wife's favour securing property for payment of her dower-debt — Words "arth" and "mustaghraq" used in document — Document held created charge only. ('13) 11 All L Jour 570 (573) (DB).

[11] Where an instalment bond provided that the executant would be personally responsible for the payment of the money and in case of default it would be competent to the other party "to institute a suit, obtain a decree and to recover the dues by attachment and sale of the under tenure". The document was held to create only a charge. ('06) 33 Cal 985 (992) (DB).

[12] The presence of a personal liability makes the transaction a mortgage. (Vol 23) 1936 Lah 482 (484) (DB).

[13] Where *A* executed a mortgage before the Punjab Alienation of Land Act (XIII of 1900) and subsequent to the Act took a further advance on the old security on the same conditions as the original mortgage, it was held that the subsequent transaction was not a fresh alienation so as to be hit by the Act, but that it created only a charge. (Vol 8) 1921 Lah 136 (137) : 2 Lah 202 (DB) ✠ (Vol 19) 1932 Lah 465 (466) : 13 Lah 660 (FB).

15. Creation of charge — Writing and registration. — [1] All the requirements as to registration, attestation and signature, necessary for the creation of a simple mortgage contained in S 59, will apply also to the creation of a charge (Vol 27) 1940 Mad 140 (141) : I L R (1940) Mad 306 (DB) ✠ (Vol 26) 1939 Mad 202 (203) : I L R (1939) Mad 199 (DB).

[2] Decree incorporating compromise creating charge — It is exempted from registration under S. 17 (2) (VI), Registration Act (Vol 23) 1936 All 621 (624) ✠ (Vol 20) 1933 Bom 298 (299) (DB) ✠ (08) 35 Cal 837 (841) (DB) ✠ (Vol 17) 1930 Nag 17 (19) ✠ (Vol 26) 1939 Nag 118 (120) : I L R (1941) Nag 356 ✠ (Vol 33) 1946 Mad 293 (293).

16. Rights and liabilities of a charge holder. — [1] The words "so far as may be", show that certain provisions which apply to a simple mortgage may not be applicable to the case of a charge (Vol 26) 1939 Mad 202 (203) : I L R (1939) Mad 199 (DB).

[2] The provisions contained in S. 67 held to be applicable to charges (Vol 21) 1934 Cal 862 (864) : 61 Cal 1047 (DB) ✠ (Vol 24) 1937 Oudh 420 (423) : 12 Luck 35 (DB) ✠ (Vol 23) 1936 Oudh 52 (54) : 11 Luck 575 (DB).

[3] The provisions of S. 67-A are applicable to charges created by act of parties but not to charges created by operation of law. (Vol 21) 1934 Cal 862 (863, 864) : 61 Cal 1047 (DB)

[4] A charge-holder, like a simple mortgagee has a right to bring the property charged to sale. (Vol 28) 1941 All 345 (351) : I L R (1941) All 691 (FB) ✠ (Vol 23) 1936 P C 204 (206) : 59 Mad 910 : 63 Ind App 304 (PC).

[5] The first part of the section deals with substantive rights and the second with the manner in which they are to be enforced and if a transaction creates a charge within the meaning of the first part of the section it does not become invalid only because a remedy provided for the enforcement of the charge is other than the sale of the property (Vol 26) 1939 Nag 132 (134)

[6] Where a charge-holder is given possession of the property as a charge-holder, he can remain in possession of it until the amount due to him is satisfied; but if the possession is not attributable to the charge, he cannot insist on retaining possession until his dues are paid (Vol 24) 1937 Cal 129 (138, 139) : I L R (1937) 1 Cal 203 (DB).

[7] Section 92 is applicable to charge — Prior charge paid off by subsequent mortgagee — Mortgagee is subrogated to rights of charge-holder. (Vol 34) 1947 Nag 43 (45) (DB)

17. Priority as amongst several charges. — [1] Ordinarily as between several charges created on the same immovable property a charge later in point of time will be postponed to one earlier in point of time. (Vol 28) 1941 Cal 436 (441) ✠ (Vol 10) 1923 Rang 222 (223) : 1 Rang 261.

18. Assignment of a charge. — [1] A charge is not a merely personal right but is a right as to property and as such is transferable. (Vol 25) 1938 Mad 457 (458) (DB). (Vendor's lien under S. 55 (4) (b).) ✠ (Vol 2) 1915 Cal 543 (544) : 42 Cal 849 (DB). (Do.)

[2] Deed of assignment transferring right to maintenance of junior member of tarwad requires registration (Vol 23) 1936 Mad 573 (574).

[3] A charge being a right to or interest in immovable property, an assignment of a decree creating charge falls under S. 17 (1) (e), Registration Act. (Vol 28) 1941 Bom 71 (75) : I L R (1941) Bom 136 (DB).

[4] A partition deed between *A* and *N* created a charge in favour of *A* on properties allotted to *N*'s share for expenses of certain religious ceremonies. *A* transferred his share to *X* who performed such cere-

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monies and claimed to enforce the charge against *N*'s properties *Held* that *X* could enforce the charge against *N*. (Vol 29) 1942 Mad 711 (712)

19. "Save as. . . . . in force" – [1] It is only in cases where there is no express provision of law which is in force that the principle underlying S. 100 can come into play (Vol 32) 1945 Mad 350 (351)

[2] In case of a charge for a loan under the Land Improvement Loans Act (XIX of 1883), S. 7 (1) of that Act read with its proviso operates as a saving clause and excludes it from the provision as to notice. (Vol 26) 1939 Bom 185 (187).

[3] A charge for rent under the Central Provinces Tenancy Act (I of 1920) is saved from the operation of the provision as regards notice in this section by reason of the express provision in S. 9 of that Act. (Vol 27) 1940 Nag 156 (158): I L R (1941) Nag 607 (DB).

[4] A first charge created under S. 177 of the United Provinces Municipalities Act (II of 1916) in respect of municipal tax comes within the saving clause and excludes it from the operation of the provision as to notice. (Vol 30) 1943 All 115 (119, 120): I L R (1943) All 453 (FB) *(Overruling* (Vol 27) 1940 All 456: I L R (1940) All 669.)

[5] The provision as to notice under this section was applied to charges created under the Calcutta Municipal Act of 1899, for sums due on account of a tax imposed upon buildings or lands and consolidated rates. (Vol 2) 1915 Cal 478 (480, 481): 42 Cal 625 (DB).

[6] Where a charge is created by a decree of a Court on a certain property that charge is enforceable even against a subsequent *bona fide* transferee of that property. This applies to charge for maintenance. ('37) 169 Ind Cas 169 (171) (Nag).

20. Transferee for consideration without notice — [1] A charge is not enforceable against a *bona fide* transferee for value (Vol 30) 1943 Bom 414 (416) ✠ (Vol 23) 1936 Sind 16 (19) (DB) ✠ (Vol 26) 1939 Nag 132 (136) ✠ (Vol 27) 1940 Nag 163 (171): I L R (1941) Nag 513 (DB) ✠ (Vol 24) 1937 Oudh 35 (42) (FB) ✠ (Vol 24) 1937 Oudh 217 (219): 13 Luck 101 (FB) ✠ (Vol 23) 1936 Lah 482 (484) (DB).

[2] The section as amended in 1929 does not effect any change in the law as it stood before the amendment. (Vol 31) 1944 Nag 1 (6): I L R (1943) Nag 713 (DB) ✠ (Vol 30) 1943 Bom 414 (416) ✠ (Vol 27) 1940 All 456 (456): I L R (1940) All 669 (DB) (*Overruled* on another point in (Vol 30) 1943 All 115: I L R (1943) All 453 (FB).) ✠ (Vol 24) 1937 Oudh 217 (219): 13 Luck 101 (FB) ✠ (Vol 32) 1945 Mad 350 (351).

[But see (Vol 21) 1934 Bom 189 (192) (DB) ✠ (Vol 24) 1937 Mad 92 (94) ✠ (Vol 26) 1939 All 687 (688): I L R (1939) All 885 (DB).]

[3] The onus is on the transferee to prove that he is a transferee for conisderation without notice. (Vol 26) 1939 Nag 132 (135) ✠ (Vol 27) 1940 Nag 163 (171): I L R (1941) Nag 513 (DB) ✠ (Vol 2) 1915 Cal 478 (481): 42 Cal 625 (DB) ✠ (Vol 15) 1928 Pat 587 (589): 7 Pat 584 (DB).

[4] The defence is a single defence that the defendant is a purchaser for value without notice and does not consist of first, a defence that the defendant is a purchaser for value and then a reply from the plaintiff that he had notice. (Vol 2) 1915 Cal 478 (481): 42 Cal 625 (DB).

[5] The defence of a purchase without notice ought to be specifically alleged and proved by the transferee. (Vol 15) 1928 Pat 587 (589): 7 Pat 584 (DB).

[6] Where a subsequent transferee is a simple mortgagee, he cannot be considered "to have the property in his hands" so as to be able to plead the defence under the proviso. (Vol 27) 1940 Mad 701 (703)

21. Subsequent transferee from a transferee if protected.—[1] A purchaser with notice may shelter himself under the title of the person from whom he purchased if the latter can successfully raise the defence of want of notice. (Vol 2) 1915 Cal 478 (481): 42 Cal 625 (DB)

[2] Where a property subject to charge was purchased by *H* without notice who transferred it to *K* who had notice of the charge held that *K* could not avail himself of a defence under this proviso. (Vol 24) 1937 Pesh 76 (78) (DB).

22. Charge whether binds auction-purchaser.—[1] The provision as to notice applies to transfers by auction sales in execution and an auction purchaser takes the property free of the charge if he has no notice thereof (Vol 27) 1940 All 456 (457): I L R (1940) All 669 (DB). (*Overruled* on another point in (Vol 30) 1943 All 115: I L R (1943) All 453 (FB)) ✠ (Vol 32) 1945 Pat 434 (443, 444) (DB) ✠ (Vol 30) 1943 All 115 (122): I L R (1943) All 453 (FB) (*Overruling* (Vol 26) 1939 All 687: I L R (1939) All 885) ✠ (Vol 24) 1937 Oudh 217 (219): 13 Luck 101 (FB) (*Overruling* (Vol 16) 1929 Oudh 316: 5 Luck 172) ✠ (Vol 24) 1937 Oudh 31 (32): 12 Luck 353 (*Reversed* on another point in (Vol 28) 1941 Oudh 305: 16 Luck 607.) ✠ (Vol 24) 1937 Nag 36 (36 37). I L R (1938) Nag 183 ✠ (Vol 28) 1941 Pat 95 (97 98): 20 Pat 86 (DB).

[But see (Vol 27) 1940 Mad 701 (702) ✠ (Vol 25) 1938 Oudh 84 (86): 13 Luck 746 (DB) ✠ (Vol 24) 1937 Cal 129 (138): I L R (1937) 1 Cal 203 (DB) ✠ (Vol 12) 1925 All 60 (61): 47 All 60 (DB)]

23. Enforcement of charge.—[1] Suit for enforcing charge by sale of property charged—There must be preliminary decree under O 34, R. 4, Civil P.C. (Vol 29) 1942 Sind 83 (84): I L R (1942) Kar 168 ✠ (Vol 27) 1940 Cal 60 (62, 64).

[2] By virtue of O. 34, R. 14 of the Code of Civil Procedure, a charge holder cannot obtain a money decree in respect of the amount charged and sell the property. He must file a suit for sale of the property charged. (Vol 7) 1920 Pat 521 (522): 5 Pat L Jour 248 ✠ (Vol 27) 1940 Pat 283 (285) (DB) ✠ ('05) 1 Nag L R 117 (119, 120) ✠ (Vol 5) 1918 Cal 705 (707): 45 Cal 530 (DB) ✠ ('87) 11 Moo Ind App 241 (266) (P C).

[3] The effect of a decree on a charge is the same as that of a decree on a mortgage. (Vol 24) 1937 Cal 129 (138): I L R 1937-1 Cal 203 (DB).

[4] Decree for sale—Property sold—Sale proceeds found insufficient—Charge-holder will be entitled to apply for personal decree against judgment-debtor if latter is under personal obligation to pay money. ('05) 2 All L Jour 379 (383) (DB) ✠ (Vol 22) 1935 All 411 (415, 416): 57 All 797 (DB).

[But see (Vol 19) 1932 Cal 775 (780, 781): 59 Cal 1314 (DB)]

[5] Decree creating charge for future maintenance to be paid at particular time—Charge holder may apply for execution of decree as amount of maintenance becomes due. ('70) 15 Suth W R 128 (129) (DB) ✠ ('86) 9 All 33 (34) (DB) ✠ (Vol 26) 1939 All 579 (580) (DB) ✠ ('98) 2 Cal W N 33 (33, 34).

[6] The amount of court-fee that is recoverable in a pauper suit and for which the Government has a charge on the subject-matter of the suit can be recovered by the Government in execution of the decree and a separate suit for the purpose is not necessary. ('96) 18 All 419 (421) (DB).

[7] Person having charge on company's property—Company in liquidation—Person can claim priority over

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unsecured creditors without bringing suit for that purpose. (Vol 1) 1914 Bom 267 (268) (DB).

[8] Where a charge-holder is entitled to claim possession of the property instead of a sale thereof, the decree in a suit for possession will have to approximate as close as may be to a decree for foreclosure. (Vol 26) 1939 Nag 132 (136).

[9] A charge-holder not entitled to possession of the property cannot enforce the charge by suing for possession (Vol 27) 1940 Nag 8 (11) (DB).

24. Personal liability.—[1] A charge-holder will be given a personal decree where the charge is on the income of the property and the defendant has been in receipt and enjoyment of the income. (Vol 19) 1932 Oudh 168 (170) (DB) ✠ (Vol 23) 1936 Oudh 52 (55): 11 Luck 575 (DB).

[2] Where the plaintiff had a seller's charge under S. 55 (4) (*b*) and sued to enforce his charge and also claimed a personal decree against the defendant, he was granted such a decree. (Vol 20) 1933 P C 143 (145): 60 Ind App 183: 11 Rang 186 (P C).

25. Sale in execution of a charge decree — Whether extinguishes the charge. — [1] Property subject to recurring charge sold in execution of a decree for arrears payable in respect of sum charged — Liability in respect of future payments is not extinguished — Auction-purchaser would get property subject to charge. (Vol 27) 1940 Cal 60 (62, 63)✠(Vol 20) 1933 All 934 (938) (D B).

[2] Charge decree executed as money decree—Decree-holder not objecting to sale subject to mortgage — Charge is not extinguished. (Vol 32) 1945 Pat 426 (427) (D B).

26. Charge created by a decree. — [1] A charge created by a compromise decree is a charge created by "act of parties" and hence is a "charge" within this section. (Vol 31) 1944 Nag 1 (7) : I L R (1943) Nag 713 (D B)✠(Vol 30) 1943 Oudh 354 (359): 19 Luck 1 (F B) ✠ ('06) 28 All 655 (659) ✠ (Vol 32) 1945 Pat 434 (435) (D B) ✠ (Vol 28) 1941 Pat 95 (98) : 20 Pat 86 (D B) ✠ (Vol 24) 1937 Oudh 217 (219) : 13 Luck 101 (F B) ✠ (Vol 28) 1941 Cal 436 (438)✠(Vol 12) 1925 All 60 (61): 47 All 90 (D B)

[*See also* (Vol 32) 1945 Pat 278 (280) (D B). (It was held that the decree was not a consent decree and the charge created by it was not a charge within this section.)]

[2] A charge created by a decree is a charge created by "operation of law" and hence constitutes a "charge" under this section. (Vol 30) 1943 Oudh 354 (359) : 19 Luck 1 (F B)✠(Vol 33) 1946 Mad 51 (51).

[3] A charge created by a decree is not a charge as is contemplated by this section. (Vol 27) 1940 Nag 163 (166): I L R (1941) Nag 513 (D B) ✠ ('37) 169 Ind Cas 169 (171) (Nag).

[*See also* (Vol 26) 1939 All 579 (580) (D B).]

[4] No charge, if it comes within the meaning of the section, whether by decree or otherwise, will be enforceable against a transferee for consideration without notice of it. (Vol 31) 1944 Nag 1 (7): I L R (1943) Nag 713 (D B) ✠ (Vol 30) 1943 Oudh 354 (359) : 19 Luck 1 (F B) ✠ (Vol 28) 1941 Pat 95 (98) : 20 Pat 86 (D B) ✠ (Vol 28) 1941 Cal 436 (438, 439)✠(Vol 32) 1945 Pat 434 (437) (D B).

[5] This section will not apply to the case of a transfer during the pendency of a litigation in which a charge is created by a decree. In such a case the transfer is affected by the doctrine of *lis pendens* and the question of notice is immaterial (Vol 31) 1944 Bom 191 (193): I L R (1944) Bom 274 (D B)✠(Vol 32) 1945 Mad 126 (127) : I L R (1945) Mad 726 (D B)✠(Vol 32) 1945 Mad 350 (351).

[6] If a decree does create a charge on properties, the decree-holder has the right to bring the charged properties to sale in execution proceedings and it is not necessary to file a separate suit for enforcing the charge. (Vol 33) 1946 Bom 207 (209) (D B).

27. Payments in the nature of salvage. — [1] Where a person having some interest in a property or some right or duty towards the owner of the property pays money in order to save the property from loss or destruction, he has a first charge on the property for such payments ('67) 11 Moo Ind App 241 (258) (P C)✠ ('94) 21 Cal 142 (148, 149): 20 Ind App 160 (P C).

[2] Government revenue is the first and paramount charge upon the land and if default is made in payment, the land is sold in a summary way. The purchaser gets a clear title and the land is lost for ever to the defaulting proprietor. ('94) 21 Cal 142 (148): 20 Ind App 160 (P C).

[3] As to whether a person who pays the Government revenue on behalf of another who is liable to pay it is entitled to a charge for such payment, following views have been expressed:

(a) A co-sharer who pays the quota of the Government revenue due from another co-sharer in order to save the estate from being sold is entitled to a charge on the other co-sharer's share for the payment made on his behalf. ('67) 11 Moo Ind App 241 (258) (P C)✠('06) 26 Mad 686 (711, 725) (F B)✠ (Vol 23) 1936 Mad 752 (760, 763) (D B) ✠ (Vol 28) 1941 Nag 245 (249): I L R (1941) Nag 474 (D B)✠ (Vol 19) 1932 Nag 171 (172): 28 Nag L R 214.

(b) A payment of Government revenue made by one having an interest which would be sacrificed by the loss of the estate does not give a charge on the estate for the money so paid and therefore, a co-sharer paying the Government revenue does not acquire any charge on the share of the defaulting co-sharer. ('87) 14 Cal 809 (825, 827, 832) (F B)✠ ('92) 14 All 273 (295, 298) (F B) ✠ (Vol 24) 1937 All 618 (619) : I L R (1937) All 706 (D B) ✠ ('02) 26 Bom 437 (442) (D B) ✠ (Vol 1) 1914 Cal 263 (268) (D B) ✠ (Vol 15) 1928 Pat 641 (643, 644) : 7 Pat 613 (D B)✠('92) 7 C P L R 42 (43, 44).

[4] The mortgagee paying the Government revenue in order to save the property from sale has a charge on the property. ('03) 30 Cal 794 (798, 799) (D B)✠(Vol 17) 1930 Cal 151 (153): 57 Cal 298 (D B)✠(Vol 7) 1920 Pat 521 (522) : 5 Pat L Jour 248 ✠ (Vol 6) 1919 Low Bur 136 (138).

[See however (Vol 23) 1936 Rang 47 (48).]

[5] The principle as to payments in the nature of salvage, is not confined to payments of Government revenue, but is of general application. (Vol 30) 1943 Mad 573 (576, 577) : I L R (1944) Mad 44 ✠ (Vol 11) 1924 Rang 204 (206) : 1 Rang 714 (D B) ✠ ('79) 4 Cal 539 (541) (D B)✠(Vol 15) 1928 Rang 278 (280): 6 Rang 500.

[6] *A* purchasing oil well which was subject to mortgage—*B* having right of pre-emption — *A* making part payment to mortgagee towards mortgage decree —Payment necessary to save oil well from sale — *A* held had charge for money paid against *B* exercising his right of pre-emption. (Vol 11) 1924 Rang 204 (205, 206): 1 Rang 714 (D B).

[7] The principle of salvage lien can be applied in India to cases of payment of rent or other dues the non-payment of which would have wiped out all the subsidiary interests in land (Vol 30) 1943 Mad 573 (576, 577): I L R (1944) Mad 44.

[8] The charge given on the principle of salvage lien is not a charge within the meaning of the section. (Vol 11) 1924 Rang 204 (206): 1 Rang 714 (D B).

[a][101. Any mortgagee of, or person having a charge upon, immoveable property, or any transferee from such mortgagee or charge-holder, may purchase or otherwise acquire the rights in the property of the mortgagor or owner, as the case may be, without thereby causing the mortgage or charge to be merged as between himself and any subsequent mortgagee of, or person having a subsequent charge upon, the same property; and no such subsequent mortgagee or charge holder shall be entitled to foreclose or sell such property without redeeming the prior mortgage or charge, or otherwise than subject thereto.]

No merger in case of subsequent encumbrance.

[a] *Substituted* by the Transfer of Property (Amendment) Act, 1929 (20 [XX] of 1929), S. 51.

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[9] The application of the doctrine of salvage lien does not depend upon the question whether the demand which was met was a charge or a first charge on the property. The doctrine of salvage lien is wider than the doctrine of subrogation In the case of subrogation, the person making the payment gets only the rights of the person whose dues are paid off while in the case of salvage lien such person is entitled to a right which prevails over all the interests which are saved by the payment. (Vol 30) 1943 Mad 573 (577) : I L R (1944) Mad 44.

28. Hindu widow's right of maintenance.— [1] A Hindu widow's right of maintenance is not a charge on the family property within the meaning of this section. ('06) 4 Cal L Jour 476 (481, 483) (D B) ✠ ('11) 35 Mad 147 (151) (D B) ✠ ('72) 17 Suth W R 432 (436) (D B)✠(Vol 13) 1926 All 527 (529) (D B)✠(Vol 12) 1925 Lah 32 (33): 5 Lah 375 (D B)✠(Vol 24) 1937 Mad 915 (918) (D B)✠(Vol 26) 1939 All 579 (580) (D B).

[But see ('71) 1871 Pun Re No. 7, p 11 (11) (DB).]

[2] Debts binding upon a Hindu take precedence over his widow's right of maintenance (Vol 7) 1920 Mad 722 (722) : 43 Mad 800 (D B)✠(Vol 17) 1930 Mad 824 (829): 54 Mad 132 (D B) ✠ ('81) 5 Bom 99 (109) ✠ (Vol 14) 1927 Lah 883 (883) ✠ ('78) 2 Bom 494 (505) (F B) ✠ (Vol 20) 1933 Lah 901 (904): 15 Lah 9 (D B).

[3] Though under S. 39, a right of maintenance can be enforced against a transferee with notice or a gratuitous transferee, the rule does not apply where the debts have precedence over the right of maintenance, and a transfer of the family property is in liquidation of such debts. ('78) 2 Bom 494 (498, 499) (D B) ✠ (Vol 2) 1915 Mad 464 (466, 470, 471) (D B).

[4] If the maintenance has been made a charge upon the property it will take precedence over the right of a subsequent purchaser of the same property in execution of a money decree even though such decree is in respect of a debt binding on the husband. (Vol 15) 1928 Mad 713 (718) (F B) ✠ (Vol 17) 1930 Mad 824 (830): 54 Mad 132 (D B).

29. Debts of a deceased Muhammadan. — [1] The unsecured debts of a deceased Muhammadan are not a charge upon the estate left by him. ('81) 7 Cal L Rep 460 (463) (D B) ✠ ('78) 4 Cal 402 (408) : 5 Ind App 211 (P C)✠(Vol 16) 1929 Mad 609 (610) (D B).

[2] A Muhammdan wife's claim for dower does not create a charge upon the estate of the husband. (Vol 29) 1942 Pat 210 (212) : 20 Pat 798 (DB) ✠(Vol 3) 1916 P C 46 (48) : 38 All 581 : 43 Ind App 294 (P C).

30. Nankar and dahyak rights.—[1] A right to receive a cash *nankar* out of the profits of a *zamindari* is a charge on such *zamindari*. (Vol 3) 1916 Oudh 129 (130) : 19 Oudh Cas 49.

[2] A cash *nankar* granted in lieu of the surrender of *zamindari* rights is a charge on the *zamindari* rights so surrendered. (Vol 25) 1938 Oudh 84 (85) : 13 Luck 746 (DB) ✠(Vol 6) 1919 Oudh 403 (404) : 21 Oudh Cas 327.

[3] *Dahyak* or *daswant* is closely analogous to *nankar* and is a charge on the property. (Vol 6) 1919 Oudh 403 (404) : 21 Oudh Cas 327.

SECTION 101—SYNOPSIS

1. Scope.
2. Renewal of one mortgage by another.
3. Transaction in discharge of prior mortgage invalid—Effect.
4. Mortgagee purchasing portion of mortgaged property—Effect.
5. Purchase at sale in execution of decree for rent or for recovery of land revenue.
6. Who can claim benefit of section.
7. "As between himself and any subsequent mortgagee."
8. Charge kept alive—Enforcement.
9. Section, if retrospective.

1. Scope.—[1] The mere fact of a charge having been paid off does not decide the question whether it was extinguished. It is a matter of intention of the parties. The intention to keep the charge alive is presumed where it is for the benefit of the person paying to do so. This principle of equity is called the rule of intention. ('84) 10 Cal 1035 (1046) : 11 Ind App 126 (P C) ✠(1877) 46 L J Ch 352 (352) : 5 Ch D 634, *Adams* v. *Angell* ✠ (1894) 64 L J Ch 1 (6) : 1895 App Cas 11, *Thorne* v. *Cann* ✠(Vol 18) 1931 Pat 426 (431, 432) : 10 Pat 630 (DB).

[2] Where a mortgagee or a person having a charge upon immoveable property purchases or acquires the rights in the property, the question whether the mortgage or charge is kept alive does not also depend upon any rule of intention. The section declares that there shall be no merger as between the mortgagee and any subsequent mortgagee or charge-holder of the same property. (Vol 27) 1940 Pat 64 (65) ✠(Vol 32) 1945 Bom 116 (118).

[See however (Vol 30) 1943 All 156 (157) : I L R (1943) All 444 (DB).]

[3] It is not the intention of Legislature in amending this section to amend or alter the old law which covered the case of union of two estates which occurred when the purchaser of equity of redemption acquired the rights of the mortgagee or when the rights of the mortgagor were acquired by the mortgagee (Vol 32) 1945 Bom 116 (118, 119). (Charge on immovable property created by judgment-debtor in favour of holder of money decree—Sale of property in execution of mortgage decree—Purchase by charge-holder—Debt under charge is extinguished—Personal remedy against judgment-debtor is barred.)

[4] Section does not provide for a case of an owner of property acquiring a charge on the property as by inheritance. (Vol 29) 1942 Nag 33 (35) : I L R (1942) Nag 309 (DB).

[*See also* (Vol 29) 1942 All 175 (184) : I L R (1942) All 259 (DB).]

[5] Section does not apply to a case where a mortgagee acquires the ownership of the property and it is for his benefit to keep it alive, though there are no subsequent incumbrances. In such cases the rule of intention will still apply. (Vol 30) 1943 Oudh 407 (408, 409) (DB).

[See however (Vol 29) 1942 Bom 95 (96) (DB) ✠(Vol 30) 1943 Mad 429 (430) : I L R (1943) Mad

Section 101—Note 1 *(contd.)*
531. (FB). (Per Patanjali Sastri J. in Order of Reference.)]

[6] Where a Hindu widow mortgages her husband's property and then the mortgagee transfers to her, in her individual and independent capacity, the mortgagee right, there would be no merger and the widow's personal heirs would inherit the mortgagee right after her death while the equity of redemption would devolve on her husband's heirs. (Vol 29) 1942 All 175 (184) : I L R (1942) All 259 (DB).

[7] Whether it is for the benefit of the party to keep a charge alive must be decided with reference to the circumstances existing at the time the charge is paid off, or the union of interests takes place. (Vol 30) 1943 Mad 429 (431) : I L R (1943) Mad 531 (FB). (Per Patanjali Sastri, J. in Order of Reference.) ✠ (Vol 30) 1943 Oudh 284 (286, 287) : 19 Luck 17 (DB) ✠(Vol 9) 1922 Bom 211 (212) : 46 Bom 1009 (DB) ✠ (Vol 21) 1934 Pat 134 (136) : 13 Pat 200 (DB) ✠(Vol 29) 1942 Mad 558 (564 (DB) ((Vol 3) 1916 Mad 875 *Approved.*)

[8] The possibility of a future claim for pre emption is not a circumstance from which it can be said that it is for the benefit of the person paying off a charge to keep it alive. (Vol 14) 1926 Oudh 606 (608) : 1 Luck 560 (DB) ✠('12) 34 All 268 (272) (DB).

[*See also* (Vol 30) 1943 Oudh 284 (287) : 19 Luck 17 (DB).]

2. **Renewal of one mortgage by another.**—[1] A renewal of one mortgage by another does not necessarily extinguish the prior security The rule of intention applies to such cases and the prior mortgage will remain if it is for the benefit of the party renewing, to keep it alive. ('13) 35 All 211 (225) : 40 Ind App 105 (P C).

[2] If there is an intermediate mortgage, the prior mortgage will be kept alive as against the intermediate mortgage. (Vol 31) 1944 Nag 163 (171): I L R (1944) Nag 383 (FB) ✠(Vol 28) 1941 All 200 (206) : I L R (1941) All 220 ✠('89) 16 Cal 523 (523) (DB) ✠('86) 10 Bom 88 (90) (DB) ✠ (Vol 5) 1918 Mad 1327 (1328) (DB) ✠ (Vol 19) 1932 Oudh 314 (317) : 7 Luck 26 (DB) ✠(Vol 26) 1939 Rang 247 (248) : 1939 Rang L R 207. (The doctrine of merger is not applicable to mortgages.)

[3] Where the prior mortgagee obtains the renewal in partial discharge of the prior security or obtains other additional security, the prior mortgage will be kept alive. (Vol 2) 1915 Cal 77 (79) ✠(Vol 11) 1924 Mad 619 (620) ✠(Vol 27) 1940 Pat 65 (70) (DB) ✠ (Vol 28) 1941 All 200 (206) : I L R (1941) All 220.

[4] Where a prior mortgagee had purchased the rights under a puisne mortgage it was held that the rights under the prior mortgage remained in force. (Vol 15) 1928 Lah 301 (303, 304) : 9 Lah 88 (DB).

[5] Where, notwithstanding it would be for the benefit of the mortgagee to keep the prior mortgage alive, the intention is clear that the prior mortgage should be extinguished, it will not be kept alive ('81) 3 All 706 (709) (DB) ✠ ('89) 13 Bom 348 (351) (DB) ✠(Vol 22) 1935 Lah 203 (206).

[6] If the prior mortgagee by taking the subsequent mortgage, undertakes to discharge not only his own prior mortgage but also another mortgage on the property, he cannot keep alive his prior mortgage as against the mortgagee whom he had undertaken to pay. (Vol 27) 1940 All 540 (544).

3. **Transaction in discharge of prior mortgage invalid—Effect.**— [1] Where a mortgagee takes a subsequent sale or mortgage in discharge of his mortgage and it turns out that the later transaction is inoperative or invalid, the prior mortgage remains and is not extinguished. (Vol 25) 1938 All 418 (423) : I L R (1938) All 714 (FB) ✠(Vol 34) 1947 All 214 (222) : I L R (1946) All 375 (DB) ✠(Vol 20) 1933 Nag 241 (242, 243): 30 Nag L R 142 ✠(Vol 20) 1933 Rang 92 (92) : 11 Rang 112 ✠ (Vol 23) 1936 Mad 61 (62) : 59 Mad 44 (DB)✠(Vol 24) 1937 Mad 293 (294) ✠ (Vol 6) 1919 Oudh 89 (91) : 22 Oudh Cas 349 (DB)

[*See also* (Vol 9) 1922 Cal 114 (115) (DB) ✠ (Vol 26) 1939 Rang 247 (248) : 1939 Rang L R 207.]

[2] *A* mortgaged five-sixths share in a village to *B*. After the death of *A*, his widow *C* and his nephew *D* executed another mortgage in favour of *B* in discharge of the previous mortgage. The property mortgaged was the whole village including one-sixth share therein belonging to *D* in his own right. It was found that the later mortgage was not binding on the widow *C*. *B* then sued to enforce the earlier mortgage It was held that he was entitled to do so. (Vol 3) 1916 P C 68 (70) : 39 All 178 : 44 Ind App 60 (P C) (On appeal from ('13) 11 All L Jour 365. ✠(Vol 25) 1938 P C 123 (127): : 32 Sind L R 448 : I L R (1938) Mad 646 (P C).

[See however (Vol 24) 1937 Mad 148(149).]

[3] Where a mortgagee takes a subsequent mortgage or sale in discharge of his mortgage, but at that time the properties are under attachment in execution of a money-decree, the prior mortgage will remain enforceable and will not be extinguished by the sub-equent transaction. (Vol 5) 1918 Mad 460 (460) (D B) ✠ ('82, 8 Cal 530 (533) (DB) ✠ (Vol 26) 1939 Mad 393 (395, 396) : I L R (1939) Mad 600 (D B) ✠ (Vol 24) 1937 Rang 359 (360) ✠ (Vol 25) 1938 Mad 465 (466)

[But see (Vol 9) 1922 All 76 (78) (DB) ✠ ('44) 1944 All L Jour 376 (377) (DB) ✠ (Vol 20) 1933 Mad 873 (882, 883) : 57 Mad 195 (DB) ✠ (Vol 23) 1936 Mad 61 (63) : 59 Mad 44 (D B) ✠ (Vol 23) 1936 Pat 404 (405) : 15 Pat 120 (DB)]

[4] Where a prior mortgagee sues on his mortgage without making the subsequent mortgagee a party to the suit, and purchases the property in execution of his decree, the purchase is inopera ive against the subsequent mortgagee against whom the prior mortgage remains. (Vol 24) 1937 Mad 769 (773) (DB).

4 **Mortgagee purchasing portion of mortgaged property — Effect.** — [1] A mortgagee purchasing the mortgaged property in partial discharge of his mortgage can nevertheless keep the mortgage alive as against a subsequent encumbrancer. (Vol 23) 1936 Mad 473 (475) (D B).

5. **Purchase at sale in execution of decree for rent or for recovery of land revenue.** — [1] Where a mortgagee himself purchases the property at a sale in execution of a decree for rent under S. 165 of the Bengal Tenancy Act, and there is no benefit in keeping it alive, the mortgage is extinguished even though the mortgagee does not take steps to extinguish the mortgage under S. 167 of the Act. (1900) 28 Cal 12 (15, 16) (D B).

[But see ('99) 4 Cal W N 268 (269) (DB).]

[2] Where the mortgagee purchases the property in execution of his decree, and the same property is purchased subsequently by the landlord in execution of a decree on the rent charge, the landlord cannot oust the mortgagee from possession without annulling under S 167, Bengal Tenancy Act, the incumbrance. ('11) 38 Cal 923 (932) (DB)

[But see (Vol 8) 1921 Cal 599 (600) (DB)]

[3] Where in execution of a decree for rent, the landlord himself purchases a raiyati holding, he can, as against a mortgagee of the holding hold his charge for rent as a shield against the mortgagee. ('02) 6 Cal WN 834 (835) (DB).

Notice and Tender.

102. Where the person on or to whom any notice or tender is to be served or made under this Chapter does not reside in the district in which the mortgaged property or some part thereof is situate, service or tender on or to an agent holding a general power-of attorney from such person or otherwise duly authorized to accept such service or tender shall be deemed sufficient.

Service or tender on or to agent.

[a][Where no person or agent on whom such notice should be served can be found or is known] to the person required to serve the notice, the latter person may apply to any Court in which a suit might be brought for redemption of the mortgaged property, and such Court shall direct in what manner such notice shall be served, and any notice served in compliance with such direction shall be deemed sufficient:

[b][Provided that, in the case of a notice required by section 83, in the case of a deposit, the application shall be made to the Court in which the deposit has been made.]

[c][Where no person or agent to whom such tender should be made can be found or is known to the person desiring to make the tender, the latter person may deposit [d][in any Court in which a suit might be brought for redemption of the mortgaged property] the amount sought to be tendered, and such deposit shall have the effect of a tender of such amount.

[a] *Substituted* by the Transfer of Property (Amendment) Act, 1929 (20 [XX] of 1929), S. 52 for "Where the person or agent on whom such notice should be served cannot be found in the said district, or is unknown". [b] *Inserted, ibid.* [c] *Substituted ibid*, for "Where the person or agent to whom such tender should be made cannot be found within the said district, or is unknown". [d] *Substituted ibid.*, for "in such Court as last aforesaid".

Section 101 — Note 5 *(contd.)*

[4] Sale under S. 138, C P. Land Revenue Act, free of encumbrance—Mortgagee decree-holder purchasing the property Considerations of merger do not apply. (Vol 32) 1945 Nag 289 (291) : I L R (1945) Nag 643 (D B).

6. Who can claim benefit of section. — [1] The benefit of the section can be claimed not only by the mortgagee acquiring the rights in the property, but also by persons deriving title from him. (Vol 25) 1938 Lah 286 (288) (D B) ✠ (Vol 9) 1922 Mad 249 (253) (D B).

7. "As between himself and any subsequent mortgagee"—[1] Sons of mortgagee living with him as members of joint Hindu family — Sons purchasing mortgaged property in discharge of mortgage— No intermediate encumbrance—Suit for pre-emption by third person — Son setting up mortgage as shield—*Held*, there was no merger. (Vol 22) 1935 Oudh 445 (446) : 11 Luck 302 (DB).

[2] Where there are no intermediate incumbrances, merger necessarily follows, even though it would be for the benefit of the mortgagee to keep the charge alive. (Vol 29) 1942 Bom 95 (96) (DB).

8. Charge kept alive—Enforcement.—[1] Where a charge is kept alive, it can always be used as a shield against subsequent incumbrancers. (Vol 9) 1922 PC 11 (13) : 48 Ind App 465 : 43 All 469 (P C) ✠ (Vol 31) 1944 Nag 163 (171) : I L R (1944) Nag 383 (FB).

[2] The charge may be set up as a shield even though at the time the plea is raised, the enforcement of the charge may have been barred by limitation. (Vol 20) 1933 Nag 241 (243) : 30 Nag L R 142 ✠ (Vol 27) 1940 Mad 646 (649) ✠ (Vol 26) 1939 All 660 (662).

[But see (Vol 34) 1947 All 74 (78) (FB). (Subsequent mortgagee can rely on prior mortgage only if, apart from S. 101, it was capable of being sued upon at date of subsequent mortgage.) ✠ (Vol 14) 1927 All 638 (640)]

[3] The charge may also be used by way of attack and may be actively enforced by way of suit, within the period of limitation prescribed therefor. (Vol 30) 1943 Oudh 407 (409, 409) (D B) ✠ (Vol 32) 1945 All 158 (159) : I L R (1945) All 186 (DB) ✠ (Vol 29) 1942 Mad 558 (565) (D B) ✠ (Vol 31) 1944 Nag 163 (172) : I L R (1944) Nag 383 (FB) ✠ (Vol 14) 1927 All 417 (418) : 49 All 430 (D B) ✠ (Vol 19) 1932 Oudh 314 (316) : 7 Luck 26 (DB).

[4] Where a charge kept alive by *A* is used as a shield against *B*, a subsequent incumbrancer, *B* can sell the property in enforcement of his mortgage subject to *A*'s charge (Vol 26) 1939 All 660 (661) ✠ ('05) 1 Cal L Jour 531 (538) (DB) ✠ ('81) 4 Mad 213 (215) (D B) ✠ ('86) 8 All 105 (108) (FB).

[*See also* (Vol 21) 1934 Mad 31 (38) (FB).]

[But see ('91) 13 All 432 (438, 439, 459, 463) (F B) ✠ (10) 32 All 138 (141) (D B) ✠ (Vol 19) 1932 Mad 84 (85)]

[5] If *A*'s charge does not entitle him to possession of the property but he has got into possession as a purchaser or in some other way he can defend his possession against *B* or the auction-purchaser in execution of the decree on *B*'s mortgage. ('08) 7 Cal W N 11 (20) (D B) ✠ (Vol 10) 1923 Rang 107 (107) (D B) ✠ (Vol 20) 1933 Nag 241 (244) : 30 Nag L R 142 ✠ (Vol 22) 1935 Oudh 411 (412) : 11 Luck 270 (DB) ✠(Vol 24) 1937 Oudh 478 (480) (DB)✠(Vol 26) 1939 All 660 (662) ✠ (Vol 27) 1940 Mad 646 (649)

[But see ('10) 7 Mad L Tim 230 (230) (DB) ✠ ('85) 7 All 568 (573) (DB).]

9. Section, if rerrospective.—[1] The section is retrospective in its operation. (Vol 19) 1932 All 489 (492) : 54 All 897 (FB).

[But see (Vol 29) 1942 Mad 558 (570) (D B) ✠ (Vol 19) 1932 Rang 197 (199) : 10 Rang 465 ✠(Vol 23) 1936 Rang 152 (156) : 14 Rang 494 (DB) ✠ (Vol 19) 1932 Lah 237 (238) (DB).]

Section 102 — Note 1

[1] A tender was made by the mortgagor to one *P* whose services had been engaged by the mortgagee and who had been assisting the agent of the mortgagee in his attempts to obtain possession of the mortgaged property as per terms of the mortgage deed. He was, however, not recorded as the attorney of the mortgagee and he disclaimed authority to receive a tender on behalf of the mortgagee It was held that the tender was bad. ('08) 32 Bom 521 (531) (DB).

103. Where, under the provisions of this Chapter, a notice is to be served on or by, or a tender or deposit made or accepted or taken out of Court by, any person incompetent to contract, such notice may be served [a]on or by, or tender or deposit made, accepted or taken, by the legal curator of the property of such person; but where there is no such curator, and it is requisite or desirable in the interests of such person that a notice should be served or a tender or deposit made under the provisions of this Chapter, application may be made to any Court in which a suit might be brought for the redemption of the mortgage to appoint a guardian *ad litem* for the purpose of serving or receiving service of such notice, or making or accepting such tender or making or taking out of Court such deposit, and for the performance of all consequential acts which could or ought to be done by such person if he were competent to contract[b]; and the provisions of [c][Order XXXII in the First Schedule to the Code of Civil Procedure, 1908] shall, so far as may be, apply to such application and to the parties thereto and to the guardian appointed thereunder.

Notice, etc., to or by person incompetent to contract.

[a] *Inserted* by the Transfer of Property (Amendment) Act 20 [XX] of 1929, S. 53. [b] As to persons competent to contract, *see* Ss. 11 and 12 of the Indian Contract Act, 1872 (9 [IX] of 1872). [c] *Substituted* by the Transfer of Property (Amendment) Act, 1929 (20 [XX] of 1929), S. 53, for "Chapter XXXI of the Code of Civil Procedure".

104. The High Court may, from time to time, make rules consistent with this Act for carrying out, in itself and in the Courts of Civil Judicature subject to its superintendence, the provisions contained in this Chapter.

Power to make rules.

CHAPTER V.

OF LEASES OF IMMOVEABLE PROPERTY.

105. A lease of immoveable property is a transfer of a right to enjoy such property, made for a certain time, express or implied, or in perpetuity, in consideration of a price paid or promised or of money, a share of crops, service or any other thing of value to be

Lease defined.

Section 103 — Note 1

[1] A tender under S. 60 or a notice under S. 69 or S. 83 cannot be made to, or served on, a 'guardian ad litem' until such a person is actually appointed. ('03) 27 Bom 23 (29) (DB). (Tender.)

[2] The words "person incompetent to contract" must be read in the light of Ss. 11 and 12 of the Contract Act.

[3] A natural guardian such as the father or mother of a Hindu minor, cannot be held to be a "legal curator" and a notice or tender to him without his being appointed a guardian *ad litem* is not valid and binding on the minor. (Vol 9) 1922 All 355 (355, 356) ; 44 All 64 (DB).

[4] If where the mortgagee is a minor it is determined by the mortgagor to proceed under Ss. 83 and 84, then it is requisite that a notice should be served; if in the case of an infant mortgagor those entrusted with the care of his affairs consider the mortgage-money should be tendered or paid, then it may be desirable in the interests of the minor that this should be done. ('03) 27 Bom 23 (28) (D B).

[5] Where the fact of minority of the person in whose favour a deposit is made under S. 83, is disputed, the Court can, under the provisions of O. 32, R. 3 of the Civil P. C., make an enquiry into the matter. (Vol 15) 1928 All 311 (312) : 50 All 655 (DB).

[6] Where the proposed guardian refuses to act as such, the Court can under O. 32, R. 4, Civil P. C., appoint an officer of the Court as the guardian ad litem for the purposes of this section. (Vol 10) 1923 All 183 (184) : 45 All 273 (D B). (Letters Patent appeal from (Vol 9) 1922 All 147 : 44 All 102— The view taken by *Lindsay J.*, confirmed.)

[7] A deposit in favour of a minor usufructuary mortgagee without a proper guardian *ad litem* being appointed for him is not a valid deposit, and the mortgagor cannot claim any mesne profits from the former from the date of his deposit. (Vol 13) 1926 All 665 (666, 667) : 48 All 611 (D B) ✠ (Vol 17) 1930 All 609 (610) (D B).

Section 104—Note 1

[1] This section does not make it obligatory for the High Courts to make rules ('02) 25 Mad 244 (271) (FB).

[2] Mortgage suits and the execution of decrees passed therein are governed by the provisions of the Code of Civil Procedure. (Vol 1) 1914 Oudh 289 (290). (In the absence of any rules framed by the High Court under S. 104, T. P. Act fixing the "court rate" the case is governed by S. 34, Civil P. C., and the Court can, in a suit on a mortgage bond award interest at the contract rate of 7½ per cent. per annum till the date of realisation.) ✠(Vol 4) 1917 Mad 128 (131) (DB). (Per *Bakewell J.*)

[3] As to the nature of rules contemplated by this section, *see* ('02) 25 Mad 244 (273) (F B).

[4] Rules which are inconsistent with the provisions of the Code of Civil Procedure, cannot be framed under this section. ('02) 25 Mad 244 (271, 272) (F B).

[But see (Vol 15) 1928 Bom 123 (128) :52 Bom 459 (DB). (Original side rules.)]

[5] A rule which is not consistent with this Act, would be *ultra vires*. ('98) 25 Cal 703 (708, 709) (FB).

[6] The rule-making power is limited to carrying out the provisions of Chap. IV. If the rule framed goes beyond this it would be *ultra vires*. ('02) 25 Mad 244 (254) (F B).

SECTION 105—SYNOPSIS

1. Applicability of chapter.
2. Lease is an interest in property.
3. Agreement to grant lease.
4. "Right to enjoy."
5. Contract necessary for lease.
6. Tenancy by payment and acceptance of rent.
7. Kabuliyat, rent-note, etc., whether lease.
8. Agreement varying rent or other terms of lease, whether lease.
9. Tenancy by acquiescence.
10. Lease and licence.
11. Lease or licence—Tests for determination.

rendered periodically or on specified occasions to the transferor by the transferee, who accepts the transfer on such terms.

The transferor is called the lessor, the transferee is called the lessee, the price is called the premium, and the money, share, service or other thing to be so rendered is called the rent.

Lessor, lessee, premium and rent defined.

SECTION 105 — SYNOPSIS *(contd.)*

12. Occupation as lodger.
13. Occupation as tenant or servant.
14. Market rights.
15. Who can grant a lease.
16. Lease by de facto proprietor.
17. Lease by or in favour of a minor.
18. Lease of untransferable property.
19. Commencement of lease.
20. "Certain time."
21. Term of lease—Determination.
22. Lease entitling lessee to hold as long as he pays rent or as long as he may wish.
23. Lease for a term certain with a provision for continuation thereafter.
24. Lease expressed to be terminable before end of term fixed.
25. Periodic leases.
26. Tenancy at will.
27. Lease for life.
28. Lease with a clause for renewal—General.
29. Covenant for renewal—Enforceability against assignee from lessor or lessee.
30. Lessee holding over after expiration of lease—General.
31. Lessee holding over after expiration of lease—Renewal clause in lease, effect of.
32. Lessee holding over after expiry of lease—Basis of liability for compensation.
33. Permanent tenancy—Onus of proof.
34. Permanent tenancy—Construction of leases.
35. Permanent tenancy—Circumstantial evidence as to—General.
36. Circumstantial evidence as to permanent tenancy—Long and undisturbed possession at fixed rent
37. Circumstantial evidence as to permanent tenancy—Lease for dwelling or residential purpose.
38. Circumstantial evidence as to permanent tenancy—Successions and transfers.
39. Consideration for lease.
40. "Price paid or promised."
41. Rent—General features.
42. Rent—Illustrative cases.
43. Rent in kind—Payment of money value.
44. Rent—Service as rent.
45. Variation of rent.
46. Lease for a premium and usufructuary mortgage—Distinction.
47. Maintenance grants.
48. Heritability of lease.

1. Applicability of chapter.— [1] This chapter applies to all leases except agricultural leases. (Vol 14) 1927 All 78 (79) (DB) ✠ ('09) 5 Mad L Tim 222 (222).

[2] Although T. P. Act does not in its terms apply to agricultural leases, definition in S. 105 applies to agricultural leases as well. (Vol 6) 1919 Mad 168 (169): 42 Mad 203 (SB).

[3] Although T. P. Act does not apply to agricultural leases, analogy of the Act may be relied upon. ('10) 33 Mad 253 (253) (DB).

[4] To determine if a lease is for an agricultural purpose the primary object of the lease is to be considered. (Vol 14) 1927 All 78 (79, 80) (DB) ✠('12) 15 Cal L Jour 672 (674) (DB).

[5] Lease for residential purpose with right to take fruits from trees on the land and plant other fruit trees —Lease not agricultural—T. P. Act applies. (Vol 13) 1926 Cal 312 (313) (DB).

[6] Lease of tank for rearing and preserving fish and of the banks for grazing cattle—Primary object being the rearing of fish, lease is not for agricultural purpose. (Vol 22) 1935 Cal 638 (639).

[7] Where the lease is merely of a tank with so much of its banks as is necessary for its use, it cannot be regarded as an agricultural lease because the tank is the principal subject of the lease. ('73) 20 Suth W R 341 (341) (DB).

[8] Where the lease is merely of a tank with so much of its banks as is necessary for its use it cannot be regarded as an agricultural lease and no right of occupancy can be acquired in the tank—In this case, the surrounding land was of considerable area and the lease being indivisible, it was held that the whole lease was for agricultural purpose. (Vol 18) 1931 Cal 135 (138) (DB).

[9] Lease held to be horticultural, because it was granted not for enjoying fruit only but also for the purpose of planting trees. ('26) 96 Ind Cas 89 (89) (Cal).

[10] Where a certain land is given for "cultivation and building tenants' houses" held that the lease was for a mixed purpose, agricultural and non-agricultural for a lump rent. ('14) 24 Ind Cas 788 (788) (Oudh).

[11] Principle of S. 116 applied to the Punjab where the Act does not apply. ('28) 112 Ind Cas 651 (652) (Lah).

[12] Lease granted by a municipality is within this Chapter (Vol 15) 1928 All 95 (95). (Lease cannot be determined merely by a resolution passed by the Municipal Board.)

2. Lease is an interest in property.—[1] Lease is an interest in the property. Unless there is a transfer of such an interest there can be no lease. (Vol 27) 1940 Cal 89 (90): I L R (1939) 2 Cal 254✠ (Vol 1) 1914 Cal 485 (486) (DB).

[But see (Vol 28) 1941 All 56 (59, 60): I L R (1941) All 17 (DB) (There is a transfer of an interest in the property under a usufructuary mortgage while under a lease there is only a transfer of the right of enjoyment of the property.)]

[2] Provisions of law like S. 39 of the Contract Act which are applicable to mere contracts are not applicable to lease. (Vol 6) 1919 Mad 168 (169): 42 Mad 203 (SB).

[3] A bid-sheet or dak-fard showing the bids made at the auction of land for settlement is a verbal settlement, and the document which did not contain the most important terms and was never intended to be delivered to the lessee as a document of title cannot in such circumstances constitute a lease. (Vol 13) 1926 Pat 487 (489) (DB).

[4] A suit for ejectment against a lessee does not lie so long as the lease is in existence. ('07) 34 Cal 57 (63) (DB) ✠ (Vol 15) 1928 All 95 (95).

[5] Tenancy void—Independent collateral agreement not to eject during a certain period held good answer to suit for ejectment. (Vol 17) 1930 All 678 (681) (DB).

3. Agreement to grant lease.—[1] A mere agreement to grant a lease in future is not a lease. (Vol 16) 1929 Rang 164 (165): 7 Rang 70 (DB) ✠('10) 37 Cal

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308 (311) (DB) ✠ (Vol 1) 1914 Low Bur 241 (248): 8 Low Bur Rul 64 (DB) ✠ ('10) 14 Cal W N 65 (67).

[2] Whether a contract in writing or orally made is to be construed as a lease or merely as an agreement to lease must be gathered from the terms of the whole document. (Vol 10) 1923 Oudh 227 (238).

[3] The question whether there was a present demise or merely an agreement to make a demise in future must depend upon the paramount intention of the parties. ('10) 12 Cal L Jour 300 (303) (DB).

[4] Mere provision in an agreement that the lease is to commence from a future date does not make it merely executory agreement (Vol 17) 1930 Bom 210 (212) ✠(Vol 12) 1925 Cal 1087 (1089, 1092) : 52 Cal 695✠('13) 1913 Pun L R No. 97, page 357 (359) (DB)✠ (Vol 4) 1917 Nag 207 (208).

[5] Mere provision in an agreement for execution of a formal document, does not make agreement merely executory. (Vol 21) 1934 Mad 418 (419, 420): 57 Mad 760 (DB) ✠ (Vol 17) 1930 Bom 210 (212, 213) ✠(Vol 12) 1925 Cal 1087 (1093) : 52 Cal 695 ✠ (Vol 17) 1930 Pat 530 (532) (DB).

[6] Even where possession is allowed to be taken under the agreement it may amount only to a personal agreement not creating any present interest in the property. ('06) 33 Cal 502 (504, 505) (DB). (Reclamation licence with agreement for lease.) ✠(Vol 11) 1924 Cal 558 (560) (DB) ✠(Vol 17) 1930 Pat 356 (357).

[7] Executory agreement for lease—Possession taken by promisee — Ejectment suit by owner — Doctrine of equitable interest does not apply in India—Promisee may however obtain stay of suit and sue for specific performance. (Vol 18) 1931 P C 79 (82) : 58 Cal 1235 : 58 Ind App 91 (P C)

[8] Specific performance of an agreement for lease cannot be enforced unless the terms of the lease can be ascertained with reasonable certainty from agreement. (Vol 31) 1944 Mad 518 (524) : I L R (1945) Mad 355 (D B) ✠ (Vol 11) 1924 Cal 346 (347, 348) ✠(Vol 9) 1922 Bom 404 (404) (D B).

[9] A person entering into possession under a mere agreement for lease may be liable for damages for use and occupation. ('12) 15 Ind Cas 432 (432) (Mad).

[10] Person entering into possession under mere agreement for lease may be liable for damages for breach of contract where he vacates the property before the end of the period for which he has agreed to be in possession by paying rent. (Vol 14) 1927 Cal 275 (277) (D B).

4. "Right to enjoy." — [1] Fresh lease of property during continuance of its previous lease—Such a lease has no effect and no rent can be recovered on its basis. (Vol 22) 1935 Cal 193 (195).

[2] A valid lease cannot be granted by a person not in possession of the lands leased. ('74) 1 Ind App 76 (81) (P C).

[3] The transfer of a bare right of possession without the right to the usufruct is not a lease. ('99) 9 Mad L Jour 290 (295) (D B).

[4] There must be a transfer of the exclusive right of possession of the leased property in order to constitute a lease. ('97) 20 Mad 58 (65) (F B).

[5] Hukumnama granting right to dig mica mines with 105 kudalis — Grantor retaining right to use and enjoy mines—*Held*, hukumnama could not be regarded as a lease as it was a grant of a partial and limited interest and was in the nature of an easement. (Vol 31) 1944 Pat 261 (266) : 23 Pat 115 (D B).

[6] Right to enjoy the property does not cease to be a lease merely because the mode of enjoyment results in the exhaustion of the property. (Vol 30) 1943 P C 153 (156) : 70 Ind App 180 : 22 Pat 713 (P C)✠(Vol 27) 1940 Pat 633 (647) : 20 Pat 13 (S B). (Per Manohar Lall, J.)

[7] Where under the terms of a mortgage deed proprietary possession is transferred to the mortgagee while the cultivating possession has been retained by the mortgagor, the relationship of landlord and tenant is created thereby between them. ('10) 1910 Pun L R No. 150, page 409 (415, 416) (D B).

[8] A transfer of "rents and profits" of the land without any words of limitation is construed as a transfer of the land itself (Vol 27) 1940 Pat 516 (525, 526, 535, 536) : 19 Pat 433 (D B).

5. Contract necessary for lease. — [1] Tenancy is created by contract either express or implied or by statute (Vol 9) 1922 Pat 429 (430) : 1 Pat 764 (D B).

[2] Rent note not intended to be acted upon — No lease ('92) 19 Bom 133*n* (134*n*).

[3] Tenancy cannot be created by implication or acquiescence. (Vol 16) 1929 Nag 13 (13).

[4] Suit for rent of ferry tolls—Defendant not having entered into any contract with plaintiff but having collected the tolls—Lower Court passing decree for rent holding that the defendant has made himself plaintiff's tenant in respect of the ghats by use and occupation—*Held* that this was wrong and no decree for rent could be passed. (1900) 27 Cal 239 (242) (D B).

[5] A mere entry in a khasra does not create a contract of tenancy with the persons entered therein. The mere fact of a person's holding lands in a zemindari estate is not a sufficient proof that he is a tenant. (Vol 4) 1917 Pat 345 (347 349) (D B).

[6] On terms of lease deed lessor having option, on expiry of 10 years, to enter into contract of tenancy with person in occupation—Plaintiff-lessor giving notice to defendant who was in occupation but defendant not replying — *Held*, this amounted merely to an offer of tenancy but as there was no acceptance by defendant there was no contract of tenancy. (Vol 31) 1944 Nag 141 (142) : I L R (1944) Nag 267.

[7] Admission of a lease by the person in possession or by the owner will not by itself create a lease. ('80) 5 Cal 864 (865) (D B).

[8] Tenant openly breaking up waste land and cultivating it with knowledge of landlord and without any objection by him — Cultivator is licensee first but when improvement and cultivation have continued for a number of years and the cultivator is shown in the village records as tenant a tenancy may be implied. (Vol 4) 1917 Nag 36 (36).

[9] When a lease is contained in writing it can be contained in more than one document. (Vol 17) 1930 Rang 210 (212) ✠ (Vol 4) 1917 Mad 274 (276) (D B).

6 Tenancy by payment and acceptance of rent.—[1] Mere fact of payment and acceptance of rent does not necessarily create lease ('85) 11 Cal 434 (446) (F B) ✠ ('03) 7 Cal W N 132 (135).

[2] Payment and acceptance of rent is an element of evidence going to prove the existence of a tenancy. (1900) 27 Cal 156 (164, 165) : 26 Ind App 216 (P C) ✠ ('76) 1 Cal 391 (399) : 3 Ind App 92 (P C) ✠ ('85) 11 Cal 434 (446) (F B).

[3] *Marfatdari* receipts i. e., receipts granted in the name of payer on behalf of another, do not constitute any relationship of landlord and tenant between the payer and the payee, nor any recognition of the payee's right as tenant. (Vol 13) 1926 Pat 465 (467) : 5 Pat 415 (D B).

[4] Cases not governed by this Act — Payment and acceptance of rent may be sufficient to prove a tenancy even in regard to agricultural land, notwithstanding the presumption as to its being one from year to year. (Vol 12) 1925 Mad 881 (882) (D B).

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[5] A tenancy can arise from payment and acceptance of rent, only where the person, to whom the rent is paid, is the owner of the property (Vol 7) 1920 Cal 693 (693, 694) (D B) ✠ (Vol 6) 1919 Cal 796 (797).

[6] Grant of lease by trespasser — Owner accepting rent from lessee — Creation of fresh tenancy may be implied. (1900) 27 Cal 156 (164, 165) : 26 Ind App 216 (P C).

7. Kabuliat, rent-note, etc., whether lease. — [1] *Kabuliat* or rent note itself does not operate as a lease. (Vol 31) 1944 All 221 (222) : I L R (1944) All 346 (DB) ✠ (Vol 30) 1943 Lah 127 (128) : I L R (1943) Lah 695 (F B) ✠ (Vol 29) 1942 All 330 (330) ✠ (Vol 27) 1940 Nag 143 (144)

[See however (Vol 33) 1946 Pat 22 (24) : 24 Pat 439 (D B). (In Bihar, an agricultural lease may be created by a *kabulrat* executed by the lessee and accepted by the lessor.)]

[2] Rent-note or a *kabuliat* can evidence a lease subject to its admissibility in evidence. ('11) 14 Cal L Jour 614 (615, 616) (D B) ✠ ('06) 9 Oudh Cas 296 (298, 299) (D B).

[3] An application for the grant of a lease with the endorsement of sanction on such application may be sufficient to create a lease ('04) 27 Mad 43 (44) (D B) ✠ ('81) 7 Cal 703 (707) (F B) ✠ ('06) 33 Cal 502 (504, 505) (D B).

[4] Rent-note or a *kabuliat* can be enforced as a contract against the person executing it (Vol 31) 1944 All 221 (222) : I L R (1944) All 346 (D B) ✠ (Vol 29) 1942 All 330 (330).

8. Agreement varying rent or other terms of lease, whether lease. — [1] An agreement merely varying the amount of rent payable under an existing lease is not itself a lease. ('97) 24 Cal 20 (24) (D B) ✠ Vol 9) 1922 Cal 511 (512) (D B).

[But see (Vol 16) 1929 Lah 291 (292) : 10 Lah 685 (D B). (Where a compromise varies the terms of a registered lease with regard to the rate of rent, the variation amounts to a fresh lease.)]

[2] In the following cases, agreements varying other terms of lease, were held to be leases. ('22) 3 Lah L Jour 14 (17) (Duration of lease extended.) ✠ (Vol 21) 1934 Lah 743 (743). (Document prescribing changes in the manner of holding the property.)

9. Tenancy by acquiescence.— [1] Acquiescence of owner in occupation of his property by third person, by itself cannot create a tenancy. (Vol 16) 1929 Nag 13 (13) ✠ (Vol 2) 1915 Cal 494 (495) (D B).

[2] Acquiescence of owner in occupation of his property by third person may be evidence of a contract of tenancy which may be express or implied (Vol 2) 1915 Cal 494 (495) (D B) ✠ (Vol 4) 1917 Nag 36 (36, 37).

[3] Acquiescence may preclude the owner on the principle of estoppel from denying the occupier's claim to be a tenant. ('05) 29 Bom 580 (610, 611) (D B).

10. Lease and licence.— [1] *Held* a right to take cattle etc., along a defined strip of land was a lease as it possessed the characteristics of an interest in land. (Vol 13) 1926 Nag 174 (174, 175).

[2] Only a right of user not involving possession given—Right amounting to an interest in the property — Such right is not licence. (Vol 20) 1933 All 735 (736) : 55 All 874 (F B).

[3] A licensee cannot sue in his own name in respect of the property. (Vol 13) 1926 Oudh 609 (609, 610).

[4] Where licensee is ousted from the property by the owner, he cannot sue him for possession, unless it be under S. 9 of the Specific Relief Act. (Vol 3) 1916 All 219 (220) : 38 All 178.

[5] Suit for ejectment against licensee — Licensee may obtain a stay of the suit and sue for an injunction against the owner restraining him from suing him for ejectment. (Vol 18) 1931 P C 79 (82) : 58 Cal 1235 : 58 Ind App 91 (P C).

[6] The licensee can sue for damages for wrongful revocation of the licence. ('29) 120 Ind Cas 673 (673) (D B) (Lah).

[7] An irrevocable licence held was a good defence to a suit for ejectment by the owner (Vol 21) 1934 All 517 (519) : 56 All 975 (D B) ✠ (Vol 25) 1938 All 32 (34) (D B) ✠ (Vol 14) 1927 All 342 (344) ✠ (Vol 12) 1925 All 203 (204) ✠ (Vol 2) 1915 All 56 (57) : 37 All 91 (D B) ✠ (Vol 27) 1940 Lah 18 (19) ✠ (Vol 5) 1918 Nag 180 (180).

[8] An instrument granting a licence does not require registration. ('29) 120 Ind Cas 673 (673) (D B) (Lah).

[9] No notice to quit is necessary to determine a licence and to bring a suit for ejectment against the licensee. ('93) 16 Mad 97 (97) (D B) ✠ (Vol 5) 1918 Cal 601 (602) (D B) ✠ (Vol 21) 1934 Rang 291 (292).

[10] A license is not a transferable right. (Vol 22) 1935 Lah 958 (959) : 16 Lah 608 (D B) ✠ (Vol 11) 1924 All 825 (825) (S B).

[11] A licensee is not liable to forfeiture by denial by the licensee of the owner's title. (Vol 12) 1925 All 203 (204) ✠ (Vol 4) 1917 All 395 (396) : 39 All 621.

11. Lease or licence — Tests for determination. — [1] Lease or license— Substance of the transaction must be considered and not merely the nomenclature used by the parties. (Vol 20) 1933 All 735 (737) : 55 All 874 (F B) ✠ (Vol 34) 1947 Cal 236 (238) ✠ (Vol 23) 1936 Pat 362 (368) (D B).

[2] Where only a right of user not involving possession is granted, the right is only a licence. (Vol 17) 1930 Bom 165 (166) (D B) ✠ (Vol 34) 1947 Cal 236 (238) ✠ (Vol 25) 1938 Nag 377 (379, 382) : I L R (1939) Nag 432 (D B) ✠ (Vol 13) 1926 Mad 978 (979) ✠ ('06) 29 Mad 353 (356) (D B) ✠ ('93) 16 Mad 280 (281, 282) (D B) ✠ (Vol 1) 1914 Oudh 272 (273) ✠ (Vol 14) 1927 Bom 115 (117, 122) : 51 Bom 274 (D B)

[3] Right of occupation given but not the exclusive right — Right is only a licence. ('07) 35 Cal 82 (99) (F B) ✠ (Vol 17) 1930 Oudh 203 (204) (D B) ✠ (Vol 10) 1923 Bom 228 (229, 232) ✠ (Vol 12) 1925 Mad 434 (434, 435) : 48 Mad 368 (F B).

[4] Where a right of exclusive possession is given, the right will normally be a lease, although there may be some reservations or restrictions as to the user of the property, provided the general control over the property is in the grantee (1904) 1904 App Cas 405 (408) : 73 L J P C 62 *Glenwood Lumber Co.* v. *Phillips* ✠ (Vol 32) 1945 Pat 200 (202) : 23 Pat 932 (DB) (Government acquiring land under Land Acquisition Act and making it over on payment to Railway Company for user and enjoyment during term of contract — Transaction held lease.) ✠ (Vol 34) 1947 Cal 236 (238) ✠ (Vol 34) 1947 Bom 241 (246) (D B) ✠ (Vol 17) 1930 Bom 165 (166) (D B) ✠ (Vol 12) 1925 Mad 434 (436) : 48 Mad 368 (F B).

[5] Right of exclusive possession given but only personal right (not interest in property) intended to be created— Right held was only a license. (Vol 23) 1936 Pat 372 (377) : 15 Pat 460 (D B) ✠ (Vol 14) 1927 All 720 (721) ✠ (Vol 5) 1918 Nag 180 (180) ✠ ('93) 16 Mad 97 (97) (D B) ✠ (Vol 23) 1936 Pat 362 (368) (D B) ✠ (Vol 21) 1934 Rang 291 (292).

[6] Lease or license—Fact that under the agreement the defendant permits the plaintiff the use of a portion of the premises is conclusive that the status granted in favour of defendant is that of a tenant. (Vol 34) 1947 Cal 236 (238).

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12. Occupation as lodger.—[1] A lodger is not a lessee but only a licensee. (1868) 3 Q B 350 (357) : 37 L J M C 73, *Watkins* v. *Miltonnel Gravesend Overseers* ✠ (1906) 1 K B 60 (67, 68, 70) : 75 L J K B 310, *Kent* v. *Fittal.*

[2] The mere fact that the landlord lives on the premises held not sufficient to hold that a person occupying rooms in the house is only a lodger and not a tenant. (1906) 1 K B 60 (67) : 75 L J K B 310, *Kent* v. *Fittal.*

[3] *A* constructing a building on land of *B* with his consent with the intention that it would be used as study hall by *C*—*Held*, result of putting *C* into possession was not to give him any right in the property — He was not a tenant but a mere licensee. (Vol 29) 1942 Rang 11 (12) (D B).

13. Occupation as tenant or servant. — [1] Suppose a landlord *A* says to *B*, 'I let you my field for Rs. 30 a year in tenancy, and I agree that you shall not pay me any rent in cash, while you work as my agent —Here if *B* accepts, a clear contract of tenancy is created whether *B* serves *A* or not — If *B* did not serve he would be liable to pay Rs. 30 as rent — But suppose *A* says to *B* 'I engage you as my servant on Rs. 30 a year and instead of paying you Rs. 30 in cash I allow you to take the produce of my sir land'—Here, there is no intention to enter into a contract of tenancy and if *B* put an end to the special contract of service, there is no other basis upon which he would be liable to pay rent. ('05) 3 Nag L R 185 (191, 192).

[2] Private servant allowed to cultivate occupancy land in lieu of remuneration — *Held*, he was a tenant. ('02) 15 C P L R 42 (43, 45).

[3] Agent appointed to carry on duties of Mokaddam in village allowed to appropriate usufruct of a particular field in the sir land of the proprietor as his remuneration— No lease. ('05) 3 Nag L R 185 (191, 192).

[4] Person engaged as mukhtyar and given land rent-free in lieu of salary so long as the agency subsisted — Such a person is not a tenant. ('88) 1 C P L R (182, 185).

[5] Person permitted to occupy a house site without payment of rent so long as he did blacksmith's work for the grantor — *Held*, licensee and not tenant. ('92) 16 Mad 97 (97) (D B).

[6] Where an agreement is made between *A* and *B* that *B* should cultivate *A's* land and as his remuneration take a share of the crops and there is no intention to grant *B* an interest in the land, the agreement is not a lease but a license. ('11) 11 Ind Cas 32 (32) (Cal).

14. Market rights. — [1] Where grant of a right to hold a fair or a market on a piece of land gives the grantee the right of exclusive occupation of the land and there is no sufficient reason to hold that only a personal right and not an interest in the property was intended to be granted the grant amounts to a lease. (Vol 17) 1930 Cal 739 (742, 743) : 57 Cal 655 (DB) ✠ (Vol 16) 1929 Cal 197 (199, 200, 201) : 55 Cal 1328 (DB) ✠ (Vol 27) 1940 Cal 89 (91) : I L R (1939) 2 Cal 254.

[2] Where by the grant of a right to hold market or fair the right of exclusive occupation is not given, the grant is only a licence and not a lease. ('08) 35 Cal 82 (93, 100) (FB).

[3] Persons who are allowed to sell articles in a market or on a road are not lessees but only licensees. (Vol 22) 1935 Pat 184 (185) ✠ (Vol 15) 1928 Oudh 99 (100, 101) : 3 Luck 282 ✠ ('08) 35 Cal 82 (89, 91, 99, 100) (FB).

[4] A person, to whom has been granted the right to collect licence fees from persons selling goods in the municipal market, is not a lessee but only a licensee. (Vol 22) 1935 Pat 184 (185).

15. Who can grant a lease.—[1] When nazul is entrusted to the management of Municipal Board the transfer of management confers no proprietary right in property — The lease is executed by Municipal Board as agent of Government that remains the owner. (Vol 30) 1943 All 82 (83).

[2] Vesting of public street in local body does not make it owner of the soil or empower it to grant leases of a public street. (Vol 22) 1935 Lah 953 (958) : 16 Lah 608 (DB).

[3] Person whose land has been compulsorily acquired by the Government cannot grant lease thereof. (Vol 21) 1934 Bom 140 (142) (DB).

[4] A person cannot grant a lease to outlast his own interest. (1900) 27 Cal 156 (162) : 26 Ind App 216 (P C).

[5] Where a lease has been granted by a traspasser and the owner accepts rent from the tenant such acceptance does not amount to a confirmation of the lease. ('03) 27 Bom 515 (531, 532) (DB).

[6] Where a life-tenant grants a permanent lease, the sub-lease is void against the superior landlord after the death of the life-tenant and the landlord cannot ratify it by mere acceptance of rent from the tenant inducted by the life-tenant. (1900) 27 Cal 156 (162) : 26 Ind App 216 (PC). (Acceptance of rent may give rise to inference of fresh tenancy by implication.)

[7] Lease by a Hindu widow in excess of her powers — Acceptance of rent from the tenant by the reversioner after widow's death amounts to a ratification of the lease by the widow. ('98) 25 Cal 1 (8, 9) : 24 Ind App 164 (PC).

[8] *Held*, that a stanamdar in Malabar is entitled to grant a lease for a term exceeding his own life time so as to make it binding on his successor provided the lease is beneficial to the estate. (Vol 8) 1921 Mad 80 (81) : 44 Mad 509 (DB).

16. Lease by de facto proprietor.—[1] A person in possession of a certain immovable property is not entitled to grant a lease of the same when he is not otherwise entitled to do so. And a tenant inducted by such a person can be evicted by the true owner without notice. But such a lessee will have a good title as against persons other than the owner and his privies. (Vol 9) 1922 Pat 429 (431) : 1 Pat 764 (DB) ✠ ('04) 31 Cal 703 (706) (DB).

[2] A person inducted on land as tenant by a *de facto* owner of the property who has no title to it is entitled to the tenancy even as against the true owner where both the grantor and grantee have acted in good faith. ('07) 5 Cal L Jour 9 (14) (FB) ✠ (Vol 1) 1914 Cal 685 (685) (DB) ✠ (Vol 9) 1922 Pat 429 (431) : 1 Pat 764 (DB).

[3] Tenant inducted by person in possession but not entitled to lease has good title against persons other than owner and his privies. ('93) 20 Cal 708 (713) (FB).

17. Lease by or in favour of a minor. — [1] A lease by a minor is void. (Vol 18) 1931 Mad 147 (148, 149).

[2] Minor on attaining majority cannot ratify lease granted as a minor. (Vol 18) 1931 Bom 178 (182) (DB).

[3] Lease granted by guardian of minor in excess of his authority — Lease is not void and the minor can ratify it on attaining majority. *See* ('12) 15 Cal L Jour 220 (222) (DB).

[4] Where a lease in favour of a minor contains covenants to be performed by him, the lease is invalid. (Vol 5) 1918 Pat 626 (627) : 3 Pat L Jour 518 (DB) ✠ (Vol 4) 1917 Mad 630 (645) : 40 Mad 308 (FB).

18 Lease of untransferable property. — [1] Where a lease covers both transferable and untransfer-

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able properties but is separable as regards the two kinds of properties it will be valid with regard to the transferable items. ('09) 19 Mad L Jour 485 (487) (DB)

19. Commencement of lease.—[1] Lease which is to commence at a future date is valid. (Vol 17) 1930 Bom 210 (212 213)✠('13) 1913 Pun L R No. 97, p. 357 (359) (DB) ✠ (Vol 12) 1925 Cal 1087 (1093) : 52 Cal 695.

[2] Lease not void for uncertainty though it does not give date of commencement (Vol 31) 1944 Mad 518 (523, 524) : I L R (1945) Mad 355 (DB).

[3] The mere fact that rent is fixed according to the Bengali year does not mean that the tenancy is to commence from the beginning of the Bengali year and not the date of the lease. (Vol 15) 1928 Cal 392 (396) : 55 Cal 435 (DB).

20. "Certain time."—[1] Uncertainty as to term will be fatal to validity of lease. ('05) 29 Bom 580 (602, 603) (DB).

[2] Period may be implied by law or usage. ('78) 3 Cal 696 (699) (DB).

[3] A lease which is silent as to the duration of its term would not be a lease within the meaning of this section. (Vol 27) 1940 Cal 89 (90) : I L R (1939) 2 Cal 254.

[4] The word "certain" in S 105 means really certain or capable of being made certain at a future date. (Vol 23) 1936 Lah 890 (891) ✠ ('04) 27 Mad 332 (336) (DB).

[5] Words "a certain time" in S. 105 may seem inconsistent with the phrase "a lease of uncertain duration" in S. 108 (i). But the latter phrase is apparently intended to apply to leases from year to year terminable by a notice to quit or life tenancies. (Vol 32) 1945 Pat 162 (167, 168) : 23 Pat 871 (DB).

[6] There may be a valid and legal lease of which the time is not "limited" within the meaning of S. 110. (Vol 30) 1943 Bom 306 (310) : I L R (1943) Bom 553 (DB).

[7] A lease for the life-time of the lessee is a valid lease. ('36) 164 Ind Cas 837 (839) (Cal).

[8] A lease to continue during the existence of certain institutions is valid. (Vol 18) 1931 Bom 466 (471) (DB) ✠ (Vol 18) 1931 Bom 178 (181) (DB).

[9] A lease till the lessor provided other suitable land to the lessee was held in the circumstances of the case uncertain as to the period of the lease and was therefore void. ('05) 29 Bom 580 (602, 603) (DB).

[10] A lease for a day is valid. (Vol 11) 1924 Rang 278 (279) (DB).

21. Term of lease—Determination.—[1] A lease for an indefinite period is ordinarily to be construed as enuring at least for the life-time of the lessee. (Vol 14) 1927 Cal 179 (181, 182) (DB) ✠ (Vol 8) 1921 Cal 474 (476) : 47 Cal 979 (DB)

[2] The fact that a yearly rent is reserved may show that the tenancy is one from year to year. ('97) 24 Cal 720 (722, 724) (DB) ✠ (Vol 13) 1926 Cal 558 (558) : 53 Cal 95 (DB).

[*See* ('13) 24 Mad L Jour 75 (78) (DB)]

[3] Presumption of yearly tenancy from the rent being paid yearly does not apply to the case of lodgings. (Vol 3) 1916 Cal 358 (359) : 44 Cal 403 (DB).

[4] Though a yearly rent was reserved, the lease was held to be merely a tenancy at will. ('29) 31 Bom L R 335 (338).

[5] Where the future event with reference to which the term of a lease is fixed is uncertain in character and it cannot be said at any time whether such event has occurred, it must be held that the parties have fixed a term of the lease. But the lease will be void for uncertainty. ('05) 29 Bom 580 (604) (D B).

22. Lease entitling lessee to hold as long as he pays rent or as long as he may wish. —[1] On the construction of leases entitling lessee to hold as long as he pays rent or as long as he may wish, following views are expressed :

(a) Such a lease is a permanent and heritable one. (Vol 13) 1926 Bom 374 (374, 375) (DB). (Disapproved in (Vol 30) 1943 Bom 148)

(b) Such a lease is one for the life of the lessee (Vol 30) 1943 Bom 148 (149) (DB) ✠ ('25) 90 Ind Cas 832 (833) (D B) (Cal) ✠ ('77) 1877 Bom P J 177 (D B) ✠ (Vol 26) 1939 Cal 423 (424, 425) (D B).

(c) Such a lease is one for a period exceeding one year and requires registration ('22) 3 Lah L Jour 14 (17) ✠ (1900) 2 Bom L R 488 (489) (D B).

(d) Such a lease is not one for a term exceeding five years within the meaning of the proviso to S. 17, sub-section (1) of the Registration Act. ('04) 27 Mad 43 (44) (DB).

(e) Such a lease is a tenancy at will. Such a lease is really a tenancy at the will of the lessee, which by implication of law, is a tenancy at the will of both the parties ('13) 36 Mad 557 (558) (D B)✠('86) 8 All 198 (200) (D B) ✠ (Vol 28) 1941 Pat 228 (230) : 20 Pat 115 (D B).

[2] An agreement by the lessor not to raise the rent, so long as the lessee kept the premises, does not imply that the lessee is to be entitled to keep the premises as long as he wishes. ('13) 1913 Pun L R No. 180, p. 604 (607) (DB).

[3] Lease which merely says that the lessor will be entitled to eject the tenant in case of non-payment of rent does not necessarily imply that the tenant could not be ejected so long as he paid his monthly rent. (Vol 15) 1928 Lah 937 (938).

[But see (1900) 2 Bom L R 488 (489).]

23. Lease for a term certain with a provision for continuation thereafter. — [1] Lease granted for a term certain—After expiry of the term lessee entitled, at his option, to continue to hold for a further period—Lease is only for the term fixed and the further period is not to be counted as a part of the term. ('86) 8 All 198 (200) (D B) ✠ ('06) 8 Bom L R 580 (583) (D B)✠ ('90) 17 Cal 548 (555, 556) ✠ (Vol 19) 1932 Sind 217 (218, 219) : 26 Sind L R 377 (DB)

[See however ('86) 1886 Pun Re No. 68, p. 144 (149) (D B).]

[2] Where the right of the lessee to continue in possession after the expiry of the term fixed is subject to the concurrence of the lessor, the lease is to be treated as one for the period fixed. ('77) 26 Suth W R 98 (98) (D B) ✠ ('84) 8 Bom 493 (494) (D B) ✠ ('78) 3 Bom 21 (22) (DB) ✠ ('86) 1886 Pun Re No. 68, p. 144 (149) (D B).

[3] Where the intention is to confer a further interest on the lessee in continuation of the interest created in the first instance and not merely an option of obtaining a renewal the lease is one for a period exceeding that fixed therein as the primary term ('86) 13 Cal 113 (114) (D B) ✠ ('36) 164 Ind Cas 55 (56, 57) (Cal).

[4] Lease for five years with provision for enhanced payment of rent in case lessee continued in possession thereafter — *Held*, on construction that it was only a lease for five years. (Vol 18) 1931 Nag 128 (128).

[5] The mere fact that clause in lease deed for fixed term provides for payment of damages by way of enhanced rent for use and occupation after the term does not mean that the relationship of landlord and tenant continues in such case; tenant is liable to ejectment after the period. (Vol 21) 1934 Lah 129 (130) (D B).

[6] Where a lease was granted for a period of years and contained a provision that the lessee might continue in possession thereafter as long as he performed

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the conditions of the lease. Held that the lease conferred a life-interest on the lessee (Vol 16) 1929 Bom 66 67) (D B) ✠ ('07) 11 Cal W N 809 (811) (D B).

24. Lease expressed to be terminable before end of term fixed.—[1] A lease, which fixes a certain period as the term thereof but provides that it may be terminated before the end of the term in a certain contingency, is a good lease (Vol 26) 1939 Bom 215 (219, 220) : I L R (1939) Bom 320.

[2] Lease for five years, with clause for termination before in certain event : *Held* lease was for period exceeding one year. (Vol 9) 1922 Cal 436 (437, 438) : 49 Cal 507.

[3] Lease for 30 years determinable at the will of the lessor—*Held*, lessee was liable to be ejected at the will of the lessor. (Vol 10) 1923 All 382 (383).

[4] Lease for six years and reserving yearly rent and providing that it is determinable at any time by lessor by giving 15 days notice—*Held* that later clause prevailed and nothing more than tenancy at will was created. ('86) 8 All 405 (408) (DB).

25. Periodic leases.—[1] A lease which can be determined without notice, is not ordinarily a periodic lease. ('90) 14 Bom 319 (320) (DB). (Lease held to be tenancy at will, although an annual rent was reserved.)

[2] A lease which can be terminated by the lessor at any time is a tenancy at will and not a lease from year to year, although an annual rent may be reserved under the lease. ('29) 31 Bom L R 335 (338).

[3] A lease providing that it is determinable at 15 day's notice—Lease is not necessarily one from month to month. ('86) 8 All 405 (408) (DB).

[4] Patta granted for one fasli to remain in force until another patta was granted—*Held*, it was a lease from year to year. ('81) 3 Mad 358 (359) (DB).

[5] Mere fact that the rent is fixed on an annual basis will not necessarily show that a lease is one from year to year. (Vol 12) 1925 Pat 256 (257) (DB) ✠ (Vol 8) 1921 Lah 96 (96).

[6] A characteristic of periodical tenancy is that as each period commences, it is not a new tenancy : it is really an accretion to the old tenancy. (Vol 30) 1943 Bom 306 (309) : I L R (1943) Bom 553 (DB).

[7] Lease from month to month or from year to year—Tenant holding such a tenancy has an interest for one year or one month certain as the case may be with an accruing interest during every year or month thereafter springing out of the original contract as part and parcel of it. (Vol 27) 1940 Cal 89 (91) : I L R (1939) 2 Cal 254.

26. Tenancy at will.—[1] Tenant having no power to alienate his right of residency without permission of owner of site, selling it—Owner receiving rent from purchaser—No document executed to witness tenancy —Purchaser is tenant at will—Such a tenant can be evicted at any time. (Vol 29) 1942 Pesh 74 (75) (DB).

[2] Lease expressed to be for six years but determinable at any time by fifteen days' notice by lessor—*Held*, lease was tenancy at will—The later clause was held to override the previous clause as to the term of the lease being six years. ('86) 8 All 405 (408) (DB).

[3] A tenancy at will arises by implication of law in cases of permissive occupation—Where the tenancy is created by express contract between the parties there is no scope for characterising the tenancy as one at will. (Vol 29) 1942 Cal 341 (341, 342) (DB).

[4] Terms of holding as between landlord and tenant are matter of contract—In the absence of express agreement, if the owner lets another into possession and the latter pays rent a tenancy at will or from year to year is created. ('78) 3 Cal 696 (699) (D B).

[5] Where in a lease deed besides the use of the expression 'bemiadi thica patta' the lease is granted to the lessee and his heirs and they are to pay rent to the lessor and to his disciples and the rent payable is referred to as 'a fixed rent' and moreover the lease permits the lessee not only to enjoy the property himself in any manner he thinks proper by holding it in direct possession by planting orchards cultivating it, building houses but also to let to tenants as he thinks fit the lease is a permanent lease and does not create tenancy terminable at the will of the landlord by a notice to quit. (Vol 23) 1936 Pat 275 (281, 282) (DB).

[6] Lease for one year providing that thereafter the lessee shall pay the annual rent regularly every year— Subsequent to the year, there is only a tenancy at will. ('86) 8 All 198 (200) (DB).

[7] *A* occupying *B*'s land with his permission but without paying rent — *A held* was a tenant at will. (Vol 13) 1926 Sind 71 (74) : 21 Sind L R 185 (DB).

[8] Living on premises without payment of rent, on account of business and family relationship — *Held*, a tenancy at will was constituted. (Vol 13) 1926 Sind 98 (100).

[9] A tenancy at will can be terminated by the lessor by a simple demand for possession. ('07) 34 Cal 57 (63, 64) (DB) ✠ (Vol 12) 1925 Pat 256 (258) (DB) ✠ (Vol 20) 1933 Pat 561 (562) (DB)

[10] A tenancy at will can be terminated by the lessee by simply communicating to the lessor his intention to give up the lease and actually vacating the property. (Vol 7) 1920 Lah 217 (217) ✠ (Vol 13) 1926 Sind 71 (74, 75) : 21 Sind L R 185 (DB).

[11] A tenancy at will is not a lease under this section. (Vol 27) 1940 Cal 89 (91) : I L R (1939) 2 Cal 254 ✠ (Vol 20) 1933 Pat 561 (562) (DB).

[12] A tenancy at will is not a heritable or transferable interest. (Vol 29) 1942 Pat 397 (401) (DB). (Heritable) ✠ (Vol 25) 1938 Nag 506 (509) : I L R (1940) Nag 269 (DB) (Do.) ✠ (Vol 27) 1940 Cal 89 (91) : I L R (1939) 2 Cal 254. (Do) ✠ (Vol 20) 1933 Pat 561 (562) (DB). (Transferable)

[13] A tenancy at will is not a lease for a period exceeding one year for registration. ('90) 14 Bom 319 (320) (DB).

27. Lease for life. — [1] A lease granted for the life of two persons enures till the death of the survivor of them. (Vol 11) 1924 Pat 572 (573) : 3 Pat 534 (DB).

[2] A lease for life is regarded as one for a period exceeding one year for the purpose of registration. ('94) 18 Bom 109 (110) (DB).

28. Lease with a clause for renewal— General.— [1] The provision for renewal only entitles the lessee to obtain a new lease in his favour after the expiry of the original term ('78) 5 Ind App 164 (168) (PC).

[2] Tenancy for term of years— Renewal clause — Option to renew not exercised by tenant before expiry of tenancy— Tenancy held became annual after expiry of period of lease — Tenant held liable to be ejected. (Vol 31) 1944 Bom 210 (212).

[3] Death of lessee before expiry of the term of the lease with a clause for renewal—His heirs in possession at the time of the expiration of the term — Heirs are entitled to obtain renewal. (Vol 12) 1925 Cal 516 (517, 518) (DB).

[4] Where covenant for renewal is conditional, covenant for renewal cannot be enforced if at the time of renewal there is a subsisting breach of the conditions by the lessee. (Vol 5) 1918 Cal 59 (61) (DB).

[5] If the lease does not state at whose option the lease is to be renewed, it is exercisable by the lessee only. ('12) 16 Cal L Jour 217 (222) (DB). (Option may be exercised by lessee personally or his representative in interest.)

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[6] Where time was of the essence of the contract the lessee must exercise the option before the expiry of the lease. ('05) 27 All 696 (698) (DB) ✠ (Vol 5) 1918 Cal 59 (61) (DB).

[7] Where a lease confers a right on the lessee to apply for renewal and no time is fixed for it the lessee will not necessarily lose his right of renewal by not having made the application within the currency of his term if he continues in possession afterwards with the sanction of the lessor. (Vol 20) 1933 Cal 477 (480) (DB)

[8] Lessee being in a position to enforce covenant for renewal on the expiry of first lease — Fact that lease was not renewed may, in the absence of an explanation, raise a presumption that lessee abandoned his right of renewal (Vol 6) 1919 Cal 972 (973) (DB)

[9] Execution of fresh lease dependent on re-assessment at the instance of lessor — It is for the lessor to make re-assessment and then call upon tenant to exercise his option— Lessor bound to give notice to the lessee for exercising the option before he can treat the lease as determined. (Vol 25) 1938 Cal 724 (726, 727) (DB)

[10] Lessee entitled to renewal not asking for same but continuing in possession and willing to do his part —Option not lost by laches. (Vol 8) 1921 Mad 541 (541) : 44 Mad 230 (DB).

[11] The period, for which the lease is to be renewed is the same as the original period unless it is otherwise provided for in the lease ('78) 5 Ind App 164 (169) P C).

[12] Terms of renewal should *prima facie* be same as original except clause for renewal. (Vol 26) 1939 Cal 77 (78) ✠ (Vol 25) 1938 Cal 724 (727) (DB).

[13] There is no presumption that, unless a contrary intention is shown, the lessee will have an option of renewal. (Vol 2) 1915 P C 59 (63) : 39 Bom 625 : 42 Ind App 229 (P C).

[14] An express covenant to renew in appropriate technical language is not essential. ('12) 16 Cal L Jour 217 (221, 222) (DB).

[15] A clause for the perpetual renewal of a lease is valid. (Vol 8) 1921 Mad 541 (541, 542) : 44 Mad 230 DB) ✠ ('07) 30 Mad 300 (303) (DB).

[16] A perpetual lease and a lease with a clause for perpetual renewal are not the same. (Vol 25) 1938 Cal 724 (726) (DB)

[17] The right of renewal is a privilege granted to the lessee and therefore the renewal can only be of the contract as made. For example, if the contract is made with tenants, one of them cannot enforce the contract, or where the position of the parties changes, the renewal cannot be enforced. (Vol 16) 1929 Cal 50 (55) : 55 Cal 841 (DB).

[18] Covenant for renewal in a lease for 99 years "upon such terms and conditions as shall be judged reasonable" held not too vague to be enforced. (Vol 14) 1927 Mad 513 (521) : 50 Mad 595 (DB).

[19] A lease of land provided, among other things, "this lease shall and may be renewed for a further term of 99 years upon such terms and conditions as shall be deemed reasonable". Before expiry of the term the lessees transferred their interest in a portion of the property and after expiry claimed renewal in virtue of the above clause: *Held* on construction that the covenant only applied to the premises as a whole and that since lessees lost interest in a portion of the property, the circumstances did not justify a renewal of the lease. (Vol 15) 1928 P C 258 (260) : 51 Mad 885 : 55 Ind App 423 (P C). ((Vol 14) 1927 Mad 513 : 50 Mad 595, *Reversed.*)

[20] A covenant for renewal does not operate as a present demise but is a mere contract which can be given effect to, by enforcing specific performance only, in case of refusal to perform it by the lessor, and as the contract of lease and the covenant for renewal are two separate contracts the ratification of the lease does not necessarily amount to a ratification of the covenant for renewal. (Vol 16) 1929 Cal 50 (54, 55) : 55 Cal 841 (DB).

[21] Where the covenant in a lease as to further settlement with the lessee after the expiration of the lease, was subject to the pleasure of the lessor, it was held that covenant was not one for renewal. (Vol 34) 1947 Cal 378 (381) (DB).

29. Covenant for renewal — Enforceability against assignee from lessor or lessee.—[1] A covenant for renewal in a lease is a covenant running with the land (Vol 14) 1927 Mad 513 (521, 522) : 50 Mad 595 (DB) ✠ (Vol 8) 1921 Mad 541 (541) : 44 Mad 230 (DB) ✠ (02) 25 Mad 3 (6) (FB).

See also Notes under S. 40.

[2] A covenant for renewal contained in a lease granted by a Hindu widow does not bind the reversioners. (Vol 24) 1937 All 328 (331) (DB)

[3] Assignee of a lease can enforce a covenant for renewal. ('12) 16 Cal L Jour 217 (223) (DB) ✠ (Vol 12) 1925 Nag 281 (283) : 23 Nag L R 26 ✠ ('63) 9 Moo Ind App 431 (445) (PC).

[4] Tenancy with a covenant for renewal—Tenancy renewed under S. 116 — Assignee of such tenancy also entitled to an option of renewal. (Vol 14) 1927 Cal 725 (730) : 54 Cal 813 (DB).

[5] A mortgagee other than an English mortgagee is not an assignee of the lease. (Vol 14) 1927 Cal 100 (102) (DB) ✠ (Vol 14) 1927 Cal 725 (729 to 733) : 54 Cal 813 (DB).

[6] An independent contract is not enforceable against transferees without notice. ('02) 25 Mad 3 (6) (FB).

30. Lessee holding over after expiration of lease—General.—[1] Lessee holding over after expiry of lease is known as tenant by sufferance. ('98) 22 Bom 895 (898) (DB) ✠ (Vol 20) 1933 All 756 (758) (DB) ✠ ('10) 37 Cal 674 (678) (DB).

[2] Tenancy by sufferance is merely a fiction to avoid continuance in possession operating as a trespass — It cannot be created by contract and arises by implication of law when a person who has been in possession under a lawful title continues in possession after that title has determined without the consent of the person entitled. (Vol 29) 1942 Cal 341 (341) (DB).

[3] Expression "tenant by sufferance" does not imply any existing tenancy (1900) 24 Bom 504 (508) (DB) ✠ ('09) 31 All 514 (517) (DB).

[4] Tenant by sufferance can be sued in ejectment without any notice to quit or any demand for possession. (Vol 20) 1933 All 756 (758) (DB) ✠ (98) 22 Bom 893 (898) (DB) ✠ (Vol 8) 1921 Cal 574 (575) (DB) ✠ (Vol 10) 1923 Pat 130 (131) : 2 Pat 171 (DB) ✠ ('09) 31 All 514 (517) (DB).

[5] Tenant by sufferance cannot be dispossessed by landlord otherwise than by due course of law. ('68) 9 Suth W R 123 (124) (DB) ✠ ('05) 29 Bom 213 (216) (DB)

[6] Lessee holding over after expiry of term without lessor's assent—Possession constitutes good title except against true owner. (67) 8 Suth W R 386 (390) (DB).

[*See also* (Vol 34) 1947 Pat 78 (80). (Lessee holding over after expiry of lease—Lease to *C* found invalid — *C* cannot succeed against lessee holding over though lessor supports *C*'s claim.)]

[7] Lease providing for damages till date of vacating property in case of lessee holding over after expiry

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of lease — Relationship of landlord and tenant does not subsist after expiry of lease. (Vol 21) 1934 Lah 129 (130) (DB).

31. Lessee holding over after expiration of lease — Renewal clause in lease, effect of. — [1] Lessee holding over after expiration of lease—Renewal clause—Suit for ejectment—Covenant for renewal held a good defence. ('12) 15 Cal L Jour 672 (674) (DB) ✠ (Vol 10) 1923 Pat 236 (237, 238) (DB).

[2] Where lessor seeks to turn out lessee before expiry of period for renewal, following views have been expressed:

(a) Lessee can compel lessor to renew lease. ('77-78) 5 Ind App 164 (168) (PC).

(b) Lessee in such cases has an estate in the property. (Vol 18) 1931 Bom 178 (181) (DB)✠(Vol 14) 1927 Cal 725 (730) : 54 Cal 813 (DB).

(c) Lessee is in the same position as if promised renewal has been made (Vol 10) 1923 Pat 236 (238) (DB) ✠ (Vol 8) 1921 Cal 574 (575) (DB) ✠ ('12) 16 Cal L Jour 217 (224) (DB).

[3] Where a lessee has been allowed to be in possession of the property for the full term for which renewal had been promised, he cannot thereafter rely on the covenant for renewal in defence to the suit for ejectment by the lessor. ('78) 5 Ind App 164 (169) (PC).

[4] Where a lessee holds over after the expiry of his term and the landlord assents to his doing so, the effect is not to renew the lease for the full period provided under the covenant for renewal but only from year to year or from month to month according to the purpose of the tenancy. (Vol 14) 1927 Cal 725 (729) : 54 Cal 813 (DB).

32. Lessee holding over after expiry of lease—Basis of liability for compensation. — [1] Where a lessee holds over after a lease has expired, and the landlord has not assented to such holding over, lessee is liable for mesne profits from the date of the determination of the lease. (Vol 10) 1923 Bom 398 (398) (DB) ✠ (Vol 2) 1915 Low Bur 47 (48) : 8 Low Bur Rul 270.

[2] Lessee holding over after expiry of lease without landlord's assent, lessee is not liable for use and occupation. ('10) 12 Cal L Jour 612 (614) (DB) ✠ (Vol 2) 1915 Low Bur 47 (48) : 8 Low Bur Rul 270.

[3] Lessee entitled to remain in possession after expiration of lease till payment of value of improvements — He is liable not for mesne profits but only for rent at rate fixed under the lease. (Vol 17) 1930 Mad 434 (438, 439).

[4] Lessee holding over after expiry of lease — Landlord not assenting — Liability for compensation is *ex delicto* (Vol 22) 1935 Mad 307 (308)✠(Vol 4) 1917 Mad 901 (902) : 39 Mad 54 (DB) ✠ ('99) 26 Cal 338 (347) (SB).

33. Permanent tenancy — Onus of proof.—[1] Where the relationship of landlord and tenant is established between two persons and the tenant claims that the tenancy is a permanent one, it is for the tenant to establish that by agreement, custom or law his tenancy is permanent. (Vol 7) 1920 P C 67 (69) : 43 Mad 567 : 47 Ind App 76 (PC) ✠ (Vol 16) 1929 P C 156 (157): 52 Mad 549: 56 Ind App 248 (PC) ✠(Vol 11) 1924 P C 65 (66) : 47 Mad 337 : 51 Ind App 83 (PC) ✠(Vol 34) 1947 Mad 88 (89).

[2] Where the entire evidence on both sides is once before the Court, the question as to onus of proof is not material and the issue as to permanence will be determined on the evidence before the Court. (Vol 9) 1922 P C 292 (302) : 45 Mad 586 : 49 Ind App 286 (PC) ✠ (Vol 7) 1920 P C 67 (69) : 43 Mad 567 : 47 Ind App 76 (PC).

[3] Where a tenant sets up a permanent tenancy but fails to establish his claim, he can fall back upon any lesser title which may be proved. ('90) 13 Mad 249 (253) (DB).

34 Permanent tenancy—Construction of leases. —[1] Where the document creating tenancy is ambiguous or of doubtful import, the Court is entitled to take into consideration the surrounding circumstances and the mode of enjoyment of the property and the actings of the parties in coming to a conclusion that a permanent interest has been granted. ('75) 24 Suth W R 176 (177) (PC).

[2] Where the meaning of the document creating tenancy is clear, the Court must confine itself to the words used in the instrument. (Vol 16) 1929 Pat 376 (381) (DB) ✠ (Vol 18) 1931 Cal 160 (162) (DB) ✠ (Vol 6) 1919 Mad 338 (339) (DB).

[3] Words providing that the lessee is to enjoy the property from generation to generation *prima facie* indicate a permanent right. (Vol 31) 1944 Nag 280 (281): I L R (1944) Nag 838 (DB) ✠ (Vol 12) 1925 Pat 228 (234, 235) (DB) ✠ (Vol 10) 1923 Cal 351 (352) (DB) ✠ (Vol 6) 1919 Mad 338 (338)(DB) ✠ ('76) 1 Cal 391 (398): 3 Ind App 92 (PC) ✠ (Vol 13) 1926 Cal 533 (535) : 53 Cal 270 (DB).

[4] Absence of words providing that lessee is to enjoy property from generation to generation, is a factor against permanence. ('67) 11 Moo Ind App 433 (463, 466) (PC) ✠ (Vol 17) 1930 Mad 434 (435, 436, 437).

[5] Presence or absence of words providing that lessee was to enjoy property from generation to generation is not conclusive (Vol 13) 1926 Oudh 72 (74) ✠ (Vol 12) 1925 Mad 732 (733)✠(Vol 13) 1926 Oudh 260 (261)✠('86) 12 Cal 117 (130) : 12 Ind App 205 (PC).

[6] The fact that a lease has been granted for the purpose of reclamation does not necessarily prove the lease to be permanent. ('82) 8 Cal 664 (673):9 Ind App 33 (PC).

[7] Where a lease has been granted for the purpose of erecting buildings, the fact may indicate that the lease is a permanent one. ('05) 32 Cal 648 (651) (DB)✠ (Vol 22) 1935 All 492 (493) (DB)✠(Vol 1) 1914 Cal 300 (300) (DB).

[8] Where the terms of a lease and other circumstances indicate on the whole the grant of a permanent lease, the mere fact that the lease contains a provision for forfeiture in case of non-payment of rent or for other reason does not make the lease not permanent. ('10) 37 Cal 918 (927) : 37 Ind App 198 (PC).

[9] Though a clause restraining transfer is *prima facie* inconsistent with the grant of a permanent right, it is not conclusive. (Vol 19) 1932 Cal 764 (766) : 59 Cal 1282 (DB) ✠ (Vol 13) 1926 Cal 533 (535) : 53 Cal 270 (DB)✠(Vol 4) 1917 Cal 746 (783):43 Cal 332 (SB)✠ ('89) 13 Bom 373 (375) (DB).

[10] Though the fixing of rent without any liability for enhancement may suggest permanence, such liability for enhancement does not necessarily import that the lease is not permanent. (Vol 18) 1931 P C 207 (209) (PC).

[11] A substantial premium suggests permanence. (Vol 18) 1931 P C 207 (209) (PC).

[12] A clause which throws the entire cost of improvements on the lessee may indicate some degree of continuity but not necessarily perpetuity. (Vol 4) 1917 Cal 746 (783) : 43 Cal 332 (SB) ✠ (Vol 17) 1930 Mad 434 (437).

[13] The word bemiad simply means "without any term" It does not in itself import a permanent lease. But along with other circumstances it may indicate such lease. (Vol 18) 1931 P C 207 (209) (PC).

[14] The words putra poutradi krame support the theory of permanence. (Vol 10) 1923 Cal 505 (505)

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(DB)✠(Vol 3) 1916 Cal 664 (665) (DB) ✠ (Vol 13) 1926 Oudh 260 (261).

[15] A permanent tenancy may be created without the use of any words of inheritance although if the intention be to create a permanent tenancy one would expect to find a reference to heirs or successors. (Vol 30) 1943 Bom 148 (149) (DB).

[16] The term mirasi denotes heritability and permanence of tenure. (Vol 10) 1923 Cal 705 (706) (DB) ✠ ('91) 15 Bom 407 (408) (DB) ✠ ('94) 18 Bom 507 (511) (DB).

[17] The term mourasi implies a permanent hereditary tenure. (Vol 16) 1929 Cal 454 (456); 56 Cal 180✠ (Vol 5) 1918 Cal 459 (459) (DB).

[18] The words istimrari mokarari do not in themselves import the idea of heritability. (Vol 15) 1928 P C 146 (148) : 7 Pat 649 : 55 Ind App 212 (PC)✠(1900) 27 Cal 156 (165, 166) : 26 Ind App 216 (PC)✠('86) 12 Cal 117 (130) : 12 Ind App 205 (PC).

[19] Words "Istimrari mokarari" may establish a permanent and heritable right, when there are also other factors indicative of such right. ('76) 1 Cal 391 (398) : 3 Ind App 92 (PC) ✠ ('72) Ind App (Sup Vol) 181 (186) (PC).

[20] The word purakudi does not imply a permanent occupancy right. ('04) 27 Mad 291 (299) : 31 Ind App 83 (PC).

[21] The expression ulavadai does not import a permanent tenancy. ('99) 22 Mad 264 (267) (DB).

[22] Mulgeni is a permanent lease. ('10) 33 Mad 253 (254) (DB)✠('91) 15 Bom 407 (413) (DB).

[23] Taluk imports a permanent tenure. ('22) 65 Ind Cas 145 (150)(DB)(Cal)✠(Vol 5) 1918 Cal 799 (800) (DB)✠(Vol 8) 1921 Cal 474 (475, 476) : 47 Cal 979.

[24] The word zamindari implies a permanent lease. ('03) 25 All 1 (15) : 29 Ind App 203 (PC).

35. Permanent tenancy — Circumstantial evidence as to—General.—[1] Long possession, transfers by succession or sale, buildings of pacca structures with landlord's permission, the landlord having acquiesced in or having knowledge of the successive transfers, etc. All these raise the presumption of permanency, although the origin of the tenancy may not be known. (Vol 6) 1919 P C 11 (11) : 47 Cal 1 : 1919 Pun Re No. 81 : 46 Ind App 131 (PC).

[2] The question whether a permanent tenancy can be inferred from circumstances is a question of law (Vol 28) 1941 Pat 228 (231) : 20 Pat 115 (DB) ✠ (Vol 14) 1927 P C 102 (105) : 8 Lah 573 : 54 Ind App 178 (PC).

36. Circumstantial evidence as to permanent tenancy — Long and undisturbed possession at fixed rent. — [1] Long and undisturbed possession at fixed rent is not by itself sufficient to establish a claim of permanent tenancy. (Vol 11) 1924 P C 65 (67) : 47 Mad 337 : 51 Ind App 83 (PC)✠(Vol 16) 1929 P C 156 (158) : 56 Ind App 248 : 52 Mad 549 (PC) ✠ (Vol 34) 1947 Mad 88 (88).

[2] When the origin of the tenancy is not known, long and uninterrupted possession at unvarying rent is not sufficient by itself to give rise to an inference of permanency. (Vol 16) 1929 Cal 37 (42) : 56 Cal 738 (DB)✠('98) 25 Cal 896 (908) (FB).

[But see (Vol 17) 1930 Bom 39 (43) (DB)✠(Vol 11) 1924 Mad 833 (834) ✠ ('89) 16 Cal 223 (231, 232) : 16 Ind App 6 (PC)✠('07) 31 Bom 183 (201, 202) (DB).]

[3] Length of possession at a fixed rent when it co exists with other factors may give rise to an inference of permanence of tenancy, especially if the origin of the tenancy is not known. (Vol 31) 1944 Pat 109 (110) ✠ (Vol 26) 1939 Pat 448 (450, 451) : 18 Pat 571 (DB) ✠ (Vol 7) 1920 Cal 325 (326)(DB)✠ Vol 6) 1919 Mad 1135 (1137, 1138) (DB).

[4] Where the value of the property in the locality has gone up very high and the rent fixed is comparatively low, the fact that it has not been raised may suggest that the tenancy is a permanent one. ('07) 34 Cal 902 (907, 908) : 34 Ind App 160 (PC).

[5] The fact that the rent paid has not been uniform or that the possession of the tenant has been interrupted, is a factor which will weaken a claim of permanent tenancy. (Vol 14) 1927 P C 102 (105) : 8 Lah 573 : 54 Ind App 178 (PC).

37. Circumstantial evidence as to permanent tenancy — Lease for dwelling or residential purpose.—[1] Lease for building a gola house and a platform for rice mill—Lease for indefinite period—Lessee not to sell residential rights without permission of landlord—Lease was held to be permanent. (Vol 27) 1940 Pat 24 (25) : 18 Pat 805 (DB).

[2] Land leased for residential purposes—Unaltered rent paid for 57 years—Pucca structures—Presumption of permanent tenancy. (Vol 15) 1928 Cal 315 (320) : 55 Cal 355 (DB).

[3] Origin not known — Lessee constructing pucca house — Tenancy transferred from time to time and landlord acquiescing in the transactions — Landlord's suits against other tenants dismissed on ground that tenancies were permanent — Inference is that tenancy is permanent. (Vol 10) 1923 All 486 (487).

[4] Permanent works beyond those agreed upon at time of the lease constructed — Landlord encouraging their erection in circumstances leading lessees to believe that they are accepted as permanent tenants — New erection would raise an equitable estoppel against ejectment. (Vol 6) 1919 Nag 144 (147).

[5] Lease originally granted for building and manufacturing purposes at fixed annual rent—Lessee and his successors in possession for long time during which transfers taking place without objection by zamindar—Lease must be deemed to be perpetual with transferable and heritable rights — Mere fact of land being subsequently cultivated does not affect nature of original lease (Vol 28) 1941 All 51 (54, 55) : I L R (1941) All 27 (DB).

[6] Tenancy created before Transfer of Property Act — Permanent structures standing on land for many years—Transfers in past—No change in rent—Tenancy is permanent and transferable. (Vol 24) 1937 Cal 373 (374).

[7] Lease for 99 years— There is nothing strange if pacca structures are built by grantee because in such a case the structures would be built in the expectation that the lease would be renewed even though at a higher rent on the termination of the period. (Vol 29) 1942 Bom 161 (171): I L R (1942) Bom 357 (DB).

[8] Land let out by Government for building without mention of duration of terms — Tenancy is at will — It becomes one from year to year on payment of rent. (Vol 24) 1937 Pat 399 (406) (DB).

[9] Tenancy found to be for residential purposes — Origin of tenancy unknown — Rent not varied—Proof of one or two transfers — Inference that tenancy was in its origin of a permanent character does not arise. (Vol 23) 1936 Cal 100 (101).

[10] A constructing building on *B*'s land knowing that it belongs to *B* in the expectation that building would be occupied by *C*—This does not give *C* permanent right of occupancy as against *B* unless it can be proved that before its construction *B* agreed with *A* that *C* should have such a permanent right. (Vol 29) 1942 Rang 11 (12) (DB).

38. Circumstantial evidence as to permanent tenancy—Successions and transfers.— [1] The fact

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that a tenancy has been held in the same family from generation to generation would be some indication that tenancy is permanent. ('26) 96 Ind Cas 315 (315) (DB) (Cal).

[*See also* (Vol 16) 1929 Cal 37 (40): 55 Cal 738 (DB). (*Held* not a strong indication.)]

[2] The fact that a tenancy is not shown to be hereditary weakens case for permanency. (Vol 24) 1937 Pat 391 (393, 394) (DB).

[3] Fact that there have been transfers of the holding which have been recognised by the landlord is strong indication of the tenancy being permanent. ('07) 34 Cal 902 (907) : 34 Ind App 160 (P C)⁂ ('05) 32 Cal 51 (60, 61) : 31 Ind App 149 (P C.) (*Reversing* (02) 6 Cal W N 352,) ⁂ ('05) 32 Cal 41 (49, 50) : 31 Ind App 144 (PC).

[4] Documents reciting transfers and sub-leases are admissible to show that lease is permanent. (Vol 27) 1940 Cal 393 (394).

[5] The mere retention of the name of the old tenant for the purpose of identifying the holding in the sherista of the landlord is not in itself sufficient to indicate that there was no recognition by the landlord that the tenancy was heritable and transferable. ('12) 15 Ind Cas 110 (115) (DB) (Cal)

[6] Where the transfers are recent and not such as to have come to the notice of the landlord they will not be evidence against him suggesting a permanent tenancy. (Vol 16) 1929 P C 156 (158): 56 Ind App 248: 52 Mad 549 (PC).

39. Consideration for lease.—[1] Where the consideration for the transfer is not either premium or rent as defined by the section the transaction will not be a lease. (Vol 24) 1937 Mad 882 (893) : I L R (1937) Mad 638 (FB)⁂(Vol 9) 1922 Oudh 201 (201) : 25 Oudh Cas 39.

[2] Where a lease is granted in consideration of the lessee buying certain goods or accepting certain services from the lessor and paying for them at a certain rate, the lease is not granted in consideration of the money to be so paid and such money is not rent. (Vol 21) 1934 Cal 803 (807) : 61 Cal 556 (SB).

[3] Under the Central Provinces Tenancy Act, a tenancy held could be created without consideration. (Vol 12) 1925 Nag 90 (92).

40. 'Price paid or promised."—[1] "Price" means money only. (Vol 24) 1937 Mad 882 (887): ILR (1937) Mad 638 (FB).

[*See* (Vol 9) 1922 Oudh 201 (201) : 25 Oudh Cas 39.]

[2] Price includes money due. ('02) 25 All 115 (119): 30 Ind App 54 (PC)⁂(Vol 15) 1928 Bom 377 (378, 379) ⁂(Vol 10) 1923 Nag 60 (61) : 19 Nag L R 1.

[3] Lease by Municipality in favour of electric company—Annual rent—Provision that a certain sum due from Municipality to Government must be paid by lessee by annual instalments and that on such payment it would become the owner of part of the premises—*Held* that the whole of this sum at any rate cannot be treated as premium. (Vol 21) 1934 Cal 803 (807) : 61 Cal 556 (SB).

[4] A grant in lieu of maintenance, where no definite sum of money is due as maintenance is not, therefore a lease (Vol 24) 1937 Mad 882 (892, 893): ILR (1937) Mad 638 (FB).

[5] 'Premium" should be regarded as the equivalent of the vernacular nazarana. (Vol 8) 1921 Nag 137 (138).

[6] Rent, if it is to be paid in money, is a periodical payment (Vol 21) 1934 Cal 803 (805): 61 Cal 556 (SB).

[7] Where, looking at the substance of the transaction the payment is premium and not rent, it will not cease to be such merely because it is styled as "advance rent" (Vol 16) 1929 Cal 433 (434) : 56 Cal 252.

[8] A lessor has no lien for unpaid premium. (Vol 13) 1926 Mad 55 (56) : 48 Mad 821 (DB).

[9] Forfeiture of lease does not entitle the lessee to a refund of the premium. ('94) 18 Mad 32 (33) (DB).

[10] Where a part of the premium is paid and it is agreed that if the balance is not paid within a fixed time, the lessor is to be entitled to cancel the lease and recover possession and on the default of the lessee the lessor proceeds to do so, the lessee is not entitled to a refund of the part of the premium paid by him. (Vol 21) 1934 All 293 (294).

41. Rent—General features. — [1] Licence fee is not rent (Vol 15) 1928 Oudh 99 (100, 101) : 3 Luck 282⁂(Vol 1) 1914 Oudh 272 (273).

[See however (Vol 13) 1926 Nag 174 (174, 175).]

[2] Amount payable under a collateral agreement in consideration of the grant of the lease is not rent. ('02) 25 Mad 603 (611) : 29 Ind App 138 (PC).

[3] Suit for recovery of possession of a tank—Defendant pleading that he was a tenant under a patta and was liable to pay only *mukarrari* rent of Rs. 3—Parties arriving at a compromise to the effect that as long as plaintiff possessed the village in which the tank was situate defendant and his heirs were to pay Rs. 12 over and above the *mukarrari* rent but if he transferred the village by sale or gift the defendant would not be bound to pay Rs 12, held the stipulation was a personal obligation and the payment bargained for was not rent. (Vol 31) 1944 Pat 293 (296) : 23 Pat 334 (DB).

[4] Where the lessee has agreed to accept, in consideration of the lease, certain goods to be supplied by the lessor or certain services to be rendered by him and to pay for such goods or services, such payment is not consideration for the lease. (Vol 21) 1934 Cal 803 (807, 808) : 61 Cal 556 (SB). (Per *Buckland J*.)

[5] Grant by holder of an impartible estate for maintenance of a junior member of the family—Grantee required under the grant to pay to the grantor annually a certain sum of money—Such sum held was not rent. (Vol 24) 1937 Mad 882 (891, 892) : I L R (1937) Mad 638 (FB).

[6] Actual figure of rent not fixed but method of fixing rent certain — Lease is binding (Vol 31) 1944 Mad 518 (523) : I L R (1945) Mad 355 (DB)⁂(Vol 11) 1924 Cal 346 (347, 348).

[7] Court has no power to go behind the contract between the parties and pass a decree for a fair and equitable rent. (Vol 24) 1937 Pat 391 (392) (DB)

[8] In cases governed by Transfer of Property Act no suit for settlement of rent lies, for the Court has no power to make a contract for the parties—An aggrieved landholder's remedy against a trespasser in possession is by way of ejectment (Vol 29) 1942 Pat 86 (87)

[9] A decree for rent necessarily implies a decision that the relationship of landlord and tenant exists between the parties and will be *res judicata* in a future suit for rent. ('12) 17 Cal W N 627 (629) (DB).

42. Rent — Illustrative cases. — [1] Cash rent fixed — Fixed quantities of certain commodities also to be supplied to landlord annually—On construction held commodities formed part of rent. (Vol 4) 1917 All 483 (484) : 38 All 286 (FB). (('13) 35 All 19, *Disting.*)

[See however (Vol 1) 1914 Cal 781 (781) (DB).]

[2] Annual payment (muhatarita) to be made by non-agricultural rights occupying house sites in village abadi held rent. ('04) 27 All 183 (185).

[3] An amount payable to the Government or other public authority on behalf of the landlord is rent, provided that the payment is a part of the consideration

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for the lease ('11) 38 Cal 278 (283) (DB) ✠ ('95) 22 Cal 680 (688) (DB)

[*See also* (1900) 27 Cal 67 (73) (FB). (Sum payable by under-lessee to superior landlord on behalf of lessee held rent.)]

[4] Where the sum payable by the lessee to the Government or public authority on behalf of the landlord, does not form part of the consideration for the lease, such sum is not rent ('05) 32 Cal 169 (172, 173, 174) ✠ ('35) 11 Cal 221 (225 226) (DB).

[5] Defendant to render village service and to give plaintiff half share in produce of land given to him — Arrangement to enure during plaintiff's life — Arrangement held amounted to lease. (Vol 33) 1946 Mad 310 (311)

43. Rent in kind — Payment of money value. — [1] Where a lease deed fixes a money rent but provides that a certain quantity of grain or other commodity may be delivered in lieu of it, the lessor is entitled on default by the lessee, to recover only the stipulated sum of money and not the market value of the article. ('10) 12 Cal L Jour 595 (596) (DB) ✠ (Vol 14) 1927 Cal 243 (244) (DB).

[2] Lease deed fixing rent in kind or partly in kind and partly in money — Money value of thing to be delivered also stated — Default by lessee

(a) If value of article is mentioned by way of description, market-value held recoverable (Vol 9) 1922 Pat 4 (5) ✠ (Vol 5) 1918 Cal 797 (798) ✠ ('10) 37 Cal 626 (628) (DB).

(b) If value of article is fixed as an alternative form, only sum fixed in the lease deed held recoverable. (Vol 18) 1931 Cal 468 (469) 58 Cal 72 ✠ (Vol 15) 1928 Cal 166 (167) : 55 Cal 574 (DB).

[3] Unless the rent is fixed in the form of two equal alternatives, the lessor is entitled to a decree in the first instance, for the particular thing and not for its value (Vol 18) 1931 Cal 468 (469) : 58 Cal 72.

44. Rent — Service as rent. — [1] A lease in consideration of service to be rendered is valid. ('05) 32 Cal 243 (246) (DB) ✠ ('99) 23 Bom 602 (607) (DB) ✠ (Vol 16) 1929 Cal 224 (224) : 56 Cal 862.

45. Variation of rent. — [1] Rent once fixed cannot be altered, so long as the lease continues, except by agreement. (Vol 29) 1942 Nag 119 (122) : I L R (1942) Nag 721 ✠ (Vol 17) 1930 Bom 39 (43) (DB) ✠ ('08) 7 Cal L Jour 284 (286) (DB)

46. Lease for a premium and usufructuary mortgage — Distinction. — [1] Where the money paid is a loan advanced and the transfer of possession is for securing repayment of such loan, transaction is a mortgage. (Vol 26) 1939 Nag 166 (167) : I L R (1941) Nag 203 (DB) ✠ (Vol 21) 1934 Pat 217 (219) (DB) ✠ (Vol 17) 1930 Mad 160 (162, 167) (DB) ✠ ('02) 26 Bom 252 (258) (FB).

[2] Where the money is paid as a price and not as a loan and there is no intention to provide any security for repayment of a loan, the transaction is a lease. (Vol 22) 1935 Mad 320 (321 322) (DB) ✠ (Vol 21) 1934 All 950 (951) ✠ (84) 7 Mad 203 (206) (FB) ✠ (Vol 5) 1918 Oudh 279 (280).

[*See also* (Vol 32) 1945 Mad 189 (190) : I L R (1945) Mad 777 (DB)]

[3] Lease or mortgage — Intention of parties is to be gathered mainly from deed with such extrinsic evidence as may be admissible for showing in what manner language of deed is related to existing facts. ('40) 1940 Oudh W N 1233 (1236) ✠ (Vol 21) 1934 Pat 217 (219, 221) (DB) ✠ (Vol 6) 1919 Mad 322 (330) : 41 Mad 959 (DB) ✠ ('10) 6 Nag L R 65 (68).

[4] Lease or mortgage — Nomenclature used by parties is immaterial. ('02) 26 Bom 252 (258) (FB) ✠ ('40) 1940 Oudh W N 1233 (1234) ✠ (Vol 22) 1935 Mad 320 (321) (DB) ✠ (Vol 15) 1928 Bom 567 (577).

[5] Lease or mortgage — Deed unambiguous — Extrinsic evidence not admissible for determining intention of parties (Vol 12) 1925 Mad 881 (881) (DB).

47. Maintenance grants. — [1] Maintenance grant held to be a grant of an absolute interest and therefore not a lease (Vol 32) 1945 Pat 162 (167) : 23 Pat 871 (DB). (*Khorposh* grant of impartible estate) ✠ ('75) 1 Cal 391 (398) : 3 Ind App 92 (PC) ✠ (Vol 32) 1945 Pat 162 (167) : 23 Pat 871 (DB). (*Khorposh* grant of impartible estate.)

[*See also* (Vol 24) 1937 Mad 882 (891) : I L R (1937 Mad 638 (FB). (Per *Varachariar J.*, in the Order of Reference.)]

[2] Maintenance grant assumed to be a lease (1900) 27 Cal 156 (163, 164) : 26 Ind App 216 (PC) ✠ (Vol 22) 1935 Cal 261 (262) (DB) ✠ ('10) 37 Cal 674 (678) (DB).

[3] Grant in lieu of maintenance — Consideration for grant is neither premium nor rent within the meaning of S. 105 (Vol 24) 1937 Mad 882 (895) : I L R (1937) Mad 638 (FB).

[But see ('11) 38 Cal 278 (282, 283) (DB).]

[4] Maintenance grant of impartible estate — Grantee obliged to pay Government revenue and road cess under the grant — Obligation held no consideration for grant and grant therefore not lease. (Vol 32) 1945 Pat 162 (166) : 23 Pat 871 (DB).

48. Heritability of lease. — [1] A lease is *prima facie* a heritable right. (1846) 3 Moo Ind App 261 (275, 276) (PC) ✠ (1851) 4 Moo Ind App 321 (333) (PC).

[2] On the death of a tenant for a term of years, his interest survives to his legal representatives. ('90) 17 Cal 686 (687, 688) (PC) ✠ (1846) 3 Moo Ind App 261 (275, 276) (PC).

[3] A lease not for a fixed term of years is a heritable right. (Vol 15) 1928 Lah 937 (938) ✠ (Vol 27) 1940 Cal 89 (91) : I L R (1939) 2 Cal 254 ✠ (Vol 24) 1937 Nag 321 (322) : I L R (1937) Nag 406.

[4] A lease for the life of the grantee terminates on the death of the lessee. (Vol 30) 1943 Bom 148 (149) (DB).

[5] A tenancy at will is not a heritable interest. (Vol 27) 1940 Cal 89 (91) : I L R (1939) 2 Cal 254 ✠ (1900) 10 Mad L Jour 201 (202) (DB).

[6] Where a village was conveyed "subject to faithful service", it was held that, in the absence of words showing an intention to make the grant hereditary, it must be held to be one ceasing on the death of the grantee. ('08) 7 Cal L Jour 90 (93) (DB).

[7] The fact that the lease has been granted for a residential or building purpose generally indicates an intention to confer a hereditary interest. (Vol 19) 1932 Cal 215 (216) ✠ ('10) 37 Cal 377 (382) (DB).

[8] The term "mokarari" by itself does not show that a lease is a hereditary one. ('88) 15 Cal 342 (344) (PC)

[See however (Vol 13) 1926 Cal 993 (994) : 53 Cal 816 (DB)]

[9] Where a lease is granted for an indefinite period the lease will generally be regarded as conferring only a life-interest on the lessee, unless there is sufficient reason to suppose that a hereditary interest was granted. ('82) 8 Cal 664 (673) : 9 Ind App 33 (PC) ✠ ('77) 3 Cal 210 (212) : 4 Ind App 223 (PC).

[10] Where the intention of the grantor is to create an interest which is to last as long as his own interest in the property, the period of the lease is capable of ascertainment by reference to such interest and hence, in such a case, the rule, making the grant only a life-estate, does not apply. ('77) 3 Cal 210 (212) : 4 Ind App 223 (PC).

106. In the absence of a contract or local law or usage to the contrary, a lease of immoveable property for agricultural or manufacturing purposes shall be deemed to be a lease from year to year, terminable, on the part of either lessor or lessee, by six months' notice expiring with the end of a year of the tenancy; and a lease of immoveable property for any other purpose shall be deemed to be a lease from month to month, terminable on the part of either lessor or lessee, by fifteen days' notice expiring with the end of a month of the tenancy.

Duration of certian leases in absence of written contract or local usage.

Every notice under this section must be in writing signed by or on behalf of the person giving it, and [a][either be sent by post to the party who is intended to be bound by it or be tendered or delivered personally to such party], or to one of his family or servants at his residence, or (if such tender or delivery is not practicable) affixed to a conspicuous part of the property.

[a] *Substituted* by the Transfer of Property (Amendment) Act, 1929 (20 [XX] of 1929), S. 54, for "tendered or delivered either personally to the party who is intended to be bound by it."

SECTION 106 — SYNOPSIS

1. Contract to the contrary.
2. Lease for a term certain — Notice.
3. Lease for life.
4. Perpetual lease.
5. Tenancy at will.
6. Lease for indefinite period.
7. Possession under agreement to grant lease for a term certain.
8. Law to the contrary.
9. Usage to the contrary.
10. Immovable property.
11. Presumption of yearly or monthly tenancy under this section.
12. Lease for agricultural or manufacturing purposes.
13. Reservation of yearly or monthly rent — Effect.
14. Lease from year to year.
15. Lease from month to month.
16. Possession under invalid lease — Presumption.
17. Notice to quit — General principles.
18. Notice to quit with an option to continue on different terms.
19. Notice required under other sections for determining lease.
20. Notice by lessee—Duty to give up possession.
21. Waiver of notice.
22. Suit for ejectment — Notice to quit.
23. Denial of lessor's title by lessee and notice to quit.
24. Other modes of determination of lease.
25. Effect of giving notice where it is not necessary.
26. Notice by lessor undertaking to pay compensation for improvements—Effect.
27. Determination of main lease by notice — Effect on sub-lease.
28. Resumption of possession by landlord without giving notice—Effect.
29. Lessee giving up possession before termination of lease—Liability for damages or rent.
30. Lessee holding over after expiry of notice to quit — Effect.
31. Notice to quit — Who can give.
32. Who can give notice to quit — Co-lessors.
33. Who can give notice to quit—Assignment by lessor.
34. Who can give notice — Miscellaneous.
35. Notice to quit — To whom to be given.
36. Notice to or by agent.
37. Period of notice.
38. Expiring with end of year or month of tenancy.
39. Year or month of tenancy.
40. Calendar for calculation of time.
41. Form of notice.
42. Mode of service.
43. Service by post.
44. Service of notice on party's pleader or solicitor.
45. Leases by Government.
46. Lease by Municipality.
47. Notice in cases not governed by this section.

1. Contract to the contrary.—[1] Where a lease is expressly made determinable by the lessor without any previous notice there is clearly a contract to the contrary under this section. ('06) 16 Mad L Jour 557 (558) (DB) ✠ (Vol 15) 1928 Mad 687 (689) (DB) ✠ (Vol 11) 1924 All 726 (727) ✠ (Vol 5) 1918 Cal 665 (665) (DB) ✠ (Vol 12) 1925 Pat 256 (257) (DB).

[2] Where a lease is expressed to be determinable by notice but the notice is not of the kind required by this section there is a contract to the contrary within this section. (Vol 12) 1925 Rang 206 (206). (One month's notice in lease of house property.)✠(Vol 6) 1919 Cal 54 (55) (DB). (Three months' notice in lease of homestead land.) ✠ ('02) 5 Oudh Cas 113 (114, 115). (Lease of a house — Provision for one month's notice.) ✠ (Vol 26) 1939 P C 11 (13) : I L R (1939) Kar (P C) 90 (P C). (Lease for agricultural or manufacturing purpose — Parties may contract that lease is to be from month to month determinable at fifteen days' notice.) ✠ (Vol 11) 1924 Lah 643 (643, 644) (Lease for eleven months determinable at a week's notice.)

[See however (Vol 25) 1938 Cal 656 (658) : I L R (1938) 2 Cal 261.]

[3] A notice may be according to the contract between the parties although such notice does not expire with the end of a year or month of the tenancy. (Vol 15) 1928 Lah 348 (348, 349)✠(Vol 7) 1920 Lah 96 (97).

[4] Where a contract of tenancy simply provides for a notice of a certain period which is different from the period of notice under this section, the notice need not expire with a year or month of the tenancy (Vol 11) 1924 Nag 220 (220) ✠ (Vol 6) 1919 Cal 54 (55) (DB) ✠ (Vol 15) 1928 Lah 348 (348, 349). ((Vol 10) 1923 Lah 659, *Dissent.*) ✠ (Vol 11) 1924 Oudh 309 (311).

[But see (Vol 30) 1943 Bom 306 (310):I L R (1943) Bom 553 (DB) ✠ (Vol 10) 1923 Lah 659 (659, 660).]

[5] Where after the termination of a lease, the lessee holds over with the assent of the landlord and the lease is renewed from year to year or from month to month, a covenant in the original lease making it determinable without notice will also hold good in the case of the lease formed by holding over. (Vol 25) 1938 All 649 (650) ✠ (Vol 6) 1919 Cal 54 (55) (DB)✠(Vol 7) 1920 Lah 96 (97) ✠(Vol 12) 1925 Oudh 173 (173) : 27 Oudh Cas 224✠('09) 12 Oudh Cas 279 (284).

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[6] Unless there is some indication to the contrary, the term 'ordinary tenant' would in Calcutta mean monthly tenant, even though there was no reference to payments of monthly rent, and such a tenancy would be terminable on 15 days' notice expiring with the end of the month of the tenancy. (Vol 26) 1939 P C 11 (13): I L R (1939) Kar P C 90 (PC).

[7] In a suit for ejectment by a landlord against a tenant on the allegation of the tenancy having been determined by notice to quit the onus of proving that the tenancy is not determinable by notice is on the tenant (Vol 23) 1936 Cal 351 (352) ✠ (Vol 4) 1917 Cal 37 (38) (DB).

2. Lease for a term certain — Notice. — [1] Where a definite period is fixed as the term of a lease the lease will automatically come to an end by efflux of the time limited thereby. A notice will not be necessary to determine the lease. (Vol 20) 1933 All 756 (757, 758) (DB) ✠ (Vol 12) 1925 Nag 48 (48) ✠ (Vol 13) 1926 Nag 201 (202) ✠ ('05) 2 Cal L Jour 343 (351) (DB) ✠ (Vol 19) 1932 All 314 (315) (DB).

[2] Where a definite period is fixed as term of a lease, it cannot be determined before the end of the term fixed, by a notice to quit. (Vol 6) 1919 Oudh 124 (125) ✠ (Vol 1) 1914 Mad 301 (303).

[3] After the expiration of the term fixed by the lease, the lessee continuing in possession, will, in the absence of an assent by the lessor or his representative in interest, only be a tenant by sufferance. He can be sued in ejectment at any time without any previous notice or demand of possession (Vol 16) 1929 Pat 444 (446) (DB) ✠ (Vol 6) 1919 Pat 254 (256) (DB) ✠ (Vol 14) 1927 Bom 192 (193, 194) : 51 Bom 149 (DB)✠(Vol 17) 1930 Lah 386 (388) (DB) ✠ (Vol 27) 1940 Lah 410 (412) (DB).

[4] Where a lease for a term certain is granted in favour of *A* and then another lease is granted in favour of *B* to commence on the expiration of *A's* lease, *B* can sue *A* for possession after the period of *A's* lease has expired without a previous notice to quit (Vol 19) 1932 All 314 (315) (DB) ✠ (Vol 18) 1931 All 649 (650, 651) (D B).

[5] Where on the expiry of the term of a lease for 7 years the lessor as a result of a compromise in the suit for ejectment, allowed the lessee to remain in possession upto a certain date on certain conditions, it was held that the lessee did not become a year to year tenant or a tenant holding over and was not entitled to six months' notice ('47) 1947 All W R (HC) 167 (168).

3 Lease for life.—[1] In a lease for the life-time of the tenant, a notice will not be necessary for bringing a suit for ejectment against the tenant's representatives, where the lease has terminated on the death of the tenant. ('94) 18 Bom 256 (259) (DB) ✠ (08) 7 Cal L Jour 90 (95) (DB).

4. Perpetual lease.— [1] A perpetual lease is not determinable by notice under this section. ('86) 9 Mad 307 (319) : 13 Ind App 32 (PC).

[2] Where a person alleges a perpetual lease for building purposes but there is no registered instrument the oral agreement accompanied by delivery of possession operates only to create a month to month tenancy under this section. (Vol 31) 1944 Pat 30 (31, 33) : 22 Pat 554 (D B).

5. Tenancy at will.—[1] Where it was provided in a lease that the tenant would pay the monthly rent regularly and that in case of default for three months he would vacate the property, it was held that as soon as rent for three months fell into arrears the tenancy was reduced to one at will and that from that date the tenant could be ejected without any notice to quit. (Vol 25) 1938 Nag 506 (509) : I L R (1940) Nag 269 (DB).

[2] Notwithstanding transferability, a lease may be only a tenancy at will. ('80) 6 Cal L Rep 117 (118) (DB).

[3] A tenancy at will can be determined by a notice to quit. (Vol 15) 1928 Cal 279 (280) (DB).

[4] A notice to quit will not be necessary to determine a tenancy at will. (Vol 12) 1925 Pat 256 (258) (DB)✠ (Vol 20) 1933 Pat 561 (562) (DB)✠(Vol 27) 1940 Oudh 401 (403) : 16 Luck 44 (DB).

[5] A mere demand for possession will be sufficient to put an end to the tenancy at will. (Vol 23) 1936 Oudh 102 (105) (DB) ✠ (Vol 33) 1946 Oudh 144 (145) : 21 Luck 292✠('37) 62 Cal L Jour 201 (204) (DB)✠(78) 2 Mad 346 (351) (DB).

[6] A reasonable notice will be quite sufficient to determine the tenancy at will, where a notice is given. ('05) 2 Cal L Jour 343 (349) (DB). (Five months' notice held reasonable)✠(Vol 5) 1918 Cal 355 (356) (DB).

[7] A tenancy at will is ordinarily determined by the death of the lessor, or lessee. (1900) 10 Mad L Jour 201 (202) (DB) (Lessor)✠(Vol 25) 1938 Nag 506 (509): I L R (1940) Nag 269 (DB). (Lessee.)

6. Lease for indefinite period.—[1] Lease for indefinite period — Lessor serving notice to quit and after lessee's refusal suing for ejectment — *Held*, lessee had lease for life and therefore lessor was not entitled to eject him. (Vol 13) 1926 Cal 379 (379) (DB).

7. Possession under agreement to grant lease for a term certain.—[1] *A* agreed to take a lease of lands for ten years and entered into possession of the lands. He paid rent but no lease was executed. It was held that the agreement to grant a lease for ten years amounted to a contract to the contrary. (05) 2 Cal L Jour 343 (346) (DB).

8. Law to the contrary.—[1] Where the right of a landlord to eject his tenant after determining the tenancy under the general law is interrupted by temporary enactments, the right is revived on such enactment ceasing to be in force. (Vol 15) 1928 Cal 436 (437) (DB).

9. Usage to the contrary —[1] The presumption as to the duration of a tenancy and its mode of determinability under this section will not apply to cases, where there is a usage to the contrary. (78) 3 Cal 696 (699) (DB).

[2] A month's notice will be necessary to determine a tenancy of building in the city of Bombay. (Vol 12) 1925 Bom 167 (167).

[3] Where local custom requires a monthly tenancy to be determined by a month's notice, it need not be served in the manner prescribed by this section. (Vol 14) 1927 Sind 24 (25).

10. Immovable property.—[1] A jalkar or right of fishery is "immovable property." ('93) 20 Cal 446 (448) (DB).

11. Presumption of yearly or monthly tenancy under this section. — [1] Where there is no satisfactory evidence as to the period for which a lease has been granted, it will be deemed to be one from year to year or one from month to month according to the purpose of the lease (Vol 30) 1943 Mad 311 (312) (Year to year tenancy.)✠(Vol 7) 1920 Nag 62 (62) (Do.)✠(Vol 8) 1921 Bom 224 (224) : 45 Bom 350 (DB) (Do.) ✠ ('05) 32 Cal 243 (246) (DB) (Month to month tenancy.) ✠ (Vol 13) 1926 Nag 147 (148). (Do) ✠ (Vol 24) 1937 Nag 321 (321) : I L R (1937) Nag 406 (Do.) ✠(Vol 27) 1940 Cal 89 (91) : 1 L R (1939) 2 Cal 254. (Do.)

[2] A lease of shops in the Punjab was held to be one from month to month. ('13) 1913 Pun L R No. 180, p. 604 (608) (DB) ✠ ('98) 1898 Pun Re No. 33, p. 113 (114) (DB).

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[3] A lease which is not for agricultural or manufacturing purposes must be presumed to be one from month to month. This presumption will apply even to a building lease. (Vol 28) 1941 All 399 (399, 400) ✠ (Vol 25) 1938 All 42 (43): I L R (1938) All 53 (DB) ✠ (Vol 6) 1919 Cal 400 (400) ✠(Vol 26) 1939 Pat 296 (303) ✠(Vol 26) 1939 Mad 247 (249).

[See however (Vol 23) 1936 All 385 (385, 386) (DB).]

12. Lease for agricultural or manufacturing purposes. — [1] In the case of agricultural leases, the presumption of yearly tenancy under this section will apply only if the section has been made applicable to such leases by special notification. (Vol 6) 1919 Pat 254 (256) (DB).

[2] It has been held that the question, whether a lease was for a manufacturing purpose is one of fact. (Vol 10) 1923 Rang 13 (15) (DB).

[3] Hosiery manufacture—Lessee carrying on knitting and cutting operations on leased premises though yarn from raw material was produced on another premises — Lease held to be for manufacturing purposes. (Vol 33) 1946 Cal 317 (318) (DB).

[4] Where a lease is for a manufacturing purpose but the landlord gives only a notice of one month to terminate the lease and the tenant in his reply to that notice admits that he is a monthly tenant, this does not estop him from contending in a subsequent suit for ejectment against him, that the notice is not sufficient and that he is entitled to six months' notice. (Vol 11) 1924 Bom 115 (116) : 48 Bom 38.

13. Reservation of yearly or monthly rent—Effect. — [1] The reservation of a yearly rent would *prima facie* imply that a lease is not one from month to month but one from year to year. (Vol 30) 1943 Cal 474 (474) : I L R (1943) 1 Cal 34 (DB) ✠ (Vol 13) 1926 Cal 558 (558) : 53 Cal 95 (DB).

[2] Where a lease is not for an agricultural or manufacturing purpose but a yearly rent is reserved under the lease if the lease is made by an oral agreement and delivery of possession and not by a registered deed, the lease can be presumed to be one from month to month under this section notwithstanding the reservation of a yearly rent. (Vol 3) 1916 Cal 338 (339) (DB) ✠(Vol 7) 1920 Cal 858 (858) (DB)✠(Vol 8) 1921 Pat 307 (308) (DB).

[3] It has been held that where in a lease not for an agricultural or manufacturing purpose a yearly rent is reserved but there is no registered deed, there would be a valid lease for the first year and if after expiry of the first year the lessor accepts rent from the lessee and assents to his continuing in possession the lease would be renewed from month to month terminable by fifteen days' notice. (Vol 30) 1943 Cal 474 (474): I L R (1943) 1 Cal 34 (DB).

[4] A tenancy may well be a monthly tenancy though the rent may be mentioned as so much per year. (Vol 28) 1941 Pat 488 (490) (DB).

[5] The expression "ordinary tenant" used in a lease-deed with reference to house property in Calcutta *prima facie* indicates a monthly tenancy although there is no reference to payment of monthly rent. (Vol 26) 1939 P C 11 (13) : I L R (1939) Kar (P C) 90 (P C).

14. Lease from year to year.—[1] A lease from year to year is intended to go on indefinitely, till it is determined by either party by a proper notice at the end of any year of the tenancy. ('04) 8 Cal W N 139 (140)✠(Vol 1) 1914 Bom 152 (153) : 38 Bom 240 (DB).

[2] A lease from year to year is a single lease for the whole period till it is terminated. Although liable to be determined at the end of any year by a valid notice, it does not *ipso facto* come to an end at the end of every year. ('35) 62 Cal L Jour 201 (204) (DB).

[3] A periodic lease like a yearly tenancy is not determined by the death of the tenant. His legal representatives cannot be evicted from the land without a proper notice to quit. ('89) 1889 Bom P J 79 (DB).

15. Lease from month to month.—[1] A joint monthly lease is liable to partition among the co-lessees (Vol 16) 1929 Cal 710 (713): 57 Cal 715 (DB).

[2] A monthly tenancy under this section is a heritable interest and is not determined by the death of the tenant. (Vol 27) 1940 Cal 89 (91): I L R (1939) 2 Cal 254 ✠('02) 5 Oudh Cas 113 (114, 115).

16. Possession under invalid lease—Presumption. —[1] Where a lease for a term of years or in perpetuity is granted but is invalid and the lessee enters into possession under such a lease, a tenancy may arise by implication from the payment of rent by the tenant and its acceptance by the landlord. The presumption of a yearly or monthly tenancy under this section may apply to such leases. (Vol 6) 1919 Mad 1186 (1187) (DB) ✠(Vol 15) 1928 All 617 (619): 51 All 285 (DB).

[2] The invalid lease itself cannot be treated as a yearly or monthly tenancy under this section. (Vol 16) 1929 All 387 (387).

[3] Oral contract of lease of residential quarters—Tenant to occupy premises at least for one year and thereafter tenancy to be terminated on month's notice — Lease held invalid for want of registered deed — Lease should be deemed to be from month to month. (Vol 34) 1947 Cal 351 (352).

17. Notice to quit—General principles.—[1] A notice to quit must be a clear and unambiguous intimation to the lessor or lessee, as the case may be, of the intention of the party giving the notice that the lease is to terminate at a certain time. No particular form is necessary. ('85) 7 All 899 (902, 904) (FB) ✠ ('85) 11 Cal 533 (538) (DB).

[2] A notice to quit ought not to be construed with a view to find fault with it but with a view to its validity. (Vol 30) 1943 Bom 306 (307): I L R (1943) Bom 553 (DB) ✠(Vol 5) 1918 P C 102 (106, 107): 46 Cal 458: 45 Ind App 222 (PC).

[3] The validity of a notice to quit ought not to turn on the splitting of a straw. ('38) 68 Cal L Jour 411 (412) ✠(Vol 18) 1931 Mad 352 (353, 354).

[4] Notices to quit, though not strictly accurate or consistent in the statement embodied in them, may still be good in law. The test of their sufficiency is not what they would mean to a stranger but what they would mean to tenants presumably conversant with all those facts and circumstances. (Vol 5) 1918 P C 102 (106, 107, 110): 46 Cal 458: 45 Ind App 222 (P C).

[5] A tenancy can be determined only as a whole or not at all. It cannot be determined piecemeal. ('21) 33 Cal L Jour 518 (518, 519) (DB).

[6] A notice to quit with reference to a portion of the holding is bad. (Vol 26) 1939 Cal 291 (292) (DB).

[7] It is open to the Court, notwithstanding certain features in a notice which may suggest that it is an attempt to terminate the tenancy partially, to hold, on the construction of the notice in the light of all the facts and circumstances of the case, that the notice is not of this kind and is valid. (Vol 5) 1918 P C 102 (110): 46 Cal 458: 45 Ind App 222 (P C).

[8] A notice is not invalid merely because the landlord treats the person to whom the notice is given as a trespasser and not as a tenant. (Vol 20) 1933 Cal 260 (262) (DB) ✠('08) 7 Cal L Jour 107 (109) (DB).

[9] Where a notice to quit is invalid or insufficient it will not have the effect of determining the lease. (Vol 8) 1921 Pat 334 (335) ✠('91) 15 Bom 415*n* (415*n*) (DB) ✠('10) 6 Nag L R 17 (18).

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[10] Where an invalid notice is accepted and acted upon by the party to whom it is given, the tenancy would be determined. (Vol 12) 1925 Rang 206 (206).

[11] Where a lease is really determinable only by six months' notice under this section but the lessor gives only a month's notice, the mere fact that the lessee in his reply notice erroneously admits that he is a monthly tenant will not estop him from contending that the notice was insufficient. (Vol 11) 1924 Bom 115 (115): 48 Bom 38.

[12] A notice to quit is necessary under this section before a suit for ejectment can be brought only where the defendant is a tenant of the plaintiff. (Vol 26) 1939 Pat 167 (168).

[13] A notice to quit will not give a cause of action for a suit for ejectment against a person where the relationship of landlord and tenant between the parties has been created not by a lease but by a decision of Court. (Vol 29) 1942 Cal 406 (407).

18. Notice to quit with an option to continue on different terms. — [1] A notice giving the lessee an option either to vacate the property by a certain date or to pay enhanced rent from such date will be bad. ('85) 11 Cal 533 (537, 538) (DB).

[2] It has been held that a notice which merely informs the lessee that if he wants to keep the premises after a certain date, he will have to pay enhanced rent at a certain rate is bad. ('12) 16 Cal L Jour 561 (563) (DB).

[3] Where a notice clearly expresses an intention to terminate a lease by a certain date, the mere fact that it is coupled with an intimation that if the lessee continued in possession after such date he would be liable for enhanced rent does not make the notice bad. (Vol 8) 1921 Pat 334 (335) ✠('04) 1904 Pun Re No. 5, p. 27 (29) (DB) ✠(Vol 8) 1921 All 194 (194, 195): 43 All 330 (DB) ✠(Vol 6) 1919 Lah 304 (305): 1919 Pun Re No. 34.

[4] Where a notice to quit clearly conveys the intention to terminate the lease by a certain date, the mere fact that the notice provides for its abandonment in case the other party agrees to an enhancement or reduction of the rent, does not affect the validity of the notice. (Vol 22) 1935 Bom 247 (251) (DB) ✠ ('09) 2 Ind Cas 548 (548) (DB) (Cal) ✠('96) 22 Bom 241 (243) (DB) ✠('13) 19 Ind Cas 758 (759) (All).

[5] A notice to quit is not bad, merely because it provides that if the tenant fails to vacate the property by the date fixed in the notice, he will be liable for damages at a certain rate. ('08) 12 Cal W N 1059 (1063) ✠(Vol 12) 1925 All 199 (199).

19. Notice required under other sections for determining lease.—[1] A notice under S. 108, cl. (e) expressing the lessee's intention of avoiding a lease on account of the destruction of the property, which is the subject matter of the lease, need not comply with the requirements prescribed by this section. (Vol 3) 1916 Cal 707 (707) (DB).

[2] The notice under S. 111, clause (g) given by the lessor or his transferee determining a lease on forfeiture being incurred need not comply with the requirements laid down in this section. (Vol 9) 1922 Mad 349 (349) (DB).

20. Notice by lessee—Duty to give up possession.—[1] Although, under S. 108, cl. (q), the lessee is bound to put the lessor into possession of the property on the determination of the lease, a failure to do so will only entitle the lessor to damages and will not make the determination of the lease by notice by the lessee ineffective or incomplete. ('96) 22 Bom 348 (353, 354) (DB).

[But see ('10) 1910 Pun L R No. 188, page 537 (538): 1910 Pun Re No. 94.]

21. Waiver of notice.—[1] Landlord accepting rent from tenant for period after expiry of notice—In order to succeed in an ejectment suit landlord must show that another proper notice to quit had been duly served on the tenant. (Vol 28) 1941 Pat 495 (497).

[2] Lessor giving another notice to quit after expiry of first notice—This is a waiver of first notice. (Vol 22) 1935 Bom 247 (251) (DB).

[3] Merely allowing tenant to continue in possession after expiry of notice to quit—No waiver. (Vol 10) 1923 Nag 129 (130).

[4] Giving notice and then claiming arrears of rent up to institution of suit is not waiver of notice. (Vol 4) 1917 Pat 469 (470): 2 Pat L Jour 595 (DB).

[5] Acceptance of rent for period before expiry of notice is not waiver. (Vol 8) 1921 Cal 126 (127) (DB).

[6] Acceptance of rent for period after expiry of notice is waiver. ('05) 29 Bom 580 (613) (DB).

22. Suit for ejectment — Notice to quit. — [1] Where the defendant in a suit for ejectment has been a tenant under the plaintiff, a decree for ejectment cannot be passed against him, unless it is established that the tenancy has been lawfully determined. ('21) 13 Mad L W 397 (399) (DB)✠('03) 13 Mad L Jour 475 (476) (DB)✠(Vol 4) 1917 Cal 426 (426) (DB).

[2] Where a lease is determinable by a notice to quit and has not been determined in any other manner according to law, ejectment cannot be decreed against a tenant, unless a sufficient and valid notice to quit has been served upon him. ('11) 9 Ind Cas 19 (20) (DB) (Cal)✠('95) 1895 Bom P J 321 (DB)✠('94) 18 Bom 110 (114) (DB).

[3] Where the determination of the lease by notice is not complete by the expiration of a valid notice to quit before the institution of the suit the suit itself cannot be treated as a notice to quit. Nor can the Court in such a case pass a decree for ejectment against the tenant fixing a certain time within which he must vacate the property. ('35) 62 Cal L Jour 201 (204, 205) (DB) ✠ ('90) 1890 All W N 175 (176) (DB)✠('94) 18 Bom 107 (108) (DB) ✠ ('07) 34 Cal 57 (63) (DB) ✠ ('96) 6 Mad L Jour 59 (61) (DB) ✠ ('10) 6 Nag L R 17 (20).

[But see ('95) 23 Cal 200 (201) (DB)✠(Vol 10) 1923 Pat 340 (341) (DB).]

[4] A trespasser can be ejected without any previous notice. (Vol 21) 1934 Cal 134 (134) ✠ ('07) 34 Cal 57 (61) (DB).

[5] Where a tenancy is established, the onus of proving, in a suit for ejectment, that the tenancy has been determined by a notice to quit or otherwise is on the plaintiff. (Vol 29) 1942 Cal 341 (341) (DB)✠(Vol 6) 1919 Mad 1135 (1136, 1137) ✠ (Vol 2) 1915 All 251 (252) (DB) ✠ ('02) 26 Bom 360 (362) (DB) ✠ (Vol 30) 1943 Mad 311 (312).

[6] It has been held that, where it is proved that a notice to quit was served on the defendant the onus is on him to prove that it was invalid. (Vol 15) 1928 Cal 436 (438) (DB).

[7] A plea as to the absence of a notice to quit can be raised even in second appeal for the first time. ('94) 18 Bom 256 (259) (DB)✠('78) 2 Mad 346 (350) (DB).

[See however ('95) 1895 Bom P J 165 (DB) ✠ (Vol 20) 1933 Lah 377 (378).]

[8] A plea as to the invalidity of a notice cannot be allowed to be raised for the first time in second appeal. (Vol 4) 1917 Pat 469 (470) : 2 Pat L Jour 595 (DB) ✠ (Vol 11) 1924 Mad 904 (904, 905).

[9] In a suit for ejectment against a tenant, the plea of want of notice may be taken as an alternative

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to a plea of permanent tenancy. ('86) 10 Bom 669 (672) (DB).

[10] Even after a lease has been determined, a lessee cannot be ejected by the lessor by force. The lessee can only be evicted in due course of law. (Vol 16) 1929 Oudh 529 (534) : 4 Luck 619 (DB).

23. Denial of lessor's title by lessee and notice to quit — [1] In the case of a lease from year to year the disclaimer of title by the lessee will make the lessee liable to ejectment without notice. (Vol 6) 1919 P C 1 (4) : 42 Mad 589 : 46 Ind App 109 (P C).

[2] Different views are held as to whether the denial of title by the defendant in the suit for ejectment itself will be sufficient for the purpose of obviating the necessity of a notice to quit.

(a) Denial of title in the suit itself is enough. ('92) 17 Bom 631 (636) (DB) ✠ ('94) 18 Bom 256 (259) (DB)✠('91) 1 Mad L Jour 218 (220) (DB).

(b) Such denial is not sufficient. ('98) 1898 Bom P J 206 (206, 207) (DB)✠('94) 17 Mad 218 (220) (DB)✠ ('08) 31 Mad 261 (263) (DB) ✠ ('94) 17 All 45 (47) (DB)✠('91) 15 Bom 407 (412, 414) (DB)

[3] Different views are held as to whether the assertion of a permanent tenancy by a tenant who is not entitled to such a right will amount to a denial of title

(a) Such claim will amount to a disclaimer of title. ('83) 8 Bom 228 (230) (DB) ✠ (1900) 24 Bom 426 (434) (DB).

(b) Such claim will not amount to a disclaimer of title. ('93) 1893 Bom P J 292 (294) (DB) ✠ ('03) 27 Bom 515 (550) (DB) ✠ ('94) 17 Mad 218 (220) (DB)✠('03) 27 Mad 23 (24) (DB).

24. Other modes of determination of lease. — [1] Where a lease has been determined according to the law without any notice to quit, such a notice is not necessary before a suit for ejectment against the tenant. (Vol 8) 1921 Cal 574 (575) (DB) ✠ ('77) 1877 Bom P J 177 (DB) ✠ (Vol 7) 1920 Pat 803 (804) ✠ ('13) 11 All L Jour 981 (985).

[2] Where a lease is voidable under the law and has been avoided according to the law, the position is the same as if the lease has been lawfully determined and the quondam lessee can be ejected without any previous notice to quit. ('09) 36 Cal 675 (691) (DB).

[3] A lease of joint land is not *ipso facto* determined by partition among the co-owners and the allotment of the leased land to one of them, so as to dispense with the necessity of a notice to quit before a suit for ejectment by him against the tenant. ('82) 6 Bom 70 (72) (DB)✠('81) 6 Bom 67 (69) (DB).

[4] Where the monthly tenant of a house is obliged to vacate the house under an order from the Plague Authority acting under statutory powers, the tenant is not thereby absolved from liability to give the usual notice to quit, if he desires to put an end to the tenancy. ('99) 1 Bom L R 739 (741, 742) (DB).

25 Effect of giving notice where it is not necessary. — [1] Where a notice to quit is given by the landlord although such notice is not necessary for evicting a person from certain immovable property, no tenancy is created merely by reason of such notice. ('03) 30 Cal 883 (900)✠(Vol 4) 1917 Cal 219 (220, 221) (DB).

26. Notice by lessor undertaking to pay compensation for improvements — Effect — [1] Where a lessor in his notice to quit has undertaken to pay compensation to the tenant for the improvements effected by him before compelling him to vacate the property the lessor cannot enforce his right to possession, unless he has paid or tendered such compensation, although there may be no provision for it in the lease. (Vol 23) 1936 Cal 581 (581, 582).

27. Determination of main lease by notice — Effect on sub-lease. — [1] The determination of a lease by a valid notice by the lessor will automatically put an end to any sub-lease granted by the lessee ('97) 21 Bom 311 (313) (DB)✠(Vol 19) 1932 Cal 241 (242) : 59 Cal 739 (DB).

28. Redemption of possession by landlord without giving notice — Effect. — [1] A tenure was resumable by the grantor thereof after notice but the latter took possession of the land without giving notice and the grantee acquiesced in such resumption and did not raise any objection on the ground of want of notice; it was held that he could not afterwards contend that the resumption was unlawful for want of notice. ('03) 13 Mad L Jour 209 (210) (DB)✠(Vol 1) 1914 Bom 152 (153) : 38 Bom 240 (DB).

29. Lessee giving up possession before termination of lease — Liability for damages or rent. — [1] Where a tenant gives notice determining a lease but such notice is invalid but the tenant gives up possession and the landlord re-enters on the premises, the lessee will not be liable for rent. But he will be liable for damages for premature determination of the lease in breach of the contract of tenancy. (Vol 10) 1923 Cal 524 (527) (DB)✠(Vol 10) 1923 Cal 63 (65) : 49 Cal 345 (DB)

[2] Where the lessee of a house under a monthly tenancy is obliged to vacate the house under the orders of the Plague Authority, he is not thereby absolved from the duty of giving notice to quit for the usual period if he wishes to terminate the lease or from the liability to pay rent till the lease is so determined. ('99) 1 Bom L R 739 (741, 742) (DB).

30 Lessee holding over after expiry of notice to quit — Effect. — [1] Where a lessee continues to be in possession of the property after the lease has been determined by a valid notice, he will not be liable for rent (Vol 1) 1914 All 1 (2).

[2] Where a lessee continues in possession after the lease has been determined by a valid notice, he will be liable for damages The amount awardable as damages is within the discretion of the Court to be exercised according to the circumstances of the case. (Vol 11) 1924 Lah 643 (643 644).

[3] Where a notice to quit given by a lessor to the lessee is coupled with a demand of rent at a higher rate if the lessee should continue in possession after the date fixed in the notice, and the notice to quit is valid and terminates the tenancy on the date mentioned therein, the demand of rent at higher rate is virtually an offer of a fresh tenancy on new terms. If the tenant has not accepted the offer, he will not be liable for the enhanced rent. But he will be liable for mesne profits and damages (Vol 24) 1937 All 36 (38) (DB)✠(Vol 20) 1933 Oudh 465 (466) : 9 Luck 112 (DB)✠(Vol 11) 1924 Lah 643 (643, 644).

[4] The continuation in possession after the date fixed in the notice to quit amounts by itself, to an acceptance by the tenant of the offer of a new tenancy on different terms. (Vol 21) 1934 All 115 (116, 117) ✠ (Vol 12) 1925 Oudh 189 (190) : 28 Oudh Cas 77✠ (Vol 20) 1933 Oudh 465 (465) : 9 Luck 112 (DB) ✠ (Vol 27) 1940 Nag 140 (141).

[But see (1900-02) 1 Low Bur Rul 82 (83) ✠ ('04) 1904 Pun Re No. 5, p. 27 (30) (DB) ✠ (Vol 8) 1921 All 194 (194, 195) : 43 All 330 (DB)]

[5] Where a notice to quit given by the lessor to the lessee is coupled with a demand of rent at a higher rate if the lessee should continue in possession after the date fixed in the notice but the notice is not valid, the lease will continue to be in force even after the date

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fixed in the notice. In such cases the continuance in possession of the tenant after the date fixed in the lease without protesting against the proposal to enhance rent will not amount to a binding agreement to pay such enhanced rent (Vol 8) 1921 Pat 334 (335) ✠ (Vol 27) 1940 Nag 140 (141).

[But see (Vol 20) 1933 Oudh 465 (465) : 9 Luck 112 (DB)✠(Vol 13) 1926 Oudh 79 (80).]

31. Notice to quit—Who can give.—[1] Under this section a lease can be determined by a notice to quit either by the lessor or the lessee The expression "lessor" will include any person who would be entitled to the possession of the property on the termination of the lease. (Vol 6) 1919 Mad 1186 (1187) (DB)✠(Vol 6) 1919 Lah 31 (31, 32) : 1 Lah 241.

32. Who can give notice to quit—Co-lessors.—[1] A lease cannot be determined by notice by one or some of the co-lessors alone. ('08) 35 Cal 807 (811) (DB)✠(Vol 22) 1935 Bom 262 (263)✠(Vol 22) 1935 Cal 577 (577)✠('79) 3 Bom 23 (24, 25) (DB)✠('05) 29 Mad 29 (32, 33, 34) (DB).

[See however (Vol 3) 1916 Cal 906 (907) (DB).]

[2] One co-lessor cannot give a notice to quit even as to his own share in the property. ('04) 31 Cal 786 (790) (DB)✠(Vol 7) 1920 Cal 513 (515).

[3] Even where a tenant has incurred the liability to have his lease forfeited under S. 111, the lease cannot be determined, except where all the co-lessors concur in doing so. ('81) 7 Cal 470 (473) (DB) ✠ ('08) 35 Cal 807 (811) (DB).

[4] Where one co-sharer landlord has been acting as manager on behalf of all the co-sharers, he can give a valid notice to quit on behalf of all. (Vol 22) 1935 Bom 219 (222) (DB).

[5] Where the tenant has dealt with one co-owner as the sole owner and sole landlord and by so doing is estopped from denying his title, such co-owner can give him notice to quit and sue him in ejectment. ('07) 7 Cal L Jour 257 (260, 261) (DB) ✠('05) 29 Mad 29 (35) (DB).

[6] Where a person is co-owner with others with regard to one property and a sole owner of another property and both properties are separately let to the same tenant such co-owner can give a notice to quit with regard to the separate property. (Vol 22) 1935 Cal 577 (578).

[7] The concurrence of all co-sharers is not necessary for a suit for ejectment against a trespasser. (Vol 7) 1920 Cal 513 (515).

[8] Suit for ejectment can be brought against a tenant by sufferance by one of the co-sharer landlords alone. (Vol 14) 1927 Bom 192 (194): 51 Bom 149 (DB) ✠('08) 35 Cal 807 (811) (DB).

[9] Where a notice to quit is given by all the co-sharer landlords, a suit for ejectment can be brought against him by one or some of the co-sharers alone. (Vol 21) 1934 Cal 127 (128) (DB) ✠('86) 13 Cal 75 (78) (DB).

[10] It has been held that, except where there is a special provision of law to the contrary, one co-owner cannot sue in respect of the common property in his own name on behalf of all. ('07) 7 Cal L Jour 257 (260, 261) (DB) ✠('96) 21 Bom 154 (158, 159) (DB).

[11] One co-sharer landlord cannot sue for his own share of the rent, unless there is an agreement for the payment of rent separately to such landlord. ('79) 4 Cal 96 (101, 102) (FB) ✠('81) 7 Cal 150 (152) (DB).

[12] One co-sharer alone cannot enhance the rent of the holding or sue for enhancement of such rent. ('79) 3 Bom 23 (24, 25) (DB) ✠(Vol 22) 1935 Bom 262 (263) ✠ ('79) 4 Cal 96 (102, 103) (F B) ✠ ('83) 9 Cal 864 (865) (DB). (Except where the rent has been paid separately to the co sharer landlords)

[13] A notice to quit given by one of two joint Receivers is not valid. (Vol 4) 1917 Cal 621 (623, 624) (SB).

[14] A notice to quit by one only of two Uralans of a Malabar Devaswom is invalid. (Vol 11) 1924 Mad 771 (772) (DB).

33. Who can give notice to quit—Assignment by lessor.—[1] A subsequent lessee of the property for a term of years can give a notice to quit under this section. (Vol 6) 1919 Mad 1186 (1187) (DB) ✠(Vol 6) 1919 Lah 31 (32): 1 Lah 241.

[2] Where the lessor has assigned his interest in the property to another, the latter can give notice to quit, even though a notice of the assignment has not been given to the lessee. (Vol 6) 1919 Lah 31 (32): 1 Lah 241.

[3] Where under the terms of the assignment the landlord has undertaken to recover possession from the tenant and hand over the property to the transferee, a notice to quit by the assignor even after the assignment will be valid and effective. (Vol 11) 1924 Mad 904 (905).

34. Who can give notice — Miscellaneous. — [1] A Receiver appointed by the Court can, if so authorised by the order of appointment issue a notice to quit against a tenant of the property of which he has been appointed Receiver. ('91) 18 Cal 477 (480) (DB).

[2] The trustee of a religious society can give notice to quit to a tenant of property belonging to the society. ('04) 8 Cal W N 918 (922) (DB).

35. Notice to quit—To whom to be given.—[1] Where the leasehold interest is not vested in a single person but in joint tenants notice to quit must be given to all the joint tenants. (Vol 5) 1918 P C 102 (110, 111): 46 Cal 458: 45 Ind App 222 (P C).

[2] Proof of service of notice on one joint tenant will be *prima facie* evidence of notice having reached all the joint tenants. (Vol 5) 1918 P C 102 (110, 112) : 46 Cal 458: 45 Ind App 222 (P C) ✠(Vol 32) 1945 Nag 255 (257) (DB).

[3] Where no notice was addressed to one of the joint tenants at all, the mere service of notice on the other joint tenants will not be sufficient to determine the lease. (Vol 12) 1925 Cal 752 (753, 754) (DB).

[4] Where the joint tenants constitute members of a join Hindu family living together in the same house the service on one of them, at their residence, of a notice addressed to all of them is enough. (1900) 4 Cal W N 572 (573) (DB).

[5] Where a lease has been granted to one member of a joint Hindu family, the lease can be determined by a notice to quit issued to such member alone. ('97) 1897 Bom P J 188 (188) (DB).

[6] Where a lessee dies leaving a number of heirs, all the heirs must be served with a notice to quit if the lease is to be determined. (Vol 27) 1940 Cal 89 (91): I L R (1939) 2 Cal 254.

[7] Where there are several co lessees, one of whom dies, a notice to quit to the survivors alone is not enough. A notice to quit must be served on the heirs of the deceased also. (Vol 27) 1940 Cal 89 (91) : I L R (1939) 2 Cal 254.

[8] Where a sole tenant dies leaving several heirs separate notices to quit served on all of them are enough to determine the lease. It is not necessary that there must be a single notice to all of them. ('02) 6 Cal W N 134 (137, 138) (DB).

[9] The assignee of a lease is entitled to a notice under this section. ('07) 5 Cal L Jour 205 (207) (DB).

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[10] A sub-lessee is not entitled to any notice before he can be ejected by the superior lessor. ('97) 1897 Bom P J 188 (188) (DB).

[11] Where a tenancy is purchased by one person benami in the name of another, a notice to the real purchaser is enough to determine the lease. (Vol 13) 1926 Cal 634 (637).

36. Notice to or by agent.—[1] A notice to quit can be given by a duly authorised agent so as to bind the principal. (Vol 22) 1935 Cal 577 (578).

[2] Where an unauthorised person gives a notice to quit on behalf of another, the notice will be invalid. It cannot be ratified by the person on whose behalf it purports to be given. (Vol 4) 1917 Cal 621 (624) (SB).

[3] An authority to give a notice to quit need not be in writing. The authority to sue in ejectment includes an authority to give notice to quit. (Vol 16) 1929 Cal 651 (652, 653): 57 Cal 10 (D B).

[4] Section 229 of the Contract Act applies to notices to quit. (Vol 14) 1927 Sind 24 (25).

37. Period of notice.—[1] If the period of the notice is shorter than that prescribed such notice will not be sufficient to terminate the lease. ('93) 3 Mad L Jour 222 (223) (D B) ✠(Vol 16) 1929 Nag 332 (333) ✠(Vol 12) 1925 Rang 206 (206) ✠(Vol 8) 1921 Pat 334 (335) ✠('08) 12 Cal W N 724 (725) (DB).

[2] The notice may be for a longer period than required. (Vol 19) 1932 P C 279 (280): 59 Ind App 414 (P C).

[3] Where a notice falls short of the requisite period the mere fact that the tenant is actually allowed to hold the property for the full length of the period for which notice ought to have been given and a suit for ejectment against him is brought only afterwards, will not cure the defect in the notice so as to make it effectual for the purpose of terminating the tenancy. ('91) 15 Bom 407 (411) (DB).

[4] Where the party to whom a notice is given accepts it and acts upon it, the fact that it is not of the requisite length will not matter. (Vol 12) 1925 Rang 206 (206).

[5] To terminate a tenancy under this section the notice must be of fifteen clear days or six clear months according as the tenancy may be a monthly or a yearly one. (1900) 28 Cal 118 (122) (DB).

[6] The day on which the notice is served must be excluded but not the day on which the tenancy is purported to be terminated. (Vol 2) 1915 Cal 313 (315) (DB).

[7] Where a notice is prescribed by the contract of lease itself but the contract does not specify the length of the notice, it has been held that at least a notice of six months must be given in the case of a tenancy from year to year. (Vol 6) 1919 Pat 108 (111) (DB).

38. Expiring with end of year or month of tenancy. — [1] A letting to a monthly tenant is not a letting which expires at the end of first month or at the end of each succeeding month. Nor is there re-letting at the commencement of each month of the tenancy. It is a letting for the period which is determinable by due notice. (Vol 32) 1945 Pat 385 (385) (DB).

[2] A notice which does not expire at the end of a year or month of the tenancy will be invalid under this section. (Vol 31) 1944 Cal 84 (86) (DB) ✠ ('85) 7 All 899 (902, 903, 904) (FB) ✠(Vol 15) 1928 Cal 392 (395): 55 Cal 435 (DB).

[3] A notice terminating the tenancy before the end of the current year or month of the tenancy, in which such notice is given, will be bad. ('10) 6 Nag L R 17 (18, 19) ✠ ('91) 4 C P L R 32 (32) ✠ (Vol 32) 1945 Pat 463 (464) : 24 Pat 454 (DB).

[4] Where a notice to quit does not expire with the end of a month or year of the tenancy as required by this section, the mere fact that the notice is for a longer period than is required under this section will not validate the notice. (Vol 31) 1944 Cal 84 (85, 87) (DB) ✠(Vol 7) 1920 All 104 (105) (DB) ✠('98) 1898 Bom P J 206 (206, 207) (DB) ✠ (Vol 10) 1923 Cal 524 (527) (DB).

[5] Where a notice under this section does not expire with the end of a year or month of the tenancy, the mere fact that the tenant is allowed to hold on till the end of such a period and the suit for ejectment is brought against him only afterwards cannot cure the defect in the notice so as to make it effective for the purpose of terminating the tenancy. ('85) 7 All 899 (902, 904) (FB).

[6] It is immaterial whether a notice is to quit on the last day of a month or year of the tenancy or on the next day after that. (Vol 19) 1932 P C 279 (280) : 60 Cal 380 : 59 Ind App 414 (PC) ✠ (Vol 18) 1931 Mad 352 (354). (Notice to quit on the next day after last day.) ✠ ('38) 68 Cal L Jour 411 (412). (Do.)

[7] A notice requiring a yearly tenant to vacate before the expiry of the last day of the year is good. (1900) 27 Cal 570 (577, 578) (DB).

[8] A notice to quit by the last day of a year or month of the tenancy is valid. (Vol 24) 1937 Nag 139 (140) : ILR (1937) Nag 214 ✠ (Vol 8) 1921 All 194 (194) : 43 All 330 (DB) ✠ (Vol 34) 1947 Cal 244 (245). (Notice requiring tenant to vacate as last day of month came to an end.)

[9] A notice requiring tenant to vacate immediately on the expiry of a month was held valid. (Vol 32) 1945 Pat 463 (464) : 24 Pat 454 (DB).

39. Year or month of tenancy. — [1] A year or month of the tenancy at the end of which a notice under this section is required to expire is the year or month calculated with reference to the commencement of the tenancy. (Vol 31) 1944 Cal 84 (85, 87) (DB) ✠ ('94) 7 C P L R 150 (151).

[2] Where a month to month tenancy is expressed to commence on a certain day that day need not be excluded in computing the period of the month of the tenancy. (Vol 30) 1943 Bom 306 (309, 310): ILR (1943) Bom 553 (DB).

[3] Where it is uncertain from what day of the month, a tenancy from month to month began, it may be presumed that it began from the 1st day of a calendar month. (Vol 24) 1937 All 36 (38) (DB) ✠ ('06) 10 Cal W N 841 (844) (DB).

[4] An agreement between the lessor and the lessee that the period of the tenancy should only run from the beginning of the calendar month, may be implied from the date fixed for the payment of the rent. (Vol 23) 1936 Oudh 306 (307) : 12 Luck 241 (DB) ✠ ('07) 30 Mad 109 (111) (DB) ✠ ('02) 5 Oudh Cas 113 (114).

[5] Where the original lease was for a definite term of a year or years, the tenancy by holding over will commence from the next day after such anniversary, and a month of the tenancy must be determined with reference to such commencement. (Vol 19) 1932 P C 279 (280) : 60 Cal 380 : 59 Ind App 414 (PC).

40. Calendar for calculation of time. — [1] Though the year, month etc., are to be interpreted according to the British calendar, there may be a contract to the contrary under which some other calendar may be prescribed. Such contract may be express or implied. Where there is such contract, the calendar prescribed thereby will determine the reckoning of time. (Vol 3) 1916 Cal 576 (577) (DB) ✠ (Vol 31) 1944 Cal 84 (86) (DB). (The same principle applies to month to to month tenancy.)

Section 106 *(contd.)*

41. Form of notice. — [1] Where there is no statutory provision for the determination of a tenancy by a written notice, a notice to quit may be oral. ('07) 34 Cal 57 (63, 64) (DB).

[2] A notice under this section may be signed by a party personally or by his authorised agent. (Vol 2) 1915 Cal 313 (315) (DB) ✠ (Vol 12) 1925 All 199 (200).

[3] The mere institution by the lessor of proceedings for the possession of the leased property under S. 145, Criminal P. C., will not be a notice to quit. ('79) 4 Cal 339 (341) (DB).

[4] A mere resolution passed by a Municipal Council deciding to determine a lease granted by the municipality will not, in itself, amount to a notice to quit under this section. (Vol 15) 1928 All 95 (95, 96).

42. Mode of service. — [1] The mode of service mentioned last in this section is not to be resorted to when the second or the third mode is practicable. (Vol 26) 1939 P C 11 (13) : I L R (1939) Kar (PC) 90 (PC).

[2] The sender of the notice is free to adopt any of the first three modes of service mentioned in the section as he may think fit. (Vol 10) 1923 Cal 682 (684) (DB).

[3] The sender of the notice can get the notice served by delivery or tender to a member of the addressee's family or to one of his servants at his residence though service of the notice personally on the addressee is not impracticable. (1900) 4 Cal W N 572 (573) (DB).

[4] Where a notice is not sent by post the delivery or tender of the notice must be made to the addressee personally except when such delivery or tender is made at his residence, in which case it may be made to one of his family or servants. (Vol 10) 1923 Cal 682 (684) (DB).

[5] Vicarious service can only be at residence of the addressee. (Vol 5) 1918 P C 102 (110) : 46 Cal 458 : 45 Ind App 222 (PC).

[6] Where a notice is desired to be served at the residence of the addressee it must be delivered or tendered to him or to one of his family or servants. In the absence of such delivery or tender, merely beating a drum and affixing the notice to the wall of the house wherein the addressee resides will not be enough. (Vol 6) 1919 Cal 400 (401).

[7] The tender and refusal of a notice is as good as delivery of the notice for the purpose of this section, even where the refusal is not by the addressee himself but by one of his family or servants at his residence. ('10) 14 Cal W N 372 (374) (DB) ✠ ('12) 16 Ind Cas 213 (214) (DB) (Cal).

43. Service by post. — [1] If a letter properly directed, containing a notice to quit, is proved to have been put into the post office, it is presumed that the letter reached its destination at the proper time according to the regular course of business of the post office, and was received by the person to whom it was addressed. That presumption would apply with still greater force to letters which the sender has taken the precaution to register and is not rebutted by the fact that a receipt for the letter is produced signed on behalf of the addressee by some person other than the addressee himself. (Vol 5) 1918 P C 102 (111, 112): 46 Cal 458 : 45 Ind App 222 (PC).

[2] The presumption of due service applies only in cases in which it is shown that the notice was properly addressed. ('08) 7 Cal L Jour 251 (258, 259) (DB).

[3] The express provision that the notice may be sent by post only contemplates the sending by post to the correct address. (Vol 26) 1939 P C 11 (13) : I L R (1939) Kar (P C) 90 (P C).

[4] A notice is sent by registered post but is returned as having been refused by the addressee. This will be sufficient service of the notice for the purpose of this section. (Vol 7) 1920 All 104 (105) (D B) ✠ ('98) 1898 Bom P J 206 (206, 207) (D B) ✠ ('12) 16 Ind Cas 213 (214) (D B) (Cal).

[But see (Vol 22) 1935 Bom 247 (251) (D B).]

[5] The production in Court of the cover, in which the notice was sent, with the endorsement of the postal official to the effect that it was refused by the addressee, would be sufficient to prove tender and refusal by the addressee. (Vol 25) 1938 All 388 (389, 390)✠(Vol 7) 1920 Cal 287 (288) (D B).

[But see (Vol 2) 1915 Cal 313 (315, 320) (D B).]

[6] The provision that the notice must be delivered or tendered personally to the addressee or to one of his family or servants at his residence will not apply to service of notice by post. (Vol 25) 1938 All 388 (389, 390).

44. Service of notice on party's pleader or solicitor.—[1] It has been held that, if a notice is sent to a party's pleader or solicitor and is sent by such pleader or solicitor to the party, this would be tantamount to a personal service on the party, though it is an indirect mode of service. (Vol 14) 1927 Sind 24 (25)✠ ('96) 22 Bom 754 (757).

45. Leases by Government.—[1] A lease by the Government for building purposes fixing no term must be presumed to be a yearly tenancy determinable by six months' notice expiring with a year of the tenancy. (Vol 24) 1937 Pat 391 (395) (D B) ✠ (Vol 24) 1937 Pat 444 (446) (D B).

[2] A notice to quit given on behalf of the Government need not be signed by the Secretary of State for India himself. A notice signed by the Collector will be enough. ('08) 8 Cal L Jour 34 (37) (D B).

46. Lease by municipality. — [1] A lease by a municipality cannot in the absence of a contract to the contrary, be determined by a mere resolution passed by the Municipal Council and without any notice being served on the lessee in accordance with the provisions of this section. (Vol 15) 1928 All 95 (95, 96).

47. Notice in cases not governed by this section.—[1] In cases in which a lease is not governed by this section, it will be regarded, in the absence of a contract, local law or usage to the contrary, as determinable by a sufficient notice given by either party to the other. The lease will not be determinable without such notice. (Vol 20) 1933 Mad 165 (165, 166).

[2] The requirements of this section as to the validity of a notice will not apply to leases not governed by this section. (Vol 15) 1928 Lah 348 (348, 349)✠(Vol 12) 1925 Mad 346 (346).

[3] The question of the sufficiency of notice in the case of leases not governed by this section will have to be determined according to the principles of justice, equity and good conscience. It will have to be seen in each case whether the notice given is a reasonable one with regard both to the length of such notice and the time at which it is to expire. ('80) 15 Bom 415*n* (415*n*) (D B)✠(Vol 15) 1928 Pat 354 (355) : 7 Pat 496 (D B)✠ ('04) 8 Cal W N 774 (778) (F B)✠(Vol 5) 1918 Nag 210 (211, 212)✠(Vol 20) 1933 Mad 165 (165, 166)✠ (Vol 16) 1929 Mad 617 (621) (D B).

[4] In cases in which a lease is not governed by this section, local custom will have to be given due consideration in determining the reasonableness of a notice. (Vol 12) 1925 Mad 346 (346).

[5] The provisions of this section may be kept in view as a guide to what may be a reasonable notice in a lease not governed by this section. ('13) 17 Cal W N 1073 (1074) (D B).

[a]**107.** A lease of immoveable property from year to year, or for any term exceeding one year, or reserving a yearly rent, can be made only by a registered instrument.

Leases how made.

[b][All other leases of immoveable property may be made either by a registered instrument or by oral agreement accompanied by delivery of possession.]

[c][Where a lease of immoveable property is made by a registered instrument, such instrument or, where there are more instruments than one, each such instrument shall be executed by both the lessor and the lessee :]

[d][Provided that the [e][Provincial Government] may, [f][* * * *] from time to time, by notification in the [g][Official Gazette], direct that leases of immoveable property, other than leases from year to year, or for any term exceeding one year, or reserving a yearly rent, or any class of such leases, may be made by unregistered instrument or by oral agreement without delivery of possession.]

[a] As to limitation to the territorial operation of S. 107, *see* S. 1, *supra*. S. 107 extends to every cantonment in British India—*see* the Cantonments Act, 1924 (2 [II] of 1924), S. 287. [b] *Substituted* by the Transfer of Property (Amendment) Act, 1904 (6 [VI] of 1904), S 5. [c] *Inserted* by the Transfer of Property (Amendment) Act, 1929 (20 [XX] of 1929), S. 55. [d] *Inserted* by Act 6 [VI] of 1904, S 5. [e] *Substituted* by A O. for "Local Government." [f] The words "with the previous sanction of the Governor-General in Council" were *repealed* by A. O. [g] *Substituted* by A. O. for "local official Gazette."

Section 106—Note 47 *(contd.)*

[6] A six months' notice will not be indispensable in every case to determine a yearly tenancy. (Vol 4) 1917 Low Bur 67 (68) ✠ ('09) 36 Cal 927 (933 934) (D B) ✠ (Vol 20) 1933 Mad 165 (165, 166)✠('42) 75 Cal L Jour 431 (433) (D B).

[7] The notice need not necessarily expire with a year of the tenancy. ('86) 13 Cal 3 (7) (D B) ✠ (Vol 12) 1925 Mad 346 (347)✠(Vol 8) 1921 Cal 126 (127) (D B).

[8] Generally a notice of six months is considered reasonable ('07) 11 Cal W N 1124 (1126) (D B) ✠ ('95) 20 Bom 759 (761) (D B).

[9] In regard to tenancies in the mofussil of Bengal the six months' period must generally be calculated according to the Bengali calendar. ('15) 22 Cal L Jour 74 (75)✠(Vol 2) 1915 Cal 709 (709, 710) (D B).

[10] A notice purporting to terminate an agricultural tenancy should either ask for possession at the end of the agricultural year or at least when the crop of the year has been harvested. (Vol 17) 1930 Pat 143 (144) (D B) ✠ (Vol 15) 1928 Pat 354 (356) : 7 Pat 496 (D B)✠('02) 29 Cal 203 (206, 207) (D B).

SECTION 107 — SYNOPSIS

1. Scope.
2. Law in the Punjab.
3. Term of a lease.
4. "From year to year."
5. "For any term exceeding one year."
6. "Reserving a yearly rent."
7. Effect of non-registration.
8. Lease coming within the first paragraph created by oral agreement, if can be treated as valid lease under second paragraph.
9. Paragraph 2.
10. Paragraph 3.
11. Proviso.
12. Lease by Government.
13. Lease embodied in a decree or order of a Court.
14. Leases and part performance.
15. Agreement to lease.

1. Scope. — [1] Where the Act applies, no lease can be created except in one of the manners specified by this section (Vol 30) 1943 Lah 127 (128) : I L R (1943) Lah 195 (F B).

2. Law in the Punjab.—[1] Section 107 has been made applicable to Punjab by notification No. 183-st, issued on 27 April 1935 — In all non-municipal areas, whether before or after Notification lease for any term can be effected by oral agreement accompanied by delivery of possession. (Vol 20) 1933 Lah 61 (64) : 14 Lah 137 (D B).

[2] Lease, if made in writing, requires to be registered under Registration Act which is applicable to Punjab. (Vol 3) 1916 Lah 353 (354): 1915 Pun Re No. 97 (D B).

[3] In all the municipal areas after 1935 a lease can be effected only in the manner prescribed by this section (Vol 30) 1943 Lah 127 (128) : I L R (1943) Lah 195 (F B)✠(Vol 26) 1939 Lah 423 (424) : I L R (1940) Lah 70 (D B).

3. Term of a lease.—[1] The term of a lease is to be determined from the document of lease, where there is one, construed in the light of surrounding circumstances (Vol 22) 1935 All 492 (493) (D B) ✠ ('29) 31 Bom L R 335 (336).

[2] Lease — No period specifically fixed — Words in deed indicating period in general—In such case, period for purpose of registration means period during which lessee is entitled to continue in possession. (Vol 1) 1914 All 120 (120, 121): 36 All 176 (D B).

[3] If a lessee is entitled to remain in possession so long as he continues to pay the agreed rent it will be a permanent lease. (Vol 13) 1926 Bom 374 (374) (D B).

[4] If lessee agrees to vacate the land whenever the lessor wants it, it will only be a tenancy at will. (Vol 19) 1932 Bom 493 (495).

[5] Lease — Period fixed—Words indicating further continuance of lease—Lease is for fixed period. ('86) 8 All 198 (200) (DB).

[6] House let at annual rent for one year — Lessee declaring that he would continue to pay annual rent every year and on failure, owner to be at liberty to recover rent through Court—Lease held was for one year. ('86) 8 All 198 (200) (DB).

[7] Lease for one year—Lessee agreeing to hold further if the lessor agrees—Lease held only for one year. ('77) 26 Suth W R 98 (98) (DB) ✠ ('79) 3 Bom 21 (22) (DB) ✠ ('06) 8 Bom L R 580 (585) (DB) ✠ (Vol 10) 1923 Cal 670 (672) (DB).

[8] Lease of a house—Kabuliat not admissible being unregistered — No patta—Relationship of landlord and tenant not denied — Lease held from month to month. (Vol 26) 1939 Pat 296 (303).

[9] Lease of sir land—Kabuliat not admissible being unregistered — No patta—Relationship of landlord and tenant admitted — Tenancy held from year to year. (Vol 14) 1927 Nag 353 (353).

[10] Where there is no document of lease, the nature of the tenancy must be determined from the surrounding circumstances and in particular from the course of

Section 107 — Note 3 *(contd.)*
dealings by the parties concerned. (Vol 29) 1942 Cal 486 (487).

4. "From year to year." — [1] A tenancy "from year to year" is a tenancy continuing so long as the parties desire to continue it and though terminable at the option of either party at the end of any year, it is not *ipso facto* terminated at the end of every year. ('35) 62 Cal L Jour 201 (204) (DB).

[2] Period of lease not specified in deed — Provision for payment of annual rent does not imply that lease is from year to year — Period is to be determined under S. 106 (Vol 8) 1921 Pat 307 (308) (DB) ✠ (Vol 4) 1917 Pat 46 (46) : 2 Pat L Jour 180 ✠ (Vol 22) 1935 Oudh 90 (90) : 10 Luck 490 (DB)✠(Vol 7) 1920 Cal 858 (858) (DB)✠(Vol 7) 1920 Cal 581 (583) (DB).

[3] Lease executed for one year—Lease to remain in force until another patta was executed—Lease held was not for one year only. ('81) 3 Mad 358 (359) (DB).

5 "For any term exceeding one year." — [1] Lease for one Sambat year—Period exceeding one year according to British Calendar — Lease is not for term exceeding one year. (Vol 11) 1924 Nag 216 (216).

[But see (Vol 15) 1928 Nag. 27 (28) : 23 Nag L R 152.]

[2] Where a tenant is entitled to hold on so long as he pays the stipulated rent or renders the stipulated service, the tenancy is for a term exceeding one year. (1900) 2 Bom L R 488 (489) (DB).

[3] Lease—Express term that lessee shall vacate property in case he fails to pay rent or whenever lessor requires him to do so—Period exceeding one year mentioned in lease — Lease is not for term exceeding one year. (Vol 10) 1923 All 382 (383) ✠ ('29) 31 Bom L R 335 (338).

[4] A lease for the life of a lessee is a lease for a term exceeding one year. ('94) 18 Bom 109 (110) (DB).

[5] Lease described as yearly lease—No period fixed — Lessor having option to terminate lease on finding out fraud or deceit on lessee's part—Lease held for term exceeding one year. (Vol 4) 1917 Bom 274 (275) : 41 Bom 458 (DB).

[6] Lease—Lessee to pay rent yearly—On failure to pay rent any year or if lessee did not behave properly lease to come to an end automatically—No period fixed — Lease held was not for term exceeding one year. (Vol 9) 1922 All 54 (54) (DB).

[7] A lease deed provided: "I have taken the land from KH and am building a shop on it, I promise and give it in writing that I shall pay KH every month a rent of annas three per month. In any month in which I fail to pay the rent KH will be competent to have the shop vacated by me." It was held that it could not be called a lease from year to year or for a term exceeding one year. ('97) 1897 All W N 69 (70).

[8] A lease deed provided: "I have taken the house on lease on a monthly rent for my personal use. If the owner deems it necessary to have the building vacated he shall give me fifteen days' prior notice whereupon I shall vacate the premises forthwith." It was held that it was not a lease for a term exceeding one year. ('86) 1886 All W N 115 (117) (FB).

[9] A lease deed provided for the payment of a monthly rent and did not specify any period. It could be terminated in non-payment of rent. But there was no clause to show that it would continue so long as the rent was paid. It was held that it was not one for a term exceeding one year. (Vol 9) 1922 Lah 43 (43) : 2 Lah 300 (DB) ✠ (Vol 15) 1928 Lah 937 (938).

6. "Reserving a yearly rent." — [1] The words "reserving a yearly rent" show that the lease is not limited to one year only. (Vol 21) 1934 All 902 (902).

[2] A lease reserving a yearly rent is really a lease from year to year. (Vol 30) 1943 Cal 474 (474) : I L R (1943) 1 Cal 34 (DB) ✠ ('96) 9 C P L R 57 (58) ✠ ('90) 14 Bom 319 (320) (DB)✠(Vol 21) 1934 All 902 (902).

[3] Lease for indefinite period reserving yearly rent — Rent to be paid in two six monthly instalments — Lease is still one reserving yearly rent. (Vol 12) 1925 Lah 491 (492) : 6 Lah 319 (DB).

[4] Lease terminable at lessor's option—Yearly rent mentioned — Lease not one reserving yearly rent. ('26) 92 Ind Cas 526 (527) (Lah).

[5] A lease which is for a period of one year only cannot be called a lease reserving a yearly rent though there is a mention of an annual rent in the deed. ('40) 42 Pun L R 75 (76)✠(Vol 4) 1917 Low Bur 133 (134).

7. Effect of non-registration. — [1] All leases coming within the first paragraph of this section can be made only by registered instrument. (Vol 12) 1925 Pat 216 (224) : 4 Pat 139 (DB) ✠ (Vol 14) 1927 Sind 206 (207) (DB) ✠ (Vol 29) 1942 Pat 397 (399) (DB).

[2] Where a lease coming within the first paragraph of this section is evidenced by more documents than one, all such documents must be registered. (Vol 13) 1926 Bom 384 (386) (DB).

[3] Where a lease is effected by a registered instrument, an agreement which affects the incidents of the tenure created by the lease must also be registered. (Vol 21) 1934 Lah 743 (743) ✠ (Vol 25) 1938 Cal 795 (797) ✠ ('12) 39 Cal 284 (297, 298) (FB) ✠ (Vol 16) 1929 Lah 291 (292) : 10 Lah 685 (DB).

[4] An unregistered document of lease, in cases where the lease is required to be registered, conveys no title and creates no rights in the lessee. (Vol 30) 1943 All 279 (280) ✠ (Vol 12) 1925 Cal 1171 (1172, 1173) (DB) ✠ (Vol 7) 1920 Pat 803 (804). (Lease for life.) ✠ (Vol 2) 1915 Oudh 165 (166) ✠ ('12) 36 Bom 500 (503) (DB) ✠ (Vol 24) 1937 Mad 656 (657) ✠ (Vol 3) 1916 Mad 517 (517) ✠ (Vol 17) 1930 All 678 (680) (DB) ✠ (Vol 23) 1936 Nag 295 (295) ✠ (Vol 19) 1932 Cal 83 (84) : 59 Cal 396 (DB) ✠ ('09) 33 Bom 610 (625) (DB)✠ (Vol 29) 1942 Pat 397 (399) (DB).

[5] An unregistered lease which is required to be registered cannot be used in evidence to prove the transaction. (Vol 13) 1926 Bom 384 (386) (DB) ✠ (Vol 4) 1917 Mad 735 (736) (DB)✠(Vol 28) 1941 Rang 117 (117) (DB) ✠ (Vol 1) 1914 Mad 359 (360) (DB) ✠ (Vol 28) 1941 Mad 602 (603) ✠ (Vol 32) 1945 Nag 102 (103) : I L R (1945) Nag 510.

[6] An unregistered lease deed cannot be used to prove any term of the transaction. (Vol 2) 1915 Mad 76 (76) (DB) ✠ (Vol 5) 1918 Nag 74 (75) : 15 Nag L R 31✠ (Vol 3) 1916 Mad 517 (517).

[7] An unregistered lease deed may be used for collateral purposes. (Vol 11) 1924 Nag 199 (200). (Evidence of ownership) ✠ (Vol 18) 1931 Lah 501 (502) ✠ (Vol 2) 1915 Oudh 165 (166). (To explain the circumstances under which the lessee got into possession) ✠ (Vol 17) 1930 Pat 550 (552) (DB) ✠ (Vol 19) 1932 Sind 60 (61): 25 Sind L R 451 (DB)✠(Vol 33) 1946 All 403 (405).

[But see (Vol 1) 1914 Mad 638 (638) (DB) ✠ ('05) 1 Nag L R 147 (149).]

[8] Lease deed not registered — Lessee entering into possession — Lease is admissible as evidence of agreement contained therein and for determining rights and liabilities of parties. (Vol 29) 1942 Oudh 231 (236) : 17 Luck 530 (D B).

[9] If the lessee has entered into possession the lessor cannot sue him for rent on the basis of the unregistered lease deed. (Vol 23) 1936 Cal 628 (629) : 62 Cal 294.

[10] Lease deed not registered—Lessee entering into possession— Lessor can claim damages from lessee for use and occupation of property. ('09) 31 All 276 (278) (S B) ✠ (Vol 32) 1945 Nag 69 (71) : I L R (1944) Nag

Section 107 — Note 7 *(contd.)*
704 (D B) ✠ (Vol 24) 1937 Mad 656 (657, 658) ✠ (Vol 29) 1942 Oudh 93 (95) : 17 Luck 205 (D B) ✠ (Vol 17) 1930 Lah 915 (916) ✠ (Vol 22) 1935 All 785 (785) ✠ (Vol 29) 1942 Oudh 408 (409) : 18 Luck 201.

8. Lease coming within the first paragraph created by oral agreement, if can be treated as valid lease under second paragraph.—[1] The word "only" in the first paragraph makes it clear that leases coming within its scope cannot be created otherwise than by a registered instrument. (Vol 18) 1931 P C 79 (80) : 58 Cal 1235 : 58 Ind App 91 (P C) ✠ (Vol 29) 1942 Oudh 93 (95) : 17 Luck 205 (D B).

[2] Lease coming within first paragraph of section— Lease cannot be created by oral agreement accompanied by delivery of possession. (Vol 13) 1926 Pat 130 (135) : 5 Pat 80 (D B) ✠ (Vol 24) 1937 All 36 (38) (D B) ✠ ('95) 22 Cal 752 (755) (D B) ✠ (Vol 23) 1936 Bom 246 (248) ✠ (Vol 21) 1934 Mad 418 (419, 420) :57 Mad 760 (DB) ✠ (Vol 17) 1930 Mad 272 (276) (D B) ✠ ('36) 63 Cal 31 (39). (Oral lease cannot be made) ✠ (Vol 24) 1937 Rang 180 (181, 182) (D B).

[3] A lease for more than a year, by oral agreement and delivery of possession was treated as a lease for one year. (Vol 30) 1943 Cal 474 (474, 475) : I L R (1943) 1 Cal 34 (D B) ✠ (Vol 27) 1940 Cal 89 (90, 91) : I L R (1939) 2 Cal 254 ✠ (Vol 20) 1933 Pat 485 (488) ✠ (Vol 28) 1941 Pat 244 (245).

[But see (Vol 34) 1947 Cal 351 (352). ((Vol 30) 1943 Cal 474 (D B), *Dissent.*)]

[4] Lease for more than year by oral agreement and delivery of possession — After expiry of one year lessor accepting rent and assenting to lessee's continuing in possession — Lease is renewed from year to year or month to month under S. 116 according to purpose of tenancy. (Vol 31) 1944 Pat 30 (31, 32) : 22 Pat 554 (D B) ✠ (Vol 30) 1943 Cal 474 (474, 475) : I L R (1943) 1 Cal 34 (D B).

[But see ('47) 1947 All W R (H C) 167 (168).]

9. Paragraph 2.—[1] If a lease coming under this paragraph is effected by an instrument, the instrument must be registered. ('11) 11 Ind Cas 863 (863) (Low Bur) ✠ (Vol 23) 1936 Nag 174 (175) ✠ (Vol 18) 1931 Lah 501 (502).

[2] An oral agreement to give a lease, in order to create a valid lease, must be accompanied by delivery of possession. ('11) 11 Ind Cas 849 (850) (Low Bur) ✠ (Vol 28) 1941 Pat 577 (583) : 20 Pat 346 (D B) ✠ (Vol 21) 1934 Pesh 81 (81) ✠ (Vol 13) 1926 Oudh 609 (610).

[3] "Delivery of possession" means actual delivery. (Vol 13) 1926 Oudh 609 (610) ✠ (Vol 1) 1914 Cal 754 (754) (D B).

[4] Where actual delivery is not possible, the lease must be effected by a registered instrument. (Vol 26) 1939 Lah 162 (163).

[5] It is not necessary that delivery of possession must be physical at the time of the agreement; delivery of constructive possession is quite sufficient for the purpose of the section. (Vol 30) 1943 Lah 127 (129) : I L R (1943) Lah 695 (F B).

[6] Lease effected by oral agreement and delivery of possession— Unregistered document evidencing lease— Document is inadmissible in evidence in view of S. 49 of Registration Act. ('38) 1938 Oudh W N 1080 (1083).

[But see (Vol 23) 1936 Mad 301 (303) : 59 Mad 779 (D B).]

[7] When a lease is effected by oral agreement accompanied by delivery of possession and there is a *kabuliat* executed by the lessee, it can be admitted in evidence to prove the oral agreement. (Vol 30) 1943 Lah 127 (128) : I L R (1943) Lah 695 (F B) ✠ (Vol 9) 1922 All 54 (54) (D B).

10. Paragraph 3 — [1] A document signed only by the lessee will not be operative as a lease under this section. (Vol 30) 1943 All 212 (213, 214) (D B) ✠ (Vol 30) 1943 Lah 127 (128) : I L R (1943) Lah 695 (F B) ✠ (Vol 29) 1942 All 330 (330) ✠ (Vol 25) 1938 Mad 746 (747) ✠ (Vol 27) 1940 Nag 143 (144) ✠ (Vol 19) 1932 Sind 217 (219) : 26 Sind L R 377 (D B) ✠ (Vol 21) 1934 Pesh 81 (81) ✠ (Vol 31) 1944 Pat 35 (36) ✠ (Vol 34) 1947 Pat 78 (79) (D B).

[But see (Vol 33) 1946 Pat 22 (24) : 24 Pat 429 (D B).]

[2] A document signed by the lessor only does not operate as a lease. (Vol 27) 1940 Oudh 425 (425, 427) (D B) ✠ (Vol 29) 1942 Oudh 231 (233, 235) : 17 Luck 530 (D B) ✠ (Vol 34) 1947 Pat 78 (79) (D B) ✠ (Vol 31) 1944 Pat 35 (36) ✠ (Vol 33) 1946 Oudh 129 (143) : 21 Luck 194 (D B).

[3] A document signed by lessee or lessor only binds the executant in the absence of fraud or coercion. (Vol 31) 1944 All 221 (221) : I L R (1947) All 346 (D B) ✠ (Vol 29) 1942 All 330 (330).

[4] A person in possession under a kabuliat is liable to pay compensation for the use and occupation of the land. (Vol 31) 1944 All 221 (222) : I L R (1944) All 346 (D B).

[5] Where there are more lessors than one or more lessees than one, all of them must join in the execution of the instrument, unless the executing lessors or the lessees, as the case may be, had authority to sign on behalf of the others also. ('08) 1908 Pun L R No. 189, p. 609 (611) (D B).

11. Proviso.— [1] The proviso empowers the Provincial Government to exempt such leases from the formality of registration when they are made in writing and from delivery of possession when they are made otherwise. (Vol 23) 1936 Nag 174 (175).

[2] In the Presidency of Bombay a lease for a term of one year or less can be made either by an unregistered document or by merely an oral agreement by virtue of Notification No. 12501, dated 8-12-1908. (Vol 19) 1932 Sind 217 (219) : 26 Sind L R 377 (D B).

12. Lease by Government.— [1] Leases granted by the Government need not be registered as they are in the nature of a Crown grant. (Vol 14) 1927 Pat 319 (322) : 6 Pat 446 (D B).

[But see (Vol 1) 1914 All 120 (121) : 36 All 176 (DB) ✠ (Vol 33) 1946 Mad 180 (181) (DB).]

[2] The provisions of S. 107 of the Transfer of Property Act are applicable to leases by Government but that section being supplemental to the Registration Act and leases by Government being excepted from registration by S. 90 (1) (d) of the same Act, Government leases are exempted from the provisions of S. 107 of this Act also. (Vol 10) 1923 Oudh 114 (115) : 27 Oudh Cas 64.

13. Lease embodied in a decree or order of a Court.— [1] Compromise decree operating as lease — Registration is compulsory under the Registration Act. (Vol 31) 1944 Mad 273 (275) : I L R (1944) Mad 543 (F B). ((1910) 33 Mad 102, *Overruled.*) ✠ (Vol 19) 1932 Pat 97 (100) : 11 Pat 98 (D B) ✠ (Vol 28) 1941 Pat 536 (538) ✠ (Vol 17) 1930 Cal 94 (97) : 57 Cal 775 (D B) ✠ (Vol 24) 1937 Cal 499 (499, 500).

[2] When a decree or order does not purport to create a lease and only recognises it, it need not be registered either under the Registration Act. ('20) 57 Ind Cas 798 (800) (D B) (Cal).

14. Leases and part performance.— [1] Section 27A of the Specific Relief Act, 1877, which embodies the principle of part performance, allows the lessee a positive right to get the unregistered lease deed registered by a suit for the specific performance of the

108. In the absence of a contract or local usage to the contrary, the lessor and the lessee of immoveable property, as against one another, respectively, possess the rights and are subject to the liabilities mentioned in the rules next following or such of them as are applicable to the property leased :—

Rights and liabilities of lessor and lessee.

(A) Rights and Liabilities of the Lessor.

(a) The lessor is bound to disclose to the lessee any material defect in the property, with reference to its intended use, of which the former is and the latter is not aware, and which the latter could not with ordinary care discover :

(b) the lessor is bound on the lessee's request to put him in possession of the property :

Section 107—Note 14 *(contd.)*

contract to grant the lease. (Vol 24) 1937 Nag 74 (76): I L R (1936) Nag 115 (D B).

15. Agreement to lease.— [1] "Lease" is defined both in the Registration Act as well as in this Act. But the definition that is to be adopted for the purpose of this section is that which is given in this Act in S. 105. (Vol 30) 1943 Lah 127 (128) : I L R (1943) Lah 695 (F B) ✠ (Vol 10) 1923 Oudh 237 (238).

[2] An agreement to lease, which is not a lease according to the definition given in S. 105 is not required to be registered for the purpose of this section, though under the Registration Act, S. 2 (7), a lease has been defined as including, *inter alia* an "agreement to lease". ('36) 63 Cal 31 (37).

[3] Even for the purpose of the Registration Act, registration is only compulsory if there is a present demise and not where the agreement is a merely executory one. (Vol 6) 1919 P C 79 (80) : 47 Cal 485 : 46 Ind App 240 (P C) ✠ ('36) 63 Cal 31 (37).

[4] An agreement to lease does not, of itself create any interest in or charge on, the property agreed to be leased. ('10) 14 Cal W N 65 (67)✠('12) 35 Mad 63 (73) (F B)✠ (Vol 20) 1933 Rang 220 (222) (D B).

[5] Where an agreement to lease under which the parties reserve a yearly rent is not followed by a duly registered document and the proposed lessee enters into possession of the property, his possession is only that of a licensee. (Vol 30) 1943 All 279 (280).

[6] An oral agreement to grant a lease is valid and enforceable. (Vol 20) 1933 Rang 220 (222) (D B).

Section 108 (General).—Note 1

[1] All or nearly all the clauses are expressions of well settled principles familiar to the law of England. (Vol 16) 1929 Cal 272 (275) (D B).

[2] Section does not in terms apply to agricultural leases — But principles underlying various clauses are applicable. (Vol 4) 1917 Mad 465 (469) : 40 Mad 910 (D B). (Per Srinivasa Aiyangar J.) ✠ (Vol 2) 1915 Mad 717 (718) (D B).

[3] Leases in provinces to which Act does not apply —Principles of section apply. (Vol 21) 1934 Pesh 101 (102) (N-W F P) ✠ (Vol 24) 1937 Lah 930 (931) : I L R (1937) Lah 649 (D B). (Principle underlying the covenant for quiet enjoyment in cl. (c) is of universal application.) ✠ (Vol 7) 1920 Lah 390 (391).

[4] Part of tenancy land acquired by Government under Land Acquisition Act — Compensation paid to landlord — Tenant is entitled to abatement of rent, (Vol 17) 1930 Bom 592 (593).

Section 108, Clause (a)—Note 1

[1] Lessee aware of defect or could, with ordinary care, have discovered defect — Lessor cannot be said to have committed breach of obligatian under this clause. ('13) 17 Cal W N 960 (963) (D B).

[2] Thatch over chimney in leased premises of which lessor was aware but not lessee — Furniture of leasee destroyed by fire arising from chimney—Lessor held committed breach of obligation to disclose defect. ('69) 12 Suth W R 145 (145) (D B).

[3] In cases falling under this clause there is no warranty of fitness of the premises for the purpose for which they are intended to be used. (Vol 4) 1917 Bom 34 (38).

[4] A defect in property with reference to its intended use has a reference to the nature and condition of the property and not the title to the property. ('13) 17 Cal W N 960 (963) (D B) ✠ (Vol 17) 1930 Cal 561 (564) : 57 Cal 1189 (D B).

[5] The Indian law makes no distinction in principle between the obligation of a lessor and of a vendor so far as regards the duty to give a good title, though the incidents of these different types of transfers may be different as regards the obligation to give disclosure and furnish a proof thereof. (Vol 17) 1930 Cal 561 (567) : 57 Cal 1189 (D B) ✠ (Vol 18) 1931 P C 299 (301) : 58 Ind App 392 : 59 Cal 699 (P C) ✠ (Vol 29) 1942 Nag 103 (105) : I L R (1942) Nag 349 (D B). (Lessor found to have no title to land—Lessee not getting possession —Lessee can recover premium paid.)

[6] Lease executed—Breach of obligation imposed by this clause resulting in damages to lessee — Lessee can sue for damages. ('69) 12 Suth W R 145 (145) (D B).

SECTION 108, CLAUSE (b).—SYNOPSIS

1. Obligation to give possession.
2. "On the lessee's request."
3. Failure to give possession—Effect.
4. Contract to the contrary.

1. Obligation to give possession. — [1] This clause imposes a statutory obligation on the lessor to deliver possession to the lessee. ('02) 25 Mad 587 (597) (D B).

[2] What amounts to delivery of possession in any particular case depends on the nature of the property leased. ('10) 33 Mad 102 (110) (D B). (Overruled on a different point in (Vol 31) 1944 Mad 273 : I L R (1944) Mad 543 (F B).)

[3] Lease of rent payable by tenants—Giving of notice to tenant to attorn in future to lessee amounts to delivery of possession of leased property. But it is necessary that the lessor himself must have possession to give to the lessee. (Vol 14) 1927 Lah 1 (3) : 7 Lah 423 (D B) ✠ ('10) 33 Mad 102 (110) (D B). (Overruled on a different point in (Vol 31) 1944 Mad 273 : I L R (1944) Mad 543 (F B).)

[4] The fact that the lessee can take legal proceedings to recover possession himself from the party in occupation will not relieve the lessor from his obligation to deliver possession. (Vol 5) 1918 Lah 238 (238, 239) : 1918 Pun Re No. 19 (D B).

[5] A lease by a person not in possession is, not *ipso facto* void. ('75) 1 Cal 297 (301) (D B).

[6] The lessee's suit against a third person in possession on the strength of the lease cannot be dismissed on the ground that the lease was void for the reason that the lessor had no possession. ('68) 11 Suth W R 80 (81) (S B).

(c) the lessor shall be deemed to contract with the lessee that, if the latter pays the rent reserved by the lease and performs the contracts binding on the lessee, he may hold the property during the time limited by the lease without interruption.

The benefit of such contract shall be annexed to and go with the lessee's interest as such, and may be enforced by every person in whom that interest is for the whole or any part thereof from time to time vested.

Section 108, cl. (b)—Note 1 *(contd.)*

[7] Suit for rent—Onus is on lessor to show that he has put lessee in possession. (Vol 19) 1932 P C 28 (30) : 59 Ind App 29 : 59 Cal 1012 (P C).

[8] Tenant already paying rent under lease or lessee claiming that certain subjects of which he has not got possession are within subjects let — Onus is on lessee to show that he did not get possession. (Vol 19) 1932 P C 28 (30) : 59 Ind App 29 : 59 Cal 1012 (P C).

[9] The question as to when the possession is to be delivered depends upon the terms of the lease. (Vol 14) 1927 Lah 1 (3) : 7 Lah 423 (D B).

2. "On the lessee's request."—[1] The lessor is bound to give possession to the lessee only on lessee's request. (Vol 9) 1922 Cal 348 (353) : 49 Cal 257 (DB).

[2] Lessor is not bound to put an unwilling and recalcitrant lessee into possession against his will. (Vol 23) 1936 Lah 815 (816) ✠ ('09) 9 Cal L Jour 595 (597) (DB).

[3] A request by the lessee to the lessor to deliver possession is not necessary where, to the knowledge of both the lessor and the lessee, the property is not in possession of the lessor. (Vol 5) 1918 Lah 238 (239): 1918 Pun Re No. 19 ✠('10) 33 Mad 499 (501) (Lessor must make it possible for lessee to take possession by removing third persons from possession)

3. Failure to give possession—Effect.—[1] Possession not delivered by lessor—Lessee can sue him for damages (Vol 30) 1943 P C 24 (28) : ILR (1943) 1 Cal 372 : I L R (1943) Kar (P C) 39 : 70 Ind App 18 (P C) ✠(Vol 13) 1926 Pat 508 (511): 6 Pat 94 (D B) ✠(Vol 4) 1917 Mad 465 (467, 469) : 40 Mad 910 (DB).

[2] Failure of lessee to pay premium stipulated — Lessor cannot withhold possession unless possession was made conditional on payment of premium. (Vol 6) 1919 Mad 168 (170, 171) : 42 Mad 203 (S B).

[3] Third party in possession—Lessee can sue third party for possession ('69) 11 Suth W R 80 (81) (DB)✠ ('02) 25 Mad 587 (591) (DB) ✠(Vol 8) 1921 Mad 42 (44, 46) : 44 Mad 937 (DB).

[4] *A* leasing properties to *B* for certain period and then leasing same to *C* for further period after expiry of *B*'s lease—*C* can, after such expiry, sue *B* for possession. (Vol 19) 1932 All 314 (315) (DB) ✠(Vol 18) 1931 All 649 (651) (DB) ✠('89) 13 Bom 294 (296) (DB).

[5] Lessor's failure to give possession—Lessee may repudiate or rescind whole contract. (Vol 15) 1928 Nag 328 (328) ✠(Vol 15) 1928 Mad 380 (381) (DB). (But lessee cannot do so where he takes possession of portion of demised property.)

[6] Non-delivery of possession—Lessee rescinding whole contract —He can recover back premium or other consideration paid. (Vol 6) 1919 Oudh 134 (136) ✠ (Vol 14) 1927 Lah 844 (845) (D B) ✠(Vol 6) 1919 Oudh 398 (398) ✠(Vol 17) 1930 Cal 385 (386, 387) : 57 Cal 114 (DB) ✠(1864) 2 Mad H C R 315 (316) (DB).

[7] Non-delivery of possession of property or part thereof — Lessee can ask for specific performance. (Vol 30) 1943 P C 24 (28) : I L R (1943) 1 Cal 372 : I L R (1943) Kar (P C) 39 : 70 Ind App 18 (P C).

4. Contract to the contrary.—[1] Lessee agreeing to take possession of leased property himself—Agreement is "contract to the contrary"—Lessor has no duty to place lessee in possession. (Vol 16) 1929 Mad 611 (615, 616) (D B).

SECTION 108, CLAUSE (c)—SYNOPSIS

1. Scope.
2. "Without interruption."
3. Interruption by holder of paramount title.
4. Interruption by trespasser.
5. "Shall be deemed to contract."
6. Benefit of covenant runs with the land.
7. Crown grants.
8. Effect of breach of covenant.

1. Scope.—[1] This clause protects the lessee against interruption by whomsoever it is occasioned (Vol 7) 1920 Lah 390 (391) ✠(Vol 10) 1923 Cal 41 (43) : 50 Cal 68 (DB) ✠ (Vol 16) 1929 Cal 272 (275) (DB)✠ (Vol 22) 1935 Mad 973 (975) ✠(Vol 25) 1938 Nag 439 (440) ✠('01) 25 Bom 269 (273) (DB) ✠(Vol 4) 1917 Pat 549 (550) : 2 Pat L Jour 713 (DB).

[But see ('05) 7 Bom L R 713 (722, 723). (To constitute a breach of covenant for quiet enjoyment on landlord's part there must be some act of interruption by him or those claiming under him.)]

[2] Landlord is bound to protect possession of lessee against lawful eviction only and not against unlawful or tortious evictions by third parties. (Vol 25) 1938 Cal 690 (691, 692) ✠(Vol 20) 1933 Mad 465 (466) ✠(Vol 2) 1915 Mad 717 (718) (DB) ✠(Vol 24) 1937 Lah 930 (931) ✠(Vol 10) 1923 Cal 41 (43, 44) : 50 Cal 68 (DB). (Reason being that lessee has his proper remedy against wrong doers) ✠(Vol 32) 1945 All 425 (427) : I L R (1945) All 412 (Do) ✠(Vol 34) 1947 Nag 48 (52) : I L R (1946) Nag 568 (D B). (Do.) (Vol 13) 1926 Lah 371 (372) ✠(Vol 16) 1929 Cal 272 (276) (DB).

[3] The words "if the latter pays the rent reserved by the lease and performs the contracts binding on the lessee" do not make the payment of rent and the performance of the contracts conditions precedent to the enforceability of the obligation to secure quiet enjoyment ('12) 23 Mad L Jour 119 (124) (D B).

[4] An express covenant for quiet enjoyment holds good during the whole of the term expressed to be granted by the lease and not merely during the actual continuance of the estate of the lessor. (Vol 22) 1935 Mad 973 (975).

[5] Lease to commence in future—Lessee cannot, before his right to possession accrues, sue for breach of covenant for quiet enjoyment. (1835) 42 R R 532 (539) : 2 Bing (N C) 90, *Treland* v. *Bircham*.

[6] Strictly speaking, S. 108 (c) which embodies the principle of quiet enjoyment does not come into operation where the lessees were never put in possession by the lessor, the actual physical possession being already with the lessees in pursuance of the sale in their favour. (Vol 32) 1945 All 425 (426) : I L R (1945) All 412 (DB).

[7] The covenant for quiet enjoyment protects the lessee against all disturbance by the lessor whether lawful or not, save under a right of re-entry. (Vol 34) 1947 Nag 48 (51) : I L R (1946) Nag 568 (D B).

2. "Without interruption." — [1] Interruption means a substantial interference with the enjoyment

(B) Rights and Liabilities of the Lessee.

(d) If during the continuance of the lease any accession is made to the property, such accession (subject to the law relating to alluvion for the time being in force) shall be deemed to be comprised in the lease :

Section 108, Cl (c)—Note 2 *(contd.)*

by the lessee of the leased property. ('97) 24 Cal 296 (304) (D B)✠ (Vol 2) 1915 Mad 717 (719) (DB)✠ ('01) 5 Cal W N 353 (355) (DB).

[2] Actual dispossession is not necessary to constitute interruption (Vol 10) 1923 Nag 31 (32) ✠(Vol 13) 1926 Cal 906 (907) (DB)✠(Vol 22) 1935 Cal 464 (465) (D B).

[3] Lessee evicted by Plague Authorities under powers vested in them by law—There was no breach on part of lessor of covenant for quiet enjoyment. ('99) 23 Bom 510 (512, 513).

[4] Land leased for being used for sale of firewood —Municipality refusing permission for such sale— There was breach of obligation to secure quiet enjoyment. (Vol 6) 1919 Oudh 398 (398).

[5] A covenant for quiet enjoyment does not include a covenant for title. (Vol 4) 1917 Mad 465 (467, 470) : 40 Mad 910 (D B)✠(Vol 17) 1930 Cal 561 (564) : 57 Cal 1189 (DB) ✠ (Vol 21) 1934 Cal 437 (438) (DB).

[But see (1864) 1 Suth W R 1 (2) (D B). (Case before Act) ✠(Vol 32) 1945 All 425 (427): I L R (1945) All 412 (DB)]

3. Interruption by holder of paramount title.—[1] An interruption of the lessee's enjoyment by the holder of a paramount title is an "interruption" within the meaning of this clause. ('02) 25 Bom 269 (273, 274) (DB) ✠ ('13) 17 Cal W N 960 (962) (DB) ✠ (Vol 34) 1947 Nag 48 (51): I L R (1946) Nag 568 (DB) ✠ (Vol 32) 1945 All 425 (427): I L R (1945) All 412 (D B) ✠ (Vol 22) 1935 Mad 973 (975) ✠ (Vol 7) 1920 Lah 390 (391) ✠ (Vol 9) 1922 Cal 237 (240) (DB).

[2] A title paramount means a title superior to that of the lessor. (Vol 8) 1921 Cal 532 (533) (DB) ✠ (Vol 16) 1929 Cal 22 (25): 55 Cal 1013 (DB) ✠ (Vol 32) 1945 All 425 (428): ILR (1945) All 412 (DB).

[3] Third person filing suit against lessee without impleading lessor, and, in execution of decree, dispossessing lessee — Dispossession is not necessarily by person with paramount title—But where lessor is made party dispossession will be by owner of paramount title. (Vol 8) 1921 Cal 532 (533, 534) (DB) ✠ (Vol 9) 1922 Cal 237 (242) (DB) (Lessor made party.) ✠ (Vol 16) 1929 Mad 195 (196). (Do.)

4. Interruption by trespasser.—[1] Lessee evicted or interrupted in enjoyment of his property by trespasser—Lessor can sue to eject trespasser for putting lessee in possession (Vol 10) 1923 Cal 192 (193) (DB) ✠ (84) 10 Cal 1076 (1079) (DB) ✠ (Vol 15) 1928 Pat 354 (355): 7 Pat 496 (DB) ✠ (Vol 2) 1915 Mad 358 (360) (DB).

[But see ('98) 21 Mad 288 (290) (DB).]

[2] Lessee evicted by trespasser—Lessor's right to reversion affected by trespass—Lessor is entitled to declaration of title and delivery of formal possession by proclamation of his reversionary right. (Vol 4) 1917 Mad 760 (761): 39 Mad 1042 (DB). ((96) 18 All 440 (FB) *Followed*)

[3] Lessee evicted by trespasser—Lessor can sue to eject trespasser under S 9, Specific Relief Act ('05) 28 Mad 238 (249) (DB) ✠ ('11) 5 Sind L R 42 (44) (DB) ✠ ('10) 12 Cal L Jour 483 (485) (DB) ✠ (Vol 16) 1929 Bom 467 (468): 53 Bom 777 (DB) ✠ ('11) 15 Cal W N 715 (716) (DB).

[But see (Vol 13) 1926 Mad 18 (20) ✠ ('02) 6 Cal W N 616 (617) (DB)]

[4] The covenant for quiet enjoyment does not cover the tortious entries, evictions or interruptions by trespassers (Vol 34) 1947 Nag 48 (51): I L R (1946) Nag 568 (DB).

5. 'Shall be deemed to contract"—[1] The covenant for quiet enjoyment in this clause is deemed to be a part of the contract and to be read into the contract. (Vol 24) 1937 Pat 44 (47) (DB).

6. Benefit of covenant runs with the land.—[1] It is only the benefit of a covenant for quiet enjoyment that runs with the land and not the benefit of the obligations under clauses (a) or (b). (Vol 4) 1917 Mad 465 (469) 40 Mad 910 (DB).

[2] The legal representatives of the lessee or the assignee of the lessee can enforce the covenant for quiet enjoyment given by this clause. (Vol 16) 1929 Mad 195 (196)

7. Crown grants.—[1] This Act does not apply to Crown grants.—But provisions of S. 108 may be referred to for determining nature of ordinary covenants by which lessor and lessee are bound. (Vol 4) 1917 Mad 465 (469): 40 Mad 910 (DB).

8. Effect of breach of covenant.—[1] Lease executed —Covenant for quiet enjoyment broken by lessor— Lessee can sue lessor for damages as on breach of contract ('14) 17 Cal W N 960 (962) (DB) ✠ ('97) 1897 Bom P J 372 (DB) ✠ (Vol 25) 1938 Nag 439 (440) (Lease of theatre—Measure of damages stated.)

[2] Lease executed—Covenant for quiet enjoyment broken by lessor—Lessee can sue lessor for specific performance of contract by putting him in possession. ('04) 31 Cal 647 (656) (FB) ✠ (82) 8 Cal 963 (965) (DB).

[*See also* (Vol 30) 1943 P C 24 (28) : I L R (1943) 1 Cal 372 : ILR (1943) Kar (PC) 39: 70 Ind App 18(PC)]

[3] Lease executed—Covenant for quiet enjoyment broken by lessor—Lessee can treat contract of lease as rescinded and deliver property to lessor (76) 25 Suth W R 492 (492) (DB) ✠ (12) 23 Mad L Jour 119 (128) (DB) ✠ (Vol 14) 1927 Lah 880 (880).

[See however (Vol 14) 1927 Lah 1 (4): 7 Lah 423 (DB).]

[4] Lessee not able to enjoy property for full term of lease—Period of lease fixed under terms of lease is not extended (Vol 16) 1929 Oudh 286 (287).

[5] Lessee evicted by title paramount—Lessee can recover from lessor pecuniary loss suffered by him by action for eviction as well as refund of consideration for lease. (Vol 34) 1947 Nag 48 (53): I L R (1946) Nag 568 (DB).

Section 108, Clause (d)—Note 1

[1] A lessee is under this clause entitled to any accessions made to the demised property during the continuance of the lease, ('05) 2 Sind L R 1 (6) (DB) ✠ (Vol 14) 1927 Cal 902 (904): 55 Cal 201 (D B). (Accretion by alluvion.) ✠ (Vol 12) 1925 Cal 758 (759) (DB).

[2] Where there is an acquisition of land from the sea or a river by gradual, slow and imperceptible means the accretion by alluvion belongs to the owner of the adjoining land. ('76) 13 Moo Ind App 467 (473) (P C) ✠ ('06) 28 All 647 (649) (DB).

[3] An accretion to land by alluvion need not be imperceptible. (Vol 1) 1914 P C 48 (59): 42 Cal 489:

(e) if by fire, tempest or flood, or violence of an army or of a mob or other irresistible force, any material part of the property be wholly destroyed or rendered substantially and permanently unfit for the purposes for which it was let, the lease shall, at the option of the lessee, be void :

Provided that, if the injury be occasioned by the wrongful act or default of the lessee, he shall not be entitled to avail himself of the benefit of this provision :

Section 108, Cl. (d.)—Note 1 *(contd.)*
10 Nag L R 108: 41 Ind App 221 (PC) ✠ (Vol 5) 1918 Mad 1083 (1084, 1088) : 40 Mad 1083 (DB) ✠ (Vol 7) 1920 Pat 330 (331): 5 Pat L Jour 1 (DB).

[4] Land submerged and again re-formed and identifiable as forming part of particular estate—Owner of that estate is entitled to it. ('74) 2 Ind App 28 (32) (PC) ✠ ('06) 3 Cal L Jour 560 (562) (PC).

[5] Accretion brought about artificially and not by natural causes—Party bringing it about may become entitled to it, but not where it is brought about intentionally with motive of getting benefit of accretion. ('90) 13 Mad 369 (377) (DB).

[6] Encroachments by tenant during his tenancy upon adjoining lands of landlord—Presumption is that lands encroached upon are added to tenure, for benefit of tenant so long as original holding continues, and afterwards for benefit of landlord, unless it clearly appears that tenant made encroachments for his own benefit. ('74) 22 Suth W R 246 (247) (DB).

[7] Before the tenant acquires by prescription an absolute title, or the tenancy right the landlord can eject the lessee from the portion encroached upon. (Vol 4) 1917 Pat 471 (473): 2 Pat L Jour 506 (DB) ✠ (Vol 8) 1921 Cal 83 (83) (DB) ✠ (Vol 5) 1918 Cal 639 (641) (DB) ✠ ('03) 16 C P L R 36 (40).

[8] Lessor treating lessee as tenant in respect of encroachment while latter professing to hold it as part and parcel of leased property—The two plots constitute one tenancy and stand on same footing. (Vol 5) 1918 Cal 639 (641, 642) (DB).

[9] Title by prescription acquired by lessee to tenancy rights in land encroached upon by him—Lessor cannot eject lessee before termination of lease. ('12) 16 Cal W N 634 (636) (DB) ✠ ('09) 4 Ind Cas 526 (528) (DB) (Cal).

[10] Lessee acquiring full title by prescription to land encroached upon—Landlord's title is extinguished. (Vol 13) 1926 Cal 883 (885) (DB).

[11] Tenant encroaching on land adjoining his holding but belonging to person other than landlord—Possession of land may be adverse to owner thereof—But presumption is that tenant made encroachment not for his own benefit but for that of his landlord. (Vol 22) 1935 Cal 771 (772) (DB) ✠ (Vol 6) 1919 Cal 378 (379) (DB) ✠ (Vol 15) 1928 Lah 351 (352) ✠ (Vol 5) 1918 Mad 278 (279) (DB). (Onus is on tenant to show that encroachment was for his own benefit.)

[12] A subsequent severance of the encroached portion from the demised property is sufficient to rebut the presumption that encroachment was not for benefit of tenant but for that of landlord. (Vol 2) 1915 Cal 386 (387) (DB).

[13] Encroachment by tenant on land of third person—Landlord entitled to encroachment—Landlord can claim additional rent for excess area. (Vol 22) 1935 Cal 771 (773) (DB) ✠ (Vol 23) 1936 Cal 454 (455) (DB).

[14] Encroachment by tenant on land of third person adjoining his holding—Landlord entitled to encroachment—Lessee is bound to hand over excess area to landlord on determination of lease along with property originally demised. (Vol 12) 1925 Cal 1114 (1116) (DB).

SECTION 108, CLAUSE (e)—SYNOPSIS

1. Scope.
2. "Flood."
3. "Substantially and permanently unfit."
4. "At the option of the lessee."
5. Proviso.
6. Effect of repudiation.

1. **Scope.**—[1] The clause has no reference to the case of the property becoming unprofitable or unfit for cultivation through the failure of its ordinary water supply or through something not happening which was expected to happen. (Vol 1) 1914 Sind 75 (77): 8 Sind L R 222 (DB).

[2] The failure of rain is not a ground under this clause for avoiding the lease. ('10) 8 Ind Cas 471 (473): 1 Upp Bur Rul 2nd Qr. 22.

[3] Principle embodied in the section is not a principle which was ever applied by the Courts of Chancery in England and appears to have been borrowed from the Roman Law or from some other system of law, such as the law of Scotland which is largely derived or based on the Roman Law. (Vol 32) 1945 Pat 300 (305): 24 Pat 197 (DB).

[4] Section 108 (e) cannot be invoked except in cases where the parties to a lease have not themselves provided for the contingencies referred to. (Vol 32) 1945 Pat 300 (305): 24 Pat 197 (DB).

2. "Flood."—[1] The word "flood" in this clause is restricted to sea-water flooding and not fresh water flooding. (Vol 7) 1920 Mad 584 (584): 43 Mad 132 (DB).

[But see (Vol 23) 1936 Mad 664 (665).]

3. "Substantially and permanently unfit."—[1] The words "substantially and permanently unfit" imply that the damage must be so great that the land could not be rendered fit for cultivation at a reasonable expenditure during any portion of the remaining period of the lease. ('28) 109 Ind Cas 243 (243) (Mad).

[2] The onus is on the lessee to establish that the demised property was rendered substantially and permanently unfit. ('28) 109 Ind Cas 243 (243) (Mad).

[3] Part of house rendered dangerous for habitation by earthquake shock — That cannot be said to render house "substantially and permanently unfit" for residence. ('10) 7 Ind Cas 201 (202) (DB) (All).

[4] Godown burnt down so badly that it could not be repaired within three months — Godown held was rendered substantially and permanently unfit for use. ('99) 23 Bom 15 (19).

[5] An eviction of the tenant by the Plague Authorities under the Epidemic Diseases Act (1897) could not be said to render the demised premises permanently unfit. ('99) 1 Bom L R 739 (742) (DB).

[6] The inability of the lessee of salt works to carry on his work owing to the workers' strike cannot be said to have rendered the leased property substantially unfit. (Vol 15) 1928 Bom 61 (63): 52 Bom 142 (DB).

[7] Lease for agricultural purposes—Lands leased silted up by floods, it being possible to put them right by means of certain expenditure: *Held* tenancy could not be put an end to. (Vol 16) 1929 Mad 575 (576).

4. "At the option of the lessee."—[1] Destruction etc., of premises—Lease does not *ipso facto* become void —Only exercise of option by lessee will render it void

(f) if the lessor neglects to make, within a reasonable time after notice, any repairs which he is bound to make to the property, the lessee may make the same himself, and deduct the expense of such repairs with interest from the rent, or otherwise recover it from the lessor :

(g) if the lessor neglects to make any payment which he is bound to make, and which, if not made by him, is recoverable from the lessee or against the property, the lessee may make such payment himself, and deduct it with interest from the rent or otherwise recover it from the lessor;

Section 108, cl. (e)—Note 4 *(contd.)*

from moment of such exercise. ('99) 23 Bom 15 (19) ☆(Vol 13) 1926 Lah 371 (372) ☆('10) 12 Bom L R 474 (481) ☆ (Vol 20) 1933 Lah 517 (519) ☆ (Vol 1) 1914 Sind 75 (77): 8 Sind L R 222 (DB) ☆('28) 109 Ind Cas 243 (243) (Mad).

[2] The exercise of the option need not be by any written notice—Nor need such notice, if given, require any length of time for its operation. (Vol 3) 1916 Cal 707 (707) (DB).

[3] Option must be exercised within reasonable time of occurrence—Otherwise lessee cannot be allowed to repudiate lease. ('10) 12 Bom L R 474 (482).

[4] The question as to what is reasonable time for exercise of option will depend upon the facts of the case. ('10) 12 Bom L R 474 (482).

[5] There is no valid exercise of option until the lessee delivers possession of the property to the lessor. ('10) 35 Bom 333 (338) (DB). (('10) 12 Bom L R 474, *Affirmed.*)

[6] Lessee not exercising option to avoid lease—That will not render him liable, in absence of contract to contrary, to restore property to lessor in its original state by repairing or re-building premises. (Vol 15) 1928 Mad 1140 (1141, 1142): 51 Mad 994 (DB).

5. Proviso.—[1] Injury caused by wrongful act or default of lessee—Lessee cannot get benefit of this clause—He may be liable to pay damages to lessor. (Vol 13) 1926 All 695 (697): 48 All 404 (DB).

[2] Lessee owing to his neglect for failure to give intimation as required by the rules, evicted by Plague Authorities—He is not thereby absolved from liabilities under lease. ('99) 1 Bom L R 739 (742) (DB).

[3] *A* renting premises, storing large number of bales of piece goods and putting watchman in charge—Watchman lighting hanging light in close proximity to goods, locking up premises and going away—Premises destroyed by fire—Fire held was caused through *A's* default. (Vol 7) 1920 Mad 493 (495) (DB).

6. Effect of repudiation.—[1] Lessee validly repudiating lease by exercising option under this clause—He can refuse to pay future rent in respect of premises. ('94) 17 Mad 98 (99) (DB).

[2] Lessee validly repudiating lease—He can sue lessor to recover under S. 65, Contract Act, any rent or premium which he had paid already for period after repudiation. (Vol 20) 1933 Lah 517 (519) ☆(Vol 22) 1935 Nag 208 (209): 31 Nag L R 368 ☆('99) 23 Bom 15 (21).

[3] Failure by lessee after repudiation to restore vacant possession to lessor—He is liable to lessor for damages. ('10) 35 Bom 333 (338) (DB). (Affirming ('10) 12 Bom L R 474.)

[4] Lessor accepting rent after repudiation of lease by lessee—Lessee becomes tenant from month to month or year to year according to purpose of original lease. ('10) 35 Bom 333 (338) (DB).

Section 108, Clause (f)—Note 1

[1] There is no general rule of law that a lessor is bound to keep the demised property in good repair or to expend any money on the property. ('98) 2 Cal W N 34 (36) ☆(Vol 10) 1923 Cal 524 (525) (DB) ☆(Vol 14) 1927 Bom 115 (118): 51 Bom 274 (DB).

[2] Lessor is not liable to compensate the lessee for any loss sustained by him by reason of want of repair. ('98) 2 Cal W N 34 (37).

[3] Lessor's failure to effect repairs—Lessee cannot terminate lease. (Vol 13) 1926 Cal 546 (549) ☆(Vol 23) 1936 Mad 564 (566): 59 Mad 942 (DB) ☆(Vol 10) 1923 Cal 524 (526) (DB).

[4] Lessor's failure to effect repairs—Lessee can only effect such repairs and deduct expense from rent or otherwise recover it from lessor. (Vol 13) 1926 Cal 546 (549) ☆('10) 12 Cal L Jour 351 (354) (DB).

[5] Breach of covenant to repair by lessor—Lessee can claim damages for breach. (Vol 23) 1936 Mad 564 (568): 59 Mad 942 (DB).

[6] Breach of covenant to repair by lessor—Suit for rent by lessor—Lessee can claim to set off damages for breach against rent. (Vol 1) 1914 Lah 186 (186) (DB).

[7] Lessor's failure to effect repairs—Lessee cannot claim specific performance by compelling lessor to carry out repairs. (Vol 23) 1936 Mad 564 (568): 59 Mad 942 (DB).

[8] The words "or otherwise recover it from the lessor" give a right of reimbursement to the lessee apart from his right of deduction of the expense from rent. ('10) 12 Cal L Jour 351 (354) (DB) ☆(Vol 29) 1942 Oudh 231 (237): 17 Luck 530 (DB). (Claim to reimbursement would be under S. 70, Contract Act.)

[9] Under terms of tenancy, lessee bound to make repairs at his own expense—He cannot deduct value of repairs from rent due. ('06) 3 All L Jour 134 (135) (DB).

[10] Under contract, lessor bound to make repairs and lessee having no right to do so—Lessee effecting repairs cannot deduct expenditure from rent. ('66) 6 Suth W R (Civ Ref) 26 (27) (DB).

[11] Under contract lessee to make repairs on lessor's failure to do so and deduct costs from rent—He cannot claim damages against lessor for non-repair. ('68) 1868 Pun Re No. 14, page 46 (47).

Section 108, Clause (g)—Note 1

[1] This clause does not apply in terms to agricultural leases. But the principle underlying it is applicable as being in consonance with justice, equity and good conscience. (Vol 27) 1940 Mad 410 (412).

[2] In execution of decree against lessor his interest sold in auction — Lessee thereafter depositing decree amount under O. 21, R. 89, Civil P. C. — Payment by lessee does not come within this clause. ('02) 6 Cal W N 336 (337) (DB).

[3] Property subject to maintenance charge payable by *A* leased by him to *B*—On failure of *A* to pay maintenance, *B* paying it — *B* can deduct amount so paid from rent due. (Vol 27) 1940 Mad 410 (411).

[4] Property leased being subject to a mortgage—Lessee paying off mortgage can invoke benefit of this clause. (Vol 21) 1934 Mad 658 (660, 661) ☆ (Vol 15) 1928 Mad 380 (381) (DB).

(h) the lessee may [a][even after the determination of the lease] remove, at any time [b][whilst he is in possession of the property leased but not afterwards] all things which he has attached to the earth: provided he leaves the property in the state in which he received it:

[a] *Inserted* by the Transfer of Property (Amendment) Act, 1929 (20 [XX] of 1929), S 56. [b] *Substituted* for 'during the continuance of the lease," *ibid.*

Section 108, cl. (g)—Note 1 *(contd.)*

[5] Lessor failing to pay Government revenue of leased property — Lessee may make payment and recover it from lessor (Vol 14) 1927 Oudh 609 (609) ✠ ('86) 12 Cal 213 (216) (DB).

[6] Government assessment increased after lease— Lessor is bound to make increased payment also. ('10) 34 Mad 231 (242) (FB).

[7] Rent fixed at Rs. 19— Government assessment which was originally Re. 0-15-3 raised to Rs. 59-8 6— *Held* that up to rent amount of Rs. 19 landlord was liable for Government assessment and lessee was responsible beyond that amount. (Vol 12) 1925 Bom 168 (170) (DB).

[8] Tenant undertaking to pay whole of cesses levied under Bengal Cess Act at time of lease, inclusive of share payable by tenant and also of share payable by landlord— Amount of cess increased subsequently — Incidence of new burden must be regulated according to statute. ('08) 12 Cal W N 154 (156) (DB).

[9] Tenant agreeing to pay Government assessment —Assessment afterwards enhanced — Tenant is bound to pay excess assessment. ('09) 6 Mad L Tim 236 (240, 242) (DB).

[10] Landholder responsible for payment of cess — On failure, sub-landholder making payment to avert attachment and sale of land— Suit by landholder for arrears of poruppu— Sub-landholder can claim deduction of amount of cess. (Vol 32) 1945 Mad 509 (511): I L R (1946) Mad 349 (DB).

[11] Lessee making payment under this clause may not only deduct such amount from the rent, but may also claim damages against lessor. (Vol 18) 1931 Cal 129 (130) (DB).

[12] Lessee making payment under this clause can recover it under Ss 69 and 70, Contract Act (Vol 14) 1927 Oudh 609 (609) ✠ ('86) 12 Cal 213 (216) (DB) ✠ (Vol 21) 1934 Cal 667 (668).

[13] Lessee himself undertaking to make payment which lessor was bound to pay — Lessee cannot get benefit of this clause — If lessor himself pays it he can recover it from lessee. (Vol 9) 1922 Pat 75 (76) (DB) ✠ (Vol 2) 1915 Cal 601 (604) (DB) (Lessor's property sold owing to lessee's failure to make payment— Lessor can claim damages against lessee)

Section 108, Clause (h)—Note 1

[1] This clause enacts in substance the principles of the Roman Civil law and the pre-existing law of the land. ('04) 27 Mad 211 (217).

[2] Trees planted by tenant or buildings erected by him or things attached to earth by tenant can be removed by tenant — Trees already on land, or spontaneously growing there even after commencement of tenancy, and building already on land cannot be removed by tenant. ('28) 108 Ind Cas 242 (244) (DB) (Cal) ✠ (Vol 34) 1947 Cal 159 (161) (DB) ✠ (01) 24 Mad 47 (55) (FB) ✠ (Vol 7) 1920 Nag 113 (115) ✠ (Vol 3) 1916 Mad 939 (939) (D B). (Mulgeni lease.) ✠ (Vol 17) 1930 All 433 (433).

[3] Case not governed by Act — Trees planted by tenant can, on principle of this section be removed by him. (Vol 7) 1920 Nag 113 (115)✠('01) 24 Mad 47 (58) (F B). (Kanom tenure.)✠ (Vol 1) 1914 Bom 312 (312): 38 Bom 716 (D B) ✠ (Vol 10) 1923 All 417 (418) ✠ (Vol 3) 1916 Mad 939 (939) (DB) ✠ (Vol 9) 1922 Oudh 249 (249): 25 Oudh Cas 181.

[But see (01) 23 All 211 (212) (DB)✠ ('28) 108 Ind Cas 242 (244) (DB) (Cal) ✠ (Vol 1) 1914 Oudh 212 (213) (DB)]

[4] Tenant quitting possession— Fixtures become property of lessor—Tenant loses all right, title and interest in structures. (Vol 28) 1941 Bom 337 (339) (Tenant cannot return and remove structures) ✠ (Vol 7) 1920 Bom 87 (87): 44 Bom 950 (DB)

[5] Tenant erecting structure with landlord's consent or acquiescence and handing over property with structure — Tenant can claim compensation. (Vol 2) 1915 Lah 235 (236) (DB) ✠ (Vol 29) 1942 Pesh 74 (75) (DB) ✠ (Vol 3) 1916 Mad 502 (502) (DB) ✠ (Vol 7) 1920 Bom 87 (87): 44 Bom 950 (DB) ✠ ('01) 6 Cal W N 134 (140) (DB) ✠ (Vol 24) 1937 All 512 (513).

[See however (Vol 31) 1944 Pat 30 (34, 35): 22 Pat 554 (DB) (Lessees under erroneous belief that they had permanent rights, constructing valuable structures on land demised, to the knowledge of landlord— Landlord not interfering — *Held* lessees could not claim compensation for structures on equitable principles— (1900) 27 Cal 570, *Followed.*)]

[6] *S* agreeing in 1933 to grant permanent lease of land to *B* at monthly rent of Rs. 101 and on condition of payment of salami — In anticipation of execution of lease *B* led into possession — *B* erecting substantial structures with knowledge and approval of *S*—No lease executed— *S* suing for ejectment in 1940 —*B* held not entitled to compensation for structures but could remove them under S. 108 (b). (Vol 34) 1947 Cal 353 (364) (DB).

[7] Well sunk by tenant is not thing which he has attached to earth—No question of any removal thereof arises ('87) 10 Mad 112 (113) (DB).

[*See also* (Vol 30) 1943 Mad 311 (312, 313).]

[8] Void lease— Clause does not in terms apply — But principle applies — Lessee can remove structure erected by him but cannot claim compensation. (Vol 4) 1917 Mad 333 (334) (DB).

[9] Property leased acquired before expiry of lease under Land Acquisition Act — Compensation awarded for both land and thing attached thereto by lessee — Tenant held entitled to share in compensation amount for thing he had attached. ('95) 22 Cal 820 (826) (DB).

[10] The tenant's right to remove the thing he has attached to the demised property is subject to a contract or local usage to the contrary. (Vol 28) 1941 Bom 337 (339) (Lessee to remove structure on determination of tenancy — Contract held excluded operation of this clause) ✠(Vol 18) 1931 Cal 133 (134) (DB) (Lease providing for fixtures and erections raised subsequently to pass to lessor at expiration or sooner determination —Right to fixtures held passed to lessor on surrender by lessee.) ✠(Vol 12) 1925 Mad 732 (734). (Lessor contracting to pay compensation for improvements made by lessee) ✠ (Vol 1) 1914 Cal 896 (898) (D B). (Usage)

[11] The usage in South Kanara that the tenant can remove the structure erected by him or claim compensation for its value prevails over the provisions of the Act. (Vol 8) 1921 Mad 284 (284) (DB).

(i) when a lease of uncertain duration determines by any means except the fault of the lessee, he or his legal representative is entitled to all the crops planted or sown by the lessee and growing upon the property when the lease determines, and to free ingress and egress to gather and carry them :

(j) the lessee may transfer absolutely or by way of mortgage or sub-lease the whole or any part of his interest in the property, and any transferee of such interest or part may again transfer it. The lessee shall not, by reason only of such transfer, cease to be subject to any of the liabilities attaching to the lease :

nothing in this clause shall be deemed to authorize a tenant having an untransferable right of occupancy, the farmer of an estate in respect of which default has been made in paying revenue, or the lessee of an estate under the management of a Court of Wards, to assign his interest as such tenant, farmer or lessee :

Section 108, Clause (i) — Note 1

[1] This clause enacts in substance the principles of the Common law of England and of what was also the Common law of India. (Vol 1) 1914 Mad 225 (226) (DB).

[2] Lessor *A* suing lessee *B* for possession — Decree passed for possession on condition of *A* depositing certain amount on date specified— *A* failing to do so and *B* continuing in possession and raising crops on land— *B* held entitled to benefit of this clause — *A* could not get crops by subsequently depositing amount. (Vol 24) 1937 Mad 879 (882).

[3] The principle of this clause applies to usufructuary mortgages of uncertain duration. (Vol 7) 1920 Upp Bur 56 (58): 3 Upp Bur Rul 141✠(Vol 1) 1914 Mad 225 (226) (DB). (Kanom mortgage.)

[4] Where the tenant knows when his term is to cease, he can have no equity in his favour and will not be entitled to the benefit of this clause. ('90) 13 Mad 15 (16).

[5] The phrase "a lease of uncertain duration" is apparently intended to apply to leases from year to year terminable by a notice to quit or to leases granted by a tenant for life to be terminated on the death of the grantor. (Vol 32) 1945 Pat 162 (167, 168) : 23 Pat 871 (DB).

[6] Tenancy determined by lessee's own negligence or misconduct—Rule in this clause cannot apply. ('90) 13 Mad 15 (16).

SECTION 108, CLAUSE (J) —SYNOPSIS.

1. Scope.
2. Absolute transfer.
3. Rights of assignee.
4. Liabilities of assignee.
5. Mortgage or sub-lease by lessee.
6. Lessee continues liable.
7. Rights of lessee against assignee or sub-lessee.
8. Last paragraph.
9. Agricultural leases.
10. Clause not retrospective.

1. Scope. — [1] The general principle of law that property of any kind may be transferred except as provided by this Act or any other law for the time being in force applies to lease-hold interest as well. (Vol 14) 1927 Cal 220 (223) (D B). (Non-permanent agricultural lease.)✠(Vol 24) 1937 Lah 360 (362) (DB).

[2] This clause merely enacts the pre-existing law, (Vol 19) 1932 All 473 (474) (DB)✠('90) 13 Mad 60 (62) (DB) ✠ (Vol 34) 1947 All 49 (50). (Lease-hold interest created before Act is transferable.)

[3] This clause applies to all kinds of leases governed by the Act. (Vol 8) 1921 Cal 741 (747): 48 Cal 359 (DB). (Yearly tenancy created after the Act is transferable.)✠('08) 12 Cal W N 724 (726) (DB). (All lessees including lessees holding under permanent leases are liable for rent even after they have transferred their rights.) ✠ (Vol 5) 1918 Cal 182 (183) (DB). (Interest of a lessee of a homestead is transferable under Act.)

[4] The lessee can, under this clause, transfer absolutely, or mortgage or sub-lease, the whole, or part of his interest in the property unless the right is clearly not transferable. (Vol 6) 1919 Cal 251 (251) (DB). (District of Noakhali and its neighbourhood— Local usage or custom prohibits transfer of osat raiyati holding granted for erecting houses without consent of landlord.)✠(Vol 1) 1914 Lah 472 (472): 1914 Pun Re No. 33 ✠(Vol 17) 1930 All 315 (317) ✠ (Vol 19) 1932 Lah 518 (519). (In the absence of a prohibition by law, custom or agreement every right is transferable.)✠(Vol 19) 1932 All 473 (474) (DB)✠(Vol 11) 1924 Pat 324 (326)✠(Vol 2) 1915 Cal 154 (154) (DB). (A lease for a definite term for general purposes is heritable, and when the conduct of the parties shows it to be transferable, it must be treated as such.) ✠ ('95) 8 C P L R 33 (35). (In the absence of any local usage or law forbidding it, a lease would be capable of transfer.)

Covenant against alienation.

[5] A covenant against alienation does not render an alienation by the lessee of his interest *ipso facto* void unless there is a condition for re-entry by the lessor on breach of the covenant, as required under S. 111 (g). ('94) 18 Bom 603 (606) (DB). ✠('06) 28 All 400 (401) (DB) ✠(Vol 2) 1915 Cal 209 (210) (DB)✠('97) 21 Bom 195 (197) (DB).✠(Vol 32) 1945 Bom 399 (401) : I L R (1945) Bom 343. (Assignment in breach of condition is effectual to vest term of tenancy in assignee.)

[6] Covenant against alienation — Proviso for re-entry—Transfer by lessee — Lease does not *ipso facto* cease to be operative unless lessor exercises option to forfeit it. (Vol 7) 1920 Mad 1006 (1008) : 43 Mad 503 (D B) ✠ (Vol 6) 1919 Cal 132 (133)✠('09) 36 Cal 745 (748) (DB)✠(Vol 12) 1925 Pat 68 (92) (FB)✠(1910) 79 L J K B 921 (923, 924) : (1910) 2 K B 32, *Parker* v. *Jones*.

[7] Transfer by lessee in contravention of covenant against alienation — Lessor can sue lessee for damages. ('09) 36 Cal 745 (748) (DB)✠(Vol 8) 1921 Bom 27 (27) : 45 Bom 1197 (D B). (It must be proved that landlord had suffered damage.)

[8] Covenant against alienation— Lessee threatening to make alienation—Lessor can sue for injunction restraining lessee from making it ('70) 7 Bom H C R (AC) 69 (70) (DB).

[9] Lessee not to alienate without consent of lessor— Consent cannot be withheld arbitrarily, unreasonably or vexatiously. (Vol 15) 1928 Sind 137 (140): 23 Sind L R

Section 108 Cl. (j) — Note 1 *(contd.)*
325✠(1921) 90 L J Ch 417 (419, 420): (1921) 2 Ch 7, *In re Winfrey and Chatterton's Agreement* ✠ (1933) 102 L J Ch 353 (358) : 1933 Ch 904, *Premier Confectionary Co.* v. *London Commercial Sale Rooms Ltd.*

[10] A lessor contracting for a right of re-purchase of the lessee's right does not in any way derogate from the transferable quality of the lessee's right. (Vol 10) 1923 Oudh 47 (48) (DB).

[11] Lessee cannot make transfer to last beyond his own interest — Determination of lease will put an end to interests transferred by him. ('74) 22 Suth W R 274 (275) (D B) ✠ ('74) 25 Suth W R 347 (350) (DB)✠(Vol 13) 1926 Nag 62 (62) ✠ (Vol 13) 1926 Nag 184 (186).

[12] A tenancy for life comes to an end at the death of the tenant and is not a heritable interest. (Vol 30) 1943 Bom 148 (149) (DB). ((Vol 13) 1926 Bom 374, *Dissent.*)

2. Absolute transfer.—[1] A lessee can transfer his interest absolutely by sale. ('12) 9 All L Jour 483 (487) ✠(Vol 19) 1932 All 473 (474) (DB)✠(1900) 5 Cal L Jour 205 (206) (SB).

[2] Lessee transferring his interest absolutely — Transfer creates privity of estate between lessor and transferee but not privity of contract. (Vol 26) 1939 PC 14 (16): I L R (1939) 1 Cal 283: I L R (1939) Kar (PC) 78 : 66 Ind App 50 (PC).

[3] Lessee transferring his interest absolutely — Assignee is liable to lessor for all burdens imposed upon him by mere assignment whether he enters into possession or not. (Vol 26) 1939 P C 14 (16) : I L R (1939) 1 Cal 283 : I L R (1939) Kar (PC) 78 : 66 Ind App 50 (P C) ✠ (Vol 27) 1940 Pat 516 (527, 528) : 19 Pat 433 (DB).

3. Rights of assignee.—[1] The assignee is entitled to the option of the lessee to purchase the leased property. (Vol 4) 1917 Bom 111 (113) : 42 Bom 103.

[2] An assignee from the lessee, to whom possession had not been given by the lessor, can sue the lessor for damages for breach of the obligation. (Vol 13) 1926 Pat 508 (511) : 6 Pat 94 (DB).

4. Liabilities of assignee.—[1] There is no provision in the Act dealing with the liability of the transferee of the lessee. (Vol 12) 1925 Bom 330 (330) ✠ (Vol 21) 1934 Bom 134 (135) : 58 Bom 327 (FB).

[2] The assignee is liable to perform all the burdens of the lease by reason of the privity of estate that comes into existence between himself and the lessor. (Vol 31) 1944 Cal 219 (221) : I L R (1944) 2 Cal 90 (D B). (An assignee of a lease-hold interest is liable to pay rent to the landlord only on the ground of privity of estate—(Vol 26) 1939 P C 14 : I L R (1939) 1 Cal 263 : I L R (1939) Kar (P C) 78 : 66 Ind App 60 (P C) and (Vol 28) 1941 P C 36 : 20 Pat 521 : I L R (1941) Kar (P C) 66 : 68 Ind App 67 (PC), *Rel. on.*) ✠ (Vol 9) 1922 Nag 224 (225). (Government not to alienate—Assignment by lessee—Assignee would be bound by covenant.)✠(Vol 18) 1931 Cal 790 (790) (DB). (Assignee is liable for arrears of rent as much as the original lessee.) ✠ (Vol 27) 1940 Bom 154 (155) : I L R (1940) Bom 328 (DB) ✠ (Vol 23) 1936 Pat 493 (494) : 15 Pat 673 (D B). (Express covenant not to transfer demised property without consent of landlord binds purchaser of lessee's interest.)

[3] A covenant to pay rent runs with the land and binds the assignee. ('92) 14 All 176 (177) (DB) ✠ (Vol 24) 1937 Cal 373 (374) ✠ (Vol 14) 1927 Mad 931 (931) ✠ (Vol 22) 1935 Mad 669 (669) (DB) ✠('05) 3 Low Bur Rul 90 (90) ✠ (Vol 22) 1935 Cal 368 (388) : 62 Cal 346 (D B).

[4] Assignee is not liable for rents accrued due before the date of assignment. ('75) 1875 Bom P J 308 (D B) ✠ ('78) 3 Cal L Rep 285 (286) (DB).

[5] Assignment not valid — Assignee entering into possession may be liable to lessor for damages for use and occupation. ('92) 14 All 176 (178) (DB).

[6] The liability of the assignee to the lessor on the covenants dates only from the date of the assignment. (Vol 8) 1921 Pat 76 (76) ✠ ('96) 9 C P L R 113 (116) ✠ ('93) 3 Mad L Jour 292 (293). (Assignee is liable to lessor for rent from date on which he purchased lessee's interest, and not from date of possession.) ✠ (Vol 3) 1916 Mad 768 (768, 769) : 38 Mad 86 (DB). (Do.)

[7] The liability of the assignee to the lessor ceases upon the transfer of his interest to another. (Vol 31) 1944 Cal 219 (221, 222) : ILR (1944) 2 Cal 90 (DB).

[8] Lessee *M* assigning share of his interest to *X* —*M* and *X* in possession of whole of leased property as tenants-in-common—*M* and *X* will be each liable to lessor to perform whole of covenants in lease, including payment of rent. (Vol 27) 1940 Pat 516 (528, 540) : 19 Pat 433 (DB) ✠ (Vol 12) 1925 Cal 1056 (1059, 1060) (F B).

[9] Lessee assigning whole of his interest to *X* and *Y*—*X* and *Y* in possession of whole property as tenants-in-common—*X* and *Y* each is liable to lessor to perform whole of covenants in lease including payment of rent (Vol 14) 1927 Mad 931 (932) (DB) ✠ (Vol 17) 1930 Lah 515 (518) : 11 Lah 427 (FB).

[10] Assignee of share of lessee's interest or assignees of whole of lessee's interest holding their shares in physical severalty — Each is liable on covenants in lease in so far as they affect portion in his possession provided obligation under covenants can be divided e. g. covenant to pay rent. (Vol 31) 1944 Pat 129 (133) (D B) ✠ (Vol 14) 1927 Mad 931 (932) (DB).

5. Mortgage or sub-lease by lessee.—[1] A mortgage or a sub-lease by the lessee of his interest creates neither a privity of estate nor a privity of contract between the lessor and the transferee. (Vol 31) 1944 Nag 141 (142) : I L R (1944) Nag 267. (Therefore sub lessee not liable for rent to head lessor.) ✠(Vol 32) 1945 Cal 89 (92) (Do.)✠ Vol 21) 1934 Mad 563 (564). (Usufructuary mortgage.) ✠ (Vol 28) 1941 P C 36 (37, 38) : 20 Pat 521 : I L R (1941) Kar (P C) 66 : 68 Ind App 67 (P C). (Mortgage.) ✠ (Vol 26) 1939 P C 14 (19) : I L R (1939) 1 Cal 283 : I L R (1939) Kar (P C) 78 : 66 Ind App 50 (P C). (Grantee of lease transferring whole of his term to sub-grantee—Transfer operates by way of sub-demise and not of assignment.) ✠ (Vol 5) 1918 Mad 425 (426) : 40 Mad 1111 (D B). (Mortgage with possession.)✠('95) 21 Bom 311 (313) (DB). (Sub-lease.) ✠ (Vol 18) 1931 Lah 614 (614). (Do.) ✠ (Vol 15) 1928 Nag 147 (148). (Mortgage.)

[2] An absolute demise for the unexpired residue of the term, by way of sub-lease does not operate as an assignment and does not create any privity of estate or of contract between the lessor and the sub-lessee. (Vol 17) 1930 P C 59 (60) : 57 Ind App 110 : 57 Cal 1176 (PC) ✠ (Vol 26) 1939 P C 14 (15) : I L R (1939) 1 Cal 283 : I L R (1939) Kar (PC) 78 : 66 Ind App 50 (P C) ✠ (Vol 1) 1914 Low Bur 45 (46) ✠ (Vol 27) 1940 Mad 410 (411).

[See however (Vol 13) 1926 Pat 508 (511) : 6 Pat 94 (DB).]

[3] The mortgagee or the sub-lessee is not liable to perform the covenants of the lease (Vol 31) 1944 Nag 141 (142) : I L R (1944) Nag 267 ✠ (Vol 21) 1934 Bom 134 (136) : 58 Bom 327 (F B). (*Overruling* ('05) 29 Bom 391.) ✠ (Vol 14) 1927 Cal 100 (101) (D B) ✠ (Vol 21) 1934 Mad 563 (564). (Usufructuary mortgage by the lessee) ✠ (Vol 5) 1918 Mad 425 (427) : 40 Mad 1111 (DB). (Do.) ✠ (Vol 15) 1928 Nag 147 (148) ✠ (Vol 26) 1939 PC 14 (16, 19) : I L R (1939) 1 Cal 283 : ILR (1939) Kar (P C) 78 : 66 Ind App 50 (P C) ✠ (Vol 28)

(k) the lessee is bound to disclose to the lessor any fact as to the nature or extent of the interest which the lessee is about to take, of which the lessee is, and the lessor is not, aware, and which materially increases the value of such interest :

(l) the lessee is bound to pay or tender, at the proper time and place, the premium or rent to the lessor or his agent in this behalf :

Section 108 Cl. (j) — Note 5 *(contd.)*
1941 P C 36 (38) : 20 Pat 521 : I L R (1941) Kar (P C) 66 : 68 Ind App 67 (PC).

[4] A mortgagee or a sub lessee may be liable under S. 40 on the restrictive covenants, if any, in the head-lease if he had taken the transfer with notice of such covenants. (Vol 23) 1936 Cal 727 (732, 733) (D B) ✠ (Vol 32) 1945 Cal 89 (92) ✠ (Vol 7) 1920 Pat 383 (402) (DB).

[5] A mortgagee from the lessee who has taken the mortgage with notice of the covenant to pay rent can be sued by the lessor for relief under S. 27, Specific Relief Act and S. 91, Trusts Act, 1882. (Vol 25) 1938 All 167 (169) : I L R (1938) All 288 (D B).

[6] Breach by sub-lessee of negative or restrictive covenants in head-lease of which he had notice— Remedy of lessor is not at law by way of specific performance under a species of implied privity but a remedy in equity by injunction against violation of covenant. (Vol 32) 1945 Cal 89 (92).

[7] Lease — Covenants in, whether affirmative or negative — Court must look to substance and not to form. (Vol 32) 1945 Cal 89 (92).

6. Lessee continues liable.—[1] The lessee does not, under this clause cease to be liable for the rent and for the performance of other obligations of the lease. ('10) 34 Mad 179 (181) (D B) ✠ (Vol 12) 1925 Bom 330 (330) ✠ (Vol 22) 1935 Mad 669 (669) (D B) ✠ (Vol 11) 1924 Cal 359 (359) ✠ ('08) 12 Cal W N 724 (726) (D B) ✠ (Vol 32) 1945 Pat 414 (416) : 24 Pat 401 (DB).

[But see (Vol 8) 1921 Bom 27 (27) : 45 Bom 1197 (D B).]

[2] The lessee cannot, by merely giving the lessor notice of transfer of the lease, get rid of his obligation to pay rent. (Vol 17) 1930 PC 13 (15, 17) (P C) ✠ ('71) 7 Beng L R 152 (158) (FB) ✠ ('95) 22 Cal 494 (500) (D B).

[3] The lessee cannot, by merely giving the lessor notice of the transfer of the lease, plead in answer to a suit for rent that the transferee is willing to pay it. (Vol 5) 1918 Cal 49 (49) (DB).

[4] Lessor accepting rent from assignee of lessee — Privity of contract is created between lessor and assignee — Lessee ceases to be liable for rent. (Vol 5) 1918 Mad 425 (426) : 40 Mad 1111 (DB) ✠ (Vol 29) 1942 Cal 514 (516) (DB) ✠ (Vol 6) 1919 Lah 304 (305): 1919 Pun Re No. 34 ✠ (Vol 23) 1936 Bom 88 (89): 60 Bom 894 (DB).

[5] Express covenant to pay rent by lessee — Lessee is not absolved from payment merely because lessor has received rent from assignee. (Vol 23) 1936 Bom 88 (89): 63 Bom 394 (DB).

[6] Lessor accepting rent from lessee's assignee, not as transferee from lessee, but as agent of lessee—There is no recognition of assignment by lessor. ('13) 17 Cal W N 156 (158) (DB).

[7] No receipt of rent by lessor from lessee's assignee — Lessee and assignee are both liable on covenants in lease — But he can take out execution against one of them only. (Vol 12) 1925 Cal 423 (423, 424) (DB) ✠ (Vol 12) 1925 Sind 296 (297) ✠ ('07) 30 Mad 410 (412) (DB) ✠ ('05-06) 3 Low Bur Rul 90 (90) ✠ ('94) 17 Mad 296 (298).

7. Rights of lessee against assignee or sub-lessee. — [1] As between the lessee and his assignee the latter is primarily liable to perform the covenants in the lease, and will be deemed to have impliedly contracted to indemnify the lessee against the claims of the lessor for breach of the obligations imposed by virtue of the contract of lease. ('80) 5 Cal 811 (817) ✠ (1870) 39 L J Ex 69 (73) : L R 5 Ex 132, *Moule* v. *Garratt*.

8. Last paragraph. — [1] The clause does not operate so as to enable a valid transfer being made of an occupancy tenancy. ('06) 28 All 696 (697). (Agra Tenancy Act.)

9. Agricultural leases. — [1] This clause, in terms, does not apply to agricultural leases. But the principle underlying it will apply (Vol 5) 1918 Nag 155 (156): 14 Nag L R 188. (A transfer of a sub-lease is valid without landlord's consent though transfer by tenant is invalid without such consent.)

[2] The lessee will continue liable notwithstanding the assignment to another. ('07) 30 Mad 410 (412) (DB) ✠ (Vol 29) 1942 Cal 514 (516) (DB) ✠ (Vol 5) 1918 Mad 928 (930) (DB).

[But see (Vol 12) 1925 Cal 423 (424) (DB).]

[3] Relationship of landlord and tenant with permanent occupancy right not created by any contract of parties — Neither this clause nor principle underlying it applies. (Vol 2) 1915 Mad 34 (35) (DB).

10. Clause not retrospective. — [1] This clause is not retrospective. ('98) 25 Cal 896 (906) (FB) ✠ (Vol 1) 1914 Cal 665 (666) (DB). (Tenancy not transferable before Act—Clause does not make it assignable.)

SECTION 108, CLAUSE (l) — SYNOPSIS

1. Scope.
2. Interest on rent.
3. Rent not a charge.
4. Rent in kind.
5. Tender or payment at proper time and place.
6. "To the lessor or his agent."
7. Payment must be by lessee.
8. Increase of rent.
9. Question of title.
10. Concurrent lease.
11. Void lease.
12. Non-payment of rent.
13. Suspension, abatement and reduction of rent.

1. Scope. — [1] A right to recover rent or the liability to pay rent involves the existence of a relationship of landlord and tenant between the parties. ('07) 31 Bom 159 (161) (DB).

[2] No relationship of landlord and tenant — No liability to pay rent arises. ('05) 32 Cal 567 (570) (DB).

[3] So long as the relationship of landlord and tenant continues, the tenant is liable for rent. ('84) 8 Bom 160 (163) (DB) ✠ ('02) 5 Oudh Cas 113 (115) ✠ ('02) 15 C P L R 9 (10) ✠ ('12) 15 Oudh Cas 295 (300) ✠ ('09) 36 Cal 675 (691) (DB) ✠ (Vol 16) 1929 Pat 440 (444) (DB).

[4] The tenant not being in actual occupation of the demised property is not a valid defence to the landlord's claim for rent. ('84) 8 Bom 164 (167) (DB) ✠ ('74) 21 Suth W R 5 (6) (DB) ✠ (Vol 23) 1936 Lah 815 (816) ✠ ('84) 8 Bom 160 (163) (DB) ✠ ('66) 5 Suth W R (Act X) 78 (78) (DB).

[5] Voidable lease avoided — Obligation to pay rent ceases. ('09) 36 Cal 675 (691) (DB).

[6] Right to rent is vested in landlord — Tenant cannot contract with third party to divest landlord of that right. ('11) 12 Ind Cas 855 (856) (Low Bur).

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[7] Lump rent fixed for several estates leased out to a person — Landlord cannot split up or apportion it and claim proportionate rent for particular estate. ('73) 5 N W P H C R 42 (43) (DB).

[8] No "lease" as defined in S. 105 executed — Relationship of landlord and tenant established — Landlord would, on general principles, be entitled to recover rent due as a debt. ('09) 12 Oudh Cas 140 (143) (DB) ✠ ('85) 11 Cal 221 (225) (DB). (Amount held recoverable as damages for breach of contract.)

2 Interest on rent. — [1] The word "rent" will not include interest payable on arrears of rent. ('06) 5 Cal L Jour 69 (70) (DB) ✠ (Vol 6) 1919 Cal 391 (391) (DB).

[2] A sum of money paid by lessee to lessor as rent and accepted by lessor as such — He cannot apply it towards any interest that may be due on arrears of rent. ('06) 5 Cal L Jour 69 (70) (DB) ✠ (Vol 6) 1919 Cal 391 (391) (DB).

[3] Interest is recoverable on arrears of rent where there is a stipulation for such interest. ('02) 30 Cal 213 (215) (DB) ✠ ('13) 21 Ind Cas 82 (82) (Oudh) ✠ (Vol 8) 1921 Pat 301 (302).

[4] Interest can also be claimed as damages on the arrears of rent in the absence of a stipulation for interest. ('12) 16 Cal L Jour 552 (553) (DB).

[5] In the absence of any contract or usage, interest on arrears of rent is not allowed. (Vol 21) 1934 All 115 (117).

[6] A tender of rent without interest accrued due at the time of the tender is not a good tender. (Vol 6) 1919 Cal 159 (160) (DB).

3. Rent not a charge. — [1] Rent or premium payable is not a charge on the leasehold premises. (Vol 13) 1926 Mad 55 (56) : 48 Mad 821 (DB). ((Vol 6) 1919 Mad 168 : 42 Mad 203, *Dissent.*) ✠ (Vol 23) 1936 Rang 488 (490) (DB).

[2] Rent or premium is not a charge on crops raised by tenant. (Vol 23) 1936 Rang 488 (490) (DB).

4. Rent in kind. — [1] Rent stipulated to be paid in kind — Failure to pay rent — Lessor cannot claim interest either under Interest Act or as damages under S. 73, Contract Act — S. 73, Contract Act will enable award only of value of grain at time it is due as damages and not as interest. ('10) 12 Bom L R 831 (836) (DB) ✠ ('69) 2 Beng L R (App) 27 (28) (DB).

[2] Rent to be paid in kind — Lessor receiving in previous years value in money for rent in kind — Lessor is not disabled from claiming payment of rent in kind for any particular year. ('99) 3 Cal W N 151 (152) (DB).

5. Tender or payment at proper time and place. — [1] A tender of rent must be of the exact sum due. ('92) 1892 All W N 217 (219) (DB).

[2] No place of payment fixed by contract — Lessee must apply to lessor for reasonable place being named — Where this is not done lessee must make payment at lessor's place. (Vol 20) 1933 All 147 (148) ✠ ('12) 16 Cal L Jour 552 (554) (DB) ✠ (Vol 16) 1929 Sind 13 (14) : 23 Sind L R 29 ✠ (1900) 4 Cal W N 324 (326) (DB).

[3] The lessee may prove a contract subsequent to the lease that the rent should be paid at a particular place. (Vol 12) 1925 Nag 281 (282) : 23 Nag L R 26.

[4] Clause does not require landlord to make a demand for rent — Lessee is bound to pay rent without any demand. (Vol 28) 1941 Bom 286 (287) : I L R (1941) Bom 521 ✠ (Vol 16) 1929 Sind 13 (14) : 23 Sind L R 29.

[5] No time for payment of rent specified — Rent will become due at close of period in respect of which rent is reserved in absence of usage to the contrary. ('04) 27 Mad 143 (150) : 31 Ind App 17 (PC) ✠ (1900) 10 Mad L Jour 26 (27) (DB) ✠ ('93) 8 Mad L Jour 201 (202) (DB) ✠ (Vol 32) 1945 Lah 158 (163) : 47 Cri L Jour 44 (DB).

[But see (Vol 13) 1926 Nag 314 (315) : 22 Nag L R 13.]

[6] The expression "proper time" means the time which has been fixed by the terms of the agreement or where there is no agreement or where the agreement is silent in regard to the time of payment, the time which has been orally agreed upon between the parties. (Vol 32) 1945 Lah 158 (163) : 47 Cri L Jour 44 (DB).

6. "To the lessor or his agent." — [1] A payment or tender of the rent must be made to the lessor or his agent in this behalf. ('71) 16 Suth W R 79 (80) (DB).

[2] A payment to a person directed by the lessor will be a payment to the lessor himself. (1864) 1864 Suth W R (Act X Rul) 112 (113) (DB).

[3] A payment of rent after the death of the lessor to a person who is not the heir is not binding on the lessor's real legal representative. ('03) 1903 Pun Re No. 72, page 304 (307).

[4] Lessor benamidar for another person — Payment of rent to real owner by lessee is good. (Vol 2) 1915 Mad 48 (48).

Joint lessors.

[5] A payment of rent by the lessee to one of several co-lessors, will not be a valid discharge of the debt against them all. ('98) 25 Cal 324 (330) (DB).

[But see ('98) 22 Bom 794 (800) (DB) ✠ ('86) 1886 Bom P J 238 (238) (DB) ✠ (1865) 2 Suth W R (Act X Rul) 15 (15) (DB) ✠ ('68) 10 Suth W R 441 (441) (DB).]

[6] A payment to one of several co-lessors, will not be a good discharge of the liability against them all if such payment is made fraudulently or collusively. (Vol 3) 1916 Mad 208 (209) (DB) ✠ (Vol 15) 1928 Bom 420 (421) (DB). ✠ (Vol 12) 1925 Bom 69 (74) : 49 Bom 245 (DB) ✠ ('12) 35 Mad 685 (687).

[7] A payment to all the joint lessors is not invalid merely because they have severed their interests, if there is no arrangement between them and the lessee for apportionment of the rent. ('80) 5 Cal 902 (905) (FB).

[8] As a general rule one of several joint lessors cannot sue for his share of the rent in the absence of a special agreement between the lessee and the lessor for payment to them of their shares separately. ('98) 1898 All W N 129 (130) ✠ (Vol 21) 1934 P C 58 (59) : 61 Cal 313 : 61 Ind App 35 (PC) ✠ ('12) 23 Mad L Jour 161 (161) (DB) ✠ ('21) 62 Ind Cas 47 (48) (Pat) ✠ ('82) 5 All 40 (41) (DB). (The making of the other lessors defendants did not cure defect in the suit.) ✠ ('04) 31 Cal 707 (709) (SB) ✠ (Vol 14) 1927 Cal 79 80 (DB).

[But see (1900) 27 Cal 479 (483) (DB). (They can sever their interests and then sue separately for their shares, provided the suits are so framed as to free the tenant from all further liability to any of them.)]

[9] One of the joint lessors can sue for the entire rent due making all the others defendants. (Vol 14) 1927 Cal 79 (80) (DB) ✠ ('10) 1910 Pun W R No. 82 ✠ ('08) 35 Cal 331 (344) (P C) ✠ (Vol 13) 1926 Cal 333 (334) (DB).

[But see ('21) 62 Ind Cas 47 (48) (Pat). (One can sue for entire rent even though others are not parties.)]

[10] An arrangement between the lessors and the lessee for collection of rent in separate shares does not preclude the lessors from together suing for the whole rent. ('11) 14 Cal L Jour 373 (375) (DB).

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[11] One of several lessors can sue the lessee for apportionment of rent making all the other lessors parties to the suit. ('80) 5 Cal 902 (905) (FB).

7. Payment must be by lessee. — [1] A lessor cannot be compelled to accept payment of rent from a person who was not established to be his tenant. ('10) 12 Cal L Jour 551 (552) (DB).

[2] The lessor can sue a benamidar for the lessee for rent. (Vol 8) 1921 Pat 351 (351) (DB).

[3] Where *A* leases to *B* certain property and *B* happens to be one of several partners, the lessor cannot sue the partners for rent. ('92) 16 Bom 568 (574).

[But see ('96) 19 Mad 471 (476) (DB).]

[4] Lease granted to several persons — Each of lessee is liable for whole rent. (Vol 15) 1928 All 534 (535) ✠ ('74) 22 Suth W R 295 (295) (DB) ✠ (Vol 7) 1920 Mad 509 (510, 511) (DB).

[But see ('10) 12 Cal L Jour 642 (643) (DB).]

[5] Lease granted to several persons — Lessor can sue one of them for whole rent. ('07) 11 Cal W N 1026 (1028) (DB) ✠ (Vol 1) 1914 Lah 500 (501) : 1914 Pun Re No. 107.

[But see ('68) 10 Suth W R 304 (304) (DB).]

[6] Death of lessee — Executor is not personally liable for rent accuring due after lessee's death unless he enters into possession, in which case his position will be that of assignee of the term. ('36) 165 Ind Cas 121 (122) (Cal).

8. Increase of rent. — [1] A lessor is not entitled to increased rent merely on the ground that the prevailing rent on other land in the vicinity is higher. (Vol 1) 1914 Cal 475 (476) (DB).

[2] A stipulation in the lease that, if the tenant continues after the expiry of the period fixed, he should pay an increased rent from that date is not a penalty and is valid. (Vol 16) 1929 Pat 717 (720) : 9 Pat 487 (DB).

[3] Tenant continuing in spite of notice of enhancement of rent—He will be deemed to have agreed to pay enhanced rent. (Vol 12) 1925 Oudh 189 (190): 28 Oudh Cas 77.

[4] Stipulation to pay higher rent on failure to make certain payments at specified times— Failure to make payment as aforesaid—Lessor can claim enhanced rent. ('99) 22 Mad 453 (454) (DB).

[But see ('95) 22 Cal 658 (665) (SB). (Per Prinsep and Ghose, JJ.—Rampini J. contra)✠('72-92) 1872-1892 Low Bur Rul 439 (440). (Lessor entitled only to a fair rent.)]

[5] Stipulation for enhanced rent if area of demised property found on measurement to exceed that mentioned in lease—Area found to be less—Stipulation does not enable lessee to abatement of rent. (1865) 2 Suth W R (Act X Rul) 71 (71) (DB).

[6] Area in excess of that mentioned in lease—Lessor is entitled to rent for excess area. (Vol 1) 1914 Cal 475 (476) (DB).

[7] A stipulation to pay a higher rent in certain events is enforceable even against a court-auction-purchaser of the tenant's interests. ('71) 15 Suth W R 448 (449) (DB).

9. Question of title.—[1] Rent suit by lessor against lessee — Question of lessor's title is wholly foreign to suit. ('06) 1906 Pun Re No. 141, p. 511 (512).

[2] A lessor can recover rent from the lessee even though he may have no title to the land. (Vol 2) 1915 Low Bur 10 (10). ((Vol 2) 1915 Low Bur 75 : 8 Low Bur Rul 227 (FB), *Followed.*)✠('89) 13 Bom 323 (325) (DB)✠('10) 32 All 213 (214) (DB).

[3] A lessee from one joint owner cannot set up the rights of the co-sharers of his lessor and refuse to pay rent to his lessor. ('89) 13 Bom 323 (325) (DB)✠('98-99) 3 Cal W N 214 (215) (D B) ✠ ('84) 1884 Bom P J 286 (286) (DB).

10. Concurrent lease.—[1] *A* leasing property to *B* for a period of years and then granting another lease to *C* to commence before expiry of prior lease—*A* cannot sue *B* for rent but can claim rent from *C* who in his turn can recover from *B*. ('08) 30 All 369 (370) (DB).

11. Void lease. — [1] Lease void — Party in occupation under lease is not liable to pay any rent to owner of property. ('72) 9 Beng L R (App) 37 (38) (DB)✠('09) 31 All 58 (59) (D B) ✠ (Vol 23) 1936 Cal 628 (629) : 62 Cal 294.

[2] Lease void — Party in occupation under lease is liable to owner for damages for use and occupation. (Vol 11) 1924 Oudh 97 (98) ✠ ('69) 12 Suth W R 289 (290) (DB)✠(Vol 12) 1925 All 100 (101) (DB)✠('09) 31 All 276 (278) (FB).

12. Non-payment of rent. — [1] Lessee, in case of default of payment of rent, liable to be evicted on three days' notice and to pay interest on rent due — Default in payment of rent — Remedy of suit for damages for breach of contract is also available to lessor though such remedy was not expressly stipulated for. (Vol 29) 1942 Pat 269 (270).

13. Suspension, abatement and reduction of rent. —[1] This clause does not say that if the lessor fails to put the lessee in possession or if, having put him in possession, the lessee is deprived of possession in whole or in part, the lessee is not bound to pay rent. ('12) 23 Mad L Jour 119 (125) (DB).

[2] Non-delivery of possession or the failure to secure possession of the property in whole or in part is a good answer to a suit for rent in respect of the property not delivered or secured and for the period the tenant is out of possession. (Vol 30) 1943 P C 24 (28) : I L R (1943) 1 Cal 372 : I L R (1943) Kar (P C) 39 : 70 Ind App 18 (P C). (Lump sum rent—Failure to give possession of part— Relief by abatement or apportionment of rent can be granted— Doctrine of suspension of rent is inapplicable in Bengal.)✠ (12) 23 Mad L Jour 119 (125) (DB). (('02) 25 Mad 587, *Followed.*)✠(Vol 19) 1932 P C 28 (30) : 59 Cal 1012: 59 Ind App 29 (PC). (Lessor must deliver possession before he can enforce the tenant's obligation to pay rent.)✠(Vol 2) 1915 Mad 717 (719) (DB)✠(Vol 16) 1929 Cal 719 (722) (DB)✠(Vol 15) 1928 Cal 136 (137) (DB). (Dispossession.)

[3] Lessee not put in possession of any part of demised property or not secured by lessor in his possession of any portion thereof after delivery of possession — Lessee can rescind whole contract of lease, but must deliver to lessor property in his possession. ('12) 23 Mad L Jour 119 (128) (DB).

[4] Non-delivery or failure to secure possession of part of property — Lessee rescinding whole contract of lease but not delivering whole property — He is bound to pay rent for portion in his enjoyment. ('12) 23 Mad L Jour 119 (131) (D B) ✠ ('08) 12 Cal W N 767 (769) (DB).

[5] The doctrine of suspension of rent on lessor's failure to put lessee in possession of part of demised property or secure possession of part of property as applicable in England, does not apply to this country. If the tenant continues in possession of a part of the property, he will be liable to an abated share of the rent. (Vol 15) 1928 Mad 380 (381) (DB)✠(Vol 10) 1923 Mad 459 (461) (DB)✠(Vol 16) 1929 All 52 (52)✠(Vol 7) 1920 Oudh 125 (126).

[6] Eviction of lessee by lessor from part of demised property—Doctrine of suspension of rent applies. (Vol 22) 1935 Cal 134 (137) (D B) ✠ (Vol 18) 1931 Cal 537 (541): 59 Cal 155 (FB). ((Vol 8) 1921 Cal 220, Overruled

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on another point.)✠ (Vol 22) 1935 Pat 38 (39) : 14 Pat 323 (DB)✠('09) 5 Nag L R 47 (49).

[7] The doctrine of suspension of rent applies also to cases of non-delivery of possession of a part of the demised property. (Vol 6) 1919 Cal 379 (380, 381): 46 Cal 956 (D B).

[8] The English doctrine of suspension of rent is not to be rigidly applied in this country, but should be applied only as a rule of justice, equity and good conscience. (Vol 14) 1927 Cal 737 (738, 739) : 55 Cal 689 (DB)✠(Vol 21) 1934 Pat 653 (665) : 13 Pat 396 (D B).

[9] Where possession of a part of the property is not given, but the tenant has acquiesced in the non-delivery by payment of rent, or the non-delivery was due to some bona fide mistake, there should be an apportionment and not a suspension of rent. (Vol 28) 1941 Cal 384 (385). (Court should consider whether failure to put tenant in possession of entire area was due to mistake as to extent of boundaries or some other bona fide act.)✠(Vol 12) 1925 Cal 1187 (1188) (DB). (Acquiescence.)

[10] The doctrine of suspension rests upon the fact that the tenure is an entire and indivisible one, the rent being fixed as a lump sum for the entire land. (Vol 22) 1935 Cal 134 (137, 139) (D B) ✠ (Vol 21) 1934 Pat 653 (655) : 13 Pat 396 (DB).

[11] Rent separately assessed for separate parcels of property demised — Doctrine of suspension is not applicable. (Vol 16) 1929 Cal 130 (131) (DB)✠(Vol 30) 1943 Cal 91 (92) : I L R (1942) 2 Cal 406.

[12] The doctrine of suspension of rent, where the tenant has not been put in possession of part of the subject leased, applies where the rent is a lump rent for the whole land leased treated as an indivisible subject. It has no application where the stipulated rent is so much per acre or bigha. (Vol 12) 1925 P C 97 (99) : 52 Cal 417 : 52 Ind App 160 (P C). (The facts as explained in (Vol 18) 1931 P C 104 : 58 Cal 1281: 58 Ind App 141 (PC) (which was also in connexion with same matter) show that it is a case of eviction by paramount title.)

[13] Where rent is fixed at so much per bigha or acre, the doctrine of suspension has no application. (Vol 16) 1929 Cal 568 (571) : 57 Cal 137 (DB)✠(Vol 18) 1931 Cal 397 (398) (D B)✠(Vol 26) 1939 Pat 356 (357). (Assumed.)

[14] Eviction by landlord—No question as to rental being lump rental or so much per acre or bigha arises — Doctrine of suspension applies provided there is indivisibility of tenure. (Vol 20) 1933 Cal 566 (570, 571).

[15] In Bengal, even where the rent is fixed as a lump sum for the whole area leased, the doctrine of suspension of rent does not apply to cases of failure of the lessor to give possession of a part of the land leased. (Vol 30) 1943 P C 24 (28, 29) : 70 Ind App 18 : I L R (1943) 1 Cal 372: I L R (1943) Kar (P C) 39 (PC).

[16] In order to constitute an eviction by the lessor for the application of the doctrine of suspension of rent the act done by the lessor must be a wrongful or tortious act of dispossession. (Vol 21) 1934 Cal 146 (148) ✠(Vol 22) 1935 Cal 134 (137) (D B) ✠(Vol 21) 1934 Pat 653 (656): 13 Pat 396 (DB).

[17] To constitute eviction for the application of the doctrine of suspension of rent the act done by the lessor must not be a mere trespass but must be something of a grave and permanent character done with the intention of depriving the tenant of the enjoyment of the demised property (Vol 28) 1941 Pat 417 (417) ✠(Vol 23) 1936 Cal 135 (138) ✠(Vol 29) 1942 Pat 266 (267).

[18] To constitute eviction for the application of the doctrine of suspension of rent, there must be a substantial interference by the lessor with the enjoyment of the property though actual physical expulsion is not necessary. (Vol 23) 1936 Cal 135 (138) ✠(Vol 4) 1917 Cal 177 (178, 179) (DB).

[19] A *bona fide* or innocent dispossession does not constitute an eviction by the lessor and is not a ground for a suspension of rent. ('36) 40 Cal W N 166 (172) (D B). (Mistake about the extent of the property demised.) ✠(Vol 28) 1941 Pat 417 (417).

Eviction by paramount title.

[20] Eviction by paramount title is a good defence to a suit for rent. ('82) 1882 Bom P J 167 (167) (D B) ✠(Vol 18) 1931 Cal 537 (541): 59 Cal 155 (F B) ✠(Vol 16) 1929 Cal 22 (25): 55 Cal 1013 (DB).

[21] Suit for rent — Plea of eviction by paramount title—Eviction must have been from something actually forming part of demised premises — Party evicting must have good title — Tenant evicted must have quitted against his will. (Vol 22) 1935 Cal 368 (384, 385) : 62 Cal 346 (D B) ✠(Vol 16) 1929 Cal 272 (275) (DB).

[22] Suit for rent — Plea of eviction by paramount title — Forcible expulsion is not necessary. (Vol 22) 1935 Cal 368 (385): 62 Cal 346 (D B) ✠(Vol 26) 1939 Cal 216 (218): I L R (1938) 2 Cal 559 (DB).

[23] Claim by title paramount — Lessee consenting to an attornment to such person or to change title under which he holds, or entering into a new arrangement for holding under him — This will be an eviction by paramount title. (Vol 22) 1935 Cal 368 (385): 62 Cal 346 (D B) ✠(Vol 26) 1939 Cal 216 (218): I L R (1938) 2 Cal 559 (DB).

[24] Mere institution of a suit for possession or mere apprehension of eviction is not sufficient. (Vol 26) 1939 Cal 216 (218): I L R (1938) 2 Cal 559 (DB). (Suit for possession.) ✠(Vol 23) 1936 Cal 628 (629) : 62 Cal 294. (Apprehension of eviction.) ✠('70) 14 Suth W R 85 (87) (DB). (Do.)

[25] Lessee evicted by title paramount from whole of property demised — Lessee is not liable to pay any rent at all. (Vol 12) 1925 All 273 (275): 47 All 63 ✠(1864) 1 Suth W R 1 (2) (DB).

[26] Eviction from part of demised premises—There will be abatement of rent to the extent of property lost to lessee. (Vol 18) 1931 P C 104 (105, 107): 58 Cal 1281 : 58 Ind App 141 (P C) ✠(Vol 22) 1935 Cal 134 (138) ✠(Vol 18) 1931 Cal 537 (541): 59 Cal 155 (F B).

[27] Eviction by title paramount from part of demised premises — Doctrine of suspension does not apply. (Vol 30) 1943 P C 24 (26, 28): I L R (1943) 1 Cal 372: I L R (1943) Kar (P C) 39: 70 Ind App 18 (P C) ✠(Vol 22) 1935 Cal 134 (138) (DB).

[But see ('73) 20 Suth W R 347 (348) (D B). (Doctrine of suspension was assumed to apply but as leased property fixed separate rent for separate mouzahs abatement was given.)]

[28] Lessor unable to give possession to lessee of part of demised property by reason of third person with paramount title being in possession — Lessee held was in a position similar to that of person who had been evicted from that part—There was same equity for apportionment as in case of "eviction." ('94) 21 Cal 1005 (1016, 1017): 21 Ind App 118 (PC).

Diluvion.

[29] Lessee deprived of part of demised property by diluvion or by earthquake — There will be abatement of rent to extent of property lost to lessee, unless there is contract to contrary. (Vol 18) 1931 Cal 537 (539): 59 Cal 155 (FB). (Diluvion.)✠(Vol 8) 1921 Cal 220 (221)

(m) the lessee is bound to keep, and on the termination of the lease to restore, the property in as good condition as it was in at the time when he was put in possession, subject only to the changes caused by reasonable wear and tear or irresistible force, and to allow the lessor and his agents, at all reasonable times during the term, to enter upon the property and inspect the condition thereof and give or leave notice of any defect in such condition, and, when such defect has been caused by any act or default on the part of the lessee, his servants or agents, he is bound to make it good within three months after such notice has been given or left :

(n) if the lessee becomes aware of any proceeding to recover the property or any part thereof, or of any encroachment made upon, or any interference with the lessor's rights concerning such property, he is bound to give, with reasonable diligence, notice thereof to the lessor :

Section 108 Cl (l)—Note 13 *(contd.)*

(DB). (Do.) ✠ (Vol 1) 1914 Lah 42 (42). (Earthquake.) ✠('12) 15 Cal L Jour 507 (509) (DB). (Contract to contrary.)

Acquisition under Land Acquisition Act.

[30] Part of demised property acquired under Land Acquisition Act — Lessor receiving compensation for land acquired—He is bound to make abatement of rent. ('84) 10 Cal 544 (546) (DB) ✠('83) 9 Cal 571 (573) (DB). (Landlord and tenant taking a moiety of the compensation as per agreement— Tenant held entitled to abatement of rent.) ✠(Vol 1) 1914 Mad 113 (113).

[31] Lessee receiving whole of compensation—He cannot claim any abatement of rent. ('82) 10 Cal L Rep 526 (528) (DB).

Trespasser.

[32] Eviction by a trespasser is not a ground for abatement of rent. (Vol 25) 1938 Cal 690 (692) ✠(Vol 12) 1925 P C 97 (98): 52 Ind App 160 : 52 Cal 417 (P C) ✠(Vol 10) 1923 Cal 429 (430) (DB).

[33] Lessee must protect himself from illegal encroachment by others — Failure to do so is no ground for prejudicing landlord's claim for rent. (Vol 12) 1925 P C 97 (98) : 52 Ind App 160 : 52 Cal 417 (P C) ✠(Vol 9) 1922 Cal 87 (92): 49 Cal 948 (SB) ✠(Vol 25) 1938 Cal 690 (691, 692).

Mistaken inclusion in lease of tenant's own property.

[34] Tenant's own property by mistake included in lease — No fraud or misrepresentation — Lease is not altogether void — But lessee is liable for rent in proportion to property of which he is given possession under lease. ('12) 39 Cal 1016 (1027) (DB).

Surrender by tenant.

[35] Lessor accepting surrender of part of land from his tenant — He cannot claim rent for that portion. (Vol 27) 1940 Pat 516 (523): 19 Pat 433 (DB).

Miscellaneous.

[36] *A* usufructuarily mortgaging his land to *B*—*B* leasing it back to *A*—Suit for rent by *B* — *A* held not entitled to claim reduction of rent on ground that *B* did not advance full amount of consideration, shown in mortgage-deed. (Vol 30) 1943 Mad 220 (221).

[37] Lessor taking lesser rent for some years than that actually due — It will not disentitle him from claiming rent at stipulated rate (Vol 3) 1916 Cal 104 (105) (D B) ✠('13) 41 Cal 493 (506): 40 Ind App 223 (PC) ✠(Vol 16) 1929 Pat 717 (719): 9 Pat 487 (D B) ✠ (Vol 4) 1917 Mad 143 (144) (D B) ✠ ('04) 14 Mad L Jour 477 (479) (DB.) (Non-payment of rent.)

[38] Leased property consisting of villages identified by boundaries given — Rent fixed not calculated with reference to extent of lands at all—Lessee cannot claim any abatement of rent on ground that lessor failed to deliver possession of total extent of lands mentioned in lease deed. (Vol 10) 1923 Mad 459(460)(DB).

Section 108, Clause (m) — Note 1

[1] This clause refers to "permissive waste" while cl. (o) refers to "voluntary waste." (Vol 4) 1917 Bom 34 (36).

[2] While there is no general rule of law apart from contract or statute to compel the lessor to repair the demised property, there is an implied obligation on the part of the tenant to keep the premises "wind and water-tight" and to make fair and tenantable repairs (Vol 10) 1923 Cal 524(525)(DB) ✠(Vol 14) 1927 Bom 115 (118) : 51 Bom 274 (DB) ✠ (Vol 4) 1917 Bom 46 (51).

[3] The doctrine of permissive waste is to be applied under the rules of general common sense and goes no further than that a tenant is bound to take reasonable care of the property entrusted to him and see that through no neglect of his own it is irreparably damaged. (Vol 4) 1917 Bom 34 (36).

[4] The tenant is bound to keep and restore the property to the lessor in as good condition as it was when he received it. ('99) 1 Bom L R 191 (194) (DB).

[5] Tenant is bound to preserve boundaries of land he holds as tenant especially where he holds adjoining land of his own — If he does not do so he is bound to make good to landlord quantity of land to which latter is entitled ('83) 6 Mad 263 (265, 266) (DB) ✠('01) 5 Cal W N 846 (858) (DB).

[6] Dilapidation caused by friction of air or by exposure and ordinary use — Tenant is not liable. (1901) 17 T L R 570 (570), *Terrell* v. *Murrey*.

[7] Wall of leased premises collapsing for no fault of lessee — He is not liable to lessor in damages or to restore building to its original state. (Vol 4) 1917 Bom 34 (36, 38).

[8] Fire is "irresistible force"—Lessee will be free from liability only if it was not caused by his negligence—If he is responsible for fire, he will be liable to lessor. (Vol 7) 1920 Mad 493 (495, 496) (D B). (*Per* Krishnan J.) ✠(Vol 28) 1941 All 327 (328, 330) ✠(Vol 15) 1928 Mad 1140 (1141): 51 Mad 994 (DB).

[9] Lessor giving required notice under this clause —Lessee, in answer, repudiating his liability to pay damages—Lessor is not bound to wait till expiry of three months before instituting suit for relief. (Vol 7) 1920 Mad 493 (494, 496) (DB).

[10] Lessee covenanting to keep the premises wind and water tight and in habitable condition — Premises subsequently damaged by earthquake — *Held* covenant was contract to contrary. (1900) 4 Cal W N 521 (523) (FB).

[11] Tenant alone held liable for damage caused to third person by fall of wall. (Vol 4) 1917 Bom 46 (52).

Section 108, Clause (n) — Note 1

[1] Lessee must protect his lessor's property from encroachment or unlawful eviction — If he fails to do so landlord can sue him for damages. ('82) 9 Cal L Rep 347 (348) (DB).

"(o) the lessee may use the property and its products (if any) as a person of ordinary prudence would use them if they were his own; but he must not use, or permit another to use, the property for a purpose other than that for which it was leased, or fell [a][or sell] timber, pull down or damage buildings [a][belonging to the lessor, or] work mines or quarries not open when the lease was granted, or commit any other act which is destructive or permanently injurious thereto :

[a] *Inserted* by the Transfer of Property (Amendment) Act, 1929 (XX [20] of 1929), S. 56.

Section 108 Cl. (n)—Note 1 *(contd.)*

[2] The clause merely reproduces the law existing prior to the Act. ('82) 1882 Bom P J 167 (167) (DB).

[3] This clause throws a duty upon the lessee to give notice to the lessor so that the lessor may protect his interest. (Vol 16) 1929 Cal 272 (276) (DB).

[4] A mere trespass on the land leased without any damage to the property is only an interference with the lessee's rights and not with the lessor's rights so as to oblige the lessee to give notice to the lessor under this clause. (Vol 5) 1918 Cal 244 (245) (DB) ✠ (Vol 12) 1925 Cal 155 (157) (DB).

[5] If the trespass is such that it interferes with the lessor's right to recover rent, it will be an interference in respect of which the lessee will be bound to give notice under this clause. ('10) 1910 Mad W N 838(838).

SECTION 108, CLAUSE (o)—SYNOPSIS.

1. Reasonable user of demised property.
2. User for purposes other than those for which property is leased.
3. Cutting of trees on land.
4. Working mines and quarries.
5. "Any other act which is destructive" etc.
6. Effect of breach of obligation.

1. Reasonable user of demised property. — [1] The lessee is bound to manage the leasehold property in a proper and efficient manner. (Vol 4) 1917 Pat 549 (550): 2 Pat L Jour 713 (DB).

[2] Tenant using property in reasonable and tenant-like manner—He is not liable to lessor for any damage caused to property by such user. ('70) 5 Beng L R 401 (416 417)(FB). (Ware house let for storing goods—Lessee storing goods not unreasonably— Floor giving way by weight of goods—Lessee not liable for damage.)

[3] Tenant collecting stones on land and selling same— Use of land held not reasonable. (Vol 28) 1941 Pat 13 (15, 17) : 20 Pat 96 (DB). ((Vol 23) 1936 Pat 11, *Not approved.*)

2. User for purposes other than those for which property is leased.— [1] Tenant must use the property only for the purpose for which it is granted. ('78) 3 Cal 781 (784) (DB). (Even occupancy tenant.)

Instances of acts inconsistent with purpose of lease.

[2] Building godown and brick kiln on land let for agricultural purposes. (Vol 23) 1936 Oudh 316 (317) : 12 Luck 256.

[3] Converting wet land into garden by planting fruit trees. ('89) 12 Mad 320 (322) (DB). (Kanom lease.)

[4] Turning agricultural land into building land. ('90) 12 All 419 (422) (FB).

[5] Land let for tying cattle and storing cowdung cakes being used for building structure for keeping and preserving chaff. (Vol 13) 1926 All 66 (67).

[6] Converting land under cultivation into mango grove in absence of local custom. ('87) 10 Mad 351 (352, 353) (DB) ✠ ('09) 10 Cal L Jour 595 (598) (DB).

[7] Building of dwelling house by occupancy tenant on agricultural land for purposes not connected with agriculture. ('93) 16 Mad 407 (408, 409) (DB) ✠ ('01) 24 Mad 65 (69) (DB).

[8] Building permanent structures on land leased for laying out flower garden. (Vol 27) 1940 Mad 32 (33) (DB). (Lease for laying out flower garden—Lessee and his assignee building permanent structures.)

[9] Converting cultivable land into tank. ('71) 7 Beng L R (App) 69 (70) (DB).

Instances of user not inconsistent with purpose of lease.

[10] Lease of land for winning oil by sinking wells —Lessee finding that oil could not be got in commercial quantities making use of gas coming out of wells— Use of gas, set free by wells, held not necessarily inconsistent with purpose of lease. (Vol 16) 1929 P C 108 (110) : 7 Rang 157 : 56 Ind App 140 (PC).

[11] The conversion, by a permanent tenant of a wet land, used for paddy and rabbi cultivation into a cocoanut garden is not a conversion of the land for a purpose different from that for which it was let. ('99) 22 Mad 39 (41, 42) (DB). (*Distinguishing* ('89) 12 Mad 320.)

[12] Leased land used for indigo cultivation and factory erected thereon — Question whether user will render land unfit for purpose of tenancy will depend upon size of holding, area withdrawn from actual cultivation and effect of such withdrawal upon fitness of holding taken as a whole for profitable cultivation. ('07) 34 Cal 718 (722, 723) : 34 Ind App 133 (PC). (('04) 31 Cal 174, *Reversed.*)

[13] Planting trees not materially affecting the character of the holding is not an inconsistent user. ('99) 9 Mad L Jour 146 (147) (DB).

[14] Building by an occupancy tenant held not a misuse. ('66) 6 Suth W R (Act X Rul) 40 (40) (DB).

[15] Granting a usufructuary mortgage is not an inconsistent use. ('90) 12 All 419 (422) (FB).

3. Cutting of trees on land.—[1] Trees standing upon land at the time of the lease are part of the land and belong to the landlord. ('67) 11 Moo Ind App 295 (313, 316) (PC) ✠ (Vol 10) 1923 All 406 (406, 407) : 45 All 361 (DB) ✠ (Vol 17) 1930 Cal 240 (241) : 57 Cal 344 (DB) ✠ ('94) 22 Cal 742 (751) (DB) ✠ (Vol 11) 1924 Pat 147 (149) (DB) ✠ ('08) 4 Nag L R 104 (110)✠ ('07) 30 Mad 155 (157) (DB) ✠ (Vol 22) 1935 Pat 188 (191) ✠ (Vol 8) 1921 Sind 109 (111) : 16 Sind L R 87. (('67) 11 Moo Ind App 295 (PC), *Followed.*)

[2] Trees standing on land at time of lease—Tenant is entitled to enjoy such trees during period of his tenancy but cannot cut them down and appropriate them to himself unless such right is given by contract or is an incident of tenure by virtue of some positive law or custom. ('90) 3 C P L R 18 (19) ✠ (Vol 7) 1920 Nag 113 (115). (Mere grant of protected status does not confer right to cut trees.) ✠ (1864) 1864 Suth W R (Gap No.) 367 (367) (DB).

[3] Perpetual lease at a fixed rent —Tenant is entitled to ownership of trees on land as incident of tenure. (Vol 16) 1929 Cal 330 (330) (DB) ✠ (Vol 12) 1925 Cal 139 (140) (DB) ✠ ('01) 23 All 126 (127) (DB).

[4] Under S. 23, Bengal Tenancy Act, the tenant can cut trees. (Vol 22) 1935 Pat 472 (472).

[5] Subject to restrictions imposed by statute, the occupancy tenant in U. P. is entitled to the trees on the land and to use them as long as the tenure exists. ('86) 8 All 467 (474) (DB).

(p) he must not, without the lessor's consent, erect on the property any permanent structure, except for agricultural purposes :

Section 108 Cl. (o) — Note 3 *(contd.)*

[6] Occupancy tenant—Wajib-ul-arz allowing tenant to cut trees. ('81) 1881 Pun Re No. 61, p. 142 (143) ✠ ('74) 1874 Pun Re No. 79, p. 238 (239) (DB).

[7] Lease for clearing jungle land and bringing it under cultivation — Lease containing no reservation — Tenant has a right to cut and take trees for himself. ('74) 22 Suth W R 523 (524) (DB) ✠ ('96) 23 Cal 209 (211, 212) (DB).

[8] Perpetual lease of land for agricultural purposes — Lessee cannot claim timber of trees which have spontaneously grown on land. (Vol 29) 1942 Oudh 460 (461) : 18 Luck 390 (DB).

[9] Where trees are of spontaneous growth there appears to be no equity in lessee's favour. (Vol 7) 1920 Nag 113 (115).

[10] Landlord is entitled to the lac spontaneously deposited on trees standing in the lands of the tenant. ('08) 4 Nag L R 104 (112).

[11] Mulgeni lease — Tenant can cut trees of spontaneous growth as a customary incident of the tenure. (Vol 3) 1916 Mad 939 (940) (DB).

[12] A tenant is entitled to prevent the growth of any trees which were not growing at the time of the commencement of his tenancy, and the growth of which would interfere with the purpose for which the land was let to him. ('91) 13 All 571 (572) (DB).

[13] The lessor or the landlord cannot interfere with the tenant's enjoyment of the trees during the period of the tenancy. (Vol 10) 1923 All 406 (406, 407) : 45 All 361 (DB) ✠ (Vol 7) 1920 Nag 113 (115) ✠ (Vol 13) 1926 Mad 853 (857) (DB) ✠ ('90) 3 C P L R 18 (19) ✠ ('08) 4 Nag L R 104 (112, 113).

4. Working mines and quarries. — [1] As a general rule, the grant even of a permanent lease does not carry with it the right to minerals in the absence of an express contract to the contary, (Vol 3) 1916 P C 191 (193) : 44 Cal 585 : 44 Ind App 46 (PC) ✠ (Vol 6) 1919 P C 17 (20) : 47 Cal 95 : 46 Ind App 158 (PC) ✠ ('10) 37 Cal 723 (730) : 37 Ind App 136 (PC). (('06) 33 Cal 54, *Reversed.*) ✠ (Vol 18) 1931 P C 162 (163, 164) : 58 Ind App 228 : 59 Cal 80 (PC).

[2] The property in the mines and minerals remains in the proprietor of the land leased. (Vol 22) 1935 Cal 368 (381) : 62 Cal 346 (DB).

[3] A lessee cannot work new mines in the land leased out to him. ('11) 38 Cal 845 (859) (DB).

[4] Right to minerals expressly granted to lessee — Right to work mines is also impliedly granted thereby. (Vol 12) 1925 P C 42 (44) : 4 Pat 244 : 52 Ind App 109 (PC) ✠ ('06) 33 Cal 462 (472) (DB).

5. "Any other act which is destructive" etc.— [1] A tenant cannot alter the land in such a way as to permanently injure the interests of the landlord. ('83) 9 Cal 609 (611) (DB) ✠ (1865) 2 Suth W R 157 (158) (DB).

[2] Excavation of agricultural land for making bricks is injurious to property — Tenant cannot make such excavations in absence of provision in lease to that effect. ('72) 17 Suth W R 416 (417) (DB).

[3] Provision in lease for excavation of agricultural land by lessee for making bricks — Terms cannot be construed as giving lessee right to make such excavations as would cause complete destruction of property. ('05) 9 Cal W N 255 (257) (DB).

[4] Tenant having permanent and heritable right at fixed rent in large track of land making small excavation in an area of a few square feet for making bricks — Act held not detrimental to land — Tenant's right of enjoyment held extended to making such excavations. (Vol 11) 1924 Cal 56 (57) : 50 Cal 694 (DB).

[5] The construction of a well upon an agricultural holding is not a destructive or a permanently injurious act. ('12) 15 Oudh Cas 170 (175, 176) (DB) ✠ (1864) 1864 Suth W R (Gap No. Civ.) 279 (279) ✠ ('99) 21 All 386 (389) (DB).

[6] Use of an agricultural land temporarily for a theatrical company, where there are no crops on the land is not destructive or injurious to the land. ('98) 20 All 469 (470). (Case under N. W. P. Rent Act.)

[7] A transfer by way of usufructuary mortgage is not an act injurious to the property. ('90) 12 All 419 (422, 423) (FB).

[8] An act cannot be said to be detrimental to the land unless it injures the land itself. ('90) 12 All 419 (422) (FB).

6. Effect of breach of obligation. — [1] Breach of obligation under this clause does not necessarily entail forfeiture of lease — Lessor can claim damages. ('83) 9 Cal 609 (610, 611) (DB).

[2] Threatened breach — Lessor is entitled to injunction restraining tenant from committing such breach. ('75) 23 Suth W R 298 (300) (DB) ✠ (Vol 27) 1940 Mad 32 (33) (DB).

[3] Breach of obligation under this clause — Lessor cannot on his own responsibility evict tenant or induct other person on land. (Vol 4) 1917 Pat 549 (550) : 2 Pat L Jour 713 (DB).

Section 108, Clause (p) — Note 1

[1] A lessee cannot erect any permanent structure on the land for non-agricultural purposes. ('82) 9 Cal L Rep 221 (223) ✠ ('94) 16 All 328 (330).

[2] The lessee of a building cannot even add a structure to it. (Vol 14) 1927 Lah 225 (225).

[3] House or premises, not used for agricultural purposes, falling into disrepair — Tenant is entitled to rebuild and repair that portion. ('88) 1888 All W N 125 (126).

[4] An agricultural tenant can erect a walled enclosure on the land and build a cattle-shed, as they are for agricultural purposes. ('88) 1888 Pun Re No. 122, page 332 (333) (DB).

[5] Agricultural leases — Provisions of this Act not applicable — English law should be applied — Tenant with permanent right of occupancy cannot be prevented from erecting permanent structures on the land unless such erection will cause permanent damage or injury to property. (Vol 19) 1932 Mad 328 (336) (DB) ✠ ('01) 24 Mad 65 (66, 69) (DB). (Unless erection will cause permanent damage or injury.)

[6] Land let for building purposes — This clause will not apply. (Vol 22) 1935 All 1040 (1040) (DB).

[7] Tenant erecting permanent structure on land for non-agricultural purposes — Lessor cannot on that ground eject him — He can claim its demolition. (Vol 1) 1914 All 285 (287) ✠ ('07) 17 Mad L Jour 197 (198) (DB). *(Obiter.)*

[8] One of several lessors cannot enforce the obligation under this clause and ask for the demolition of the building erected, where the other co-lessors are not willing to enforce it. (Vol 26) 1939 Pat 428 (430).

(*q*) on the determination of the lease, the lessee is bound to put the lessor into possession of the property.

Rights of lessor's transferee.

109. If the lessor transfers the property leased, or any part thereof, or any part of his interest therein, the transferee, in the absence of a contract to the contrary, shall possess all the rights, and, if the lessee so elects, be subject to all the liabilities of the lessor as to the property or part transferred so long as he is the owner of it; but the lessor shall not, by reason only of such transfer, cease to be subject to any of the liabilities imposed upon him by the lease, unless the lessee elects to treat the transferee as the person liable to him :

Provided that the transferee is not entitled to arrears of rent due before the transfer, and that, if the lessee not having reason to believe that such transfer has been made, pays rent to the lessor, the lessee shall not be liable to pay such rent over again to the transferee.

The lessor, the transferee and the lessee may determine what proportion of the premium or rent reserved by the lease is payable in respect of the part so transferred, and, in case they disagree, such determination may be made by any Court having jurisdiction to entertain a suit for the possession of the property leased.

Section 108, Clause (q) — Note 1

[1] This clause enacts the well settled rule that the tenant must, on the expiration or sooner determination of his tenancy, deliver up to his landlord possession of the demised property. ('98) 22 Bom 348 (353, 354) (DB) ✠ (Vol 24) 1937 Lah 121 (124) ✠ (Vol 8) 1921 Bom 93 (101) ✠ (Vol 13) 1926 Lah 371 (372) ✠ ('05) 15 Mad L Jour 368 (369) (DB) ✠ (Vol 4) 1917 Cal 219 (220) (DB) ✠ ('98) 1898 Pun Re No. 14, p. 25 (28) (DB).

[2] The tenant cannot refuse to give up possession on the ground that the landlord has no title, unless subsequent to the lease there is an ouster of the landlord's right by a paramount title. (Vol 15) 1928 Rang 162 (163) (DB) ✠(Vol 12) 1925 Oudh 694 (696) ✠(Vol 8) 1921 Bom 93 (100, 101) ✠ ('99) 1 Bom L R 491 (493) (DB). ✠('05) 15 Mad L Jour 368 (369) (DB). (Ouster of landlord's right subsequent to lease.)

[3] Tenant cannot refuse to give up possession on the ground that at some time during the period of his lease he was disturbed for a few days in his possession. (Vol 13) 1926 Lah 371 (372).

[4] Tenant cannot refuse to give up possession on the ground that there is a covenant for renewal in his favour. (Vol 3) 1916 Mad 1224 (1224) (DB) ✠(Vol 24) 1937 All 328 (332) (DB).

[5] Lessee cannot refuse to give up possession on the ground that he has erected permanent structures on the land to the knowledge of the lessor and without interference by him. ('99) 21 All 496 (502, 503): 26 Ind App 58 (P. C.). (Unless lessor is barred by equitable estoppel from claiming possession.) ✠(Vol 25) 1938 Pat 236 (237). (*Ramsden* v. *Dyson*, (1865) L R 1 H L 129, *Foll.*)

[6] The lessee is bound to put the lessor in possession of not only the land leased but also the crops on the land. ('10) 11 Cal L Jour 87 (90) (DB).

[7] The lessee must put the lessor in possession of any accessions made to the property and of encroachments by the lessee enuring for the benefit of the lessor under clause (d). (Vol 12) 1925 Cal 1114 (1116) (DB).

[8] Lessee failing to deliver possession on determination of lease—Lessor can sue him in ejectment. ('10) 7 Mad L Tim 350 (350) (DB) ✠(Vol 4) 1917 Cal 219 (220) (DB).

[9] Determination of lease—Lessee failing to deliver possession ejected by force by lessor—Lessee can sue lessor to recover possession under S. 9, Specific Relief Act. (Vol 12) 1925 Sind 275 (278, (279) ✠('05) 29 Bom 213 (216, 217) (DB).

[10] Lessee failing to deliver possession on determination of lease—Lessor can sue lessee for damages for wrongful occupation. ('98) 22 Bom 348 (354) (DB). ✠(Vol 24) 1937 Lah 121 (124) ✠('77) 1877 Bom P J 171 (171) (DB) ✠(Vol 20) 1933 Lah 61 (64): 14 Lah 137 (DB) ✠(Vol 24) 1937 All 328 (333) (DB) ✠(Vol 11) 1924 Cal 240 (242): 50 Cal 667 ✠(Vol 1) 1914 All 1 (2) ✠('10) 20 Mad L Jour 555 (559) (DB) ✠ (Vol 24) 1937 Mad 478 (480).

[11] Lessee failing to deliver possession on determination of lease—Lessor cannot sue for rent. ('77) 1877 Bom P J 171 (171) (DB).

[12] Lessee surrendering tenancy by notice to landlords—Delivery of possession to one of them—Others cannot sue tenant either for rent or for damages for use and occupation. (Vol 11) 1924 Lah 474 (475).

[13] Lessee is not liable for rent, or for use and occupation if he has offered to deliver possession but the lessor has refused to take it. (Vol 24) 1937 Lah 121 (124, 125).

[14]Land leased to several lessees jointly—All must vacate at determination of tenancy—If some alone vacate, this will not relieve them of liability so long as any one or some of them remains or remain in occupation. (Vol 23) 1936 Sind 213 (215): 30 Sind L R 135 (DB).

[15] Lease expressly providing that lessee need not deliver possession at expiry of lease—Lessee is not under any obligation to put lessor in possession. ('86) 1886 Bom P J 78 (DB).

SECTION 109—SYNOPSIS

1. Scope.
2. "Transfers the property."
3. "The property leased or any part thereof."
4. "All the rights . . . of the lessor."
5. Election by lessee.
6. Notice.
7. Arrears of rent.
8. Apportionment of rent.

1. Scope.—[1] Where rights are co-existent with and inseparable from obligations, so that the assignment of the one cannot be effected without the assignment of the other, there can be no valid transfer of rights without the consent and authority of those interested in the performance of the obligations. ('72-73) 6 Mad H C R 145 (151) (DB).

[*See also* (Vol 1) 1914 Low Bur 200 (201) : 7 Low Bur Rul 95.]

[2] The principle underlying the section applies to transfers by operation of law. (Vol 13) 1926 Nag 495

110. Where the time limited by a lease of immoveable property is expressed as commencing from a particular day, in computing that time such day shall be excluded. Where no day of commencement is named, the time so limited begins from the making of the lease.

Exclusion of day on which term commences.

Where the time so limited is a year or a number of years, in the absence of an express agreement to the contrary, the lease shall last during the whole anniversary of the day from which such time commences.

Duration of lease for year.

Where the time so limited is expressed to be terminable before its expiration, and the lease omits to mention at whose option it is so terminable, the lessee, and not the lessor, shall have such option.

Option to determine lease.

Section 109 —Note 1 *(contd.)*

(495) ✠('80) 5 Cal 902 (906) (FB) ✠(Vol 10) 1923 Nag 91 (92).

[3] Even in cases of transfers of property leased out for agricultural purposes, the principle underlying the section is applicable. ('06) 29 Mad 29 (35, 36) (DB).

2. "Transfers the property."—[1] The section assumes that there has been a valid transfer of property. (Vol 9) 1922 All 45 (46) (DB).

3. "The property leased or any part thereof." —[1] The transfer may be of a part of such property or a part of the lessor's interest in such property. (Vol 14) 1927 Lah 188 (189). (Mortgage of the leased property.) ✠ (Vol 6) 1919 Lah 31 (32) : 1 Lah 241. (Lease of reversion.)

[2] *A*, the owner of property leases the property to *B*, and thereafter usufructuarily mortgages it to *C*. *A* cannot after the mortgage accept any surrender from the lessee or enforce a forfeiture clause against him. (Vol 17) 1930 Bom 329 (330) (DB). (Surrender.) ✠ (Vol 23) 1936 Mad 116 (117). (Forfeiture.) ✠(Vol 14) 1927 Bom 145 (148). (Mortgagee in possession can determine a lease without consent of the mortgagor.)

[3] *A*, the owner of property, executes a lease thereof to *B*, and subsequently, executes another lease of the same property in favour of *C*. *A* cannot, after the date of the second lease, give *B* any notice to quit or recover any rent due after the date of the second lease from *B*. ('03) 90 L T 89 (90): 52 W R (Eng) Dig 84, *Wordsley Brewery Co.* v. *Halford* ✠('08) 30 All 369 (371) (DB) ✠(Vol 9) 1922 Cal 412 (415, 416): 49 Cal 495 (DB).

[But see (Vol 10) 1923 Cal 368 (369) (DB). (Case under Bengal Tenancy Act.)]

4. "All the rights . . of the lessor".—[1] Where the entire property is transferred, the transferee can sue to eject the tenant on the basis that the tenancy has terminated or on the basis of a forfeiture for breach of condition (Vol 24) 1937 Mad 91 (91) ✠(Vol 6) 1919 Mad 1186 (1187) (DB) ✠(Vol 5) 1918 Bom 79 (79): 43 Bom 28 (DB). (Transferee can enforce forfeiture.)

[2] Transferee can also continue the suit instituted by the lessor in connection with the property leased. ('69) 12 Suth W R 122 (123) (DB).

[3] An assignment of a part of a holding effects a severance of the holding and entitles the transferee to eject the tenant from the land covered by the assignment. (Vol 7) 1920 Mad 838 (841): 42 Mad 603 (FB).

[But see ('80) 5 Cal 902 (905) (FB).]

[4] A covenant to pay rent or to repair is one running with the land and the assignee is therefore entitled to enforce such right. (Vol 23) 1936 Bom 88 (91, 94): 60 Bom 394 (DB). ✠(70) 14 Suth W R 83 (83) (DB) ✠('01) 3 Bom L R 679 (680) (DB) ✠(Vol 17) 1930 All 105 (105).

5. Election by lessee.—[1] Once the lessee does make his election, he cannot thereafter turn round and charge the original lessor in respect of his liabilities. (Vol 21) 1934 Mad 658 (662).

6. Notice.—[1] The section provides no penalty for want of notice to lessee of such transfer except the loss of rent which might be paid by the lessee to the original lessor in ignorance of the transfer. (Vol 10) 1923 Lah 389 (389) ✠('98) 1898 Bom P J 383 (DB) ✠(1864) 1864 Suth W R (FB) 30 (31) (FB).

[2] Where the lessee knows that his original lessor has transferred his interests to another his paying rent to the original lessor is not valid. ('13) 17 Cal L Jour 372 (378) (DB); ✠('12) 14 Ind Cas 801 (802) (Low Bur).

[3] No attornment is necessary under this Act. (Vol 26) 1939 Lah 49 (50).

[But see ('70) 13 Suth W R 228 (229) (DB).]

7. Arrears of rent.—[1] *A* transferred to *B* his property "together with the arrears of past years' due" by the tenants of such property. It was held that the words "arrears of past years' due" did not pass to the purchasers decrees for arrears of rent held by the vendors. ('75) 7 N W P H C R 88 (91) (DB).

8. Apportionment of rent.—[1] Where the lessor, the transferee and the lessee have agreed as to the amount of rent payable to the transferee, the lessor or the transferee can sue for the rent payable to him without impleading the other. (Vol 29) 1942 Pat 120 (126) (DB).

[2] A transferee of a specific portion of a lease-hold holding is not liable for the entire rent but only that portion of the rent which could be apportioned to the area in his exclusive possession. (Vol 31) 1944 Pat 129 (133, 134) (DB).

Section 110 — Note 1

[1] Per Rau J. — This section applies whether the lease is a written one or oral—Per Mukherjea J.— The section only applies to written leases. (Vol 31) 1944 Cal 84 (85, 87) (DB) ✠ (Vol 33) 1946 Cal 460 (461). (Opinion of Rau J., *Followed*.)

[2] The section has no application to a case of an oral lease by which no time is limited. (Vol 33) 1946 Cal 460 (461).

[3] Per Rau, J.—(Obiter). The rule laid down in this section is not inflexible, and the section must be read as qualified by some such phrase as "unless the context otherwise requires." (Vol 31) 1944 Cal 84 (86) (DB).

[4] When a period is limited by the lease and the period is expressed to commence "from" a particular date, in computing the period that day is to be excluded. (Vol 31) 1944 Cal 84 (88) (DB). *(Per Mukherjea J.)* ✠ (Vol 30) 1943 Bom 306 (310, 311) : ILR (1943) Bom 553 (D B) ✠ (Vol 19) 1932 P C 279 (280) : 60 Cal 380 : 59 Ind App 414 (PC).

[5] *A* letting to a monthly tenant is not a letting which expires at the end of the first month or at the end of each succeeding month nor is there a re-letting at the commencement of each month of the tenancy. (Vol 32) 1945 Pat 385 (385) (D B).

[6] Where the parties to an agreement to grant a lease intend that the lease is to run from the date of its execution, the provisions of S. 110 can be applied to

Determination of lease.

111. A lease of immoveable property determines—

(a) by efflux of the time limited thereby:

(b) where such time is limited conditionally on the happening of some event—by the happening of such event:

(c) where the interest of the lessor in the property terminates on, or his power to dispose of the same extends only to, the happening of any event—by the happening of such event:

(d) in case the interests of the lessee and the lessor in the whole of the property become vested at the same time in one person in the same right:

(e) by express surrender; that is to say, in case the lessee yields up his interest under the lease to the lessor, by mutual agreement between them:

(f) by implied surrender:

(g) by forfeiture; that is to say, (1) in case the lessee breaks an express condition which provides that on breach thereof the lessor may re-enter [a][* * * *]; or (2) in case the lessee renounces his character as such by setting up a title in a third person or by claiming title in himself; [b][or (3) the lessee is adjudicated an insolvent and the lease provides that the lessor may re-enter on the happening of such event]; and in [c][any of these cases] the lessor or his transferee [d][gives notice in writing to the lessee of] his intention to determine the lease:

(h) on the expiration of a notice to determine the lease, or to quit, or of intention to quit, the property leased, duly given by one party to the other.

Illustration to clause (f).

A lessee accepts from his lessor a new lease of the property leased, to take effect during the continuance of the existing lease. This is an implied surrender of the former lease, and such lease determines thereupon.

[a] The words "or the lease shall become void" were *repealed* by the Transfer of Property (Amendment) Act, 1929 (20 [XX] of 1929), S. 57. [b] *Inserted, ibid.* [c] *Substituted, ibid*, for "either case". [d] *Substituted, ibid.*, for "does some act showing".

Section 110 — Note 1 *(contd.)*

such agreement. (Vol 31) 1944 Mad 518 (524) : I L R (1945) Mad 355 (DB)

[7] The principle that where no day of commencement is named in the lease, the time limited begins from the making of the lease has been applied even to agricultural leases. (Vol 6) 1919 Cal 837 (838) (DB) ✠ (Vol 15) 1928 Cal 392 (396) : 55 Cal 425 (DB).

[8] Where no day for commencement of the lease is named, it may commence on another day, if the intention of the parties implied from the circumstances, is to make the lease commence on that day. ('07) 30 Mad 109 (112) (D B) ✠ (Vol 25) 1938 Cal 358 (359) : I L R (1938) 2 Cal 134.

[9] Where a tenancy from month to month arises by implication under S. 106 and there is no express contract of tenancy, the date on which the tenant entered into possession cannot be treated as the date from which the lease is "expressed" to commence. (Vol 31) 1944 Cal 84 (85, 87) (DB).

[10] Where there is no evidence as to when the lease was granted and when it was intended to commence, the presumption will be that the tenancy expires on the last day of each month. ('08) 8 Cal L Jour 34 (37) ✠ (Vol 23) 1936 Oudh 306 (307) : 12 Luck 241 (D B).

[11] The first para of this section is not applicable to a periodical tenancy such as a tenancy from year to year or from month to month. (Vol 30) 1943 Bom 306 (310) : I L R (1943) Bom 553 (D B).

[12] In order that second paragraph may apply the time limited by the lease must be a year, or a number of years, and there must be no express agreement to the contrary. (Vol 19) 1932 P C 279 (280) : 60 Cal 380 : 59 Ind App 414 (P C).

[13] Where there is an express agreement to the contrary the terms of the agreement prevail. (Vol 25) 1938 Cal 358 (359) : I L R (1938) 2 Cal 134.

[14] Lease expressed to be for four years commencing from first day of June, 1921—Rent for each month payable before 7th of next month— *Held* there was no express agreement to the contrary and lease lasted up to midnight of 1st day of June, 1925. (Vol 19) 1932 PC 279 (280) : 60 Cal 380 : 59 Ind App 414 (PC).

[15] Time limited by lease being number of years — Lease must be deemed to last during whole anniversary of day from which time commences. (Vol 27) 1940 All 444 (445).

[16] Lease for four years, commencing on 1-6-1939 —Stipulation in document that lease would end with May, 1943—Stipulation held constituted express agreement to contrary. (Vol 34) 1947 Cal 68 (70) (DB).

SECTION 111 — SYNOPSIS

1. Scope.
2. Clause (a).
3. Renewal of lease.
4. Clause (b)
5. Clause (c).
6. Death of lessor and lessee.
7. Clause (d).
8. Surrender—General.
9. Clause (e).
10. Clause (f).
11. Clause (g).
12. Forfeiture—Permanent lease
13. Forfeiture for breach of condition.
14. Forfeiture for denial of title.
15. Forfeiture on insolvency of lessee.
16. Notice of intention to determine lease on forfeiture.
17. Tenant cannot deny his landlord's title—Estoppel.
18. Re-entry on forfeiture.
19. Who can enforce forfeiture.
20. Forfeiture of service tenures.

SECTION 111 — SYNOPSIS *(contd.)*

21. Clause (h).
22. Tenancy at will.
23. Leases not governed by the Act.
24. Joint lessors—Termination of lease.
25. Possession after determination of tenancy.

1. Scope.—[1] This section does not apply to a lease created by devise. (Vol 11) 1924 Oudh 305 (305, (306) : 27 Oudh Cas 1.

[2] This section does not apply in terms to agricultural leases which are exempted from its operation by S. 117. (Vol 24) 1937 Cal 669 (669) : ILR (1937) 1 Cal 679 (D B).

[3] This section does not apply to leases executed before the Act was passed. (Vol 25) 1938 Cal 128 (129) (D B).

[4] So long as a tenancy is not determined in one of the ways known to law, a tenant cannot be ejected as a trespasser. ('28) 112 Ind Cas 257 (258) (DB) (Mad) ✠ (Vol 6) 1919 Mad 1135 (1136) (D B) ✠ (Vol 13) 1926 Nag 253 (255) ✠ ('32) 11 Cal L Rep 387 (388) (DB).

[5] The determination of a lease determines also, with one exception, all interests derived from the lessee. (Vol 13) 1926 Nag 62 (63) ✠ (Vol 14) 1927 Oudh 339 (340) : 2 Luck 612 ✠ (Vol 19) 1932 Nag 107 (109) : 28 Nag L R 93 ✠ (Vol 4) 1917 Cal 236 (241) (D B) ✠ (Vol 11) 1924 Mad 776 (777) (DB).

[See however (Vol 12) 1925 All 580 (582, 583) : 47 All 589 (DB).]

[6] A lease for a term is not determined merely by the lessor unlawfully entering on the leased property before the expiry of the term. (Vol 14) 1927 Lah 1 (4): 7 Lah 423 (D B).

2. Clause (a).—[1] A lease from year to year does not terminate at the end of each year, though it is terminable by a notice to quit at the end of any year. ('02) 12 Mad L Jour 194 (196) (D B) ✠ (Vol 13) 1926 Nag 201 (202).

[2] A lease for a term of years *prima facie* implies that the lessee's right to the property demised ends with the term. It does not *prima facie* import any right of renewal. (Vol 2) 1915 P C 59 (66) : 39 Bom 625 : 42 Ind App 229 (P C).

[3] No act either by the lessor or by the lessee such as a notice to quit is necessary to determine a lease for a term of years. (Vol 18) 1931 All 649 (650) (D B) ✠ (Vol 27) 1940 Lah 410 (412) (DB) ✠ (Vol 13) 1926 Nag 201 (202) ✠ (Vol 19) 1932 All 314 (315) (DB).

[4] Where a lease for a term of years provides expressly that after the expiry of the term the tenancy is terminable by a notice, the lease is not determined until such notice is given. (Vol 1) 1914 Mad 301 (303).

3. Renewal of lease.—[1] A covenant for renewal in a lease will, as a general rule, be construed as a covenant for a single renewal and not as a perpetual renewal. (Vol 26) 1939 Cal 77 (78) ✠ ('33) 7 Bom 109 (115) ✠ (Vol 13) 1926 Cal 1065 (1067): 53 Cal 590 (DB) ✠ (Vol 24) 1937 All 328 (331) (DB).

[2] Where a lessee has an option to ask for a renewal but does not ask for it before the expiry of the term and merely continues in possession he becomes merely a tenant from year to year after the termination of the original tenancy. (Vol 31) 1944 Bom 210 (213) ✠ (Vol 7) 1920 Bom 215 (215) (DB).

[3] If the covenant for renewal in a lease itself requires the lessee to exercise his option before the expiry of the term he will lose his right if he does not exercise it within time. (Vol 5) 1918 Cal 59 (61) (DB) ✠ (Vol 16) 1929 Cal 407 (407) (DB).

[4] Where a lease is for 3 years with an agreement to grant a further lease for 5, 7, 14 or 21 years, the lessee will be entitled, even after the expiry of the 3 years and while continuing in possession as a tenant from year to year, to call upon the lessor to renew the lease for 5, 7, 14 or 21 years. But the lessor may, at any time, call upon the lessee to exercise his option and may, in default, determine the lease. ('05) 27 All 696 (699) ✠ (Vol 25) 1938 Cal 724 (726) (D B).

[5] Where the option for renewal does not state the terms of the renewal, the new lease would be for the same period and on the same terms as the original lease in respect of all essential conditions except as to the covenant for renewal itself. (Vol 26) 1939 Cal 77 (78) ✠ (Vol 25) 1938 Cal 724 (727) (DB) ✠ (Vol 5) 1918 Cal 591 (592) (DB).

[6] A covenant 'that the lease shall, and may, be renewed" under certain circumstances means the lease as a whole. (Vol 15) 1928 P C 258 (260): 51 Mad 885: 55 Ind App 423 (PC). (Reversing (Vol 14) 1927 Mad 513 (516): 50 Mad 595.)

[7] A covenant for renewal in a lease by a Hindu widow having only a limited estate has been held to be not binding on the estate after her death. (Vol 24) 1937 All 328 (331) (DB).

[8] A lease contained the clause "After my enjoyment of the said bazar taken settlement of, and on my being in possession thereof for the full term under the lease you will be at liberty to lease out this bazar afresh at an appropriate jama and I shall be entitled to take settlement again at your will, otherwise I will relinquish the ijara in your favour"—*Held* that the covenant was not in essence a covenant for renewal with the lessee On the other hand any renewal which might be made with him was entirely subject to the pleasure of the lessor. (Vol 34) 1947 Cal 378 (381) (DB).

4. Clause (b).—[1] It has been held that a service tenancy under which the tenant holds the land on condition that if he refuses to render service the lease will determine, may fall within clause (b). (Vol 4) 1917 Cal 116 (117) (DB).

5. Clause (c).—[1] Where the interest of the lessor in the property terminates or his power to dispose of the same extends only to the happening of any event, the lease will terminate on the happening of such event. (1900) 27 Cal 156 (162): 26 Ind App 216 (PC) ✠ (Vol 6) 1919 Oudh 278 (283) (DB).

[2] Where a mortgagee grants a lease, the lease will determine on the redemption of the mortgage. (Vol 8) 1921 Mad 393 (393) (DB) ✠ ('10) 8 Ind Cas 466 (467): 1 Upp Bur Rul 14 ✠ ('06) 1906 All W N 241 (241).

[3] A sub-lease by a lessee for a term of years will be determined by the expiry of the period of the head lease. (Vol 2) 1915 Cal 64 (65) (DB).

[4] A lease by a Hindu widow or other limited owner in Hindu law does not necessarily terminate with her death. The reversioners may, at their option, treat it as valid for the full term leased or may treat it as determined on the death of the limited owner. ('07) 34 Cal 329 (333): 34 Ind App 87 (PC) ✠ ('01) 28 Cal 532 (539) (DB).

[5] Where the reversioners treat the lease by a limited owner under Hindu law as determined after the death of the limited owner, the tenancy will be determined without any further act being necessary to determine it. (Vol 10) 1923 Pat 130 (131): 2 Pat 171 (DB).

6. Death of lessor and lessee.—[1] The death of the lessor does not determine the lease, except in cases where his own interest ceases on his death or it is provided in the lease that the lease shall terminate on his death. (Vol 16) 1929 Nag 23 (26) ✠ ('33) 5 All 191 (194) (DB).

[2] A lease is a heritable right. (Vol 27) 1940 Cal 89 (91): I L R (1939) 2 Cal 254 ✠ (Vol 29) 1942 Oudh 325 (326): 17 Luck 712.

Section 111—Note 6 *(contd.)*

[3] The death of a lessee does not terminate the lease but the interest survives to his legal representatives. (Vol 16) 1929 Nag 23 (26) ✠ ('82) 5 All 191 (194) (DB) ✠ (Vol 27) 1940 Cal 89 (91): I L R (1939) 2 Cal 254 ✠ (Vol 14) 1927 Lah 423 (423) ✠ (Vol 15) 1928 Lah 937 (938).

[4] The death of one of the joint lessees will not determine the lease until both of them are dead without leaving any legal representative. (Vol 12) 1925 Pat 228 (236).

[5] A lease for an indefinite period is determinable by the death of the lessee. (Vol 14) 1927 Cal 179 (181) (DB).

[6] A lease for five years with an agreement that the lessor would continue to give the land at the same rent, should the tenant require the land, is a lease for the life of the tenant. (Vol 18) 1931 Bom 178 (180, 181) (DB).

[7] A lease to a company for a specific purpose would come to an end when the company becomes defunct. (Vol 10) 1923 Nag 243 (245, 246).

7. Clause (d) —[1] In cases outside the Act, it has been held that merger is a matter of intention of the parties and not a thing which occurs *ipso jure* upon the acquisition of a superior with inferior right. (Vol 9) 1922 P C 94 (95): 48 Ind App 485 (P C).

[2] By virtue of S. 2, clause (c), this clause will not apply where a lease is created before the Act, even though the union of interests is after the Act, and the question of merger in such cases must be decided with reference to the rule of intention. (Vol 31) 1944 Cal 282 (283) (DB).

[But see ('09) 36 Cal 802 (806) (DB) ✠ (Vol 1) 1914 Cal 489 (493).]

[3] There is no merger unless the interests united are co-extensive. (Vol 9) 1922 Cal 284 (285) (DB) ✠ ('11) 7 Nag L R 154 (158).

[4] It is necessary that the interests of the lessor and the lessee in the whole of the property should become vested in the same person in the same right. (Vol 6) 1919 Pat 390 (391) (DB) ✠ (Vol 23) 1936 Pat 63 (64) ✠ (Vol 22) 1935 Lah 522 (523).

[5] A lessee of the entire interest in certain properties acquiring one-eighth interest in the proprietary rights thereof does not cause merger. (Vol 24) 1937 Mad 398 (399).

[6] The purchase by the tenant of a fractional share of the property does not cause a merger. (Vol 18) 1931 P C 63 (64): 6 Luck 197: 58 Ind App 75 (PC).

[7] The taking by the tenant of a usufructuary mortgage of the holding does not effect a merger. ('19) 52 Ind Cas 236 (236) (All) ✠ ('02) 24 All 487 (491) (DB).

[8] Where a merger takes place, subordinate interests derived from the lessee will also come to an end unless the holder of such subordinate interest can show some equity in his favour. ('06) 2 Nag L R 29 (30) ✠ (Vol 34) 1947 All 240 (242).

[9] Governor-General in Council taking possession of a person's land under S. 16, Land Acquisition Act and leasing same to railway — Possession not given by such person — Management of Railway passed to Governor-General in Council — Latter held had right to maintain suit for ejectment against the person. (Vol 34) 1947 Pat 263 (264) (DB).

8. Surrender — General.—[1] Where there are more lessors than one, a surrender must be made to all of them. (Vol 1) 1914 Nag 84 (86) : 10 Nag L R 93 ✠ (Vol 8) 1921 Pat 341 (343).

[2] Where to the knowledge of the lessee, the lessor Y has transferred the property to *X*, the lessee cannot thereafter validly make a surrender to Y. ('01) 3 Bom L R 679 (680) (DB).

[3] A tenant of one co-owner cannot make a valid surrender to another co-owner. (Vol 5) 1918 Mad 1152 (1152) (DB).

[4] A surrender by one of several joint lessees is valid only as to his share. (Vol 10) 1923 Rang 151 (152) : 1 Rang 19 (DB) ✠ (Vol 18) 1931 Nag 159 (160): 27 Nag L R 116.

[5] A surrender cannot be made so as to prejudice the rights of a third person. ('99) 12 C P L R 134 (136) ✠ (Vol 23) 1936 Nag 171 (174) ✠ (Vol 12) 1925 Cal 1238 (1240) (DB).

[6] A surrender does not affect the rights of a sublessee. (Vol 4) 1917 Cal 236 (241) (DB) ✠ ('96) 18 All 354 (357) (DB).

[7] Where a valid mortgage has been executed by the lessee, the rights of the mortgagee are not affected by the surrender. (Vol 1) 1914 Nag 38 (40): 10 Nag L R 129 ✠ ('11) 33 All 335 (336) (DB) ✠ (Vol 10) 1923 All 295 (295) (DB).

[8] Where the lessor has mortgaged the land and the right to receive the rent, he cannot accept a surrender of the lease without the concurrence of the mortgagee. (Vol 17) 1930 Bom 329 (330) (DB).

[9] It is open to a lessee to surrender before he need if he so desires if the lessor is prepared to accept the surrender. (Vol 34) 1947 Nag 188 (190).

9. Clause (e). — [1] A mere relinquishment or abandonment by the lessee of the holding without acceptance on the part of the lessor is not a surrender. (Vol 3) 1916 Cal 454 (455).

[2] The lessee cannot by merely giving notice of relinquishment get rid of his obligations under the lease. The mere fact that the lessor has received the notice cannot be construed as an assent on his part to the relinquishment ('92) 15 Mad 67 (68) (DB) ✠ ('83) 9 Cal 671 (677) (DB).

[3] It has been held that this clause does not apply to cases where the lease contains an express clause that the lessee should not surrender before the expiry of the term. ('09) 2 Ind Cas 633 (633) (DB) (Cal).

[4] A lease provided that the lessee may surrender any portion, or the whole of the property, and the lessee, by a written notice purported to surrender a portion of the property, but nevertheless continued in possession of a part of such portion : *Held* that the surrender was not valid in law and could not be treated as valid to the extent to which possession was given up. ('99) 26 Cal 29 (37, 38) : 25 Ind App 210 (PC).

[5] A lease for 999 years provided for the surrender of the lease by six months' notice by the lessee, and the lessee gave such notice and vacated the land demised : *Held* that the surrender was properly made. (Vol 5) 1918 P C 125 (128) : 46 Cal 552: 45 Ind App 275 (PC).

[6] A surrender need not be in writing. (Vol 6) 1919 Pat 13 (14) (DB) ✠ ('90) 13 Mad 124 (127) (DB) ✠ (Vol 6) 1919 Cal 840 (840) (DB) ✠ (Vol 7) 1920 Cal 858 (858) (DB) ✠ ('02) 25 All 77 (79).

[But see (Vol 23) 1936 Cal 774 (779, 780) (DB).]

[7] Where the original lease is by a registered instrument, a surrender of a portion of the lease with an abatement of rent can be effected only by a registered instrument. ('21) 63 Ind Cas 483 (484) (DB) (Cal) ✠ (Vol 12) 1925 Nag 459 (460).

[8] A conditional surrender will operate only on the performance of condition. (Vol 20) 1933 Pat 446 (448).

10. Clause (f). — [1] The acceptance of a new lease during the continuance of the old lease operates as a surrender in law, of the old lease. (Vol 26) 1939 Pat 598 (601) : 18 Pat 317 (DB) ✠ (Vol 21) 1934 All 787 (789) (DB).

Section 111—Note 10 (*contd.*)

[2] The subsequent grant, to the lessee of land for cultivation of coffee, of mining rights in such land does not imply a surrender of the lease for coffee cultivation. (Vol 12) 1925 Mad 1277 (1277, 1278):48 Mad 815 (DB).

[3] The execution of a kabuliat by the tenant merely recognising an already existing right is not implied surrender of the old tenancy and the creation of a new one. ('04) 32 Cal 51 (60) : 31 Ind App 149 (P C) ✠ ('04) 32 Cal 41 (50) : 31 Ind App 144 (P C).

[4] If the new lease is void or voidable or does not pass an interest according to the contract or intention of the parties, it does not operate as an implied surrender of the old lease. (Vol 11) 1924 Cal 355 (356) (DB) ✠ ('10) 8 Mad L Tim 309 (310) (DB).

[5] Where there is no actual demise by way of a new lease the acceptance of payment of rent from a person who has acquired an interest in the lease under an agreement with the tenant with the assent of the landlord does not operate as an implied surrender. ('10) 20 Mad L Jour 555 (561) (DB).

[6] Though the taking of a new lease will be an implied surrender of the old lease, it will not affect the validity of the acts done under the old lease. (Vol 25) 1938 Nag 377 (384) : I L R (1939) Nag 432 (DB).

[7] A mere non-payment of rent does not constitute an implied surrender. ('96) 18 All 290 (294) (DB).

[8] A mere relinquishment of the tenancy does not operate as a surrender, but if it is accepted by the lessor by taking over possession, it amounts to an implied surrender. (Vol 26) 1939 Oudh 257 (267) : 14 Luck 723 (DB) ✠ ('08) 7 Cal L Jour 309 (311) (DB).

11. Clause (g). — [1] "Forfeiture" implies the loss of a legal right by reason of some breach of obligation. ('06) 30 Bom 466 (472) (DB).

[2] The Courts lean strongly against forfeiture. (Vol 21) 1934 All 103 (105) ✠ (Vol 6) 1919 Mad 897 (899) (DB) ✠ (Vol 3) 1916 Mad 652 (653) (DB).

[3] If the plaintiff comes to a Court relying on forfeiture, he must prove his right strictly. ('03) 5 Bom L R 1016 (1019) (DB)✠(Vol 12) 1925 Cal 1212 (1213, 1214) (DB) ✠ (Vol 13) 1926 Mad 1202 (1202) : 50 Mad 331✠ (Vol 20) 1933 Cal 890 (891) : 60 Cal 1110.

[4] This clause should not be extended to cases not strictly covered by it. (Vol 6) 1919 Mad 886 (887) (DB).

[5] Covenants, the breach of which entails forfeiture, are always to be strictly construed against the lessor. (Vol 12) 1925 Mad 57 (58) ✠ (Vol 24) 1937 Cal 636 (637) (D B) ✠ (Vol 22) 1935 Mad 163 (165) : 58 Mad 378 (DB).

[6] Where it is not established that there was a lease no question of forfeiture under this clause can arise. (Vol 30) 1943 Oudh 105 (106) ✠ ('07) 10 Oudh Cas 31 (33) (D B) ✠ (Vol 23) 1936 All 385 (386) (DB).

[7] A lease cannot be determined in part, by forfeiture. (Vol 23) 1936 Mad 252 (255) ✠ ('82) 4 All 174 (176) (DB).

[8] Under the kanom in Malabar, wilful and extensive waste by the kanomdar is a ground of forfeiture. ('99) 9 Mad L Jour 306 (308, 309).

12. Forfeiture—Permanent lease.—[1] A permanent lease is liable to be forfeited on breach of a condition which provides that on breach thereof the lessor may re-enter. ('83) 7 Bom 256 (260) (D B). (Condition against alienation.) ✠ (Vol 4) 1917 Cal 236 (239) (DB).

[2] A permanent lease is liable to be forfeited on the ground of denial of title. (Vol 20) 1933 Bom 97 (99) : 57 Bom 194 (DB) ✠ (Vol 17) 1930 All 479 (481) (D B) ✠ ('97) 24 Cal 440 (448)✠ (Vol 20) 1933 Lah 221 (222): 13 Lah 796 (DB) ✠ (Vol 4) 1917 Cal 86 (87) (D B) ✠ (Vol 6) 1919 Mad 266 (268) (D B) ✠ (Vol 6) 1919 Mad 897 (899) (D B) ✠ (Vol 3) 1916 Pat 417 (418) : 1 Pat L Jour 157.

[3] Where a permanent lessee in a suit by the lessor claims to have been in adverse possession of the land for over 12 years, the lessee claims title in himself within cl. (g) and it amounts to a disclaimer of title. (Vol 32) 1945 All 285 (286) : I L R (1945) All 222.

13. Forfeiture for breach of condition.—[1] Even in cases not governed by the Act, unless there is a proviso for re-entry, a breach of a condition or covenant will not entail a forfeiture. ('08) 1908 Pun Re No. 53, p. 264 (264) ✠ (Vol 1) 1914 Lah 472 (472) : 1914 Pun Re No. 33 ✠ (Vol 16) 1929 Oudh 529 (532, 533) : 4 Luck 649 (DB).

[2] Breach of a condition of attendance by the lessee on the lessor on ceremonial occasions does not operate to cause a forfeiture. (Vol 6) 1919 P C 1 (5) : 46 Ind App 109 : 42 Mad 589 (P C).

[3] What is meant by an "express condition" is that the condition can be gathered from the words of the instrument, giving to them their ordinary meaning so that the Court may be certain that such condition was part of the stipulation between the parties and was understood to be so by them. ('10) 8 Mad L Tim 238 (239) (D B).

[4] It has been held that even a valid condition against alienation will not operate to cause a forfeiture or render the alienation in breach of it inoperative, unless there is a proviso for re entry by the lessor for the breach of the condition. ('06) 28 All 400 (401) (D B) ✠ ('03) 26 Mad 157 (161, 162) (D B) ✠ (Vol 7) 1920 Mad 1006 (1008) : 43 Mad 503 (S B) ✠ (Vol 16) 1929 Cal 228 (229) (D B) ✠ (Vol 8) 1921 Cal 474 (476) : 47 Cal 979 (D B).

[But see ('97) 21 Bom 195 (197) (DB).]

[5] An alienation will not cause a forfeiture where one of the incidents of a tenure is that it is transferable. (Vol 12) 1925 Mad 914 (914).

[6] A transfer will put an end to a tenure though no right of re-entry is reserved, where one of the incidents of a tenure is that it is not transferable. ('13) 36 Mad 380 (382) (D B) ✠ (Vol 8) 1921 Oudh 13 (13).

[7] A condition against alienation means a condition against alienation by act of parties and not one by operation of law or by or in execution of a decree. ('90) 12 All 192 (197) (D B) ✠ ('93) 20 Cal 273 (278) (D B) ✠ (Vol 9) 1922 Cal 96 (97) (D B).

[8] A condition against alienation is not broken by an alienation of a part of demised premises. (Vol 24) 1937 Cal 636 (637) (DB) ✠ (Vol 19) 1932 Cal 787 (788): 60 Cal 47 (D B) ✠ (Vol 13) 1926 Mad 1202 (1202) : 50 Mad 331 ✠ (Vol 12) 1925 Mad 57 (58).

[9] A condition against alienation is not broken by an alienation by only one of several lessees. (Vol 1) 1914 All 305 (306) ✠ (Vol 23) 1936 Pat 450 (455) : 15 Pat 680 (DB). (Where share of each tenant is specified landlord may re-enter on the share of person alienating.)

[10] A condition against an assignment is not broken by a sub-demise of the lease by way of mortgage. (Vol 15) 1928 Cal 681 (683) (D B). ((Vol 15) 1928 Cal 99 : 54 Cal 948, *Reversed.*)

[11] A condition against alienation is not broken by an alienation which is not valid and operative. (Vol 25) 1938 P C 20 (22) : 65 Ind App 45 : 17 Pat 69 : 32 Sind L R 276 (P C) ✠ (Vol 23) 1936 Pat 372 (377) : 15 Pat 460 (DB).

[12] A condition against alienation to "any person or persons" is not broken by an alienation by one lessee of his share in favour of his co-lessee. (Vol 14) 1927 Mad 261 (263)

[13] Stipulation in lease that if lessee or his successors transferred the lands, the lessee or transferee would be liable to pay landlord one-fourth of consideration—Otherwise, transfer not valid and landlord would

Section 111—Note 13 *(contd.)*

be entitled to possession and title under lease would be extinguished—Terms to be operative between parties and their representatives—Transfer by assignees from original tenant's heirs —Treating condition as a restrictive condition against alienation, it was perfectly valid and binding upon the persons deriving title through or from the original parties — Apart from it, stipulation amounted to a covenant running with the land. (Vol 29) 1942 Cal 452 (454) (DB).

[14] A *wakf* created by a tenant is not such a dealing with the property as to entail a forfeiture of tenancy. (Vol 34) 1947 All 49 (50).

[15] The due payment of rent may be an express condition in the lease, a breach of which may cause a forfeiture. (Vol 22) 1935 Lah 863 (865) (D B). (There must be a provision for re-entry on breach of such condition.) ✠ (Vol 8) 1921 Nag 10 (11) : 17 Nag L R 205.

[16] The lessee cannot avoid a lease for a term for a breach of a covenant by the lessor. (Vol 12) 1925 Mad 833 (834).

14. Forfeiture for denial of title.—[1] The landlord's right of forfeiture arising from disclaimer of title is no part of the contract of tenancy but is a right which the law implies in all cases from the relation of landlord and tenant. ('96) 20 Bom 354 (361) (F B).

[2] To constitute a disclaimer of title, there must be a direct repudiation of the relation of landlord and tenant or a distinct claim to hold the estate on a ground wholly inconsistent with the existence of such relation, which, by necessary implication is a repudiation of it. (Vol 3) 1916 Mad 749 (750) (DB). ((1836) 5 L J Ex 253, *Doe d Gray* v. *Stanian* and ('05) 2 Cal W N 928, *Rel. on*) ✠ (Vol 6) 1919 Mad 897 (900) (DB).

[3] The denial of title must be by clear and unambiguous words. (Vol 6) 1919 P C 1 (4) : 46 Ind App 109: 42 Mad 589 (P C) ✠ (Vol 32) 1945 All 293 (297, 298) : 1 L R (1945) All 248 (D B).

[3a] The denial of title must be to the knowledge of the landlord. (Vol 7) 1920 Mad 256 (256) : 43 Mad 480 (D B) ✠ (Vol 22) 1935 Bom 41 (42) : 59 Bom 194 (D B) ✠ (Vol 6) 1919 Mad 1106 (1108) : 41 Mad 629 (D B) ✠ (Vol 21) 1934 Lah 289 (290) : 15 Lah 683 ✠ (Vol 21) 1934 All 103 (104).

[4] It has been held that where a tenant admits a tenancy but disputes the terms of the tenancy or sets up a more favourable tenancy such as a permanent tenancy, it is not such a repudiation of the tenancy as would cause forfeiture. (Vol 7) 1920 Bom 53 (53, 54) ✠ ('86) 13 Cal 248 (253, 254) (D B) ✠ (Vol 13) 1926 Cal 1181 (1182) (D B) ✠ (Vol 3) 1916 Nag 15 (16) : 13 Nag L R 11 ✠ (Vol 26) 1939 Oudh 257 (267, 268) : 14 Luck 723 (D B) ✠ ('04) 27 Mad 23 (24) (D B)✠ (Vol 3) 1916 Mad 249 (259) (D B).

[But see ('84) 8 Bom 228 (230) (D B).]

[5] Where a person claiming to be the landlord is one who claims under a derivative title from the original landlord and the lessee without repudiating his character as tenant states that the original lessor's title is really vested in another person there is no disclaimer of title. (Vol 13) 1926 Cal 1205 (1206) (DB) ✠ (Vol 6) 1919 Mad 897 (900, 901) (D B) ✠ (Vol 6) 1919 Mad 266 (268) (D B).

[6] Where the tenant puts the claimant to proof of his title there is no disclaimer of title. (Vol 7) 1920 Cal 734 (734) (D B) ✠(Vol 15) 1928 Cal 312 (315) (D B).

[7] Where the tenant merely requires further information *bona fide* before he pays the rent to anybody there is no disclaimer of title. (Vol 11) 1924 Bom 454 (455) : 48 Bom 541 (D B) ✠(Vol 15) 1928 Cal 312 (315) (D B).

[8] Where there is no renunciation of the lease but the lessee, being unable to get possession of a part of the property claimed by a third person executed a lease to him in respect of that part there is no denial of title. ('08) 7 Cal L Jour 648 (651) (D B).

[9] An admission in good faith by a tenant, of the superior title of a third person to a portion of the lands included in the tenancy without denying the landlord's title to receive the entire rent is not such a denial as would entail a forfeiture. (Vol 2) 1915 Mad 85 (86) (D B).

[10] A setting up, in a suit to which the landlord is not a party, of the title of a third person, without any denial of payment of rent to him before suit does not entail a forfeiture. (Vol 2) 1915 Mad 85 (86) (D B).

[11] The setting up of the title of a co-sharer landlord is not a denial of the whole title and does not work a forfeiture. (Vol 2) 1915 Cal 660 (661) (D B).

[12] A denial of execution of a *kabulhat* is not a denial of title. (Vol 13) 1926 Cal 1205 (1206) (D B).

[13] A mere non-payment of rent or a refusal to pay rent or the payment of rent to a third person is not, in the absence of a renunciation of the relation of landlord and tenant, a denial of title, and will not put an end to the tenancy or constitute the possession of the tenant adverse to the landlord. (Vol 3) 1916 Nag 15 (16) : 13 Nag L R 11. (Non payment,) ✠ (Vol 10) 1923 Pat 201 (203) (D B). (Do.)✠ ('13) 35 All 145 (148) (D B). (Do.)✠ (Vol 11) 1924 Cal 647 (647) (D B). (Do.) ✠ ('13) 19 Ind Cas 119 (120) (All). (Do.) ✠(Vol 32) 1945 All 293 (297, 298) :I L R (1945) All 248 (D B). (Do.) ✠ (Vol 18) 1931 Nag 105 (105). (Refusal to pay,)✠ (Vol 1) 1914 Cal 645 (646) (D B). (Payment to third person.) ✠ (Vol 22) 1935 Lah 441 (443) ✠ ('13) 19 Ind Cas 64 (65) (D B) (Cal) ✠('98) 1898 Bom P J 355 (D B).

[14] A mere renunciation of tenancy is not a disclaimer of title unless there is a repudiation of the character of landlord and tenant by setting up a title in another or by claiming a title in himself. (Vol 1) 1914 Cal 51 (52) (D B).

[15] An alienation by the lessee by way of a sale or a mortgage is not necessarily a denial of title of the landlord. (Vol 3) 1916 Nag 15 (16) : 13 Nag L R 11 ✠ ('13) 35 All 145 (148) (D B) ✠ (Vol 21) 1934 Lah 289 (290) : 15 Lah 683 ✠ ('91) 1891 Bom P J 133 Reprint p. 67 (70) (D B).

[16] A denial of title by some only of several joint tenants does not work a forfeiture of the tenancy. (Vol 22) 1935 Cal 393 (394) ✠('12) 39 Cal 903 (905) (D B).

[17] The denial of title by the lessee, after an assignment by him of the lease to another cannot work a forfeiture of the assignee's interest. (Vol 5) 1918 Bom 132 (132, 134) : 42 Bom 734 (D B).

[18] In a suit for ejectment filed by the lessor, a denial of the landlord's title in the written statement filed by the lessee is not a denial of title of which advantage can be taken in that suit itself. (Vol 6) 1919 P C 1 (4) : 46 Ind App 109 : 42 Mad 589 (P C).

[19] A denial in a previous suit instituted by the landlord in consequence of which the suit was dismissed, can be taken advantage of by the lessor in order to maintain a subsequent suit for ejectment. (Vol 30) 1943 All 279 (280) ✠ (Vol 5) 1918 Pat 174 (175).

[20] Where the plaint in an ejectment suit alleges a denial of title by the defendant before suit and this is not denied in the written statement, it has been held that the implied admission of a denial of title before suit is not such a clear and unambiguous denial before suit as would entitle the plaintiff to maintain the suit. (Vol 10) 1923 Lah 409 (410).

[But see (Vol 7) 1920 Lah 66 (66).]

[21] A tenant denying the title of the landlord becomes liable to immediate eviction at the option of the landlord. ('88) 12 Bom 352 (356) (D B) ✠ ('81) 8 Cal L Rep 150 (151) (DB) ✠ (Vol 20) 1933 Lah 221 (222).

Section 111—Note 14 *(contd.)*
13 Lah 796 (D B) ✠ (Vol 7) 1920 Lah 66 (67) ✠ (Vol 6) 1919 Mad 1106 (1106, 1107) (D B) ✠ ('90) 17 Cal 196 (198) (D B).

[22] A tenant denying the title of the landlord cannot claim to be entitled to any notice to quit. ('96) 20 Bom 354 (362) (F B) ✠ (Vol 19) 1932 Lah 43 (44) ✠ ('06) 33 Cal 339 (342) (D B) ✠ (Vol 13) 1926 Mad 143 (144) ✠ (Vol 4) 1917 Cal 116 (117) (D B) ✠ (Vol 14) 1927 Sind 248 (250) (D B) ✠ ('94) 17 All 45 (47) (D B).

15. Forfeiture on insolvency of lessee. — [1] Where, in a lease, there was a condition for re-entry on the insolvency of the lessee, and the lessee's interest was purchased in execution of a decree by *X* and thereafter the lessee became insolvent, it was held that the "lessee" for the purpose of the conditibn, was, under the circumstances, really *X* and that as he did not become insolvent, no forfeiture took place. (Vol 12) 1925 Cal 750 (751).

[2] A disclaimer of a lease by the Official Assignee under S. 62 of the Presidency Towns Insolvency Act, 1909, puts an end to the lease and the lessor's interest becomes thereby accelerated without anything further being done. ('36) 63 Cal 1123 (1134) (D B).

16. Notice of intention to determine lease on forfeiture. —[1] Where a forfeiture is incurred, by reason of an act or omission on the part of the lessee, the lessor has an option to take advantage of it. (Vol 7) 1920 P C 190 (192) (P C).

[2] The lessor wishing to determine the lease for forfeiture must give a notice in writing to the lessee of his intention to determine the lease. (Vol 27) 1940 Oudh 92 (92).

[3] The service of notice must be proved by legal evidence. (Vol 7) 1920 P C 190 (197) (P C).

[4] It has been held that in cases not governed by the Act, the necessity for an overt act showing the intention to determine the lease is not necessary. (Vol 2) 1915 Mad 813 (814): 38 Mad 445 (DB)✠ (Vol 6) 1919 Mad 266 (268) (DB). (Lease before Act came into force.) ✠ (Vol 19) 1932 Cal 221 (225): 58 Cal 1359 (DB).

[But see (Vol 22) 1935 Mad 943 (944).]

[5] Where a lease provides that on breach of condition the lessee should be given notice according to law before ejectment, the tenant cannot be ejected unless a notice according to the contract is given. (Vol 4) 1917 Cal 426 (426) (D B).

[6] Even after service of notice, the lease is still voidable and not void. (Vol 32) 1945 Pat 260 (262, 264): 24 Pat 109 (F B).

17. Tenant cannot deny his landlord's title—Estoppel.—[1] It has been held that even though the lease expires by efflux of time, a tenant who has been let into possession under the lease cannot deny the landlord's title under S. 116 of the Evidence Act, so long as he has not openly restored possession by surrender to his landlord. (Vol 2) 1915 P C 96 (98): 42 Ind App 202: 37 All 557 (P C) ✠ (Vol 14) 1927 P C 151 (155): 54 Ind App 276: 5 Rang 427 (PC).

[2] Even where the tenant has not been let into possession by *X*, if once the relation of landlord and tenant comes into existence between them, the tenant cannot dispute the title of *X*. (Vol 15) 1928 Bom 265 (266, 267) (D B).

[But see ('85) 11 Cal 519 (524) (D B).]

[3] An under-tenant or assignee from the lessee or a person who comes in by collusion with the lessee is bound by the estoppel against the tenant and cannot deny the title of the original landlord. (Vol 19) 1932 Cal 241 (243): 59 Cal 739 (DB) ✠('90) 13 Mad 335 (338) (DB).

[4] A tenant can always show that the landlord's title has determined, since the beginning of the relationship of landlord and tenant between them (Vol 13) 1926 Pat 498 (499) ✠ ('98) 22 Bom 428 (430) (DB) ✠(Vol 16) 1929 Cal 22 (24, 25): 55 Cal 1013 (DB) ✠(Vol 22) 1935 Bom 144 (147) ✠ ('79) 2 Mad 226 (229) (DB).

[5] It is open to a tenant to show that his acknowledgment of a person as a landlord was due to fraud, coercion or misrepresentation. (Vol 4) 1917 Mad 789 (797, 799): 40 Mad 561 (FB) ✠ (Vol. 25) 1938 Rang 227 (228) ✠ ('13) 11 All L Jour 341 (343).

18. Re-entry on forfeiture.—[1] Where a right of re-entry has accrued to the landlord on breach of condition if the lessee resists the plaintiff's entry, the lessor's remedy is to sue in ejectment and not to make a forcible entry. ('12) 15 Oudh Cas 295 (300) ✠ (Vol 2) 1915 Oudh 218 (219) (DB).

19. Who can enforce forfeiture.—[1] A transfer of the lessor's interest carries with it the right to enforce a forfeiture and the transferee can enforce the same even if the forfeiture was incurred before the transfer was made. (Vol 5) 1918 Bom 79 (80): 43 Bom 28 (DB) ✠('87) 14 Cal 176 (183).

[2] A usufructuary mortgagee of the lessor of his interest can enforce a forfeiture clause in the lease given by the mortgagor. (Vol 23) 1936 Mad 116 (117).

[3] Where after a notice to determine the lease had been given, the lessor granted a new lease in favour of a third person it was held that the latter could enforce the forfeiture against the previous lessee. (Vol 11) 1924 Lah 49 (51, 52) (D B).

20. Forfeiture of service tenures.—[1] In cases to which the Act does not apply, the refusal to perform service will terminate the service tenure even without any overt act being done by the lessor to terminate the lease. (Vol 19) 1932 Cal 221 (225): 58 Cal 1359 (D B) ✠ (Vol 10) 1923 Nag 163 (163) ✠('05) 2 Cal L Jour 403 (406) (DB).

[2] A notice to quit is not necessary for determining a lease where a forfeiture has been incurred for refusal to perform service. (Vol 4) 1917 Cal 116 (117) (DB) ✠(Vol 14) 1927 Cal 561 (562) (DB) ✠(Vol 2) 1915 Mad 1135 (1136) (DB).

[3] The dismissal of a ghatwal has been held to carry with it the forfeiture of his tenure. (Vol 19) 1932 Cal 77 (80) (DB).

21. Clause (h).—[1] In the case of a lease from year to year or from month to month, it is, in the absence of a contract or local law or usage to the contrary, terminable by a notice to quit under S. 106. (Vol 7) 1920 Nag 62 (62) ✠(Vol 4) 1917 Mad 141 (141) (DB).

[2] Where there is no tenancy at all no notice to quit or determine lease is necessary. (Vol 26) 1939 Pat 167 (168).

[3] Where the tenancy is denied no notice to quit or determine the lease is necessary. (Vol 6) 1919 Mad 897 (900) (DB).

[4] Where a lease is cancelled on the ground of fraud no notice to quit or determine the lease is necessary before suing for ejectment. (Vol) 20 1933 Mad 67 (69) ✠ ('09) 36 Cal 675 (691) (DB).

[5] A lease if not determined in any of the modes provided by clauses (a) to (g) can be determined only by a proper notice to quit or to determine the lease. ('90) 1890 All W N 175 (176) (D B) ✠('96) 6 Mad L Jour 59 (61) (DB) ✠('84) 8 Bom 164 (166) (DB) ✠(Vol 8) 1921 Pat 334 (335) ✠(Vol 24) 1937 Pat 391 (395) (DB).

[6] An invalid notice does not determine the lease or render the possession of the tenant wrongful. (Vol 23) 1936 Cal 581 (582) ✠(Vol 15) 1928 All 95 (96).

112. A forfeiture under section 111, clause *(g)*, is waived by acceptance of rent which has become due since the forfeiture, or by distress for such rent, or by any other act on the part of the lessor showing an intention to treat the lease as subsisting:

Waiver of forfeiture.

Provided that the lessor is aware that the forfeiture has been incurred:

Provided also that, where rent is accepted after the institution of a suit to eject the lessee on the ground of forfeiture, such acceptance is not a waiver.

Section 111 — Note 21 *(contd.)*

[7] Where an invalid notice is accepted by the landlord and the defect is waived, the lease will be terminated. (Vol 12) 1925 Rang 206 (206).

[8] Where a tenant gives a notice of his intention to quit by a particular date, but does not vacate fully on that date, the landlord is entitled to another notice to quit or an equivalent rent for the period of notice. ('10) 1910 Pun L R No. 188, p. 537 (538): 1910 Pun Re No. 94.

[9] A notice to quit or determine the lease must be given before a suit for ejectment is instituted. ('10) 6 Nag L R 17 (19).

[10] The Court cannot in its decree in a suit for ejectment give notice to quit or determine the lease. ('94) 18 Bom 107 (108) (DB).

[11] Plea of want of notice cannot be raised for first time in appeal. (Vol 31) 1944 Pat 77 (86): 22 Pat 513 (DB).

22. Tenancy at will.—[1] It has been held that a tenancy at will is not a lease as defined by the Act and this section has, therefore, no application to such tenancy. (Vol 27) 1940 Cal 89 (91): I L R (1939) 2 Cal 254.

[But see (Vol 23) 1936 Bom 98 (98).]

[2] A tenancy at will is determined by the death of the tenant or the landlord. (Vol 27) 1940 Cal 89 (91): I L R (1939) 2 Cal 254 ✠(Vol 12) 1925 Pat 256 (257) (DB) ✠(1900) 10 Mad L Jour 201 (202) (DB).

[3] No formal notice is necessary to terminate a tenancy at will. (Vol 20) 1933 Pat 561 (562) (DB).

[4] A verbal demand for possession is enough to terminate a tenancy at will. (Vol 12) 1925 Pat 256 (257) (DB) ✠('07) 34 Cal 57 (64) (DB).

23. Leases not governed by the Act.—[1] The principles underlying this section may be applied to leases not governed by the Act. ('03) 26 Mad 157 (160) (DB) ✠(Vol 14) 1927 Nag 50 (51) ✠ (Vol 6) 1919 Mad 1106 (1107): 41 Mad 629 ✠(Vol 13) 1926 Sind 71 (74, 75): 21 Sind L R 185 (DB) ✠ ('45) 47 Pun L R 87 (88). (Section 111 (g).)

[2] A tenancy not governed by the Act and not determined on any grounds referred to in clauses (a) to (g) can only be determined by a reasonable notice to quit. ('79) 4 Cal 339 (341) (DB) ✠('04) 8 Cal W N 774 (778) (FB).

[3] By some Provincial Acts, a right of forfeiture is excluded for denial of the landlord's title. (Vol 20) 1933 Mad 165 (166) ✠ ('08) 31 Mad 261 (263) (DB) ✠('97) 24 Cal 720 (723) (DB).

[4] This section does not apply to N. W. F. Province. (Vol 32) 1945 Pesh 16 (18) (DB).

24. Joint lessors—Termination of lease.—[1] All joint lessors must act in determining a lease. (Vol 1) 1914 All 160 (161) ✠(Vol 22) 1935 Cal 577 (577) ✠(Vol 11) 1924 Mad 771 (772) (DB) ✠('06) 29 Mad 29 (34) (DB) ✠(Vol 21) 1934 Cal 127 (128) (DB).

[But see ('87) 11 Bom 644 (648).]

[2] It has been held that where a lease is granted by several joint lessors, containing a clause for forfeiture for non-payment of rent and subsequent to the lease the lessors become divided, each of them can enforce the forfeiture clause for non-payment of his share of the rent. (Vol 2) 1915 Mad 813 (814): 38 Mad 445 (DB).

[3] Where once a lease has been properly determined one of the lessors may maintain a suit in ejectment, making the others parties to the suit. (Vol 4) 1917 Mad 151 (153): 39 Mad 1049 (DB).

25. Possession after determination of tenancy. — [1] The possession of a tenant who holds over after the determination of the tenancy, without the consent of the landlord is wrongful though not adverse. (Vol 21) 1934 Lah 129 (130) (DB) ✠(Vol 20) 1933 Lah 509 (510) (DB) ✠('07) 34 Cal 922 (924) (DB).

[2] As a person in wrongful possession, a tenant holding over will be liable to pay damages to the lessor for such unlawful occupation. (Vol 15) 1928 Cal 436 (438) (DB).

[3] The words "damages for use and occupation" imply an occupation by a person with the permission of the owner in which case the law implies a contract to pay compensation for such occupation. ('99) 26 Cal 338 (347).

SECTION 112—SYNOPSIS.

1. Scope.
2. Acceptance of rent.
3. "Any other act."
4. Knowledge of breach.
5. Effect of waiver.
6. Second proviso.

1. Scope. — [1] The Courts always lean against forfeiture. (Vol 11) 1924 Mad 649 (650) (D B).

[2] If the lessor, knowing that a forfeiture has been incurred, does any act whereby he acknowledges the continuance of the tenancy, at a later period, he will be regarded in law as having waived the forfeiture. (Vol 27) 1940 Pat 478 (478, 479) (D B) ✠ (Vol 23) 1936 Mad 252 (255).

[3] A lessor cannot proceed on the footing that a lease subsists and at the same time claim that it has been forfeited. (Vol 7) 1920 P C 190 (195) (P C).

[4] Where once the forfeiture is waived, the lessor cannot be allowed to retract from it. (1864) 122 E R 865 (866): 5 B & S 359, *Ward* v. *Day* ✠(1778) 98 E R 1371 (1371): Cowp 803, *Goodright* v. *Davids* ✠ ('13) 24 Mad L Jour 263 (265) (S B). (Per Walis J.)

[5] No question of waiver arises where a lease has been determined by the landlord taking advantage of forfeiture. (Vol 18) 1931 Pat 240 (240) (D B) ✠ ('10) 20 Mad L Jour 555 (558) (D B). (Per Munro J.) ✠ ('13) 24 Mad L Jour 263 (264) (S B).

[6] Waiver of forfeiture is different from waiver of notice to quit. The former is matter of election of landlord alone while latter cannot be done without assent of both, landlord and tenant. (Vol 32) 1945 Bom 132 (134): I L R (1945) Bom 68 (D B).

[7] Principle of section applies to the Punjab and Delhi province. (Vol 33) 1946 Lah 330 (338) (F B).

2. Acceptance of rent. — [1] The acceptance of rent accruing due after the forfeiture operates as a matter of law to waive all forfeitures then known to the lessor. (Vol 32) 1945 Nag 255 (256): I L R (1945) Nag 629 (D B) ✠ (Vol 32) 1945 Pat 260 (262): 24 Pat 109 (FB) ✠ (Vol 27) 1940 Pat 478 (479) (D B) ✠ ('35) 18 Nag L Jour 159 (163) ✠ ('97) 1897 Bom P J 182 (DB) ✠ (Vol 12) 1925 Mad 914 (915) ✠ (Vol 7) 1920 Cal 655 (657) (D B) ✠ (Vol 1) 1914 All 460 (461).

113. A notice given under section 111, clause *(h)*, is waived, with the express or implied consent of the person to whom it is given, by any act on the part of the person giving it showing an intention to treat the lease as subsisting.

Waiver of notice to quit.

Illustrations.

(a) *A*, the lessor, gives *B*, the lessee, notice to quit the property leased. The notice expires. *B* tenders, and *A* accepts, rent which has become due in respect of the property since the expiration of the notice. The notice is waived.

(b) *A*, the lessor, gives *B*, the lessee, notice to quit the property leased. The notice expires, and *B* remains in possession. *A* gives to *B* as lessee a second notice to quit. The first notice is waived.

Section 112—Note 2 *(contd.)*

[2] It operates as a waiver even though it is accepted under protest or conditionally without prejudice to the forfeiture. (Vol 26) 1939 Oudh 257 (268) : 14 Luck 723 (D B) ✠ (Vol 2) 1915 Cal 454 (456) (D B) ✠ (Vol 7) 1920 P C 190 (195, 197) (P C). (Conditional acceptance.) ✠ (Vol 22) 1935 Mad 454 (455) (D B). (Do.)

[3] Even if the lease provides that a waiver must be expressed in writing receipt of rent operates as waiver. (Vol 7) 1920 P C 190 (195) (P C).

[4] The fact that the rent received is credited to a suspense account will not prevent it from operating as a waiver of forfeiture. ('83) 9 Cal 843 (846) (D B).

[5] Lessee after forfeiture of lease remitting amount as rent but lessor accepting it as damages for use and occupation — Acceptance is of rent and operates as waiver of forfeiture. (Vol 32) 1945 Pat 260 (261, 262) : 24 Pat 109 (F B).

[6] Acceptance of rent due prior to forfeiture, though made after forfeiture does not operate as a waiver. (Vol 33) 1946 All 328 (329) ✠ (Vol 32) 1945 Nag 255 (256) : 1 L R (1945) Nag 629 (D B) ✠ (Vol 3) 1916 Cal 931 (933) (D B) ✠ (Vol 11) 1924 Cal 520 (522) (D B) ✠ (1863) 33 L J Q B 3 (10) : 11 W R (Eng) 948, *Ward* v. *Day*.

[7] Acceptance of rent from any person in possession will operate as a waiver. ('25) 90 Ind Cas 832 (833) (D B) (Cal). (Sub-lessee.) ✠ ('96) 20 Bom 439 (446). (Assignee.)

3. "Any other act." — [1] As instances of other acts may be mentioned the following:

(a) Demand for rent due after forfeiture. ('87) 14 Cal 176 (184).

(b) Action for rent due after forfeiture. (Vol 8) 1921 Mad 284 (284) (D B) ✠ (Vol 7) 1920 Cal 899 (900) (D B) ✠ (Vol 3) 1916 Pat 409 (410) : 1 Pat L Jour 185.

(c) A fresh notice to terminate a tenancy is waiver of prior forfeiture. (Vol 11) 1924 Bom 454 (456) : 48 Bom 541 (D B).

(d) A notice to quit given by the lessor. (Vol 27) 1940 Pat 478 (479) (D B) ✠ (Vol 32) 1945 Pat 260 (262) : 24 Pat 109 (F B). ((Vol 27) 1940 Pat 478, *Affirmed.*)

[2] It is not sufficient that the lessor, knowing that a forfeiture has been incurred, is merely silent. (Vol 10) 1923 Nag 129 (130).

[But see (Vol 32) 1945 All 293 (297) : I L R (1945) All 248. (Disclaimer of lessor's title — No action for several years—Forfeiture held waived.) ✠ (Vol 11) 1924 Lah 281 (285). (Do.)]

[3] Where the lessor in granting a receipt for rent due prior to forfeiture, described the grantee of the receipt as a "tenant," it was held that this was not a waiver. (Vol 3) 1916 Cal 931 (934) (D B).

4. Knowledge of breach. — [1] The lessor must have notice or knowledge of the forfeiture at the time of the supposed waiver. (Vol 19) 1932 Cal 787 (789) : 60 Cal 47 (D B) ✠ ('91) 1891 Bom P J 107 (D B).

[2] The onus is on the lessee to show such knowledge on the part of the lessor. (Vol 19) 1932 Cal 787 (789) : 60 Cal 47 (D B).

5. Effect of waiver.—[1] A waiver of a forfeiture operates as regards all prior causes of forfeiture. ('12) 16 Cal W N 104 (106) (D B).

[2] Waiver does not preclude the lessor from taking advantage of subsequent causes of forfeiture. (Vol 23) 1936 Pat 493 (495) : 15 Pat 673 (D B) ✠ (Vol 3) 1916 Lah 403 (404) ✠ ('92) 1892 Bom P J 553 (D B) ✠ (Vol 11) 1924 Mad 776 (777) (D B).

[3] Where the breach is of a continuing nature the waiver of any forfeiture up to a certain day will afford no defence to an ejectment for a subsequent breach. ('67) 8 Suth W R 138 (139) (D B). (Covenant to keep premises in repair.)

[4] Non-payment of rent at a stipulated rate month after month is a continuing breach — The landlord's conduct in having waived his right to forfeit on such a breach for any particular month or months does not destroy his right to forfeit on similar breaches in a subsequent month. (Vol 8) 1921 Bom 307 (308, 309) : 45 Bom 535.

[5] A waiver once made is irrevocable as to the forfeiture waived, and the lessor cannot subsequently claim to enforce the forfeiture. (Vol 7) 1920 P C 190 (195) (P C).

6. Second proviso. — [1] An acceptance of rent after the institution of a suit for ejectment on the ground of forfeiture is not a waiver. (Vol 33) 1946 Lah 330 (338) (F B) ✠ ('10) 8 Mad L Tim 99 (99) (D B) ✠ ('66) 2 Bom H C R 66 (69).

Section 113 — Note 1

[1] The section will not apply where the landlord claims to treat the tenant as a tenant from year to year but the latter asserts a permanent tenancy. (Vol 14) 1927 Pat 305 (308) (DB).

[2] Sections 113 and 116 have not made the Indian law different from the English law on the question whether the acceptance of payments by the landlord after the notice to quit amounts to waiver of the notice. (Vol 32) 1945 Bom 132 (135) : I L R (1945) Bom 68 (DB).

[3] The acceptance of rent accrued due before the date of the notice to quit is not a waiver of the notice to quit. (Vol 8) 1921 Cal 126 (127) (DB)

[4] The acceptance of rent accrued due subsequent to the notice is a waiver of the notice. (Vol 13) 1926 Cal 763 (763).

[5] It is not in every case that the payment and acceptance of rent by the landlord after the notice to quit of necessity waives the notice. The question whether the act of the landlord was one from which one can impute to him the intention of creating a renewal of the tenancy or treating the tenancy as still subsisting is a question of fact. (Vol 32) 1945 Bom 132 (134) : ILR (1945) Bom 68 (DB).

[6] A claim in a suit for ejectment for the arrears of rent due is not a waiver of the notice. (Vol 4) 1917 Pat 469 (470) : 2 Pat L Jour 595 (DB).

[7] Mere abortive negotiations between the parties with regard to the payment of rent subsequent to the notice do not constitute a waiver. (Vol 14) 1927 Rang 276 (276, 277) (DB).

114. Where a lease of immoveable property has determined by forfeiture for non-payment of rent, and the lessor sues to eject the lessee, if, at the hearing of the suit the lessee pays or tenders to the lessor the rent in arrear, together with interest thereon and his full costs of the suit, or gives such security as the Court thinks sufficient for making such payment within fifteen days, the Court may, in lieu of making a decree for ejectment, pass an order relieving the lessee against the forfeiture: and thereupon the lessee shall hold the property leased as if the forfeiture had not occurred.

Relief against forfeiture for non-payment of rent.

Section 113 — Note 1 *(contd.)*

[8] The acceptance of rent due subsequent to the notice to quit, even after the institution of a suit for ejectment, will operate as a waiver of such notice. (Vol 13) 1926 Cal 763 (763).

[9] Where, pending a suit for ejectment, the Court passed an order by consent of parties by which certain payments were made by the defendant and accepted by the plaintiff, it was held that such acceptance would not constitute a waiver of the notice. (Vol 21) 1934 Cal 837 (837, 838).

[10] The fact that the lessor accepts the rent under protest will not prevent it from operating as a waiver of the notice. (Vol 10) 1923 Cal 663 (664) (DB).

[11] A party who denies having given a first notice to quit, cannot on being found against on that point, plead that his second notice was a waiver of the first. (Vol 14) 1927 Pat 305 (308) (DB).

[12] The fact that no suit is filed for ejectment immediately on the expiry of the notice does not operate as a waiver. (Vol 10) 1923 Nag 129 (130).

[13] In the case of cosharers, the acceptance of rent by one of them will operate as a waiver only in so far as he is concerned. The others will not be affected thereby. (Vol 19) 1932 Pat 259 (260, 261) (DB).

[14] The effect of waiver is that the tenancy is not regarded as having been at all determined, but is regarded as continuing. (Vol 10) 1923 Cal 663 (665) (DB).

SECTION 114 — SYNOPSIS

1. Scope.
2. "Lessor."
3. "Lessee."
4. "At the hearing of the suit."
5. "Rent in arrear."
6. "The Court may pass an order."
7. Relief where period of grace is provided.
8. Consent decree providing for forfeiture.
9. Suit for ejectment on forfeiture.
10. Relief against forfeiture for breaches of other conditions.
11. Forfeiture under decree — Construction of decree.

1. Scope. — [1] Section has no application to maintenance grants. (Vol 18) 1931 Nag 60 (63): 27 Nag L R 24.

[2] Agricultural lease governed by contract — Court can apply equitable principle underlying this section. (Vol 31) 1944 Nag 229 (230): I L R (1944) Nag 877 (DB) ✠ (Vol 15) 1928 Mad 250 (252) ✠ (Vol 6) 1919 Mad 12 (13): 42 Mad 654 (SB).

[See however (Vol 3) 1916 Mad 680 (684): 39 Mad 834 (DB).]

[3] The general principle on which this section is based will be applicable to the Punjab. ('12) 17 Ind Cas 991 (992): 1912 Pun Re No. 6 (Rev) ✠ (Vol 11) 1924 Lah 49 (51, 52) (DB). (Section 114 inapplicable under S. 2, cl. (c)—Contract before 1882.)

[4] General principle on which this section is based applied to case — Courts are not bound by conditions laid down in section. (Vol 14) 1927 Mad 239 (240).

[5] Under S. 114 there must be an actual payment or tender before the Court. Mere readiness to pay is not sufficient. (Vol 33) 1946 All 328 (329).

2. "Lessor." — [1] If, in a suit by an assignee of the lessor for ejectment on the ground of forfeiture, the tenant pays up the rent in arrears the Court can grant relief against forfeiture. (Vol 23) 1936 Mad 116 (117).

3. "Lessee." — [1] The word "lessee" must be liberally construed as including transferees from him and such transferees can claim relief under this section. (Vol 1) 1914 All 411 (413) ✠ (Vol 34) 1947 Bom 86 (87) (DB).

4. "At the hearing of the suit." — [1] The word "suit" would include an appeal also, and consequently the payment or tender may be made at the hearing of the appeal. (Vol 31) 1944 Nag 229 (231): ILR (1944) Nag 877 (DB) ✠ ('13) 21 Ind Cas 405 (406) (DB) (Mad).

[But see (Vol 33) 1946 All 328 (329).]

[2] No relief can be granted to the tenant after an order for ejectment has been passed. (Vol 18) 1931 Cal 457 (458): 58 Cal 311 ✠ (Vol 3) 1916 Mad 680 (681, 682): 39 Mad 834 (DB) ✠ (Vol 15) 1928 Mad 193 (194): 51 Mad 157 (DB).

5. "Rent in arrear." — [1] "Rent in arrear" must be taken to mean all the rent due up to the date of relief and not merely the rent for the non-payment of which the forfeiture of the lease had occurred. (Vol 18) 1931 Cal 457 (458): 58 Cal 311.

[2] "Rent in arrear" will include the rent which the lessor may be unable to recover under the law relating to limitation. (Vol 8) 1921 Mad 418 (419): 44 Mad 629 (DB) ✠ (Vol 23) 1936 Mad 116 (117).

6. "The Court may pass an order." — [1] The Court has a discretion under this section which it may exercise according to the circumstances of the case. (Vol 18) 1931 Cal 457 (457): 58 Cal 311 ✠ (Vol 34) 1947 Bom 86 (87) (DB).

[2] In the absence of special circumstances which would go against the lessee, the Court will generally exercise its discretion in favour of granting relief. (Vol 14) 1927 Cal 908 (910): 54 Cal 485 ✠ (Vol 1) 1914 All 805 (806) ✠ (Vol 12) 1925 Mad 919 (921) ✠ ('95) 1895 Bom P J 206 (DB).

[3] The mere fact that the lessee sets up a plea of payment which he fails to prove will not, in itself, disentitle him to relief. (Vol 1) 1914 Mad 706 (708) (DB) ✠ ('88) 13 Bom 323 (325) (DB).

[4] Failure of lessee to prove plea of payment may along with other circumstances, disentitle him to the relief. (Vol 10) 1923 Nag 193 (195): 19 Nag L R 50 ✠ ('05) 15 Mad L Jour 210 (210) (DB).

[5] Where the conduct of a tenant qua tenant has been such that it would be unreasonable that the landlord should be compelled to keep him as a tenant, relief against forfeiture will not be granted. (Vol 14) 1927 Cal 908 (910): 54 Cal 485 ✠ (Vol 10) 1923 Nag 193 (195): 19 Nag L R 50.

[6] The relief against forfeiture is subject to other equities that may have arisen between the date of the forfeiture and the application for relief. (Vol 14) 1927 Cal 908 (910): 54 Cal 485.

[7] Landlord, between date of forfeiture and application for relief, re-letting premises to third party or otherwise dealing with them — Relief under this section will not be given. (Vol 14) 1927 Cal 908 (910): 54 Cal 485.

[a][114A. Where a lease of immoveable property has determined by forfeiture for a breach of an express condition which provides that on breach thereof the lessor may re-enter, no suit for ejectment shall lie unless and until the lessor has served on the lessee a notice in writing—

Relief against forfeiture in certain other cases.

(a) specifying the particular breach complained of ; and

(b) if the breach is capable of remedy, requiring the lessee to remedy the breach;

and the lessee fails, within a reasonable time from the date of the service of the notice, to remedy the breach, if it is capable of remedy.

Nothing in this section shall apply to an express condition against the assigning, under-letting, parting with the possession, or disposing of the property leased, or to an express condition relating to forfeiture in case of non-payment of rent.]

[a] *Inserted* by the Transfer of Property (Amendment) Act, 1929 (20 [XX] of 1929), S. 58.

Section 114 — Note 6 *(contd.)*

[8] The question whether the lessor has or has not entered and dispossessed the tenant is immaterial in deciding whether relief should or should not be granted under this section. ('06) 34 Cal 358 (368) (DB). (Reversed on another point in (Vol 4) 1917 P C 163 : 45 Cal 87 : 44 Ind App 246 (PC).)

[9] Where the discretion has been exercised by the Court one way or the other, it will not be interfered with by the appellate Court unless it is clear that the first Court had not exercised its discretion on proper judicial principles. (Vol 15) 1928 Mad 250 (253) ✠ (Vol 31) 1944 Nag 229 (230, 231) : I L R (1944) Nag 877 (DB) ✠ (Vol 34) 1947 Bom 86 (87) (DB).

7. Relief where period of grace is provided. — [1] Where the lease itself provides for a period of grace for payment of the rent which may become due, the Court can grant relief against the forfeiture. (Vol 8) 1921 Bom 403 (404) : 45 Bom 300 (DB) ✠ (Vol 15) 1928 Mad 250 (251, 253) ✠ (Vol 10) 1923 Nag 193 (195) : 19 Nag L R 50 ✠ (Vol 3) 1916 Mad 680 (683): 39 Mad 834 (DB).

8. Consent decree providing for forfeiture. — [1] Where a consent decree creates the relation of landlord and tenant and provides for forfeiture on non-payment of rent, the Court can give relief against the forfeiture. ('06) 31 Bom 15 (24, 25) (FB). ('86) 10 Bom 435, *Overruled.*) ✠ (1900) 24 Mad 265 (270, 271) (DB) ✠ (Vol 8) 1921 Cal 565 (567) (DB) ✠ (Vol 34) 1947 Bom 86 (86) (DB).

9. Suit for ejectment on forfeiture. — [1] In appropriate cases, the Court may refuse a decree for ejectment, and may merely pass a decree for the arrears of rent. (Vol 15) 1928 All 716 (717).

10. Relief against forfeiture for breaches of other conditions. — [1] In cases of forfeiture for breaches of conditions other than non-payment of rent, no relief can be granted. (Vol 23) 1936 Pat 493 (495) : 15 Pat 673 (DB).

[2] A forfeiture for breach of a condition against alienation cannot be relieved against under this section. (Vol 6) 1919 Mad 12 (12, 13) : 42 Mad 654 (SB) ✠ (Vol 23) 1936 Pat 493 (495) : 15 Pat 673 (DB).

11. Forfeiture under decree — Construction of decree. — [1] First Court decreeing relief against forfeiture on payment of certain amount — Amount paid — Appellate Court granting additional amount to be paid within "one month from this date" — *Held* in construing decree Court ought to act in favour of tenant against forfeiture and that non-payment of additional amount within one month did not cause forfeiture. (Vol 11) 1924 Mad 649 (650) (DB).

Section 114-A — Note 1

[1] The section is not retrospective in its operation. (Vol 26) 1939 Lah 330 (338) (DB).

[2] The Act does not provide for relief against forfeiture when lessee renounces his character by setting up a title in himself or in a person other than the lessor — Courts cannot therefore import into the Act such a provision which is not there. (Vol 30) 1943 All 279 (280) ✠ (Vol 33) 1946 Lah 330 (338) (FB).

[3] Lease for agricultural purposes — Forfeiture incurred by reason of breach of express condition in the lease-deed — Relief against forfeiture can be given on equitable principles if notice of forfeiture is not in accordance with this section. (Vol 34) 1947 Mad 119 (120) (FB).

[4] This section merely defines the form in which the notice under S. 111 (g) is to be issued in cases where the breach of the condition is capable of being remedied and a single notice is sufficient. (Vol 25) 1938 Cal 589 (593) : I L R (1938) 2 Cal 434 (DB).

[5] The object of the notice is to give the lessee precise information of what is alleged against him and what is demanded of him. (1899) 47 W R (Eng) 644 (646) : (1899) 2 Q B 79, *Horsey Estate, Ltd.* v. *Steiger.*

[6] Number of houses let with a covenant to "keep them in good condition and complete tenantable repairs" — On breach notice served upon the lessee stating "I hereby give you notice that you have broken the covenents for repairing the inside and outside of a the houses contained in the lease and I require you to repair them forthwith" : *Held* that there was nothing in the notice to show in respect of which house the breach had been committed and that the notice was not valid. (1897) 45 W R (Eng) 471 (472) : (1897) 1 Ch 271, *Flecher* v. *Nokes.*

[7] Where a breach of more conditions than one is complained of, a notice to remedy those breaches is not bad merely because in respect of one or more of them the breach cannot be established. (1900) 48 W R (Eng) 264 (265, 266) : (1900) 1 Ch 496, *Pann'l* v. *City of London Brewery Co.*

[8] Where two covenants are broken and a notice in respect of only one of them is given and afterwards that breach is waived, the lessor cannot take advantage of the notice in respect of the other breach. (1900) 48 W R (Eng) 441 (442, 443) : (1900) 2 Ch 156, *Jacob* v. *Down.*

[9] Where a vast number of repairs were to be made and a suit for ejectment was filed only two days after the service of notice upon the lessee, it was held that reasonable time had not been allowed to remedy the breach. (1899) 47 W R (Eng) 644 (646) : (1899) 2 Q B 79, *Horsey Estate, Ltd.* v. *Steiger.*

115. The surrender, express or implied, of a lease of immoveable property does not prejudice an under-lease of the property or any part thereof previously granted by the lessee, on terms and conditions substantially the same (except as regards the amount of rent) as those of the original lease; but unless the surrender is made for the purpose of obtaining a new lease, the rent payable by, and the contracts binding on the under-lessee, shall be respectively payable to and enforceable by the lessor.

Effect of surrender and forfeiture on under-leases.

The forfeiture of such a lease annuls all such under-leases except where such forfeiture has been procured by the lessor in fraud of the under-lessees, or relief against the forfeiture is granted under section 114.

116. If a lessee or under-lessee of property remains in possession thereof after the determination of the lease granted to the lessee, and the lessor or his legal representative accepts rent from the lessee or under-lessee, or otherwise assents to his continuing in possession, the lease is in the absence of an agreement to the contrary, renewed from year to year, or from month to month, according to the purpose for which the property is leased, as specified in section 106.

Effect of holding over.

Illustrations.

(a) *A* lets a house to *B* for five years. *B* underlets the house to *C* at a monthly rent of Rs. 100. The five years expire, but *C* continues in possession of the house and pays the rent to *A*. *C*'s lease is renewed from month to month.

(b) *A* lets a farm to *B* for the life of *C*. *C* dies, but *B* continues in possession with *A*'s assent. *B*'s lease is renewed from year to year.

Section 115 — Note 1

[1] A lessee cannot give to a sub-tenant what he does not possess himself. (Vol 10) 1923 Cal 691 (691) : 50 Cal 419.

[2] If the lease is determined by efflux of time or by forfeiture or by operation of law the sub-lease will also be determined. (Vol 13) 1926 Nag 62 (63). [Sub-lease though granted with landlord's consent does not survive after determination of tenancy.) ✠ (Vol 33) 1946 Nag 419 (423) (DB). (Determination by operation of law.) ✠ (Vol 19) 1932 Cal 241 (242) : 59 Cal 739 (DB). (Tenant's right terminating by decree in ejectment suit.) ✠ ('04) 27 Mad 401 (404) (DB) ✠ (Vol 7) 1920 Cal 706 (707) : 47 Cal 907.

[3] A surrender being a voluntary act on the part of the lessee the lessee's action will not be allowed to prejudice the sub lessee. (Vol 4) 1917 Nag 51 (52) ✠ (Vol 4) 1917 Nag 86 (87) : 14 Nag L R 107. (Case of implied surrender under S. 35 (4) of C. P Tenancy Act.) ✠ (Vol 33) 1946 Nag 419 (423) (DB) ✠ ('69) 11 Suth W R 485 (487) (DB).

[4] The section merely brings the under-lessees into direct contact with the lessors except where the surrender is made for the purpose of obtaining a new lease. (Vol 26) 1939 Bom 98 (100) : I L R (1939) Bom 144 (DB).

[5] It is doubtful whether the exception in the second paragraph of the section would apply to leases by Government in view of the Crown Grants Act 1895. (Vol 11) 1924 Bom 212 (216).

[6] Where the surrender is made for the purpose of obtaining a new lease the benefits of the contract of under-lease and the right to the rent thereunder vest in the new lessee whether he is the original lessee or his nominee. (Vol 26) 1939 Bom 98 (100) : I L R (1939) Bom 144 (DB).

[7] An implied surrender under S. 35 (4) of the C. P. Tenancy Act, 1898, has been held to be analogous to a forfeiture which would put an end to the sub-lease in the absence of fraud or collusion. (Vol 4) 1917 Nag 86 (87) : 14 Nag L R 107.

[8] The effect of a surrender or of a forfeiture of agricultural leases on under-leases must be determined by reference to the local laws, or custom, if any, governing the particular transaction or to the general principles underlying this section ('71) 3 N W P H C R 63 65 (FB) ✠ ('98) 22 Bom 389 (404) (FB) ✠ (Vol 7) 1920 All 128 (129) (DB) ✠ (Vol 33) 1946 Nag 419 (423) (DB) (Principle underlying section applies.)

[9] Voluntary surrender, even in the case of an agricultural lease will not put an end to a valid under-lease. (Vol 4) 1917 Cal 236 (241) (DB) ✠ ('96) 18 All 354 (356) (DB) ✠ ('95) 1895 Bom P J 545 (DB) ✠ (Vol 8) 1921 Cal 444 (448) : 48 Cal 605 (FB) ✠ (Vol 23) 1936 Mad 422 (423) ✠ (Vol 19) 1932 Nag 107 (109) : 28 Nag L R 93.

[10] Forfeiture will put an end to an agricultural lease. (Vol 17) 1930 All 352 (352) (DB) ✠ (Vol 4) 1917 Cal 236 (241) (DB) ✠ (Vol 11) 1924 Mad 776 (777) (DB) ✠ ('90) 14 Bom 384 (386) (DB).

SECTION 116 — SYNOPSIS

1. Scope.
2. "Remains in possession."
3. More lessees than one — Only some remaining in possession—Effect of.
4. Effect of lessee's legal representative remaining in possession.
5. Legal representative of the lessor.
6. "Accepts rent or otherwise assents to his continuing in possession."
7. Acceptance by only one of several lessors.
8. Clause for enhancement of rent in a quit notice, whether amounts to an assent.
9. Suit for rent for the period of lessee's possession after determination, whether amounts to assent.
10. Clause for renewal.
11. "In the absence of an agreement to the contrary."
12. Effect of renewal.
13. Nature of possession of tenant holding over without consent.
14. Possession under a lease valid for a part of the term only.

1. Scope.—[1] The effect of holding over with the consent of the lessor under this section is, firstly, that in the absence of an agreement to the contrary the lease is renewed as to all terms except the duration of the lease, and, secondly, that the duration of the renewed lease is from year to year or from month to month according to the purpose for which the property is leased as specified in S. 106. (Vol 21) 1934 Mad 458 (459, 460): 58 Mad 75 (D B).

Section 116—Note 1 *(contd.)*

[2] It is the assent of the lessor or his legal representative that effects a renewal of the lease under this section. The lessee's assent is not necessary. (Vol 11) 1924 Bom 322 (323, 324): 48 Bom 341 ✠ (Vol 13) 1926 Mad 566 (567) ✠ (Vol 16) 1929 Cal 553 (555) : 57 Cal 338 (D B).

[3] The doctrine of holding over contained in this section involves the position that there existed a relationship of landlord and tenant between the parties. Where there was no contract of tenancy between the parties, this section has no application. (Vol 31) 1944 Nag 141 (142): I L R (1944) Nag 267.

[4] The principle underlying this section is applicable to agricultural leases on the ground of justice, equity and good conscience, in the absence of any special reason for not doing so. (Vol 13) 1926 Mad 1071 (1072) (D B)✠(Vol 6) 1919 Nag 88 (89)✠(Vol 4) 1917 Low Bur 37 (38) (D B) ✠ (Vol 11) 1924 Pat 560 (563) : 3 Pat 403 (D B)✠('02) 27 Bom 262 (265) (D B) ✠ ('17) 40 Ind Cas 116 (117) (Oudh) ✠(Vol 13) 1926 Cal 1239 (1239) (D B).

[5] Section 116 does not apply to the N. W. F. Province. (Vol 32) 1945 Pesh 16 (18) (D B).

[6] The principle of this section has been applied to cases arising in Punjab. ('28) 112 Ind Cas 651 (652) (Lah).

[7] Section 116 has to be read along with S. 111 cl. (a). The section does not affect the rights of landlord and tenant as contained in Ss. 112 and 113. (Vol 32) 1945 Bom 132 (135): I L R (1945) Bom 68 (D B).

2. "Remains in possession." — [1] Where the lessee remained in possession for six days after the determination of the lease, it was held that he had become a lessee from month to month and liable for the rent of the whole month. (Vol 11) 1924 Bom 322 (322, 324): 48 Bom 341.

[2] There must be a continuity of possession by the lessee without any break at the determination of the original lease. (Vol 13) 1926 Cal 696 (697) (D B).

[3] Lease determined—Lessee dispossessed and again admitted on property by lessor—There is no renewal of old lease. ('12) 24 Mad L Jour 263 (264) (F B).

[4] Lease for seven years expiring in 1935 —Tenant holding over—Suit by landlord for ejecting tenant filed in 1939—Pending suit, landlord entering into new contract with tenant allowing latter to remain in possession —Contract not registered —Tenant held was not lessee holding over after expiry of first lease. ('47) 1947 All W R (H C) 167 (168).

3. More lessees than one—Only some remaining in possession—Effect of. —[1] More lessees than one — Only some remaining in possession — Lease is renewed only in favour of latter — Rest are not liable for rent for period during which others remained in possession after determination of lease. ('05) 9 Cal W N 340 (342).

4 Effect of lessee's legal representative remaining in possession. — [1] Lease determined by death of lessee—Consent of lessor to lessee's legal representative remaining in possession does not operate as renewal of lease in his favour (Vol 25) 1938 Nag 506 (510): I L R (1940) Nag 269 (D B) ✠ (Vol 14) 1927 Pat 305 (306, 307) (D B) ✠ (Vol 12) 1925 Pat 357 (361, 362) (D B).

[2] Renewal of lease in lessee's favour—Subsequently lessee's representative coming in possession of property — Representative gets benefit of renewal. (Vol 20) 1933 Cal 822 (824) (D B).

[3] *A* continuing in possession after expiry of lease without lessor's consent - *A* dying and *B*, his legal representative, continuing in possession — *B* held was mere trespasser and lessor could not by his assent effect renewal of original lease. ('07) 31 Mad 163 (166, 167) (D B). (('85) 8 Mad 424 not followed.) ✠ (Vol 16) 1929 All 610 (612).

5. Legal representative of the lessor.—[1] The term "legal representative" implies a person who occupies the same position as the lessor. (Vol 2) 1915 Cal 64 (66) (D B).

[2] *A* grants a lease to *B* who in turn sub-lets the property to *C*. After the determination of *B's* lease, *C* continues in possession. *A* leases the same property to *D* who accepts rent from *C*. *D*, who holds only a fraction of the interest held by *A*, cannot be called his legal representative and acceptance of rent by him from *C* does not renew the lease of *C*. (Vol 2) 1915 Cal 64 (66) (D B).

6. "Accepts rent or otherwise assents to his continuing in possession." — [1] The consent, express or implied, of the lessor has to be shown before the lessee is entitled to a renewal. (Vol 30) 1943 Oudh 392 (395) (D B).

[2] The acceptance of rent is only one form of the assent of the lessor to the lessee's remaining in possession of the property ('67) 7 Suth W R 152 (152) (D B)✠ (Vol 21) 1934 Mad 458 (459): 58 Mad 75 (D B).

[3] The acceptance must be of rent as such. (Vol 8) 1921 Cal 789 (791, 792) (DB).

[4] Acceptance must be voluntary. ('09) 3 Ind Cas 100 (100) (Cal).

[5] The payment of the rent by the lessee must be in the capacity which he held under the original lease. ('02) 26 Mad 535 (537) (DB).

[6] Mere delay or passive failure on the part of the lessor in taking steps to eject a lessee who remains on the property after the determination of the lease does not by itself amount to an assent on the part of the lessor to the lessee's remaining in possession of the property. ('07) 34 Cal 396 (398) (DB) ✠ (Vol 4) 1917 Mad 735 (737) (DB).

7. Acceptance by only one of several lessors. —[1] Where there are more lessors than one and one of them accepts rent from the tenant with respect to his share in the property, the lease is renewed in respect of that lessor's share only. (Vol 6) 1919 Cal 110 (110) (D B).

8. Clause for enhancement of rent in a quit notice, whether amounts to an assent.—[1] Where the clause in the quit notice was : "In default of so vacating I write this, with a pure mind that Rs. 75 per month will be collected from the tenancy along with the costs of Court," it was held that no consent on the part of the lessor could be inferred from the clause. (Vol 13) 1926 Mad 566 (566, 567).

9. Suit for rent for the period of lessee's possession after determination, whether amounts to assent —[1] Lease determined.—Lessee remaining in possession – No indication of lessor's refusal to consent to continuance of possession—Suit by lessor for rent of such period amounts to assent on his part. (Vol 22) 1935 Pat 271 (272) ✠ (Vol 27) 1940 Pat 555 (556).

[2] Where there are clear indications to show the dissent of the lessor, no consent on his part can be inferred from a suit for rent of such a period. (Vol 27) 1940 Pat 555 (556).

10. Clause for renewal.—[1] If there is a clause for renewal in the original lease but after the determination thereof no fresh lease is formally executed under the covenant for renewal, but the lessee remains in possession with the assent of the lessor, he can claim the benefit of this section. (Vol 31) 1944 Bom 210 (213) ✠ (Vol 14) 1927 Cal 725 (730) : 54 Cal 813 (D B).

[2] The tenant continuing in occupation under a special agreement for a further lease is a different case from the tenant holding over merely by consent but if for any reason his agreement has to be disregarded he

117. None of the provisions of this Chapter apply to leases for agricultural purposes, except in so far as the [a]Provincial Government] [b][* * * *] may, by [c]notification published in the [d][Official Gazette], declare all or any of

Exemption of leases for agricultural purposes.

Section 116 — Note 10 *(contd.)*
can fall back upon the landlord's consent and claim his rights under S. 116. (Vol 14) 1927 Cal 725 (730) : 54 Cal 813 (DB).

[3] Lease for term of years—Lessee to deliver possession at expiry of term without notice—In case of failure to deliver possession, lessee liable to pay rent at double rate till delivery — Clause held was merely penal and did not confer on lessee option to continue in possession after expiry of term. (Vol 30) 1943 Oudh 392 (394, 395) : 19 Luck 265 (D B).

11. "In the absence of an agreement to the contrary."— [1] The agreement to the contrary may be express or implied. ('13) 17 Cal L Jour 167 (171, 172) (DB).

[2] The fact that the original lease reserves an annual rent is no objection to holding that the tenancy by holding over under this section is one from month to month where the purpose of the lease is not agricultural or manufacturing. Nor does this fact imply an agreement that the tenancy by holding over should be one from year to year. ('04) 32 Cal 123 (127) (S B) ✠ (Vol 20) 1933 Cal 260 (261) (DB).

[3] The fact that the original lease contains a clause that the lessee may be ejected without notice is no ground for holding that notice as per Ss. 106 and 116 is not necessary for determining the new tenancy by holding over that arises by the tenant continuing in possession with the lessor's assent. (Vol 21) 1934 Cal 135 (135) (D B).

[4] If rent is to be paid annually there is the presumption of annual tenancy. (Vol 6) 1919 Cal 529 (531) (D B).

[5] The presumption of yearly lease does not always arise from the fact of an annual payment of rent. (Vol 2) 1915 Cal 64 (67) (DB) ✠ (Vol 6) 1919 Cal 212 (214).

12. Effect of renewal.—[1] The effect of a renewal is that there comes into existence a new lease between the parties. ('22) 65 Ind Cas 589 (591) (DB) (Cal) ✠(Vol 21) 1934 Cal 135 (136) (DB) ✠ (Vol 18) 1931 Lah 675 (675).

[2] The renewal is, in the absence of an agreement to the contrary, on the same terms as those contained in the expired lease. (Vol 25) 1938 All 649 (650) ✠ ('17) 40 Ind Cas 41 (42) (Oudh) ✠ (Vol 21) 1934 Mad 458 (460) : 58 Mad 75 (DB) ✠ ('01) 11 Mad L Jour 186 (187) (D B) ✠ ('35) 37 Pun L R 765 (765) ✠ (Vol 13) 1926 Cal 1239 (1239, 1240) (DB) ✠ (Vol 6) 1919 Pat 254 (255) (D B) ✠ (Vol 16) 1929 Rang 55 (56) : 6 Rang 691 (DB) ✠ ('11) 35 Bom 333 (333) (DB).

[3] If any statutory provisions have come in existence before the renewal, the terms of the renewed lease may be affected thereby. ('10) 7 Ind Cas 721 (723) (DB) (Cal).

[4] If the lessor had waived any of the conditions in the old lease during its existence he will not be entitled to enforce such a condition against the lessee after renewal. (Vol 2) 1915 Cal 68 (69) (DB).

[5] The duration of a renewed lease by virtue of this section will be from year to year or from month to month according to the purpose of it and not that of the original lease. ('09) 12 Oudh Cas 279 (283, 284).

[6] Land leased for three years for keeping shop — Lease renewed after expiry of term — Renewal will be from month to month. ('13) 17 Cal L Jour 167 (172) (DB).

[7] Lease renewed — Either party desiring to determine it— He must give notice to other party according to provisions of S. 106. (Vol 1) 1914 All 460 (461) ✠ ('04) 32 Cal 123 (128) (SB) ✠ (Vol 10) 1923 Pat 340 (340, 341) (D B) ✠ (Vol 14) 1927 Cal 279 (280) (DB).

13. Nature of possession of tenant holding over without consent.—[1] Determination of lease—Lessee continuing in possession without lessor's consent—There is no renewal of lease and no relation of lessor and lessee exists between parties. (Vol 15) 1928 PC 146 (149) : 55 Ind App 212 : 7 Pat 649 (P C) ✠ (Vol 29) 1942 Oudh 93 (95) : 17 Luck 205 (DB).

[2] The possession of the person holding over without lessor's consent becomes wrongful from the date of the termination of the old lease. (Vol 30) 1943 Oudh 392 (395) : 19 Luck 265 (D B) ✠ (Vol 9) 1922 P C 184 (185) (P C).

[But see (Vol 17) 1930 All 177 (179) (DB)✠('22) 65 Ind Cas 589 (591) (DB) (Cal).]

[3] A tenant holding over is only in by the laches of the owner, so that there is no privity between them. (1900) 24 Bom 504 (508) (DB) ✠ (Vol 14) 1927 Pat 572 (575) : 3 Pat 534 (D B) ✠ (Vol 14) 1927 Bom 192 (194) : 51 Bom 149 (D B) ✠ (Vol 12) 1925 Pat 216 (221) : 4 Pat 139 (DB).

[4] Tenant holding over without landlord's consent—Notice under S. 106 before filing suit for ejectment is not necessary. (Vol 27) 1940 Oudh 401 (403) : 16 Luck 44 (D B) ✠ (Vol 27) 1940 All 444 (445) ✠ (Vol 14) 1927 Bom 192 (193): 51 Bom 149 (DB)✠(Vol 5) 1918 Cal 391 (392) (D B).

[5] The possession of the tenant holding over is not adverse to the owner. (Vol 12) 1925 All 698 (699) ✠ (Vol 4) 1917 Mad 735 (737) (D B) ✠ ('94) 18 Bom 507 (512) (DB) ✠ ('08) 31 Mad 163 (167) (DB).

[But see ('26) 28 Bom L R 1357 (1359) (DB)✠ ('09) 31 All 514 (517) (D B) ✠ ('10) 37 Cal 674 (678, 679) (D B) ✠ (Vol 1) 1914 Mad 564 (568) : 37 Mad 1 (D B) ✠ (Vol 16) 1929 Pat 18 (21) : 7 Pat 675 (DB) ✠ (Vol 3) 1916 Lah 353 (355) : 1916 Pun Re No. 97 (DB).]

[6] Suit for possession—Defendant pleading adverse possession and also relying upon Art. 139, Limitation Act — *Held*, that plea of adverse possession was inconsistent with the application of Art. 139. (Vol 21) 1934 P C 77 (80) : 56 All 111 : 61 Ind App 50 (PC).

[7] Where a tenant holds over, for a period of twelve years, from the determination of the tenancy, without the landlord's assent, he acquires under S. 28 of the Limitation Act, a title to the property, not by reason of his possession having been adverse for a period of twelve years but by reason of the efflux of time limited under Art. 139 of the Limitation Act. (Vol 9) 1922 P C 184 (185) (PC). (Per Fletcher J., in the High Court judgment appealed from.) ✠ (Vol 27) 1940 Lah 410 (412) (DB).

[8] A tenant holding over can sue under S. 9 of the Specific Relief Act, if he is dispossessed otherwise than in due course of law. (Vol 6) 1919 Bom 97 (98, 99) : 43 Bom 531 (D B) ✠ (Vol 1) 1914 Mad 296 (296) : 37 Mad 281 (D B).

14. Possession under a lease valid for a part of the term only.—[1] Verbal lease for seven years by *A* to *B* — Possession delivered to *B* — Lease held was valid for first year— *B* held became lessee from year to year under this section. (Vol 30) 1943 Cal 474 (474, 475) : I L R (1943) 1 Cal 34 (D B) ✠ (Vol 20) 1933 Pat 485 (488).

SECTION 117 — SYNOPSIS.

1. Scope.
2. "Agricultural purposes."
3. Agricultural leases may be made orally.

such provisions to be so applicable [e][in the case of all or any of such leases], together with, or subject to those of the local law, if any, for the time being in force.

Such notification shall not take effect until the expiry of six months from the date of its publication.

[a] *Substituted* by A. O. for "Local Government". [b] The words "with the previous sanction of the Governor-General in Council," were *repealed* by the Devolution Act, 1920 (38 [XXXVIII] of 1920), S. 2 and Sch. I. [c] For notification issued by the Government of Bombay, *see* Bombay Gazette, 1910, Pt. I, p. 59 For notification as to Sind, *see ibid.* [d] *Substituted* by A. O. for "local official Gazette". [e] *Inserted* by the Transfer of Property (Amendment) Act, 1904 (6 [VI] of 1904), S. 6.

Section 117 *(contd.)*

1. Scope.— [1] This section exempts leases for agricultural purposes from the provisions of this chapter, unless they are made applicable by notification by the Provincial Government. ('09) 5 Mad L Tim 222 (222) ✠ (Vol 20) 1933 Bom 168 (173) (DB) ✠ ('95) 20 Bom 354 (361) (FB) ✠ (Vol 20) 1933 Cal 745 (745) : 60 Cal 771 ✠ (1900) 27 Cal 205 (209) (DB) ✠(Vol 15) 1928 Pat 354 (355, 356) : 7 Pat 496 (DB) ✠ (Vol 12) 1925 Mad 346 (346) ✠ (Vol 6) 1919 Pat 254 (256) (DB) ✠ (Vol 19) 1932 Lah 586 (588) : 13 Lah 432 (DB) ✠ (Vol 24) 1937 Cal 695 (695) ✠ (Vol 13) 1926 All 432 (435) : 48 All 385 (DB).

[2] The object of the Legislature, in excepting agricultural leases from the operation of the provisions of this chapter was to retain in force the special provisions relating to the class of leases dealt with in the various local Rent Acts. (Vol 22) 1935 Pat 508 (511) : 15 Pat 8 (DB). (Overruled on another point in (Vol 31) 1944 Pat 87 : 23 Pat 185 (FB).) ✠ (Vol 12) 1925 Pat 421 (431) : 4 Pat 404 (DB) ✠ (1900) 27 Cal 205 (209) (DB).

[3] In the absence of any law, usage or custom to the contrary, the principles of this chapter which merely reproduces the well-established rules of English law, have been held applicable to leases for agricultural purposes as rules of justice, equity and good conscience. (Vol 31) 1944 Nag 94 (96) : I L R (1944) Nag 141 ✠ (Vol 27) 1940 Mad 410 (412). (Principle of S. 108 applied.) ✠ (1900) 24 Mad 47 (56) (FB). (Do.) ✠ (Vol 23) 1936 Mad 664 (665). (Do.) ✠ (Vol 34) 1947 Nag 48 (51): I L R (1946) Nag 568 (DB). (Do.)✠(Vol 29) 1942 Oudh 460 (462) : 18 Luck 390 (DB). (Do.)✠(Vol 23) 1936 Pat 111 (111) ✠ (Vol 6) 1919 Mad 12 (13) : 42 Mad 654 (SB). (S. 111.) ✠ (Vol 34) 1947 Mad 119 (120). (Do.) ✠ (Vol 34) 1947 Mad 68 (69). (Do.) ✠ (Vol 4) 1917 Cal 37 (38) (DB). (Do.) ✠ (Vol 31) 1944 Nag 229 (230) (DB). (S. 114.) ✠ (Vol 6) 1919 Pat 254 (255) (DB). (S. 117.)

2. "Agricultural purposes." — [1] The term 'agriculture' includes horticulture, forestry and even the use of land for pasture. ('01) 24 Mad 421 (424) (DB) ✠ ('13) 17 Cal L Jour 411 (415) (DB) ✠ (Vol 13) 1926 Cal 312 (313) (DB)✠ (Vol 24) 1937 Nag 289 (290): I L R (1938) Nag 31 ✠ (Vol 9) 1922 Mad 351 (351) : 45 Mad 710 (DB).

[2] It is not the actual use of the land, but the original purpose of the tenancy which determines the question of applicability or otherwise of the Act. (Vol 29) 1942 Cal 330 (331) (DB).

[3] A lease granted to a rent farmer or middleman is not one for agricultural purposes though it relates to agricultural land. (Vol 31) 1944 Pat 87 (89) : 23 Pat 185 (FB). ((Vol 22) 1935 Pat 508 : 15 Pat 8, *Overruled.*) ✠ (Vol 34) 1947 Pat 78 (79) (DB) ✠ (Vol 17) 1930 P C 13 (15) (P C).

[4] A lease of land to be used as a yard for ploughing cattle, or stocking hay for such cattle, or for the purpose of storing manure, or crops, or for growing plants to be used as manure for agriculture, or as a habitation to agriculturists will be a lease for agricultural purposes. (Vol 18) 1931 Cal 135 (136, 137) (DB). (Lease of land for stacking grass.) ✠ ('02) 25 Mad 627 (631) (DB). (Lease for rearing live-stock.) ✠ ('13) 17 Cal L Jour 411 (413, 414) (DB). (Lease of land for grazing ploughing cattle.)

[5] If the primary object of the lease is a purpose relating to agriculture, the lease will be one for an "agricultural purpose." (Vol 18) 1931 Cal 135 (138) (DB) ✠ (Vol 22) 1935 Cal 638 (639) (DB) ✠ (Vol 14) 1927 All 78 (79) (DB) ✠ (Vol 24) 1937 Oudh 151 (152); 12 Luck 514.

[6] A lease, the primary object of which is the user of the property for residential purposes, is not one for agricultural purposes merely because the lessee has also a right to cultivate or raise trees in the compound. (Vol 13) 1926 Cal 312 (313) (DB) ✠ (Vol 8) 1921 Cal 379 (380) (DB).

[7] The following have been held to be leases for agricultural purposes :

(a) A lease for growing casuarina tress. (Vol 9) 1922 Mad 351 (351):45 Mad 710 (DB). (Dissenting from (Vol 4) 1917 Mad 787.)

(b) A reclamation lease granted for the purpose of removing the jungle and bringing the land under cultivation. ('10) 13 Cal L Jour 318 (321) (DB) ✠ (Vol 5) 1918 Nag 210 (211) ✠ (Vol 3) 1916 Cal 609 (611) (DB). [*See* (Vol 22) 1935 Oudh 90 (92) : 10 Luck 490 (DB).]

(c) A lease for rearing tea plants. (Vol 25) 1938 Cal 589 (592) : I L R (1938) 2 Cal 434 (DB).

(d) A lease for working of lac-bearing trees. (Vol 24) 1937 Nag 289 (290) : I L R (1938) Nag 31.

(e) A lease for cultivation of indigo. ('04) 31 Cal 174 (176) (DB) ✠ ('07) 34 Cal 718 (722) : 34 Ind App 133 (PC).

(f) A lease of land for the cultivation of potatoes, grain or vegetables. ('02) 25 Mad 627 (630) (DB).

(g) A lease of land for coffee cultivation. ('01) 24 Mad 421 (426) (DB). (Dissenting from ('94) 17 Mad 98.)

[8] Lease of land on which grass grows spontaneously—Grass preserved and subsequently sold — Lease held for agricultural purposes. (Vol 16) 1929 Oudh 529 (533) : 4 Luck 649 (DB).

[9] In the case of a lease of zerait lands as well as lands settled with raiyats where the lease contemplates direct cultivation of the former by the tenants, the lease is one for an agricultural purpose. (Vol 12) 1925 Pat 421 (431) : 4 Pat 404 (DB).

[10] Under S. 219 (2), Agra Tenancy Act, 1926, a theka shall be deemed to be a lease for agricultural purposes. (Vol 22) 1935 All 382 (386) (DB).

[11] Lease covering entire mouza—Patta requiring lessees to cultivate parti and dih lands and entitling them to increase in rent roll — Fixed raiyati rents not to be reduced—Right to plant trees and sink wells given —Lease held to be a lease for agricultural purposes. (Vol 22) 1935 Pat 508 (511): 15 Pat 8 (DB). (Overruled on another point in (Vol 31) 1944 Pat 87 : 23 Pat 185 (FB).)

[12] A sub-lease of agricultural lands under which the sub-lessee was to hold possession of the property and by making cultivation and proper management to

CHAPTER VI.

OF EXCHANGES.

118. When two persons mutually transfer the ownership of one thing for the ownership of another, neither thing or both things being money only, the transaction is called an "exchange".

"Exchange" defined.

A transfer of property in completion of an exchange can be made only in manner provided for the transfer of such property by sale.

Section 117 — Note 2 *(contd.)*

pay the fixed amount of rent regularly, held was one for agricultural purposes. (Vol 15) 1928 Pat 89 (94) (DB).

[13] Where the holding of a raiyat consisted partly of agricultural and partly of homestead land, and the homestead portion was let out to a sub-tenant: *Held* that, having regard to the nature of the original tenancy, the incidents of the sub-lease would be governed by the provisions of the Bengal Tenancy Act and not by the Transfer of Property Act. (Vol 3) 1916 Cal 32 (32) (DB).

[14] When specific areas are leased and express power is given to lessee to take actual possession of those areas and he has option to cultivate them himself, the lease is one for agricultural purposes. (Vol 14) 1927 All 657 (658) : 50 All 202 (DB).

[15] The following have been held not to be leases for agricultural purposes.

(a) A lease of a right to receive collections of a village. ('02) 5 Oudh Cas 222 (224).

(b) A lease merely for gathering fruits from trees. ('13) 17 Cal L Jour 411 (415) (DB).

(c) A lease of the land for building a shop in a bazar. (Vol 13) 1926 Cal 373 (374) (DB).

(d) A patni lease in Bengal. ('01) 28 Cal 744 (746, 747) (DB) ✠ (Vol 25) 1938 Cal 172 (175) (DB). (Darpatni.)

(e) A lease of a water-tank for sowing water-nuts. (Vol 2) 1915 Nag 49 (51) : 11 Nag L R 49✠(Vol 2) 1915 Nag 57 (58) : 11 Nag L R 122.

[See however ('69) 1 N W P H C R 254 (255) (DB)]

(f) A lease of a water-tank which does not appertain to an agricultural holding but is used only for the preservation and rearing of fish. ('04) 31 Cal 937 (942) (DB) ✠ ('73) 19 Suth W R 200 (201) (DB)✠ (Vol 2) 1915 Nag 57 (58) : 11 Nag L R 122.

[*See also* (Vol 22) 1935 Cal 638 (639).]

[See however (Vol 18) 1931 Cal 135 (137) (DB).]

[16] A lease of a mokarari described and registered as a taluk held not an agricultural lease. (Vol 1) 1914 Cal 618 (621) (DB).

[17] Land leased out for erecting houses and, if lessees liked, planting fruit trees — Lease held not for agricultural purposes. (Vol 13) 1926 Cal 312 (313) (DB).

[18] Where the holding was mainly used for residential purposes, the fact that the surplus land was planted with fruit bearing trees, held did not alter the character of the holding. (Vol 8)1921 Cal 379 (380) (DB).

[19] Lease created expressly for residential purposes in favour of non-agriculturist — No indication that lands were put to agricultural use — Lease held not for agricultural purpose. (Vol 20) 1933 Cal 643 (644).

[20] Lease relating to homestead land within municipal area — Record of rights showing land as bagan— Lessee enjoying home in one of the leased plots for a long time — Lease held not an agricultural lease and governed by the Transfer of Property Act. (Vol 14) 1927 Cal 279 (279) (DB).

[21] Lease in respect of garden land with fruit trees standing on part of which tenant is allowed to have his dwelling place—Lessee required to take care not to injure trees while plucking fruits — Stipulation that if tenant injured the orchard, he was liable to eviction— Lease also contained provision for raising crops—Lease held not for agricultural purposes. (Vol 20) 1933 Cal 822 (823) (DB).

3 Agricultural leases may be made orally.— [1] Agricultural lease from year to year or for a term exceeding one year or reserving a yearly rent, is not required to be made by a registered instrument. Such a lease may be effected by an oral agreement. (Vol 20) 1933 Mad 451 (452) (DB)✠(Vol 19) 1932 Cal 715 (716) (DB) ✠ (Vol 16) 1929 Oudh 529 (533) : 4 Luck 649 (DB) ✠ (Vol 32) 1945 Nag 69 (70) : I L R (1944) Nag 704 (DB)✠(Vol 24) 1937 Nag 289 (290) : I L R (1938) Nag 31✠(Vol 11) 1924 Pat 641 (643) : 3 Pat 349 (DB)✠ (Vol 10) 1923 Cal 432 (433) (DB). (It may be even by conduct of parties.)

[2] If an agricultural lease is made in writing, S. 17, Registration Act, 1908, requires that it should be registered, unless the Provincial Government has exempted from its operation leases for a term exceeding five years and the annual rents reserved by which do not exceed fifty rupees (Vol 20) 1933 Mad 451 (452) (DB) ✠ (Vol 11) 1924 Pat 641 (643) : 3 Pat 349 (DB)✠(Vol 10) 1923 Cal 432 (433) (DB)✠(Vol 32) 1945 Nag 69 (70, 71) : 1 L R (1944) Nag 704 (DB). (Unregistered lease for five years — Landlord cannot recover rent.)✠(Vol 24) 1937 Nag 289 (290) : I L R (1938) Nag 31 ✠ (Vol 13) 1926 Nag 9 (9) ✠ (Vol 28) 1941 Pat 577 (583) : 20 Pat 346 (DB)✠('01) 24 Mad 421 (426) (DB).

SECTION 118 — SYNOPSIS

1. Distinction between sale and exchange.
2. Transfer partly for money—Nature of.
3. Mutual transfer of ownership.
4. Partition is not exchange.
5. Two sale deeds, whether exchange.
6. "Ownership of one thing."
7. Mode of effecting exchange.
8. Remedy of parties to exchange.

1. Distinction between sale and exchange. — [1] An exchange is similar to a sale in so far as it is also a mutual transfer of ownership of one thing for the ownership of another, but it differs from a sale in that neither of the things transferred is the price of the other. (Vol 11) 1924 All 390 (391) : 46 All 359 (DB).

[2] Where *A*, a muktyar gave an eight anna court-fee stamp to *B*, his client, and was going to have another eight-anna stamp from *B* in exchange : *Held*, it was not a sale of stamp. ('03) 30 Cal 921 (922) (DB).

[3] Transfer of cotton for cotton seeds is an exchange. ('01) 25 Bom 696 (698) (S B).

[4] *A* gives *B* one hundred rupee currency note and *B* gives one hundred rupees in coins in return. In this case also neither of the things transferred can be said to be the price of the other. ('78) 3 Cal 379 (382) (DB).

[5] The distinction between a transfer by way of sale and a transfer by way of exchange lies in the nature of the consideration for such transfer. (Vol 25) 1938 All 229 (230, 231) (DB)✠(Vol 7) 1920 Oudh 182 (183).

[6] The provisions of Ss. 118, 119 and 120 show that the Legislature has put an exchange on the same footing with a sale in almost every respect. (Vol 10) 1923 Lah 456 (457).

Section 118 — Note 1 *(contd.)*

[7] Where the transaction otherwise amounts to an exchange, the fact that one of the parties to the transaction intends to sell the land which he takes in exchange after the exchange or that he has contracted to do so before the exchange takes place does not affect the real nature of the transaction. (Vol 31) 1944 Pesh 5 (16).

2. Transfer partly for money — Nature of. — [1] Where the consideration for a transfer of property is partly money and partly other property, and it is not possible to divide the transaction into separate transactions of sale and exchange, it has been held that the transaction would be an exchange and not a sale for the purposes of pre-emption and that this would be so even if the purpose of adding the non-pecuniary portion of the consideration is to defeat the right of pre-emption. (Vol 25) 1938 All 229 (231) (DB)✠(Vol 24) 1937 All 665 (667) (DB) ✠ ('07) 3 Nag L R 138 (139, 140).

[2] A permanent transfer of property for a sum of money plus something that is not money, does not, merely because of such addition, cease to be a sale. ('93) 1893 Pun Re No. 29, page 154 (157, 158) (DB). Per Plowden J.)

[3] If the value of the non-pecuniary consideration forms only a negligible portion of the total consideration, the transaction would be a sale (Vol 23) 1936 Lah 234 (234)✠(Vol 21) 1934 Lah 823 (824).

[4] If the parties, in substance, intended to make an exchange of properties, the mere fact that a small sum of money was paid by one to the other by way of adjusting the values, would not alter the nature of the transaction as an exchange. ('13) 1913 Pun L R No. 199, page 676 (679) ✠ (1900) 1900 Pun Re No. 97, page 391 (392)✠(Vol 12) 1925 Lah 326 (327).

[5] Right of equity of redemption over property transferred for proprietary rights over another property — Transaction is not sale — No right of pre-emption. (Vol 2) 1915 Oudh 149 (151) : 18 Oudh Cas 109 (DB).

[6] In case of a custom to that effect, pre-emption is allowed, even in cases of exchange. ('85) 7 All 626 630, 631, 632) (FB).

3. Mutual transfer of ownership.—[1] A transaction which is a family arrangement is not an exchange. (Vol 15) 1928 All 641 (643) : 51 All 79 (FB).

[2] Where *A* allowed *B* to cultivate his occupancy holding *X* and *B* allowed *A* to cultivate his occupancy holding *Y* but the record remained unchanged and each paid rent for the land he cultivated in the name of the other, it was held that the transaction was not an exchange. (Vol 10) 1923 Nag 144 (144, 145).

[3] Where *A* and *B* hold decrees against each other and settle their claims by a document under which *A* transfers a property to *B*, and *B* merely gives up his claim against *A* under his decree, the transaction is not an exchange. ('07) 11 Cal W N 342 (344) (DB).

[4] Where *A* surrenders his lease-hold interest to his landlord in consideration of another lease given by the latter of other property, there is no mutual transfer of ownership. (1900) 6 Cal W N 905 (910, 911) (DB).

[5] Where a husband transfers land to his wife for use by her during her life-time, and she gives up her right to future maintenance the transaction is not an exchange. (Vol 9) 1922 Mad 311 (313) : 45 Mad 612 (FB).

4. Partition is not exchange.—[1] A partition is not an "exchange". ('98) 25 Cal 210 (215) (DB)✠(Vol 2) 1915 Mad 103 (104) : 43 Mad 849 (D B).

[2] Where *A* and *B* were co-owners of property X, and *B* was the sole owner of property Y, and *B* transferred to *A* property Y in consideration for *A* giving up his rights in property X in favour of *B*, it was held that the transaction was an exchange. ('01) 5 Cal W N 724 (726) (DB).

[3] The transaction contemplated by the section is a mutual transfer brought about in pursuance of an agreement between the parties and a partition is not such a transaction. (Vol 7) 1920 Oudh 182 (183).

[4] Where, under a compromise decree, co-owners of undivided property take specific portions therein in lieu of their undivided interest in the whole property, the compromise does not amount to any transfer of property at all and therefore is not an exchange. (Vol 24) 1937 Pat 232 (234) (DB).

5. Two sale deeds, whether exchange.—[1] The question must be decided having regard to all the circumstances of the case. (Vol 6) 1919 Lah 246 (247).

[2] Where the deeds form part of the same transaction, and no cash consideration passes between the parties, the deeds really constitute only a mutual transfer of ownership of one property for another, and therefore constitute only an exchange. (Vol 25) 1938 All 229 (230) (DB)✠(Vol 6) 1919 Lah 246 (247).

[3] The fact that the value of the properties mutually transferred were fixed by the parties does not necessarily make the transaction mutual sales of property. (Vol 25) 1938 All 229 (231) (DB)✠(Vol 6) 1919 Lah 246 (247).

[But see (Vol 1) 1914 Mad 489 (492) : 37 Mad 422 (DB). (No longer good law in view of the Full Bench decision in (Vol 9) 1922 Mad 311 : 45 Mad 612.)]

[4] Section 92 of the Evidence Act does not preclude the admissibility of extrinsic evidence to show that two documents purporting to be separate sale deeds are in reality part and parcel of the same transaction. (Vol 14 1927 All 696 (697) : 50 All 59 (DB).

[But see ('06) 8 Bom L R 283 (287) (DB). (Case before Transfer of Property Act applied to Bombay.)]

6. "Ownership of one thing." — [1] The word "thing" includes both tangible and intangible things and hence the transfer of a proprietary interest in certain land for the equity of redemption in respect of another land is an "exchange" within this section. (Vol 2) 1915 Oudh 149 (150) : 18 Oudh Cas 109 (DB).

[2] The transfer of a debt in consideration of the transfer of the equity of redemption in certain property is an exchange. (Vol 1) 1914 Mad 489 (492) : 37 Mad 423 (DB).

[3] The transfer of a right to enforce a charge for maintenance for the transfer of ownership of the property has been held to be an exchange (Vol 15) 1928 All 204 (205) (DB).

[4] A transfer of property in consideration of the transferee forbearing to sue to set aside a certain sale is not a mutual transfer of property and is therefore not an exchange. (Vol 18) 1931 Mad 140 (143); 54 Mad 163 (DB).

7. Mode of effecting exchange.—[1] Where the law prescribes a particular mode of transfer, such transfer can be effected only in that mode. ('11) 33 All 728 (731) (DB).

[2] In the case of tangible immovable property of the value of one hundred rupees and upwards, or in the case of a reversion or other intangible thing, the transfer by way of exchange can be made only by a registered instrument. (Vol 3) 1916 Mad 821 (821); 38 Mad 519 (DB) ✠(Vol 12) 1925 Mad 1174 (1174)✠(Vol 1) 1914 Lah 108 (108)✠(Vol 27) 1940 Lah 311 (312)✠(Vol 1) 1914 Mad 489 (492, 493) : 37 Mad 423 (DB)

[3] In the case of tangible immoveable property of a value less than one hundred rupees, a transfer by way of exchange can be made either by a registered instrument or by delivery of the property. (Vol 13) 1926 Mad 543 (544)✠(Vol 19) 1932 Oudh 135 (136) (DB).

[a][**119.** If any party to an exchange or any person claiming through or under such party is by reason of any defect in the title of the other party deprived of the thing or any part of the thing received by him in exchange, then, unless a contrary intention appears from the terms of the exchange, such other party is liable to him or any person claiming through or under him for loss caused thereby or at the option of the person so deprived, for the return of the thing transferred, if still in the possession of such other party or his legal representative or a transferee from him without consideration.]

Right of party deprived of thing received in exchange.

[a] *Substituted* by the Transfer of Property (Amendment) Act, 1929 (20 [XX] of 1929), S. 59.

Section 118 — Note 7 *(contd.)*

[4] Delivery to validate exchange must be physical and not constructive—Intangible property — Exchange not possible. (Vol 33) 1946 All 125 (126).

[5] An exchange may be effected by a single instrument. It is not necessary that there should be two separate deeds of transfer of property. (Vol 16) 1929 All 63 (64).

[6] If *A* and *B* agree to execute separate sale deeds by way of exchange, title will pass to *B* as soon as *A* has duly executed his deed in favour of *B*, notwithstanding that *B* has not executed a similar deed in favour of *A*. (Vol 7) 1920 Oudh 182 (184) ✠ (Vol 16) 1929 All 63 (64).

[7] A deed which simply recites a transaction of exchange that has already taken place and provides for a penalty for failure to carry out the arrangement as agreed, is not itself a deed of exchange. ('91) 1891 Pun Re No. 26, p 148 (149).

8. Remedy of parties to exchange.—[1] On the completion, by mutual transfer, of the transaction of exchange the party who has failed to obtain possession must sue for possession of the property and not for the specific performance of a contract (Vol 16) 1929 All 63 (64).

[2] Where *A* performs his part of the contract by executing a transfer of his property to *B*, but *B* fails to execute a transfer of his property to *A*, *A*'s remedy is only to sue *B* for the specific performance of the contract or for damages for breach of the contract. He cannot sue *B* for recovery of possession of the property transferred to *B*. ('67) 3 Agra H C R 394 (395) (DB).

[3] Neither party performing his part of the contract —Neither of them can sue for specific performance of the contract—One of the parties deprived of possession of his property by the other—Former is entitled to sue for a declaration of title to and for possession of the property. (Vol 3) 1916 Cal 325 (326) (DB).

Section 119—Note 1

[1] The principles of this section have been applied to cases arising in the Province of Punjab. (Vol 21) 1934 Lah 934 (935) ✠ (Vol 4) 1917 Lah 164 (165) : 1917 Pun Re No. 51 (DB).

[2] Where *A* and *B* exchanged certain properties, and the property got by *A* was entered upon by a mortgagee from *B*'s brother under a mortgage given before the date of exchange, *A*'s dispossession is not complete and permanent. *A* is still owner of the property and the section has therefore no application. (Vol 21) 1934 Lah 934 (935).

[3] If the other party is deprived of the property by reason of defect in title he would have the remedy provided for by this section, namely, to the return of the thing transferred by him or to compensation, but until such deprivation the exchange remains valid. (Vol 16) 1929 All 63 (64) ✠ (Vol 27) 1940 All 478 (480).

[4] Where the title of a party to an exchange is initially defective, but subsequent to the exchange, such party acquires a full title to the property, the other party is, by virtue of S. 43, entitled to the benefit of such acquisition. (Vol 8) 1921 Cal 748 (749) (DB).

[5] The amount of compensation would ordinarily be the value of the property of which the party was deprived. If the property has been valued in the deed of exchange itself, such value would furnish a basis for fixing the amount of compensation. (Vol 4) 1917 Lah 164 (166) : 1917 Pun Re No. 51 (DB).

[6] Where a party is deprived of a portion of the property got by him, he must, if he wishes to obtain return of the thing transferred by him, give up the portion of the thing got by him of which he was not deprived. If he retains such portion, his only remedy is to claim compensation for the loss of the other portion. ('99) 9 Mad L Jour 137 (138) (DB). *(Obiter.)* ✠ (Vol 4) 1917 Lah 164 (165, 166) : 1917 Pun Re No. 51 (DB).

[7] Where the guardian of a minor exchanges his property for another, and he is subsequently deprived of the property got by him, the remedy of the minor is to claim that the thing transferred by the guardian should be returned to him or that he should be compensated for the loss. (Vol 11) 1924 Bom 517 (518) (DB).

[8] Where a transaction of exchange is completed and the transferor fails to give possession to the transferee, the latter's remedy is to sue for possession on the basis of his title. He cannot sue for the specific performance of a contract. (Vol 16) 1929 All 63 (64).

[9] Where properties have been mutually transferred by parties by way of exchange, and the exchange is for some reason void, either of them can ordinarily recover from the other the property transferred by him. But where the exchange is void as being prohibited by law, the Court will help neither party in getting back his property from the other. (Vol 8) 1921 Oudh 132 (133)

[10] Where in an exchange between *X* and *Y*, *Y* executed a security bond in favour of *X* binding himself to pay an amount not exceeding Rs. 4014-8 6 at the rate of Re. 1-4-0 per kuli for the land that might go out of *X*'s possession, and *X*, being deprived of the land transferred to him, sued *Y* to recover his own land, it was held that the express terms of the above security bond superseded the rights of the parties under this section and hence *X* was not entitled to claim the return of the land given by him. ('98) 21 Mad 69 (73) (DB).

[11] Where a clause in a deed of exhange was to the effect that "neither party would have any claim against the other contrary to the terms of the exchange" it was held that the clause did not amount to a clear expression of a contrary intention and did not take away the warranty implied by the section (Vol 4) 1917 Lah 164 (165) : 1917 Pun Re No 51 (DB).

[12] A suit for a return of the thing exchanged will be governed by Art. 143, Limitation Act ('07) 30 Mad 316 (319) (DB) ✠ (Vol 7) 1920 Mad 812 (812) : 42 Mad 690 (DB).

[13] A suit for compensation for the loss suffered by the deprivation of the thing exchanged is governed by Art. 83, Limitation Act, or, where the exchange is by a registered document, by Art 116 read with Art. 83 of that Act. ('08) 31 Mad 452 (453) (DB).

120. Save as otherwise provided in this Chapter, each party has the rights and is subject to the liabilities of a seller as to that which he gives and has the rights and is subject to the liabilities of a buyer as to that which he takes.

Rights and liabilities of parties.

Exchange of money.

121. On an exchange of money, each party thereby warrants the genuineness of the money given by him.

CHAPTER VII.

OF GIFTS.

"Gift" defined.

122. "Gift" is the transfer of certain existing moveable or immoveable property made voluntarily and without consideration, by one person, called the donor, to another, called the donee, and accepted by or on behalf of the donee.

Acceptance when to be made.

Such acceptance must be made during the lifetime of the donor and while he is still capable of giving.

If the donee dies before acceptance, the gift is void.

Section 119 — Note 1 *(contd.)*

[14] Where there is an express contract in the deed of exchange between *A* and *B* that each should make good to the other any loss that may be sustained by the other, by giving him other property of equal value, a suit by *A*, on being deprived of his property, against *B* for compelling the latter to give him other property in performance of the contract will be governed by Art 113, Limitation Act. ('99) 9 Mad L Jour 137 (140) (DB) ✠ ('88) 11 All 27 (31) (FB)

[15] This section does not affect the terms and incidents of any exchange made or effected before the 1st April 1930 or any right, title, or obligation or liability acquired, created or incurred before such date. (Vol 27) 1940 Mad 426 (427).

Section 120 — Note 1

[1] Where there was a custom among cotton dealers that dealers delivering cotton to owners of cotton presses with or without a special contract were entitled to get in return the same quality and weight of duly pressed clean cotton, it was held that so soon as the cotton was delivered to the owners of the press, the property in the cotton passed to them and that if it was destroyed by fire thereafter, they should bear the loss, and should pay to the dealers the price of the cotton delivered by them. ('88) 11 Mad 459 (468, 469) (DB).

[2] The fact that under this section the liability of a party who takes in an exchange is the same as that of a buyer in a sale, will not enable a third person to claim a right of pre-emption against such party. (Vol 11) 1924 All 390 (391) : 46 All 359 (DB) ✠ (Vol 24) 1937 All 665 (667) (DB).

[3] No party can claim under this section a charge over other's property as provided for in S. 55, sub-s. (6), cl. (b). (Vol 3) 1916 Mad 821 (822) : 38 Mad 519 (DB).

[4] A party to an exchange cannot invoke the principle of S. 55, sub-s (4), cl (b) and claim a charge for any money that may be due under such exchange. ('12) 16 Ind Cas 109 (109) (DB) (Mad).

Section 121 — Note 1

[1] The mere delivery of money to a person conveys a perfectly valid and indefeasible title to it. ('01) 25 Bom 702 (705) (DB) ✠ ('90) 1890 Pun Re No. 83, p. 259 (261) (DB).

[2] "Money" does not include anything which is not legal tender. It includes current coin of the realm and all things which are "accustomably transferable in the country in the same manner as cash." ('01) 25 Bom 702 (705) (DB).

[3] Badashahi coins of Baroda have not by law been made legal tender in British India and are therefore not "money" in British India. ('01) 25 Bom 702 (705, 706) (DB).

[4] It is not necessary in order to constitute a thing "money" that it should be a legal tender receivable at a value in rupees fixed by law. Where a coin has a current value, attaching to it as coin, and not merely by weighing them as lumps of gold or silver, it is money. ('73) 5 N W P H C R 187 (188) (DB).

SECTION 122 — SYNOPSIS

1 Scope.
2. "Voluntarily."
3. "Without consideration."
4. Competency to give.
5. Competency to receive.
6. "Person."
7. Gift to Hindu idol, etc.
8. "Existing moveable or immoveable property."
9. "Accepted by or on behalf of the donee."
10 Donor dying before acceptance.
11. Advancement.
12. Gift to a persona designata.
13. Gift for unlawful objects.
14. Gift or trust.
15. Gift or sale.
16. Gift or will.

1. Scope.—[1] A gift may be made absolutely or conditionally. Where it is made conditionally the property can be recovered back by the donor on breach of the condition. (Vol 14) 1927 P C 123 (124, 127) (PC) ✠ (Vol 23) 1936 All 197 (199, 200) : 58 All 687 (DB).

[2] A gift which is complete and absolute at the time it was made cannot be modified by conditions subsequently added. ('84) 6 All 313 (321) : 11 Ind App 44 (P C).

[3] A release of a security in favour of the mortgagor is not a transfer of property and hence not a gift. (Vol 13) 1926 Cal 170 (171) (DB).

[4] In the following case, a relinquishment by one of the two coparceners forming a joint Hindu family, of all his interests, was held to amount to a gift. (Vol 30) 1943 Sind 177 (181) : I L R (1943) Kar 227 (DB).

2. "Voluntarily."—[1] The presence of undue influence does not necessarily show that the transfer was not made voluntarily, and that the gift is, therefore, void—if the donor has acted voluntarily, the presence of undue influence would render the gift only voidable. (Vol 32) 1945 P C 54 (56): I L R (1945) Bom 440: I L R (1945) Kar P C 115 : 72 Ind App 21 (PC).

3. "Without consideration."—[1] A transfer in consideration of natural love and affection is a gift. So also is a transfer in consideration of an expectation of spiritual and moral benefit. (Vol 16) 1929 Pat 591 (592, 593) (DB)

[2] The abandonment of a person's right to future maintenance is a "consideration" and a transfer for

Section 122 — Note 3 (*contd.*)

such consideration is not a gift. (Vol 9) 1922 Mad 311 (311) : 45 Mad 612 (FB). (Order of Reference.)

[3] A transfer which purports to be a sale may be shown to be only really a gift. ('11) 33 All 340 (341) : 38 Ind App 85 (PC) (('05) 27 All 612, *Reversed*.)

[4] A transfer for services rendered will, if the services are merely the *motive* for the transfer, be a gift. (Vol 15) 1928 Bom 250 (252) (DB) ✠ (Vol 34) 1947 Bom 198 (202) (DB) ✠ ('10) 34 Bom 287 (290) (DB) ✠ (Vol 5) 1918 Mad 458 (458) (DB).

[5] A settlement on a wife will be a gift even if the marriage proves to be invalid. (Vol 19) 1932 P C 34 (35) (PC).

[6] Promise to discharge the debt of the transferor is a valid consideration and a transfer for such consideration is not a gift. (Vol 15) 1928 All 500 (503) : 50 All 818 (DB).

4. Competency to give. — [1] A minor cannot make a valid gift. ('03) 30 Cal 539 (547, 548) : 30 Ind App 114 (PC).

[2] In the case of a gift by a pardanashin lady, it is necessary to show very clearly that the lady fully understood the transaction. (Vol 9) 1922 P C 14 (15) : 43 All 525 : 48 Ind App 381 (PC) ✠ (Vol 21) 1934 P C 208 (209) (PC) ✠ (Vol 33) 1946 All 121 (124) ✠ (Vol 12) 1925 P C 204 (209) : 28 Oudh Cas 338 : 47 All 703 : 52 Ind App 342 (PC).

[3] Gift was alleged to have been made by an old and infirm woman. It was held that the burden of proving that it was executed with full knowledge of its contents, willingly and without any pressure or undue influence is on the donee. ('12) 15 Ind Cas 529 (532) (DB) (Bom).

[4] A leper is not incompetent to make a gift under the Hindu law. ('66) 6 Suth W R 68 (68) (DB).

5. Competency to receive. — [1] Under the Hindu law also the donee must be in existence at the time the gift takes effect. ('72) 18 Suth W R 359 (367) (PC).

[2] An agent of a person can take a gift from his principal. ('03) 25 All 358 (364) (DB).

[3] A gift can be validly made to an idol. Marsh 357 (360).

6. "Person." — [1] The donee must be an ascertained or ascertainable person. ('03) 13 Mad L Jour 364 (366, 367) (DB).

[2] "Public" cannot be a donee under this section, though apart from this section, there may be a dedication in favour of the public. ('03) 13 Mad L Jour 364 (366, 367) (DB).

[3] An unregistered society is a "person." (Vol 14) 1927 All 789 (789) (DB) ✠ (Vol 22) 1935 All 872 (873). (Gift to Anjuman.)

[See however (Vol 4) 1917 All 94 (94) (DB). (Transfer to "Dharam Samaj" : Held, invalid.)]

[4] Gift in favour of two or more persons—Presumption is that they take only as tenants-in-common. (Vol 4) 1917 Mad 484 (484) (DB) ✠ (Vol 13) 1926 Nag 48 (49).

[5] Where a gift is to two persons only one of whom is capable of taking, the former will take the whole of the property. ('89) 16 Cal 677 (682) : 16 Ind App 44 (PC).

7. Gift to Hindu idol, etc. — [1] Dedication can be validly made to a Hindu idol whether consecrated or to be consecrated. ('10) 37 Cal 128 (140, 141) (FB) ✠ (Vol 1) 1914 Cal 200 (201) : 41 Cal 57 (DB) ✠ (Vol 11) 1924 All 357 (359) : 46 All 130 (DB).

[2] Dedication in favour of an idol is not a "gift" within the meaning of this Act. ('98) 25 Cal 112 (127) ✠ ('88) 12 Bom 247 (264, 265) (DB) ✠ (Vol 1) 1914 Oudh 255 (259) (DB) ✠ (Vol 14) 1927 Mad 636 (638) : 50 Mad 687 (FB). (Idol is not living person.) ✠ (Vol 13) 1926 Nag 469 (470) (Idol is incapable of accepting a gift.) ✠ (Vol 6) 1919 Mad 809 (810, 811) : 42 Mad 440 (DB). (Do.) ✠ ('10) 37 Cal 128 (155) (FB). (Do.)

[But see (Vol 29) 1942 Cal 386 (389) (D B) ✠ (Vol 28) 1936 Cal 556 (561) : 63 Cal 1098 (DB) ✠ (Vol 31) 1944 Nag 33 (35, 36) : I L R (1944) Nag 81 (F B) ✠ (Vol 3) 1916 All 302 (303) (D B) ✠ (Vol 18) 1931 Oudh 14 (14) (D B) ✠ (Vol 15) 1928 All 699 (702).]

[3] A dedication of a house for a choultry does not require registration under S. 123. (Vol 31) 1944 Sind 16 (18) : I L R (1943) Kar 397 (D B).

[*See also* (Vol 31) 1944 Nag (33, 35, 36) : I L R (1944) Nag 81 (F B) ✠ ('04) 6 Bom L R 56 (57) (D B).]

[4] A gift to dharam is void for vagueness. ('99) 26 Bom 725 (735) : 26 Ind App 71 (P C) ✠ (Vol 20) 1933 Lah 833 (835) : 14 Lah 827 (D B) ✠ ('07) 30 Mad 340 (341) (D B). (Subramaniya Ayyar, J., contra.)

[5] A gift for worship of God without naming the deity is void for vagueness and uncertainty of the object of the gift. (Vol 6) 1919 Cal 199 (199) : 46 Cal 951 (D B) ✠ ('11) 33 All 793 (795) (D B).

8. "Existing moveable or immoveable property."—[1] By usage, a Goswami of the Ballavacharya sect has an interest in the property held by him (including the temple and the idol) of which he can make a gift. (Vol 2) 1915 All 44 (49) (D B).

[2] A gift of a non-transferable occupancy holding cannot be questioned by the heirs of the donor himself on the ground of its non-transferability, though such transfer may not be binding on the landlord. (Vol 5) 1918 Cal 615 (616, 617) : 45 Cal 434 (D B).

[3] A gift of a mortgage is a gift of immovable property. (Vol 8) 1921 Mad 137 (138) : 44 Mad 196 (D B).

9. "Accepted by or on behalf of the donee."—[1] There must be actual acceptance of gift, in fact, though it need not be express. (Vol 19) 1932 All 444 (445) : 54 All 534 (D B).

[2] From the conduct of the donee, Courts may draw a presumption that he accepted the gift. (Vol 20) 1933 Cal 488 (489) (D B) ✠ (Vol 19) 1932 All 444 (445, 446) : 54 All 534 (D B) ✠ (Vol 19) 1932 Mad 272 (275) ✠ (Vol 25) 1938 Oudh 26 (30) : 13 Luck 697 (D B).

[3] Where it is shown that the donee was not aware of the gift, it cannot be presumed that he accepted the gift, and there is no valid gift. (Vol 14) 1927 P C 42 (43) : 50 Mad 193 : 54 Ind App 89 (P C).

[4] A guardian of a minor or other person incompetent to contract may accept a gift in favour of such person on his behalf. (Vol 25) 1938 Oudh 26 (30) : 13 Luck 697 (D B).

[5] The minor himself is competent to personally accept a gift without a guardian. (Vol 3) 1916 Nag 55 (55) : 13 Nag L R 18.

[6] The acceptance of a gift which is onerous is sufficient to constitute a valid gift. It is not necessary that the onerous conditions also should be specifically accepted. (Vol 20) 1933 Cal 488 (489) (D B).

[7] Mortgaged property was gifted by *A* to his sons — The sons were held entitled to question the validity of the mortgage. ('26) 95 Ind Cas 406 (406) (D B) (Lah.)

10. Donor dying before acceptance.—[1] It is essential that there should be a transfer of the ownership during the lifetime of the donor. (Vol 30) 1943 Bom 7 (9) (DB).

[2] Where the donor has handed over the document of gift to the donee who has received it, it is sufficient acceptance. The fact that it was not stamped properly and the stamp duty and penalty were paid after the death of the donor does not detract from the complete-

[a]123. For the purpose of making a gift of immoveable property, the transfer must be effected by a registered instrument signed by or on behalf of the donor, and attested by at least two witnesses.

Transfer how effected.

For the purpose of making a gift of moveable property the transfer may be effected either by a registered instrument signed as aforesaid or by delivery.

Such delivery may be made in the same way as goods sold may be delivered.

[a] As to limitation to the territorial operation of S. 123, *see* S. 1 *supra*. S. 123 extends to every cantonment in British India—*see* the Cantonments Act 1924 (2 [II] of 1924), S. 287.

Section 122—Note 10 *(contd.)*

ness of the gift during his lifetime. (Vol 29) 1942 Cal 386 (389) (D B).

11. Advancement.—[1] The doctrine of advancement has no application to this country. (Vol 29) 1942 All 308 (311) : I L R (1942) All 178 (D B) ✠ (Vol 34) 1947 All 314 (316) (D B) ✠ (Vol 15) 1928 P C 172 (173): 55 Cal 944 : 55 Ind App 235 (P C) ✠ (Vol 8) 1921 P C 56 (57) : 48 Cal 260 : 47 Ind App 275 (P C). (The husband or the father would nevertheless be beneficial owners of property purchased in the name of wife or child.) ✠ (Vol 12) 1925 P C 181 (182) : 48 Mad 605 : 52 Ind App 286 (P C). (Do.)

[2] Where *A* deposited his money in the name of himself and his wife, it was held that there was no presumption of any intended advancement to the wife. (Vol 30) 1943 Bom 7 (8) (DB). ((Vol 15) 1928 P C 172: 55 Cal 944 : 55 Ind App 235 (P C), *Rel. on.*)

[3] As between two persons born of British parents, the doctrine of advancement would apply. (Vol 8) 1921 P C 56 (58) : 48 Cal 260 : 47 Ind App 275 (P C.)

[4] The doctrine of advancement does not apply in the case of Indian Christians. (Vol 29) 1942 Mad 503 (505) : I L R (1942) Mad 844 (D B).

[5] Purchase in the name of concubine with the funds of her paramour—It is for her to establish that the purchase was made for her. (Vol 34) 1947 All 314 (316) (D B).

12. Gift to a persona designata.—[1] Gift describing donee "as the adopted son of the donor"—Adoption not valid, or no adoption taking place—Whether the gift stands, depends upon whether the words "adopted son" are merely words of description or whether adoption was the reason for the gift. ('85) 11 Cal 463 (483, 484) : 12 Ind App 72 (P C) ✠ (Vol 9) 1922 Bom 352 (353) : 47 Bom 65 (D B) ✠ (Vol 21) 1934 Oudh 137 (138) : 9 Luck 530 (D B).

13. Gift for unlawful objects.— [1] A gift for future illicit cohabitation is invalid. (Vol 20) 1933 Bom 209 (215) (D B).

[But see ('05) 28 Mad 413 (416, 417) (D B). (Transactions intended to be gifts, if amounting to completed transfers of property, cannot be impeached.)]

[2] A gift in fraud of creditors will not be valid. (Vol 7) 1920 Cal 93 (95) (D B).

14. Gift or trust.— [1] An incomplete gift or voluntary transfer of property cannot take effect as a declaration of trust. (Vol 11) 1924 Bom 88 (89) ✠ (Vol 8) 1921 Cal 148 (149) : 48 Cal 986.

15. Gift or sale.—[1] A document purporting to be a gift may be shown to be really a sale and *vice versa*. ('06) 33 Cal 773 (785) : 33 Ind App 86 (P C) ✠ ('11) 33 All 340 (341) : 38 Ind App 85 (P C) ✠ ('91) 13 All 409 (416, 417) (F B). (*Held*, only a sale.) ✠ ('10) 34 Bom 287 (290) (D B).

16. Gift or will.— [1] A document purporting to be a will may really be a gift or *vice versa*. (1865) 3 Suth W R 200 (202, 203) (DB).

[2] The test is when is the document to take effect and whether the power to revoke is reserved by the author expressly or by necessary implication. (Vol 11) 1924 Mad 605 (606) ✠ (Vol 34) 1947 Bom 49 (51) ✠ (Vol 27) 1940 Mad 236 (238) ✠ (Vol 12) 1925 Mad 471 (472, 473) ✠ (Vol 16) 1929 Lah 143 (144).

SECTION 123—SYNOPSIS

1. Scope.
2. Gifts of immovable property.
3. Registration and operation of gift.
4. "Signed by or on behalf of the donor."
5. "Attested by at least two witnesses."
6. Donee's possession under invalid gift of immovable property.
7. Gifts in Cantonment areas.
8. Delivery of property.
9. Gifts of actionable claims.
10. Law in places to which Transfer of Property Act is not extended.

1. Scope.— [1] With regard to immovable property the section provides that irrespective of the value of the property, the transfer must be effected only by a registered instrument signed by or on behalf of the donor and attested by at least two witnesses. (Vol 3) 1916 All 351 (351) : 38 All 212 ✠ (Vol 26) 1939 Rang 76 (78) : 1938 Rang L R 678 ✠ (Vol 21) 1934 Cal 772 (773) : 61 Cal 525 ✠ (Vol 11) 1924 Pat 657 (660) : 3 Pat 842 (D B) ✠ (Vol 25) 1938 All 452 (454) : I L R (1938) All 633 (D B) ✠ ('99) 1 Bom L R 495 (497) (D B) ✠ (Vol 11) 1924 Nag 214 (215) ✠ (Vol 26) 1939 Mad 290 (290).

[2] With regard to moveable property the section provides two modes of transfer, i. e., it may be effected either by a registered instrument as aforesaid or by delivery of the property. (Vol 30) 1943 Bom 453 (454) ✠ ('87) 14 Cal 446 (449) (D B) ✠ (Vol 28) 1941 Mad 154 (157, 158) : I L R (1941) Mad 232 (D B) ✠ (Vol 9) 1922 All 467 (469) : 45 All 115 (F B) ✠ (Vol 10) 1923 Pat 165 (170) (D B) ✠ (Vol 11) 1924 Pat 657 (660) : 3 Pat 842 (D B) ✠ (Vol 18) 1931 All 596 (597) : 53 All 632 (D B) ✠ (Vol 11) 1924 Bom 88 (88).

[3] The provisions laid down in the section are mandatory and must be strictly fulfilled. (Vol 15) 1928 All 699 (702) (D B). (Gift of immovable property by Hindu by way of sankalap is not valid.)

2. Gifts of immovable property.— [1] A gift which is not registered and signed as required by the section is bad and cannot pass any title to the donee. (Vol 30) 1943 Sind 177 (180) : I L R (1943) Kar 227 (D B) ✠ (Vol 6) 1919 P C 44 (46) : 43 Mad 234 : 46 Ind App 285 (P C) ✠ (Vol 21) 1934 P C 67 (68) : 12 Rang 238 (P C).

[2] A mere delivery of possession without a registered instrument will not cure the defect. (Vol 30) 1943 Sind 177 (181) : I L R (1943) Kar 227 (D B).

[3] Under S. 49 of the Registration Act a deed of gift not registered as required by this section may be used in evidence for collateral purposes. (Vol 30) 1943 Mad 15 (19) (D B).

3. Registration and operation of gift. — [1] Fact of registration of gift does not render gift complete without acceptance—Donor can revoke gift before acceptance. (Vol 26) 1939 Mad 290 (290, 291) ✠ (Vol 11) 1924 Pat 657 (660, 661) : 3 Pat 842 (D B).

[2] Where the donor of immovable property has handed over to the donee an instrument of gift duly

Gift of existing and future property.

124. A gift comprising both existing and future property is void as to the latter.

Gift to several of whom one does not accept.

125. A gift of a thing to two or more donees, of whom one does not accept it, is void as to the interest which he would have taken had he accepted.

Section 123—Note 3 *(contd.)*

executed and attested, and the gift has been accepted by the donee, the donor has no power to revoke the gift prior to the registration of the instrument. (Vol 14) 1927 P C 42 (44) : 50 Mad 193 : 54 Ind App 89 (P C)✠ (Vol 4) 1917 Mad 27 (30) : 40 Mad 204 (FB) ✠ (Vol 10) 1923 Mad 282 (283) (F B) ✠ (Vol 12) 1925 Bom 210 (222, 223) : 49 Bom 388 (FB) ✠ (Vol 15) 1928 P C 86 (87) : 52 Bom 313 (P C).

[3] The mere custody by the donor of the gift deed does not lead to any adverse conclusion against the donee, especially where the entire conduct of the donee shows that he accepted the gift and the document was kept in the family box to which the donee also had access. (Vol 34) 1947 Mad 127 (128).

4. "Signed by or on behalf of the donor."— [1] The words "signed by or on behalf of the donor" have been loosely used in the section, and must be construed as meaning only a signature by a person duly authorised by the donor. ('02) 24 All 319 (325, 327) (F B). (Per *Stanley C. J.*)

[2] Gift of house by *A* to *B*—No document executed — *B* passing document to *A* reciting making of gift — Document signed by *B*—Document held could not have effect of valid gift. (Vol 13) 1926 Bom 261 (262) (DB).

5. "Attested by at least two witnesses."— [1] If there is no attestation as required by the section the deed of gift is null and void. (Vol 12) 1925 Pat 151 (152) ✠ (Vol 29) 1942 Pat 120 (125) (D B).

[2] No attestation of gift as required by section — Deed cannot affect property gifted. (Vol 21) 1934 Cal 772 (775) : 61 Cal 525 ✠ (Vol 9) 1922 Pat 514 (524, 525) : 2 Pat 52 (D B).

6. Donee's possession under invalid gift of immovable property.—[1] Gift of immovable property not effected according to first clause of section — Gift is invalid— Possession of donee is adverse to donor (Vol 6) 1919 P C 44 (46, 47) : 43 Mad 244 : 46 Ind App 285 (P C) ✠ (Vol 13) 1926 Oudh 371 (377) : 29 Oudh Cas 378 : 1 Luck 273(FB)✠(Vol 28) 1941 Pat 219(221)(DB).

7. Gifts in Cantonment areas. — [1] Oral gift by Mahomedan to another in Cantonment area: *Held* that inasmuch as only S. 123 was extended to Cantonment area and not S. 129, Mahomedan law was inapplicable and gift invalid. (Vol 7) 1920 Lah 249 (251).

8. Delivery of property.—[1] Delivery of moveable property under this section is the delivery described in S. 33 of the Sale of Goods Act, 1930 (old S. 90 of the Contract Act, 1872). (Vol 10) 1923 Pat 165 (170, 171) (D B). (Section 90, Contract Act, 1872) ✠ (Vol 1) 1914 Cal 566 (567) (D B). (Do.)✠('84) 6 All 634 (636) (D B). (Do.)

[2] Sum bestowed as gratuity on *X*, railway servant —Order for payment received by pay-master — Before payment sum attached in execution of decree obtained against *X* by *K*— Receipt of order to pay held was not equivalent to delivery of money to *X* and could not be attached by *K* before it was received by *X*. ('84) 6 All 634 (636) (D B).

[3] The delivery of the cheque by the Railway Company to the Mercantile Bank, though coupled with the request to send the amount to their London Office to be paid to defendants is not equivalent to delivery to the defendants. (Vol 11) 1924 Bom 88 (88).

[4] Sum sanctioned as gratuity in favour of deceased railway servant — Amount credited to his Provident Fund account— *Held* there was no delivery of possession. (Vol 30) 1943 Bom 453 (455).

[5] Where the property gifted is handed over to the Court of Wards on account of a minor donee and the Court of Wards assumed superintendence of the property, there is a sufficient delivery so as to pass the property to the donee. (Vol 30) 1943 Sind 177 (181) : I L R (1943) Kar 227 (D B).

[6] Where the property gifted is in the possession of a third person and the third person consents to hold the property on behalf of the donee when asked by the donor to deliver the property to the donee, there is no sufficient delivery of the property to the donee if the third person is not authorised by the donee to hold the property on his behalf. In such a case, the transaction does not operate to transfer the property to the donee. (Vol 10) 1923 Pat 165 (170, 171) (D B) ✠ ('84) 6 All 634 (636) (D B) ✠ (Vol 11) 1924 Bom 88 (88).

[7] Where a deposit was made in a bank by the husband in the joint names of himself and his wife, payable to either or survivor, held that there was no gift of the money by the husband to the wife. (Vol 18) 1931 All 596 (597) : 53 All 633 (D B).

[8] Deposit of money in joint names of husband and wife — Deposit payable to wife only after husband's death— *Held* that the deposit did not operate as a gift to the wife. (Vol 30) 1943 Bom 7 (9) (D B).

9. Gifts of actionable claims.— [1] A deed of gift of immovable property and actionable claims which fails as a gift of immovable property for non-compliance with the requirements of this section does not fail also as a gift of actionable claims unless the gift of the latter is made conditional on the gift of the former taking place (Vol 8) 1921 Mad 137 (139, 140) : 44 Mad 196 (D B).

[2] The making of a gift of a fixed deposit in a bank is not the making of a gift of movable property but is the gift of an actionable claim. The handing over of the fixed deposit receipt would not be enough; it will be necessary to have a document in writing signed by the transferor. (Vol 32) 1945 All 409 (418, 419) (D B).

10. Law in places to which Transfer of Property Act is not extended.— [1] This section will not affect gifts effected in places to which the Transfer of Property Act is not extended. (Vol 8) 1921 Cal 647 (649) (DB) ✠ ('37) 39 Pun L R 1014 (1015)✠(Vol 13) 1926 Lah 286 (287).

[2] Gift to mosque is valid and deed of gift is not admissible without registration under S. 17 (1) (d) of Registration Act. (Vol 13) 1926 Lah 372 (372) (D B).

Section 124—Note 1

[1] Even under the Mahomedan Law there cannot be a gift of future property. ('98) 22 Bom 489 (492) (DB).

[2] Deed transferring whole income of property without transferring property itself—Deed held gift of future income and invalid under S. 124. (Vol 34) 1947 All 179 (180) (DB).

Section 125—Note 1

[1] Gift to two or more persons as joint tenants— Failure of the gift as regards one of them by reason of non-acceptance—The donees who accept the gift would take the whole. ('89) 16 Cal 677 (682): 16 Ind App 44 (P C).

126. The donor and donee may agree that on the happening of any specified event which does not depend on the will of the donor a gift shall be suspended or revoked; but a gift which the parties agree shall be revocable wholly or in part, at the mere will of the donor, is voild wholly or in part, as the case may be.

When gift may be suspended or revoked.

A gift may also be revoked in any of the cases (save want or failure of consideration) in which if it were a contract, it might be rescinded.

Save as aforesaid, a gift cannot be revoked.

Nothing contained in this section shall be deemed to affect the rights of transferees for consideration without notice.

Illustrations.

(a) *A* gives a field to *B*, reserving to himself, with *B's* assent, the right to take back the field in case *B* and his descendants die before *A*. *B* dies without descendants in *A's* lifetime. *A* may take back the field.

(b) *A* gives a lakh of rupees to *B*, reserving to himself, with *B's* assent, the right to take back at pleasure Rs. 10,000 out of the lakh. The gift holds good as to Rs. 90,000, but is void as to Rs. 10,000 which continue to belong to *A*.

SECTION 126—SYNOPSIS

1. Scope.
2. Agreement for revocation.
3. Conditional assignment of insurance policy.
4. Gift revocable at the will of the donor.
5. Paragraph 2—General.
6. Who may suspend or revoke gifts.
7. Revocation, if need be express.
8. "Save as aforesaid, a gift cannot be revoked"—Paragraph 3.
9. "Transferees for consideration without notice"—Paragraph 4.

1. Scope.—[1] Section 126 enumerates some of the conditions under which the donor may revoke the gift; but this section is not exhaustive. (Vol 17) 1930 All 669 (674) (DB).

[2] Before the amendment of S. 129 in 1929, this section did not affect any rule of Hindu law. Under that law, if a person made a gift to another in expectation that the donee will do some work in consideration of the gift, and the donee failed to do it, the gift was revocable. (Vol 17) 1930 All 669 (674) (DB).

[3] Apart from this section a person can make conditional gifts. The conditions in such cases must be valid conditions under the various sections of Chapter II. (Vol 21) 1934 Rang 129 (131) (DB)⁂ ('32) 4 Mad 200 (202, 203) (DB).

2. Agreement for revocation.—[1] *A* making gift of funds for founding college—Founding of college becoming impossible by passing of University Act—*Held* that promoters of scheme and donors must be deemed to have agreed that on failure of scheme gift shall be revoked. (Vol 21) 1934 Oudh 329 (333) (DB).

3. Conditional assignment of insurance policy.—[1] Where a policy of life insurance is assigned with the provision that if the assignee should predecease the assignor, the benefit under the policy should revert to the assignor and form part of his estate the latter provision is valid under this section. The contingency on which the assignment is to be revoked not depending on the assignor's will, is covered by the first part of the first paragraph of this section. (Vol 31) 1944 Nag 185 (186, 187): I L R (1944) Nag 871.

4. Gift revocable at the will of the donor.—[1] Where the gift is revocable wholly or in part at the mere will of the donor the gift is void wholly or in part as the case may be. ('10) 34 Bom 604 (617) ⁂('82) 5 Mad 173 (179) (DB).

5. Paragraph 2—General.—[1] A gift can be revoked on the ground of coercion, fraud, misrepresentation or undue influence. (Vol 5) 1918 Cal 615 (617): 45 Cal 434 (DB).

[2] Where a husband attempted to commit suicide in consequence of which he obtained a deed of release from his wife and the son, it was held that his act amounted to "coercion" and the deed was liable to be set aside. (Vol 5) 1918 Mad 414 (416): 41 Mad 33 (SB).

[3] There are many classes of influence in which the donee from his position is presumed to be likely to have exercise special influence over the mind of the donor. (Vol 14) 1927 P C 148 (150) (P C).

[4] Examples of undue influence—

(a) Influence of solicitor over his client. ('88) 10 Suth W R 469 (472) (DB) ⁂(Vol 17) 1930 Mad 317 (320, 321) (DB).

(b) Influence of medical attendant over his patient. ('37) 1937 All L Jour 1027 (1029) (P C).

(c) Influence of spiritual adviser over his disciple. ('90) 12 All 523 (529) (DB).

(d) Influence of a trustee over his *cestui que trust*. ('06) 30 Bom 578 (589) (DB).

(e) Influence of an executor over the beneficiary under the will. (1893) 1893 W N (Eng) 128 (128), *Wheeler* v. *Sargent*.

(f) Influence of a parent over his child. ('05) 30 Mad 169 (174) (FB).

(g) Influence of an agent over his principal. (Vol 14) 1927 P C 148 (150) (P C).

(h) Influence of a paramour over his mistress. (Vol 25) 1938 Bom 304 (306) (DE).

[5] Where the donee is in a position to exercise undue influence over the donor, the burden is on the donee to show that there was no such influence. He can discharge the burden by showing that the gift was the spontaneous act of the donor, acting under circumstances which enabled the donor to exercise an independent will and which justifies the Court in holding that the gift was the result of the free exercise of the donor's will. (Vol 16) 1929 P C 3 (6) (P C) ⁂(Vol 14) 1927 P C 148 (150) (P C).

[6] There is no rule of law that the gift is invalid in the absence of competent independent advice. (Vol 25) 1938 P C 38 (40): 32 Sind L R 285 (P C) ⁂ ('14) 36 All 81 (91, 92): 41 Ind App 23: 16 Oudh Cas 378 (P C) ⁂(Vol 16) 1929 P C 3 (7) (P C) ⁂(Vol 5) 1918 Cal 363 (371) (S B) ⁂ (Vol 12) 1925 P C 204 (209): 47 All 709: 28 Oudh Cas 338: 52 Ind App 342 (P C).

[7] If upon review of the facts, the conclusion is reached that the obtaining of independent advise would not have made any difference in the result, then the deed ought to stand even when no independent advice was obtained. ('14) 36 All 81 (92): 16 Oudh Cas 378: 41 Ind App 23 (P C)⁂ (Vol 5) 1918 Cal 363 (371) (S B).

[8] The absence of the power of revocation in the gift deed is merely a circumstance to be weighed with

127. Where a gift is in the form of a single transfer to the same person of several things of which one is, and the others are not, burdened by an obligation, the donee can take nothing by the gift unless he accepts it fully.

Onerous gift.

Where a gift is in the form of two or more separate and independent transfers to the same person of several things, the donee is at liberty to accept one of them and refuse the others, although the former may be beneficial and the latter onerous.

A donee not competent to contract and accepting property burdened by any obligation is not bound by his acceptance. But if, after becoming competent to contract and being aware of the obligation, he retains the property given, he becomes so bound.

Onerous gift to disqualified person.

Illustrations.

(a) *A* has shares in *X*, a prosperous joint stock company, and also shares in *Y*, a joint stock company, in difficulties. Heavy calls are expected in respect of the shares in *Y*. *A* gives *B* all his shares in joint stock companies. *B* refuses to accept the shares in *Y*. He cannot take the shares in *X*.

(b) *A* having a lease for a term of years of a house at a rent which he and his representatives are bound to pay during the term, and which is more than the house can be let for, gives to *B* the lease, and also, as a separate and independent transaction, a sum of money. *B* refuses to accept the lease. He does not by this refusal forfeit the money.

Section 126—Note 5 *(contd.)*

the other circumstances of the case. ('12) 15 Ind Cas 529 (533) (DB) (Bom).

[9] Questions which a Court should consider in deciding the issue of undue influence are, (a) whether the gift in question is one which a right minded person might be expected to make; (b) whether the gift is or is not an improvident act on the donor's part; (c) whether the gift is such as to have required advice if not obtained by the donor; and (d) whether the intention to make the gift originated with the donor. ('88) 15 Cal 684 (698, 700): 15 Ind App 81 (P C).

[10] In the case of deeds taken from pardanashin ladies the burden of proof rests on those who found their claim on them (Vol 9) 1922 P C 14 (16): 43 All 525: 48 Ind App 381 (P C) ✠('91) 18 Cal 545 (548): 18 Ind App 144 (P C) ✠('95) 17 All 1 (12): 21 Ind App 148 (P C).

[11] The Courts have been careful to see that the strongest and most satisfactory proof is given by the person who claims under a sale or gift from pardanashin ladies that the transaction was a real or *bona fide* one and fully understood by the woman whose property is dealt with. (Vol 31) 1944 All 42 (53) (DB). (Sale.) ✠('12) 34 All 455 (462): 16 Oudh Cas 271: 39 Ind App 156 (P C) ✠(Vol 25) 1938 P C 38 (40): 32 Sind L R 285 (P C) ✠(Vol 12) 1925 P C 204 (209): 47 All 703: 28 Oudh Cas 338: 52 Ind App 342 (P C).

[12] While it is important to maintain the principles of law laid down for the protection of pardanashin ladies, it is also important not to transmute such a legal protection into a legal disability. (Vol 31) 1944 All 42 (53, 54) (DB) ✠(Vol 15) 1928 P C 303 (305) (P C) ✠('14) 36 All 81 (92): 41 Ind App 23: 16 Oudh Cas 378 (P C).

6. Who may suspend or revoke gifts.—[1] A right to revoke a gift under the provisions of this section may be exercised by the donor himself. It also survives after his death to his legal representatives who may therefore revoke the gift (Vol 12) 1925 All 437 (438): 47 All 619 (DB) ✠(Vol 14) 1927 Bom 384 (387): 51 Bom 133 (DB).

[But see (Vol 21) 1934 All 507 (511) (DB).]

[2] A right to revoke a gift, being a mere right to sue, cannot be transferred by the donor and, consequently, a transferee from the donor cannot claim to exercise such right. (Vol 9) 1922 Pat 514 (525): 2 Pat 52 (DB).

7. Revocation, if need be express.—[1] In the absence of any express reservation of a power of revocation in the gift-deed, a donor does not continue to have the right to revoke a gift. (Vol 34) 1947 Mad 127 (128).

[2] If the donor has the power of revocation, an exercise of that power cannot be inferred from the mere fact that he conveyed the property to a stranger; an express act of revocation would at least be necessary. (Vol 2) 1915 Low Bur 86 (87): 8 Low Bur Rul 185.

[3] A document styled as "a deed of gift" and executed and registered as such conferred on the donee a complete and immediate title to the property subject to the right of the donor to enjoy it during his lifetime. It was held that the document was a deed of gift and not a will and could not be revoked. (Vol 34) 1947 Bom 49 (51, 52).

8. "Save as aforesaid a gift cannot be revoked"—Paragraph 3.—[1] Where a gift is complete and the donor has done all in his power to give effect to it, it is irrevocable except in the circumstances mentioned in the section. ('99) 23 Bom 131 (134) (DB). ✠(Vol 5) 1918 Cal 615 (617): 45 Cal 434 (DB) ✠(Vol 20) 1933 Rang 418 (422) (DB) ✠('86) 1886 All W N 86 (89) (DB).

9. "Transferees for consideration without notice"—Paragraph 4.—[1] A right of revocation under this section cannot be exercised against a transferee for consideration without notice of the existence of such right. (Vol 25) 1938 Cal 157 (160) (DB).

[2] A volunteer or a person who takes with notice of the existence of the right, cannot get the benefit of the saving clause. (Vol 25) 1938 Bom 97 (106) (DB) ✠('07) 30 Mad 169 (178) (S B) ✠(Vol 10) 1923 Mad 67 (69) (DB).

Section 127 — Note 1

[1] Where the thing gifted is itself not burdened by any obligation, but the instrument of gift imposes a condition that the donee should discharge certain liabilities, the donee accepting the gift will take it subject to the condition and is bound to perform the condition. (Vol 20) 1933 Cal 488 (489) (DB) ✠ (Vol 12) 1925 Nag 29 (30).

[2] The third paragraph of this section shows that even a gift subject to a burden can be accepted by a person incompetent to contract without the intervention of a guardian. (Vol 3) 1916 Nag 55 (55): 13 Nag L R 18.

[3] The fact that the donee, after accepting the gift, dies before becoming competent to contract, will not affect the completeness of the gift. ('97) 20 Mad 147 (148) (DB).

128. Subject to the provisions of section 127, where a gift consists of the donor's whole property, the donee is personally liable for all the debts due by [a][and liabilities of] the donor at the time of the gift to the extent of the property comprised therein.

Universal donee.

[a] *Inserted* by the Transfer of Property (Amendment) Act, 1929 (20 [XX] of 1929), S. 60.

129. Nothing in this Chapter relates to gifts of moveable property made in contemplation of death, or shall be deemed to affect any rule of Muhammadan law [a][* * * *]

Saving of donations *mortis causa* and Muhammadan law.

[a] The words "or, save as provided by section 123, any rule of Hindu or Buddhist law" were *repealed* by the Transfer of Property (Amendment) Act, 1929 (20 [XX] of 1929), S. 61.

Section 127—Note 1 *(contd.)*

[4] Until the donee actually repudiates his acceptance of the gift, he will be liable to fulfil the obligation imposed by the gift. (Vol 24) 1937 Oudh 517 (520) (DB).

[5] Once onerous gift is accepted the donee becomes bound to fulfil the obligation by which the property gifted is burdened. (Vol 24) 1937 Oudh 517 (520) (DB) ✠ (Vol 23) 1936 Oudh 47 (48) (DB).

[6] Sections 122 and 123 of the Succession Act correspond to this section.

Section 128—Note 1

[1] Position of universal donee and universal legatee is practically the same. (Vol 32) 1945 All 433 (439): I L R (1946) All 1 (DB).

[2] Even if a deed of trust comprises all the property of the author of the trust, the trustees would not be liable personally for the debts of the author of the trust. (Vol 26) 1939 Oudh 161 (174): 14 Luck 548 (DB).

[3] A surrender by a Hindu widow in favour of the next reversioner is not a gift and this sanction cannot apply to such a transaction. ('36) 18 Nag L Jour 179 (182).

[But see (Vol 24) 1937 Cal 226 (228, 229).]

[4] Where a Hindu widow purported to surrender her interest in favour of a person who was not the next reversioner jointly with the next reversioner, it was held that the transaction was really a universal gift. ('36) 18 Nag L Jour 179 (182). (Surrender in favour of daughter and her son.)

[5] Portion of donor's property excluded from gift—Section will not apply irrespective of value of property excluded or whether it is moveable or immovable. (Vol 17) 1930 All 180 (182) (DB) ✠ (Vol 19) 1932 Oudh 40 (43): 7 Luck 411 (DB) ✠ (Vol 15) 1928 All 500 (502): 50 All 818 (DB) ✠ (Vol 28) 1941 Oudh 205 (210) (DB).

[See however (Vol 31) 1944 Nag 225 (227): I L R (1945) Nag 194 (DB).]

[6] Gift of whole of properties—Compromise between donor and donee giving back a land for which donor was to pay rent to donee, and was to return it to donee in the event of donor dying without issue, —*Held*, donee was a universal donee. (Vol 20) 1933 All 146 (147).

[7] The liability of the universal donee is limited to the extent of the property received by him. (Vol 20) 1933 All 146 (147) ✠ (Vol 22) 1935 Oudh (432, 433): 11 Luck 199 (DB) ✠ (Vol 27) 1940 Lah 285 (288) (DB) ✠ (Vol 15) 1928 All 234 (235) (DB).

[8] A universal donee cannot escape liability by reason merely of the fact that the donor has, after the date of the gift, made part payments towards the debt or acknowledged it, and thus kept the debt alive. ('37) 1937 Mad W N 395 (396). (Renewal of pronote after gift.)

[9] Donor owing to the same person, a mortgage-debt and unsecured debt—Donee of whole property seeking to redeem the mortgage debt only—*Held*, mortgagee was entitled to tack on unsecured debt also to mortgage-debt and claim both. ('83) 7 Bom 101 (106) (DB).

[10] Donor adjudicated insolvent after valid gift of his whole property—Court acting under S. 4 of the Provincial Insolvency Act, cannot sell properties in the hands of donee for payment of debts. (Vol 17) 1930 Pat 305 (306) (DB).

[11] Hindu widow giving her whole property to her reversioners—Donee making part payment towards her mortgage-debt—*Held*, donee cannot take advantage of the widow's death and challenge the mortgage as reversioners. (Vol 31) 1944 Nag 225 (227, 228): I L R (1945) Nag 194 (DB).

[12] The section applies to gifts by Muhammadans or in favour of Muhammadans. (Vol 17) 1930 Oudh 268 (270) (DB) ✠ (Vol 22) 1935 Oudh 432 (433): 11 Luck 199 (DB).

[13] A *hiba-bil-ewaz* is not really a gift and hence section does not apply to it. (Vol 14) 1927 Oudh 176 (176) (DB).

[14] The onus of showing that a transaction in favour of a particular person is a universal gift is on the person setting it up. (Vol 15) 1928 All 500 (502, 503): 50 All 818 (DB).

Section 129—Note 1

[1] Where there is no rule of Muhammadan law inconsistent with any of the provisions of the chapter, those provisions will directly apply even where the transaction is between Muhammadans. (Vol 17) 1930 Oudh 268 (270) (DB).

[2] Where a rule of the Muhammadan law is in conflict with any provision in this chapter, the former will prevail over the latter. ('34) 147 Ind Cas 504 (505) (DB) (Pat).

[3] A gift in contemplation of death is the middle point between a gift *inter vivos* and a legacy. ('71) 6 Mad H C R 270 (278) (DB).

[4] A gift in expectation of suicide is not one made in contemplation of death. (1925) 1925 Ch 553 (555): 95 L J Ch 204, *In re Dudman*.

[5] Whatever strictness is required in the proof of a testamentary disposition is at least equally required in cases of gifts in contemplation of death. ('66) 11 Moo Ind App 139 (168) (PC)

[6] This section does not except from the operation of the chapter those rules of Muhammadan law which were applied by Courts only as being in accordance with justice equity and good conscience. (Vol 23) 1936 Rang 430 (433): 14 Rang 439 (FB) ✠ ('01) 24 Mad 513 (520) (DB) ✠ (Vol 25) 1938 Rang 435 (437) (DB).

[See however (Vol 24) 1937 Rang 240 (244) (DB).]

[7] Where the Muhammadan law was, under the Bengal, Agra and Assam Civil Courts Act, 1887, declared applicable, this section was held not to affect any rule of Muhammadan law so declared applicable. (Vol 16) 1929 Pat 417 (419) (DB).

CHAPTER VIII[a].

OF TRANSFERS OF ACTIONABLE CLAIMS.

Transfer of actionable claim.

130. *(1)* The transfer of an actionable claim [b][whether with or without consideration] shall be effected only by the execution of an instrument in writing signed by the transferor or his duly authorized agent, [c][* * *] shall be complete and effectual upon the execution of such instrument, and thereupon all the rights and remedies of the transferor, whether by way of damages or otherwise, shall vest in the transferee, whether such notice of the transfer as is hereinafter provided be given or not:

Provided that every dealing with the debt or other actionable claim by the debtor or other person from or against whom the transferor would, but for such instrument of transfer as aforesaid, have been entitled to recover or enforce such debt or other actionable claim, shall (save where the debtor or other person is a party to the transfer or has received express notice thereof as hereinafter provided) be valid as against such transfer.

(2) The transferee of an actionable claim may, upon the execution of such instrument of transfer as aforesaid, sue or institute proceedings for the same in his own name without obtaining the transferor's consent to such suit or proceedings and without making him a party thereto.

Exception. — Nothing in this section applies to the transfer of a marine or fire policy of insurance, [d][or affects the provisions of section 38 of the Insurance Act, 1938].

Illustrations.

(i) A owes money to *B*, who transfers the debt to C. *B* then demands the debt from *A*, who, not having received notice of the transfer, as prescribed in section 131, pays *B*. The payment is valid, and *C* cannot sue *A* for the debt.

(ii) A effects a policy on his own life with an Insurance Company and assigns it to a Bank for securing the payment of an existing or future debt. If *A* dies, the Bank is entitled to receive the amount of the policy and to sue on it without the concurrence of *A's* executor, subject to the proviso in sub-section *(1)* of section 130 and to the provisions of section 132.

[a] This Chapter was *substituted* by the Transfer of Property Act, 1900 (2 [II] of 1900), S. 4, for Chapter VIII. [b] *Inserted* by the Transfer of Property (Amendment) Act, 1929 (20 [XX] of 1929), S. 62. [c] The words "and notwithstanding anything contained in section 123" were *omitted*, *ibid.* [d] *Added* by the Insurance Act, 1938 (4 [IV] of 1938), S. 121. [26-2-1938.]

SECTION 130 — SYNOPSIS

1. Scope.
2. "Transfer."
   3. There must be present transfer of an existing actionable claim.
   4. Assignment of rents and profits and assignment of lessor's right of reversion under a lease.
   5. Assignment of part of debt.
   6. Debts due to a joint Hindu family.
   7. Transfer by operation of law.
8. "Whether with or without consideration."
9. Form of assignment.
   10. No particular words are necessary to constitute assignment.
   11. Registration not necessary.
   12. Agreement between debtor and creditor that debts would be paid from a fund in the hands of a third person, if assignment.
13. "Duly authorized agent."
14. Completeness of the transfer and notice to the debtor.
   15. Transfer of mortgage debt — Equities between mortgagor and mortgagee, if available against transferee.
   16. "All the rights and remedies of the transferor whether by way of damages or otherwise, shall vest in the transferee."
   17. Assignor's liability after the assignment.
   18. The right of a tenant in Malabar to compensation.
19. Sub-section (2).
20. Exception.
21. The principle of 'caveat emptor' applies to the purchase of an actionable claim.
22. Law in the Punjab.

1. Scope. — [1] The section contains a special scheme which has some of the features both of the English Common Law and of the principles of equity. (Vol 10) 1923 Cal 719 (722) (DB) ✠ (Vol 22) 1935 Cal 218 (219, 220): 62 Cal 1 (DB).

[2] This section is not inapplicable to Muhammadans so as to take a gift by a Muhammadan of an actionable claim, out of the operation of the section (Vol 4) 1917 Mad 20 (26) (DB) ✠ (Vol 23) 1936 Pat 527 (530) ✠ (Vol 29) 1942 Pat 210 (211): 20 Pat 798 (DB).

2. "Transfer."—[1] The word "transfer" is used in this section in the same wide sense as that which is attributed to the word "convey" by the definition to be found in S. 205 (11), English Law of Property Act 1925. (Vol 25) 1938 Rang 1 (3).

[2] The section covers absolute transfers of actionable claims as well as transfers by way of security. ('13) 37 Bom 198 (210): 40 Ind App 24 (PC) ✠ (Vol 2) 1915 Mad 1031 (1031): 38 Mad 297 (FB) ✠ (Vol 32) 1945 Bom 11 (12) ✠ (Vol 28) 1941 Mad 147 (148): ILR (1941) Mad 378 (DB).

[3] The transfer of an actionable claim may also be made conditionally. (Vol 31) 1944 Nag 185 (187): ILR (1944) Nag 871.

[4] An endowment policy was assigned by the assured in favour of his wife by an endorsement on it and the assignment was duly communicated to the insurance company. The endorsement recited that in the event of the wife predeceasing the assured or in the event of his surviving the date on which the policy was to become mature, the benefits of the policy together with the rights to recover thereunder would revert to the assured. It was held that this section applied to such a transfer. (Vol 26) 1939 Mad 411 (413): ILR (1939) Mad 415 (DB).

Section 130 *(contd.)*

3. There must be present transfer of an existing actionable claim. — [1] The word "transfer" means a present transfer. (Vol 13) 1926 Nag 206 (207).

[2] A promise by the debtor to pay money to his creditor, when he, the debtor, might receive a debt due to him by a third person, does not constitute an assignment of the debt so as to charge the debt in the hands of the third person. ('73) 1873 Pun Re No. 63, p. 99 (100) (DB) ✠ ('84) 1884 Pun Re No. 60, p. 158 (160) (DB).

[3] An undertaking by the debtor to deposit at the creditor's shop all the cheques that he might get from the P. W. Department or to give him cheques in satisfaction of money due to the creditor does not constitute a present assignment of the debt. (Vol 13) 1926 Nag 206 (207).

[4] It is necessary not only that there should be a present transfer, but also that the actionable claim transferred is in existence, at the time of the transfer. (Vol 25) 1938 Rang 1 (4).

[5] A share of a partner in a partnership and the right to recover it is an actionable claim which is assignable but not a right of a partner to a rendition of accounts. (Vol 28) 1941 Sind 73 (78) (DB).

[6] A vendor's right to recover purchase-money from the purchaser is an actionable claim. (Vol 29) 1942 Mad 209 (210).

[7] The buyer's right under S. 61 of the Sale of Goods Act, 1930, to recover back the price paid under a contract of sale on failure of its consideration is an actionable claim. (Vol 30) 1943 Nag 332 (332): I L R (1943) Nag 762.

4. Assignment of rents and profits and assignment of lessor's right of reversion under a lease.— [1] In the case of an assignment of rents and profits the assignee will be entitled to only the right to realize the rents and profits by virtue of the assignment in his favour, but in the case of a reversion, the rights which the lessor had on the date of the reversion will also be transferred to him. (Vol 25) 1938 Mad 100 (102) (DB).

5. Assignment of part of debt. — [1] There is nothing in this section which prohibits the transfer of a part of a debt. (Vol 15) 1928 Mad 1201 (1207): 52 Mad 465 (DB). ((Vol 12) 1925 Mad 753, *Not approved.*) ✠ (Vol 27) 1940 Mad 258 (265) ✠ (Vol 28) 1941 Lah 337 (338) (DB).

[But see (Vol 12) 1925 Mad 753 (756) ✠ (Vol 25) 1938 Cal 377 (381): 62 Cal 510 (DB) ✠ (Vol 27) 1940 Pat 170 (174): 18 Pat 839 (DB).]

6. Debts due to a joint Hindu family. — [1] If there are debts due to a joint Hindu family from a certain person, the member renouncing his share in the debts need not execute a formal deed of transfer in favour of the remaining members. ('36) 63 Cal 194 (204).

[2] Where in a partition of a joint Hindu family a debt evidenced by a pronote falls to the share of a particular member, he can sue to recover the amount due under the pronote without an assignment under this section. ('37) 1937 Mad W N 134 (134) ✠ (Vol 21) 1934 Mad 529 (532): 57 Mad 1082 (DB).

[But see ('07) 17 Mad L Jour 393 (393) (DB).]

7. Transfer by operation of law. — [1] The section does not affect a transfer of an actionable claim by operation of law or by, or in execution of, a decree or order of Court, as such transfers are expressly saved by S. 2, cl. (d). (Vol 30) 1943 Pat 218 (223): 22 Pat 114 (DB) ✠ (Vol 26) 1939 Sind 288 (289): ILR (1939) Kar 344 (DB) ✠ (Vol 13) 1926 Sind 78 (79, 80).

8. "Whether with or without consideration." —[1] The words "whether with or without consideration" make it clear that a gift of an actionable claim can validly be made under this section. (Vol 25) 1938 Mad 236 (238) (DB).

[2] A dedication of an actionable claim to an idol is not governed by this section and may be made orally. (Vol 13) 1926 Nag 469 (470).

9. Form of assignment. — [1] The section requires that the transfer of an actionable claim shall be effected only by the execution of an instrument in writing. (Vol 31) 1944 Cal 335 (339): I L R (1943) 2 Cal 325 ✠ (Vol 19) 1932 Bom 446 (448): 56 Bom 462 (DB) ✠ (Vol 23) 1936 Pat 527 (530) ✠ (Vol 25) 1938 Sind 24 (27): 32 Sind L R 640 ✠ (Vol 27) 1940 Mad 157 (159).

[But see (Vol 24) 1937 All 424 (425) (DB).]

[2] An assignment by way of a trust deed is valid. (Vol 31) 1944 Cal 335 (339): I L R (1943) 2 Cal 325.

[3] The object of reducing the transfer to writing is to put the arrangement entered into between the parties beyond dispute. (Vol 26) 1939 Mad 543 (546) (DB).

[4] As transfers by way of charge on or hypothecation of actionable claim fall under this section, such transfers must be effected by execution of an instrument in writing. ('13) 37 Bom 198 (210): 40 Ind App 24 (P C).

[5] A mere deposit of a life policy will not create any charge on the life policy. ('13) 37 Bom 198 (210): 40 Ind App 24 (P C) ✠(Vol 28) 1941 Mad 147 (148): I L R (1941) Mad 378 (DB).

[6] A deposit of securities lying with the creditor, by the creditor will not create any charge on the debts due by the debtor. (Vol 16) 1929 Rang 318 (319): 7 Rang 365 (D B). (('13) 37 Bom 198: 40 Ind App 24 (P C), *Followed.*)

[7] A fixed deposit is a debt or an actionable claim and transfer of the same can only be made by an instrument in writing signed by the transferor. (Vol 32) 1945 All 409 (411): I L R (1945) All 315 (DB).

10. No particular words are necessary to constitute assignment. — [1] A transfer of an actionable claim need not be in any particular form or be couched in technical language. But the words used must sufficiently indicate the transferor's intention to transfer the claim. (Vol 25) 1938 Mad 236 (238) (DB) ✠('84) 1884 Pun Re No. 60, p. 158 (159) (DB) ✠(Vol 11) 1924 Lah 684 (685) ✠(Vol 13) 1926 Cal 447 (448, 449) (D B) ✠(Vol 24) 1937 All 424 (427) (DB) ✠(Vol 28) 1941 Mad 147 (148): I L R (1941) Mad 378 (DB).

[2] The following are all illustrations of valid assignment of actionable claim:

(a) Endorsement on an instrument which represents the debt. (Vol 22) 1935 All 837 (838) ✠(Vol 24) 1937 Sind 181 (183): 31 Sind L R 93 (DB).

(b) Endorsement on a money bond to the effect, 'I have sold the document', or to the effect, 'the balance due should be paid into the hands of my son'. (Vol 11) 1924 Lah 684 (685).

(c) A direction in writing to pay the amount due on an instrument endorsed on the instrument by the payee thereof coupled with the delivery of the instrument so endorsed to the person to whom the payment is directed. (Vol 13) 1926 Cal 447 (449) (DB) ✠('06) 30 Mad 75 (77, 78) (DB) ✠(Vol 8) 1921 Mad 122 (124) (D B). (But mere acknowledgment of payment by payee is not assignment.)

(d) A partition list allotting a pronote to a particular member of a joint family. ('10) 21 Mad L Jour 80 (82) (DB).

(e) An assignment by way of an entry made in a statement of accounts is sufficient. (Vol 6) 1919 Mad 1076 (1076) (DB).

Section 130—Note 10 *(contd.)*

(f) A letter given by a person to another, directing the latter to receive from the former's debtor the amount due to him under an instalment bond. ('12) 13 Mad L Tim 77 (79) (DB)

(g) Where there is a verbal transfer of an actionable claim on a certain date and the transfer is reduced to writing the next day and the instrument refers to the transfer as having been made on the previous day, the instrument is a deed of transfer and cannot be held otherwise simply because it is expressed in the past tense. (Vol 19) 1932 Bom 446 (448): 56 Bom 462 (DB).

(h) An arrangement by all the partners, on the dissolution of a firm, that some of them would be entitled to the debt due to the firm. (Vol 26) 1939 Sind 288 (289): I L R (1939) Kar 344 (DB).

(i) Money lying with banker as deposit in *A*'s name —Agreement in writing between *A* and *B* that portion of deposit should be transferred to *B* while remaining portion should go to *A*'s benefit — Arrangement operates as assignment of actionable claim. (Vol 25) 1938 Mad 236 (238) (DB).

(j) Money in *A*'s name deposited in Court of Magistrate—Suit by *B* against *A* and attachment before judgment of deposit—On date of hearing *A* admitting *B*'s claim and requesting Court to pay off his claim out of deposit — Court passing decree under O 12, R. 6, Civil P. C., and money requisitioned from Magistrate's Court — *A*'s declaration which was given effect to by Court held amounted to assignment. (Vol 24) 1937 All 424 (426) (DB).

(k) Member of Provident Fund executing trust deed assigning to himself and another person, as trustees, amount of money standing to his credit and other monies to which he might become entitled as subscriber of fund — Trustees to receive money and pay its income to settlor during his life— After settlor's death whole sum to be distributed to certain persons — Right to revoke or alter trust deed reserved by settlor — *Held* there was valid assignment (Vol 31) 1944 Cal 335 (339): I L R (1943) 2 Cal 325.

(l) An application by the assignor to the Court of Wards to take over management of the property including debts due to assignor, on behalf of the minor assignee is sufficient. (Vol 30) 1943 Sind 177 (181): I L R (1943) Kar 227 (DB)

[3] A mere admission or relinquishment by a person of his rights in an actionable claim would not be sufficient. ('12) 16 Cal L Jour 436 (437) (DB).

[4] Where *A* and *C* were partners of a firm and *C* executed a deed of release whereby he gave up his claim to the business of the firm and declared that thenceforth, the partnership would be conducted by *A* and *D*, it was held that no title vested in *A* and *D* under this section as a deed of transfer was necessary. ('12) 16 Cal L Jour 436 (437) (DB).

11. Registration not necessary.—[1] No registration is necessary for the transfer of an actionable claim (Vol 8) 1921 Mad 197 (199): 44 Mad 196 (D B).

[But see (Vol 14) 1927 Rang 39 (40).]

12. Agreement between debtor and creditor that debts would be paid from a fund in the hands of a third person, if assignment.—[1] An agreement between a debtor and a creditor that a particular debt should be paid from and out of a particular fund or money in the hands of a third person would be an assignment of the debt. (Vol 27) 1940 Mad 258 (261, 263) ✠(Vol 20) 1933 Lah 102 (103): 14 Lah 325 (D B) ✠(Vol 5) 1918 Mad 172 (177) (SB) ✠('97) 1897 Pun Re No. 43, p. 195 (200 201) (DB) ✠(Vol 17) 1930 Cal 782 (785): 57 Cal 1101 (DB).

[2] Where, on an instrument executed by *B* in favour of *A*, *A* makes an endorsement directing *B* to pay *C*, and then delivers the instrument so endorsed to *C*, the transaction will be an assignment of the debt. ('07) 30 Mad 75 (77, 78) (DB).

[3] Agreement to pay money out of cheques coming into possession in future creates valid equitable assignment. (Vol 1) 1914 Mad 281 (284): 38 Mad 500 (DB).

[4] A mere direction by *A* to his debtor *B* that he should pay *C*, does not amount to a transfer of the debt to *C* in the absence of any agreement between *A* and *C* that he should get the amount (Vol 13) 1926 Cal 447 (449) (DB) ✠(Vol 12) 1925 Mad 753 (756)

[5] *A* applying to credit society for loan giving his salary bills as security — Application granted — Bond executed by *A* in favour of society not stating that loan would be paid up from *A*'s salary — *A* writing to his employer to pay society such sums out of his salary as society might apply for—*Held* there was no equitable assignment of salary in favour of society. (Vol 29) 1942 Pat 307 (308) (DB).

13. "Duly authorized agent."—[1] Where at the time of the transfer by the agent he was not authorised to do so, but subsequently the principal ratifies the act, the ratification dates back retrospectively to the date of the transfer and cures the defect in the transfer. The transfer must be taken to have been made by an agent duly authorised in that behalf. (Vol 26) 1939 Mad 543 (545) (DB).

14. Completeness of the transfer and notice to the debtor.—[1] A transfer of an actionable claim is complete on the execution of the instrument signed by the transferor (Vol 22) 1935 Cal 756 (758) (DB)

[2] The transfer of an actionable claim does not depend upon the giving of notice to the debtor. (Vol 25) 1938 Rang 426 (428): 1938 Rang L R 480 (D B) ✠(Vol 6) 1919 Mad 1076 (1077) (DB) ✠(Vol 22) 1935 Mad 1003 (1005): 59 Mad 141 (D B) ✠(Vol 27) 1940 Pat 683 (691): 19 Pat 715 (DB).

[3] If there are several transfers of the debts in favour of different persons, they take in the order of the dates of these transfers and not in the order of the dates on which notices were given to the debtor. (Vol 22) 1935 Mad 1003 (1005): 59 Mad 141 (DB).

[4] A subsequent transferee without notice of the earlier transfer may obtain priority over the earlier transferee if the latter has been guilty of gross negligence or is barred by estoppel from setting up his rights (Vol 22) 1935 Mad 1003 (1005): 59 Mad 141 (DB).

[5] A dealing by the debtor with the debt without notice of the transfer will, under the second paragraph of the section, be valid against the transferee (Vol 25) 1938 Rang 1 (5) ✠('87) 3 C P L R 147 (149) ✠(Vol 11) 1924 Pat 118 (119): 2 Pat 754 (DB).

[6] The notice required by this section must be an express notice conforming to the provisions of S 131. (Vol 10) 1923 Cal 719 (720) (D B) ✠(Vol 25) 1938 Rang 1 (5) ✠('10) 33 Mad 123 (129) (DB).

[7] If the notice does not conform to the provisions of S. 131 the debtor is not bound by it and is not debarred from treating the debt as payable to the original creditor. (Vol 2) 1915 Low Bur 10 (11): 8 Low Bur Rul 288.

[8] After the receipt of notice, the debtor cannot refuse to pay the debt to the transferee; if he still makes payment to the transferor he is not absolved from liability to make payment to the transferee. ('10) 33 Mad 123 (130) (DB).

[9] After a notice is given to the debtor of the assignment he cannot make any payment to anyone else even under the order of the Court unless the assignee was a party to the proceeding in which the order is passed,

Section 130 — Note 14 *(contd.)*
(Vol 30) 1943 Mad 244 (245) : I L R (1943) Mad 587 (DB).

[10] A conditional or qualified notice is not invalid. ('10) 33 Mad 123 (129) (DB).

[11] Fact of transfer or its validity and operation disputed—Only safe course for debtor is not to pay debt to any one but to ask claimants to interplead—Payment to person found to have no title—Debtor must pay over again to right person. ('10) 33 Mad 123 (130) (DB).

[12] The notice of transfer must be given to the debtor himself or some person duly authorised by him to receive such notice (Vol 2) 1915 Low Bur 10 (11): 8 Low Bur Rul 288.

[13] The provisions of S 130 presuppose a valid transfer. If the procedure laid down in this section is strictly followed but the transfer contravenes some other provisions of law, no rights under this section can pass from the transferor to the transferee. (Vol 23) 1936 Oudh 275 (276) : 12 Luck 150 (DB).

[14] Where a debt is transferred with the object of defeating the creditors of the transferor, the creditors are not bound by the transfer and can treat the debt as still being the property of the transferor. ('12) 1912 Mad W N 363 (364).

15. Transfer of mortgage debt — Equities between mortgagor and mortgagee if available against transferee. — [1] A notice to the mortgagor is not necessary in order to render its assignment valid. ('11) 11 Ind Cas 778 (778) (DB) (Low Bur).

[2] Until a mortgagor receives notice of the transfer the mortgagor may validly make payment to the mortgagee (transferor) and to have credit for them against the transferee. (Vol 7) 1920 Mad 742 (743) : 43 Mad 803 (D B)✠(Vol 11) 1924 Nag 401 (404) ✠ ('80) 2 Mad 212 (214) (DB).

[3] A right to set off an independent claim against the mortgagee is not available to the mortgagor who has not received notice of the transfer. (Vol 4) 1917 Mad 928 (930): 40 Mad 683 (DB).

16. "All the rights and remedies of the transferor, whether by way of damages or otherwise, shall vest in the transferee."—[1] All rights and remedies of the transferor, whether by way of damages or otherwise, in respect of the actionable claim vest in the transferee. (Vol 23) 1936 Oudh 105 (106) (DB)✠(Vol 6) 1919 Mad 1076 (1077) (D B) ✠ (Vol 22) 1935 Cal 218 (221) : 62 Cal 1 (DB)✠(Vol 32) 1945 Bom 11 (13).

[2] *M* executing bond for certain amount in favour of *S*—Loan to be repaid in yearly instalments without interest—On default in payment of any instalment creditor entitled to sue for that instalment — Stipulations held were voidable on ground of undue influence — Transferee of bond held could avoid stipulations. (Vol 23) 1936 Oudh 105 (106) (DB).

[3] The transferee is after the date of the transfer, the only party entitled to sue the debtor or the other person for the recovery of the actionable claim. (Vol 6) 1919 Mad 1076 (1077) (D B) ✠ (Vol 7) 1920 Mad 426 (427) (DB)✠(Vol 32) 1945 Bom 11 (13)
[But see (Vol 14) 1927 Mad 817 (818)]

17. Assignor's liability after the assignment —[1] Deed of transfer of actionable claim stating that no part payment had been made to transferor — Provision in deed that transferee should collect amount of claim by recourse to litigation if he could not recover it otherwise — Transferee failing to recover debt from debtor — Transferee suing transferor for price paid for transfer and for costs of litigation against debtor. Transferee *held* was entitled to get decree against transferor. (Vol 14) 1927 Rang 129 (129).

[2] Transfer of debt by way of security— Transferee colluding with debtor—Transferor can file suit against transferee for redemption and can get debt re-assigned to him — If security is lost by reason of transferee not enforcing it, transferee can be sued for damages by transferor for his default. (Vol 22) 1945 Bom 11 (13).

18. The right of a tenant in Malabar to compensation. — [1] The right of a tenant in Malabar to compensation for improvements made on the tenancy land is analogous to an actionable claim and a transfer of such right by the tenant to a third person cannot affect the rights of the landlord unless he has notice of the transfer when he accepts the surrender of the property leased and settles the account with the tenant. ('99) 23 Mad 86 (88) (D B) ✠ (Vol 13) 1926 Mad 650 (651).

19. Sub-section (2). — [1] The transferee is not required to obtain the consent of the transferor to the suit or proceeding against the debtor or other person and need not make the transferor a party to such suit or proceeding. (Vol 22) 1935 Cal 756 (758) (DB).

20. Exception.—[1] Transfers of fire and marine policies have been excepted from the general provisions of this section. (Vol 24) 1937 Sind 181 (183) : 31 Sind L R 98 (DB).

[2] Until the amendment of the Exception in 1938 transfers of life policies were required to be made in accordance with the provisions of this section. ('13) 37 Bom 471 (478) (DB)✠(Vol 24) 1937 Sind 181 (183) : 31 Sind L R 98 (DB).

[3] The rights and remedies of a transferee of a life policy existing prior to the commencement of the Insurance Act, 1938, are not affected by the provisions of S. 38 of the Act. (Vol 31) 1944 Nag 185 (186) : I L R (1944) Nag 871.

21. The principle of "caveat emptor" applies to the purchase of an actionable claim. — [1] The principle of "*caveat emptor*" applies to the purchase of an actionable claim. (Vol 2) 1915 Lah 86 (86).

[2] Holder of promissory note paid off by executant —After holder's death, his widow not knowing that note was paid off, selling note — Principle of "*caveat emptor*" held applied and purchaser had no remedy (Vol 2) 1915 Lah 86 (86).

22. Law in the Punjab. — [1] The technical provisions contained in this section as to the requirements of writing for the transfer of an actionable claim are not applicable in the Punjab. (Vol 23) 1936 Lah 547 (548)✠(Vol 12) 1925 Lah 575 (575)✠(Vol 19) 1932 Lah 30 (31).

[2] The Courts are guided by the rules of justice equity and good conscience as regards the requirements of writing for the transfer of actionable claim. ('07) 1907 Pun Re No. 9, p. 46 (53).

[3] The Court applied the provisions of S 25, sub-s. (6) of the English Judicature Act, 1873 as being in consonance with justice, equity and good conscience. ('07) 1907 Pun Re No. 9 p 46 (52).

[4] Where a part of a debt was assigned, it was held that if this section enabled the transfer of a part of the debt, the principle underlying the section may be applied to the cases arising in the Punjab also, and that if it did not, then even according to the rules of justice, equity and good conscience, the assignee's rights were enforceable where the assignor and other persons interested were made parties and there was no question of any harassment of the debtor by a multiplicity of proceedings. (Vol 28) 1941 Lah 337 (337, 338) (DB).

Transfer of policy of marine insurance.

[a][130A. *(1)* A policy of marine insurance may be transferred by assignment unless it contains terms expressly prohibiting assignment, and may be assigned either before or after loss.

(2) A policy of marine insurance may be assigned by endorsement thereon or in any other customary manner.

(3) Where the insured person has parted with or lost his interest in the subject-matter insured, and has not, before or at the time of so doing, expressly or impliedly agreed to assign the policy any subsequent assignment of the policy is inoperative :

Provided that nothing in this sub-section affects the assignment of a policy after loss.

(4) Nothing in clause *(e)* of section 6 shall affect the provisions of this section.]

[a] *Inserted* by the Transfer of Property (Amendment) Act, 1944 (6 [VI] of 1944), S. 2. [7-3-1944.]

Notice to be in writing, signed.

131. Every notice of transfer of an actionable claim shall be in writing, signed by the transferor or his agent duly authorized in this behalf, or, in case the transferor refuses to sign, by the transferee or his agent, and shall state the name and address of the transferee.

Liability of transferee of actionable claim.

132. The transferee of an actionable claim shall take it subject to all the liabilities and equities to which the transferor was subject in respect thereof at the date of the transfer.

Illustrations.

(i) *A* transfers to *C* a debt due to him by *B*, *A* being then indebted to *B*. *C* sues *B* for the debt due by *B* to *A*. In such suit *B* is entitled to set off the debt due by *A* to him; although *C* was unaware of it at the date of such transfer.

(ii) *A* executed a bond in favour of *B* under circumstances entitling the former to have it delivered up and cancelled. *B* assigns the bond to *C* for value and without notice of such circumstances. *C* cannot enforce the bond against *A*.

Warranty of solvency of debtor.

133. Where the transferor of a debt warrants the solvency of the debtor, the warranty, in the absence of a contract to the contrary, applies only to his solvency at the time of the transfer, and is limited, where the transfer is made for consideration, to the amount or value of such consideration.

Section 131 — Note 1

[1] The requirements of this section must be strictly complied with for bringing into operation the proviso to S. 130 (1). (Vol 10) 1923 Cal 719 (719) (D B) ✠ ('07) 9 Bom L R 838 (843) (D B).

[2] The transferee or his agent can sign the notice only if the transferor refuses to sign it. ('10) 33 Mad 123 (130 (D B).

[3] The fact of transferor's refusal need not be mentioned in the notice. ('10) 33 Mad 123 (130) (D B).

[4] Where a notice was served by the transferee on the debtor and it was not proved that the transferor refused to sign the notice, it was held that a payment made by the debtor to the transferor was valid. (Vol 2) 1915 Low Bur 10 (11) : 8 Low Bur Rul 288.

[5] where the notice states the name of the transferee but does not state his address the provisions of this section are not complied with, and the notice is not effective to bring the exception mentioned in the proviso to sub-s. (1) of S. 130 into operation. (Vol 10) 1923 Cal 719 (719, 720) (DB).

[6] The name and address of the solicitor of the transferee cannot be substituted for the name and address of the transferee himself. (Vol 10) 1923 Cal 719 (720) (D B).

[7] Notice under this section will not be bad merely because it is coupled with a condition or qualification, provided the other requirements of the section are complied with. ('10) 33 Mad 123 (129) (D B).

[8] Where the notice does not strictly comply with the provisions of this section and is defective in form the debtor himself cannot generally waive the defects in a notice. (Vol 10) 1923 Cal 719 (720) (D B).

Section 132 — Note 1

[1] Right to recover arrears of profits assigned to cosharer in conveyance of village share—Cosharer suing lambardar to recover the arrears — Lambardar claiming to set off against the claim, amounts due to him— *Held* that the right to recover the profits was an interest in immovable property and not an actionable claim, and that this section did not apply. (Vol 23) 1936 Nag 217 (218).

[2] Where the debtor is entitled to set off against the assigned debt another debt due to him, the assignee can, as the first illustration shows, take the assignment only subject to this right of set off. ('07)30 Mad 235(238)(DB).

[3] Where the debtor is entitled to claim unliquidated damages from the assignor arising out of the same transaction as the assigned debt, he can set off the same against the assigned debt. (1878) 26 W R (Eng) 403 (404) : 3 Ex D 127, *Young* v. *Kitchin* ✠ (1888) 57 L J P C 35 (41) : 13 App Cas 199, *Government of Newfoundland* v. *Newfoundland Rly. Co.*

[4] It is the duty of the assignee before he takes the assignment to make enquiries as to any equities or liabilities affecting the subject-matter of the assignment. (Vol 3) 1916 Mad 242 (246) (D B).

[5] It is not the duty of the debtor to inform the assignee, on the receipt of notice of assignment, that the assignment is burdened with liabilities, unless there are circumstances leading him to think that the assignee is being defrauded and is likely to sustain further loss. (1848-52) 8S R R 296 (313) : 3 H L C 702, *Mangles* v. *Dixon*.

[6] Where *A* owed a debt to *B*, and *B* owed another debt to *A* and in execution of a decree against *B*, the debt due by *A* to *B* was sold and was purchased by *C*. it was held that in a suit by *C* against *A* to enforce the debt, *A* can set off the debt due by *B* to him. (Vol 10) 1923 Lah 261 (262) : 3 Lah 414 (D B) ✠ (Vol 31) 1944 Nag 98 (99) : I L R (1944) Nag 170.

[*See also* (Vol 1) 1914 Bom 299 (299) : 38 Bom 631 (D B).]

134. Where a debt is transferred for the purpose of securing an existing or future debt, the debt so transferred, if received by the transferor or recovered by the transferee, is applicable, first, in payment of the costs of such recovery: secondly, in or towards satisfaction of the amount for the time being secured by the transfer; and the residue, if any, belongs to the transferor or other person entitled to receive the same.

Mortgaged debt.

[a][**135.** Every assignee, by endorsement or other writing, of a policy of insurance against fire, in whom the property in the subject insured shall be absolutely vested at the date of the assignment, shall have transferred and vested in him all rights of suit as if the contract contained in the policy had been made with himself.]

Assignment of rights under policy of insurance against fire.

[a] *Substituted* by the Transfer of Property (Amendment) Act, 1944 (6 [VI] of 1944), S. 3. [7-3-1944.]

[a][**135A.** *(1)* Where a policy of marine insurance has been assigned so as to pass the beneficial interest therein, the assignee of the policy is entitled to sue thereon in his own name; and the defendant is entitled to make any defence arising out of the contract which he would have been entitled to make if the action had been brought in the name of the person by or on behalf of whom the policy was effected.

Assignment of rights under policy of marine insurance.

(2) Where the insurer pays for a total loss, either of the whole, or, in the case of goods, of any apportionable part, of the subject-matter insured, he thereupon becomes entitled to take over the interest of the insured person in whatever may remain of the subject-matter so paid for, and he is thereby subrogated to all the rights and remedies of the insured person in and in respect of that subject-matter as from the time of the casualty causing the loss.

(3) Where the insurer pays for a partial loss, he acquires no title to the subject-matter insured, or such part of it as may remain, but he is thereupon subrogated to all rights and remedies of the

Section 134 — Note 1

[1] This section deals with cases of transfers by way of security. (Vol 22) 1935 Cal 218 (221) : 62 Cal 1 (DB) ✠ ('10) 33 Mad 123 (129) (D B).

[2] In cases of transfers of a book-debt for the purpose of securing a debt the transfer sometimes takes the form of an absolute assignment but it can be shown that the transfer was not absolute, but was intended to be merely by way of security. (Vol 22) 1935 Cal 218 (220, 221) : 62 Cal 1 (D B).

[3] Debt due to *A* from *C* secured by pledge or hypothecation of *C's* property — *A* can transfer such debt, separated from security to *B* to secure debt due to *B* by *A*—*B* will be entitled to benefit of all sums received by *A* from *C* in reduction of his own debt whether recovered from secured property or otherwise. (Vol 18) 1931 P C 245 (247, 248) : 59 Cal 377 : 58 Ind App 323 (P C).

[See however (Vol 8) 1921 Mad 681 (681) (D B).]

[4] After a debt is transferred by way of security, the remedy of the transferor as a creditor regarding the recovery of the debt passes to the transferee and what remains in the transferor is only the right to redeem the transferee. (Vol 2) 1915 Mad 1031 (1032) : 38 Mad 297 (F B).

[5] The transferor cannot proceed against his debtor. (Vol 7) 1920 Mad 426 (427) (D B) ✠ (Vol 32) 1945 Bom 11 (13).

[6] The only person who can sue for the recovery of the debt in his own name is the transferee himself. (Vol 2) 1915 Mad 1031 (1031, 1032) : 38 Mad 297 (F B)✠(Vol 7) 1920 Mad 426 (426) (D B)✠(Vol 32) 1945 Bom 11 (13).

[7] After the execution of the transfer of a debt no decree can be passed in favour of the transferor plaintiff in a suit by him to recover the debt even if the transferee is impleaded as a defendant. (Vol 32) 1945 Bom 11 (13).

[8] It is the duty of the transferee to use reasonable diligence to recover the debt from the debtor. ('04) 32 Cal 27 (35) : 31 Ind App 176 (P C).

[9] Transferee failing to use reasonable diligence to recover debt due to his own fault — He will be deemed to have recovered it and will not be allowed to claim it from transferor. ('04) 32 Cal 27 (35) : 31 Ind App 176 (P C) ✠ (Vol 2) 1915 Mad 1031 (1032) : 38 Mad 297 (F B) ✠ (Vol 7) 1920 Mad 426 (427) (D B).

[10] Where the plaintiff transferor has an interest jointly with the assignee it does not matter whether the transferee was a defendant or plaintiff and a decree can be passed in favour of the transferor plaintiff and the transferee. (Vol 32) 1945 Bom 11 (13).

[11] Where a charge is created on a debt by way of security it amounts to a transfer and the charge-holder can sue to recover the debt from the transferor's debtor. ('11) 34 Mad 53 (54) (D B) ✠ ('09) 33 Bom 610 (627, 628) (D B).

[12] When the transferee brings a suit against the transferor's debtor for the recovery of his debt, he must implead the transferor as a party to the suit, so that the matter may be settled in his presence. (Vol 7) 1920 Mad 426 (427) (D B).

[13] When a debt is transferred by way of security only, the transferee does not become the absolute owner thereof. He becomes entitled to recover out of the transferred debt only the amount which is secured, the residuary interest being still left in the transferor. (Vol 22) 1935 Cal 218 (221) : 62 Cal 1 (D B).

[14] The transferor can at any time pay off the debt due to the transferee and have the security released. (Vol 22) 1935 Cal 218 (221) : 62 Cal 1 (D B) ✠ (Vol 27) 1940 Mad 258 (264).

Section 135 — Note 1

[1] Where *A* mortgaged certain property to *B* and then insured the same against fire it was held that *B*, who did not take an assignment of the policy, was not entitled to claim the insurance amount from the insurer, when the property was destroyed by fire. (Vol 10) 1923 Rang 6 (7, 8): 11 Low Bur Rul 294 (D B).

insured person as from the time of the casualty causing the loss, in so far as the insured person has been indemnified by such payment for the loss.

(4) Nothing in clause *(e)* of section 6 shall affect the provisions of this section.]

[a] *Inserted* by the Transfer of Property (Amendment) Act, 1944 (6 [VI] of 1944), S. 4. [7-3-1944.

Incapacity of officers connected with Courts of Justice.

136. No Judge, legal practitioner or officer connected with any Court of Justice shall buy or traffic in, or stipulate for, or agree to receive any share of, or interest in, any actionable claim, and no Court of Justice shall enforce at his instance, or at the instance of any person claiming by or through him, any actionable claim, so dealt with by him as aforesaid.

Saving of negotiable instruments, etc.

137. Nothing in the foregoing sections of this Chapter applies to stocks, shares or debentures, or to instruments which are for the time being, by law or custom, negotiable, or to any mercantile document of title to goods.

Explanation. — The expression "mercantile document of title to goods" includes a bill of lading, dock warrant, warehouse-keeper's certificate, railway receipt, warrant or order for the delivery of goods, and any other document used in the ordinary course of business as proof of the possession or control of goods, or authorizing or purporting to authorize either by endorsement or by delivery, the possessor of the document to transfer or receive goods thereby represented.

Section 136 — Note 1

[1] Any transfer in defiance of the prohibition contained in this section is void. (Vol 19) 1932 All 345 (347): 54 All 499 (D B).

[2] A purchase by a pleader of an actionable claim under a life insurance policy in execution of a decree is not vitiated by this section. (Vol 14) 1927 Cal 691 (692) (D B).

[3] A sale or an assignment by way of security of an actionable claim to any of the persons named in the section comes within the prohibition and is therefore void. (Vol 12) 1925 Pat 310 (312) : 4 Pat 43 (D B)✠ (Vol 19) 1932 All 345 (347): 54 All 499 (D B)✠('13) 40 Cal 650 (677) (F B) ✠ (Vol 1) 1914 Mad 512 (519) : 37 Mad 238 (F B ✠(Vol 22) 1935 Cal 756 (759): 63 Cal 578 (D B). (Assignment by way of security.)

[4] *Held*, that a gift by a Judge to his nephew, a Barrister, of his rights under the contract to purchase certain immovable property did not amount to buying or trafficking in or stipulation for any share of or interest in an actionable claim. (Vol 11) 1924 Lah 709 (710) (D B)

[5] The section does not prohibit a mere sale by any of the persons named. (Vol 14) 1927 Pat 2 (4) (D B).

[6] Where a pleader advanced money to his client on a usufructuary mortgage, for the purpose of paying off a redemption decree passed in the client's favour, it was held that the transaction of mortgage did not offend this section. (Vol 3) 1916 Oudh 219 (220) : 19 Oudh Cas 60.

[7] The term "legal practitioner" will include an advocate, a vakil, attorney of a High Court, a pleader, a mukhtar or revenue agent. (Vol 19) 1932 All 345 (347): 54 All 499 D B (Vakil) ✠ (Vol 12) 1925 Pat 310 (311, 312): 4 Pat 43 (D B) (Mukhtar) ✠('13) 40 Cal 650 (651) (F B) (Pleader — Per Richardson and Stephen, JJ., in Order of Reference.)

[8] A pleader's clerk is not disqualified from dealing in actionable claim. ('96) 9 C P L R 35 (35).

SECTION 137 — SYNOPSIS

1. Shares.
2. "Instruments which are negotiable."
3. Transfer of negotiable instruments.
4. "Any mercantile document of title to goods."

1. Shares.—[1] A share is not a chose in action in India. It is a moveable property within the meaning of the Indian Companies Act, 1913, and is transferable in the manner stated in that Act (Vol 13) 1926 P C 38 (40): 50 Bom 360 : 53 Ind App 92 (P C)✠(Vol 30) 1943 Mad 74 (76) : I L R (1943) Mad 115 (D B). (*Reversing* (Vol 28) 1941 Mad 394: I L R (1941) Mad 419.)

2. "Instruments which are negotiable" — [1] The two essentials of negotiability are (i) that the instrument is transferable like cash, merely by delivery, and (ii) that the person holding it is able to sue, in due course, in his own name. (Vol 25) 1938 Sind 24 (27) : 32 Sind L R 640.

[2] A *bona fide* transferee for value of negotiable instrument acquires a good title thereto, even though his transferor had none. (Vol 5) 1918 Low Bur 122 (128) : 9 Low Bur Rul 143 (D B).

[3] A negotiable instrument partakes of the nature of a contract also, as it contains either an order or a promise to pay money. (Vol 21) 1934 Cal 549 (549) : 61 Cal 425 (D B).

[4] Promissory notes, bills of exchange and cheques are "negotiable" within the meaning of Negotiable Instruments Act, 1881, when they are payable either to order or to bearer. ('70) 14 Suth W R (O C) 5 6) (D B). (A bill of exchange)✠(Vol 21) 1934 Bom 356 (358) (DB). (Pronote payable to bearer or order.)✠(Vol 7) 1920 Low Bur 42 (43) : 10 Low Bur Rul 96 (Do) ✠ (Vol 18) 1931 Cal 387 (388) : 58 Cal 752 (D B) (Do.) ✠ ('93) 17 Mad 85 (86) (D B) (Do)✠(Vol 22) 1935 Rang 156 (157) (Do).

[5] Instruments such as various kinds of hundis, debentures payable to bearer, or scripts or bonds, have been regarded as negotiable instruments by the custom of trade (Vol 6) 1919 Lah 85 (86): 1919 Pun Re No 29 (D B) ✠ (1898) 67 L J Q B 986 (995): (1898) 2 Q B 658, *Bachunaland Exploration Co.* v. *London Trading Co.* ✠(Vol 5) 1918 Low Bur 122 (128): 9 Low Bur Rul 143 (D B).

[6] "Pahunch" is ordinary receipt and not negotiable instrument. (Vol 25) 1938 Sind 24 (27) : 32 Sind L R 640.

[7] A document of title to goods cannot be negotiable in the strict sense of the word as the endorsee of it does not get a better title than his assignor. (Vol 5) 1918 Low Bur 122 (128): 9 Low Bur Rul 143 (D B).

[8] A promissory note made payable simply to the payee is not negotiable. ('75) 1 All 732 (734) (D B) ✠ (97) 7 Mad L Jour 231 (232) (D B)✠('06) 1906 Pun Re No 144, p. 516 (518).

[9] A deposit receipt is not a negotiable instrument. (Vol 1) 1914 Bom 286 (287): 38 Bom 618 (D B).

[10] A railway receipt is not a negotiable instrument unless by special custom. (Vol 10) 1923 Rang 1 (3, 4): 11 Low Bur Rul 341 (D B).

THE SCHEDULE.

Year and chapter.	Subject.	Extent of repeal.
	(a) STATUTES.	
27 Hen. VIII, c. 10	Uses	The whole.
13 Eliz., c. 5	Fraudulent conveyances	The whole.
27 Eliz., c. 4	Fraudulent conveyances	The whole.
4 Wm. and Mary, c. 16	Clandestine mortgages	The whole.
	(b) ACTS OF THE GOVERNOR-GENERAL IN COUNCIL.	
IX of 1842	Lease and release	The whole.
XXXI of 1854	Modes of conveying land	Section 17.
XI of 1855	Mesne profits and improvements	Section 1 so far as the title, the words "to mesne profits and," and in the preamble "to limit the liability for mesne profits and".
XXVII of 1866	Indian Trustee Act	Section 51.
IV of 1872	Punjab Laws Act	So far as it relates to Bengal Regulations I of 1798 and XVII of 1806.
XX of 1875	Central Provinces Laws Act	So far as it relates to Bengal Regulations I of 1798 and XVII of 1806.
XVIII of 1876	Oudh Laws Act	So far as it relates to Bengal Regulation XVII of 1806.
I of 1877	Specific Relief Act	In sections 35 and 36, the words "in writing".
	(c) REGULATIONS.	
Bengal Regulation I of 1798.	Conditional sales	The whole Regulation.
Bengal Regulation XVII of 1806.	Redemption	The whole Regulation.
Bombay Regulation V of 1827.	Acknowledgment of debts; Interest; Mortgagees in possession.	Section 15.

Section 137 – Note 3 *(contd.)*

3. Transfer of negotiable instruments.—[1] The usual mode of transfer of a negotiable instrument is by endorsement or by delivery. (Vol 22) 1935 Bom 343 (346) : 59 Bom 573 ✠ (Vol 24) 1937 Pat 100 (102) : 16 Pat 74 (F B)

[2] Such instruments may be transferred otherwise than by negotiation. (Vol 24) 1937 Oudh 405 (405, 406): 13 Luck 373 (D B). (Written assignment of promote – Endorsement not necessary to make assignment valid.)✠ (Vol 24) 1937 Pat 100 (102): 16 Pat 74 (F B) (Transfer by registered instrument; (Vol 21) 1934 Pat 382 : 13 Pat 655, *Overruled.*)✠(Vol 26) 1939 Lah 501 (502): ILR (1940) Lah 84. (Oral assignment is valid in the Punjab.)✠ (Vol 6) 1919 Lah 85 (86) : 1919 Pun Re No. 29 (D B) (D)✠(Vol 28) 1941 Pesh 45 (47) (D B) (In the Punjab and N. W. F P, hundis can be assigned orally.) (Vol 8) 1921 Low Bur 92 (93) : 11 Low Bur Rul 174. (Assignment in writing is valid under the general law apart from T. P. Act.)

[*See* (Vol 30) 1943 Sind 67 (72) : I L R (1942) Kar 516 (D B). (But not by a mere book entry.)]

[3] Negotiable Instruments Act does not prohibit assignment in any of the several ways allowed by law. (Vol 20) 1933 Mad 133 (133).

[4] Negotiable instruments are actionable claims and as such they can also be transferred by assignment under S. 130 ('05) 28 Mad 544 (545, 546) (D B)✠(Vol 1) 1914 Cal 566 (566) (D B) ✠ (Vol 8) 1921 Low Bur 92 (93, 94) 11 Low Bur Rul 174 ✠(Vol 20) 1933 Mad 133 (133) (D B) ✠ (Vol 22) 1935 Bom 343 (346) : 59 Bom 573 ✠ (Vol 19) 1932 Nag 23 (24) : 27 Nag L R 327 ✠ (Vol 21) 1934 Cal 549 (549): 61 Cal 425 (D B)✠ (Vol 2) 1915 Mad 1031 (1031, 1032): 38 Mad 297 (F B)✠('06) 9 Oudh Cas 174 (177) (D B)✠(Vol 13) 1926 Nag 206 (207).

[5] The incidents, of a transfer by assignment and of a transfer by endorsement are different. In the former case, the assignee acquires all the right, title and interest of the assignor, while an endorsee is clothed with the rights and advantages of a holder in due course (Vol 22) 1935 Bom 343 (346) : 59 Bom 573 ✠ (Vol 19) 1932 Nag 23 (25) : 27 Nag L R 327 ✠ (Vol 25) 1938 Mad 377 (379) : I L R (1938) Mad 568 (FB) ✠ ('01) 24 Mad 654 (656) (DB) ✠ (Vol 6) 1919 Lah 85 (86) : 1919 Pun Re No. 29.

[6] The assignment being subject to the rules in chap VIII the transfer is subject to all the equities and liabilities to which the transferor was subject, while in case of endorsement it is not. (Vol 21) 1934 Cal 549 (549, 550) : 61 Cal 425 (DB).

[7] The assignee being an assignee of the debt, can sue all the persons liable for the debt, while an endorsee who gets only the property in the "instrument" by the endorsement, has merely the rights on the instrument and therefore, can sue only the person whose name appears thereon. (Vol 25) 1938 Mad 377 (379) : I L R (1938) Mad 568 (FB) ✠ (Vol 21) 1934 Cal 549 (550) : 61 Cal 425 (DB)

[8] Where the endorsement is in blank, it only operates to transfer the property in the instrument and not as an assignment of the debt. (Vol 22) 1935 Mad 240 (242, 243). (Approved in (Vol 25) 1938 Mad 377 : I L R (1938) Mad 568 (FB).)

4. "Any mercantile document of title to goods."—

[1] In order that a document may be a "mercantile document of title to goods" it must be a document (a)

SUPPLEMENTARY ACT, 1929.

(ACT XXI of 1929.)[a]

[4th October, 1929.]

An Act to supplement the Transfer of Property (Amendment) Act, 1929.

WHEREAS by reason of the passing of the Transfer of Property (Amendment) Act, 1929, it is expedient that certain amendments should be made in certain other enactments; It is hereby enacted as follows :—

[a] For Statement of Objects and Reasons, *see* Gazette of India, 1929, Pt. V, p. 93; for Report of Special Committee, *see ibid.*, p. 40; for Report of Select Committee, *see ibid.*, p. 126.

The Act has been *declared* to be in force with modifications in the Sonthal Parganas under the Sonthal Parganas Settlement Regulation (3 [III] of 1872), S. 3 (3)(a); *see* Bihar and Orissa Gazette, 1930, Pt. II, p. 433.

Short title and commencement.

1. *(1)* This Act may be called the Transfer of Property (Amendment) Supplementary Act, 1929.

(2) It shall come into force on the first day of April, 1930.

2 to 14. [Amendments.] *Repealed by the Repealing Act, 1938 (1 [I] of 1938), S. 2 and Sch.*

Savings.

15. *(1)* Save as provided in sub-section *(2)*, nothing in this Act shall be deemed to affect—

(a) the terms or incidents of any transfer or disposition of property made or effected before the first day of April, 1930;

(b) the validity, invalidity, effect or consequences of anything already done or suffered before the aforesaid date;

(c) any right, title, obligation or liability already acquired, accrued or incurred before such date;

(d) any remedy or proceeding in respect of such right, title, obligation or liability; or

(e) anything done in the course of any proceeding pending in any Court on the aforesaid date;

and any such remedy or proceeding may be enforced, instituted or continued, as the case may be, as if this Act had not been passed.

(2) Notwithstanding anything contained in section 9 of this Act,[a] in the Presidency of Bombay and such other territories as the [b][Central Government] may, by notification in the [c][Official Gazette], specify in this behalf, a suit by a mortgagee for foreclosure or sale on a mortgage by deposit of title deeds may be instituted within two years from the date of the commencement of this Act, or within sixty years from the date when the money secured by the mortgage became due, whichever period expires first; and no such suit instituted within the said period of sixty years and pending at the date of the commencement of this Act, either in a Court of first instance or of appeal, shall be dismissed on the ground that the twelve years' rule of limitation is applicable.

[a] Section 9 of this Act related to the amendment in Art. 132 of the Limitation Act, 1908. [b] *Substituted* by A. O. for "Governor-General in Council". [c] *Substituted* by A. O. for "Gazette of India."

THE SCHEDULE [Repealed by the Repealing and Amending Act, 1939 (XXXIV of 1939), S. 3 and Sch. II.]

Section 137— Note 4 *(contd.)*

which is used in business as proof of the possession or control of the goods, or (b) which authorises or purports to authorise the possessor of the document to transfer or receive the goods thereby represented. (Vol 1) 1914 Bom 290 (292, 293) : 38 Bom 255 (DB). (Affirmed in (Vol 3) 1916 P C 7 : 40 Bom 630 : 43 Ind App 164 (PC).

[2] Illustrations of such documents are :

(a) a railway receipt—(Vol 3) 1916 P C 7 (8) : 40 Bom 630 : 43 Ind App 164 (PC) ✠ (Vol 21) 1934 PC 246 (248) : 61 Ind App 416: 58 Mad 181 (PC).

(b) a bill of lading—(1869-70) 18 W R (Eng) 1041 (1043) : L R 4 H L 317, *Barber* v. *Meyerstein*.

[*See* (Vol 6) 1919 Mad 140 (143): 41 Mad 871 (DB).]

(c) Delivery order — ('11) 38 Cal 127 (141) (DB) ✠ ('34) 8 Bom 501 (509, 510) (DB) ✠ (Vol 5) 1918 Low Bur 122 (127) : 9 Low Bur Rul 143 (DB).

[3] A document called a "mate's receipt" by a shipping company is not a document of title to goods. ('14) 41 Cal 670 (678) (P C).

[4] A railway receipt which provides for delivery of goods only to the consignee or his endorsee as his agent is not an instrument of title within the meaning of this section. ('12) 14 Bom L R 532 (541).

[5] The law governing transferability of document of title to goods is the same as the law which governs the transferability of the goods themselves. (Vol 5) 1918 Low Bur 122 (128) : 9 Low Bur Rul 143 (DB).

[6] The transfer of a railway receipt does not effect a transfer of the ownership of goods unless the instrument is negotiable by the custom of the trade. (Vol 10) 1923 Rang 1 (4) : 11 Low Bur Rul 341 (DB).

[7] Bill of lading differs from other documents of title in that its assignment operates as a constructive delivery of the goods to which it refers. (Vol 3) 1916 P C 7 (9) : 40 Bom 630 (635) : 43 Ind App 164 (P C)

(Act XXVI of 1917.)[a]

[27th September, 1917.]

An Act to validate certain transfers of property made prior to the 1st of January 1915.

WHEREAS it is expedient to validate certain transfers of property made prior to the 1st of January, 1915; It is hereby enacted as follows :—

[a] For Statement of Objects and Reasons, *see* Gazette of India, 1916, Pt. V, p. 81; for Report of Select Committee, *see ibid.*, 1917, Pt. V, p. 29.

Short title and extent.

1. *(1)* This Act may be called the Transfer of Property (Validating) Act, 1917.

(2) It shall extend, in the first instance, to the United Provinces of Agra and Oudh, provided that the [a][Provincial Government of any Province] may, by notification[b] in the [c][Official Gazette], extend it to [d][the whole or any part of that Province].

[a] *Substituted* by A. O. for "Governor-General in Council". [b] For notification extending the Act to Ajmer-Merwara, *see* Gazette of India, 1921, Pt. I, p. 3. [c] *Substituted* by A. O. for "Gazette of India" [d] *Substituted* by A. O. for "any other part of British India specified in the notification".

Validation of certain transfers made prior to the 1st of January, 1915.

2. Where a mortgage or gift purports to have been effected by an instrument executed prior to the 1st of January, 1915, and such instrument is required by the Transfer of Property Act, 1882, to be attested, such mortgage or gift shall not be deemed to be invalid by reason only that any person who purported to attest such instrument as a witness did not see the executant sign it, provided that such person before signing his name on the instrument received from the executant a personal acknowledgment of his signature to the same.

Restoration of certain claims.

3. Where a claim under any such instrument executed prior to the 1st of January, 1915, has been wholly or in part dismissed, rejected, or withdrawn, after the 30th day of July, 1912 and before the commencement of this Act, in a Court of first instance or of revision or appeal, by reason only of the fact that some person who purported to attest such instrument as a witness, on having received before signing his name thereon a personal acknowledgment from the executant of his signature to the same, did not see the executant sign it, the case may, if the dismissal, rejection or withdrawal has had the effect of invalidating, in whole or in part, the said instrument as between persons claiming thereunder, be restored on review in accordance with the procedure provided by the Code of Civil Procedure, 1908, for review of judgment, on application in writing made within six months from the commencement of this Act; and on such restoration, the provisions of section 2 shall apply to such instrument :

Provided nevertheless—

(1) that every Court to whom such an application is made shall have a discretion to refuse the same if it is of opinion that such restoration would prejudice the rights of any transferee for value in good faith under any transfer made subsequent to the said 30th day of July, 1912;

(2) that in the event of a decree being passed upon such application in favour of the applicant or his legal representative, interest shall only be allowed under such instrument at the contractual rate up to the date of the original dismissal, rejection or withdrawal of such claim, and for a period of six months therefrom, and at the rate of 6 per cent. thereafter until realization; and

(3) that in the event of the case being so restored the Court shall be bound by the finding of the former Court, by or before whom the case was dismissed, rejected or withdrawn, on any issue of fact which was heard and finally determined by it.

Section 3 — Note 1

[1] Where under S. 3 an appellate Court grants a review of its order dismissing an appeal, the effect of such order is to restore the appeal to the pending file and the Court must determine the appeal upon the merits, including an issue which had not been finally determined. (Vol 7) 1920 All 90 (91) : 42 All 430 (DB). (Former Court refers to the Court which grants the review).

(Act VI of 1878).

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STATEMENT OF OBJECTS AND REASONS.

"The law of treasure-trove is in a very unsatisfactory state. At present, there is one law in Madras and another in Bengal, while it is doubtful what the law is in Bombay, and in the three Presidency towns probably the English law prevails. Moreover, the law everywhere is bad and ineffective, and gives every inducement to finders to conceal or make away with their discoveries; and yet there is a good deal of treasure buried in India, and much of it of very high antiquarian and historical interest.

Under these circumstances, the present Bill has been prepared. It provides, among other things, that—

(a) the finder shall give notice to the Collector of the District of the discovery of treasure, and either deposit the treasure in the Government Treasury, or give security for producing it when required;

(b) notice shall be given by the Collector to the owner or owners of the land where the treasure was found;

(c) the discovery of the treasure shall be advertised, and all claimants desired to come forward within six months;

(d) if there is reason to believe that the treasure was hidden or deposited more than a hundred years previously, no claim of any outside person shall be admitted;

(e) in the case of treasure found in a public place, such as in digging a road, a railway, or a canal, such treasure shall vest, if more than a hundred years old, or if unclaimed, in the proportion of three-fourths in the finder and one-fourth in Government; and

(f) if the land or other property on which the treasure is found belongs to a private party, then the latter shall receive the Government share, unless the finder has made any previous agreement with such owner or owners, in which case the division shall be regulated according to that agreement.

The Bill adopts the principle of certain recent legislation in the north of Europe, which has practically worked well."

—*Gazette of India, 1876, Part V, page 1463.*

ACT HOW AFFECTED BY SUBSEQUENT LEGISLATION.

—Adapted by A. O.
—Amended in its application to Bihar by Bihar Act 22 of 1947.
—Repealed in part by Acts 12 of 1891; 10 of 1914.

[THE INDIAN] TREASURE-TROVE ACT, 1878.

(ACT VI of 1878)[a]

[13th February, 1878.]

An Act to amend the law relating to Treasure-trove.

Preamble.

WHEREAS it is expedient to amend the law relating to treasure-trove ; It is hereby enacted as follows :—

[a] For the Statement of Objects and Reasons, *see* Gazette of India, 1876, Part V, page 1463.

This Act has been declared to be in force in—Sonthal Parganas by the Sonthal Parganas Settlement Regulation (3 of 1872), S. 3; British Baluchistan by the British Baluchistan Laws Regulation, 1913 (2 of 1913), S 3 ;

Preamble — Note 1

[1] This Act applies only to things which have been hidden. (Vol 18) 1931 Cal 430 (432) : 59 Cal 21 (DB). (Timber found embedded in the bed of the river is governed by Forest Act and not by this Act.) ✠ ('08) 31 Mad 397 (399) (DB).

Khondmals District by the Khondmals Laws Regulation, 1936 (4 of 1936), S. 3 and Schedule ; and Angul District by the Angul Laws Regulation, 1936 (5 of 1936), S. 3 and Schedule.

It has also been declared by notification under S. 3 (a) of the Scheduled Districts Act, 1874 (14 of 1874), to be in force in the Scheduled Districts of Hazaribagh, Lohardaga and Manbhum, and in Pargana Dhalbhum and the Kolhan in the District of Singbhum—*see* Gazette of India, 1881, Part I, page 504 (The District of Lohardaga included at that time the present District of Palamau, which was separated in 1894 ; Lohardaga is now called the Ranchi District; *see* Calcutta Gazette, 1899, Part 1, page 44.)

Preliminary.

Short title. 1. This Act may be called the Indian Treasure-trove Act, 1878.

Extent. It extends to the whole of British India.

[a][* * * * *].

[a] The words "And it shall come into force at once" were *repealed* by the Repealing and Amending Act 1914 (10 [X] of 1914).

2. [Repeal of enactments.] *Repealed by the Amending Act, 1891 (12 [XII] of 1891).*

Interpretation-clause. 3. In this Act—

"Treasure." "treasure" means anything of any value hidden in the soil, or in anything affixed thereto :

"Collector." "Collector" means *(1)* any Revenue-officer in independent charge of a district, and *(2)* any officer appointed by the [a][Provincial] Government to perform the functions of a Collector under this Act.[b]

"Owner." When any person is entitled, under any reservation in an instrument of transfer of any land or thing affixed thereto to treasure in such land or thing, he shall, for the purposes of this Act, be deemed to be the owner of such land or thing.

[a] *Substituted* by A. O. for "Local". [b] In Bombay Mamlatdars have been *appointed* to perform the functions of Collectors under the Act.—*see* Bombay Rules and Orders.

Procedure on finding Treasure.

4. Whenever any treasure, exceeding in amount or value ten rupees is found, the finder shall, as soon as practicable, give to the Collector notice in writing—

Notice by finder of treasure.

(a) of the nature and amount or approximate value of such treasure ;

(b) of the place in which it was found ;

(c) of the date of the finding ;

and either deposit the treasure in the nearest Government Treasury, or give the Collector such security as the Collector thinks fit, to produce the treasure at such time and place as he may from time to time require.

Notification requiring claimants to appear. 5. On receiving a notice under section 4, the Collector shall, after making such enquiry (if any) as he thinks fit, take the following steps (namely) :—

(a) he shall publish a notification in such manner as the [a][Provincial] Government from time to time prescribes in this behalf to the effect that on a certain date *(mentioning it)* certain treasure *(mentioning its nature, amount and approximate value)* was found in a certain place *(mentioning it)*, and requiring all persons claiming the treasure or any part thereof to appear personally or by agent before the Collector on a day and at a place therein mentioned, such day not being earlier than four months, or later than six months, after the date of the publication of such notification ;

Section 3 — Note 1

[1] The meaning of the word "treasure" as given in the Dictionary denotes previous ignorance as to the existence of the thing at or near the place where it comes to light. (Vol 33) 1946 Nag 362 (363) : I L R (1946) Nag 815 : 47 Cri L Jour 674.

[2] Property not hidden is not treasure. ('08) 31 Mad 397 (400) (D B) ✠ (Vol 5) 1918 All 322 (323) : 19 Cri L Jour 35. (Isolated coins picked up by a casual observer is not a treasure-trove.)

Section 4 — Note 1

[1] The word "finder" used in S. 4 must be understood as discovery by chance and that connotes ignorance on the part of the finder before the discovery. (Vol 33) 1946 Nag 362 (364) I L R (1946) Nag 815 : 47 Cri L Jour 674. (Woman with knowledge that her ornaments had been hidden by her husband digging it out—She is not a finder but the labourers whom she engaged to dig are 'finders'.)✠(Vol 2) 1915 Mad 78 (79) : 15 Cri L Jour 632. (Labourers engaged to dig out a treasure are finders.')

[2] Impossibility of the 'finder' to discharge the obligation to deposit the treasure will absolve him from the performance of it. (Vol 2) 1915 Mad 78 (79) : 15 Cr L Jour 632 ✠ (Vol 33) 1946 Nag 362 (365) : I L R (1946) Nag 815 : 47 Cri L Jour 674 (Obligation to deposit a treasure in the treasury does not rest on a person who has not the physical control over the property.)

Section 5 — Note 1

[1] Possession of land carries with it possession of everything which is attached to under that land and in the absence of a person with a better title to what is found under the land, the possessor of the land has the right to possess that also. ('08) 31 Mad 397 (399, 400) (D B).

(*b*) when the place in which the treasure appears to the Collector to have been found was at the date of the finding in the possession of some person other than the finder the Collector shall also serve on such person a special notice in writing to the same effect

[a] *Substituted* by A. O. for "Local".

PROVINCIAL AMENDMENT

Bihar.

After the word and figure 'section 4', the words "or information from any other source" shall be *inserted* —Bihar Act XXII of 1947, S. 3. [29-11-1947.]

Forfeiture of right on failure to appear.

6. Any person having any right to such treasure or any part thereof as owner of the place in which it was found or otherwise, and not appearing as required by the notification issued under section 5 shall forfeit such right.

Matters to be enquired into and determined by the Collector.

7. On the day notified under section 5 the Collector shall cause the treasure to be produced before him, and shall enquire as to and determine,—

(*a*) the person by whom, the place in which and the circumstances under which, such treasure was found; and

(*b*) as far as is possible, the person by whom, and the circumstances under which, such treasure was hidden.

Time to be allowed for suit by person claiming the treasure.

8. If, upon an enquiry made under section 7, the Collector sees reason to believe that the treasure was hidden within one hundred years before the date of the finding, by a person appearing as required by the said notification and claiming such treasure, or by some other person under whom such person claims, the Collector shall make an order adjourning the hearing of the case for such period as he deems sufficient, to allow of a suit being instituted in the Civil Court by the claimant to establish his right.

When treasure may be declared ownerless.

9. If, upon such enquiry the Collector sees no reason to believe that the treasure was so hidden; or

if, where a period is fixed under section 8, no suit is instituted as aforesaid within such period to the knowledge of the Collector; or

if such suit is instituted within such period and the plaintiff's claim is finally rejected;

the Collector may declare the treasure to be ownerless.

Appeal against such declaration.

Any person aggrieved by a declaration made under this section may appeal against the same within two months from the date thereof to the Chief Controlling Revenue Authority.[a]

Subject to such appeal every such declaration shall be final and conclusive.

[a] *Defined* in General Clauses Act, 1897 (10 [X] of 1897), S. 3 (*9a*).

Proceedings subsequent to declaration.

10. When a declaration has been made in respect of any treasure under section 9, such treasure shall in accordance with the provisions hereinafter contained, either be delivered to the finder thereof, or be divided between him and the owner of the place in which it has been found in manner hereinafter provided.

When no other person claims as owner of place, treasure to be given to finder.

11. When a declaration has been made in respect of any treasure as aforesaid, and no person other than the finder of such treasure has appeared as required by the notification published under section 5 and claimed a share of the treasure as owner of the place in which it has been found, the Collector shall deliver such treasure to the finder thereof.

When only one such person claims and his claim is not disputed, treasure to be divided.

12. When a declaration has been made as aforesaid in respect of any treasure, and only one person other than the finder of such treasure has so appeared and claimed, and the claim of such person is not disputed by the finder, the Collector shall proceed to divide the treasure between the finder and the person so claiming according to the following rule (namely) :—

Section 6 — Note 1

[1] Section 6 contemplates persons having rights as owners of the place where the property is found but does not declare a substantive law that the owner of the soil is entitled to the treasure-trove. ('95) 19 Bom 668 (672) (DB).

[2] Person accused of theft pointing out the place where the stolen property was buried — While unearthing the same another bag containing some money and ornaments also unearthed — Magistrate suspecting the commission of offence in respect of it calling for claimants to come forward under S. 523 of Criminal P. C.—Talukdar and owner of the field claiming the same — Suit on claim being rejected — *Held* that the Treasure-Trove Act did not apply to the case as no notice was given by the finder under it. ('95) 19 Bom 668 (672) (DB).

If the finder and the person so claiming have not entered into any agreement then in force as to the disposal of the treasure, three-fourths of the treasure shall be allotted to such finder, and the residue to such person. If such finder and such person have entered into any such agreement the treasure shall be disposed of in accordance therewith:

Provided that the Collector may in any case, if he thinks fit, instead of dividing any treasure as directed by this section,—

(*a*) allot to either party the whole or more than his share of such treasure, on such party paying to the Collector for the other party such sum of money as the Collector may fix as the equivalent of the share of such other party, or of the excess so allotted, as the case may be; or

(*b*) sell such treasure or any portion thereof by public auction, and divide the sale-proceeds between the parties according to the rule hereinbefore prescribed.

Provided also that, when the Collector has by his declaration under section 9 rejected any claim made under this Act by any person other than the said finder or person claiming as owner of the place in which the treasure was found, such division shall not be made until after the expiration of two months without an appeal having been presented under section 9 by the person whose claim has been so rejected, or, when an appeal has been so presented, after such appeal has been dismissed.

When the Collector has made a division under this section, he shall deliver to the parties the portions of such treasure, or the money in lieu thereof to which they are respectively entitled under such division.

and shares to be delivered to parties.

13. When a declaration has been made as aforesaid in respect of any treasure, and two or more persons have appeared as aforesaid and each of them claimed as owner of the place where such treasure was found, or the right of any person who has so appeared and claimed is disputed by the finder of such treasure, the Collector shall retain such treasure and shall make an order staying his proceedings with a view to the matter being enquired into and determined by a civil Court.

In case of dispute as to ownership of place, proceedings to be stayed.

14. Any person who has so appeared and claimed may, within one month from the date of such order, institute a suit in the civil Court to obtain a decree declaring his right; and in every such suit the finder of the treasure and all persons disputing such claim before the Collector shall be made defendants.

Settlement of such dispute.

15. If any such suit is instituted and the plaintiff's claim is finally established therein, the Collector shall, subject to the provisions of section 12, divide the treasure between him and the finder.

and division thereupon.

If no such suit is instituted as aforesaid, or if the claims of the plaintiffs in all such suits are finally rejected, the Collector shall deliver the treasure to the finder.

16. The Collector may, at any time after making a declaration under section 9, and before delivering or dividing the treasure as hereinbefore provided, declare by writing under his hand his intention to acquire on behalf of the Government, the treasure or any specified portion thereof, by payment to the persons entitled thereto of a sum equal to the value of the materials of such treasure or portion, together with one fifth of such value, and may place such sum in deposit in his treasury to the credit of such persons; and thereupon such treasure or portion shall be deemed to be the property of Government, and the money so deposited shall be dealt with, as far as may be, as if it were such treasure or portion.

Power to acquire the treasure on behalf of Government.

17. No decision passed or act done by the Collector under this Act shall be called in question by any Civil Court, and no suit or other proceeding shall lie against him for anything done in good faith in exercise of the powers hereby conferred.

Decision of Collector final, and no suit to lie against him for acts done *bona fide*.

18. A Collector making any enquiry under this Act may exercise any power conferred by the Code of Civil Procedure[a] on a Civil Court for the trial of suits.

Collector to exercise powers of Civil Court.

[a] *See* now Act 5 [V] of 1908.

19. The [a][Provincial] Government may, from time to time, make rules[b] consistent with this Act to regulate proceedings hereunder.

Power to make rules.

Such rules shall, on being published in the [c][Official] Gazette, have the force of law.

[a] *Substituted* by A. O. for "Local". [b] For rules made under this section, *see* different Provincial Rules and Orders. [c] *Substituted* by A. O. for "Local".

Penalties.

20. If the finder of any treasure fails to give the notice, or does not either make the deposit or give the security, required by section 4 or alters or attempts to alter such treasure so as to conceal its identity, the share of such treasure, or the money in lieu thereof to which he would otherwise be entitled, shall vest in Her Majesty.

Penalty on finder failing to give notice, etc.

and he shall, on conviction before a Magistrate, be punished with imprisonment for a term which may extend to one year, or with fine, or with both.

21. If the owner of the place in which any treasure is found abets, within the meaning of the Indian Penal Code, any offence under section 20, the share of such treasure, or the money in lieu thereof to which he would otherwise be entitled, shall vest in Her Majesty,

Penalty on owner abetting offence under section 20.

and he shall, on conviction before a Magistrate, be punished with imprisonment which may extend to six months, or with fine, or with both.

PROVINCIAL AMENDMENT.

BIHAR.

To section 21, the following shall be *added*, namely—

"Any person who knowingly fails to report to the Collector the finding of any treasure in the land of which he is the owner within two months of such finding shall be deemed to have abetted an offence under section 20."

—Bihar Act XXII of 1947, S. 4. [29-11-1947.]

SCHEDULE. [Repealed by the Amending Act, 1891 (12 [XII] of 1891).]

[THE INDIAN] TRUSTEE ACT, 1866

(ACT XXVII of 1866)

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9. Contingent rights of minor trustees and mortgagees.
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12. Contingent rights of trustees.
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14. When uncertain which of several Trustees survived.
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Section 20 —Note 1

[1] Woman with knowledge that her ornaments have been hidden by her husband in a wall engaging labourers to dig them out— She is not a 'finder' under S. 4 and therefore cannot be guilty of an offence under S. 20 or 21—The labourers are 'finders' and are guilty under S. 20 for failing to give notice under S. 4. (Vol 33) 1946 Nag 362 (364) : 1 L R (1946) Nag 815 : 47 Cri L Jour 674.

[2] Person finding treasure selling it and depositing it in a bank—Though the sale proceeds are Government money they cease to be so when deposited in the bank—The deposit forms part of the assets of the bank and the Government cannot claim in a Criminal proceedings the refund of the money so deposited by the accused in the bank. (Vol 25) 1938 Mad 710 (710): 39 Cri L Jour 953.

Section 21 — Note 1

[1] The section does not exclude the punishment of other abettors because it makes the owner of the land liable to a sepcial penalty. (1905) 1 Weir 919 (919)(DB).

[2] Finder or his agent failing to give notice under S. 4—Usufructuary mortgagee of the land where the treasure is found is not guilty under S. 21 (Vol 5) 1918 All 322 (322) : 19 Cri L Jour 35.

[3] Accused not present at the time when treasure was found but merely took a share of it when the actual finders decided finally not to report the find — *Held* he was not guilty of an abetment of an offence under S. 4. (Vol 25) 1938 Mad 508 (508): 39 Cr L J 600.

[4] The fact that there is no evidence that the accused obtained a substantial or any portion of the treasure trove, cannot be taken into consideration for the determination of the fine to be imposed on them (Vol 2) 1915 Mad 78 (79) : 15 Cri L Jour 632.

18. Power to make order for vesting estate on refusal or neglect of Trustee to convey or release.
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55. [*Repealed.*]

ACT HOW AFFECTED BY SUBSEQUENT LEGISLATION.

—Amended by Acts 32 of 1925; 34 of 1926.
—Adapted by A. O.
—Extended in part by Act 3 of 1909.
—Repealed in part locally by Act 4 of 1882.
—Repealed in part by Acts 14 of 1870; 16 of 1874; 10 of 1914; 18 of 1919; 11 of 1923.

[THE INDIAN] TRUSTEE ACT, 1866.

(ACT XXVII OF 1866)[a]

[24th October, 1866.]

An Act to consolidate and amend the law relating to the conveyance and transfer of property in British India vested in Mortgagees and Trustees, in cases to which English law is applicable.

Preamble.

WHEREAS it is expedient to consolidate and amend the laws relating to the conveyance and transfer of moveable and immoveable property in British India vested in mortgagees and trustees, in cases to which English law is applicable It is hereby enacted as follows : —

[a] The Statement of Objects and Reasons for the Bill which was passed into law as Act XXVII of 1866 is not published.

Preamble — Note 1

[1] The Act is applicable only to cases which are governed by the English law. (Vol 3) 1916 Cal 318 (320) : 43 Cal 124.

This Act is mainly founded on "the Trustee Act, 1850" (13 & 14 Vict., c. 60) and "the Trustee Act 1852" (15 & 16 Vict., c. 55).

It has been declared, by notification under S. 3 (a) of the Scheduled Districts Act, 1874 (14 of 1874), to be in force in the following Scheduled Districts, namely—the Districts of Hazaribagh, Lohardaga (now the Ranchi District, *see* Calcutta Gazette, 1899, Part I, page 44) and Manbhum, and Pargana Dhalbhum and the Kolhan in the District of Singbhum—*see* Gazette of India, 1881, Part I, page 504.

1. [Repeal of Act.] *Repealed by the Repealing Act, 1870 (14 [XIV] of 1870).*

Interpretation-clause

2.[a] In this Act, unless there be something repugnant in the subject or context,—

"Immoveable property" shall extend to and include messuages, tenements, and hereditaments, corporeal and incorporeal, of every tenure or description, whatever may be the estate or interest therein:

[a] *Cf.* 13 & 14 Vict., c. 60, S. 2.

[a]"Stock" shall mean any fund, annuity, or security transferable in books kept by any company or society established or to be established, or transferable by deed alone, or by deed accompanied by other formalities, and any share or interest therein. It shall also include shares in ships registered under the Merchant Shipping Act, 1854,[b] or at any port in British India:

[a] *Cf.* the Merchant Shipping (Amendment) Act, 1855 (18 & 19 Vict., c. 91), S. 10, which Act was *repealed* by the Merchant Shipping Act, 1894 (57 & 58 Vict., c. 60), S. 745. [b] 17 & 18 Vict, c. 104.

"Hold" and "Holding" shall be applicable to any vested estate, whether for life or of a greater or less description, in possession, futurity, or expectancy in any immoveable property:

"Contingent right," as applied to immoveable property, shall mean a contingent or executory interest, or possibility coupled with an interest whether the object of the gift or limitation of such interest or possibility be or be not ascertained; also a right of entry, whether immediate or future and whether vested or contingent:

"Convey and Conveyance," applied to any person, shall mean the execution by such person of every necessary or suitable assurance for conveying or disposing to another immoveable property which such person holds, or in which he is entitled to a contingent right, either for the whole estate of the person conveying or disposing, or for any less estate, together with the performance of all formalities required by law to the validity of such conveyance, including the acts to be performed by married women and tenants-in-tail in accordance with the provisions of Act XXXI of 1851 *(to simplify the modes of conveying land in cases to which the English law is applicable)*:

"Transfer" shall mean the execution and performance of every deed and act by which a person entitled to stock or Government securities can transfer such stock or Government securities from himself to another:

[a]["High Court" means a Court which is a High Court for the purposes of the Government of India Act, 1935]

[a] *Substituted* by A. O. *See* the Government of India Act, 1935 (26 Geo. V, c. 2), S. 219, for list of High Courts The High Court of Judicature at Lahore is the High Court in respect of proceedings under this Act arising from the N.-W. F. P. *See* the N.-W. F. P. Law and Justice Regulation, 1901 (Regn. 7 [VII] of 1901), S. 6 *(c)*.

"Trust" shall not mean the duties incident to an estate conveyed by way of mortgage; but, with this exception, the words "Trust" and "Trustee" shall extend to and include implied and constructive trusts, and shall extend to and include cases where the trustee has some beneficial estate or interest in the subject of the trust, and shall extend to and include the duties incident to the office of executor or administrator of a deceased person;

"Lunatic" shall mean any person who shall have been found by due course of law to be of unsound mind and incapable of managing his affairs:

"Person of unsound mind" shall mean any person not a minor who, not having been found to be a lunatic, shall be incapable from infirmity of mind to manage his own affairs:

In the case of a will made or an intestacy occurring before the [a]first day of January 1866, "Heir" shall mean the person claiming an interest in the immoveable property of a deceased person under the laws concerning descent applicable to such property: and "Devisee" shall, in addition to its ordinary signification, mean the heir of a devisee and the devisee of an heir, and generally any person claiming an interest in the immoveable property of a deceased person, not as heir of such deceased person, but by a title dependent solely upon the operation of the laws concerning devise and descent:

In the case of a will made or an intestacy occurring on or after the [a]first day of January 1866, "Heir" shall mean any person claiming an interest in the immoveable property of a deceased person under the rules for the distribution of an intestate's estate and "Devisee" shall mean any person taking immoveable property under a bequest, and any person, other than an executor or administrator, claiming an interest in immoveable property, not as entitled thereto under the said rules, but by a title dependent solely upon the operation of the laws concerning intestate and testamentary succession :

[a] The day on which the Indian Succession Act, 1865 (10 [X] of 1865) came into force. This Act was *repealed* by the Indian Succession Act, 1925 (39 [XXXIX] of 1925).

"Mortgage" shall be applicable to every estate or interest in immoveable or moveable property which would in the High Court be deemed merely a security for money :

"Person" shall include any company or association, or body of persons whether incorporated or not :

[a][ ]

[a] Paras. relating to "number" and "gender" were *repealed* by the Repealing and Amending Act, 1914 (10 [X] of 1914).

High Court to have jurisdiction in what cases.

3. The powers and authorities given by this Act to the High Court shall and may be exercised only in cases to which English law is applicable, and may be exercised with respect to property within the local limits of the extraordinary original civil jurisdiction of the said Courts respectively.

High Court may convey estates of lunatic trustees and mortgagees;

4. When any lunatic or person of unsound mind shall hold any immoveable property upon any trust or by way of mortgage, it shall be lawful for the High Court to make an order that such property be vested in such person or persons in such manner and for such estate as the said Court shall direct; and the order shall have the same effect as if the trustee or mortgagee had been sane, and had duly executed a conveyance of the property in the same manner for the same estate.

[*Cf*: the Trustee Act, 1850 (13 & 14 Vict., c. 60), S. 3.]

and may convey contingent rights.

5. When any lunatic or person of unsound mind shall be entitled to any contingent right in any immoveable property upon any trust or by way of mortgage, it shall be lawful for the High Court to make an order wholly releasing such property from such contingent right or disposing of the same to such person or persons as the said High Court shall direct; and the order shall have the same effect as if the trustee or mortgagee had been sane, and had duly executed a deed so releasing or disposing of the contingent right.

[*Cf*: 13 & 14 Vict., c. 60 — S. 4]

High Court may transfer stock or Government securities of lunatic trustees and mortgagees.

6. When any lunatic or person of unsound mind shall be solely entitled to any stock or Government securities, or to anything in action upon any trust or by way of mortgage, it shall be lawful for the High Court to make an order vesting in any person or persons the right to transfer such stock or Government securities, or to receive the dividends, interest, or income thereof, or to sue for and recover such thing in action or any interest in respect thereof :

and when any person or persons shall be entitled jointly with any lunatic or person of unsound mind to any stock or Government securities or thing in action, upon any trust or by way of mortgage, it shall be lawful for the said Court to make an order vesting the right to transfer such stock or Government securities, or to receive the dividends, interest, or income thereof, or to sue for and recover such thing in action, or any interest in respect thereof, either in such person or persons so jointly entitled as aforesaid, or in such last mentioned person or persons together with any other person or persons the said High Court may appoint.

[*Cf* : 13 & 14 Vict , c. 60 — S. 5.]

Power to transfer stock or Government securities of deceased persons.

7. When any stock or Government securities shall be standing in the name of any deceased person whose executor or administrator is a lunatic or person of unsound mind, or when anything in action shall be vested in any lunatic or person of unsound mind as the executor or administrator of a deceased person, it shall be lawful for the High Court to make an order vesting the right to transfer such

Section 3 — Note 1

[1] The Court has no jurisdiction to deal with cases to which English law is not applicable. (1881) 5 Bom 154 (161).

[2] The Indian Trustee Act is applicable to a trust in which the settlor, the trustees and the *cestuis que trust* are all Hindus, provided such trust does not violate any provision of Hindu law. (1905) 32 Cal 143 (145).

Section 6—Note 1

[1] Section 6, Trustee Act applies to vesting orders. (Vol 7) 1920 Bom 230 (231).

stock or Government securities, or to receive the dividends, interest or income thereof, or to sue for and recover such thing in action, or any interest in respect thereof in any person or persons the said Court may appoint.

[*Cf* : 13 & 14 Vict, c. 60 — S. 6.]

High Court may convey estates of minor trustees and mortgagees.

8. Whenever any minor[a] shall hold any immoveable property upon any trust or by way of mortgage, it shall be lawful for the High Court to make an order vesting such property in such person or persons in such manner and for such estate as the said Court shall direct; and the order shall have the same effect as if the minor trustee or mortgagee had attained his majority, and had duly executed a conveyance of the property in the same manner for the same estate.

[*Cf* : 13 & 14 Vict., c. 60 — S. 7.]

[a] *Defined* in the Indian Majority Act, 1875 (9 [IX] of 1875), S. 3.

Contingent rights of minor trustees and mortgagees.

9. Where any minor shall be entitled to any contingent right in any immoveable property upon any trust or by way of mortgage, it shall be lawful for the High Court to make an order wholly releasing such property from such contingent right, or disposing of the same to such person or persons as the said Court shall direct; and the order shall have the same effect as if the minor had attained his majority, and had duly executed a deed so releasing or disposing of the contingent right.

[*Cf* : 13 & 14 Vict., c. 60 — S. 8.]

High Court may convey estate of trustee out of jurisdiction of Court.

10. When any person solely holding any immoveable property upon any trust shall be out of the jurisdiction of the High Court, or cannot be found, it shall be lawful for the said Court to make an order vesting such property in such person or persons, in such manner and for such estate as the said Court shall direct, and the order shall have the same effect as if the trustee had duly executed a conveyance of the property in the same manner and for the same estate.

[*Cf* : 13 & 14 Vict, c. 60 — S. 9.]

High Court may make order where persons hold immoveable property in trust jointly with persons out of jurisdiction.

11. When any person or persons shall hold any immoveable property in trust jointly with a person not within the jurisdiction of the High Court, or who cannot be found, it shall be lawful for the said Court to make an order vesting the property in the person or persons so jointly holding, or in such last mentioned person or persons together with any other person or persons, in such manner and for such estate as the said Court shall direct; and the order shall have the same effect as if the trustee out of the jurisdiction, or who cannot be found, had duly executed a conveyance of the property in the same manner for the same estate.

[*Cf* : 13 & 14 Vict., c. 60 — S. 10.]

Contingent rights of trustees.

12. When any person solely entitled to a contingent right in any immoveable property upon any trust shall be out of the jurisdiction of the High Court, or cannot be found, it shall be lawful for the said Court to make an order wholly releasing such property from such contingent right, or disposing of the same to such person or persons as the said Court shall direct; and the order shall have the same effect as if the trustee had duly executed a conveyance so releasing or disposing of the contingent right.

[*Cf* : 13 & 14 Vict, c. 60 — S. 11.]

High Court may make order where persons jointly entitled with others out of jurisdiction to contingent right in immoveable property.

13. When any person jointly entitled with any other person or persons to a contingent right in any immoveable property upon any trust shall be out of the jurisdiction of the High Court, or cannot be found, it shall be lawful for the said Court to make an order disposing of the contingent right of the person out of the jurisdiction, or who cannot be found to the person or persons so jointly entitled as aforesaid, or to such last-mentioned person or persons together with any other person or persons; and the order shall have the same effect as if the trustee out of the jurisdiction, or who cannot be found, had duly executed a conveyance so releasing or disposing of the contingent right.

[*Cf* : 13 & 14 Vict., c, 60 —S. 12.]

When uncertain which of several trustees survived.

14. Where there shall have been two or more persons jointly holding any immoveable property upon any trust, and it shall be uncertain which of such trustees was the survivor, it shall be lawful for the High Court to make an

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Section 8— Note 1

[1] Under S. 8 of the Indian Trustees Act the High Court may make a vesting order having the effect of a conveyance with regard to the property held by a minor trustee or mortgagee. (Vol 3) 1916 Cal 319 (320) : 43 Cal 124.

order vesting such property in such person or persons in such manner and for such estate as the said Court shall direct; and the order shall have the same effect as if the survivor of such trustees had duly executed a conveyance of the property in the same manner for the same estate.

[*Cf*: 13 & 14 Vict, c. 60—S. 13.]

When uncertain whether last trustee living or dead.

15. Where any one or more person or persons shall have held any immoveable property upon any trust, and it shall not be known, as to the trustee last known to have held such property, whether he be living or dead, it shall by lawful for the High Court to make an order vesting such property in such person or persons, in such manner and for such estate, as the said Court shall direct; and the order shall have the same effect as if the last trustee had duly executed conveyance of the property in the same manner for the same estate.

[*Cf*: 13 & 14 Vict., c. 60—S. 14.]

When trustee dies without heir.

16. When any person holding any immoveable property upon any trust shall have died intestate as to such property without an heir, or shall have died, and it shall not be known who is his heir or devisee, it shall be lawful for the High Court to make an order vesting such property in such person or persons, in such manner and for such estate, as the said Court shall direct: and the order shall have the same effect as if the heir or devisee of such trustee had duly executed a conveyance of the property in the same manner for the same estate.

[*Cf*: 13 & 14 Vict. c. 60—S. 15.]

Contingent right of unborn trustee.

17. When any immoveable property is subject to a contingent right in an unborn person, or class of unborn persons, who upon coming into existence would in respect thereof hold such property upon any trust, it shall be lawful for the High Court to make an order which shall wholly release and discharge such property from such contingent right, in such unborn person or class of unborn persons, or to make an order which shall vest in any person or persons the estate or estates which such unborn person or class of unborn persons would, upon coming into existence, hold in such property.

[*Cf*: 13 & 14 Vict. c 60—S. 16.]

Power to make order for vesting estate on refusal or neglect of trustee to convey or release.

18. In every case where any person holds or shall hold jointly or solely any immoveable property, or is or shall be entitled to a contingent right therein upon any trust, and a demand shall have been made upon such trustee by a person entitled to require a conveyance of such property, or a duly authorized agent of such last mentioned person, requiring such trustee to convey the same, or to release such contingent right, it shall be lawful for the High Court, if the said Court shall be satisfied that such trustee has wilfully refused or neglected to convey the said property for the space of twenty-eight days after such demand to make an order vesting such property in such person or persons, in such manner and for such estate as the Court shall direct, or releasing such contingent right in such manner as the Court shall direct; and the said order shall have the same effect as if the trustee had duly executed a conveyance of the property, or a release of such right, in the same manner and for the same estate.

[*Cf*: the Trustee Act, 1852 (15 & 16 Vict, c. 55), S. 2. Ss. 1 to 5 and Ss. 8 and 9 of this Act together with the residue were repealed except as to lunacy jurisdiction in Ireland by 56 & 57 Vict., c. 53, S. 51.]

Power to convey in place of mortgagee.

19. When any person to whom any immoveable property has been conveyed by way of mortgage shall have died without having entered into the possession or into the receipt of the rents and profits thereof, and the money due in respect of such mortgage shall have been paid to a person entitled to receive the same, or such last-mentioned person shall consent to an order for the reconveyance or vesting of such property, then in any of the following cases it shall be lawful for the High Court to make an order vesting such property, in such person or persons in such manner and for such estate as the said Court shall direct. that is to say,—

when an heir or devisee of such mortgagee shall be out of the jurisdiction of the High Court, or cannot be found:

when an heir or devisee of such mortgagee shall upon a demand by a person entitled to require a conveyance of such property, or a duly authorized agent of such last-mentioned person, have stated in writing that he will not convey the same, or shall not convey the same for the space of twenty-eight days next after a proper deed for conveying such property shall have been tendered to him by a person entitled as aforesaid, or a duly authorized agent of such last-mentioned person:

when it shall be uncertain which of several devisees of such mortgagee was the survivor:

when it shall be uncertain as to the survivor of several devisees of such mortgagee or as to the heir of such mortgagee, whether he be living or dead :

when such mortgagee shall have died intestate as to such property and without an heir, or shall have died and it shall not be known who is his heir or devisee :

and the order of the said High Court made in any one of the foregoing cases shall have the same effect as if the heir or devisee, or surviving devisee as the case may be, had duly executed a conveyance of the property in the same manner and for the same estate.

[*Cf*: 13 & 14 Vict., c. 60 –S. 19.]

Power to appoint person to convey in certain cases.

20. In every case where the High Court shall, under the provisions of this Act, be enabled to make an order having the effect of a conveyance of any immoveable property, or having the effect of a release or disposition of the contingent right of any person or persons, born or unborn it shall also be lawful for the High Court, should it be deemed more convenient to make an order appointing a person to convey such property, or release or dispose of such contingent right;

and the conveyance, or release or disposition of the person so appointed, shall, when in conformity with the terms of the order by which he is appointed, have the same effect, in conveying the property, or releasing or disposing of the contingent right, as an order of the High Court would in the particular case have had under the provisions of this Act.

In every case where the High Court shall, under the provisions of this Act, be enabled to make an order vesting in any person or persons the right to transfer any stock transferable in the books of any company or society established or to be established, it shall also be lawful for the High Court, if it be deemed more convenient, to make an order directing the secretary or any officer of such company or society at once to transfer, or join in transferring, the stock to the person or persons to be named in the order ;

and this Act shall be a full and complete indemnity and discharge to all companies or societies and their officers and servants for all acts done or permitted to be done pursuant thereto.

[*Cf*: 13 & 14 Vict., c. 60 – S. 20.]

When trustees of stock or Government securities joined with trustees out of jurisdiction.

21. When any person or persons shall be jointly entitled with any person out of the jurisdiction of the High Court, or who cannot be found, or concerning whom it shall be uncertain whether he be living or dead, to any stock or Government securities or thing in action upon any trust, it shall be lawful for the said Court to make an order vesting the right to transfer such stock or Government securities, or to receive the dividends, interest, or income thereof, or to sue for or recover such thing in action or any interest in respect thereof, either in such person or persons so jointly entitled as aforesaid, or in such last-mentioned person or persons together with any person or persons the said Court may appoint.

When any sole trustee of any stock, Government securities, or thing in action shall be out of the jurisdiction of the said Court, or cannot be found, or it shall be uncertain whether he be living or dead, it shall be lawful for the said Court to make an order vesting the right to transfer such stock or Government securities, or to receive the dividends, interest or income thereof, or to sue for and recover such thing in action, or any interest in respect thereof, in any person or persons the said Court may appoint.

[*Cf*: 13 & 14 Vict, c. 60 — S. 22.]

When trustee of stock, etc., refuses to transfer.

22. Where any sole trustee of any stock, Government securities, or thing in action, shall neglect or refuse to transfer such stock or Government securities, or to receive the dividends, interest, or income thereof, or to sue for or recover such thing in action, or any interest in respect thereof, according to the direction of the person absolutely entitled thereto, for the space of twenty-eight days next after a request in writing

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Section 20 — Note 1

[1] Section 20 may be used in the same way as the corresponding section in the English Act. (Vol 3) 1916 Cal 319 (320) : 43 Cal 124.

[2] No order of appointment of receiver to convey can be made with respect to the interest of a party who has not been served and who has not entered appearance. ('81) 7 Cal 33 (34).

Section 21 — Note 1

[1] Where property has been by order of Court directed to be sold and where some of the parties interested in such property are either out of the jurisdiction or are married woman or minors and their place of abode is unknown, the Court will appoint a person under the act to convey the interest of such persons to any purchaser, notwithstanding that at the time of the application for the purpose, no contract for sale has been entered into. ('81) 7 Cal 33 (34).

for that purpose shall have been made to him by the person absolutely entitled thereto, it shall be lawful for the High Court to make an order vesting the sole right to transfer such stock or Government securities, or to receive the dividends, interest, or income thereof, or to sue for and recover such thing in action, or any interest in respect thereof, in such person or persons as the said Court may appoint.

[*Cf*: 13 & 14 Vict., c. 60 — S. 23.]

When one of several trustees of stock, etc., refuses to transfer or receive and pay over dividends.

23. Where any one of the trustees of any stock, Government securities, or thing in action shall neglect or refuse to transfer such stock or Government securities, or to receive the dividends, interest or income thereof, or to sue for or recover such thing in action according to the direction of the person, absolutely entitled thereto, for the space of twenty-eight days next after a request in writing for that purpose shall have been made to him by such person, it shall be lawful for the High Court to make an order vesting the right to transfer such stock or Government securities, or to receive the dividends, interest, or income thereof, or to sue for and recover such thing in action, in the other trustee or trustees of the said stock, Government securities, or thing in action, or in any person or persons whom the said Court may appoint jointly with such other trustee or trustees.

[*Cf*: 13 & 14 Vict., c. 60 — S. 24.]

When stock, etc., standing in name of deceased person.

24. When any stock or Government securities shall be standing in the sole name of a deceased person, and his executor or administrator shall be out of the jurisdiction of the High Court, or cannot be found, or it shall be uncertain whether such executor or administrator be living or dead, or such executor or administrator shall neglect or refuse to transfer such stock or Government securities, or receive the dividends, interest, or income thereof, according to the direction of the person absolutely entitled thereto, for the space of twenty-eight days next after a request in writing for that purpose shall have been made to him by the person entitled as aforesaid, it shall be lawful for the said Court to make an order vesting the right to transfer such stock or Government securities, or to receive the dividends, interest, or income thereof, in any person or persons whom the said Court may appoint.

[*Cf*: 13 & 14 Vict., c. 60 — S. 25.]

Effect of order vesting legal right to transfer stock, etc.

25. Where any order shall have been made under this Act vesting the right to any stock or Government securities in any person or persons appointed by the High Court, such legal right shall vest accordingly, and thereupon the person or persons so appointed are hereby authorized and empowered to execute all deeds and powers-of-attorney, and to perform all acts relating to the transfer of such stock and Government securities into his or their own name or names or otherwise, or relating to the receipt of the dividends, interest or income thereof, to the extent and in conformity with the terms of such order.

Obligation to comply with requisitions of person invested.

Indemnity.

All companies and associations whatever, and all persons, shall be equally bound and compellable to comply with the requisitions of such person or persons so appointed as aforesaid, to the extent and in conformity with the terms of such order, as such companies, associations or persons would have been bound and compellable to comply with the requisitions of the person in whose place such appointment shall have been made, and shall be equally indemnified in complying with the requisition of such person or persons so appointed as they would have been indemnified in complying with the requisition of the person in whose place such appointment shall have been made.

Termination of powers of person replaced.

After notice in writing of any such order of the High Court concerning any stock or Government securities shall have been given, it shall not be lawful for any company or association, or any person having received such notice, to act upon the requisition of the person in whose place an appointment shall have been made, in any matter relating to the transfer of such stock or Government securities, or the payment of the dividends, interest or income thereof.

[*Cf*: 13 & 14 Vict., c. 60—S. 26.]

Effect of order vesting legal right in thing in action.

26. Where any order shall have been made under this Act by the High Court, vesting the legal right to sue for or recover any thing in action, or any interest in respect thereof, in any person or persons, such legal right shall vest accordingly; and thereupon it shall be lawful for the person or persons

so appointed to carry on, commence and prosecute, in his or their own name or names, any suit or other proceeding for the recovery of such thing in action, in the same manner in all respects as the person in whose place an appointment shall have been made could have sued for or recovered such thing in action.

[*Cf*: 13 & 14 Vict, c. 60—S. 27]

On neglect to transfer stock, &c., for twenty-eight days, order made vesting right to transfer in such person as Court appoints.

27. Where any person shall neglect or refuse to transfer any stock or Government securities, or to receive the dividends, interest or income thereof, or to sue for or recover anything in action, or any interest in respect thereof, for the space of twenty-eight days next after an order of the High Court for that purpose shall have been served upon him, it shall be lawful for the said Court to make an order vesting all the right of such person to transfer such stock or Government securities, or to receive the dividends, interest or income thereof, or to sue for and recover such thing in action, or any interest in respect thereof, in such person or persons as the said Court may appoint.

[*Cf*: 15 & 16 Vict., c. 55—S. 4.]

Similar order on like neglect by executor.

28. When any stock or Government securities shall be standing in the sole name of a deceased person, and his executor or administrator shall refuse or neglect to transfer such stock or Government securities, or receive the dividends, interest or income thereof for the space of twenty-eight days next after an order of the High Court for that purpose shall have been served upon him, it shall be lawful for the said Court to make an order vesting the right to transfer such stock or Government securities, or to receive the dividends, interest or income thereof, in any person or persons whom the said Court may appoint.

[*Cf*: 15 & 16 Vict., c. 55—S. 5]

Legal right to transfer stock to vest in person appointed by High Court.

29. When any order being or purporting to be under this Act shall be made by the High Court, vesting the right to any stock or Government securities, or vesting the right to transfer any stock or Government securities, or vesting the right to call for the transfer of any stock or Government securities in any person or persons, in every such case the legal right to transfer such stock or Government securities shall vest accordingly;

Powers of person appointed.

and the person or persons so appointed shall be authorized and empowered to execute all deeds and powers-of-attorney, and to perform all acts relating to the transfer of such stock or Government securities into his or their own name or names or otherwise, to the extent and in conformity with the terms of the order.

Obligation to comply with his requisitions.

All companies and associations, and all persons, shall be equally bound and compellable to comply with the requisitions of such person or persons so appointed as aforesaid, to the extent and in conformity with the terms of such order, as such companies, associations or persons would have been bound and compellable to comply with the requisitions of the person in whose place such appointment shall have been made.

[*Cf*: 15 & 16 Vict., c. 55—S. 6.]

Power to make order for transfer or receipt of dividends of stock, etc., in name of minor trustee.

30. When any minor shall be solely entitled to any stock or Government securities upon any trust it shall be lawful for the High Court to make an order vesting in any person or persons the right to transfer such stock or Government securities, or to receive the dividends, interest or income thereof.

When any minor shall be entitled jointly with any other person or persons to any stock or Government securities upon any trust, it shall be lawful for the said Court to make an order vesting the right to transfer such stock or Government securities, or to receive the dividends, interest or income thereof either in the person or persons jointly entitled with the minor, or in him or them together with any other person or persons the said Court may appoint.

[*Cf*: 15 & 16 Vict, c. 55—S. 3]

When decree made for sale of immoveable property for payment of debts.

31.[a] When a decree or order shall have been made by the High Court directing the sale of any immoveable property for the payment of the debts of a deceased person, every person holding such property, or entitled to a contingent right therein, as heir, or under the will of such deceased debtor, shall be deemed so to hold or be entitled (as the case may be) upon a trust within the meaning of this Act;

and the High Court is hereby empowered to make an order wholly discharging the contingent right, under the will of such deceased debtor, of any unborn person.

[*Cf*: 13 & 14 Vict., c. 60—S. 29.]

[a] Section 31 is repealed in places to which the Transfer of Property Act, 1882, extends or is extended—*See* Act IV of 1882, S. 2 and Sch.

Holding immoveable property, the sale of which has been ordered by High Court.

32. When any decree or order shall have been made by the High Court, whether before or after the passing of this Act, directing the sale of any immoveable property for any purpose whatever, every person holding such property, or entitled to a contingent right therein being a party to the suit or proceeding in which such decree or order shall have been made, and bound thereby, or being otherwise bound by such decree or order, shall be deemed so to hold or be entitled (as the case may be) upon a trust within the meaning of this Act.

Order for vesting estate in lieu of conveyance by party to suit in order to carry out sale.

In every such case, it shall be lawful for the High Court, if the said Court shall think it expedient for the purpose of carrying such sale into effect, to make an order vesting such property or any part thereof, for such estate as the Court shall think fit, either in any purchaser or in such other person as the Court shall direct.

Effect of order.

Every such order shall have the same effect as if the person so holding or entitled had been free from all disability, and had duly executed all proper conveyances and assignments of such property for such estate.

[*Cf*: 15 & 16 Vict., c. 55—S. 1.]

Court to declare what parties are trustees of immoveable property comprised in suit, and as to interests of persons unborn.

33. Where any decree or order shall be made by the High Court for the specific performance of a contract concerning any immoveable property, or for the partition or exchange of any immoveable property, or generally when any decree shall be made for the conveyance of any immoveable property, either in cases arising out of the doctrine of election or otherwise, it shall be lawful for the said Court to declare that any of the parties to the said suit wherein such decree is made are trustees of such property, or any part thereof, within the meaning of this Act, or to declare concerning the interests of unborn persons who might claim under any party to the said suit, or under the will or voluntary settlement of any person deceased who was during his lifetime a party to the contract or transactions concerning which such decree is made, that such interests of unborn persons are the interests of persons who, upon coming into existence, would be trustees within the meaning of this Act.

Thereupon it shall be lawful for the High Court to make such order or orders as to the estates, rights, and interests of such persons, born or unborn, as the said Court might, under the provisions of this Act, make concerning the estates, rights and interests of trustees born or unborn.

[*Cf*: 13 & 14 Vict, c. 60—S. 30.]

Power to direct how right to transfer stock shall be exercised.

34. It shall be lawful for the High Court to make declarations and give directions concerning the manner in which the right to any stock, Government securities or thing in action vested under the provisions of this Act shall be exercised, and thereupon the person or persons in whom such right shall be vested shall be compellable to obey such directions and declarations by the same process as that by which other orders under this Act are enforced.

[*Cf*: 13 & 14 Vict., c. 60—S. 31.]

Power to Court to make order appointing new trustees.

35. In all cases in which it shall be expedient to appoint a new trustee or new trustees, and it shall be found inexpedient, difficult or impracticable so to do without the assistance of the High Court, it shall be lawful for the said Court to make an order appointing a new trustee or new trustees, whether there be any existing trustee or trustees or not at the time of making such order, and, if there be such trustee or trustees, either in substitution for, or in addition to him or them.

Powers of new trustees.

The person or persons who, upon the making of such order, shall be trustee or trustees shall have the same rights and powers as he or they would have had if appointed by decree in a suit duly instituted.

[*Cf*: 13 & 14 Vict., c. 60—S. 32 and S. 33.]

Section 32 — Note 1

[1] Section 32 of this Act may be used in the same way as the corresponding section under the English Act. (Vol 3) 1916 Cal 319 (320) : 43 Cal 124.

Section 35 — Note 1

[1] The High Court has power in the case of a Hindu charitable trust to appoint a new trustee in place of one who has become incapable of acting in the trust. (Vol 7) 1920 Bom 230 (231).

Power to Court to vest immoveable property in new trustee.

36. It shall be lawful for the High Court, upon making any order for appointing a new trustee or new trustees, either by the same or by any subsequent order to direct that any immoveable property subject to the trust shall vest in the person or persons who upon the appointment shall be the trustee or trustees, for such estate as the Court shall direct.

Such order shall have the same effect as if the person or persons, who, before such order, was or were the trustee or trustees (if any), had duly executed all proper conveyances of such property for such estate.

[*Cf*: 13 & 14 Vict., c. 60 S. 34.]

Power to Court to vest right to sue in new trustees.

37. It shall be lawful for the High Court, upon making any order for appointing a new trustee or new trustees, either by the same or by any subsequent order, to vest the right to call for a transfer of any stock or Government securities subject to the trust, or to receive the dividends, interest or income thereof, or to sue for or recover any thing in action subject to the trust, or any interest in respect thereof, in the person or persons who, upon the appointment, shall be the trustee or trustees.

[*Cf*: 13 & 14 Vict., c. 60 — S. 35.]

Old trustees not discharged from liability.

38. Any such appointment by the High Court of new trustees, and any such conveyance or transfer as aforesaid, shall operate no further or otherwise as a discharge to any former or continuing trustee, than an appointment of new trustees under any power for that purpose contained in any instrument would have done.

[*Cf*: 13 & 14 Vict., c. 60 — S. 36.]

Who may apply.

39. An order under any of the hereinbefore contained provisions, for the appointment of a new trustee or new trustees or concerning any immoveable property, stock, or Government securities, or thing in action subject to a trust, may be made upon the application of any person beneficially interested in such immoveable property, stock, Government securities or thing in action, whether under disability or not, or upon the application of any person duly appointed as a trustee thereof; and an order under any of the provisions hereinbefore contained, concerning any immoveable property, stock, Government securities or thing in action subject to a mortgage, may be made on the application of any person beneficially interested in the equity of redemption, whether under disability or not, or of any person interested in the moneys secured by such mortgage.

[*Cf*: 13 & 14 Vict , c. 60 — S. 37.]

Application may be by petition.

40. When any person shall deem himself entitled to an order under any of the provisions hereinbefore contained, it shall be lawful for him to present a petition to the High Court for such order as he may deem himself entitled to, and he may give evidence by affidavit or otherwise in support of such petition before the said Court, and may serve such person or persons with notice of such petition as he may deem entitled to service thereof.

[*Cf*: 13 & 14 Vict., c. 60 — S. 40.]

What may be done upon petition.

41. Upon the hearing of any such petition, it shall be lawful for the said High Court, should it be deemed necessary, to direct a reference to one of the Judges of the Court to inquire into any facts which require such an investigation, or it shall be lawful for the said Court to direct such petition to stand over, to enable the petitioner to adduce evidence or further evidence before the Court, or to enable notice or any further notice of such petition to be served upon any person or persons.

[*Cf*: 13 & 14 Vict , c. 60 — S. 41.]

Court may dismiss petition with or without costs.

42. Upon the hearing of any such petition, it shall be lawful for the High Court to dismiss such petition with or without costs, or to make an order thereupon in conformity with the provisions of this Act.

[*Cf*: 13 & 14 Vict., c. 60 — S. 42.]

Power to make order in cause.

43. Whensoever in any cause or matter, either by the evidence adduced therein, or by the admissions of the parties, or by report of one of the Judges of the Court, the facts necessary for an order under this Act shall appear to the High Court to be sufficiently proved, it shall be lawful for the said Court, either upon the hearing of the

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Section 40 — Note 1

[1] Section 40 expressly authorises a petition for the appointment of a new trustee and R. 75 (a) of the Bombay High Court Rules provides for such a petition being heard in chambers. (Vol 7) 1920 Bom 230 (230).

said cause or of any petition or application in the said cause or matter, to make such order under this Act.

[*Cf*: 13 & 14 Vict, c. 60 — S. 43.]

Orders by High Court founded on certain allegations conclusive evidence of matter contained therein.

44. Whenever any order shall be made under this Act by the High Court, for the purpose of conveying any immoveable property, or for the purpose of releasing or disposing of any contingent right, and such order shall be founded on an allegation of the personal incapacity of a trustee or mortgagee or an allegation that a trustee or the heir or devisee of a mortgagee is out of the jurisdiction of the High Court, or cannot be found, or that it is uncertain which of several trustees, or which of several devisees of a mortgagee, was the survivor, or whether the last trustee or the heir, or last surviving devisee of a mortgagee, be living or dead, or on an allegation that any trustee or mortgagee has died intestate without an heir, or has died, and it is not known who is his heir or devisee, then in any of such cases the fact that the High Court has made an order upon such an allegation shall be conclusive evidence of the matter so alleged in any Court of Civil Judicature upon any question as to the legal validity of the order:

Powers as to re-conveyance of immoveable property, etc.

Provided always that nothing herein contained shall prevent the High Court directing a re-conveyance of any immoveable property conveyed or assigned by any order under this Act, or a re-disposition of any contingent right conveyed or disposed of by such order; and it shall be lawful for the said Court to direct any of the parties to any suit concerning such property or contingent right, to pay any costs occasioned by the order under this Act when the same shall appear to have been improperly obtained.

[*Cf*: 13 & 14 Vict., c. 60 — S. 44.]

Trustee of charity.

45. It shall be lawful for the High Court to exercise the powers herein conferred for the purpose of vesting any immoveable property, stock, Government securities or thing in action in the trustee or trustees of any charity or society, over which charity or society the High Court would have jurisdiction upon suit duly instituted, whether such trustee or trustees shall have been duly appointed by any power contained in any deed or instrument, or by the decree of the said Court, or by order made upon a petition to the said Court.

[*Cf*: 13 & 14 Vict., c. 60 — S. 45]

Money of minors and persons of unsound mind to be paid into Court.

46. Where any minor or person of unsound mind shall be entitled to any money payable in discharge of any immoveable property, stock, Government securities or thing in action conveyed or transferred under this Act, it shall be lawful for the person by whom such money is payable to pay the same into the High Court, in trust in any cause then depending concerning such money, or, if there shall be no such cause, to the credit of such minor or person of unsound mind, subject to the order or disposition of the said Court;

and it shall be lawful for the said Court, upon petition in a summary way, to order any money so paid to be invested in Government securities, and to order payment or distribution thereof, or payment of the dividends or interest thereof, as to the said Court shall seem reasonable

[*Cf*: 13 & 14 Vict., c. 60 — S 48]

Court may make decree in absence of trustee.

47. Where, in any suit commenced or to be commenced in the High Court, it shall be made to appear to the Court that diligent search and enquiry have been made, after any person made a defendant, who is only a trustee, to serve him with the process of the Court, and that he cannot be found, it shall be lawful for the said Court to hear and determine such cause, and to make such absolute decree therein against every person who shall appear to it to be only a trustee, and not otherwise concerned in interest in the matter in question, in such and the same manner as if such trustee had been duly served with the process of the Court, and had appeared at the hearing of such cause:

Decree not effective without service of process.

Provided always that no such decree shall bind, affect, or in any wise prejudice any person against whom the same shall be made, without service of process upon him as aforesaid, his heirs, executors or administrators for or in respect of any estate, right or interest which such person shall have at the time of making such decree for his own use or benefit, or otherwise than as a trustee as aforesaid.

[*Cf*: 13 & 14 Vict., c. 60 — S. 49.]

Orders under Act chargeable with same stamp-duty as deeds of conveyance.

48.[a] Every order to be made under this Act, which shall have the effect of a conveyance of any immoveable property, or a transfer of any such stock, Government securities or thing in action as can only be transferred by stamped deed or for the transfer of which a stamp is necessary, shall be chargeable

with the like amount of stamp duty as it would have been chargeable with if it had been a deed executed, or a transfer made, by the person or persons holding such property or entitled to such stock, Government securities or thing in action.

Every such order shall be duly stamped for denoting the payment of the said duty.

[a] *Cf* : 15 & 16 Vict., c. 55, S. 13; since *repealed* by the Statute Law Revision Act, 1892.

Costs may be paid out of estate.

49. The High Court may order the costs and expenses of and relating to the petitions, orders, directions, conveyances and transfers to be made in pursuance of this Act, or any of them, to be paid and raised out of or from the immoveable or moveable property, or the rents or produce thereof, in respect of which the same respectively shall be made, or in such manner as the said Court shall think proper.

[*Cf* : 13 & 14 Vict., c. 60 — S. 51]

Power to order enquiry concerning person of unsound mind.

50. Upon any petition being presented under this Act to the High Court, concerning a person of unsound mind, it shall be lawful for the said Court to make an order directing an enquiry whether such person is or is not of unsound mind, and incapable of managing himself and his affairs.

Effect of order.

Such order shall have the same effect as the like order made under section 1 of [a]Act XXXIV of 1858 *(to regulate proceedings in Lunacy in the Courts of Judicature established by Royal Charter)*, and the enquiry directed to be made shall be made in all respects in the manner declared and prescribed for making an enquiry under the last-mentioned Act.

Postponement of order pending enquiry.

The High Court may postpone making any order upon the petition presented as aforesaid, until any enquiry so directed to be made shall have been finally concluded.

[*Cf* : 13 & 14 Vict., c. 60 — S. 52.]

[a] *Repealed* by the Indian Lunacy Act, 1912 (4 [IV] of 1912).

Suit may be directed.

51. Upon any petition under this Act being presented to the High Court, it shall be lawful for the said Court to postpone making any order upon such petition, until the right of the petitioner shall have been declared in a suit duly instituted for that purpose.

[*Cf* : 13 & 14 Vict., c. 60 — S. 53.]

Indemnity to persons obeying orders under Act.

52. Every order made or purporting to be made under this Act by the High Court shall be a complete indemnity to all persons whatsoever for any act done pursuant thereto; and it shall not be necessary for such persons to enquire concerning the propriety of such order, or whether the High Court has jurisdiction to make the same.

[*Cf* : 15 & 16 Vict., c. 55 — S. 7.]

Execution and effect of orders.

53. Any order made by the High Court under this Act shall have the same effect, and be executed in the same manner, as a decree.

Short title.

54. This Act may be cited as the Indian Trustee Act, 1866.

55. [Application of Act to Straits Settlements.] *Repealed by the Repealing Act, 1874 (16 [XVI] of 1874).*

[THE] TRUSTEES' AND MORTGAGEES' POWERS ACT, 1866
(ACT XXVIII of 1866)
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Section 49 — Note 1

[1] In the case of Charitable Trusts the Advocate-General represents the charity and also all the beneficiaries. So the beneficiaries should not be allowed to appear and argue the case. Where they do so costs ought not to be allowed to them to be paid out of the charitable estate. But where the beneficiaries have conflicting interests and the Advocate-General cannot represent them all the beneficiaries may be allowed to appear. (Vol 24) 1937 Bom 63 (63) : I L R (1937) Bom 425 (DB).

Section 53 — Note 1

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—Amended by Acts 32 of 1925; 34 of 1926.
—Adapted by A. O.
—Repealed in part locally by Act 2 of 1882.
—Repealed in part by Acts 16 of 1874; 7 of 1882; 18 of 1919; 11 of 1923.

[THE] TRUSTEES' AND MORTGAGEES' POWERS ACT, 1866.

(ACT XXVIII OF 1866)[a]

[24th October, 1866.]

An Act to give to Trustees, Mortgagees and others, in cases to which English Law is applicable, certain powers now commonly inserted in Settlements, Mortgages and Wills, and to amend the Law of property and relieve Trustees.

Preamble. WHEREAS it is expedient that, in cases to which English law is applicable, certain powers and provisions usually inserted in settlements, mortgages, wills and other instruments

should be made incident to the estates of the persons interested, so as to dispense with the necessity of inserting the same in terms in every such instrument, and that in such cases trustees should be relieved; It is enacted as follows :—

[a] The Statement of Objects and Reasons of the Bill which was passed into law as Act XXVIII of 1866 has not been published.

This Act has been declared to be in force in the whole of British India, except the Scheduled Districts, by the Laws Local Extent Act, 1874 (XV of 1874), S. 3.

It has been declared, by notification under S. 3 (a) of the Scheduled Districts Act, 1874 (XIV of 1874) to be in force in the following Scheduled Districts, namely—West Jalpaiguri, the Western Hills of Darjiling, the Darjiling Tarai and the Damson Sub-division of the Darjiling District, *see* Gazette of India, 1881, Part I, page 74; The Districts of Hazaribagh, Lohardaga (now the Ranchi District), and Manbhum, and Pargana Dhalbhum and the Kolhan in the District of Singbhum, *ibid*, 1881. Part I, page 504; The Scheduled Districts in Ganjam and Vizagpatam, *ibid*, 1898, Part I, page 870: The Schedu'ed portion of the Mirzapur District, *ibid*, 1879, Part I, page 383; Jaunsar Bawar, *ibid*, 1879, Part I, Page 382; The Districts of Hazara, Peshawar, Kohat, Bannu, Dera Ismail Khan and Dera Gazi Khan, *ibid*, 1886. Part I, page 48; The District of Sylhet, *ibid*, 1879, Part I, page 631; The rest of Assam (except the North Lushai Hills), *ibid*, 1897, Part I, page 299.

It has been declared, by notification under S. 3 (b) of the same Act, not to be in force in the Scheduled District of Lahaul; *see* Gazette of India, 1886, Part I, page 301.

It has been extended, by notification under S. 5 of the last mentioned Act, to the Scheduled Districts of Kumaon and Garwhal; *see* Gazette of India, 1876, Part I, page 606.

This Act is based on "the Law of Property Amendment Act, 1859" (22 & 23 Vict., c. 35, and 23 & 24 Vict., c. 145), which has since been repealed by 44 & 45 Vict., c. 41, S. 71 and 45 & 46 Vict., c. 38, S. 64.

Interpretation-clause.

1. In the construction of this Act, unless there be something repugnant in the subject or context,—

"Immoveable property" shall include land, any benefit to arise out of land, and things attached to the earth or permanently fastened to anything which is attached to the earth:

"Mortgage" shall be taken to include every instrument by virtue whereof immoveable property is in any manner conveyed, pledged, or charged as security for the repayment of money or money's worth lent, and to be re-conveyed or released on satisfaction of the debt :

"Mortgagor" shall be taken to include every person by whom any such conveyance, pledge or charge as aforesaid shall be made :

"Mortgagee" shall be taken to include every person to whom or in whose favour any such conveyance, pledge or charge as aforesaid is made or transferred : and

[a]["High Court" means a Court which is a High Court for the purposes of the Government of India Act, 1935.]

[a] *Substituted* by A. O. For list of High Courts, *see* the Government of India Act, 1935 (26 Geo. V, c. 2), S. 219.

Powers of Trustees for Sale, etc., and Trustees of renewable Leaseholds.

Trustees empowered to sell may sell in lots, and either by public auction or private contract.

[a]**2.** In all cases where, by any will, deed, or other instrument of settlement, it is expressly declared that trustees or other persons therein named or indicated shall have a power of sale, either generally or in any particular event, over any immoveable property named or referred to in, or from time to time subject to, the uses or trusts of such will, deed or other instrument, it shall be lawful for such trustees or other persons, whether such property be vested in them or not, to exercise such power of sale by selling such property either together or in lots, and either by public auction or private contract, and either at one time or at several times.

[*Cf* : 23 & 24 Vict., c. 145 — S. 1.]

[a] *Repealed* in the territories to which the Indian Trusts Act, 1882 (2 [II] of 1882) for the time being extends; *see ibid.*, S. 2 and Sch.

Sale may be made under special conditions, and trustees may buy in, etc.

[a]**3.** It shall be lawful for the persons making any such sale to insert any such special or other stipulations either as to title or evidence of title, or otherwise, in any conditions of sale, or contract for sale, as they shall think fit ; and also to buy in the property or any part thereof at any sale by auction and to rescind or vary any contract for sale, and to re-sell the property which shall be so bought in, or as to which the contract shall be so rescinded, without being responsible for any loss which may be occasioned thereby ;

and no purchaser under any such sale shall be bound to enquire whether the persons making the same may or may not have in contemplation any particular re-investment of the purchase-money in the purchase of any other property or otherwise.

[*Cf.* 23 & 24 Vict. c. 145—S. 2.]

[a] *See* S. 2, Legislative-note [a].

[a]4. For the purpose of completing any such sale as aforesaid, the persons empowered to sell as aforesaid shall have full power to convey or otherwise dispose of the property in question in such manner as may be, necessary.

Trustees exercising power of sale, &c., empowered to convey.

[*Cf.* 23 & 24 Vict., c. 145—S. 3.]

[a] *See* S. 2, Legislative Note [a].

[a]5. The money so received upon any such sale as aforesaid shall be laid out in the manner indicated in that behalf in the will, deed or instrument containing the power of sale ;

Money arising from sales to be laid out in manner indicated in will, etc.

and until the money to be received upon any sale as aforesaid shall be so disposed of, the same shall be invested at interest in Government securities for the benefit of such persons as would be entitled to the benefit of the money, and the interest and profits thereof, in case such money were then actually laid out as aforesaid :

Until so laid out, money to be invested in Government securities.

Provided that if the will, deed or instrument shall contain no such indication, the persons empowered to sell as aforesaid shall invest the money so received upon any such sale in their names upon Government securities in India, and the interest of such securities shall be paid and applied to such person or persons for such purposes and in such manner as the rents and profits of the property sold as aforesaid would have been payable or applicable in case such sale had not been made.

[*Cf.* 23 & 24 Vict., c. 145—S. 4.]

[a] *See* S. 2, Legislative Note [a].

Powers of Mortgagee.[a]

6. Where any principal-money is secured or charged by deed on any immoveable property, or on any interest therein, the person to whom such money shall for the time being be payable, his executors, administrators and assigns, shall, at any time after the expiration of one year from the time when such principal-money shall have become payable, according to the terms of the deed, or after any interest on such principal-money shall have been in arrear for six months, or after any omission to pay any premium on any insurance which by the terms of the deed ought to be paid by the person entitled to the property subject to the charge, have the following powers to the same extent (but no more) as if they had been in terms conferred by the person creating the charge, namely :—

Powers incident to mortgages.

1st, a power to sell or concur with any other person in selling the whole or any part of the property by public auction or private contract, subject to any reasonable conditions he may think fit to make and to rescind or vary contracts for sale, or buy in and re-sell the property, from time to time, in like manner :

2nd, a power to appoint or obtain the appointment of a receiver of the rents and profits of the whole or any part of the property in manner hereinafter mentioned.

[*Cf.* 23 & 24 Vict., c. 145—S. 11.]

[a] As to the application of Ss. 6 to 19 to certain English mortgages, *see* Transfer of Property Act (IV [4] of 1882), S. 69.

7. Receipts for purchase-money given by the person or persons exercising the power of sale hereby conferred shall be sufficient discharges to the purchasers, who shall not be bound to see to the application of such purchase-money.

Receipts for purchase-money sufficient discharges.

[*Cf.* 23 & 24 Vict., c. 145—S 12.]

8. No such sale as last aforesaid shall be made until after six months' notice in writing given to the person or one of the persons entitled to the property subject to the charge or affixed on some conspicuous part of such property ;

Notice to be given before sale ;

but, when a sale has been effected in professed exercise of the powers hereby conferred, the title of the purchaser shall not be liable to be impeached on the ground that no case had arisen to authorize the exercise of such power, or that no such notice as aforesaid had been given ; but any person damnified by any such unauthorized exercise of such power shall have his remedy in damages against the person or persons selling.

but purchaser relieved from inquiry as to circumstances of sale.

[*Cf.* 23 & 24 Vict., c. 145—S. 13.]

9. The money arising by any sale effected as aforesaid shall be applied by the person receiving the same as follows :—

Application of purchase-money.

first, in payment of all the expenses incident to the sale or incurred in any attempted sale ;

secondly, in discharge of all interest and costs then due in respect of the charge in consequence whereof the sale was made; and

thirdly, in discharge of all the principal-moneys then due in respect of such charge;

and the residue of such money shall be paid to the person entitled to the property subject to the charge, his executors, administrators or assigns, as the case may be.

Cf. 23 & 24 Vict., c. 145– S. 14.]

Conveyance to purchaser.

10. The person exercising the power of sale hereby conferred shall have power by deed to convey or assign to and vest in the purchaser the property sold for all the estate and interest therein which the person who created the charge had power to dispose of:

Provided that nothing herein contained shall be construed to authorize the mortgagee of a term of years to sell and convey the fee simple of the property comprised therein in cases where the mortgagor could have disposed of such fee simple at the date of the mortgage.

[*Cf.* 23 & 24 Vict., c. 145—S. 15.]

Owner of charge may call for title-deeds and conveyance of legal estate.

11. At any time after the power of sale hereby conferred shall have become exercisable, the person entitled to exercise the same shall be entitled to demand and recover from the person entitled to the property subject to the charge all the deeds and documents in his possession or power relating to the same property, or to the title thereto, which he would have been entitled to demand and recover if the same property had been conveyed, appointed or surrendered to and were then vested in him for all the estate and interest which the person creating the charge had power to dispose of;

and, where the legal estate shall be outstanding in a trustee, the person entitled to a charge created by a person equitably entitled or any purchaser from such person, shall be entitled to call for a conveyance of the legal estate to the same extent as the person creating the charge could have called for such a conveyance if the charge had not been made.

Cf. 23 & 24 Vict., c. 145 S. 16.]

Appointment of receiver.

12. Any person entitled to appoint or obtain the appointment of a receiver as aforesaid may, from time to time, if any person or persons has or have been named in the deed of charge for that purpose, appoint such person or any one of such persons to be receiver, or if no person be so named, then may, by writing delivered to the person or any one of the persons entitled to the property subject to the charge, or affixed on some conspicuous part of the property, require such last-mentioned person or persons to appoint a fit and proper person as receiver, and if no such appointment be made within ten days after such requisition, then may in writing appoint any person he may think fit.

No person shall be ineligible for the office of receiver merely because he is an officer of the High Court.

[*Cf.* 23 & 24 Vict., c. 145– S. 17.]

Receiver deemed agent of mortgagor.

13. Every receiver appointed as aforesaid shall be deemed to be the agent of the person entitled to the property subject to the charge, who shall be solely responsible for his acts or defaults, unless otherwise provided for in the charge.

[*Cf.* 23 & 24 Vict., c. 145—S. 18.]

Powers of receiver.

14. Every receiver appointed as aforesaid shall have power to demand and recover and give effectual receipts for all the rents, issues and profits of the property of which he is appointed receiver, by suit, distress or otherwise in the name either of the person entitled to the property subject to the charge, or of the person entitled to the money secured by the charge, to the full extent of the estate or interest which the person who created the charge had power to dispose of.

[*Cf.* 23 & 24 Vict., c. 145—S. 19.]

Section 12 — Note 1

[1] Section 69-A, Transfer of Property Act has not repealed or modified S. 12 of Act 28 of 1866, the Trustees and Mortgagees Powers Act The only effect of the amendment is that S. 12 is not to be deemed to be incorporated in an English mortgage *propriore vigore* executed after the Amending Act came into force. The term about the appointment of receiver by the mortgagee without recourse to Court has not been modified or affected by the amendment of Transfer of Property Act (Vol 23) 1936 Cal 646 (649) : I L R (1937) 1 Cal 359 (DB).

[2] The period of ten days (for appointment of receiver) is to be calculated from the date of delivery of the letter of requisition. It is given to the mortgagor to make his choice (Vol 23) 1936 Cal 646 (649) : I L R (1937) 1 Cal 359 (DB)

Section 13 – Note 1

[1] Receiver appointed under S. 12 (under the power contained in an English mortgage) — The rule that an agent is accountable to his principal will not apply to his case and he is not accountable to the mortgagor — He is accountable to the mortgagee and then to the mortgagor if there is any balance left over after satisfying mortgagee's interest. (Vol 25) 1938 Cal 507 (510, 511).

Receiver may be removed, and new receivers appointed.

15. Every receiver appointed as aforesaid may be removed by the like authority, or on the like requisition as before provided with respect to the original appointment of a receiver, and new receivers may be appointed from time to time.

[*Cf.* 23 & 24 Vict., c. 145—S. 20.]

Receiver to receive commission not exceeding five per cent.

16. Every receiver appointed as aforesaid shall be entitled to retain out of any money received by him, in lieu of all costs, charges, and expenses whatsoever such a commission, not exceeding five *per centum* on the gross amount of all money received, as shall be specified in his appointment, and if no amount shall be so specified, then five *per centum* on such gross amount.

[*Cf.* 23 & 24 Vict., c. 145—S. 21.]

Receiver to insure if required.

17. Every receiver appointed as aforesaid shall, if so directed in writing by the person entitled to the money secured by the charge, insure and keep insured from loss or damage by fire out of the money received by him the whole or any part of the property included in the charge which is in its nature insurable.

[*Cf.* 23 & 24 Vict., c. 145—S. 22.]

Application of moneys received by him.

18. Every receiver appointed as aforesaid shall pay and apply all the money received by him in the first place in discharge of Government revenue and of all taxes, rates and assessments whatsoever, and in payment of his commission as aforesaid, and of the premiums on the insurances, if any; and in the next place in payment of all the interest accruing due in respect of any principal-money then charged on the property over which he is receiver, or on any part thereof: and, subject as aforesaid, shall pay all the residue of such money to the person for the time being entitled to the property subject to the charge, his executors, administrators, or assigns.

[*Cf.* 23 & 24 Vict., c. 145—S. 23.]

This part to relate to charges by way of mortgage only.

19. The powers and provisions contained in sections 6 to 18 of this Act, both inclusive, relate only to mortgages or charges made to secure money advanced or to be advanced by way of loan, or to secure an existing or future debt.

[*Cf.* Trustee Act, 1860 (23 & 24 Vict., c. 145)—S. 24.]

Leases.

Restriction on effect of license to alien.

20. Where any license to do any act which, without such license, would create a forfeiture, or give a right to re-enter, under a condition or power reserved in any lease heretofore granted, or to be hereafter granted, shall at any time after this Act comes into operation be given to any lessee or his assigns, every such license shall, unless otherwise expressed, extend only to the permission actually given, or to any specific breach of any proviso or covenant made or to be made, or to the actual assignment, under-lease or other matter thereby specifically authorized to be done, but not so as to prevent any proceeding for any subsequent breach (unless otherwise specified in such license);

and all rights under covenants and powers of forfeiture and re-entry in the lease contained shall remain in full force and shall be available as against any subsequent breach of covenant or condition, assignment, under lease or other matter not specifically authorized or made dispunishable by such license, in the same manner as if no such license had been given; and the condition or right of re-entry shall be and remain in all respects as if such license had not been given, except in respect of the particular matter authorized to be done.

[*Cf*: Law of Property Amendment Act, 1859 (22 & 23 Vict., c. 35) — S. 1.]

Restricted operation of partial licenses.

21. Where in any lease heretofore granted or to be hereafter granted there is or shall be a power or condition of re-entry on assigning or under-letting, or doing any other specified act without license, and a license at any time after the passing of this Act shall be given to one of several lessees or co-owners to assign or under let his share or interest, or to do any other act prohibited to be done without license; or shall be given to any lessee or owner, or any one of several lessees or owners, to assign or under-let part only of the property, or to do any other such act as aforesaid in respect of part only of such property, such license shall not operate to destroy or extinguish the right of re-entry in case of any breach of the covenant or condition by the co-lessee or co lessees, or owner or owners, of the other shares or interests in the property, or by the lessee or owner of the rest of the property (as the case may be) over or in respect of such shares or interests or remaining property, but such right of re-entry

shall remain in full force over or in respect of the shares or interests or property not the subject of such license.

[*Cf*: 22 & 23 Vict., c. 35 - S. 2.]

Apportionment of conditions of re-entry in certain cases.

22. Where the reversion upon a lease is reserved, and the rent or other reservation is legally apportioned, the assignee of each part of the reversion shall, in respect of the apportioned rent or other reservation allotted or belonging to him, have and be entitled to the benefit of all conditions or powers of re-entry for non-payment of the original rent or other reservation, in like manner as if such conditions or powers had been reserved to him as incident to his part of the reversion in respect of the apportioned rent or other reservation allotted or belonging to him.

[*Cf*: 22 & 23 Vict., c. 35 — S. 3.]

Rent-charges.

Release of part of land charged, not an extinguishment.

23. The release from a rent-charge of part of the immoveable property charged therewith shall not extinguish the whole rent-charge, but shall operate only to bar the right to recover any part of the rent-charge out of the property released, without prejudice, nevertheless, to the rights of all persons interested in the property remaining unreleased and not concurring in or confirming the release.

[*Cf*: 22 & 23 Vict., c. 35 — S. 10.]

Powers.

Mode of execution of powers.

24. A deed hereafter executed in the presence of and attested by two or more witnesses in the manner in which deeds are ordinarily executed and attested shall, so far as respects the execution and attestation thereof, be a valid execution of a power of appointment by deed or by any instrument in writing not testamentary, notwithstanding it shall have been expressly required that a deed or instrument in writing made in exercise of such power should be executed or attested with some additional or other form of execution or attestation or solemnity:

Provided always that this provision shall not operate to defeat any direction in the instrument creating the power, that the consent of any particular person shall be necessary to a valid execution, or that any act shall be performed in order to give validity to any appointment, having no relation to the mode of executing and attesting the instrument:

and nothing herein contained shall prevent the donee of a power from executing it conformably to the power by writing or otherwise than by an instrument executed and attested as an ordinary deed, and to any such execution of a power this provision shall not extend.

[*Cf*: 22 & 23 Vict., c. 35 — S. 12.]

Legatee in trust may raise money by sale, notwithstanding want of express power in will.

25. Where, by any will which shall come into operation after the passing of this Act, the testator shall have charged his immoveable property or any specific portion thereof with the payment of his debts, or with the payment of any legacy or other specific sum of money, and shall have bequeathed the property so charged to any trustee or trustees for the whole of his estate or interest therein, and shall not have made any express provision for the raising of such debt, legacy or sum of money out of such property, it shall be lawful for the said legatee or legatees in trust, notwithstanding any trusts actually declared by the testator, to raise such debts, legacy or money as aforesaid by sale and absolute disposition by public auction or private contract, of the said property or any part thereof, or by a mortgage of the same, or partly in one mode and partly in the other;

and any deed or deeds of mortgage so executed may reserve such rate of interest and fix such period or periods of repayment as the person or persons executing the same shall think proper.

[*Cf*: 22 & 23 Vict., c. 35 — S. 14.]

Powers given by last section extended to survivors, legatees, &c.

26. The powers conferred by the last preceding section shall extend to all and every person or persons in whom the property bequeathed in trust shall for the time being be vested by survivorship, or under the laws relating to intestate or testamentary succession, or to any person or persons who may be appointed under any power in the will, or by the High Court, to succeed to the trusteeship vested in such legatee or legatees in trust as aforesaid.

[*Cf*: 22 & 23 Vict., c. 35 — S. 15.]

Executors to have power of raising money, &c., where no sufficient bequest.

27. If any testator who shall have created such a charge as is described in section 25 of this Act shall not have bequeathed the property charged as aforesaid in such terms as that his whole estate and interest therein shall become vested in any trustee or trustees, the executor or executors (if any) for the time being named in such will shall have the same or the like power of raising the said moneys as is hereinbefore vested in the legatee or legatees in trust of the said property, and such power shall from time to time devolve on and become vested in the person or persons (if any) in whom the executorship shall for the time being be vested.

[*Cf* : 22 & 23 Vict., c. 35 — S. 16.]

Purchasers, &c., not bound to enquire as to powers.

28. Purchasers or mortgagees shall not be bound to enquire whether the powers conferred by sections 25, 26 and 27 of this Act, or any of them shall have been duly and correctly exercised by the person or persons acting in virtue thereof.

[*Cf* : 22 & 23 Vict., c. 35 — S. 17.]

Inheritance.

Descent how traced.

29. In cases of intestacies occurring before the first day of January, 1866, where there shall be a total failure of heirs of the purchaser, or where any immoveable property shall be descendible as if an ancestor had been the purchaser thereof, and there shall be a total failure of the heirs of such ancestor, then and in every such case the property shall descend, and the descent shall thenceforth be traced, from the person last entitled to the property as if he had been the purchaser thereof.

This section shall be read as part of [a]Act No. XXX, of 1839 *(for the amendment of the Law of Inheritance).*

[*Cf* : 22 & 23 Vict., c. 35 — Ss. 19 and 20.]

[a] The Inheritance Act, 1839. *Repealed*, except as to descents before 1866, by the Repealing Act, 1868 (VIII [8] of 1868).

Assignment of moveables and Terms for years.

Assignment to self and others.

30. Any person shall have power to assign moveable property now by law assignable, terms for years of immoveable property, and estates by *elegit*, directly to himself and another person or other persons or corporation, by the like means as he might assign the same to another.

[*Cf* : 22 & 23 Vict., c. 35 — S. 21.]

Purchasers.

Not bound to see to application of purchase-money, &c.

31. The *bona fide* payment to and the receipt of any person to whom any purchase or mortgage-money shall be payable upon any express or implied trust shall effectually discharge the person paying the same from seeing to the application, or being answerable for the misapplication thereof.

[*Cf* : 22 & 23 Vict., c. 35 — S. 23, *omitting* the limiting clause, "unless the contrary shall be expressly declared by the instrument creating the trust or security."]

Investment of Trust-funds.

On what securities trust-funds may be invested.

32. Trustees having trust-money in their hands which it is their duty to invest at interest shall be at liberty, at their discretion, to invest the same in any Government securities, and such trustees shall also be at liberty, at their discretion, to call in any trust-funds invested in any other securities than as aforesaid, and to invest the same on any such securities as aforesaid, and also from time to time, at their discretion, to vary any such investments as aforesaid for others of the same nature :

Provided always that no such original investment as aforesaid, and no such change of investment as aforesaid, shall be made where there is a person under no disability entitled in possession to receive the income of the trust-fund for his life, or for a term of years determinable with his life, or for any greater estate, without the consent in writing of such person.

[*Cf* : 23 & 24 Vict., c. 145 — S. 25.]

Trustees and Executors.

Trustees may apply income of property of minors, &c., for their maintenance.

33.[a] In all cases where any property is held by trustees in trust for a minor, either absolutely or contingently on his attaining majority, or on the occurrence of any event previously to his attaining majority, it shall be lawful for such trustees, at their sole discretion, to pay to the guardians (if any) of such minor, or otherwise to apply for or towards the maintenance or education of such minor, the whole or any part of the income to which such minor may be entitled in respect of such property, whether

there be any other fund applicable to the same purpose, or any other person bound by law to provide for such maintenance or education, or not;

and such trustees shall accumulate all the residue of such income by way of compound interest, by investing the same and the resulting income thereof from time to time in proper securities, for the benefit of the person who shall ultimately become entitled to the property from which such accumulations shall have arisen :

Provided always, that it shall be lawful for such trustees at any time, if it shall appear to them expedient, to apply the whole or any part of such accumulations as if the same were part of the income arising in the then current year.

[*Cf* : 23 & 24 Vict., c. 145 — S. 26.]

[a] Sections 33 to 37 are *repealed* in places to which the Indian Trusts Act (2 [II] of 1882) extends or is extended. *See* the Indian Trusts Act (2 [II] of 1882), S. 2.

Provisions for appointment of new trustees, on death, &c.

34. Whenever any trustee, either original or substituted, and whether appointed by any High Court or otherwise, shall die, or be six months absent from British India, or desire to be discharged from, or refuse, or become unfit or incapable, to act in the trusts or powers in him reposed, before the same shall have been fully discharged and performed, it shall be lawful for the person or persons nominated for that purpose by the deed, will or other instrument creating the trust (if any), or if there be no such person, or no such person able and willing to act, then for the surviving or continuing trustees or trustee for the time being, or the acting executors or executor, or administrators or administrator, of the last surviving and continuing trustee, or for the retiring trustees, if they shall all retire simultaneously, or for the last retiring trustee, or where there are two or more classes of trustees of the instrument creating the trust, then for the surviving or continuing trustees or trustee of the class in which any such vacancy or disqualification shall occur (and for this purpose any refusing or retiring trustee shall, if willing to act in the execution of the power, be considered a continuing trustee), by writing to appoint any other person or persons to be a trustee or trustees in the place of the trustee or trustees so dying, or being absent from British India, or desiring to be discharged, or refusing or becoming unfit or incapable to act as aforesaid.

Transfer of trust-property to new trustees.

So often as any new trustee or trustees shall be so appointed as aforesaid, all the trust-property (if any) which for the time being shall be vested in the surviving or continuing trustees or trustee, or in the heirs, executors or administrators of any trustee, shall with all convenient speed be conveyed and transferred so that the same may be legally and effectually vested in such new trustee or trustees, either solely or jointly with the surviving or continuing trustees or trustee as the case may require.

Powers, &c., of new trustees.

Every new trustee to be appointed as aforesaid, as well before as after such conveyance or transfer as aforesaid, and also every trustee appointed by any High Court, either before or after the passing of this Act, shall have the same powers, authorities and discretions, and shall in all respects act as if he had been originally nominated a trustee by the deed, will or other instrument (if any) creating the trust.

Appointment of Official Trustee to be a trustee.

The Official Trustee may with his consent, and by the order of the High Court, be appointed under this section in any case in which only one trustee is to be appointed and such trustee is to be the sole trustee.

[*Cf* : 23 & 24 Vict., c. 145 — S. 27.]

Appointment in place of trustee predeceasing testator.

35. The power of appointing new trustees hereinbefore contained may be exercised in cases where a trustee nominated in a will has died in the life-time of the testator.

[*Cf* : 23 & 24 Vict., c. 145 — S. 28.]

Trustees' receipts to be discharges.

36. The receipts in writing of any trustees or trustee for any money payable to them or him by reason, or in the exercise, of any trusts or powers reposed or vested in them or him, shall be sufficient discharges for the money therein expressed to be received, and shall effectually exonerate the persons paying such money from seeing to the application thereof, or from being answerable for any loss or misapplication thereof.

[*Cf* : 23 & 24 Vict., c. 145 — S. 29.]

Section 34 — Note 1

[1] Section 34 is repealed wholly by S. 2 of the Indian Trusts Act II of 1882 and there is no saving or exception in favour of charitable trust or of trustees of properties dedicated to charity. ('09) 33 Bom 509 (516, 517) (DB).

Every trust-instrument deemed to contain clauses for indemnity and reimbursement of trustees.

37. Every deed, will or other instrument creating a trust either expressly or by implication, shall, without prejudice to the clauses actually contained therein, be deemed to contain a clause in the words or to the effect following, that is to say,—

"that the trustees or trustee for the time being of the said deed, will or other instrument shall be respectively chargeable only for such moneys, stocks, funds and securities as they shall respectively actually receive, notwithstanding their respectively signing any receipt for the sake of conformity, and shall be answerable and accountable only for their own acts, receipts, neglects or defaults, and not for those of each other, nor for any banker, broker or other person with whom any trust-moneys or securities may be deposited, nor for the insufficiency or deficiency of any stocks, funds or securities, nor for any other loss, unless the same shall happen through their own wilful default respectively; and also that it shall be lawful for the trustees or trustee for the time being of the said deed, will or other instrument, to reimburse themselves or himself, or pay or discharge out of the trust-premises all expenses incurred in or about the execution of the trusts or powers of the said deed, will or other instrument."

[*Cf*: 22 & 23 Vict., c. 35 — S. 31]

Executors may compound, &c.

38. It shall be lawful for any executors to pay any debts or claims upon any evidence that they may think sufficient, and to accept any composition, or any security for any debts due to the deceased, and to allow any time for payment of any such debts as they shall think fit, and also to compromise, compound or submit to arbitration all debts, accounts, claims and things whatsoever relating to the estate of the deceased, and for any of the purposes aforesaid to enter into, give and execute such agreements, instruments of composition, releases and other things as they shall think expedient, without being responsible for any loss to be occasioned thereby.

[*Cf*: 23 & 24 Vict., c 145 — S. 30.]

39. [Trustee, etc., making payment under power-of-attorney, not liable by reason of death of party giving power.] *Repealed by the Powers of Attorney Act, 1882 (7 [VII] of 1882), S. 6.*

As to liability of executor or administrator in respect of rents, covenants or agreements.

40. Where an executor or administrator liable as such to the rents, covenants, or agreements contained in any lease or agreement for a lease granted or assigned, whether before or after the passing of this Act, to the testator or intestate whose estate is being administered, shall have satisfied all such liabilities under the said lease, or agreement for a lease, as may have accrued due and been claimed up to the time of the assignment hereinafter mentioned, and shall have set apart a sufficient fund to answer any future claim that may be made in respect of any fixed and ascertained sum covenanted or agreed by the lessee to be laid out on the property demised or agreed to be demised, although the period for laying out the same may not have arrived, and shall have assigned the lease or agreement for a lease to a purchaser thereof, he shall be at liberty to distribute the residuary estate of the deceased to and amongst the parties entitled thereto respectively, without appropriating any part, or any further part (as the case may be), of the estate of the deceased to meet any future liability under the said lease or agreement for a lease

The executor or administrator so distributing the residuary estate shall not, after having assigned the said lease or agreement for a lease, and having, where necessary, set apart such sufficient fund as aforesaid, be personally liable in respect of any subsequent claim under the said lease or agreement for a lease.

Nothing herein contained shall prejudice the right of the lessor or those claiming under him to follow the assets of the deceased into the hands of the person or persons to or amongst whom the said assets may have been distributed.

[*Cf*: 22 & 23 Vict., c. 35 — S. 27.]

As to liability of executor, &c., in respect of rents, &c., in conveyance on rent-charge.

41. In like manner, where an executor or administrator liable as such to the rent, covenants or agreements contained in any conveyance on chief rent or rent-charge (whether any such rent be by limitation of use, grant or reservation), or agreement for such conveyance, granted or assigned to or made and entered into with the testator or intestate whose estate is being administered, shall have satisfied all such liabilities under the said conveyance or agreement for a conveyance, as may have accrued due and been claimed up to the time of the conveyance hereinafter mentioned, and shall have set apart a sufficient fund to answer any future claim that may be made in respect of any fixed and ascertained sum covenanted or agreed by the grantee to be

laid out on the property conveyed, or agreed to be conveyed, although the period for laying out the same may not have arrived, and shall have conveyed such property, or assigned the said agreement for such conveyance as aforesaid, to a purchaser thereof, he shall be at liberty to distribute the residuary estate of the deceased to and amongst the parties entitled thereto, respectively without appropriating any part or any further part (as the case may be) of such estate to meet any future liability under the said conveyance or agreement for a conveyance.

The executor or administrator so distributing the residuary estate shall not, after having made or executed such conveyance or assignment, and having, where necessary, set apart such sufficient fund as aforesaid, be personally liable in respect of any subsequent claim under the said conveyance or agreement for conveyance.

Nothing herein contained shall prejudice the right of the grantor, or those claiming under him, to follow the assets of the deceased into the hands of the person or persons to or among whom the said assets may have been distributed.

[*Cf* : 22 & 23 Vict., c. 35 — S. 28.]

As to distribution of assets of testator or intestate after notice given by executor and administrator.

42. Where an executor or administrator shall have given such or the like notices as in the opinion of the Court in which such executor or administrator is sought to be charged would have been given by the High Court in an administration-suit, for creditors and others to send in to the executor or administrator their claims against the estate of the testator or intestate, such executor or administrator shall, at the expiration of the time named in the said notices, or the last of the said notices, for sending in such claims, be at liberty to distribute the assets of the testator or intestate, or any part thereof, amongst the parties entitled thereto, having regard to the claims of which such executor or administrator has then notice, and shall not be liable for the assets or any part thereof so distributed to any person of whose claim such executor or administrator shall not have had notice at the time of distribution of the said assets, or a part thereof, as the case may be.

Nothing in the present Act contained shall prejudice the right of any creditor or claimant to follow the assets, or any part thereof, into the hands of the person or persons who may have received the same respectively.

[*Cf*: 22 & 23 Vict, c. 35 — S 29.]

Trustee, executor, &c, may apply by petition to Judge of High Court for opinion, advice, &c., in management, &c., of trust-property.

43. Any [a][trustee,] executor or administrator shall be at liberty, without the institution of a suit, to apply by petition to any Judge of the High Court for the opinion, advice or direction of such Judge on any question respecting the [a][management or] administration of the [a][trust-property or] the assets of any testator or intestate.

Such application shall be served upon, or the hearing thereof shall be attended by, all persons interested in such application, or such of them as the said Judge shall think expedient.

The [a][trustee,] executor or administrator acting upon the opinion, advice or direction given by the said Judge shall be deemed, so far as regards his own responsibility, to have discharged his duty as such [a][trustee,] executor or administrator in the subject-matter of the said application:

Provided, nevertheless, that this Act shall not extend to indemnify any [a][trustee,] executor or administrator, in respect of any act done in accordance with such opinion, advice or direction as aforesaid, if such [a][trustee,] executor, or administrator shall have been guilty of any fraud or wilful concealment or misrepresentation in obtaining such opinion, advice or direction; and the costs of such application as aforesaid shall be in the discretion of the Judge to whom the said application shall be made.

[*Cf* 22 & 23 Vict, c. 35 — S. 30.]

[a] These words are *repealed* in places to which the Indian Trusts Act 1882 (II [2] of 1882), extends or is extended; *see* S. 2 of that Act.

Section 43 — Note 1

[1] Section 43 does not apply to trustees as the word "trustees" has been deleted by the Trusts Act, (II of 1882) But even if it were to apply the Court cannot do more than give advice or directions. ('11) 35 Bom 380 (382).

[2] The Act does not apply to charitable trusts. ('09) 33 Bom 509 (516) (DB).

[3] The Court when referred to for opinion, advice or direction will not construe any instrument or make any order affecting rights of parties. ('88) 12 Bom 638 (648). (Decision on an application by a trustee. The Act no longer applies to trustees since S. 2 of the Trusts Act has repealed operation of this Act in respect of trusts wherever that Act extends or is extended.)

[4] A Judge under S. 43 is not bound to give any opinion on a point the decision of which may depend upon question of right or title. ('83) 7 Bom 381 (384, 385).

[5] There is nothing in the section or elsewhere in the Act making it obligatory on the Administrator-General to act in accordance with any opinion given by the Judge. ('83) 7 Bom 381 (384).

General Provisions.

Tenants for life, &c., may execute powers, notwithstanding incumbrances.

44. For the purposes of this Act a person shall be deemed to be entitled to the possession or to the receipt of the rents and income of immoveable or moveable property, although his estate may be charged or incumbered, either by himself or by any former owner, or otherwise howsoever to any extent, but the estates or interests of the parties entitled to any such charge or incumbrance shall not be affected by the acts of the person entitled to the possession or to the receipt of the rents and income as aforesaid, unless they shall concur therein.

[*Cf*: 22 & 23 Vict., c. 35 — S. 31.]

Operation of Act.

45. The provisions contained in this Act shall, except as hereinbefore otherwise provided, extend only to persons entitled or acting under a deed, will, codicil, or other instrument executed after this Act comes into operation or under a will or codicil confirmed or revived by a codicil executed after that date, and only to property in British India and to cases to which English law is applicable.

[*Cf*: the Trustee Act, 1850 (23 & 24 Vict., c. 145) — S. 34.]

Short title.

46. This Act may be called the Trustees' and Mortgagees' Powers Act, 1866.

47. [Application of Act to Straits Settlements.] *Repealed by the Repealing Act, 1874 (16 [XVI] of 1874).*

[THE INDIAN] TRUSTS ACT, 1882.

(Act II of 1882.)

PREAMBLE.

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THE SCHEDULE.

STATEMENT OF OBJECTS AND REASONS.

"TRUSTS, in the strict sense in which that term is used by English lawyers, that is to say, confidences to the existence of which a 'legal' and an 'equitable' estate are necessary, are unknown to Hindu and Muhammadan law. But trusts in the wider sense of the word, that is to say, obligations annexed to the ownership of property which arise out of a confidence reposed in and accepted by the owner for the benefit of another, are constantly created by the natives of India and are frequently enforced by our Courts. "There is, probably," says Mr. Justice Phear (4 Ben. O. C. J. 134), "no country in the world where fiduciary relations exhibit themselves so extensively and in such varied forms as in India, and possession of dominion over property, coupled with the obligation to use it either wholly or partially, for the benefit of others than the possessor, is, I imagine, familiar to every Hindu." So, too, in the case of Muhammadans, where a woman is entitled to a share of her deceased father's estate in the hands of her brother (W. R. 1864, p. 377), or to eligible dower in the hands of her husband (6 W. R. 111). Trusts created by an old man for his own maintenance and ulterior purposes, for a widow, for a daughter, step-daughter or daughter-in-law and her children, are of pretty frequent occurrence amongst the natives, whether Hindu or Muhammadan, and it is desirable to keep them free from the complication of double estates in which, without the intervention of the legislature, they are certain to become entangled. But apart from the native property-holder, there is the large body of domiciled Europeans and Eurasians who have for nearly a century enjoyed and taken advantage of a trust-law recognised by our Courts: the number and wealth of this class have increased, and in suits between members of this community every Court in the country may be called upon to administer a trust-law. Nevertheless, with the exception of certain provisions in the Penal Code, the Specific Relief Act, the Code of Civil Procedure and the Limitation Act, the Indian Statute-book is silent on the subject so far as regards the bulk of the population; for the Statute of Frauds, sections 7 to 11, is in force only in the Presidency-towns, and the rules contained in Acts XXVII and XXVIII of 1866 extend only to cases to which English law is applicable, and are, in themselves, incomplete.

The object of the present Bill is to codify the law relating to trusts in the wider sense above described: but it saves the rules of Muhammadan law as to *wakf*, and the mutual relations of the members of an undivided family. And it leaves untouched religious and charitable endowments established by Hindus and Buddhists, as being matters in which the legislature cannot at present usefully interfere further or otherwise than has been done by Act XX of 1863.

With the few exceptions mentioned in this Statement, the rules contained in the Bill are substantially those now administered by English Courts of Equity and (under the name of 'justice, equity and good conscience') by the Courts of British India.

The Bill distributes the subject under the following heads: I, Preliminary: II, the creation of trusts: III, the duties and liabilities of trustees: IV, their rights and powers: V, their disabilities: VI, the rights and liabilities of the beneficiary: VII, vacating the office of trustee: VIII, the extinction of trusts; and IX, certain obligations of the nature of trusts.

The preliminary chapter, in order to prevent the introduction of conceptions resembling the English legal estate and equitable ownership, defines the interest of the beneficiary as *his right against the trustee* as owner of the property. The beneficiary has, under the Bill, no estate or interest in the subject-matter of the trust. The Bill also defines 'breach of trust' as a breach of any duty imposed on a trustee, as such, by any law for the time being in force, and declares that a person has 'notice' of a fact when he actually knows that fact, or when, but for wilful abstention from inquiry or gross negligence, he would have known it, or when information is given to, or obtained by, his agent under the circumstances mentioned in the Contract Act, section 229.

The second chapter deals with the creation of trusts. It declares that a trust may be created for any 'lawful purpose,' and, as there is a general analogy between a trust and a contract, the Bill defines such purpose to be lawful in the cases in which the Indian Contract Act, section 23, declares the object of an agreement to be lawful. An explanation shews that, where the trust-property is land situate in a foreign country, the trust, to be valid, must not create an estate not recognized by the law of that country.

The expediency of excluding oral declarations of trust has long been felt in the case of land, and the Bill (section 5) lays down, in general accordance with the seventh section of the Statute of Frauds, that no trust in relation to *immoveable* property is valid, unless declared (*a*) by a non-testamentary instrument in writing signed by the author of the trust or the trustee and registered, or (*b*) by the will of the author of the trust or of the trustee, and that no trust in relation to *moveable* property is valid unless declared, as aforesaid, or unless the ownership of the property is transferred to the trustee. Theoretically, this will modify the Hindu law, which in no transaction absolutely requires a writing (2 Mad. H. C. Rep. 39); but trusts by merely verbal declarations are as rarely met with as mortgages by merely verbal agreements: the proposed change will therefore in practice make no alteration in that law. The rule will not apply where it would operate so as to effectuate a fraud, as, for example, where a father having power to bequeath certain land is induced not to make a will of that land by the promise of his heir-presumptive that he will provide thereout for his relatives.

Section 8 declares that the subject-matter of a trust must be property transferable to the beneficiary, and that it must not be a merely beneficial interest under a subsisting trust. The object of the latter provision is to preclude the complications that would arise from allowing a trust upon a trust.

Section 9 declares that every person capable of holding property may be a beneficiary. As, under Act I of 1868, 'person' includes a corporation, the Bill here varies from English law. But the variation is intentional, as it has been more than once ruled that the Mortmain Statutes are not in force in India.

Chapter III deals with a trustee's duties and liabilities. None of the rules here contained call for remark except sections 20 and 23. Section 20 gives a list of the securities on which alone a trustee may invest trust-funds. The necessity for some such provision has been indicated by the High Court of Bombay in *De Souza* v. *De Souza*, 12 Bom. 184. Investments on mortgages of leaseholds for years are forbidden, unless, of course, such securities are expressly authorized by the instrument of trust. In England, no doubt, trustees authorized to lend on a mortgage of realty may invest on a long term of years at a peppercorn rent. But in this country such terms are practically unknown. Section 20 also allows a trustee to deposit a trust fund not exceeding Rs. 1,000 in a Government Savings Bank, and to invest on mortgage of land already pledged as security for an advance under the Land Improvement Act, 1871. A power like the latter is conferred in England by 27 & 28 Vic., cap. 114, section 161. Section 23 declares the measure of the trustee's liability in case of a breach of trust and embodies, as illustrations, the rules on which Courts of Equity act where trust-property improperly left outstanding is lost, or where a trustee retains money which should be invested, or neglects a direction to invest, or to accumulate, or improperly sells trust-securities, or is guilty of unreasonable delay in investing trust-funds or in paying them to the beneficiary.

Chapter IV treats of the rights and powers of trustees. It embodies the substance of Act XXVIII of 1866, sections 2, 3, 5, 32, 33, 36, 37, 39 and 43. Section 34 of the Bill empowers trustees to apply, not only to High Court Judges, but to District Judges, for advice on simple questions respecting the management and administration of the trust-property. Under section 36, which deals with the general authority of a trustee, trustees will be able (unless restrained from doing so by the instrument of trust) to grant reasonable agricultural leases, thin timber and otherwise act for the benefit of the trust. Except with the permission of the Court, no trustee will be able to lease trust property for a term exceeding 21 years.

Chapter V deals with disabilities of the trustees. The only section here calling for remark is 52, which declares that no trustee, and no person who has recently ceased to be a trustee, may, without the permission of the Court, buy the interest of the beneficiary in the trust-property, and that such permission shall not be given unless the purchase is manifestly for the benefit of the latter. The Bill here deviates from the present law according to which a trustee is allowed to buy trust-property from his beneficiary if the latter is *sui juris* and the former can shew that the relation of trustee and beneficiary was, at the time of the purchase, virtually dissolved, and that the fullest information and every advantage were given to the beneficiary. Such a rule seems too vague for insertion in a Code intended to be worked, for the most part, by unprofessional Judges; it has, moreover, been disapproved in *Morse* v. *Royal*, 12 Ves. 372.

In the next chapter — of the rights and liabilities of the beneficiary — the only sections requiring special notice are sections 58 and 62. The former provides for the execution of trusts by the Court, and makes no distinction between the cases where the declaration of trust is complete and those where the trust is executory, *i. e.*, where the declaration of trust is intended to be perfect at some future period.

The latter section declares that all persons taking immoveable trust-property inconsistently with the trust hold it subject to the trust, except (*a*) purchasers in good faith for consideration without notice of the trust, and (*b*) purchasers for consideration from such purchasers. This agrees with the English rule which, to prevent stagnation of property, exempts from the trust a purchaser with notice from an innocent purchaser without notice, who has got the legal estate.

Chapter VII treats of vacating the office of trustee, and, incidentally, deals with the appointment of new trustees, and declares that, on the death or discharge of one of several co-trustees, the trust survives and the trust-property passes to the others, unless the instrument of trust expressly declares otherwise.

Chapter VIII treats of the extinction of trusts and, incidentally, of their revocation.

Where no trust is declared, but for the purposes of justice the law deems one to have been created, the trust is by English lawyers termed constructive. *Benami* transactions, where property is transferred to *A* for a consideration paid by *B*, and *B* makes the payment for his own benefit, have for centuries been familiar to the people of India: gains made by one person at the cost of another are an everyday source of litigation; and in no country, owing to the extreme sub-division of immoveable property and the partition of inheritances, are constructive trusts more common.[a] Chapter IX avoids the fiction implied in the term 'constructive trusts' by treating such confidences as obligations in the nature of trusts properly so called. It specifies the fourteen principal cases in which such an obligation arises, as follows:

1. Where it does not appear that the transferor of property intended to dispose of the beneficial interest (section 80):
2. Where property is transferred to one person for a consideration paid by another (section 81):
3. Where the trust is incapable of execution or is executed without exhausting the property (section 82):
4. Where a transfer of property is made for an illegal purpose (section 83):
5. Where a bequest is made for an illegal purpose, or where the revocation of a bequest is forcibly prevented (section 84):
6. Where a transfer is made in pursuance of a rescindible contract (section 85):
7. Where a transfer is made in fraud of the transferor's creditors (section 86):
8. Where a debtor becomes his creditor's legal representative (section 87):
9. Where a pecuniary advantage is gained by a person in a fiduciary character (section 88):
10. Where an advantage is gained by the exercise of undue influence (section 89):
11. Where an advantage is gained by a tenant for life or other qualified owner in derogation of the rights of other persons interested in the property (section 90):
12. Where property is acquired with notice of an existing contract affecting it (section 91):

[a] As to these trusts, Mr. Coghlan, a District Judge in the Bombay Presidency, writes as follows: "Cases of constructive trusts are continually arising in all civil Courts [in the Mufassal], and are treated on the general principle of equity as fixed by case-made law."

13. Where a person contracts to buy property to be held on trust (section 92) :

14. Where one of several compounding creditors, by a secret arrangement with the debtor, gains an advantage over his co-creditors (section 93) :

The Bill also contains a general clause (section 94) providing for cases not so specified. It is believed that this clause will cover that form of constructive trust which the Punjab Courts have held to arise when a co-sharer in a village community absents himself without expressly abandoning his rights.

The Bill declares that, in the case of all obligations in the nature of a trust, the obligor shall be subject to the liabilities and (with the two exceptions mentioned in section 95) to the disabilities of an ordinary trustee.

Three only of the obligations above specified seem to require further notice. The Bill, it will be seen, does not attempt to suppress the inveterate practice of entering into *benami* transactions, and it must be admitted that in many, perhaps most, of these transactions the parties are actuated by religious or prudential, rather than fraudulent motives. Section 81, accordingly, declares that, where property is transferred to one person for a consideration paid by another, and it appears that the latter did not intend to pay the consideration for the benefit of the former, the transferee must hold the property for the benefit of the person paying. Resulting trusts, *i.e.*, those that arise where an interest is given for purposes to which the trust is not commensurate (as for instance, to pay debts which are satisfied, or an annuity which expires), are treated (section 82) as constructive, for here there is no declaration of trust as to the portion of the trust-property which is not required for the purpose declared. Section 86 corresponds with 13 Eliz., c. 5, as to settlements intended to defraud creditors. That Statute is in force in the Presidency-towns, and its principle has been held by the Madras High Court (4 Mad. 88) to apply to Natives in the mufassal.

Where a person gives property to charitable purposes, and either specifies no objects or such as do not exhaust the proceeds, the law as it stands, does not suffer the property or its surplus to result to the donor or his legal representatives; but the Court takes upon itself to execute the donor's intention by declaring the particular purposes to which the fund shall be applied. A similar exception is made when the purposes of the gift at the time exhaust the whole proceeds, but in consequence of an increase in the value of the property an excess of income subsequently arises. The Bill ignores these exceptions, which were introduced when the law of resulting trusts was imperfectly understood, and which unfairly disregarded the interest of the legal representative.

Lastly, it may be remarked that the Bill contains no provisions as to the presumption against trustees that advantages gained by them from their beneficiaries are gained by undue influence, or as to the escheat of a beneficiary's interest. The former matter is sufficiently provided for by the Evidence Act, I of 1872, section 111, the latter, by the Succession Act, X of 1865, and the general law as to *bona vacantia*.

The Bill is now published as settled by the Indian Law Commission[1] and in accordance with the Legislative despatch of the Secretary of State, No. 37, dated 7th October, 1880."

— Gazette of India, 1880, Part V, page 494.

[1]The short title and commencement of the proposed Act have been altered : sections 54 and 55 (which overlapped) have been amended; and in the first Explanation to section 59 the word "allows" has been substituted for "provides."

REPORT OF SELECT COMMITTEE

"The Hon'ble Mr. Stokes moved that the further Report of the Select Committee on the Bill to define and amend the law relating to Private Trusts and Trustees be taken into consideration He said that since he last had the honour of addressing the Council on this Bill, it had been twice revised by a Select Committee, at first composed of the Hon'ble Mr. Gibbs and himself, and then of the Hon'ble Messrs. Gibbs, Evans, Crosthwaite and himself, his hon'ble friend the Maharaja Jotindra Mohan Tagore, to his regret, being unable to assist them owing to his other avocations. The Committee had left the Bill in substance as it was settled by the Indian Law Commission. But it had made five changes which he would briefly state to the Council.

The Bill, as originally drawn and as settled by the Indian Law Commissioners, applied to the whole of British India. Now, the Government of India had no desire to bring this Bill into operation in any part of India against the wishes of the Local Government. The Committee had, therefore, made the Bill to extend in the first instance only to the territories respectively administered by the Governor of Madras in Council, the Lieutenant Governors of the North-Western Provinces and the Punjab, and the Chief Commissioners of Oudh the Central Provinces, Coorg and Assam; and they had given power to the other Local Governments to extend it by notification to any part of the territories respectively under their administration.

Section 20, in accordance with a suggestion of the Bombay High Court, enumerated the securities on which trustees might properly invest trust funds The learned Chief Justice of Bombay had pointed out that the most ordinary and popular investment among Native trustees (at least in the Bombay mufassal) was an investment of money with the firms of shroffs or merchants of good repute to run at interest. To proscribe this form of investment, as the Bill as introduced practically did, would, in Sir M. Westropp's opinion, cause much inconvenience Similar kinds of investment might also occur in other parts of India. The Committee had, therefore, in section 20, clause (*f*), provided that money held in trust might be invested on any security expressly authorized by any rule which the High Court might from time to time prescribe in this behalf.

At the suggestion of the British Indian Association, the Committee had expressly provided, in section 41 of the Bill, that the income of property held in trust for a minor might be applied for the reasonable expenses of his religious worship.

After section 42 they had inserted a section taken, with some slight modification, from the Property Act, 1881 (44 & 45 Vic., c 41), and declaring the power of a trustee to compromise or compound debts or claims relating to the trust. A like power was given by section 38 of the Trustees' and Mortgagees' [Powers] Act (XXVIII [28] of 1866) to executors, whose position was similar to that of trustees.

Clause (*b*), section 72, which empowered retiring trustees to appoint a new trustee, was objected to by the British Indian Association on the ground that retiring trustees would probably be indifferent to the interests of the beneficiary The Committee had, therefore, provided that they could only appoint with the consent of the Court.

No objections to the Bill had been received since it was republished last July, except those contained in a

memorial from the British Indian Association, dated the 9th December, 1881. The Committee, and especially the Hon'ble Mr. Evans and himself, had carefully examined this memorial and adopted two of the suggestions which it contained. But they were unable to adopt its other recommendations, most of which were, as seemed to them, founded on a misconception of what the law of trusts really was, as applied to Natives by the High Courts. He was prepared, if the Council wished him to do so, to go through the memorial point by point and to answer each of the objections. But this would take up at least an hour with matters of which only a lawyer could properly judge; and he was bound to say that he thought the time of the Council might be occupied both more pleasantly and more profitably than in listening to such a dissertation.

He, therefore, now asked the Council to pass the Bill. The reception which it had met with in the greater part of India, namely, in Madras, the North-Western Provinces, the Punjab, Oudh, the Central Provinces, Coorg and Assam, convinced him that it was accurate, intelligible and really wanted; and the growing tendency of Hindu testators in the Lower Provinces to create trusts by will, of which he had recently been informed by Mr. Justice Wilson, made him sanguine that His Honour the Lieutenant-Governor would soon see the propriety of extending it to the Provinces which he administered so ably.

The Hon'ble Mr. Evans said that he had been placed on the Select Committee since his return to this country in November, and had not had much leisure to go minutely through all the provisions of the Bill, but that he had in Select Committee considered the objections urged by the memorial of the British Indian Association, with the result stated by the hon'ble mover. As to the Bill generally, the somewhat cursory examination which he had been able to give to it did not lead him to believe that the rights and obligations of trustees and beneficiaries would be materially altered, save possibly as regards the class of securities in which a trustee might invest. Power was given to the High Court to relax the rules as to investment if found too stringent.

The motion was put and agreed to.

The Hon'ble Mr. Stokes then moved that the Bill as amended be passed.

The motion was put and agreed to."—

— Gazette of India, Supplement, 1882, page 67.

ACT HOW AFFECTED BY SUBSEQUENT LEGISLATION.

— Amended by Acts 3 of 1903; 1 of 1916; 21 of 1917, 31 of 1920; 37 of 1925; 18 of 1934

—Adapted by A. O.

[THE INDIAN] TRUSTS ACT, 1882.

(ACT II OF 1882)

[13th January, 1882.]

An Act to define and amend the law relating to Private Trusts and Trustees.

WHEREAS it is expedient to define and amend the law relating to private trusts and trustees; It is hereby enacted as follows :— Preamble.

CHAPTER I.

PRELIMINARY.

Short title. Commencement. **1.** This Act may be called the Indian Trusts Act, 1882 : and it shall come into force on the first day of March, 1882.

Local extent. Savings. It extends in the first instance to the territories respectively administered by the Governor of Madras in Council, the Lieutenant-Governors of the North-Western Provinces and the Punjab, the Chief Commissioners of Oudh, the Central Provinces, Coorg and Assam; and the [a][Provincial Government] may from time to time, by notification[b] in the Official Gazette, extend it to any other part of British India. But nothing herein contained affects the rules of Muhammadan law as to *waqf*, or the mutual relations of the members of an undivided family as determined by any customary or personal law, or applies to public or private religious or charitable endowments, or to trusts to distribute prizes taken in war among the captors; and nothing in the second Chapter of this Act applies to trusts created before the said day.

[a] *Substituted* by A. O. for "Local Government". [b] Act has been *extended* to—

(1) the whole of the Bombay Presidency, including the Scheduled Districts — *see* Notification No. 4802, Bom. Gazette, 1891, Pt. I, p. 743

(2) the Presidency of Fort William in Bengal, *see* Calcutta Gazette, 1913, Pt. I, p. 360.

(3) the Province of Bihar and Orissa, *see* Bihar and Orissa, Gazette, 1913, Pt. II, p. 1005.

(4) the District of Ajmer-Merwara, *see* Gazette of India, 1916, Pt. II, p. 2118.

SECTION 1 — SYNOPSIS

1. Applicability.
2. Public or private trusts.
3. Religious or charitable endowments.

1. Applicability.—[1] The Trusts Act applies only to Rangoon and not to the districts. But still the principles enunciated therein can be applied to cases coming from the districts in Rangoon. (Vol 22) 1935 Rang 44 (47) (DB).

[2] Principle of Act applies to districts in Burma to which the Act does not apply. (Vol 22) 1935 Rang 44 (47) (DB).

[3] The tendency of Legislature in India has been, as far as possible, not to disturb by special legislation existing usages and customs, and not to interfere with their public, religious and charitable endowments The considerations that apply to charities in India are

Repeal of enactments.

2. The Statute and Acts mentioned in the Schedule hereto annexed shall to the extent mentioned in the said Schedule, be repealed in the territories to which this Act for the time being extends.

Interpretation-clause — "trust".

3. A "trust" is an obligation annexed to the ownership of property, and arising out of a confidence reposed in and accepted by the owner, or declared and accepted by him, for the benefit of another, or of another and the

Section 1 — Note 1 *(contd.)*

wholly different from those in England. ('09) 33 Bom 509 (519, 520) (DB).

[4] In interpreting the Act English authority and practice may be considered. (Vol 30) 1943 Sind 223 (225) : I L R (1943) Kar 213 (DB).

[5] Trusts and legal estates are governed by the same rules. Any question of a trust in India is controlled by the provisions of the Indian Trust Act, 1882, if the trust in question does not happen to be a charitable trust. Under the Act, executory trusts may be claimed as obligations in the nature of trusts as provided for in Ss. 92 and 94. The salary drawn by an officer is trust money. Income from trust money and not trust money itself will be exempted under S. 4 (3), Income-tax Act. (Vol 14) 1927 Rang 95 (96, 97, 98 : 4 Rang 538 (FB).

2. Public or private trusts.—[1] The criterion for deciding whether a particular trust is or is not of a private nature is whether the said trust is or is not for the benefit of individuals. (Vol 22 1935 All 139 (140) (DB).

[2] The feeding of the poor is a public charity. Where a trustee has been appointed to such charity he can be removed only by an application under S. 92, Civil P. C. (Vol 12) 1925 Mad 689 (690).

[3] Property described as wakf was divided among the members of the family by the award of arbitrators. Each was receiving his share of profits and it was stated that each should apply it for trust. *Held*, it was a private trust. (Vol 20) 1933 All 622 (622) (DB).

[4] It is the extensiveness of object which affords some indication of the public nature of a trust. The test is, whether it is for a large and extensive section of the community? Appeals for funds to carry on *utsabs* of institution are hardly commensurate with private, religious or charitable institution. If a private institution receives a gift from a stranger for his own spiritual benefit, mere receipt of the gift does not make the institution a public one. But the number and nature of gifts are material. (Vol 24) 1937 Cal 67 (78, 79) : I L R (1937) 1 Cal 515 (DB).

[5] The 'raddimazalim' fund is an endowment, partly public and partly private for religious and charitable purposes and hence the Trusts Act will not apply to it. (Vol 21) 1934 Oudh 118 (121) : 9 Luck 507.

[6] Public endowment for religious uses is defined. In a private trust the beneficiaries are defined and ascertained individuals. In a public trust the beneficial interest must be vested in an uncertain and fluctuating body of persons. The fact that the fluctuating body of persons is a *shia* sect or even a sub-sect of *shias* would not make a wakf a private trust. Individual or limited individuals may have personal right in public trust. (Vol 29) 1942 Cal 343 (349) : I L R (1942) 1 Cal 211 (DB).

[7] Long user is determining factor in finding out whether temple is public or not. (Vol 18) 1931 Bom 33 (37) (D B). ('91) 15 Bom 612 (D B) ; ('99) 23 Bom 659 (DB) and (Vol 10) 1923 Cal 142 : 50 Cal 292 (DB), *Ref.*)

[8] In the case of family trusts the general consensus of the family may put an end to them, in this sense they differ from public trusts. But so long as members of the family insist that the family trusts should be continued, it is not open to the other members to insist on their discontinuance. ('37) 1937 Mad W N 162 (163).

3. Religious or charitable endowments. — [1] The Act does not apply to public charities, and no formalities are required by law to create it. In the case of trust with reference to a particular property language must be expressive of the intention to create a trust. Also rights of the author in the property should have been parted with for the benefit of the beneficiary. There must be complete dedication and a mere intention to dedicate at a future date is not sufficient. (Vol 9 1922 Mad 83 (84, 85) (DB).

[2] Act does not apply by analogy to religious and charitable trusts — Indian Courts are to be guided by English law unless it is inconsistent with the rules of practice of the Indian Courts. (Vol 24) 1937 Bom 374 (379, 380) : I L R (1937) Bom 843.

[3] Act does not apply to charities. (Vol 8) 1921 Bom 389 (393).

[4] Act in excluding Hindu religious endowments predicates them to be not strictly trusts. (Vol 15) 1928 All 689 (693) (DB).

[5] Trusts Act has no application to waqf alal-aulad. (Vol 32) 1945 All 261 (262) : I L R (1945) All 818 (FB).

[6] Mere foundation of a public religious or charitable trust does not mean that the founder has relinquished his rights as such. Subsequent benefactions are mere accretion to existing foundation. In the case of a private trust, foundation of worship of idol means that the shebaitship is vested in founder and his heirs unless disposed of otherwise. This principle applies to public trusts as well. To remove a trustee of public trust under S. 92, Civil P.C. something substantial must be shown. (Vol 24) 1937 Cal 67 (80, 81) : ILR (1937) 1 Cal 515 (DB). (AIR (10) 1923 Cal 142, *Rel. on.*)

[7] A trust for charity simpliciter so long as it is confined to charity exclusively is a perfectly good trust and it is not necessary that the objects of trust or charity need be specified. This is the law both Indian and English. A trust for khairat or kharatikam is a perfectly good trust and in such a case no specification of objects of charity is necessary. (Vol 28) 1941 All 235 (241) : I L R (1941) All 443 (DB).

[8] Income from an office held on condition that such salary would be held in trust for certain charitable purposes is not exempt from income-tax under S. 4 (3), Income-tax Act, although the money is spent for such charitable purposes. (Vol 14) 1927 Rang 95 (95) : 4 Rang 538 (FB).

[9] The Act does not apply to charitable endowments (Vol 25) 1938 P C 73 (77) : I L R (1938) Lah 68 : 65 Ind App 106: 32 Sind L R 350 (PC).

Section 2 — Note 1

[1] The saving clause in S. 1 of the Trusts Act does not affect the repealing section which immediately follows. The words of the section are unqualified and absolute (1909) 33 Bom 509 (517) (DB).

SECTION 3 — SYNOPSIS

1. Scope.
2. "Annexed to the ownership."
3. Arising out of confidence.
4. "For the benefit of another."
5. Trust property.
6. Beneficiary.

owner: the person who reposes or declares the confidence is called the "author of the trust" : the person who accepts the confidence is called the "trustee" : the person for whose benefit the confidence is accepted is called the "beneficiary" : the subject-matter of the trust is called "trust-property" or "trust-money": the "beneficial interest" or "interest" of the beneficiary is his right against the trustee as owner of the trust-property; and the instrument, if any, by which the trust is declared is called the "instrument of trust" :

"author of the trust" :

"trustee":

"beneficiary":

"trust-property": "beneficial interest."

"instrument of trust" :

a breach of any duty imposed on a trustee, as such, by any law for the time being in force is called a "breach of trust" :

"breach of trust":

and in this Act unless there be something repugnant in the subject or context, "registered" means registered under the law for the registration of documents for the time being in force : a person is said to have "notice" of a fact either when he actually knows that fact, or when, but for wilful abstention from inquiry or gross negligence, he would have known it, or when information of the fact is given to or obtained by his agent, under the circumstances mentioned in the Indian Contract Act, 1872, section 229; and all expressions used herein and defined in the Indian Contract Act, 1872, shall be deemed to have the meanings respectively attributed to them by that Act.

"registered" :

"notice".

Expressions defined in Act IX of 1872.

SECTION 3 — SYNOPSIS *(contd.)*

7. Breach of trust.
8. Notice.
9. Obligation in nature of trust.

1. Scope.—[1] A trust is in effect, the gift of property or an interest in property to a person or institution by or through the intervention of a trustee. (Vol 14) 1927 Mad 636 (638) : 50 Mad 687 (FB).

[2] Though original trust is void, subsequent admission by trustee that he holds property on trust establishes valid trust. (Vol 30) 1943 Bom 366 (370) : I L R (1943) Bom 495 (DB).

2. "Annexed to the ownership."—[1] Under the law in India there can be only one owner of the property where the property is vested in a trustee and he is the trustee. (Vol 25) 1938 Cal 818 (822) (D B). ((Vol 18) 1931 P C 196 : 58 Ind App 279: 10 Pat 851 (PC), *Rel. on.*)

[2] A trustee in the legal sense of the word is one in whom the trust property is absolutely vested The mere use of the word 'trustee' in documents does not make a man the legal trustee till he proves the ownership of the immovable properties which is the subject matter of the trust. (Vol 24) 1937 Bom 374 (378, 379) : I L R (1937) Bom 843 (DB)

[3] The Indian Law does not recognize legal and equitable estates. The owner of trust property is the trustee only. (Vol 22) 1935 Rang 84 (87) : 12 Rang 589 (DB).

[4] *Bona fide* holder of property whether under express or implied trust is legal owner. (Vol 20) 1933 Cal 366 (370) : 60 Cal 262 (DB).

[5] Trusts Act is intended to get rid of the conception of double ownership, legal and equitable. ('09) 32 Mad 443 (455) (DB).

[6] The cashier furnished a deposit as security in a Bank with the understanding that the Bank should hold the deposit as trustee The fact that the Bank made use of the security in its business though known to the cashier who had the general charge of the account books did not alter the fiduciary relationship between the parties. (Vol 24) 1937 Cal 221 (222) : I L R (1937) 2 Cal 305.

[7] Manager of property are not trustees in law. An administrator of the estate of an intestate is not a trustee (Vol 24) 1937 Bom 374 (378, 379) : ILR (1937) Bom 843 & ('10) 12 Bom L R 53 (62, 70) (DB).

[8] Liability of trustee and agent of the trustee — Difference pointed out. (Vol 23) 1936 Bom 412 (414) (DB).

[9] Where the rights of executants of a deed become extinguished and get completely vested into an idol the idol is the owner and not the trustee. (Vol 28) 1936 Cal 556 (560) : 62 Cal 1098 (DB).

[10] Money set apart for charity and invested with merchant does not make latter trustee, though interest thereon may be spent on charity. (Vol 12) 1925 Sind 259 (260).

3 Arising out of confidence. — [1] It is essential in every trust which is not wholly unilateral that there should be a confidence reposed. The beneficiary is clothed with the equitable title and the legal title resides in the trustee, no trustee can use the trust property for his own benefit He is bound to hold it for and account for the beneficiary. (Vol 28) 1941 Nag 261 (262, 263).

[2] Person agreeing to collect movables and rent from immovables, and render accounts to third person does not become trustee for owner. (Vol 7) 1920 P C 8 (11) : 16 Nag L R 94 (PC).

[3] By a deed of relinquishment *S* gave all his property to his eldest son. The son later executed another deed providing to give a village and a certain sum of money to *J* the son of the concubine of *S*. The two deeds were followed by mutation proceedings : *Held*, that the two instruments should be read together and since the property intended to be surrendered to *J* was handed over immediately to the son, a trust was created in favour of *J*. (Vol 25) 1938 P C 245 (247) : 32 Sind L R 907 (PC).

[4] *P* entrusted some money with his agent, a firm to invest it in other firms. The agent firm had no authority to invest any part of it in its own firm : *Held*, the money was held in trust and the fact that the agent firm invested it in its own firm without the knowledge of *P* could not affect the fiduciary character in which the agent firm stood. (Vol 24) 1937 P C 296 (298) : I L R (1938) Mad 91 : 31 Sind L R 678 : 64 Ind App 343 (PC).

CHAPTER II

OF THE CREATION OF TRUSTS.

Lawful purpose.

4. A trust may be created for any lawful purpose. The purpose of a trust is lawful unless it is *(a)* forbidden by law, or *(b)* is of such a nature that, if permitted, it would defeat the provisions of any law, or *(c)* is fraudulent, or *(d)* involves or implies injury to the person or property of another, or *(e)* the Court regards it as immoral or opposed to public policy.

Every trust of which the purpose is unlawful is void. And where a trust is created for two purposes, of which one is lawful and the other unlawful, and the two purposes cannot be separated, the whole trust is void.

Explanation. — In this section the expression "law" includes, where the trust property is immoveable and situate in a foreign country, the law of such country

Illustrations.

(a) A conveys property to *B* in trust to apply the profits to the nurture of females for ends to be trained up as prostitutes. The trust is void

(b) A bequeaths property to *B* in trust to employ it in carrying on a smuggling business and out of the profits thereof to support *A's* children. The trust is void.

(c) A, while in insolvent circumstances, transfers property to *B* in trust for *A* during his life, and after his death for *B*. *A* is declared an insolvent. The trust for *A* is invalid as against his creditors.

Section 3 — Note 3 *(contd.)*

[5] Where a person accepts a trust in relation to a specific sum of money and agrees to invest it in his firm and to conform to the terms of the instrument creating the trust, a valid trust is created. (Vol 28) 1941 Bom 41 (46) : I L R (1941) Bom 42 (DB).

[6] The security deposit of an employee in a Bank placed upon fixed deposit in his name is held by the Bank in trust. The fact of payment of interest by the Bank does not destroy the character of the deposit. (Vol 25) 1938 Mad 651 (652).

[7] *A*, sister of *B* and *C*, with a desire to help *B*, entrusting *C* with the sum of Rs. 50,000 with a direction to redeem the mortgage over *B's* ancestral house and hand it over to *B*—Transaction amounts to a trust. (Vol 15) 1928 Mad 43 (44).

[8] Trust is gift of property or interest in property to person or institution by or through trustee. (Vol 14) 1927 Mad 636 (638) : 50 Mad 687 (FB).

[9] A sole selling agent of a company deposited a sum of money as security to be refunded after expiry of agreement. Interest was paid on that amount : *Held*, no trust was created. (Vol 25) 1938 All 574 (576) : I L R (1938) All 896.

[10] An imperfect gift will not operate as a declaration of trust. (Vol 11) 1924 Bom 88 (88).

4. **"For the benefit of another".** — [1] Creditor not a party nor notified of trust—Debtor transferring to third person in trust for creditors—Creditor can get his debt out of trust property through trustee who is the owner thereof. (Vol 25) 1938 Cal 818 (822) (DB).

[2] Trust in favour of creditors is irrevocable if creditors are parties to conveyance or are given notice of execution. When some creditors only sign composition deed but others have notice of execution it is trust in favour of all. (Vol 23) 1936 Lah 10 (12) (DB).

[3] A document which purports to create a trust must create a genuine trust and not create a provision for relatives under the guise of a trust ; the test is the proportion of the funds to be allotted to the idol or charity. (Vol 25) 1938 Bom 23 (29) (DB).

[4] Where a person has come into possession of properties as a trustee, he is estopped from taking up the position that it is his private property. (Vol 19) 1932 Pat 33 (51) : 11 Pat 288 (DB).

5. **Trust property** — [1] Enjoyment of beneficial interest by trustee along with beneficiaries does not make it any the less trust property. (Vol 14) 1927 Mad 1134 (1134).

[2] A person may become a trustee by his own acts and conduct so as to deprive himself of all beneficial ownership of a property and declare that he will hold the same in trust for another. The definition of trust in S. 3 clearly shows that because the owner retains a certain interest in the property, it would not necessarily go against the foundation of trust. (Vol 23) 1936 Bom 296 (297).

6. **Beneficiary.**—[1] The interest of a beneficiary of a trust as defined in S 3 of the Act is his right against the trustee as owner of trust property. (Vol 25) 1938 Cal 818 (822) (DB).

7. **Breach of trust.** — [1] Where executors who are also residuary legatees under a will take money belonging to the estate for their own use before paying the debts and legatees, they commit a breach of trust and no question of title arises under the circumstances (Vol 20) 1933 Cal 286 (290) : 60 Cal 30 (DB).

8. **Notice.**—[1] Bank is not fixed with constructive notice of a trust simply because, executor opened a number of accounts, each deposit having a corresponding current account to which interest was credited. (Vol 10) 1923 Bom 155 (160, 161) (D B).

9. **Obligation in nature of trust.**—[1] Obligations in nature of trust provided in Ch IX are not included in definition of trusts which only were subject-matter of Act. (Vol 33) 1946 Bom 215 (242) : 47 Cri L Jour 594 (D B).

SECTION 4 — SYNOPSIS

1. Trusts for lawful purposes.
2. Trusts created to defeat provisions of law.
3. Trusts for the benefit of creditors.
4. Partially unlawful purpose.
5. Other illustrative cases.

1. **Trusts for lawful purposes.** — [1] If there was a complete dedication by the donor for religious purposes, the subsequent misapplication of the income by the donor would not affect the validity of the trust. (Vol 27) 1940 Mad 920 (922) (D B).

[2] Non-performance of charity does not negative charitable trust if otherwise the trust is proved. (Vol 23) 1936 Mad 138 (139, 140) (D B).

[3] Execution of surety bond by certificate-debtor to Certificate Officer under Bengal Public Demands Recovery Act—Certificate Officer is trustee for certificate-holder—There is nothing unlawful in this. (Vol 24) 1937 Cal 625 (630, 631) : I L R (1937) 2 Cal 698 (D B).

[4] Discharge of dower debt for preventing future disputes is not unlawful. ('11) 14 Oudh Cas. 356 (382) (D B).

5. No trust in relation to immoveable property is valid unless declared by a non-testamentary instrument in writing signed by the author of the trust or the trustee and registered, or by the will of the author of the trust or of the trustee.

Trust of immoveable property.

Trust of moveable property.

No trust in relation to moveable property is valid unless declared as aforesaid, or unless the ownership of the property is transferred to the trustee.

These rules do not apply where they would operate so as to effectuate a fraud.

Section 5 (*contd.*)

2. Trusts created to defeat provisions of law.—[1] The vendor, on the eve of his insolvency parting with goods on an agreement with the vendee to hold the goods or their sale proceeds in trust for him—Vendee is a trustee but the trust is unlawful and could not be enforced against the Official Assignee. (Vol 24) 1937 Sind 37 (39) : 31 Sind L R 391 (D B).

[2] Vendor making vendee "trustee for goods sold or sale proceeds" to enable vendee get false credit, object being to defeat Insolvency Act — *Held*, no valid trust. (Vol 24) 1937 Sind 37 (38, 39) : 31 Sind L R 391 (DB).

[3] Testator cannot create beneficiary estates unauthorised by law under guise of trust (1872) Ind App Sup. Vol 47 (72) (P C).

[4] Suit for possession of property on basis of trust deed — Defendant can plead fraudulent nature of deed. (Vol 28) 1941 Cal 233 (236) (D B).

3. Trusts for the benefit of creditors.—[1] Trust for benefit of creditors is *prima facie* not fraudulent. (Vol 25) 1938 Cal 818 (821) (DB).

[2] If a transfer is a trust for creditors it must conform to the requirements of the law of trusts i. e., Ss. 4, 5 and 6 must be satisfied. Hence, a mere declaration of trust with regard to moveables is clearly not enough. (Vol 14) 1927 Mad 869 (871) : 50 Mad 815 (D B).

4. Partially unlawful purpose.—[1] A trust deed provided for charitable objects and for private benevolence towards certain relatives: *Held*, the provisions relating to the bounty to the relatives were void, and the other part of the trust was valid. (Vol 24) 1937 P C 4 (8) : 64 Ind App 5: I L R (1937) All 3 (P C).

5. Other illustrative cases. — [1] A company instead of giving pensions to its officers promised them a lump sum on retirement to be computed on terms formulated by the rules of the fund. Those placed on the fund were given 'pass books' containing the amounts credited to them from time to time under the rules: *Held*, a trust was created in favour of the employees. (Vol 24) 1937 P C 261 (263) : 31 Sind L R 656 : 64 Ind App 323 : I L R (1938) Mad 1 (P C).

[2] A company had one of its objects to allocate 30 per cent. of moneys coming to them from certificate holders towards specified charities—Subscribers accepted certificates with the knowledge of the condition : *Held*, trust was created in respect of 30 per cent. of the contribution amount. (Vol 24) 1937 Mad 368 (370).

SECTION 5 — SYNOPSIS

1. Scope.
2. Declaration of trust.
3. There must be transfer of the property.
4. "In writing registered."
5. Trust of moveable property.
6. Immoveable property.
7. Subsequent conduct.
8. Agency and trust.
9. Last paragraph.

1. Scope.—[1] No trust of immovable property is valid unless declared by non-testamentary instrument in writing signed by author of trust or trustee and registered. (Vol 22) 1935 Rang 84 (87) : 12 Rang 589 (DB).

[2] Section 5 of the Trusts Act must be read with S. 6—S. 5 lays down what may be called the extrinsic conditions necessary to create a trust. S. 6 lays down the intrinsic conditions necessary for a valid trust. S. 5, cl. (2) lays down a general rule; S. 6 creates an exception in the case of a trust of moveable property. ('11) 35 Bom 403 (407) (DB).

[3] Where a non-testamentary instrument in writing is signed by the trustee as well as the author of the trust and registered there is a valid trust both in regard to moveable and immoveable property. (Vol 24) 1937 Oudh 99 (103) : 12 Luck 639 (D B).

[4] To constitute a trust, there must be a trustee, an express trust, and an estate or interest in lands vested in the trustee and which the trust must affect. (Vol 13) 1926 Mad 284 (285).

2. Declaration of trust. — [1] In the case of moveable property the ownership of the property is to be transferred. In the case of a trust of immoveable property only a declaration is necessary. The declaration itself vests the property in the trustee and is a 'transfer' of property. (Vol 25) 1938 Cal 818 (820, 821) (DB).

[2] *A*, a Jain widow who held a share in the Bank of Bombay transferred it to *B* to secure a debt. After discharging the debt she desired to transfer the share to her minor nephews. Accordingly she presented the transfer signed by *B* but the Bank refused to effect the transfer as the transferees were minors. *A* then directed the transfer to her brothers as trustees for the minors and the transfer was lodged on 15th December. Meanwhile *A* died on the 14th. The heirs of *A* contended that neither gift nor trust was created —*Held*, the trust in favour of the minors was complete, although there was no written and signed declaration of trust by *A*, as the property already vested in a trustee *B*, who had notice of the trust in favour of the minors and could in equity be compelled to perform the trust duty. ('12) 36 Bom 396 (404) (D B).

3. There must be transfer of the property.—[1] A document to be a deed of trust must contain words of transfer and vest the property in the trustee as the legal owner; although no particular form of expression is necessary. Mere intention to create a trust, however, is not sufficient. (Vol 6) 1919 Mad 555 (556) (D B).

[2] Where after registration of a trust deed the author renounces the world but remains in management of the trust property not as owner but as manager, a valid trust is created. (Vol 13) 1926 Nag 86 (88).

[3] Where there is a fund vested in trustees and payable to the children of the deceased and the deceased himself never had any interest in the fund or any disposing power over it a valid trust under the section is created. (Vol 18) 1931 Bom 300 (301) (D B).

[4] Assignment of specific property is essential to trust and allegation that a certain sum was deposited with first defendant in trust for plaintiff, and that second and third defendants had attested will to that effect is not enough to create a trust. (Vol 13) 1926 Mad 284 (285).

[5] Rules of provident fund providing for vesting of control and management of funds in trustee — No

6. Subject to the provisions of section 5, a trust is created when the author of the trust
Creation of trust. indicates with reasonable certainty by any words or acts *(a)* an intention on his part to create thereby a trust, *(b)* the purpose of the trust, *(c)* the beneficiary, and *(d)* the trust-property, and (unless the trust is declared by will or the author of the trust is himself to be the trustee) transfers the trust-property to the trustee.

Section 5—Note 3 *(contd.)*

vesting of ownership of funds in trustee — No valid trust is created— Creditor can obtain attachment order in respect of funds standing to credit of his judgment-debtor in such fund. (Vol 33) 1946 Pat 430 (431) & (Vol 29) 1942 Sind 47 (49, 50) : I L R (1941) Kar 401 (DB).

[6] Money set apart for charity invested with third party—Latter is not trustee. (Vol 12) 1925 Sind 259 (259).

[7] Trust deed empowering trustee to sell moveables and immoveables and collect outstandings—Deed containing no words of transfer— *Held*, that, as the document was one and indivisible it did not create any rights of trusteeship even in respect to movable property and no security or charge was created in respect of the moveable property in favour of the trustee. (Vol 6) 1919 Mad 555 (556) (D B).

[8] Transfer of property is not necessary if trust is declared by will, or if the author of trust is himself trustee. ('11) 35 Bom 403 (408, 409) (D B).

4. "In writing registered."—[1] Registered deed is necessary to constitute valid trust. (Vol 13) 1926 Nag 86 (88).

[2] A composition deed though exempt from registration under the Registration Act is to be registered under S. 5. (Vol 32) 1945 P C 74 (76) : 72 Ind App 76: I L R (1945) All 241: I L R (1945) Kar (P C) 108 (PC). (*Overruling* ('04) 28 Bom 364 (D B) and (Vol 1) 1914 Bom 55 : 38 B om 576 (D B).)

[3] A trust by an auction-purchaser in favour of the person who supplied him with purchase money can be created only by means of a registered instrument. (Vol 21) 1934 All 990 (993).

[4] Deed of gift registered— Contemporaneous unregistered agreement executed by donee in favour of donor that gift was revocable whenever donor would like —*Held* latter document was admissible in evidence though not registered as provisions of S. 5, Trusts Act could not be applied so as to effectuate a fraud — Nor was S. 17, Registration Act bar to its admissibility. (Vol 19) 1932 Bom 188 (189).

[5] Trust of immovable property must be by non-testamentary instrument signed by author or trustee and registered; or declared by will of trustee or author of trust. (Vol 12) 1925 Oudh 202 (206) (D B).

[6] Trust—Creation of—Charitable endowment by a Hindu in Punjab — No writing is required — Purpose should be clearly specified—Property intended should be set apart as dedicated to that purpose — Divestiture of property is necessary. (Vol 25) 1938 P C 73 (76): 65 Ind App 106 : I L R (1938) Lah 63 : 32 Sind L R 350 (PC).

[7] Twelve years enjoyment by the beneficiary will in general confer a prescriptive right even in the absence of a registered instrument. (Vol 21) 1934 All 990 (993).

[8] The vendor under an unregistered contract for sale of immoveable property by reason of what he had said or done cannot be treated as holding the property as a trustee for the purchaser as it is in violation of the Registration Act. (Vol 22) 1935 Rang 84 (85): 12 Rang 589 (D B).

5. Trust of moveable property. — [1] In a trust of moveable property the ownership of the property is to be transferred. (Vol 25) 1938 Cal 818 (820, 821, 822) (D B).

[2] Chose in action such as right to sue for specific performance of contract to lease being moveable property can be subject of trust. (Vol 16) 1929 Rang 184 (185) : 7 Rang 144 (D B).

[3] Where property is money, promissory notes and bonds, mere delivery is enough to vest property in trustee (Vol 13) 1926 Mad 109 (110) (D B).

6. Immoveable property.— [1] Under S. 5 of the Trusts Act a trust respecting immovable property must be declared by a non-testamentary instrument in writing signed by the author of the trust or the trustee and registered or it must be declared by the will of the author of the trust or trustee. (Vol 12) 1925 Oudh 202 (205) (D B).

[2] A valid trust in respect of immoveable property can only be created by a writing signed by the author of the trust and registered in the case of a non-testamentary instrument. (Vol 3) 1916 Mad 657 (658) (D B).

7. Subsequent conduct.— [1] If there was a completed dedication by the donor for religious purposes the subsequent misapplication of the income by the donor would not affect its validity and would not revest the income in him. (Vol 27) 1940 Mad 920 (922) (D B).

[2] Trust by a Hindu in Punjab — Evidence of divestiture of property must be contemporaneous—Subsequent acts and conduct of the donor are irrelevant and cannot revest the property in him. (Vol 25) 1938 P C 73 (76) : I L R (1938) Lah 63 : 65 Ind App 106 : 32 Sind L R 350 (P C).

8. Agency and trust.—[1] There is a well-marked distinction between the relation of agency and that of trust but agency may often involve a relation of trust and confidence and property in the hands of an agent may sometimes be impressed with a trust for the benefit of the principal. (Vol 25) 1938 Cal 673 (675) : I L R (1938) 1 Cal 652.

9 Last paragraph.—[1] The provision for writing in regard to a trust in relation to immoveable property is got over by the last paragraph of the section to the effect that such rules do not apply where they would operate so as to effectuate a fraud. (Vol 25) 1938 Cal 673 (676) : I L R (1938) 1 Cal 652.

[2] Deed of gift registered — Contemporaneous unregistered agreement executed by donee in favour of donor that gift was revocable whenever the donor liked : *Held*, latter document was admissible in evidence though not registered as the provisions of S. 5, Trusts Act could not be utilised to effectuate a fraud. (Vol 19) 1932 Bom 188 (189).

SECTION 6 — SYNOPSIS

1. Scope.
2. "Indicates with reasonable certainty."
3. Declaration of intention.
4. Purpose.
5. Beneficiary.
6. Trust property must be specified.
7. Transfer of trust property.
8. Rights of third parties.
9. Trust for benefit of creditors.
10. Other illustrative cases.

1. Scope. —[1] A trust to be effective must be communicated to the *cestui que trust* or he should at least know about it. The question of irrevocability is a question of fact. (Vol 22) 1935 Mad 60 (62, 64) (DB).

[2] For the creation of a trust of moveable property the requirements of S. 6, Trusts Act 1882 must be fulfilled. (Vol 28) 1941 Mad 154 (157) : I L R (1941) Mad 232 (DB).

Illustrations.

(a) *A* bequeaths certain property to *B*, "having the fullest confidence that he will dispose of it for the benefit of *C*". This creates a trust so far as regards *A* and *C*.

(b) *A* bequeaths certain property to *B*, "hoping he will continue it in the family". This does not create a trust, as the beneficiary is not indicated with reasonable certainty.

(c) *A* bequeaths certain property to *B*, requesting him to distribute it among such members of *C*'s family as *B* should think most deserving. This does not create a trust, for the beneficiaries are not indicated with reasonable certainty.

(d) *A* bequeaths certain property to *B*, desiring him to divide the bulk of it among *C*'s children. This does not create a trust, for the trust-property is not indicated with sufficient certainty.

(e) *A* bequeaths a shop and stock-in-trade to *B*, on condition that he pays *A*'s debts and a legacy to *C*. This is a condition, not a trust for *A*'s creditors and *C*.

Section 6 — Note 1 *(contd.)*

[3] Express trusts are only those validly created under Ss. 5 and 6. (Vol 24) 1937 Cal 180 (185) : 63 Cal 784.

2. "Indicates with reasonable certainty." —

(a) *General.*

[1] The intention to create a trust must be indicated with reasonable certainty. The purpose of the trust, the trust property and the beneficiaries must be indicated in such a way that the trust can be administered by the Court if the occasion arises. (Vol 22) 1935 P C 97 (102) : 62 Ind App 146 : 57 All 330 (P C).

[2] Where the original instrument of dedication is indefinite, the trust must be construed in the light of long continued usage. (Vol 21) 1934 Pat 443 (451) (DB).

[3] In an insurance policy appeared the words "to the person or persons legally entitled thereto" against the column to whom payable : *Held* requirements of S. 6 Married Women's Property Act, had not been fulfilled and no trust was created. The trust should appear express on the face. The words should be plain and unambiguous. (Vol 23) 1936 Mad 635 (636) (DB).

(aa) *Certainty as to intentions.*

[4] Where there is no indication with reasonable certainty by any words or acts of an intention to create a trust, there can be no trust. (Vol 31) 1944 P C 78 (80) : I L R (1944) Kar (P C) 262 : I L R (1944) Mad 617 (P C).

(b) *Certainty as to beneficiary.*

[5] Although it is clearly the intention of the Shia law that the property of a heirless Shia should be devoted to the poor and indigent, there is some vagueness as to the persons who are intended to be benefited. This vagueness relates to whether the beneficiaries are to be Sayyids, especially poor Sayyids, or whether they are to be the poor and indigent, whether Sayyids or not, whether they are to be the poor of the native town of deceased or the poor of the place where he resided or the poor of the place where he died, or of all these places, or whether they were to be poor Shias generally. (Vol 13) 1926 Pat 321 (327, 328) : 5 Pat 539 (DB).

(c) *Certainty as to object.*

[6] Vanabhojanam Dharmam is not too vague an object of charitable trust. (Vol 12) 1925 Mad 689 (690).

[7] Where the relevant portion of the will ran as follows:—" . . . . . the executors shall with the said ⅓ portion of the said income make annadhanam in our family choultry and if she (the testator's wife) dies leaving any moveable properties they shall be used by the said executors themselves for the said feeding charity. After my wife's decease, 2 out of 3 portions of the income enjoyed by her shall be utilized for the charity": *Held*, that the words "the charity" refer to the chattram which had immediately before been indicated. (Vol 11) 1924 P C 221 (225) : 51 Ind App 282 : 47 Mad 884 (P C).

[8] A bequest for *Dhamaco Kam* is void for uncertainty. (Vol 12) 1925 Sind 195 (197) : 19 Sind L R 220.

(d) *Certainty about trust property.*

[9] Testator merely expressing pious wish to carry on charitable and religious work and trust property not indicated with reasonable certainty — No trust is created. (Vol 29) 1942 Pat 435 (436, 437) : 21 Pat 488 (S B).

[10] In case of failure to give certain village, trust deed providing for another village of the same quality and profits : *Held* there was no uncertainty about the trust property. (Vol 24) 1937 Oudh 99 (104) : 12 Luck 639 (DB).

[11] Member of provident fund creating trust of interest accruing and accrued — Trust property, held had been indicated with reasonable certainty within meaning of S. 6 although the precise amount was not actually ascertainable at the time of the deed. (Vol 31) 1944 Cal 335 (338) : I L R (1943) 2 Cal 325.

3. Declaration of intention. — [1] Where there is no non-testamentary instrument in writing signed by the author of the trust nor a declaration of intention, no trust is created. (Vol 31) 1944 P C 78 (80) : I L R (1944) Kar (P C) 262 : I L R (1944) Mad 617 (P C).

[2] Property conveyed—Entire interest of transferor, whether legal or equitable, intended to be conveyed—No intention to create trust can be gathered. (Vol 2) 1915 P C 168 (170) (P C).

[3] A trust is not created unless the author of the trust 'indicates with reasonable certainty by any words or acts an intention on his part to create thereby a trust.' A man, who contracts to do a certain thing for consideration does not intend to create a trust. He merely enters into a contract and his obligations are thereafter contractual, not in trust. (Vol 30) 1943 Nag 266 (269) : I L R (1943) Nag 643.

[4] A trust can be created by word of mouth provided an express declaration can be proved or reasonable certainty existed of the creation of a trust by language or conduct — There must be intention to constitute a trust binding on settlor or any other; a definite property in favour of a definite person. (Vol 15) 1928 Bom 97 (98).

[5] Mere intention to create trust is not sufficient, unless some act is done to effectuate trust. ('09) 19 Mad L Jour 106 (111) (DB).

[6] The word "thereby" in S. 6 refers to "words or acts" and only means that an intention on the part of the author of the trust must appear with reasonable certainty by any words or acts. (Vol 24) 1937 Oudh 99 (104) : 12 Luck 639 (DB).

4. Purpose. — [1] Kararnama providing that interest or balance of insurance money with defendant was to be used for any ceremonial in family held constituted valid trust, as there was sufficient precision of purpose of trust. (Vol 11) 1924 Nag 63 (64).

[2] When settlor authorises trustee to invest money in trustee's business and pay interest to beneficiary, valid trust is created. (Vol 17) 1930 Mad 693 (698) (DB).

[3] A person who collects money for a charity becomes a trustee of such money for the charity. It is immaterial that the charity or society has made any

Section 6 — Note 4 *(contd.)*
arrangement with the Collector authorising him to collect because the trust is constituted by the payment by the members of the public on the representation of the Collector that the money is for a specific charitable purpose. (Vol 24) 1937 Pat 358 (360) (DB).

[4] Gift subject to condition that donee should maintain certain person creates implied trust. (Vol 12) 1925 Nag 29 (30).

[5] A deposit by an employee with employer is not a trust since there is no object of trust and the employer, is not expected to carry out any trust. (Vol 24) 1937 Lah 444 (445).

[6] A trust in favour of education simpliciter will not be void for vagueness or indefiniteness. A deed of wakf dedicated to national education is not void. (Vol 28) 1941 All 225 (234) : I L R (1941) All 377 (DB).

5. Beneficiary. — [1] For constitution of trust, beneficiaries must be indicated with reasonable certainty. (Vol 33) 1946 Mad 519 (522):ILR (1946) Mad 429 (DB).

[2] Where there is no devise of estate to anybody, no valid trust is created. (Vol 29) 1942 Bom 291 (297) (D B).

[3] Where gift provided that donee should maintain certain person, there was trust in his favour. (Vol 12) 1925 Nag 29 (30).

[4] Fund payable to children on death without disposing power to member is valid trust. (Vol 18) 1931 Bom 300 (300, 302) (DB).

[5] A beneficiary should not be made a trustee unless there are clear words indicating that he was intended to be made a trustee. (Vol 24) 1937 Mad 789 (790).

[6] In the case of Provident Fund neither the trust money nor the beneficiary can be said to be clearly indicated, hence the trust is invalid. The ownership of the trust fund also does not vest in the trustees. (Vol 29) 1942 Sind 47 (49) : I L R (1941) Kar 401 (DB).

6. Trust property must be specified. — [1] Company having one of its objects to allocate 30 per cent. of monies coming from certificate holders towards specified charities, issuing donation certificates to subscribers — Certificates accepted by subscribers on condition and with knowledge that 30 per cent. of contribution was to go to charity. Held, trust was created in respect of 30 per cent. of contribution amount. (Vol 24) 1937 Mad 368 (369, 370).

[2] Sole proprietor of company opening separate account in name of wife in company's books and placing large amounts to her credit. Interest paid to wife on aforesaid amounts described as "deposits" or "unsecured loans" in company's books but as gift in letter to wife from Company — *Held* no trust was created in favour of wife as no sum was set aside and appropriated by the husband as a fund transferable to the wife of which he was to be trustee. (Vol 31) 1944 P C 78 (80) : I L R (1944) Kar (P C) 262 : I L R (1944) Mad 617 (PC).

[3] To constitute trust, there must be trustee with express trust, and estate or interest in lands which the trust must affect. (Vol 13) 1926 Mad 284 (285).

7. Transfer of trust property. — [1] There can be no trust unless the legal interest is actually vested in trustee. (Vol 7) 1920 P C 119 (121) (PC).

[2] The Trusts Act lays considerable stress on the necessity of a transfer of ownership for the effective creation of a trust. In India there is no such thing as an equitable owner. Whatever the limitations of that estate may be, there is no doubt that in Indian Law, as in English Law, the trustees have the full legal estate in the trust property. No particular words of transfer are required but the document must aim at effecting a transfer. (Vol 28) 1941 Oudh 529 (550-554).

[3] One of the modes of transfer under the section is a non-testamentary instrument in writing which is registered. ('11) 35 Bom 403 (409) (DB).

[4] Section 6, Trusts Act, contemplates that the author of the trust should transfer the trust property. The word "transfer" has been used in a wider sense than in the T. P. Act which was also passed in the same year. It includes, not only sales, mortgages, leases, gifts but also vesting declarations. In the case of movable property, the ownership of the property is to be transferred. In the case of immovable property, only a declaration is necessary. (Vol 25) 1938 Cal 818 (820, 821) (D B).

[5] Trust is complete not after appointment of trustee, but after vesting of property in him for benefit of *cestui que trust*. (Vol 24) 1937 Bom 374 (378, 379) : I L R (1937) Bom 843.

[6] To constitute himself trustee, owner must clearly divest himself of beneficial interest, declare himself trustee and exercise control over it as such. (Vol 5) 1918 Mad 1337 (1342) (DB)

[7] Trust deed empowering trustees to sell moveables and immovables and collect outstandings — Deed containing no words of transfer —Document does not create trust nor, document being indivisible, rights of trusteeship even in respect of moveables. (Vol 6) 1919 Mad 555 (555, 556) (DB).

[8] There is no need to transfer possession, if declaration of trusts refers to specific property, beneficiary, and purpose. (Vol 2) 1915 Bom 124 (127).

[9] Section 6 must be construed as meaning that though as a rule transfer is one of the conditions necessary for a valid trust whether in the case of moveable or immoveable property no transfer is necessary where trust is declared by will or where the author of the trust is to be the trustee. ('11) 35 Bom 403 (408) (DB).

[10] Section 10, Limitation Act, 1908, deals with suit against person in whom property has been vested in trust for any specific purpose. It is not applicable to constructive trusts or obligations in the nature of trusts where there is no transfer of ownership. There is no trust without a transfer of ownership. (Vol 26) 1939 Mad 722 (723) (DB).

[11] Only real dedication, whereby owner divest himself of ownership and not mere unexpressed intention to dedicate can invalidate a subsequent transfer of property to third person. (Vol 21) 1934 Pat 612 (614) : 13 Pat 356 (DB).

[12] Physical delivery of property in addition to registered instrument is not necessary for creation of valid trust. ('11) 14 Oudh Cas 356 (383) (DB).

8. Rights of third parties. — [1] *S* executing deed of relinquishment in favour of his son *U* — *U* party to such deed — Deed referring to another deed executed by *U* and stating that *U* would act according to conditions laid down in that deed — *U* in such second deed agreeing to pay certain amount to one *J* who was not party to either deed — Two deeds, held must be read together and trust was created in favour of *J* enforceable at his instance. (Vol 25) 1938 P C 245 (247, 248) : 32 Sind L R 907 (P C).

[2] The grounds of the defendant's liability were stated in the plaint to be that, in consideration of great services rendered by the plaintiff and his father to the Zemindar, the latter agreed to give the plaintiff a salary of Rs 20 a month during the plaintiff's time and that in the deed of mortgage with possession executed by the Zemindar in favour of the defendant there was a stipulation that the defendant should pay the allowances to the plaintiff — *Held*, that plaintiff could not recover on the strength of the direction to pay contained in the mortgage deed unless the defendant could be held to have been constituted a trustee for the plaintiff.

Who may create trust.

7. A trust may be created —

(a) by every person competent to contract,[a] and,

(b) with the permission of a principal civil Court of original jurisdiction, by or on behalf of a minor;

but subject in each case to the law for the time being in force as to the circumstances and extent in and to which the author of the trust may dispose of the trust-property.

[a] *See* the Indian Contract Act, 1872 (9 [IX] of 1872), S. 11.

Subject of trust.

8. The subject-matter of a trust must be property transferable to the beneficiary.

It must not be merely beneficial interest under a subsisting trust.

Who may be beneficiary.

9. Every person capable of holding property may be a beneficiary.

Disclaimer by beneficiary.

A proposed beneficiary may renounce his interest under the trust by disclaimer addressed to the trustee, or by setting up, with notice of the trust, a claim inconsistent therewith.

Section 6 — Note 8 *(contd.)*

Circumstances from which a trust could be inferred considered. (Vol 3) 1916 Mad 65 (67) (DB).

[3] Where a person sets apart a certain sum for charity and invests it with a merchant and the interest paid by the merchant is spent on charity, the merchant is not a trustee in respect of the amount. (Vol 12) 1925 Sind 259 (259).

[4] Statement of a charge for discharge of debts in partition document does not create trust. (Vol 30) 1943 Sind 221 (222) : I L R (1943) Kar 338 (DB).

9. Trust for benefit of creditors. — [1] In the case of a deed of trust for the benefit of creditors it is not absolutely necessary that every creditor should execute the deed. Unless the creditor in some manner expresses his willingness to accept it, he cannot claim benefit under it. (Vol 25) 1938 Mad 199 (201) (DB).

10. Other illustrative cases. — [1] It is a well established principle of equity that no trust shall fail for want of a trustee. The same appears from the scheme of the Trusts Act. It is thus clear that the law of trusts in India also contemplates that no trust should be defeated for want of a trustee. (Vol 26) 1939 Oudh 161 (169, 170) : 14 Luck 548 (DB).

[2] Where for his benefit, settlor asks another to acquire property, reserving to himself right to revoke transaction, there is valid trust; but on revocation, trustee's acquisitions made later on become his own. (Vol 12) 1925 Pat 68 (91, 92) (FB).

[3] Banker, agreeing to buy securities for depositor, does not become trustee of that money by his suspending payment. ('10) 8 Mad L Tim 52 (52) (SB).

[4] Government granting pension on death of *A* to his son-in-law and daughters—On death of one daughter, Government instead of paying whole pension to surviving daughters, paying only certain portion to descendants of deceased daughter and investing balance through Accountant General for benefit of descendants of two Begums on lapse of pension — On death of surviving daughter, Government deciding to pay political pensions to heads of families left by Begums thus replacing accumulated capital by political pensions — Suit by descendant of Begum for account and administration of accumulated fund alleging it to be trust fund — *Held* that no trust had been created. (Vol 22) 1935 Bom 439 (446, 447) (DB).

[5] By a supplementary deed, the executant did not purport to execute a fresh deed of trust having revoked the former one, but merely to add to the former deed, supposed to be a valid deed of trust, supplementary provisions. The first deed was found to be ineffective as a deed of trust. The defects in the first deed could not be held to be cured by the second deed. (Vol 28) 1941 Oudh 529 (552).

[6] A document not vesting any interest in properties in trustees is not deed of trust. ('13) 17 Cal L Jour 233 (235) (DB).

[7] When there was a verbal assignment by attorney to himself of property known to be his principal's, held property vested in him in trust for the administrator for administering the estate and accounting for the residue to the next of kin. (Vol 22) 1935 P C 28 (32) (PC).

[8] Gift of certain sums by disciples to Guru to enable him to carry on charity which he was performing — Guru purchasing properties from out of these amounts—Gift held absolute followed by words merely expressing motive of gift and hence no trust was created. (Vol 24) 1937 Mad 789 (791).

[9] Only when there are other persons in management who can be regarded as general trustees and there are other funds out of which the general upkeep of the trust can be carried on, there will be any sense in distinguishing any endowment as a special trust or kattalai intended for a special purpose. Where in a gift to a temple, the person to whom the properties are conveyed is described as a trustee and there are no other general trustees in the management and the object of the gift is connected with ordinary worship, such person is not a special trustee and whether he is a trustee *de facto* or *de jure*, having taken property under the gift deed, he cannot claim to have held the properties in any character except that of the trustee of the temple. (Vol 25) 1938 Mad 314 (315) (DB).

SECTION 8 — SYNOPSIS

1. Scope.
2. Subject-matter of trust.

1. Scope. — [1] So long as the objects of a trust are lawful, any property or interest in property capable of being transferred by deeds *inter vivos* or testamentary can be saddled with trust. (Vol 12) 1925 Sind 159 (161); 19 Sind L R 286.

2. Subject-matter of trust. — [1] Liability of surety cannot form subject-matter of a trust. (Vol 26) 1939 Bom 309 (311).

[2] Property given to person receivable by her on death of mother is valid trust and not merely trust of beneficial interest. (Vol 21) 1934 Bom 64 (66) (DB).

[3] Section forbids trust upon trust. (Vol 21) 1934 Bom 64 (65) (DB).

Section 9 — Note 1

[1] Section is enabling and not a disabling provision. It recognises the possibility of a beneficiary desiring to renounce his interest under the trust and suggests two modes by which this can be done. It is not in every case in which a beneficiary sets up a claim inconsistent with the trust, that he loses thereby all his rights under the trust. The use of the word "may" repudiates this

10. Every person capable of holding property may be a trustee; but, where the trust involves the exercise of discretion, he cannot execute it unless he is competent to contract.

Who may be trustee.

No one bound to accept trust.

No one is bound to accept a trust.

Acceptance of trust.

A trust is accepted by any words or acts of the trustee indicating with reasonable certainty such acceptance.

Disclaimer of trust.

Instead of accepting a trust, the intended trustee may, within a reasonable period, disclaim it; and such disclaimer shall prevent the trust-property from vesting in him.

A disclaimer by one of two or more co-trustees vests the trust-property in the other or others and makes him or them sole trustee or trustees from the date of the creation of the trust.

Illustrations.

(a) *A* bequeaths certain property to *B* and *C*, his executors, as trustees for *D*. *B* and *C* prove *A*'s will. This is in itself an acceptance of the trust, and *B* and *C* hold the property in trust for *D*.

(b) *A* transfers certain property to *B* in trust to sell it and to pay out of the proceeds *A*'s debts. *B* accepts the trust and sells the property. So far as regards *B*, a trust of the proceeds is created for *A*'s creditors.

(c) *A* bequeaths a lakh of rupees to *B* upon certain trusts and appoints him his executor. *B* severs the lakh from the general assets and appropriates it to the specific purpose. This is an acceptance of the trust.

CHAPTER III.

OF THE DUTIES AND LIABILITIES OF TRUSTEES.

11. The trustee is bound to fulfil the purpose of the trust, and to obey the directions of the author of the trust given at the time of its creation, except as modified by the consent of all the beneficiaries being competent to contract.

Trustee to execute trust.

Where the beneficiary is incompetent to contract, his consent may, for the purposes of this section, be given by a principal civil Court of original jurisdiction.

Nothing in this section shall be deemed to require a trustee to obey any direction when to do so would be impracticable, illegal or manifestly injurious to the beneficiaries.

Explanation.—Unless a contrary intention be expressed, the purpose of a trust for the payment of debts shall be deemed to be *(a)* to pay only the debts of the author of the trust existing and recoverable at the date of the instrument of trust, or, when such instrument is a will, at the date of his death, and *(b)* in the case of debts not bearing interest, to make such payment without interest.

Illustrations.

(a) *A*, a trustee, is simply authorized to sell certain land by public auction. He cannot sell the land by private contract.

(b) *A*, a trustee of certain land for *X*, *Y* and *Z*, is authorized to sell the land to *L* for a specified sum. *X*, *Y* and *Z*, being competent to contract, consent that *A* may sell the land to *C* for a less sum. *A* may sell the land accordingly.

(c) *A*, a trustee for *B* and her children, is directed by the author of the trust to lend, on *B*'s request, trust property to *B*'s husband, *C*, on the security of his bond. *C* becomes insolvent and *B* requests *A* to make the loan. *A* may refuse to make it.

Section 9—Note 1 *(contd.)*

argument altogether. (Vol 26) 1939 Oudh 161 (173): 14 Luck 548 (DB).

[2] Where property is transferred to trustees for payment of debts of owner, even though creditors are not parties they can take advantage of trust and claim payment by proving that trust was communicated to them especially when the deed has been acted upon. (Vol 26) 1939 Mad 42 (45) (DB).

SECTION 10 — SYNOPSIS

1. Who can be trustee.
2. Acceptance of trusteeship.
3. Illustrative cases.

1. Who can be trustee. — [1] The Secretary of State can be trustee. (Vol 13) 1926 Pat 321 (330): 5 Pat 539 (DB).

[2] A person who is not *sui juris* but himself requires a person to look after his property cannot be a trustee. (Vol 1) 1914 Oudh 408 (410): 18 Oudh Cas 38 (DB).

[3] Firms adjudicated insolvents are unfit to be trustees. (Vol 14) 1927 Mad 249 (250).

[4] Trustee can be of alien race or religion. (Vol 1) 1914 Lah 187 (200): 1915 Pun Re No. 3 (DB).

[5] A beneficiary should not be made a trustee unless there are clear words indicating that he was intended to be made a trustee. (Vol 24) 1937 Mad 789 (790) (DB).

[6] Donor can constitute himself trustee, and though remaining in actual possession can transfer legal possession by declaring his possession as donee's. (Vol 13) 1926 Mad 1110 (1111).

2. Acceptance of trusteeship. — [1] Trusteeship conferred on certain person and his heirs — Where heirs take up adverse attitude there is no acceptance of trust by them. (Vol 19) 1932 Mad 267(270).

[2] Trustee accepting money as trust is estopped from denying its character subsequently. (Vol 28) 1941 Bom 41 (44): I L R (1941) Bom 42 (DB).

3. Illustrative cases.—[1] The beneficiary and the co-trustees will be entitled to preferential charge over the outstanding debts of a trustee on his bankruptcy. (Vol 28) 1941 Bom 41 (44): ILR (1941) Bom 42 (DB).

SECTION 11 — SYNOPSIS.

1. Scope.
2. Modification by Court.
3. Trust for payment of debts.
4. Explanation.

Trustee to inform himself of state of trust-property.

12. A trustee is bound to acquaint himself, as soon as possible, with the nature and circumstances of the trust-property; to obtain, where necessary, a transfer of the trust-property to himself; and (subject to the provisions of the instrument of trust) to get in trust-moneys invested on insufficient or hazardous security.

Illustrations.

(a) The trust-property is a debt outstanding on personal security. The instrument of trust gives the trustee no discretionary power to leave the debt so outstanding. The trustee's duty is to recover the debt without unnecessary delay.

(b) The trust-property is money in the hands of one of two co-trustees. No discretionary power is given by the instrument of trust. The other co trustee must not allow the former to retain the money for a longer period than the circumstances of the case required.

Trustee to protect title to trust-property.

13. A trustee is bound to maintain and defend all such suits, and (subject to the provisions of the instrument of trust) to take such other steps as, regard being had to the nature and amount or value of the trust property, may be reasonably requisite for the preservation of the trust-property and the assertion or protection of the title thereto.

Illustration.

The trust property is immovable property which has been given to the author of the trust by an unregistered instrument. Subject to the provisions of the Indian Registration Act, 1877,[a] the trustee's duty is to cause the instrument to be registered.

[a] *See* now the Indian Registration Act, 1908 (16 [XVI] of 1908).

Trustee not to set up title adverse to beneficiary.

14. The trustee must not for himself or another set up or aid any title to the trust-property adverse to the interest of the beneficiary.

Section 11 *(contd.)*

1. Scope.—[1] Executor who has proved will becomes liable for performance of the trusts, and for consequences arising from breach of them. (Vol 19) 1932 Bom 191 (191, 192).

2. Modification by Court.—[1] Extension or limitation by trustees of the scope of trust, so as to exclude who are intended to be included or to include those who are intended to be excluded is a breach of trust. ('09) 33 Bom 509 (521, 592) (DB).

[2] When emergency unforeseen by author of trust occurs and trustees are unable to take consent of beneficiaries, Court will exercise administrative jurisdiction by sanctioning acts of trustees. (Vol 20) 1933 Mad 242 (243) : 56 Mad 508 (DB).

[3] The doctrine of cypres is applied where from lapse of time and changes of circumstances, it is impossible beneficially to apply property left by founder exactly as per his directions. (Vol 19) 1932 Bom 191 (192).

[4] Subscriptions paid by persons for specific and well defined charitable object to committee of subscribers—Members of committee are trustees in either case if object is shown practicable or impracticable—In event of impracticability committee can neither abandon scheme nor make cypres application of fund on ground of general charitable intent without recourse to Court. (Vol 24) 1937 P C 240 (241) : 31 Sind L R 585 (P C).

3. Trust for payment of debts.—[1] Trust for payment of debts specified in deed — Creditors not specified are not entitled to be paid by the trustees out of their discretion. (Vol 26) 1939 Oudh 161 (174) : 14 Luck 548 (DB).

4. Explanation.—[1] The explanation to the section implies that interest can be paid on debts which bear interest but it cannot be inferred from the language used that it is incumbent on the trustees in every case to pay interest on interest bearing debts. The sentence "unless a contrary intention be expressed" is very important and shows that the provision contained in the explanation is subject to the terms of the deed of trust and where the deed of trust makes no provision for payment of any interest on the debts specified in it, the explanation to S. 11 will not entitle the creditors to claim interest. (Vol 26 1939 Oudh 161 (175, 176) : 14 Luck 548 (DB).

SECTION 13—SYNOPSIS.

1. "Maintain suits."
2. "Such other steps."

1. "Maintain suits." — [1] Suit by a trustee against a banker to recover trust moneys misapplied by him does not come under Section 92, C. P. C. He may institute the suit without the sanction of the Advocate-General. (Vol 25) 1938 Mad 999 (1004) : I L R (1938) Mad 121 (DB).

[2] Where none of the trusts created by the testator is in existence, the trustees become merely bare trustees and have no right of suit with regard to trust property. (Vol 27) 1940 Cal 228 (232).

2. "Such other steps."—[1] Trustees are entitled to carry out provisions of trust deed till suit challenging trust is decreed. (Vol 28) 1941 Bom 56 (59) : I L R (1941) Bom 170 (DB).

[2] Testator created trust by will which was disputed by daughters and grandson—Trustees paying Rs. 5,000, to them to save trust is act done in interest of the trust. (Vol 21) 1934 Lah 47 (47) (DB).

[3] Mesne profits and costs of suits should not be ordered against trustees as they are bound to defend suits seeking to extinguish the trust. (Vol 28) 1941 Bom 56 (59) : I L R (1941) Bom 170 (DB).

Section 14—Note 1

[1] Trustee acquiring property in that capacity cannot claim adverse possession until he gets a proper discharge. (Vol 22) 1935 All 458 (458)

[2] No person accepting position of trustee or of quasi-trustee and acquiring trust property can assert adverse title until he obtains proper discharge from trust (Vol 25) 1938 Nag 335 (346) : I L R (1939) Nag 1 (FB).

[3] Trustee's false assertion of ownership is sufficient ground for his removal. (Vol 9) 1922 P C 325 (332): 45 Mad 565 : 49 Ind App 237 (PC).

[4] Property under void trust can be adversely possessed by trustee. S. 10, Limitation Act has no application. (Vol 29) 1942 P C 64 (66 & 67) : 69 Ind App 137: I L R (1942) Kar (P C) 166 (P C).

15. A trustee is bound to deal with the trust-property as carefully as a man of ordinary prudence would deal with such property if it were his own; and, in the absence of a contract to the contrary, a trustee so dealing is not responsible for the loss, destruction or deterioration of the trust-property.

Care required from trustee.

Illustrations.

(a) *A*, living in Calcutta, is a trustee for *B*, living in Bombay. *A* remits trust-funds to *B* by bills drawn by a person of undoubted credit in favour of the trustee as such, and payable at Bombay. The bills are dishonoured. *A* is not bound to make good the loss.

(b) *A*, a trustee of leasehold property, directs the tenant to pay the rents on account of the trust to a banker, *B*, then in credit. The rents are accordingly paid to *B*, and *A* leaves the money with *B* only till wanted. Before the money is drawn out, *B* becomes insolvent. *A*, having had no reason to believe that *B* was in insolvent circumstances, is not bound to make good the loss.

(c) *A*, a trustee of two debts for *B*, releases one and compounds the other, in good faith, and reasonably believing that it is for *B*'s interest to do so. *A* is not bound to make good any loss caused thereby to *B*.

(d) *A*, a trustee directed to sell the trust-property by auction, sells the same, but does not advertise the sale and otherwise fails in reasonable diligence in inviting competition. *A* is bound to make good the loss caused thereby to the beneficiary.

(e) *A*, a trustee for *B*, in execution of his trust, sells the trust-property, but from want of due diligence on his part fails to receive part of the purchase-money. *A* is bound to make good the loss thereby caused to *B*.

(f) *A*, a trustee for *B* of a policy of insurance, has funds in hand for payment of the premiums. *A* neglects to pay the premiums, and the policy is consequently forfeited. *A* is bound to make good the loss to *B*.

(g) *A* bequeaths certain moneys to *B* and *C* as trustees, and authorizes them to continue trust-moneys upon the personal security of a certain firm in which *A* had himself invested them. *A* dies, and a change takes place in the firm. *B* and *C* must not permit the moneys to remain upon the personal security of the new firm.

(h) *A*, a trustee for *B*, allows the trust to be executed solely by his co-trustee, *C*. *C* misapplies the trust-property. *A* is personally answerable for the loss resulting to *B*.

16. Where the trust is created for the benefit of several persons in succession, and the trust-property is of a wasting nature or a future or reversionary interest, the trustee is bound, unless an intention to the contrary may be inferred from the instrument of trust, to convert the property into property of a permanent and immediately profitable character.

Conversion of perishable property.

Illustrations

(a) *A* bequeaths to *B* all his property in trust for *C* during his life, and on his death for *D*, and on *D*'s death for *E*. *A*'s property consists of three leasehold houses, and there is nothing in *A*'s will to show that he intended the houses to be enjoyed in specie. *B* should sell the houses, and invest the proceeds in accordance with section 20.

(b) *A* bequeaths to *B* his three leasehold houses in Calcutta and all the furniture therein in trust for *C* during his life, and on his death for *D*, and on *D*'s death for *E*. Here an intention that the houses and furniture should be enjoyed in specie appears clearly, and *B* should not sell them.

17. Where there are more beneficiaries than one the trustee is bound to be impartial, and must not execute the trust for the advantage of one at the expense of another.

Trustee to be impartial.

Where the trustee has a discretionary power, nothing in this section shall be deemed to authorize the Court to control the exercise reasonably and in good faith of such discretion.

Illustration.

A, a trustee for *B*, *C* and *D*, is empowered to choose between several specified modes of investing the trust-property. *A* in good faith chooses one of these modes. The Court will not interfere, although the result of the choice may be to vary the relative rights of *B*, *C* and *D*.

18. Where the trust is created for the benefit of several persons in succession and one of them is in possession of the trust property, if he commits, or threatens to commit, any act which is destructive or permanently injurious thereto, the trustee is bound to take measures to prevent such act.

Trustee to prevent waste.

Section 14—Note 1 *(contd.)*

[5] Where appointer of trustee professes to appoint manager of trust property which he falsely claims as his own and does not appoint him as trustee of those properties which are already trust properties, the trustee is not properly appointed. (Vol 11) 1924 P C 221 (226) : 47 Mad 882: 51 Ind App 282 (P C).

Section 15 — Note 1

[1] Discretion under S. 15 is subject to special restrictions imposed by other sections. (Vol 3) 1916 Mad 897 (899) : 38 Mad 71 (DB).

[2] Clause 2 of S. 15 does not apply when S. 20 is disregarded. (Vol 3)1916 Mad 897(900): 38 Mad 71(DB).

[3] The rule of conduct laid down by S. 15 applies also to a trustee of a charitable institution or endowment. (Vol 4) 1917 Mad 355 (356) (D B).

[4] Trustee of temple lending funds to relatives is not protected. (Vol 25) 1938 Nag 30 (32) : I L R (1940) Nag 94 (D B).

[5] Trustees recovering large sums from debtors but allowing some debts to be time-barred cannot be made personally liable for such sums. (Vol 21) 1934 Lah 47 (48) (D B).

[6] Obligations of trustee cannot be abrogated or minimised by covenant. (Vol 27) 1940 Cal 337 (343): I L R (1940) 1 Cal 372 (D B).

19. A trustee is bound *(a)* to keep clear and accurate accounts of the trust-property, and *(b)*, at all reasonable times, at the request of the beneficiary, to furnish him with full and accurate information as to the amount and state of the trust-property.

Accounts and information.

20. Where the trust-property consists of money and cannot be applied immediately or at an early date to the purposes of the trust, the trustee is bound (subject to any direction contained in the instrument of trust) to invest the money on the following securities, and on no others —

Investment of trust-money.

(a) in promissory notes, debentures, stock or other securities [a][of any [b][Provincial Government] or] of the [c][Central Government], or of the United Kingdom of Great Britain and Ireland .

SECTION 19 — SYNOPSIS

1. Trustee bound to keep clear and accurate accounts.
2. "Bound to furnish beneficiary with full information, etc."
3. Suit for accounts.
4. Liability to account.
5. Other illustrative cases.

1 Trustee bound to keep clear and accurate accounts.— [1] Trustee must keep clear and accurate accounts of trust property keeping it apart from his private property. Court should scrutinize the accounts before passing it. ('11) 10 Mad L Tim 353 (356) (DB) & ('09) 11 Bom L R 1267 (1278).

2. "Bound to furnish beneficiary with full information, etc."—[1] Trustee cannot refuse to show the accounts which he is bound to keep to the ultimate beneficiaries. (Vol 19) 1932 Bom 122 (127) : 56 Bom 242 (F B).

[2] In case of wrongful acts of trustee making it impossible to discover state of property every presumption against him must be made. (Vol 8 1921 Pat 487 (488) (D B).

3. Suit for accounts. — [1] Trustee receiving trust money has to account for it. It is no defence to say that he handed it over to co-trustees. ('41) 1941 Nag L Jour 587 (588) (D B).

[2] Loss occasioned by negligent acts or omission or wilful defaults of deceased trustee must be made good from his assets. Cause of action survives as loss arises from breach of fiduciary relation. (Vol 27) 1940 Cal 337 (343) : I L R (1940) 1 Cal 372 (D B).

[3] A *cestui que trust* can call upon an agent of the trustee, who has fraudulently mixed himself up with a breach of trust, for an account. (Vol 21) 1934 Mad 367 (370) : 57 Mad 1031 (D B).

[4] In suit for breach of trust, common account which will give beneficiaries liberty to surcharge and falsify must be taken and not account on footing of wilful default. (Vol 21) 1934 Mad 448 (455) (DB).

[5] Trustee suing and incurring liability to costs is personally liable for the same unless Court directs the costs to come out of estate. (Vol 22) 1935 Mad 5 (5) (D B) & (Vol 15) 1928 Mad 180 (183): 51 Mad 291 (DB).

[6] When suit is by *cestui que trust* against the legal representative of trustee, burden is on plaintiff to establish what was surplus in trustee's hands. (Vol 27) 1940 Cal 337 (345) : I L R (1940) 1 Cal 372 (D B).

[7] In account suit by beneficiary against trustee, latter can get decree for payment if he is in surplusage. (Vol 27) 1940 Cal 337 (344) : I L R (1940) 1 Cal 372 (D B).

[8] Where trustee's legal representative sues the *cestui que trust* to enforce right of indemnity of the deceased trustee, plaintiff should prove that the amount spent was from the private funds of the trustee for the trust. (Vol 27) 1940 Cal 337 (345) : I L R (1940) 1 Cal 372 (DB).

[9] Suit for accounts against legal representative of a trustee is in essence suit for recovery of trust fund. He stands in the position of volunteer. (Vol 27) 1940 Cal 337 (345) : I L R (1940) 1 Cal 372 (D B).

[10] Suit for accounts is not maintainable against the legal representatives of a deceased agent or trustee or co-trustee. But a suit does lie against him for the recovery of money misappropriated by the deceased. The decree would be against the assets of the deceased. ('42) 46 Cal W N 885 (D B).

[11] When suit for account is filed burden of proof is always on trustee whether he is plaintiff or defendant. (Vol 27) 1940 Cal 337 (345) : I L R (1940) 1 Cal 372 (D B).

4. Liability to account.—[1] *A* agreeing to collect sums for charitable society from customer proportionate to every sale of goods, becomes trustee of such money and the society is entitled to an account from *A* of all moneys already collected or to be collected in future. (Vol 24) 1937 Pat 358 (360) (D B).

[2] Persons entrusted with fund for temple are trustees who can be called to account by the managers—If such persons are agents to trustees they are accountable to them alone and not to *cestui que trust*. (Vol 23) 1936 Bom 412 (414) (D B).

[3] Trustee mixing his money with trust money and keeping mixed fund himself or with volunteer—*Cestui que trust* has charge over entire fund for so much as represents trust money—Account is only necessary for ascertaining trust money. (Vol 27) 1940 Cal 337 (345) : I L R (1940) 1 Cal 372 (D B).

[4] *A* having divested himself of all rights in part of the family property by a transfer to a deity, is not entitled to claim accounts from the manager of the property. (Vol 33) 1946 Nag 21 (22) : I L R (1945) Nag 820.

5. Other illustrative cases. — [1] When funds are with agents of trustee in whom funds are not vested, *cestui que trust* have no remedy against agents. Agents are accountable only to principals. (Vol 23) 1936 Bom 412 (414) (DB).

[2] Beneficiaries are not entitled to accounting unless breach of trust is alleged. Vol 33) 1946 Nag 21 (22) : I L R (1945) Nag 820

[3] *A* agreeing to collect sums for charitable society from customer proportionate to sale of goods, but failing into arrears, executed a hatchita promising to pay the sum due—The hatchita cannot be enforced, it being without consideration. (Vol 24) 1937 Pat 358 (360) (D B).

SECTION 20 - SYNOPSIS

1. Investment and forms.
2. Liability for disregard of the section.
3. Duty of trustee.
4. Powers of Court.

[d][Provided that securities, both the principal whereof and the interest whereon shall have been fully and unconditionally guaranteed by any such Government, shall be deemed, for the purposes of this clause, to be securities of such Government];

(b) in bonds, debentures and annuities [e][charged or secured by the Imperial Parliament on the revenues of India or of the Federation or of any Province];

[f][Provided that, after the fifteenth day of February, 1916, no money shall be invested in any such annuity being a terminable annuity unless a sinking fund has been established in connection with such annuity; but nothing in this proviso shall apply to investments made before the date aforesaid];

[g][*(bb)* in India three and a half per cent. stock, India three per cent. stock, India two and a half per cent. stock or any other capital stock which may at any time hereafter be issued by the Secretary of State for India in Council under the authority of an Act of Parliament and charged on the revenues of India] [e][or which may be issued by the Secretary of State on behalf of the Governor-General in Council under the provisions of Part XIII of the Government of India Act, 1925[h]];

(c) in stock or debentures of, or shares in, Railway or other Companies the interest whereon shall have been guaranteed by the Secretary of State for India in Council [i][or by the [c][Central Government]] [j][or in debentures of the Bombay [i][Provincial] Co-operative Bank, Limited, the interest whereon shall have been guaranteed by the Secretary of State for India in Council] [k][or the Provincial Government of Bombay];

[a][*(d)* in debentures or other securities for money issued, under the authority of any Act of a Legislature established in British India, by or on behalf of any municipal body, port trust or city improvement trust in any Presidency-town, or in Rangoon Town, or by or on behalf of the trustees of the port of Karachi;]

(e) on a first mortgage of immoveable property situate in British India : Provided that the property is not a leasehold for a term of years and that the value of the property exceeds by one-third or, if consisting of buildings, exceeds by one-half the mortgage-money: or

(f) on any other security expressly authorized by the instrument of trust, or by any rule which the High Court may from time to time prescribe in this behalf :

Provided that, where there is a person competent to contract and entitled in possession to receive the income of the trust property for his life, or for any greater estate, no investment on any security mentioned or referred to in clauses *(d)*, *(e)*, and *(f)* shall be made without his consent in writing.

[a] *Inserted* by the Repealing and Amending Act, 1920 (31 of 1920), S. 2 and Sch. I. [b] *Substituted* by A. O. for "Local Government". [c] *Substituted* by A. O. for "Government of India". [d] *Inserted* by the Indian Trusts (Amendment) Act, 1934 (18 [XVIII] of 1934), S. 2. [e] *Substituted* by A. O. for "charged by the Imperial Parliament on the revenues of India". [f] *Inserted* by the Indian Trusts (Amendment Act, 1916 (1 [I] of 1916), S. 2. [g] *Inserted* by A. O. [h] 26 Geo. V & 1 Edw. VIII C. 2. [i] *Inserted* by the Indian Trusts (Amendment) Act, 1917 (21 [XXI] of 1917), S. 2. [j] *Substituted* by the Repealing and Amending Act, 1925 (37 of 1925), S. 2 and Sch. I for "Central". [k] *Substituted* by the Indian Trusts (Amendment) Act, 1908 (3 [III] of 1908), S. 2.

Section 20 *(contd.)*

1. Investment and forms.—[1] The forms of instrument mentioned in S. 20 of the Indian Trusts Act are restricted only to private trusts and do not necessarily exhaust the modes of investment permissible in the case of charitable trusts. (Vol 4) 1917 Mad 355 (356) (D B).

[2] Section 20 which regulates the mode in which a trustee is to make investment is not controlled by S. 15. Trust monies payable to a minor cannot be applied for the trust at an early date as the trustees cannot pay the money, until the minor becomes *sui juris*. And even as regards money capable of being so applied at an early date, if the trustee takes the responsibility of keeping the money in investment for a long time, he must make the investment according to his obligations as trustee. (Vol 3) 1916 Mad 897 (898) : 38 Mad 71 (D B).

[3] Purchase of a house is not an investment authorised by S. 20. (Vol 20) 1933 Mad 628 (630) (D B).

2. Liability for disregard of the section. — [1] Disregard of S. 20 amounts to a breach of trust even though the act is honest. (Vol 3) 1916 Mad 897 (899) : 38 Mad 71 (D B).

[2] Lessee agreed to deposit year's lease amount with lessor—On lessee's request lessor deposited in Bank—When Bank failed it was held that even as trustee lessor was not liable for loss. (Vol 3) 1916 Mad 636 (637) (D B).

3. Duty of trustee. — [1] For disposing trust funds trustee must consider whether it is prudent and right to do so. (Vol 21) 1934 P C 243 (246) (P C).

[2] When trustee appoints surveyor to obtain true valuation, it is proper if his advice can be prudently taken into account for arriving at decision. (Vol 27) 1940 Rang 207 (213) : 1940 Rang L R 273 (D B).

[3] A person making an advance upon his own account upon the security of immovable property may no doubt be influenced to do so partly by the value of the security itself and partly by his estimate of the

[a][20A. *(1)* A trustee may invest in any of the securities mentioned or referred to in section 20, notwithstanding that the same may be redeemable and that the price exceeds the redemption value :

Power to purchase redeemable stock at a premium.

Provided that a trustee may not purchase at a price exceeding its redemption value any security mentioned or referred to in clauses *(c)* and *(d)* of section 20 which is liable to be redeemed within fifteen years of the date of purchase at par or at some other fixed rate or purchase any such security as is mentioned or referred to in the said clauses which is liable to be redeemed at par or at some other fixed rate at a price exceeding fifteen per centum above par or such other fixed rate.

(2) A trustee may retain until redemption any redeemable stock, fund or security which may have been purchased in accordance with this section.]

[a] *Inserted* by the Indian Trusts (Amendment) Act, 1916 (1 [I] of 1916), S. 3.

Mortgage of land pledged to Government under Act XXVI of 1871.

Deposit in Government Savings Bank.

21. Nothing in section 20 shall apply to investments made before this Act comes into force, or shall be deemed to preclude an investment on a mortgage of immoveable property already pledged as security for an advance under the Land Improvement Act, 1871[a], or, in case the trust-money does not exceed three thousand rupees, a deposit thereof in a Government Savings Bank.

[a] *See* now the Land Improvement Loans Act, 1883 (19 [XIX] of 1883).

Sale by trustee directed to sell within specified time.

22. Where a trustee directed to sell within a specified time extends such time, the burden of proving, as between himself and the beneficiary, that the latter is not prejudiced by the extension lies upon the trustee, unless the extension has been authorized by a principal Civil Court of original jurisdiction.

Illustration.

A bequeaths property to *B*, directing him with all convenient speed and within five years to sell it, and apply the proceeds for the benefit of *C*. In the exercise of reasonable discretion, *B* postpones the sale for six years. The sale is not thereby rendered invalid, but *C*, alleging that he has been injured by the postponement, institutes a suit against *B* to obtain compensation. In such suit the burden of proving that *C* has not been injured lies on B.

Liability for breach of trust.

23. Where the trustee commits a breach of trust, he is liable to make good the loss which the trust-property or the beneficiary has thereby sustained, unless the beneficiary has by fraud induced the trustee to commit the breach, or the beneficiary, being competent to contract, has himself, without coercion or undue influence

Section 20—Note 3 *(contd.)*

solvency and character of borrower. But a trustee may not blend these considerations together. He must not allow the character or solvency of the borrower to weigh with him so as to make his advance, in effect, an advance, not upon the security offered, but upon a consideration of other matters which seems to make it safe not to rely upon the security alone. (Vol 27) 1940 Rang 207 (214): 1940 Rang L R 273 (D B).

[3a] Trustee can mix moneys of one trust with those of others or with his own money if his drawings from mixed fund are proper and there is no breach of trust. (Vol 27) 1940 Rang 225 (227) (D B).

[4] Where at any moment it might have been necessary for the trustee to produce the funds in his hand, it cannot be held that the trustee was bound to invest the funds. (Vol 10) 1923 Mad 147(151): 46 Mad 47(DB).

[5] It is not open to a trustee to invest trust funds in debentures of a municipal body outside a Presidency-town or Rangoon Town. (Vol 33) 1946 Bom 159 (162) (D B).

[6] A municipality is not a trustee in respect of the provident fund of its employees and is not restricted to invest the fund in securities mentioned in the section. (Vol 33) 1946 Bom 159 (162) (D B).

[7] Care to be applied to a temporary investment of capital can be no less than that which the Trusts Act requires for an investment of current expenditure not immediately wanted, and so an omission to apply the same standard of care would amount to the kind of neglect contemplated by S. 15. (Vol 25) 1938 Nag 30 (32) : 1 L R (1940) Nag 94 (D B).

4. Powers of Court. —[1] In cases of emergency not provided for by the trust instrument and not within the contemplation of the author of the trust, the Court has power under its extraordinary jurisdiction to sanction the trustees doing acts which are necessary for the protection of the trust estate although not expressly authorised by the trust instrument. But the jurisdiction is of an extremely delicate character and must be exercised with the greatest caution. Where house property was subject to a large set back under the Municipal Regulations and was in urgent need of sanitary and other heavy repairs, the Court sanctioned the sale of the property by the trustees, although the trust settlement contained no power of sale. (Vol 6) 1919 Bom 119 (121): 43 Bom 519.

[2] Neither S. 36 nor S. 40 confers a power of sale on the trustee when the instrument does not provide for it. (Vol 6) 1919 Bom 119 (121) : 43 Bom 519.

SECTION 23 — SYNOPSIS

1. Breach of trust—General.
2. Making good the loss.
3. Suits against trustee.
4. Liability for interest.
5. Liability to account and failure.
6. Effect of concurrence or acquiescence.
7. Clause (e).
8. Clause (f).

having been brought to bear on him, concurred in the breach, or subsequently acquiesced therein, with full knowledge of the facts of the case and of his rights as against the trustee.

A trustee committing a breach of trust is not liable to pay interest except in the following cases : —

(a) where he has actually received interest :

(b) where the breach consists in unreasonable delay in paying trust money to the beneficiary :

(c) where the trustee ought to have received interest, but has not done so :

(d) where he may be fairly presumed to have received interest.

He is liable, in case *(a)*, to account for the interest actually received, and, in cases *(b)*, *(c)* and *(d)*, to account for simple interest at the rate of six per cent. per annum, unless the Court otherwise directs.

(e) Where the breach consists in failure to invest trust-money and to accumulate the interest or dividends thereon, he is liable to account for compound interest (with half yearly rests) at the same rate.

(f) Where the breach consists in the employment of trust-property or the proceeds thereof in trade or business, he is liable to account, at the option of the beneficiary, either for compound interest (with half-yearly rests) at the same rate, or for the nett profits made by such employment.

Illustrations.

(a) *A* trustee improperly leaves trust-property outstanding, and it is consequently lost : he is liable to make good the property lost, but he is not liable to pay interest thereon.

(b) *A* bequeaths a house to *B* in trust to sell it and pay the proceeds to *C*. *B* neglects to sell the house for a great length of time, whereby the house is deteriorated and its market price falls. *B* is answerable to *C* for the loss.

(c) *A* trustee is guilty of unreasonable delay in investing trust-money in accordance with section 20, or in paying it to the beneficiary. The trustee is liable to pay interest thereon for the period of the delay.

(d) The duty of the trustee is to invest trust-money in any of the securities mentioned in section 20, clause *(a)*, *(b)*, *(c)* or *(d)*. Instead of so doing, he retains the money in his hands. He is liable, at the option of the beneficiary, to be charged either with the amount of the principal money and interest, or with the amount of such securities as he might have purchased with the trust-money when the investment should have been made and the intermediate dividends and interest thereon.

(e) The instrument of trust directs the trustee to invest trust-money either in any such securities or on a mortgage of immoveable property. The trustee does neither. He is liable for the principal money and interest.

(f) The instrument of trust directs the trustee to invest trust-money in any of such securities and to accumulate the dividends thereon. The trustee disregards the direction. He is liable, at the option of the beneficiary, to be charged either with the amount of the principal money and compound interest, or with the amount of such securities as he might have purchased with the trust-money when the investment should have been made, together with the amount of the accumulation which would have arisen from a proper investment of the intermediate dividends.

(g) Trust-property is invested in one of the securities mentioned in section 20, clause *(a)*, *(b)*, *(c)* or *(d)*. The trustee sells such security for some purpose not authorized by the terms of the instrument of trust. He is liable, at the option of the beneficiary, either to replace the security with the intermediate dividends and interest thereon, or to account for the proceeds of the sale with interest thereon.

(h) The trust-property consists of land. The trustee sells the land to a purchaser for a consideration without notice of the trust. The trustee is liable, at the option of the beneficiary, to purchase other land of equal value to be settled upon the like trust, or to be charged with the proceeds of the sale with interest.

Section 23 *(contd.)*

1. Breach of trust—General.—[1] As a matter of procedure, breaches of trust, both positive and negative (wilful default) must be pleaded at the outset unless the trustee has refused to show the trust account. (Vol 23) 1936 Bom 30 (33) (D B).

[2] Agreement by trustee to discharge post-settlement debts of settlor, is breach of trust where object of trust is to pay pre-settlement debts and provide for settlor's family. Where act of trustee amounts to breach of trust, he must show that transaction was beneficial to beneficiary. Beneficiary need not prove breach of trust where transaction unreasonably throws great burden on trust property. ('09) 32 Mad 490 (499, 501) (D B). (Affirmed on appeal in (Vol 2) 1915 P C 33:39 Mad 115 (P C).)

[3] Just as a trustee cannot set up any title adverse to that of the *cestui que trust*, so also the beneficiary cannot repudiate the *bona fide* acts of the trustee entered upon for the benefit of the beneficiary or the *cestui que trust*. (Vol 22) 1935 Oudh 394 (397) : 11 Luck 209 (D B).

[4] On breach of trust, trustee does not cease to be trustee. (Vol 26) 1939 Mad 154 (155) (D B).

[5] Succeeding trustee may acquire a good title from an outsider against trust only, if the former was not a party to the original misappropriation. (Vol 9) 1922 Mad 409 (412) (D B).

[6] In suit for breach of trust, account taken must be common account giving beneficiaries liberty to surcharge and falsify but not account on footing of wilful default. (Vol 21) 1934 Mad 448 (455) (D B).

[6a] Trustee not rendering accounts properly but retaining trust money in his hands — He must pay interest even if debt does not ordinarily carry interest. (Vol 21) 1934 Mad 448 (454) (DB).

[7] Banker knowingly making himself party to misappropriation of trust funds is liable to refund— Direct notice from party is not necessary — Action against Banker must not be treated as one for damages but is one for accounts for breach of trust. (Vol 6) 1919 P C 184 (186) (P C).

[8] Mere change in name of charities brought about by trustees would not amount to breach of trust to

Section 23 — Note 1 *(contd.)*

justify their removal. (Vol 29) 1942 Bom 208 (211) : I L R (1942) Bom 546 (D B).

[9] Guardian using ward's money in business must account for profits made or might have been realised — Guardian's neglect of duty amounts to breach of trust and ward must be compensated for loss caused thereby. (Vol 7) 1920 Lah 291 (292):1919 Pun Re No. 157 (DB).

2. Making good the loss.—[1] The principles on which the *cestui que trust* is entitled to relief limited to the personal assets of the trustee in the hands of his legal representative are : The first principle is that a trustee is liable to make good loss caused by breach of trust. The cause of action to obtain compensation survives and his legal representative is bound to make good the loss out of assets which he receives. The second principle is that a *cestui que trust* is entitled to follow the trust property whatever shape or form it takes, in the hands of a volunteer. The same principle applies even when the trust property is money, provided it can be traced. (Vol 27) 1940 Cal 337 (343) : I L R (1940) 1 Cal 372 (DB).

[2] Where trustee wrongfully appropriates the trust money and fails to utilize it in redeeming the beneficiary's property as directed by the author of the trust, the *cestui que trust* has a right to be indemnified. (Vol 15) 1928 Mad 43 (45).

[3] The loss occasioned by acts and omissions and wilful defaults of the late trustee must be made good from his assets in the hands of his legal representative. (Vol 27) 1940 Cal 337 (345) : ILR (1940) 1 Cal 372(DB).

[4] The sons of a deceased father are not liable in respect of a claim against him for criminal breach of trust. (Vol 21) 1934 P C 238 (242) : 61 Ind App 350 : 56 All 548 (PC).

[5] Loss occasioned by negligent acts or omissions or wilful defaults of deceased trustee must be made good from his assets. Cause of action survives as loss arises from breach of fiduciary relation. (Vol 27) 1940 Cal 337 (343) : I L R (1940) 1 Cal 372 (DB).

[6] A trustee for payment to creditors if he fails to exercise due diligence in his duties must be debited with the loss caused by his laches and should not be allowed costs of suit instituted by him after limitation. (Vol 5) 1918 Mad 807 (810) (DB).

[7] If the ward's money are used by guardian in his business he should account for profits he had made or could have made but for gross or wilful default. Every plain neglect of duty by a guardian amounts to a breach of trust and he must compensate his ward for any loss occasioned thereby. (Vol 7) 1920 Lah 291 (292) : 1919 Pun Re No. 157 (DB).

[8] The object of a marriage settlement by way of trust is to protect the beneficiary against herself ; and merely because the beneficiary happens to know that the trust fund or any part thereof is to be invested in a particular manner and consents thereto, the trustees are not absolved from liability under S. 23 unless she concurred or acquiesced in the breach with full knowledge of the facts of the case and of her rights as against the trustees. (Vol 22) 1935 Rang 146 (147) (DB).

[9] Banker applying what he knows as trust funds in discharge or reduction of a debt of a customer in breach of trust, is liable for the money to the trust. (Vol 25) 1938 Mad 999 (1001):ILR (1939) Mad 121 (DB).

3. Suits against trustee. — [1] Cause of action, survives against legal representatives of deceased trustee. (Vol 21) 1934 Mad 448 (455) (DB) ⊛ (Vol 27) 1940 Cal 337 (345) : I L R (1940) 1 Cal 372 (DB).

[2] Under trust deed, father to be trustee for life and his sons to become trustees after his death—Breach of trust — Father if ceases to be trustee — Suit for *mesne profits* and possession by sons — As regards *mesne profits*—The plaintiffs were not the present trustees and they were not entitled to maintain the suit in that capacity. (Vol 26) 1939 Mad 154 (155) (DB).

4. Liability for interest.—[1] Trustee for payment to creditors is liable for loss due to his laches—Costs of suits filed by him after limitation should not be allowed — He must pay interest on money retained after payment of debts, only when he has committed breach of trust —Negligence in trustee and contributory negligence in debtor—Trustee is not liable for interest. (Vol 5) 1918 Mad 807 (810) (DB).

[2] Where a beneficiary under a *waqf* deed files a suit for recovery of his share of the profits from the property of the *mutawalli* and the payment is unreasonably delayed, the beneficiary becomes entitled to interest on the amount claimed. (Vol 20) 1933 All 186 (188) : 55 All 164 (DB).

[3] Partnership dissolved on one partner assigning his share — Remaining partners forming new firm— Assignee is entitled to profits of new firm or interest. (Vol 16) 1929 Mad 627 (632) : 52 Mad 509 (DB). ((Vol 2) 1915 P C 116 : 42 Cal 914 : 42 Ind App 91 (PC), *Rel. on.*)

[4] Muhammadan acting as a *de facto* guardian of his brother's property becomes liable to pay interest on the liquid assets held by him for minor by virtue of S. 23 read with Ss. 94 and 95. If guardian dies, estate would be liable for interest. (Vol 30) 1943 Mad 254 (255): ILR (1943) Mad 654 (DB).

[5] The words "unless the Court otherwise directs" in S. 23 allow the Court to grant a higher rate of interest if it considers it proper to do so. It cannot grant interest on costs at a higher rate than 6 per cent. but with this exception, the discretion of the Court is entirely unfettered. (Vol 32) 1945 Mad 297 (298) : ILR (1946) Mad 255 (DB).

[6] Trustee investing money on unauthorised security must be treated as failing to invest under Cl. (e) of S. 23 and he is liable for interest on money lost. (Vol 3) 1916 Mad 897 (900) : 38 Mad 71 (DB).

[7] Trustee receiving profits from trust property is not ordinarily liable for interest in the absence of any breach of trust. (Vol 10) 1923 Mad 147 (151) : 46 Mad 47 (DB).

[8] Trustee using trust money in private business need not pay more than 6 per cent. compound interest. (Vol 4) 1917 Mad 455 (455) (DB).

[9] Co-owner is not trustee for other merely because he is in enjoyment of joint property and collects rent and profits himself, and, in absence of relationship as trustee and beneficiary, there can be no liability for payment of interest. (Vol 32) 1945 Mad 17 (17).

[10] Trustee not rendering accounts properly—They must pay interest even if debt does not ordinarily carry interest. (Vol 21) 1934 Mad 448 (454) (DB).

5. Liability to account and failure. — [1] In a suit for breach of trust, the account to be taken must be a common account which will give the plaintiffs liberty to surcharge and falsify but not on account on the footing of wilful default. (Vol 21) 1934 Mad 448 (453) (DB).

[2] In ordinary circumstances, there can be little doubt that the value of produce rents at the time and place of the receipt is the measure of liability and not the price fetched by sales at a later date. If the person liable to account for produce rent to his employer should without fraud convert it to his own use his liability cannot be measured by the price at which the produce was subsequently sold. (Vol 9) 1922 Pat 598 (599) (DB).

6. Effect of concurrence or acquiescence.—[1] The onus is on the trustees, as soon as it is established that a breach of trust has been committed, to satisfy the Court that the plaintiff concurred or acquiesced in the breach of trust with full knowledge of the facts of the

24. A trustee who is liable for a loss occasioned by a breach of trust in respect of one portion of the trust-property cannot set-off against his liability a gain which has accrued to another portion of the trust-property through another and distinct breach of trust.

No set-off allowed to trustee.

25. Where a trustee succeeds another, he is not, as such, liable for the acts or defaults of his predecessor.

Non-liability for predecessor's default.

26. Subject to the provisions of sections 13 and 15, one trustee is not, as such, liable for a breach of trust committed by his co-trustee :

Non-liability for co-trustee's default.

Provided that, in the absence of an express declaration to the contrary in the instrument of trust, a trustee is so liable—

(a) where he has delivered trust-property to his co-trustee without seeing to its proper application :

(b) where he allows his co-trustee to receive trust-property and fails to make due enquiry as to the co-trustee's dealings therewith or allows him to retain it longer than the circumstances of the case reasonably require :

(c) where he becomes aware of a breach of trust committed or intended by his co-trustee and either actively conceals it or does not within a reasonable time take proper steps to protect the beneficiary's interest.

A co-trustee who joins in signing a receipt for trust property and proves that he has not received the same is not answerable, by reason of such signature only, for loss or misapplication of the property by his co-trustee.

Joining in receipt for conformity.

Illustration.

A bequeaths certain property to *B* and *C*, and directs them to sell it and invest the proceeds for the benefit of *D*. *B* and *C* accordingly sell the property, and the purchase-money is received by *B* and retained in his hands. *C* pays no attention to the matter for two years, and then calls on *B* to make the investment. *B* is unable to do so, becomes insolvent, and the purchase-money is lost. *C* may be compelled to make good the amount.

27. Where co-trustees jointly commit a breach of trust, or where one of them by his neglect enables the other to commit a breach of trust each is liable to the beneficiary for the whole of the loss occasioned by such breach.

Several liability of co-trustees.

But as between the trustees themselves, if one be less guilty than another and has had to refund the loss, the former may compel the latter, or his legal representative to the extent of the assets he has received, to make good such loss ; and, if all be equally guilty, any one or more of the trustees who has had to refund the loss may compel the others to contribute.

Contribution as between co-trustees.

Nothing in this section shall be deemed to authorize a trustee who has been guilty of fraud to institute a suit to compel contribution.

Section 23 — Note 6 *(contd.)*

case and of his rights as against the trustees. (Vol 22) 1935 Rang 146 (148) (DB).

7. Clause (e).—[1] Section 23, cl. (e) applies only to private trusts. (Vol 5) 1918 Mad 56 (58) (DB).

[2] A trustee investing money in unauthorised security must be treated as failing to invest under S. 23, cl. (e) and he is liable for interest on the money lost. (Vol 3) 1916 Mad 897 (900) : 38 Mad 71 (DB).

8. Clause (f).— [1] Muhammadan trader dying leaving two major sons, widow and some minor sons and daughters —Major sons continuing trade as family trade for benefit of family—Sections 23 (f) and 88 apply and eldest son is bound to hold for other members of the family any advantage he had gained by utilizing shares of others for his own pecuniary advantage. (Vol 18) 1931 Mad 553 (557, 558) : 54 Mad 543 (DB) (Vol 24) 1937 Mad 675 (676).

Section 26 — Note 1

[1] One of the trustees constructing a building for his own private use with the knowledge, and without objection, of the other trustees, on a temple site and not denying ownership of temple is liable only to pay reasonable ground rent. (Vol 21) 1934 Mad 115 (118) : 57 Mad 315 (DB).

[2] Co-trustee or new trustee can recover by suit the money found due by one trustee on audit report. (Vol 21) 1934 Mad 115 (126) : 57 Mad 315 (DB).

[3] Two brothers *A* and *B* undertook to collect the outstandings on behalf of the minor son of deceased — Actual collections made by *A* under the advice of *B* — *Held* that both were in fiduciary relationship and *B* was also liable. (Vol 14) 1927 Bom 75 (77) (DB).

[4] It cannot be said that where some only of certain trustees are known to have committed a breach of trust, a plaintiff must sue the whole body of trustees or none at all. It is true that when there are more trustees than one, all must join in the execution of the trust but it does not follow that when some of them commit a breach of trust, all of them must be deemed to have joined in it and must be sued collectively. (Vol 27) 1940 Cal 376 (377) (DB).

[5] All trustees are not jointly and severally liable when there is disunion among trustees and consequent impossibility of management. (Vol 21) 1934 Mad 115 (118) : 57 Mad 315 (DB).

[6] Where a co-trustee nephew of testator, took leading part in administering trust other co-trustee cannot ordinarily be liable for breach of trust committed by such co-trustee. (Vol 21) 1934 Lah 47 (48) (DB).

Section 27 — Note 1

[1] Applicability of, to religious trusts — Breach of trust—Unnecessary expenditure—Right of contribution. The principle of the section applies to religious trusts also. ('12) 23 Mad L Jour 278 (281) (DB).

28. When any beneficiary's interest becomes vested in another person, and the trustee, not having notice of the vesting, pays or delivers trust-property to the person who would have been entitled thereto in the absence of such vesting, the trustee is not liable for the property so paid or delivered.

Non-liability of trustee paying without notice of transfer by beneficiary.

29. When the beneficiary's interest is forfeited or awarded by legal adjudication [a][to the Crown], the trustee is bound to hold the trust-property to the extent of such interest for the benefit of such person in such manner as [b][the Provincial Government] may direct in this behalf.

Liability of trustee where beneficiary's interest is forfeited to the Crown.

[a] *Substituted* by A. O. for "to Government". [b] *Substituted* by A. O. for "the Government".

30. Subject to the provisions of the instrument of trust and of sections 23 and 26, trustees shall be respectively chargeable only for such moneys, stocks, funds and securities as they respectively actually receive and shall not be answerable the one for the other of them, nor for any banker, broker or other person in whose hands any trust-property may be placed, nor for the insufficiency or deficiency of any stocks, funds or securities, nor otherwise for involuntary losses.

Indemnity of trustees.

CHAPTER IV.

OF THE RIGHTS AND POWERS OF TRUSTEES.

31. A trustee is entitled to have in his possession the instrument of trust and all the documents of title (if any) relating solely to the trust-property.

Right to title-deed.

32. Every trustee may reimburse himself, or pay or discharge out of the trust-property, all expenses properly incurred in or about the execution of the trust, or the realization, preservation or benefit of the trust-property, or the protection or support of the beneficiary.

Right to reimbursement of expenses.

If he pays such expenses out of his own pocket, he has a first charge upon the trust-property for such expenses and interest thereon; but such charge (unless the expenses have been incurred with the sanction of a principal Civil Court of original jurisdiction) shall be enforced only by prohibiting any disposition of the trust-property without previous payment of such expenses and interest.

If the trust-property fail, the trustee is entitled to recover from the beneficiary personally on whose behalf he acted, and at whose request, expressed or implied, he made the payment, the amount of such expenses.

Where a trustee has by mistake made an over-payment to the beneficiary, he may reimburse the trust property out of the beneficiary's interest. If such interest fail, the trustee is entitled to recover from the beneficiary personally the amount of such over-payment.

Right to be recouped for erroneous over-payment.

Section 30 — Note 1

[1] Co-owner collecting entire rents is not trustee for the others and is not liable for what ought to have been received. (Vol 32) 1945 Mad 17 (17).

SECTION 32 — SYNOPSIS

1. **Right of indemnity.**
2. **Creditor's right of subrogation.**
3. **Limitation.**

1. Right of indemnity.—[1] Trustee has right of indemnity against the estate for amounts spent in preserving the estate, in defending his position as trustee and performing the obligations of the trust—The right is first charge on estate. ('10) 37 Cal 229 (234) : 37 Ind App 27 (PC).

[2] A trustee is entitled to be reimbursed the moneys spent by him on a *bona fide* litigation believed to be in the interest of the *cestui que trust* but a person not really entitled to the office cannot so claim. ('13) 25 Mad L Jour 452 (456) (DB).

[But see (Vol 15) 1928 Mad 180 (183) : 51 Mad 291 (D B)]

[3] Trustee is entitled to out of pocket expenses only till date of order of removal. (Vol 3) 1916 Mad 57 (64) : 38 Mad 260 (DB) & (Vol 2) 1915 Mad 1196 (1198) : 39 Mad 456 (DB).

[4] Trustee of a religious or charitable trust can only re-imburse himself from rents and profits and not corpus of trust. (Vol 3) 1916 Mad 57 (62) : 38 Mad 260 (D B).

[5] Generally, a trustee supporting his title and succeeding in supporting the trust would be entitled to an order for costs out of the estate. Where, however, the trustees are guilty of misconduct in respect of the suit, that is, where their attitude throughout has been of not upholding the trust or assist the Court in upholding the trust, they are not entitled to the order for costs out of the estate. (Vol 28) 1941 Bom 307 (310).

[6] Trustee exceeding budget allotment for purposes binding on temple is not bound to make good excess amount spent by him. In the performance of festival, trustee is to be guided by his judgment. (Vol 24) 1937 Mad 970 (971, 972).

2. Creditor's right of subrogation. — [1] The creditor is not debarred from a right of subrogation to get the benefit of trustee's right of indemnity by reason of the fact that he was not, at the date of the transaction, aware that he was dealing with a trustee. The creditor may be impeded by any obstacle which the estate could raise against the trustee or executor and the creditor has the right to step into the shoes of the trustee but these shoes may be too small, or may not be there at all. Adequate or not, such is the only right which the law allows the creditor *vis-a-vis* the estate. Provided the suit be appropriately framed, the matter of subrogation and indemnity may be determined in

Right to indemnity from gainer by breach of trust.

33. A person other than a trustee who has gained an advantage from a breach of trust must indemnify the trustee to the extent of the amount actually received by such person under the breach; and where he is a beneficiary the trustee has a charge on his interest for such amount.

Nothing in this section shall be deemed to entitle a trustee to be indemnified who has, in committing the breach of trust, been guilty of fraud.

Right to apply to Court for opinion in management of trust-property.

34. Any trustee may, without instituting a suit, apply by petition to a principal Civil Court of original jurisdiction for its opinion, advice or direction on any present questions respecting the management or administration of the trust-property other than questions of detail, difficulty or importance, not proper in the opinion of the Court for summary disposal.

A copy of such petition shall be served upon, and the hearing thereof may be attended by, such of the persons interested in the application as the Court thinks fit.

The trustee stating in good faith the facts in such petition and acting upon the opinion, advice or direction given by the Court shall be deemed, so far as regards his own responsibility, to have discharged his duty as such trustee in the subject-matter of the application.

The costs of every application under this section shall be in the discretion of the Court to which it is made.

Section 32 — Note 2 *(contd.)*

the suit by the creditor against the trustee. It is not open to the creditor to ask the Court to investigate the matter of indemnity and subrogation in execution, as it is not a matter within the scope of S. 47, Civil P. C. (Vol 20) 1933 Cal 668 (671, 672) : 60 Cal 801 ✠ (Vol 23) 1936 Pat 390 (390) : 15 Pat 88 (DB).

[2] In order that a creditor can claim right of subrogation to trustee's right of indemnity, (1) the creditor should sue the trustee as a trustee, (2) all the trustees should be represented (O. 31, R. 2, Civil P.C.); (3) the parties beneficially interested should be represented and (4) indemnity and subrogation to that right should be claimed. (Vol 20) 1933 Cal 668 (673) : 60 Cal 801.

[3] Liability on promissory note executed by trustee is restricted to personal liability of the trustee and a decree against temple properties cannot be passed. (Vol 29) 1942 Mad 198 (198).

3. Limitation.— [1] Suit by trustee for recovery of money advanced to trust is governed by Art. 120 and not Art. 132 of Limitation Act. Limitation begins from date of dispossession as trustee. (Vol 3) 1916 Mad 57 (59) : 38 Mad 260 (DB).

Section 33 — Note 1

[1] Principle that creditor advancing money to trust for trust purposes cannot be defeated by contention that duties could have been performed on less elaborate scale, does not apply where trustee acts contrary to trust. (Vol 27) 1940 Mad 719 (721, 722).

SECTION 34 — SYNOPSIS

1. Scope.
2. "Opinion, advice or direction given by Court."
3. Powers of Court to order deviation from trust deed.
4. Notice of application.
5. Appeal.
6. Revision.

1. Scope.— [1] All parts of S. 34, must be read together. That section is clearly an enabling section in that it enables any trustee, and not all trustees only, to apply by petition to a principal Court of original jurisdiction for its opinion, advice or direction on any present questions respecting the management or administration of the trust property other than questions of detail, difficulty or importance, not proper, in the opinion of the Court, for summary disposal. So, reading paras. 1 and 3 together, it would appear that what the section contemplates is that the trustee, upon a statement of facts made in good faith and applying to the Court for opinion, advice or direction, and acting in accordance with such opinion, advice or direction, shall be deemed to have discharged his duty as trustee in the subject-matter of the application. It appears, then, that the section is for the benefit and protection of the trustee. (Vol 32) 1945 Sind 81 (89) : I L R (1945) Kar 384 : 47 Cri L Jour 283 (FB) ✠ (Vol 22) 1935 Oudh 72 (75) (DB).

[2] Proceedings in an application under S. 34, Trusts Act, are intended to be summary and the Court would not be exercising a proper discretion if it disposed of matters of vital importance, such as involving the conversion of the entire trust property and the directions of the Court asked for and proposed by the trustees are stoutly opposed by the beneficiaries, in a summary manner especially when there is no question of emergency and when it is open to the trustees at all times to file a regular suit. (Vol 25) 1938 Sind 182 (183) : I L R (1939) Kar 99.

[3] An application under S. 34 is an independent procedure analogous to originating summons for direction or advice of the Court in matters relating to the trust. That section relates only to matters in which the trustee in order to protect himself asks the advice or opinion of the Court on any question respecting the management or administration of the trust property. (Vol 13) 1926 Cal 1225 (1226) (DB).

[4] Where an allegation is made that a person is entitled to office proper remedy is to file suit under S. 92, Civil P.C., and not to apply under S. 34 or S. 74. (Vol 21) 1934 Oudh 118 (121) : 9 Luck 507.

[5] Proof of embezzlement or mismanagement on part of trustee is not necessary for appointment of receiver. (Vol 23) 1936 Oudh 337 (338) : 12 Luck 635 (DB).

[6] On a petition under S. 34, Trusts Act, court-fee under Art. 1 (d), Sch. II, Court-fees Act, is sufficient. (Vol 21) 1934 Oudh 118 (121) : 9 Luck 507.

2. "Opinion, advice or direction given by Court." — [1] The words "opinion, advice or direction" must be read together as meaning nothing more than guidance. Advice, opinion or direction given under section is not an order and the disobedience thereof does not involve committal for contempt. (Vol 32) 1945 Sind 81 (92, 93) : I L R (1945) Kar 384 : 47 Cri L Jour 283 (FB).

[2] Court can refuse to give opinion if the trustee who has ignored the opinion previously given applies again. (Vol 32) 1945 Sind 81 (92) : I L R (1945) Kar 384 : 47 Cri L Jour 283 (FB).

Right to settlement of accounts.

35. When the duties of a trustee, as such, are completed, he is entitled to have the accounts of his administration of the trust-property examined and settled; and, where nothing is due to the beneficiary under the trust, to an acknowledgment in writing to that effect.

General authority of trustee.

36. In addition to the powers expressly conferred by this Act and by the instrument of trust, and subject to the restrictions, if any, contained in such instrument, and to the provisions of section 17, a trustee may do all acts which are reasonable and proper for the realization, protection or benefit of the trust-property, and for the protection or support of a beneficiary who is not competent to contract.

[a][* * * * * * * *]

Except with the permission of a principal Civil Court of original jurisdiction, no trustee shall lease trust-property for a term exceeding twenty-one years from the date of executing the lease, nor without reserving the best yearly rent that can be reasonably obtained.

[a] The second paragraph was *repealed* by the Amending Act, 1891 (12 [XII] of 1891), S. 2 and Sch. I.

Section 34 — Note 2 *(contd.)*

[3] In case of a trust to make annual payments out of income of property which is larger than is required, the Court will sanction setting aside and retention of so much of the corpus as will be sufficient by its income to meet the annual payments. (Vol 29) 1942 P C 28 (29) (PC).

[4] Where subscriptions are paid to a committee of persons for fulfilling specific charitable purpose, a trust is created to apply the funds for that object. In case of impracticability to carry out the purpose, the trustees can neither abandon the purpose, nor can they, without recourse to Court, make a *cypres* application of the funds on the ground of general charitable intent. (Vol 24) 1937 P C 240 (241) : 31 Sind L R 585 (PC).

[5] Under S. 34 Court can give opinion, advice or direction relating to the management of trust property — But it cannot ask under this section or under S. 49 one co-trustee to pay money to another trustee. (Vol 13) 1926 Cal 1225 (1226) (DB).

3. Powers of Court to order deviation from trust deed. — [1] If provisions of trust deed result in frustration of objects of trust, Court can permit deviation from deed. (Vol 26) 1939 Mad 920 (921) : I L R (1940) Mad 300 (DB).

[*See also* (Vol 11) 1924 Bom 252 (255).]

[But see (Vol 26) 1939 Rang 347 (347, 348) (DB).]

4. Notice of application. — [1] In application by trustee for leave to take a particular course, it is sufficient to serve the application on the Advocate General who represents all the beneficiaries unless there is a conflict between them and the Advocate-General. (Vol 24) 1937 Bom 63 (63) : I L R (1937) Bom 425 (DB).

5. Appeal. — [1] Opinion expressed by Court under S. 34 is not appealable. ('09) 33 Bom 429 (432) (DB) ✠ (Vol 22) 1935 Oudh 72 (73) (DB) ✠ (Vol 23) 1936 Oudh 337 (337) : 12 Luck 635 (DB).

6. Revision. — [1] When a petition under the section is presented to a Single Judge of the Oudh Chief Court and is dismissed, no revision lies against that order. (Vol 22) 1935 Oudh 72 (75) (DB).

Section 35 — Note 1

[1] When *cestui que trust* sues for money due to him, but not for accounts, trustee can ask Court to take accounts, and get decree in same suit if he is in surplusage. (Vol 27) 1940 Cal 337 (344) : I L R (1940) 1 Cal 372 (DB).

SECTION 36 — SYNOPSIS

1. Scope.
2. Reasonable and proper acts.
3. Lease.

1. Scope. — [1] The Trusts Act refers to private trusts. Section 36 is intended for the benefit of the *cestui que trust* and this is secured better by treating the leases in excess of 21 years as voidable at the option of the *cestui que trust* rather than void and illegal *per se*. ('10) 33 Mad 397 (401) (DB).

[2] Where the case is emergent and is unprovided for by the author of the trust and the consent of all the beneficiaries cannot be obtained, the Court will exercise its jurisdiction by sanctioning certain acts being done by trustees. (Vol 6) 1919 Bom 119 (121) : 43 Bom 519.

[3] Liberty given to trustee to apply trust money for his benefit does not destroy character of property as trust. (Vol 14) 1927 Mad 249 (252).

2. Reasonable and proper acts. — [1] The trustees cannot be expected to devote more care and attention to the business of the trust than an ordinary man would use in dealing with his own affairs. (Vol 21) 1934 Lah 47 (48) (DB)✠(Vol 20) 1933 Cal 393 (396).

[2] Arrangement to carry out duties of trust if conducive to smooth administration of trust is binding on parties and their representatives. (Vol 23) 1936 Mad 14 (14) (DB).

[3] Secretary who is left in charge of moneys by the managing committee for a definite purpose is entitled to apply them, as in his discretion is proper, for that purpose. It is his duty to keep the unspent moneys to the credit of one or other of the authorised accounts, until otherwise directed by the committee. (Vol 21) 1934 P C 238 (242) : 56 All 548 : 61 Ind App 350 (PC).

[4] Trustee exceeding budget allotment for purposes of temple is not bound to make good the excess amount spent by him. Trustee is to be guided by his judgment in performance of festival. (Vol 24) 1937 Mad 970 (971).

[5] Whether suit by trustee is frivolous is question of fact, and if finding of trial Court thereon is not questioned in first appeal it cannot be raised on second appeal. (Vol 27) 1940 Cal 376 (377) (DB).

[*See also* (Vol 22) 1935 Mad 5 (5) (DB)]

[6] Principle that creditor advancing money to trust for purposes of trust cannot be defeated by contention that duties could have been performed on less elaborate scale does not apply where trustee is acting contrary to the trust. (Vol 27) 1940 Mad 719 (721, 722).

[7] Rajah of Ramnad creating trust of his zamindary subject to payment of debts and allowances to himself —Trustees borrowing money from English financiers, who required conjunction of Rajah and agreement by him to postpone his rights to theirs—Trustees promising Rajah a mortgage of 4 lakhs, in his favour, which was to be utilized for creation of the suit mortgage in favour of appellant creditor of Rajah, in pursuance of compromise in his suit for recovery of amount due to him — *Held* that in absence of evidence to show that

37. Where the trustee is empowered to sell any trust-property, he may sell the same subject to prior charges or not, and either together or in lots by public auction or private contract, and either at one time or at several times, unless the instrument of trust otherwise directs.

Power to sell in lots, and either by public auction or private contract.

38. The trustee making any such sale may insert such reasonable stipulations either as to title or evidence of title, or otherwise, in any conditions of sale or contract for sale, as he thinks fit ; and may also buy in the property or any part thereof at any sale by auction, and rescind or vary any contract for sale, and re-sell the property so bought in, or as to which the contract is rescinded, without being responsible to the beneficiary for any loss occasioned thereby.

Power to sell under special conditions. Power to buy in and re-sell.

Where a trustee is directed to sell trust-property or to invest trust money in the purchase of property, he may exercise a reasonable discretion as to the time of effecting the sale or purchase.

Time allowed for selling trust-property.

Illustrations.

(a) *A* bequeaths property to *B*, directing him to sell it with all convenient speed and pay the proceeds to *C*. This does not render an immediate sale imperative.

(b) *A* bequeaths property to *B*, directing him to sell it at such time and in such manner as he shall think fit and invest the proceeds for the benefit of *C*. This does not authorize *B*, as between him and *C*, to postpone the sale to an indefinite period.

39. For the purpose of completing any such sale, the trustee shall have power to convey or otherwise dispose of the property sold in such manner as may be necessary.

Power to convey.

40. A trustee may, at his discretion, call in any trust-property invested in any security and invest the same on any of the securities mentioned or referred to in section 20, and from time to time vary any such investments for others of the same nature:

Power to vary investments.

Provided that, where there is a person competent to contract and entitled at the time to receive the income of the trust-property for his life, or for any greater estate, no such change of investment shall be made without his consent in writing.

41. Where any property is held by a trustee in trust for a minor, such trustee may, at his discretion, pay to the guardians (if any) of such minor, or otherwise apply for or towards his maintenance or education or advancement in life, or the reasonable expenses of his religious worship, marriage or

Power to apply property of minors, etc., for their maintenance, etc.

Section 36 — Note 2 *(contd.)*

financiers would have declined to lend without conjunction of Rajah, whose consent was not necessary and that Rajah would have refused to join unless the charge was created in his favour, charge and mortgage in appellant's favour cannot be supported. (Vol 2) 1915 P C 33 (37) : 39 Mad 115.

[8] Where money borrowed by mutawalli was not necessary for saving trust property from extinction but was required to fulfil the ordinary objects of trust the amount borrowed does not bind the trust property. (Vol 23) 1936 Pat 390 (390, 392) : 15 Pat 88 (DB).

[9] The feeding of the devotees in the temples is a religious charity and if the special trustees fail to perform it the general trustees can perform it out of the funds of the temple and recover it from the special trustees. (Vol 29) 1942 Mad 39 (40, 41) (DB).

[10] As between trustees and their beneficiaries and as to every person in a fiduciary character, so long as the trustee has moneys standing to his account, drawings by him will be attributed to his own money, the trust money being in tact. A trustee has no right to remit any part of the amount that is legitimately due to the beneficiary and give preference to that extent to the satisfaction of his own dues. (Vol 22) 1935 Cal 39(61) : 61 Cal 711 (DB).

3. Lease. — [1] A trustee cannot grant a permanent lease at fixed rent unless there is necessity to grant. ('09) 19 Mad L Jour 208 (209) (DB) ✠ ('10) 33 Mad 397 (DB).

[2] Temple property leased by trustee—Presumption is against permanent lease. (Vol 7) 1920 Mad 504 (505) (DB).

[3] Where temple properties are leased out by trustees the onus of proof that it was a permanent tenancy is on those who allege its existence. (Vol 7) 1920 Mad 504 (505) (DB).

[4] Waste land belonging to trust can be given on permanent lease. ('37) 1937 Mad W N 1188 (1188, 1189).

[5] Anticipatory leases by trustees are not permissible. Trustee can effect lease before expiry of pending lease only after obtaining surrender. ('32) 1932 Mad W N 543 (544).

Section 37 — Note 1

[1] Trustees are not authorised to give possession of property comprised in a trust for sale before receiving the purchase-money. (Vol 21) 1934 Mad 448 (453) (DB).

[2] Under certain circumstances trustees have power to sell property of charity for provident administration. But the purchaser takes the property subject to the obligation of showing that sale was beneficial to charity. (Vol 21) 1934 Cal 372 (375) (DB).

Section 40 — Note 1

[1] When in emergency unprovided for by the author of the trust the consent of all the beneficiaries cannot be obtained, the Court will exercise its jurisdiction by sanctioning certain acts being done by trustees. (Vol 6) 1919 Bom 119 (121) : 43 Bom 519.

Section 41 — Note 1

[1] Administrator not being trustee cannot be permitted to apply the property of the minor towards his

funeral, the whole or any part of the income to which he may be entitled in respect of such property; and such trustee shall accumulate all the residue of such income by way of compound interest by investing the same and the resulting income thereof from time to time in any of the securities mentioned or referred to in section 20, for the benefit of the person who shall ultimately become entitled to the property from which such accumulations have arisen :

Provided that such trustee may, at any time, if he thinks fit, apply the whole or any part of such accumulations as if the same were part of the income arising in the then current year.

Where the income of the trust-property is insufficient for the minor's maintenance or education or advancement in life, or the reasonable expenses of his religious worship, marriage or funeral, the trustee may, with the permission of a principal Civil Court of original jurisdiction, but not otherwise, apply the whole or any part of such property for or towards such maintenance, education, advancement or expenses.

Nothing in this section shall be deemed to affect the provisions of any local law for the time being in force relating to the persons and property of minors.

Power to give receipts.

42. Any trustees or trustee may give a receipt in writing for any money, securities or other moveable property payable, transferable or deliverable to them or him by reason, or in the exercise, of any trust or power; and, in the absence of fraud, such receipt shall discharge the person paying, transferring or delivering the same therefrom, and from seeing to the application thereof, or being accountable for any loss or misapplication thereof.

Power to compound, etc.

43. Two or more trustees acting together may, if and as they think fit,—

(*a*) accept any composition or any security for any debt or for any property claimed ;

(*b*) allow any time for payment of any debt;

(*c*) compromise, compound, abandon, submit to arbitration or otherwise settle any debt, account, claim or thing whatever relating to the trust; and,

(*d*) for any of those purposes, enter into, give, execute and do such agreements, instruments of composition or arrangement, releases and other things as to them seem expedient, without being responsible for any loss occasioned by any act or thing so done by them in good faith.

The powers conferred by this section on two or more trustees acting together may be exercised by a sole acting trustee when by the instrument of trust, if any, a sole trustee is authorized to execute the trusts and powers thereof.

This section applies only if and as far as a contrary intention is not expressed in the instrument of trust, if any, and shall have effect subject to the terms of that instrument and to the provisions therein contained.

This section applies only to trusts created after this Act comes into force.

Power to several trustees of whom one disclaims or dies.

44. When an authority to deal with the trust-property is given to several trustees and one of them disclaims or dies, the authority may

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Section 41—Note 1 *(contd.)*

maintenance and education. (Vol 6) 1919 Low Bur 39 (39).

[2] Trustees having no express power of sale by instrument of trust — Neither S. 36 nor S. 41 confers such power — Court can, however, sanction sale under its general administrative jurisdiction. (Vol 6) 1919 Bom 119 (121) : 43 Bom 519.

Section 42 — Note 1

[1] Acceptance of rent by one of several co-trustees is sufficient to constitute waiver of forfeiture. (Vol 22) 1935 Mad 454 (456) (DB).

[2] Only some trustee acting without authority of all cannot give valid discharge. (Vol 3) 1916 Mad 692 (694) : 39 Mad 597 (DB).

[3] Document intended to be executed by all trustees but executed by some only is incomplete and unenforceable. (Vol 3) 1916 Mad 692 (693): 39 Mad 597(DB).

[4] Where the document was executed by all but one trustee and where money was paid under it, the whole body of executants is bound by it. (Vol 3) 1916 Mad 692 (693) : 39 Mad 597 (DB).

Section 43 — Note 1

[1] Sole trustee authorised by deed to execute trusts and powers thereof is "sole acting trustee" and is empowered to compromise doubtful claims. (Vol 8) 1921 Mad 394 (401) (DB).

[2] Compromise by trustee in good faith is legal and Court will not enquire whether it is beneficial to trust. (Vol 7) 1920 Mad 508 (509) (DB).

[3] Majority of trustees of charitable trust can bind whole body. Where there are several trustees payment to one of them who has no authority either actual or by estoppel to receive and give discharge is not a valid payment. (Vol 3) 1916 Mad 692 (693-694): 39 Mad 597 (DB).

[4] Reduction of rent effected by trustee authorised to do so is binding on trust estate. (Vol 20) 1933 Cal 393 (396-397).

[5] Though S. 43 of the Act does not apply to public or private religious trusts, it regulates the powers of a trustee of a religious trust. Courts in India should scrutinize with great care alienations by compromise and awards out of Court made in reference to properties belonging to a charity. (Vol 5) 1918 Mad 1204(1209)(DB).

Section 44 — Note 1

[1] In the case of private trusts, surviving trustees can continue to exercise powers under trust, unless deed

be exercised by the continuing trustees, unless from the terms of the instrument of trust it is apparent that the authority is to be exercised by a number in excess of the number of the remaining trustees.

Suspension of trustee's powers by decree.

45. Where a decree has been made in a suit for the execution of a trust, the trustee must not exercise any of his powers except in conformity with such decree, or with the sanction of the Court by which the decree has been made, or, where an appeal against the decree is pending, of the Appellate Court.

CHAPTER V.

OF THE DISABILITIES OF TRUSTEES.

Trustee cannot renounce after acceptance.

46. A trustee who has accepted the trust cannot afterwards renounce it except *(a)* with the permission of a principal Civil Court of original jurisdiction, or *(b)* if the beneficiary is competent to contract, with his consent, or *(c)* by virtue of a special power in the instrument of trust.

Trustee cannot delegate.

47. A trustee cannot delegate his office or any of his duties either to a co-trustee or to a stranger, unless *(a)* the instrument of trust so provides, or *(b)* the delegation is in the regular course of business, or *(c)* the delegation is necessary, or *(d)* the beneficiary, being competent to contract, consents to the delegation.

Explanation.—The appointment of an attorney or proxy to do an act merely ministerial and involving no independent discretion is not a delegation within the meaning of this section.

Illustrations.

(a) *A* bequeaths certain property to *B* and *C* on certain trusts to be executed by them or the survivor of them or the assigns of such survivor. *B* dies. *C* may bequeath the trust-property to *D* and *E* upon the trusts of *A*'s will.

(b) *A* is a trustee of certain property with power to sell the same. *A* may employ an auctioneer to effect the sale.

(c) *A* bequeaths to *B* fifty houses let at monthly rents in trust to collect the rents and pay them to *C*. *B* may employ a proper person to collect these rents.

Section 44 — Note 1 *(contd.)*

contains express contrary directions. (Vol 13) 1926 Nag 86 (87). ((Vol 3) 1916 Mad 692 : 39 Mad 597, *Ref.*)

[2] Five trustees appointed to manage temple property—Trust deed provided that all should jointly sue on behalf of temple and also laid down procedure for filling up vacancies—One trustee resigned and another died, pending suit by trustees — *Held* remaining three could continue suit. (Vol 4) 1917 Mad 730 (731) (DB).

[3] The Trusts Act, no doubt, does not apply to public or private religious charitable endowments, but nevertheless, the principles underlying Ss. 44 and 76 serve as useful guide. (Vol 28) 1941 All 387 (391): ILR (1941) All 711 (DB).

[4] Deed appointing two trustees to realize property and distribute it among creditors—One dying—Other is competent to continue to administer trust — Fact that deed provides for joint action and in case of difference, for action according to view of majority does not exclude provisions of this section. ('32) 1932 Mad W N 297 (298).

Section 46 — Note 1

[1] Renunciation of office of co-trustee must be in accordance with conditions specified in S. 46. (Vol 14) 1927 Bom 75 (78) (DB).

[2] A person who accepts a trust relating to a sum and agrees (1) to undertake the duties of a trustee (2) to invest it in his firm and (3) to conform to terms of the deed cannot plead afterwards that transaction is not trust. (Vol 28) 1941 Bom 41 (44) : I L R (1941) Bom 42 (DB).

[3] A trustee acting under a trust which he knows or subsequently discovers to be void or invalid is not bound to surrender the trust property before he can be allowed to repudiate it by giving evidence to explain away his admission arising from his conduct as a so-called trustee. (Vol 11) 1924 Nag 129 (132) : 20 Nag L R 63 (DB).

Section 47 — Note 1

[1] Trustee cannot assign trusteeship for his own advantage. ('76) 1 Mad 235 (249) : 4 Ind App 76 (PC).

[2] Person in representative capacity cannot delegate his representative authority. (Vol 9) 1922 P C 209 (212): 49 Ind App 46 : 49 Cal 325 (PC).

[3] Where directors of a trust-fund have been given authority to purchase house-property, the duty of deciding which house is to be purchased cannot be delegated to a committee but should be done unanimously by all the directors. (Vol 21) 1934 Mad 411 (414) (DB).

[4] Trustees empowered to appoint successors cannot delegate that power. ('09) 2 Ind Cas 701 (724) (DB) (Cal).

[5] Trustee commits breach of trust by introducing stranger into trusteeship. (Vol 9) 1922 Mad 259 (260) (DB).

[6] Any body of trustees can, by a resolution in the ordinary way, appoint any one of their number as the managing or executive trustee. The appointment of a managing trustee does not involve any legal question of the trustees delegating their powers to others. (Vol 19) 1932 Mad 658 (659).

[7] A trustee is not entitled to appoint an agent to do such acts, in the performance of which he himself must use judicial discretion — Power of appointing and dismissing temple servants cannot be delegated. (Vol 8) 1921 Mad 623 (624) : 44 Mad 636 (DB).

[But see (Vol 15) 1928 Pat 304 (313) : 7 Pat 520 (DB) ✠ (Vol 20) 1933 Cal 109 (113): 60 Cal 111 (DB).]

[8] A trustee of a property has no power whatsoever to appoint a trustee of the property. Consequently a deed of trust by a trustee is void *ab initio*. A trustee has no power to transfer his trust to another person. ('09) 12 Oudh Cas 236 (245, 246) (DB).

Co-trustees cannot act singly.

48. When there are more trustees than one, all must join in the execution of the trust, except where the instrument of trust otherwise provides.

Control of discretionary power.

49. Where a discretionary power conferred on a trustee is not exercised reasonably and in good faith, such power may be controlled by a principal Civil Court of original jurisdiction.

Trustee may not charge for services.

50. In the absence of express directions to the contrary contained in the instrument of trust or of a contract to the contrary entered into

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Section 47—Note 1 *(contd)*

[9] A benamidar possesses the legal ownership of the property. He is a trustee in respect of that property. There cannot be an effectual transfer of the trust. The office of trustee is incapable of transfer. It is impossible to dissociate the office of trustee from the possession of the properties. Parting with the property virtually amounts to parting with the office and such an alienation cannot be recognised. (Vol 11) 1924 Mad 749 (752) (DB).

[10] Majority of trustees cannot elect one of them as managing trustee so as to oust minority from taking part in management. (Vol 29) 1942 Mad 397 (397).

[11] Arrangement for management of trust is not an alienation of office or delegation of the duties of office. (Vol 23) 1936 Mad 14 (15) (DB).

SECTION 48 — SYNOPSIS

1. Joint execution.
2. Borrowings by one of several trustees.
3. Suits by one of several trustees.
4. Election of trustee.
5. Managing trustee.

1. Joint execution. — [1] In the case of co-trustees, the office is a joint one and the duties of the office must be done in their joint capacity. The act of one trustee done with the sanction and approval of a co-trustee may be regarded as the act of both, but such sanction or approval must be strictly proved. The above principles of English law apply in India as well and hence the execution of any document even by the *de facto* trustee or manager alone would be ineffective in conveying a valid claim to the property. (Vol 32) 1945 P C 23 (28) : 72 Ind App 39 : I L R (1945) Kar (PC) 73.

[2] All trustees form one collective trustee and must exercise powers in joint capacity and not separately. (Vol 5) 1918 Cal 810 (811) (DB).

[3] Melkanom of temple property by one of trustees not in consultation with other trustees is invalid. (Vol 24) 1937 Mad 842 (843).

[4] Section 48 is meant only to control the conduct of the trustees so long as they are alive and does not provide for what should ensue upon the death of one of the trustees. ('32) 1932 Mad W N 297 (299).

[5] The representatives of the other deceased trustee are entitled to joint possession of the trust property with a self-constituted trustee and not to an exclusive possession of the property. ('10) 8 Mad L Tim 200 (200) (DB).

2. Borrowings by one of several trustees. — [1] Where there are several trustees, one cannot borrow money on security of trust property, unless expressly authorised by others. (Vol 13) 1926 Mad 1199 (1201)*(Vol 29) 1942 Mad 92 (93).

3. Suits by one of several trustees.—[1] No suit in regard to trust properties would be maintainable by one or some of the trustees only, if the remaining trustees are not before the Court either as plaintiffs or even as defendants. (Vol 25) 1938 Mad 982 (990) (DB).

[2] Trustee of temple properties cannot sue singly for rent without making other co-trustees parties. (Vol 1) 1914 Mad 119 (119) (DB).

[3] One trustee alone can maintain suit to evict lessee where other trustee refuses to join and is added as defendant. (Vol 11) 1924 Nag 335 (335).

[4] Ordinarily all the trustees should be co-plaintiffs and only such of them as are unwilling should be made defendants. (Vol 5) 1918 Cal 810 (811) (DB).

[5] Two out of five trustees of temple properties can sue tenants for rent—One of many trustees can validly discharge, if authorised by co-trustees. (Vol 4) 1917 Mad 698 (698, 699) (DB).

[But see (Vol 7) 1920 Mad 746 (747) (DB). (One of two *Uralans* (trustees) of *Devoswom* can maintain a suit for redemption of a *Kanom* of the *Devoswom* property without reference to the other *Uralan*)]

[6] The principle that co-shebaits should join as co-plaintiffs or defendants in case they are unwilling cannot be invoked in a suit for removal of some trustees on ground of misappropriation and breach of trust. (Vol 28) 1941 Cal 562 (567) : I L R (1941) 2 Cal 128 (DB).

[7] One trustee in a minority has no legal right to sue to set aside a majority vote even when strict obedience to technical rules has not been observed if, in substance, the rules have been complied with. (Vol 19) 1932 Mad 658 (659).

4. Election of trustee. — [1] In the case of a private trust where there are more trustees than one, all must join in the execution of the trust, and hence where all the assistant *shebaits* have not joined in electing the *shebait*, the election is not valid. (Vol 20) 1933 Cal 519 (521) : 60 Cal 538 (DB).

5. Managing trustee.—[1] Majority cannot elect one of the trustees as managing trustee and oust minority from taking part in management. (Vol 29) 1942 Mad 397 (397).

[2] There is nothing improper in one of the trustees being permitted to supervise the routine work in the temple; but there can be no general authorization by the other trustees permitting the so-called managing trustee to incur debts on behalf of the temple and create a charge on the temple properties. For so doing, the express consent and authorization of the other trustees beforehand is certainly essential. (Vol 13) 1926 Mad 1199 (1201).

[3] Co trustee not consulting other trustees in *bona fide* belief that he had exclusive right of management, should not be absolutely removed — Opportunity must be given to him to show his readiness to act in co-operation with other trustees. (Vol 14) 1927 Nag 323 (323).

[4] One of co-trustees keeping trust property and refusing co-trustee management and access to accounts. Latter can sue—He is entitled to inspection of accounts. (Vol 27) 1940 Cal 416 (416) (DB).

Section 49 — Note 1

[1] Court has no jurisdiction to interfere with the discretion of the trustee except on a properly instituted suit. (Vol 15) 1928 Lah 237 (238).

Section 50 — Note 1

[1] Section 50 reproduces a principle of the English law and applies to constructive trustee as well. (Vol 24) 1937 Bom 374 (380) : I L R (1937) Bom 843.

[2] When solicitor trustee is defendant to suit relating to trust property and his firm acts on his behalf

with the beneficiary or the Court at the time of accepting the trust, a trustee has no right to remuneration for his trouble, skill and loss of time in executing the trust.

Nothing in this section applies to any Official Trustee, Administrator General, Public Curator or person holding a certificate of administration.

Trustee may not use trust-property for his own profit.

51. A trustee may not use or deal with the trust-property for his own profit or for any other purpose unconnected with the trust.

Trustee for sale or his agent may not buy.

52. No trustee whose duty it is to sell trust-property, and no agent employed by such trustee for the purpose of the sale, may, directly or indirectly, buy the same or any interest therein, on his own account or as agent for a third person.

Trustee may not buy beneficiary's interest without permission.

53. No trustee, and no person who has recently ceased to be a trustee, may, without the permission of a principal Civil Court of original jurisdiction, buy or become mortgagee or lessee of the trust-property or any part thereof; and such permission shall not be given unless the proposed purchase, mortgage or lease is manifestly for the advantage of the beneficiary.

Trustee for purchase.

And no trustee whose duty it is to buy or to obtain a mortgage or lease of particular property for the beneficiary may buy it, or any part thereof, or obtain a mortgage or lease of it, or any part thereof, for himself.

Co-trustees may not lend to one of themselves.

54. A trustee or co-trustee whose duty it is to invest trust money on mortgage or personal security must not invest it on mortgage by, or on the personal security of, himself or one of his co-trustees.

Section 50 — Note 1 *(contd.)*

and other co-trustees, his firm will be entitled, not only to their out-of-pocket costs, but also to profit costs taxed as between attorney and client. (Vol 24) 1937 Bom 374 (382) : I L R (1937) Bom 843.

Section 51 — Note 1

[1] A trustee contracting to purchase property in the course of execution of his trust does so in his individual capacity and is personally liable in the absence of a stipulation to contrary. (Vol 29) 1942 All 73 (73).

[2] When trust money is handed over to trustee to be used in his business subject to payment of interest, and when he uses that money it ceases to be trust money. The trust can no longer look to that particular sum of money, as its *res* or subject-matter but only to a promise to pay an equal sum If he holds it purely as trust money he is debarred by S. 51 from dealing with it for his own profit and the veto so imposed is absolute. (Vol 18) 1931 Mad 251 (254) (DB).

[3] Succeeding trustee may acquire title from outsider as against trust provided he was not party to original misappropriation. (Vol 9) 1922 Mad 409 (412) (DB).

[4] Author of trust can permit trustee to apply funds to his own use and such authority will not detract from the trust. (Vol 14) 1927 Mad 249 (252).

[5] Purchase of goods with trust money and other moneys—Beneficiary unable to identify goods bought with his money — He has charge on whole property. (Vol 14) 1927 Mad 249 (251). (*In re*; *Hallet's Estate*; *Knatchbull* v. *Hallet*, (1879) 13 Ch D 696, *Foll.*)

Section 52 — Note 1

[1] Trustee not being a trustee for sale may buy property from major beneficiaries, only on disclosure to them of all facts known to him regarding the property —Secret purchase by trustee in another person's name is invalid. (Vol 9) 1922 P C 235 (236) : 48 Ind App 258 : 48 Cal 1019 (PC).

[2] Any one in fiduciary position cannot sell to himself. (Vol 10) 1923 P C 114 (117) : 50 Ind App 162 : 4 Lah 284 (PC).

[3] Trustee cannot purchase trust property nor sell his property to trust. (Vol 17) 1930 Mad 372 (374) (DB). (*Wright* v. *Morgan*, (1926) 1926 App Cas 788 and (Vol 9) 1922 P C 235 : 48 Ind App 258 : 48 Cal 1019 (PC), *Ref.*)

Section 53 — Note 1

[1] Trustee purchasing from beneficiary — Purchase is bad unless trustee has made full disclosure of all material facts. (Vol 9) 1922 P C 235 (236) : 48 Ind App 258 : 48 Cal 1019 (PC).

[2] A person appointed as manager by an executor of an estate should be regarded as an executor *de son tort* and therefore a trustee by purchasing a tenancy within the estate, comes within the principle of Ss. 53 and 88 of the Act. Therefore the purchase by him must be taken to have been made for the benefit of the estate. ('13) 15 Bom L R 343 (347).

[3] Trustee contracting to purchase property for trust is personally liable in absence of contrary stipulation in the contract itself. Court granting decree should not add direction for re-imbursement of trustee from trust property, where beneficiaries are not parties and there is no issue in that respect. (Vol 29) 1942 All 73 (73, 74).

[4] Trust—Sale by trustee to his wife—Presumption of undue benefit—Duty of Court to scrutinise transaction. (Vol 18) 1931 P C 68 (70) (PC).

[5] Trust money was to be used in business by insolvent trustee subject to payment of interest—The trustee becomes a debtor when the money is invested in his business and when the trustee becomes insolvent the trust cannot have preferential right in the general assets. (Vol 18) 1931 Mad 251 (259) (DB).

Section 54 — Note 1

[1] When trust money is handed over to any person or to trustee to use it in his business subject to payment of interest and when the money is used in the business the object matter of trust is no longer the money but the personal obligation of the trustee. The trust still subsists but a relationship of creditor and debtor is set up between the parties. When that person becomes insolvent, the trust has no preferential right to the general assets. (Vol 18) 1931 Mad 251 (258) (DB).

[*See also* (Vol 14) 1927 Mad 249 (252).]

CHAPTER VI.

OF THE RIGHTS AND LIABILITIES OF THE BENEFICIARY.

55. The beneficiary has, subject to the provisions of the instrument of trust, a right to the rents and profits of the trust-property.

Rights to rents and profits.

56. The beneficiary is entitled to have the intention of the author of the trust specifically executed to the extent of the beneficiary's interest;

Right to specific execution.

and, where there is only one beneficiary and he is competent to contract, or where there are several beneficiaries and they are competent to contract and all of one mind, he or they may require the trustee to transfer the trust-property to him or them, or to such person as he or they may direct.

Right to transfer of possession.

When property has been transferred or bequeathed for the benefit of a married woman, so that she shall not have power to deprive herself of her beneficial interest, nothing in the second clause of this section applies to such property during her marriage.

Illustrations.

(a) Certain Government securities are given to trustees upon trust to accumulate the interest until *A* attains the age of 24, and then to transfer the gross amount to him. *A* on attaining majority may, as the person exclusively interested in the trust-property, require the trustees to transfer it immediately to him.

(b) *A* bequeaths Rs. 10,000 to trustees upon trust to purchase an annuity for *B*, who has attained his majority and is otherwise competent to contract. *B* may claim the Rs. 10,000.

(c) *A* transfers certain property to *B* and directs him to sell or invest it for the benefit of *C*, who is competent to contract. *C* may elect to take the property in its original character.

57. The beneficiary has a right, as against the trustee and all persons claiming under him with notice of the trust, to inspect and take copies of the instrument of trust, the documents of title relating solely to the trust-property, the accounts of the trust property and the vouchers (if any) by which they are supported, and the cases submitted and opinions taken by the trustee for his guidance in the discharge of his duty.

Right to inspect and take copies of instrument of trust, accounts, etc.

SECTION 56—SYNOPSIS

1. Scope.
2. Trust in favour of creditors.

1. Scope. — [1] Agreement between adoptive father and natural father of plaintiff to devise property to plaintiff — Breach — Suit by son for possession against adoptive father's heirs: *Held*, suit does not lie —His only remedy is to sue the trustee for a conveyance. (Vol 18) 1931 P C 196 (202) : 58 Ind App 279:10 Pat 851 (PC).

[2] Where it was found that the defendants had realised certain dues from some cartmen in the name of and for the benefit of an institution and in the suit by the plaintiffs, members of the working committee of the institution, for money realised by the defendants, the defendants contended that the plaintiffs not being parties to the contract between the defendants and the cartmen, had no right to enforce payment against the defendants :

Held, that the defendants, when realising the dues, constituted themselves trustees for the institution, which, as *cestui que trust*, was entitled to maintain the suit. (Vol 22) 1935 Oudh 496 (496, 497) : 11 Luck 428 (D B).

[3] Immovable property vesting in trust — Certain amount to be paid to deity and balance to heirs—Deity and heirs can seek partition of property. (Vol 28) 1941 Cal 272 (281) : I L R (1940) 2 Cal 285.

[4] Where agreement between two persons secures to another benefit as a *cestui que trust*, the latter can sue in his own right to enforce the trust. (Vol 16) 1929 Sind 117 (117) (DB). (('10) 32 All 410 : 37 Ind App 152 (PC), *Rel. on.*)

2. Trust in favour of creditors.—[1] When a legal transfer of property has been made to trustees for payment of the debts of the owner the creditors being neither parties nor privies thereto, the trustees are mere mandatories and the creditors do not become *cestui que trust*. Till the trust is communicated to the beneficiaries i.e., creditor's the owner is the beneficiary and he can recall the money at pleasure. When once it is communicated the trust is irrevocable. (Vol 26) 1939 Mad 42 (45) (DB).

[2] The debtor is the *cestui que trust* till the fact of the execution of the trust in favour of the creditors is communicated to them or if the creditors themselves are not parties to the conveyance. The debtor can revoke it. It is not revocable either if the creditors are parties or the fact of execution is conveyed to them in which case the creditors are the beneficiaries. (Vol 23) 1936 Lah 10 (12) (DB).

[See however (Vol 25) 1938 Cal 818 (821, 822) (DB). (A trust for the benefit of creditors is *prima facie* not fraudulent. A creditor who is not a party to the trust deed and to whom the trust has not yet been communicated can avail himself of the benefit if a substantial property is transferred to a third person for benefit of creditors generally.)]

[3] *B* promises *A* that *B* will pay the debt of *A* to *C*. On this point, according to a Full Bench decision (53 Mad. p 287), at any rate, in this (Madras) presidency the law in India and England is the same and *C* can sue *B* only as *cestui que trust*. (Vol 19) 1932 Mad 457 (458) : 55 Mad 436 (DB).

[4] Where a sum is payable by *A* for the benefit of *C*, *C* can claim as beneficiary from *A*, the trustee. Sections 56 and 69 are applicable to such a case. (Vol 19) 1932 Oudh 82 (84) : 7 Luck 292 (DB).

Section 57 — Note 1

[1] Plaintiffs divested themselves of all rights in a part of family property by a transfer deed in favour of family deity—Though Trusts Act cannot be aplied, still the principles can be called in aid. Under Ss. 19 and 57 the beneficiaries are not entitled to an account unless there is an allegation of a breach of trust. (Vol 33) 1946 Nag 21 (22) : I L R (1945) Nag 820 (DB).

Right to transfer beneficial interest.

58. The beneficiary, if competent to contract, may transfer his interest, but subject to the law for the time being in force as to the circumstances and extent in and to which he may dispose of such interest :

Provided that when property is transferred or bequeathed for the benefit of a married woman, so that she shall not have power to deprive herself of her beneficial interest, nothing in this section shall authorize her to transfer such interest during her marriage.

Right to sue for execution of trust.

59. Where no trustees are appointed or all the trustees die, disclaim, or are discharged, or where for any other reason the execution of a trust by the trustee is or becomes impracticable, the beneficiary may institute a suit for the execution of the trust, and the trust shall, so far as may be possible, be executed by the Court until the appointment of a trustee or new trustee.

Right to proper trustees.

60. The beneficiary has a right (subject to the provisions of instrument of trust) that the trust property shall be properly protected and held and administered by proper persons and by a proper number of such persons.

Explanation I.—The following are not proper persons within the meaning of this section :—

A person domiciled abroad : an alien enemy : a person having an interest inconsistent with that of the beneficiary : a person in insolvent circumstances; and, unless the personal law of the beneficiary allows otherwise, a married woman and a minor.

Explanation II.—When the administration of the trust involves the receipt and custody of money, the number of trustees should be two at least.

Illustrations.

(a) A, one of several beneficiaries, proves that *B*, the trustee, has improperly disposed of part of the trust-property, or that the property is in danger from *B's* being in insolvent circumstances, or that he is incapacitated from acting as trustee. *A* may obtain a receiver of the trust-property.

(b) A bequeaths certain jewels to *B* in trust for *C*. *B* dies during *A's* lifetime; then *A* dies. *C* is entitled to have the property conveyed to a trustee for him.

(c) A conveys certain property to four trustees in trust for *B*. Three of the trustees die. *B* may institute a suit to have three new trustees appointed in the place of the deceased trustees.

(d) A conveys certain property to three trustees in trust for *B*. All the trustees disclaim. *B* may institute a suit to have three trustees appointed in place of the trustees so disclaiming.

(e) A, a trustee for *B*, refuses to act, or goes to reside permanently out of British India, or is declared an insolvent, or compounds with his creditors, or suffers a co-trustee to commit a breach of trust. *B* may institute a suit to have *A* removed and a new trustee appointed in his room.

Right to compel to any act of duty.

61. The beneficiary has a right that his trustee shall be compelled to perform any particular act of his duty as such, and restrained from committing any contemplated or probable breach of trust.

Illustrations.

(a) A contracts with *B* to pay him monthly Rs. 100 for the benefit of *C*. *B* writes and signs a letter declaring that he will hold in trust for *C* the money so to be paid. *A* fails to pay the money in accordance with his contract. *C* may compel *B* on a proper indemnity to allow *C* to sue on the contract in *B's* name.

(b) A is trustee of certain land, with a power to sell the same and pay the proceeds to *B* and *C* equally. *A* is about to make an improvident sale of the land. *B* may sue on behalf of himself and *C* for an injunction to restrain *A* from making the sale.

Section 58 — Note 1

[1] Interest taken by beneficiary under policies, though contingent, can be transferred. (Vol 29) 1942 Mad 138 (138).

[2] There is no doctrine of the law of India which prevents a beneficiary under a trust from dealing with his interest by way of mortgage, though it is true enough that in India such an interest is not technically regarded as an equitable estate. (Vol 37) 1940 P C 134 (136) : 67 Ind App 309 : I L R (1940) 2 Cal 436 : ILR (1940) Kar (PC) 271 (PC).

Section 59 — Note 1

[1] Where settlor and transferee of share held by settlor are residing abroad but trust is set up in British Indian Court, section applies. ('12) 36 Bom 396 (403) (DB).

[2] Insurance-policy for benefit of wife—No special trustee appointed — Suit by wife — Married Woman's Property Act, S. 6—Official trustee and widow can sue on the policy unless former disclaims trust. (Vol 21) 1934 Mad 264 (265) : 57 Mad 536 (DB).

[3] Chit transaction—Stake holder while taking mortgages, in position of trustee — Stake-holder adjudged insolvent—Official Receiver getting his property—Beneficiaries can maintain suit as stake-holder is incapable of performing duties which devolved on him as trustee. (Vol 25) 1938 Mad 668 (668) (DB).

Section 60 — Note 1

[1] Administration — Bequest of fund for charity — Court should appoint trustees residing within jurisdiction for applying fund. (1837) 1 Moo Ind App 175 (292) (PC).

[2] List given in the explanation is not exhaustive, and persons not falling directly within one or other of these descriptions may not be proper persons within meaning of section. (Vol 30) 1943 Sind 223 (226) : ILR (1943) Kar 213 (DB).

Section 61 — Note 1

[1] Beneficiary is not entitled to apply to Court in summary manner—Petition to District Court by beneficiary, for an order directing the trustee to deposit certain trust moneys in a particular bank — Court has no

Wrongful purchase by trustee.

62. Where a trustee has wrongfully bought trust property, the beneficiary has a right to have the property declared subject to the trust or retransferred by the trustee, if it remains in his hands unsold, or, if it has been bought from him by any person with notice of the trust, by such person. But in such case the beneficiary must repay the purchase-money paid by the trustee, with interest, and such other expenses (if any) as he has properly incurred in the preservation of the property; and the trustee or purchaser must *(a)* account for the nett profits of the property, *(b)* be charged with an occupation-rent, if he has been in actual possession of the property, and *(c)* allow the beneficiary to deduct a proportionate part of the purchase-money if the property has been deteriorated by the acts or omissions of the trustee or purchaser.

Nothing in this section—

(a) impairs the rights of lessees and others who, before the institution of a suit to have the property declared subject to the trust or retransferred, have contracted in good faith with the trustee or purchaser; or

(b) entitles the beneficiary to have the property declared subject to the trust or retransferred where he, being competent to contract, has himself, without coercion or undue influence having been brought to bear on him, ratified the sale to the trustee with full knowledge of the facts of the case and of his rights as against the trustee.

Following trust-property —into the hands of third persons;

63. Where trust property comes into the hands of a third person inconsistently with the trust, the beneficiary may require him to admit formally, or may institute a suit for a declaration, that the property is comprised in the trust.

into that into which it has been converted.

Where the trustee has disposed of trust-property and the money or other property which he has received therefor can be traced in his hands, or the hands of his legal representative or legatee, the beneficiary has, in respect thereof, rights as nearly as may be the same as his rights in respect of the original trust-property.

Illustrations.

(a) *A*, a trustee for *B* of Rs. 10,000, wrongfully invests the Rs. 10,000 in the purchase of certain land. *B* is entitled to the land.

(b) *A*, a trustee, wrongfully purchases land in his own name, partly with his own money, partly with money subject to a trust for *B*. *B* is entitled to a charge on the land for the amount of the trust-money so misemployed.

Section 61—Note 1 *(contd.)*

jurisdiction to deal with application summarily — Remedy is by proper suit. (Vol 15) 1928 Lah 237 (238).

[2] Trustee bound to collect funds fails to do so commits breach of trust and application must be made in Court for his removal — Subscriber to kuri chit who committed default of payment of one instalment bid at auction, obtained proceeds of sale and executed security bond in manager's favour — Plaintiff, highest bidder, cannot sue to enforce security but must file a suit against the manager for enforcement of trust. (Vol 15) 1928 Mad 256 (257).

Section 62 — Note 1

[1] The principle in S. 62, is applicable to the case of public religious trusts. The principle is an equitable one.

Where a trustee of a public religious trust sells trust property to a third person and for the purchase price conveys his own property to the trust and the sale of the trust property is set aside on the ground that there was no valid necessity to sell that property, the trust is bound to refund the benefit it had by virtue of the sale. The sale in such a case is not void. It can only be held to be voidable on the ground that it was in excess of the powers of the trustee. (Vol 29) 1942 Mad 438 (439).

[2] Person purchasing property benami in name of his wife—Decree in suit on promissory note executed by husband and wife was passed against them and against their son to extent of family properties—Benami property also sold in execution of decree — Son claimed that his mother was real owner and that she had bequeathed property to him on death, and executed mortgage in favour of plaintiffs who had knowledge of the benami nature of the property — Mortgage money applied towards payment of decree amount and sale set aside—In suit to enforce the mortgage, *held* that plaintiff was entitled to charge on properties to extent to which mortgage money was applied to set aside court sale. (Vol 12) 1925 Mad 95 (105) (DB).

[3] Trustee buying for himself, field adjacent to field of beneficiary who has right of pre-emption—Trustee's failure to exercise right of pre-emption on behalf of beneficiary is not breach of trust unless it is prejudicial to beneficiary. (Vol 17) 1930 Nag 182 (183): 26 Nag L R 258. ((Vol 10) 1923 Lah 480 : 4 Lah 171 (DB), *Disting.* (Vol 12) 1925 All 333 : 47 All 381 (DB), *Rel. on.*)

[4] Court has no power to make order directing conditional re-sale on such sale producing higher price than that for which trustees themselves bought. (Vol 21) 1934 Mad 448 (450) (DB).

SECTION 63 — SYNOPSIS

1. Scope.
2. "Beneficiary can require trustee to admit etc."
3. Conversion of trust property and tracing.
4. Beneficiary's charge.
5. Other illustrative cases.

1. Scope.—[1] Section 63 of the Trusts Act read along with S. 10, Limitation Act, shows that whenever trust property is gone into the hands of a stranger, the beneficiary can take all the necessary steps to place it in the hands of a person who can legally administer the trust even though the trustee may be stopped from suing. (Vol 5) 1918 Mad 464 (466) : 41 Mad 124 (DB).

Section 63— Note 1 *(contd.)*

[2] Trust property may be followed into hands of any one in whose hands it can be identified. The only person who can escape liability for trust property in his possession is a *bona fide* transferee for value without notice of the trust, or a transferee from him. ('12) 1912 Pun L R No. 189 p. 596 (597) : 1912 Pun Re No. 101 (DB).

2. "Beneficiary can require trustee to admit etc."—[1] If the transferee of a negotiable instrument from a trustee is not a *bona fide* holder, the beneficiary is entitled to call upon him to admit that he is only a trustee or sue for a declaration to that effect. (Vol 22) 1935 Mad 181 (183) : 58 Mad 693 (FB).

[2] Alienation by trustee — Representative suit by worshippers or beneficiaries for injunction, declaration, or possession is competent—Relief to be granted depends upon circumstances of each case—Trustee to be made party—Fact that possession cannot be granted in presence of trustee is no ground for dismissing suit. (Vol 24) 1937 Mad 819 (820, 821).

3. Conversion of trust property and tracing. — [1] Tracing is a claim *in rem*. It may be in most cases sufficient to trace that trust moneys found their way into assets of trustee. Competing claimants must show sums of money constituting available assets could not form part of trust money. (Vol 18) 1931 Mad 251 (258) (DB).

[2 3] Where a receiver is appointed to collect rent due to the estate, if lessee pays the rent to mortgagee of judgment-debtor, the receiver is entitled to follow rent in his hands. (Vol 21) 1934 Rang 84 (84) (DB).

[4] Beneficiary can follow trust-money, passed to third person owing to a breach of trust by trustee. ('09) 32 Mad 490 (509) (D B) ✠ (Vol 27) 1940 Rang 225 (227, 228) (DB).

[5] If money held by a person in a fiduciary character, though not as trustee, has been paid by him to his account to others, the person for whom he held the money can follow it. (Vol 19) 1932 Mad 247 (250) : 55 Mad 541 (DB).

[6] Employee of Bank, as part of engagement, depositing money by way of security for honesty—Money placed fixed deposit in his name — Agreement to pay interest —Such money is held by Bank in trust—Insolvency of Bank—Money can be followed so as to reach assets of Bank. (Vol 25) 1938 Mad 651 (653).

[7] Trust money in shape of money can be traced and got if it can be identified a trust money. It is clearly "traceable" if it can be identified. (Vol 22) 1935 Mad 686 (692) (DB).

[8] *A* entrusts money to *B* for safe-custody — *B* becomes a trustee therefor—On the insolvency of *B*, *A* is entitled to follow the sum of money in the hands of the Official Assignee. (Vol 23) 1936 Mad 21 (24).

[9] Where trustees invest trust money in their own firm which goes insolvent, beneficiary is entitled to trace trust money into firm's assets in hands of Official Assignee, notwithstanding his inability to specify any particular stock as representing original investment. (Vol 17) 1930 Mad 693 (698) (DB).

[10] Where a trustee mixes up trust amount with his other assets which, on his insolvency, vest in the Official Assignee, the assets can be followed in the hands of the Official Assignee for the trust amount and the right to do so does not depend on whether trust property had been properly or improperly disposed of. (Vol 28) 1941 Bom 41 (44) : ILR (1941) Bom 42 (DB).

[11] Where a trustee deals with the trust property entrusted to him in violation of the trust the beneficiary is entitled to sue for possession of the property. (Vol 5) 1918 Mad 400 (401) (DB).

[12] Where trust amount in the hands of the trustees is to be invested in their business, and if the trustees become insolvent, the assets are subject to the charge of the trust. (Vol 20) 1933 P C 148 (150) : 60 Ind App 203 : 56 Mad 570 (P C).

[13] Book adjustment of accounts between firm and insolvent cannot be treated as passing of trust money, deposited with firm in name of insolvent. (Vol 17) 1930 Mad 276 (277).

[14] Where, a certain trust has been constituted on the footing that its funds could be invested and used by the trustee in his own name in consideration of his paying customary interest, he becomes, when he invests the amount in his business, only debtor to the trust. (Vol 22) 1935 Mad 686 (692) (DB).

[15] The Chairman of a Bank is a trustee of all the moneys of the Bank. When he takes the funds of the Bank without going through the formalities required before a loan can be granted to him and purchases properties with such moneys the section will apply to him. (Vol 23) 1936 Lah 408 (409) (DB).

[16] Where a person deposits money with another and the latter purchases property with that money and also his own money, the depositor is not entitled to a charge on the property purchased unless the money has been deposited for any specific purpose. (Vol 20) 1933 Mad 917 (919).

[17] Section 63 read along with S. 10, Limitation Act, shows that whenever trust property has passed into hands of stranger, beneficiary is entitled to take all the necessary steps to place it in hands of a person, who can legally administer trust. (Vol 5) 1918 Mad 464 (466) : 41 Mad 124 (DB).

[18] Where trustee deals with trust property entrusted to him contrary to trust, beneficiary can sue for possession of property. (Vol 5) 1918 Mad 400 (401) (DB).

4. Beneficiary's charge. — [1] Where a certain amount of trust in the hands of the trustees is to be invested in their business and is so used, and when the trustees become insolvent the beneficiaries are entitled to a charge upon the assets. (Vol 20) 1933 P C 148 (150) : 60 Ind App 203 : 56 Mad 570 (P C).

[2] Trust money invested in trustee's business—Trustee firm becoming insolvent—Beneficiary has right to follow money — Assets in hands of Official Assignee was subject to charge. (Vol 22) 1935 Mad 686 (692) (DB).

[3] If money held by a person in a fiduciary character, though not as trustee, has been paid by him to his account to others, the person for whom he held the money can follow it and has a charge on the balance in the hands of those others. (Vol 19) 1932 Mad 247 (250) : 55 Mad 541 (DB).

[4] Where trustee purchases only with trust money, beneficiary can elect to take property purchased or have charge on it. But where trustee purchases with trust money as well as his own, beneficiary is entitled only to charge for trust money. (Vol 12) 1925 Cal 239 (244) (DB).

[But see (Vol 20) 1933 Mad 917 (919). (Where a person deposits money with another, and the latter purchases property with that money and also his own money, the depositor is not entitled to charge on the property purchased unless the money has been deposited for any specific purpose).]

5. Other illustrative cases. — [1] Father died leaving a son *A* and a daughter *B*. *A* took possession of

Saving of rights of certain transferees.

64. Nothing in section 63 entitles the beneficiary to any right in respect of property in the hands of—

(a) a transferee in good faith for consideration without having notice of the trust, either when the purchase-money was paid, or when the conveyance was executed, or

(b) a transferee for consideration from such a transferee.

A judgment-creditor of the trustee attaching and purchasing trust-property is not a transferee for consideration within the meaning of this section.

Nothing in section 63 applies to money, currency notes and negotiable instruments in the hands of a *bona fide* holder to whom they have passed in circulation, or shall be deemed to affect the Indian Contract Act, 1872, section 108, or the liability of a person to whom a debt or charge is transferred.

Acquisition by trustee of trust-property wrongfully converted.

65. Where a trustee wrongfully sells or otherwise transfers trust property and afterwards himself becomes the owner of the property, the property again becomes subject to the trust, notwithstanding any want of notice on the part of intervening transferees in good faith for consideration.

Section 63 — Note 5 *(contd.)*

entire estate including business. Out of profits *A* purchased properties: *Held* *A* was in a fiduciary position towards *B* and by Ss. 63, 64 and 96, the purchaser of the properties in dispute from *A* was not entitled to escape the consequence of the fiduciary relationship unless he was transferee in good faith for consideration. (Vol 32) 1945 Mad 303 (303).

[2] A provision in a settlement deed providing for the expenses of an unmarried daughter's nuptials and other ceremonies to be paid by the sons who took the properties in shares constitutes a trust in favour of the daughter and suit by daughter is not affected by limitation. (Vol 21) 1934 Mad 273 (273).

[3] A decree was passed in favour of a minor and her guardian obtained a transfer of certain lands in his own name in lieu of the decree amount: *Held*, that the guardian held the property as trustee for the minor to the extent of the minor's share in the decree. (Vol 2) 1915 All 121 (122) (DB).

[4] Trusts—Anyone in fiduciary position cannot sell to himself. (Vol 10) 1923 P C 114 (117): 50 Ind App 162: 4 Lah 284 (P C).

[5] Section is not exhaustive nor refers to tracing of trust funds with trustee, when allowed to mingle it with his own funds according to direction of settlor. ('37) 1937 Mad W N 493 (501).

[6] Property possessed by bankrupt as trustee getting amalgamated with his general property—It cannot be identified—Representative of trust has to come as general creditor to claim loss — Property converted has to be traced to particular investment. (Vol 24) 1937 Sind 37 (40): 31 Sind L R 391 (DB).

SECTION 64 — SYNOPSIS

1. Scope and applicability.
2. Clause (a).
3. Para 3.

1. Scope and applicability.—[1] *Bona fide* transferee for value—Trust property in the hands of a transferee in good faith for consideration without notice of the trust cannot be followed by the beneficiary. It can be so followed only when the transfer is not *bona fide* and not for valuable consideration. (Vol 1) 1914 Mad 708 (710): 38 Mad 1064 (DB).

[2] Section has no application to public or private religious or charitable trusts - A simple mortgagee or a judgment-creditor of trustee, who purchases trust property in court auction is not entitled to protection afforded by section. (Vol 17) 1930 Mad 405 (409, 410) (DB).

2. Clause (a). —[1] Beneficiary cannot follow trust property in hands of transferee in good faith for consideration without notice of trust. (Vol 1) 1914 Mad 708 (710): 38 Mad 1064 (DB).

[2] In view of the provisions of Ss. 64, 63 and 96, a transferee from a trustee who is in fiduciary relations with the beneficiary can escape from his liability only if he is a purchaser in good faith for consideration without having notice of the trust. (Vol 32) 1945 Mad 303 (303).

[3] Plaintiff entrusting Bombay Municipal Debenture to defendant for recovery of interest—Forged endorsement made by defendant on debenture and same pledged with 'A' Bank, which renewed it in its own name—Subsequently defendant pledging debenture with 'M' Bank to pay off 'A' Bank, who endorsed debenture in favour of 'M' Bank—'M' Bank having no notice of defendants' fraud or forgery—Plaintiff is not entitled to sue 'M' Bank for recovery of debenture or its value. (Vol 15) 1928 Bom 436 (442): 52 Bom 810 (D B).

[4] Pawnor in possession of goods agreeing to be trustee of plaintiff — Goods pledged to defendant — Defendant acting bona fide and without knowledge of trust—Pledge is valid—Insolvency of pawnor—Plaintiff is not entitled to recover goods.

[5] If the transferee of a negotiable instrument from a trustee is not a *bona fide* holder, the beneficiary is entitled to call upon him to admit that he is only a trustee or sue for a declaration to that effect. (Vol 22) 1935 Mad 181 (183): 58 Mad 693 (FB).

3. Para. 3. — [1] Circulation of money means passing money in ordinary course of business and does not refer to transfer by specific act. (Vol 11) 1924 Mad 174 (176) (DB).

Section 65 — Note 1

[1] Trustees cannot acquire title to trust property by having possession thereof and appropriating it to their own use. ('87) 19 All 277 (290): 24 Ind App 10 (PC).

Right in case of blended property.

66. Where the trustee wrongfully mingles the trust-property with his own, the beneficiary is entitled to a charge on the whole fund for the amount due to him.

Wrongful employment by partner-trustee of trust-property for parnership purposes.

67. If a partner, being a trustee, wrongfully employs trust-property in the business, or on the account of the partnership, no other partner is liable therefor in his personal capacity to the beneficiaries, unless he had notice of the breach of trust.

The partners having such notice are jointly and severally liable for the breach of trust.

Illustrations.

(a) *A* and *B* are partners. *A* dies, having bequeathed all his property to *B* in trust for *Z*, and appointed *B* his sole executor. *B*, instead of winding up the affairs of the partnership, retains all the assets in the business. *Z* may compel him, as partner, to account for so much of the profits as are derived from *A*'s share of the capital. *B* is also answerable to *Z* for the improper employment of *A*'s assets.

(b) *A*, a trader, bequeaths his property to *B* in trust for *C*, appoints *B* his sole executor, and dies. *B* enters into partnership with *X* and *Y* in the same trade, and employs *A*'s assets in the partnership-business. *B* gives an indemnity to *X* and *Y* against the claims of *C*. Here *X* and *Y* are jointly liable with *B* to *C* as having knowingly become parties to the breach of trust committed by *B*.

Liability of beneficiary joining in breach of trust.

68. Where one of several beneficiaries—

(a) joins in committing breach of trust, or

(b) knowingly obtains any advantage therefrom, without the consent of the other beneficiaries, or

(c) becomes aware of a breach of trust committed or intended to be committed and either actually conceals it, or does not within a reasonable time take proper steps to protect the interests of the other beneficiaries, or

(d) has deceived the trustee and thereby induced him to commit a breach of trust,

the other beneficiaries are entitled to have all his beneficial interest impounded as against him and all who claim under him (otherwise than as transferees for consideration without notice of the breach) until the loss caused by the breach has been compensated.

When property has been transferred or bequeathed for the benefit of a married woman, so that she shall not have power to deprive herself of her beneficial interest, nothing in this section applies to such property during her marriage.

Section 65 — Note 1 *(contd.)*

[2] Even if the employment of trust fund by the trustee in his own firm is in accordance with the terms of the trust deed and even if it has been properly employed the beneficiary would be entitled to a charge upon the whole assets. (Vol 20) 1933 P C 148 (149, 150) : 60 Ind App 203 : 56 Mad 570 (PC).

[3] If a trustee confuses the trust property with his the onus lies heavily on him to prove the extent of his own, property. If he fails to do so, and the two properties cannot be distinguished with perfect accuracy, the whole must be considered as belonging to the trust. ('11) 10 Mad L Tim 313 (321).

Section 66 — Note 1

[1] The Trusts Act is not exhaustive of all the rights attaching to a trust. The entire law as to tracing of trust property in the hands of the trustee is not to be found in Ss. 63 and 66. ('37) 1937 Mad W N 493 (501).

[2] Investment in firm to be handed over to minor on attaining majority—Insolvency of firm — Assets of firm passing to Official Assignee—Charge in favour of minor, exists—As between *cestui que trust* and trustee, and all parties claiming under the trustee, otherwise than by purchase for valuable consideration without notice, all property belonging to a trust, however much it may be changed or altered in its nature or character, and all the fruit of such property, whether in its original or in its altered state, continues to be subject to or affected by the trust. (Vol 20) 1933 P C 148 (150) : 60 Ind App 203 : 56 Mad 570 (PC).

[3] Trustee can mix moneys of one trust with those of others or even with his own money. So long as his drawings from mixed funds are proper they will be deemed to be proper. (Vol 27) 1940 Rang 225 (227) (DD).

[4] Where a trustee wrongfully mingles trust property with his own, the beneficiary is entitled to a charge on the whole property of the trustee for amount due to him. But if he obtains a personal judgment for the amount without taking steps to preserve his remedies based on the moneys being held in trust, the beneficiary loses his right to enforce the charge. (Vol 20) 1933 Bom 437 (438) : 58 Bom 67 (DB) ✠ (Vol 27) 1940 Cal 337 (345) : I L R (1940) 1 Cal 372 (DB) ✠ (Vol 17) 1930 Mad 276 (277). (If man mixes trust funds with his own, whole will be treated as trust property except so far as he may be able to distinguish what is his own.) ✠ (Vol 17) 1930 Mad 24 (26, 28) : 52 Mad 919 (DB) ✠ (Vol 28) 1941 Oudh 126 (128, 129) : 16 Luck 241 (DB) ✠ ('11) 10 Mad L Tim 313 (321) (D B).

Rights and liabilities of beneficiary's transferee.

69. Every person to whom a beneficiary transfers his interest has the rights, and is subject to the liabilities, of the beneficiary in respect of such interest at the date of the transfer.

CHAPTER VII.

OF VACATING THE OFFICE OF TRUSTEE.

Office how vacated.

70. The office of a trustee is vacated by his death or by his discharge from his office.

Discharge of trustee.

71. The trustee may be discharged from his office only as follows :

(a) by the extinction of the trust;

(b) by the completion of his duties under the trust;

(c) by such means as may be prescribed by the instrument of trust;

(d) by appointment under this Act of a new trustee in his place;

(e) by consent of himself and the beneficiary, or, where there are more beneficiaries than one, all the beneficiaries being competent to contract, or

(f) by the Court to which a petition for his discharge is presented under this Act.

Petition to be discharged from trust.

72. Notwithstanding the provisions of section 11, every trustee may apply by petition to a principal civil Court of original jurisdiction to be discharged from his office, and, if the Court finds that there is sufficient reason for such discharge, it may discharge him accordingly, and direct his costs to be paid out of the trust-property. But, where there is no such reason, the Court shall not discharge him, unless a proper person can be found to take his place.

Appointment of new trustees on death, etc.

73. Whenever any person appointed a trustee disclaims, or any trustee, either original or substituted, dies, or is for a continuous period of six months absent from British India, or leaves British India for the purpose of residing abroad, or is declared an insolvent, or desires to be discharged from the trust, or refuses or becomes, in

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Section 71 — Note 1

[1] The only modes in which a trustee can divest his office are by the universal consent of all interested parties or by retiring by virtue of a power conferred by the trust deed or by obtaining release on application to Court. ('14) 7 Low Bur Rul 39 (41) (DB).

[2] Court can remove trustee of private trust when there is clear necessity for interference to save trust estate. (Vol 7) 1920 Cal 210 (222) (DB).

[3] Where breach of trust is caused by mistake of trustee, it is unnecessary to ask for his removal; the Court in such cases should direct the transferee to make restitution to the trustee. ('09) 32 Mad 490 (507) (DB).

[4] Removal of present trustee does not entail forfeiture of the hereditary office which descends to the next heir. In case of minority, another trustee is appointed until the minor attains majority. ('11) 10 Ind Cas 300 (301) : 9 Mad L Tim 495 (DB).

[5] Where certain persons managed temple properties as *de facto* trustees, claiming to be Archakas and appropriated for their use surplus income of property and where inam register showed that property was granted to temple, *held*, that appropriation was not *bona fide* and they must account for moneys received by them and not being hereditary trustees, must be removed for breach of trust. (Vol 16) 1929 Mad 87 (88, 89) (DB).

Section 72 — Note 1

[1] Trust should not be allowed to fail for want of trustee—Court by directing trustees to hand over trust property to donor, does not extinguish trust, but makes donor himself trustee. (Vol 10) 1923 Oudh 80 (89) : 25 Oudh Cas 291 (DB).

SECTION 73 — SYNOPSIS

1. Scope.
2. Application to Court.
3. Inquiry by Court—Scope.
4. Powers of Court.
5. Para. 1—"Unfit".
6. Disagreement amongst trustees.
7. Provision for appointment by founder.

1. Scope. — [1] It is true that S. 73 relates primarily to the appointment of new trustees, but S. 74, which is to be read with S. 73, relates not only to vacancies but to disqualifications. Therefore, Ss. 73 and 74 do, in effect, confer a power of removal when "in the opinion of a principal Civil Court of original jurisdiction" a person is "unfit or personally incapable to act in the trust." The appropriate term, however, would appear to be not "removal" but "discharge." (Vol 30) 1943 Sind 223 (224) : I L R (1943) Kar 213 (DB).

[2] A new trustee, under S. 73 of the Trusts Act, need not be appointed by a registered document, as the office of trustee is not immoveable property under the Registration Act and the trust properties vest in him according to S. 75 of the Trusts Act and not by the instrument of appointment. ('09) 6 Mad L Tim 240 (241) (DB).

[3] Misconduct of trustee does not *ipso facto* result in his removal. (Vol 25) 1938 Mad 982 (993) (DB).

2. Application to Court.—[1] A petition is to be made by the beneficiary when a vacancy or disqualification occurs. The petition follows a vacancy or disqualification which is a condition precedent, the existence of which is not dependent upon an adjudication by the Court in the same proceeding. (Vol 30) 1943 Sind 223 (224, 225) : I L R (1943) Kar 213 (DB).

[2] An application for removal of a trustee for having committed breaches of contract and for the appointment of another trustee is competent under the Act: it is not necessary to file a regular suit. (Vol 31) 1944 Mad 574 (574).

the opinion of a principal civil Court of original jurisdiction, unfit or personally incapable to act in the trust, or accepts an inconsistent trust, a new trustee may be appointed in his place by —

(a) the person nominated for that purpose by the instrument of trust (if any), or

(b) if there be no such person, or no such person able and willing to act, the author of the trust if he be alive and competent to contract, or the surviving or continuing trustees or trustee for the time being, or legal representative of the last surviving and continuing trustee, or (with the consent of the Court) the retiring trustees, if they all retire simultaneously, or (with the like consent) the last retiring trustee.

Every such appointment shall be by writing under the hand of the person making it.

On an appointment of a new trustee the number of trustees may be increased.

The Official Trustee may, with his consent and by the order of the Court, be appointed under this section, in any case in which only one trustee is to be appointed and such trustee is to be the sole trustee.

The provisions of this section relative to a trustee who is dead include the case of a person nominated trustee in a will but dying before the testator, and those relative to a continuing trustee include a refusing or retiring trustee if willing to act in the execution of the power.

Appointment by Court.

74. Whenever any such vacancy or disqualification occurs and it is found impracticable to appoint a new trustee under section 73, the beneficiary may, without instituting a suit, apply by petition to a principal civil Court of original jurisdiction for the appoint-

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Section 73 — Note 2 *(contd.)*

[But see (Vol 15) 1928 Bom 20 (21) : 52 Bom 32 (DB). (Applications for removal of trustees must be made by suit.)]

3. Inquiry by Court—Scope.—[1] The enquiry is limited in its scope to matters that can be readily determined in an enquiry of a summary nature. (Vol 31) 1944 Mad 574 (574).

[2] Sections 73 and 74, Trusts Act are not intended to apply to contentious or disputed cases, where proceeding by way of suit is appropriate, but to cases appropriate to a summary procedure where the facts are not disputed or cannot reasonably be disputed. For the purpose of an application under S. 74, it is enough that the trustee has placed himself in the position of a debtor to the trust and has obtained an advantage to himself by so doing. The Court is not to embark upon an inquiry into allegations which are disputed ; it should base its opinion as to the unfitness, incapacity or disqualification of the trustee upon facts which are admitted, or which are self-evident, or which have already been the subject of decision by a competent Court. (Vol 30) 1943 Sind 223 (225) : I L R (1943) Kar 213 (DB).

4. Powers of Court. — [1] Where trustees of a certain fund are appointed by a certain community but the trustees have no power to appoint their successors and the successive trustees are being appointed for 50or 60 years by the trustees, they are not validly appointed trustees unless their appointment is sanctioned by the community. In the case of large charities, the Court should see that trustees are being appointed by a good electorate. When the donors have not provided for the appointment of trustees, those vitally interested in the charity and its due and effective administration should have some voice in choosing the trustee. ('09) 2 Ind Cas 701 (724) : 33 Bom 509 (DB).

[2] Where a *waqf* was created, before the Waqf Validating Act, in favour of the grantor's family and descendants without ultimate dedication to charity and the District Judge removed the *mutwalli* and appointed one of the beneficiaries in his place. *Held*, that the order was bad as not only the *waqf* was invalid but also a trust in favour of unborn persons from generation to generation was not supportable under Muhammadan Law. (Vol 7) 1920 Cal 587 (588) (DB).

5. Para. 1—"Unfit."—[1] Word "unfit" refers not only to physical incapability but also to case where applicant charges trustee with breach of trust. (Vol 17) 1930 Sind 41 (43).

[2] It is neither possible nor necessary to limit the term "unfit" in S. 73, Trusts Act, to physical fitness or personal incapacity, to an incapacity other than a physical incapacity. Under S. 73, mere unfitness or personal incapacity is not in itself a sufficient disqualification. It must be an unfitness or personal incapacity which in the opinion of the Court disqualifies, and when such disqualification exists, a vacancy occurs, and a new appointment is to be made. (Vol 30) 1943 Sind 223 (224) : I L R (1943) Kar 213 (DB).

6. Disagreement amongst trustees. — [1] Appointment of new trustees can be made by joint act of all the continuing trustees and if they do not agree, the matter becomes one where the Court's intercession must be called for. (Vol 31) 1944 Bom 222 (225) : I L R (1944) Bom 420.

[2] Trust created by will containing a provision that new trustee shall be appointed by the continuing trustee—Compromise effected in the matter of appointment of new trustees in case continuing trustee did not agree—Compromise not valid— Court can interfere in case of a deadlock due to the non-agreement amongst the continuing trustees. (Vol 21) 1934 Lah 331 (332).

7. Provision for appointment by founder. — [1] Where founder has made no provision for appointment of fresh trustees, his legal representatives are entitled to be appointed. (Vol 16) 1929 Bom 193 (193, 194).

[*See also* (Vol 12) 1925 Mad 218 (219, 220) (DB). (Succession to trusteeship of property follows the ordinary rule of Hindu Law and consequently a Hindu widow is entitled to succeed to the trusteeship as heir to her husband, if there is no special custom to the contrary.)]

[2] Trustee appointed by will of author of trust cannot be removed by Court on application of person other than beneficiary. (Vol 15) 1928 Bom 20 (21) : 52 Bom 32 (DB).

[3] Where power is given on death or retirement of trustee to some person to appoint another person "other" means other than trustee dying or retiring. (Vol 30) 1943 Bom 366 (367) : I L R (1943) Bom 495 (DB).

Section 74 — Note 1

[1] Per *Weston J.* — Section 74 expressly confers upon the beneficiary a right to apply to the Court by

ment of a trustee or a new trustee, and the Court may appoint a trustee or a new trustee accordingly.

Rules for selecting new trustees.

In appointing new trustees, the Court shall have regard *(a)* to the wishes of the author of the trust as expressed in or to be inferred from the instrument of trust; *(b)* to the wishes of the person, if any, empowered to appoint new trustees; *(c)* to the question whether the appointment will promote or impede the execution of the trust; and *(d)* where there are more beneficiaries than one, to the interests of all such beneficiaries.

Vesting of trust-property in new trustees.

75. Whenever any new trustee is appointed under section 73 or section 74, all the trust property for the time being vested in the surviving or continuing trustees or trustee, or in the legal representative of any trustee, shall become vested in such new trustee, either solely or jointly with the surviving or continuing trustees or trustee, as the case may require.

Powers of new trustees.

Every new trustee so appointed, and every trustee appointed by a Court, either before or after the passing of this Act, shall have the same powers, authorities and discretions, and shall in all respects act, as if he had been originally nominated a trustee by the author of the trust.

Survival of trust.

76. On the death or discharge of one of several co-trustees, the trust survives and the trust-property passes to the others, unless the instrument of trust expressly declares otherwise.

Section 74 — Note 1 *(contd.)*

petition, not by suit, for the appointment of a new trustee, and such appointment may then be made by the Court, not only when a vacancy has occurred because of death or absence from British India, but also when any "disqualification" contemplated in S. 73, renders a new appointment necessary. The right to apply under S. 74 is subject to the restriction that an appointment under S. 73 is found to be impracticable. (Vol 30) 1943 Sind 223 (226) : I L R (1943) Kar 213 (DB).

[2] An application for the removal of a trustee for a breach of trust and for appointment of a new trustee is maintainable under Ss. 73 and 74, but the inquiry is of a summary nature because Ss. 73 and 74 are not intended to deal with questions involving elaborate inquiry. (Vol 31) 1944 Mad 574 (574).

[3] Where one of the trustees is excluded from the administration of trust estate in consequence of which the trustee renounces the trust, the trustee, thereby, either disclaims or refuses within the meaning of S. 73, and an application for removal and appointment of trustee under S. 74 is competent. (Vol 17) 1930 Sind 41 (42).

[4] Allegation that person is entitled to office of trustee brings relief sought under S. 92, Civil P. C. and remedy is by way of suit only and not by application. (Vol 21) 1934 Oudh 118 (121): 9 Luck 507.

[5] Receiver cannot be appointed in proceeding for removal of trustee and appointment of new trustee under the Act. (Vol 14) 1927 Sind 237 (238) : 22 Sind L R 146 (DB).

[6] Mortgage — Equity of redemption — Proper representation — Mortgagor creating trust for paying debts including that of mortgages — Trustees subsequently discharged, debtor having taken possession of properties—Debtor declared insolvent — Suit by mortgagee on mortgages against debtor, his son and receiver —Equity of redemption held not represented in mortgage suit — As mortgagee a beneficiary could have applied for appointment of new trustees and have made them parties to his suit to represent the equity of redemption. (Vol 26) 1939 Oudh 161 (170) : 14 Luck 548 (DB).

[7] Act does not apply to wakf-alal-aulad, and no application lies under Ss. 73 and 74 for the removal of the mutwalli of such wakf and for the appointment of a new one. (Vol 32) 1945 All 261 (262, 263) : I L R (1945) All 818 (FB).

[8] Petitton under S. 74—Court-fee under Art. 1 (d), Sch. II, Court-fees Act, is sufficient. (Vol 21) 1934 Oudh 118 (121): 9 Luck 507.

[9] No appeal lies to the High Court from an order made by the District Judge under S. 74 of the Trusts Act. The Act contains no provision for an appeal from such an order. (Vol 30) 1943 Sind 223 (223, 224) : ILR (1943) Kar 213 (DB).

Section 75 — Note 1

[1] Trust — Trustee of temple — Management — Liability to account — Conduct of previous trustees supervised by members of community—Suit by succeeding trustee for taking of account — Specific items of malversation held against—Lapse of time—Direction for general accounts — Whether can be given. ('37) 70 Mad L Jour 318 (319, 320) (PC).

Section 76—Note 1

[1] Act has no application to public or private religious charitable endowments. Principles underlying Ss. 44 and 76 serve as useful guide. (Vol 28) 1941 All 387 (391) : I L R (1941) All 711 (DB).

[2] Once a founder prescribes a line of devolution as regards the trusteeship in the document creating a trust, the founder has no right to alter the line of devolution of the trusteeship unless he had reserved such a power in the original document itself. (Vol 27) 1940 Mad 633 (634).

[3] Where a will creating a trust dictates that succession is to pass to the descendants of the original trustee, the direction cannot be extended to include their collaterals, in whom there is no reason to suppose that the testator would have been inclined to repose any particular confidence. (Vol 23) 1936 Lah 300 (301).

CHAPTER VIII.

OF THE EXTINCTION OF TRUSTS.

Trust how extinguished.

77. A trust is extinguished —

(*a*) when its purpose is completely fulfilled; or

(*b*) when its purpose becomes unlawful; or

(*c*) when the fulfilment of its purpose becomes impossible by destruction of the trust-property or otherwise; or

(*d*) when the trust, being revocable, is expressly revoked.

Revocation of trust.

78. A trust created by will may be revoked at the pleasure of the testator.

A trust otherwise created can be revoked only —

(*a*) where all the beneficiaries are competent to contract—by their consent;

(*b*) where the trust has been declared by a non-testamentary instrument or by word of mouth—in exercise of a power of revocation expressly reserved to the author of the trust; or

(*c*) where the trust is for the payment of the debts of the author of the trust, and has not been communicated to the creditors—at the pleasure of the author of the trust.

Illustration.

A conveys property to *B* in trust to sell the same and pay out of the proceeds the claims of *A*'s creditors. *A* reserves no power of revocation. If no communication has been made to the creditors, *A* may revoke the trust. But if the creditors are parties to the arrangement, the trust cannot be revoked without their consent.

Revocation not to defeat what trustees have duly done.

79. No trust can be revoked by the author of the trust so as to defeat or prejudice what the trustees may have duly done in execution of the trust.

CHAPTER IX.

OF CERTAIN OBLIGATIONS IN THE NATURE OF TRUSTS.

Where obligation in nature of trust is created.

80. An obligation in the nature of a trust is created in the following cases.

Section 77 — Note 1

[1] Where gift of land is made for public purpose, the donees are trustees — If fulfilment of purpose becomes impossible, trust is extinguished and land reverts to donor. (Vol 10) 1923 Lah 93 (94).

[2] Where trustee is dissatisfied with co-trustee's management, he cannot apply for cancellation of trust. (Vol 12) 1925 All 277 (279, 280) : 47 All 313 (DB).

[3] When trust money is deposited as security for good behaviour of an employee, demand for its return does not amount to revocation and consequent extinguishment of trust. (Vol 28) 1941 Oudh 126 (128) : 16 Luck 241 (DB).

Section 78 — Note 1

[1] Valid trust once created is irrevocable by any subsequent act of the author of trust. (Vol 2) 1915 Mad 380 (382) (DB).

[2] Trust under S. 6 of the Married Women's Property Act can be revoked by beneficiary. (Vol 29) 1942 Mad 136 (138).

[3] A debtor by an arrangement made one of his creditors a trustee in respect of some of his properties for the payment of debts and subsequently hypothecated the same properties for securing an advance. Held, that the subsequent hypothecation amounted to a revocation of a trust.'('09) 1 Ind Cas 347 (348) (DB) (All) ✻ (Vol 34) 1947 Pat 131 (132).

[4] Clause (c) applies only to trust solely for payment of debts.(Vol 10)1923 Oudh 80(90):25 Oudh Cas 291(DB).

[5] Section 78 does not apply to trust created for payment of debts and other purposes. (Vol 10) 1923 Oudh 80 (90) : 25 Oudh Cas 291 (DB).

[6] *G* sold property to *S* and deposited the price with him, the deed of deposit reciting "*G* will have all his creditors paid off by said vendee and get him receipts for them." *G* was adjudged insolvent. A particular creditor *R* was not paid: *Held* no trust was created in favour of *R* and the money with *S* was available for distribution among the creditors. (Vol 19) 1932 Lah 66 (67) (DB).

[7] Where a person asks another to acquire a certain property for his benefit, i.e, for benefit of the settlor and allots a sum of money for the purpose but reserves to himself the power of revoking the trust after the amount is spent, the trust is a valid one and his refusal after the amount is spent to further finance the work is a valid revocation of the trust. (Vol 12) 1925 Pat 68 (91) (FB).

[8] In case of a *waqf-alal-aulad*, no application lies under Ss. 73 and 74, Trusts Act, for the removal of the *mutwalli* and appointment of a new one in his place. In view of S. 1, the Act has no application to such *waqfs*. (Vol 32) 1945 All 261 (263) : I L R (1945) All 818 (FB).

[9] If a person deposits money with a Bank as security for good behaviour of an employee, and demands the return of the money, there is no express revocation of the trust but the demand is one for the performance of the trust. The trust cannot be extinguished until the purpose of the trust was completely fulfilled by the return of the amount to the depositor subject to the lawful claims of the Bank against that property. (Vol 28) 1941 Oudh 126 (128) : 16 Luck 241 (DB).

[10] *A*, by a registered deed settled certain property for charitable trusts and appointed himself as Hukdar for life and after him his grandson *B*. It was held that *A* had no power to revoke the appointment of *B* who obtained a vested right to property on *A*'s death, as the deed was not a will. ('11)1911-2 Mad W N 382 (383) (DB).

Section 80 — Note 1

[1] Chapter 9 gives the principles that should govern Courts in ascertaining the rights and obligations of

81. Where the owner of property transfers or bequeaths it and it cannot be inferred consistently with the attendant circumstances that he intended to dispose of the beneficial interest therein, the transferee or legatee must hold such property for the benefit of the owner or his legal representative.

Where it does not appear that transferor intended to dispose of beneficial interest.

Illustrations.

(a) *A* conveys land to *B* without consideration and declares no trust of any part. It cannot, consistently with the circumstances under which the transfer is made, be inferred that *A* intended to transfer the beneficial interest in the land. *B* holds the land for the benefit of *A*.

(b) *A* conveys to *B* two fields, *Y* and *Z*, and declares a trust of *Y*, but says nothing about *Z*. It cannot, consistently with the circumstances under which the transfer is made, be inferred that *A* intended to transfer the beneficial interest in *Z*. *B* holds *Z* for the benefit of *A*.

(c) *A* transfers certain stock belonging to him into the joint names of himself and *B*. It cannot, consistently with the circumstances under which the transfer is made, be inferred that *A* intended to transfer the beneficial interest in the stock during his life. *A* and *B* hold the stock for the benefit of *A* during his life.

(d) *A* makes a gift of certain land to his wife *B*. She takes the beneficial interest in the land free from any trust in favour of *A*, for it may be inferred from the circumstances that the gift was for *B*'s benefit.

Section 80 — Note 1 *(contd.)*

parties in certain cases and does not relieve a party from any obligation to take the necessary steps needed by the substantive or adjective law for creating a valid trust. (Vol 3) 1916 Mad 350 (354, 356):38 Mad 321 (DB).

[2] Section 4, cl. (f), Mad. Agri. Relief Act applies to obligations declared in Chap IX. (Vol 26) 1939 Mad 471 (472) : I L R (1939) Mad 525 (DB).

[3] Where sale deed contains recital that property is bought for plaintiff in names of defendants, there is constructive trust only—S. 10, Limitation Act, does not apply to it. (Vol 9) 1922 Mad 57 (58, 59) : 45 Mad 415 (DB).

[4] Trustee *de facto* is really no other than a trustee *de son tort*. He has no right to maintain suit on behalf of trust, even if beneficial to the charity. (Vol 25) 1938 Mad 982 (990) (DB).

SECTION 81 — SYNOPSIS

1. "Intended to dispose of the beneficial interest."
2. Doctrine of advancement.
3. "Attendant circumstances."
4. Other illustrative cases.

1. "Intended to dispose of the beneficial interest." — [1] Intention referred to in the section is intention of testator at time of making will and burden of proving different intention is upon those who set up the same. ('11) 10 Mad L Tim 42 (44) (DB).

[2] 'Disposal of beneficial interert' refer to transfer or bequest referred to in earlier part of section, i. e., if it is legally proved that the testator or transferor did not intend by such transfer or bequest to part with the beneficial interest, the transferee or legatee is a trustee for the transferor or his legal representative and cannot claim the property under such transfer or bequest. ('09) 32 Mad 443 (454, 455) (DB). (Per *Sankaran Nair J.*)

[3] Fiduciary relationship may be established without the use of the word 'trust". A person may become a trustee by his own acts and conduct so as to deprive himself of all beneficial ownership of property and declare that he will hold the same in trust for another. The mere fact that the owner retains an interest in the property would not necessarily go against the foundation of trust. (Vol 23) 1936 Bom 296 (297).

[4] Legatee executing agreement to pay guzara to testator from date of will—Will giving vested remainder to legatee — Non-payment of guzara by legatee—Will not revoked by testator — Character of legatee is not changed into trustee for testator or his heirs as the intention referred to in the section is the intention of the testator at the time of making the will and not afterwards. It does not apply to a subsequent change of intention. (Vol 33) 1946 Oudh 193 (207) : 21 Luck 314 (DB).

2. Doctrine of advancement. — [1] Presumption of advancement, under English law applies only in case of persons of British nationality domiciled in India — Where husband or father makes apparent advancement to wife or child, no beneficial interest is conferred on donee, if donor proves that his intention was different; but mere statement of husband or father is not enough. (Vol 8) 1921 P C 56 (57) : 47 Ind App 275 : 48 Cal 260 : 10 Low Bur Rul 335 (PC).

[2] Advancement — Doctrine of, does not generally apply in India — Principles to be applied in English Court of Chancery are to be applied in case of persons of British parents, but residing wholly in India. (Vol 8) 1921 P C 56 (57, 58, 59) : 47 Ind App 275 : 48 Cal 260 : 10 Low Bur Rul 335 (PC).

[3] There is no presumption of advancement in the Province of Burma (Vol 23) 1936 Rang 447 (447, 448) (DB)≠(Vol 23) 1936 Rang 256 (259, 266) : 14 Rang 242 (FB).

[4] Presumption of advancement as known in English law may arise in case of Anglo-Indians where husband transfers property in name of his wife. (Vol 11) 1924 Rang 283 (286) : 2 Rang 253 (DB)≠(Vol 20) 1933 Nag 337 (339, 340) : 30 Nag L R 115.

[5] Presumption of advancement in case of British National resident in India is not rebutted by proof of management and collection of rent by husband after purchase. (Vol 5) 1918 Low Bur 15 (15, 16) : 9 Low Bur Rul 212 (DB).

[6] Where a husband or father purchases property in the name of wife or child, there is no presumption of an intended advancement unless there is some other evidence of sufficient motive for gift or transfer. The onus lies on the person alleging the advancement to prove that the purchase was intended to be an advancement. ('26) 28 Bom L R 11 (14) (DB).

3. "Attendant circumstances."—[1] "Attendant circumstances" mean the same thing as surrounding circumstances at time of making the will. ('09) 32 Mad 443 (455) (DB).

[2] Section 81 of the Trusts Act refers only to attendant circumstances but not to antecedent circumstances. (Vol 33) 1946 Oudh 193 (205) : 21 Luck 314 (DB).

[3] Where a resulting trust is sought to be proved, acts and declarations made long after the transaction are not admissible in favour of the person seeking to show such a trust and therefore it is doubtful whether they would be admissible in favour of that person's creditor against the person in whose name the property stands. (Vol 14) 1927 Bom 433 (435).

4 Other illustrative cases.—[1] The general rule and principle of the Indian law as to resulting trusts differ but little, if at all, from the general rule of English law upon the same subject, but owing to widespread and persistent practice which prevails amongst

82. Where property is transferred to one person for a consideration paid or provided by another person, and it appears that such other person did not intend to pay or provide such consideration for the benefit of the transferee, the transferee must hold the property for the benefit of the person paying or providing the consideration.

Transfer to one for consideration paid by another.

Nothing in this section shall be deemed to affect the Code of Civil Procedure[a], section 317, or Act No. XI of 1859[b] (to improve the law relating to sales of land for arrears of revenue in the Lower Provinces under the Bengal Presidency), section 36.

[a] *See* now the Code of Civil Procedure, 1908 (Act 5 [V] of 1908).

[b] The Bengal Land Revenue Sales Act, 1859.

Section 81—Note 4 *(contd.)*

the natives of India, whether Mahomedan or Hindu, for owners of property to make grants and transfers of it benami for no obvious reason or apparent purpose, without the slightest intention of vesting in the donee any beneficial interest in the property granted or transferred, as well as the usages which the natives have adopted or which have been protected by statutes, no exception has ever been engrafted on the general law of India negativing the presumption of the resulting trust in favour of the person providing the purchase money, such as has, by the Courts of Chancery in the exercise of their equitable jurisdiction, been engrafted on the corresponding law in England in those cases where a husband or father pays the money and the purchase is taken in the name of a wife or child. In such a case there is, under the general law in India, no presumption of an intended advancement as there is in England. (Vol 8) 1921 P C 56 (57): 47 Ind App 275: 10 Low Bur Rul 335 : 48 Cal 260 (PC).

[2] In the case of a voluntary conveyance of property by a grantor without any declaration of trust, there is a resulting trust in favour of the grantor, unless it can be proved that an actual gift was intended. (Vol 18) 1931 Bom 269 (271) (DB).

[3] *W* endorsed the receipt of his fixed deposit and sent it with a letter to the Bank asking them to hand-over amount to defendant. *W's* heir sued for a declaration that the money formed part of *W's* estate — *Held*, defendant was the absolute owner, and there was no resulting trust in favour of *W's* heir. (Vol 1) 1914 Bom 286 (288) : 38 Bom 618 (DB).

[4] Where a mortgage is taken in the name of *A*, the money advanced being admittedly the money of *B*, there is resulting trust in favour of *B*. (Vol 23) 1936 Rang 447 (447, 448) (DB).

[5] Assignment of mortgage-deed intended to place property conveyed by it beyond reach of assignor's creditors, falls under S. 80, assignee becoming only benamidar and assignor remaining real owner. (Vol 17) 1930 Nag 273 (277, 278) : 26 Nag L R 277 (DB).

SECTION 82 — SYNOPSIS

1. Scope.
2. Intention and presumption.
3. Advancement.
4. "Transferee must hold property, etc."
5. Other illustrative cases.

1. Scope.—[1] Section means that if nothing more is shown than transferor paid consideration, there is resulting trust (Vol 21) 1934 Mad 671 (672).

[2] Purchase by *A* in *B's* name — Sale by *B* to *C* in fraud of *A* — Suit by *A* for declaration of ownership—Second suit by *C* for possession—Plea of *A's* ownership —*Held*, that once *A* proved that the consideration was paid by him, S 82 became applicable and it was not necessary for him to rely upon any of the ingredients referred to in S 84 of the Trusts Act. (Vol 23) 1936 Mad 165 (167) (DB).

[3] Person pays consideration and another takes conveyance; latter holds property for benefit of former. (Vol 4) 1917 P C 152 (155) (PC).

[4] Property purchased in one's name with another's money with intention that property should belong to that another person creates resulting trust. ('71) 14 Moo Ind App 433 (437, 438) (PC).

[5] Where pre-emptor paid into Court whole amount including money due by vendor to previous mortgagee and vendor with that money discharged the mortgage and was in possession — *Held* that vendor must hold possession on the pre-emptor's behalf. (Vol 10) 1923 All 507 (508) : 45 All 482 (DB).

[6] The test to find out whether a transaction is *benami* or not is the source from which the purchase-money is got, but even this test becomes relevant only in the absence of all other explanatory circumstances. (Vol 12) 1925 Oudh 243 (246, 247) (DB).

2. Intention and presumption.—[1] Where property is acquired in the name of one person but the purchase price is paid by another, a presumption arises that the transaction is one for the benefit of the person providing the money. (Vol 12) 1925 Pat 68 (80) (FB).

[2] Purchase of property in name of one's mistress living under one's protection does not raise presumption that one intended to benefit her. But other circumstances may show that title passes to her. ('10) 5 Ind Cas 85 (86, 87) (DB) (Cal).

[3] The section has no bearing on the burden of proof and does not make it necessary for a person who alleges that the consideration for transfer was paid by some one other than the nominal transferee to show further that there was no intention upon the part of the person providing the money to pay for the benefit of the transferee. (Vol 29) 1942 All 308 (312, 314): ILR (1942) All 478 (DB).

[4] Section 82, Trusts Act though it may not have really altered the burden of proof, has made it much clearer than it was before that burden of proof of establishing all the facts neeessary to lead to the inference that a transfer was benami lies upon the person asserting it to be so. (Vol 28) 1941 Oudh 288 (292): 16 Luck 341 (DB).

3. Advancement. — [1] The presumption of advancement in English law when a person purchases property in the name of another in whom he is interested does not arise in India. Here the question in such a case is if the purchase was for the benefit of the person in whose name it was made, one test being the source of the purchase-money. (Vol 4) 1917 Mad 926 (927) (DB).

[2] Executor purchasing property comprised in will in name of his son—Presumption that purchase is gift by way of advancement to son is not applicable — Presumption does not apply in any case in which father could not purchase property — Such a presumption is only of general application in competition between father and son or those claiming under them. (Vol 6) 1919 P C 253 (255) (PC).

83. Where a trust is incapable of being executed, or where the trust is completely executed without exhausting the trust-property, the trustee, in the absence of a direction to the contrary, must hold the trust-property, or so much thereof as is unexhausted, for the benefit of the author of the trust or his legal representative.

Trust incapable of execution or executed without exhausting trust-property.

Illustrations.

(a) *A* conveys certain land to *B* —
"upon trust," and no trust is declared; or
"upon trust to be thereafter declared," and no such declaration is ever made; or
upon trusts that are too vague to be executed; or
upon trusts that become incapable of taking effect; or
"in trust for *C*," and *C* renounces his interest under the trust.
In each of these cases *B* holds the land for the benefit of *A*.

(b) *A* transfers Rs. 10,000 in the four per cents. to *B*, in trust to pay the interest annually accruing due to *C* for her life. *A* dies. Then *C* dies. *B* holds the fund for the benefit of *A*'s legal representative.

(c) *A* conveys land to *B* upon trust to sell it and apply one moiety of the proceeds for certain charitable purposes, and the other for the maintenance of the worship of an idol. *B* sells the land, but the charitable pur-

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Section 82 — Note 3 *(contd.)*

[3] There is no presumption in India that property acquired by father in name of child is intended for his advancement. (Vol 18) 1931 Lah 419 (423) : 12 Lah 546 (DB).

[4] Father of European nationality living in India in European style — Presumption of advancement arises, if father purchases property in name of his daughter. (Vol 17) 1930 Oudh 441 (444, 445) (DB).

[5] The deposit by a Hindu of his money in a bank in the joint names of himself and another and on terms that it is payable to either as survivor does not, on his death, constitute a gift by him to the other. There is a resulting trust in his favour in the absence of proof of a contrary intention, there being, in India, no presumption of an intended advancement to such other person. (Vol 32) 1945 PC 10 (11): 71 Ind App 197(PC).

[6] Doctrine of advancement in favour of wife or son does not apply in British India. (Vol 12) 1925 Oudh 243 (246, 247) (DB).

[7] Where an Indian Christian husband provides the money for the purchase of a property in the name of his wife, the property must be regarded as being his unless the evidence justifies the conclusion that he intends to make a gift to his wife. The English doctrine of advancement cannot be legitimately applied to Indian Christians, who are Indians of the full blood. Religious belief is not a factor in the application of the doctrine and there is no reason for making an exception in the case of Indian Christians. (Vol 29) 1942 Mad 503 (504, 505) : I L R (1942) Mad 844 (DB).

4. "Transferee must hold property etc." — [1] Benamidar cannot be considered trustee in strict sense of term. He is alias for real owner in whom vests legal title. Real owner can enforce his rights in respect of property, without referring to benamidar—Benamidar has some of liabilities but not all the rights of true owner. (Vol 16) 1929 Mad 268 (269) (DB).

[2] Person purchases property in name of another and consideration has come through former; effect of transaction is that resulting trust is created in his favour. (Vol 24) 1937 Rang 198 (199).

[3] The general principle of equity, applicable both in England and in India is that in the case of a voluntary conveyance of property by a grantor, without any declaration of trust, there is a resulting trust in favour of the grantor, unless it can be proved that an actual gift was intended. Where money was deposited by a husband in a bank in the name of himself and his wife "payable to either or survivor:" *Held*, that the money belonged to the estate of the husband. (Vol 15) 1928 P C 172 (173, 174) : 55 Cal 944 : 55 Ind App 235 (PC).

[4] It has been established by decisions that owing to the widespread and persistent practice prevailing in India of owners of property making grants and transfers benami for no obvious reason, without any intention of vesting in the donee any beneficial interest in the property granted or transferred, as well as the usages which the natives have adopted and which have been protected by statute, no exception has ever been engrafted on the general law of India, negativing the presumption of the resulting trust in favour of the person providing the purchase money. (Vol 8) 1921 P C 56 (57, 58, 59) : 47 Ind App 275 : 48 Cal 260 : 10 Low Bur Rul 335 (PC).

[5] Property belonging to the plaintiff's father sold in execution of a decree—Vendee agreed to return the same to the father on payment of a certain amount, part of which was advanced by defendants and the balance supplied by the father — Vendee executed a kobala in the names of the defendants — A year later, father unable to pay interest, put the defendants in possession to recover the amount due to them — After the execution of the kobala, some of the properties were sold for arrears of rent due and purchased by defendants — Plaintiffs sued the defendants for recovery of possession of the property on payment of amount due to the defendants—*Held*, that the defendants were in the position of creditors in possession and there was a resulting trust in favour of the plaintiffs. (Vol 6) 1919 Cal 309 (311) (DB).

5. Other illustrative cases.—[1] Co-sharers *A* and *B* having claims against taluqdar for under-proprietary title in certain villages — Agreement that claim should be prosecuted in name of *A*, *B* paying half the costs and receiving half profits when right is established — *A* obtaining decree and delivery of possession — *B* is entitled to say that *A* held partly for him—Agreement should be maintained and *B* awarded his half share. ('89) 16 Cal 62 (66, 70).

[2] Benamidar is competent to maintain suit for recovery of possession of property purchased benami in his own name and without beneficial owner being party to the suit. (Vol 19) 1932 Bom 190 (190).

Section 83 — Note 1

[1] Funds held in trust for particular purpose—Purpose failing or coming to end — Resulting trust of remaining funds — Suit for recovery of their share by subscribers of fund is governed by Art. 120, Limitation Act. (Vol 25) 1938 Mad 641 (642, 643) (DB).

[2] A trust was created by a woman which failed after her death. A resulting trust was created in favour of settlor and it descended to her heirs at the time of her death. (Vol 2)1915 Bom 267 (268):40 Bom 341(DB).

poses wholly fail, and the maintenance of the worship does not exhaust the second moiety of the proceeds. *B* holds the first moiety and the part unapplied of the second moiety for the benefit of *A* or his legal representative.

(d) *A* bequeaths Rs. 10,000 to *B*, to be laid out in buying land to be conveyed for purposes which either wholly or partially fail to take effect. *B* holds for the benefit of *A*'s legal representative the undisposed of interest in the money or land if purchased.

84. Where the owner of property transfers it to another for an illegal purpose and such purpose is not carried into execution, or the transferor is not as guilty as the transferee, or the effect of permitting the transferee to retain the property might be to defeat the provisions of any law, the transferee must hold the property for the benefit of the transferor.

Transfer for illegal purpose.

Section 83 — Note 1 *(contd.)*

[3] Where no wakf was found to have been created it was held that the property must go back to the owner or his representative. (Vol 22) 1935 All 458 (458).

[4] Resulting trust—Whole interest of grantor legal and equitable intended to be transferred—No resulting trust comes into existence unless there is no consideration or consideration wholly fails—Resulting trust property conveyed in consideration of covenant—Breach of covenant is not failure of consideration as to give rise to resulting trust. (Vol 2) 1915 P C 168 (170) (PC).

[5] Past rents were assigned to trustee for purposes of the charitable trust—Trustee later obtained decree for the rents — Trust declared subsequently incapable of being given effect to—*Held* the original owner can execute the decree without any assignment—Illustration (c) to S. 83 and (b) of S. 94 cited—Where Act is not applicable the aforesaid provisions in the Act notably the above sections, fully set out principles that should govern a case like the present one, and we are bound to follow these principles in asmuch as they accord with equity and justice of the case. (Vol 11) 1924 Pat 343 (344, 345) (DB).

[6] 'Legal representative' in section includes person entitled to represent deceased's interest by inheritance when for deceased's property no administration has been granted. (Vol 2) 1915 Bom 267 (268) : 40 Bom 341 (DB).

[7] Where debtors transferred all their properties to trustee for benefit of creditors, it was held that no resulting trust was created in favour of debtors and surplus moneys could not be sued for. (Vol 1) 1914 Sind 81 (82) : 8 Sind L R 132.

[8] Article 120, Limitation Act, governs an action under the section and time runs from the date when there was a failure of the purpose and the resulting trust thereupon arose. (Vol 25) 1938 Mad 641 (642, 643) (DB).

SECTION 84 — SYNOPSIS

1. Scope.
2. Transfer for an illegal purpose.
3. "And such purpose is not carried into execution."
4. "Transferor not as guilty as transferee."
5. Defeating provisions of law.
6. "Transferee to hold the property for the benefit of the transferor."
7. Fraudulent transfers.

1. Scope.—[1] Section 84 speaks of a case where a transfer has been effected for an unlawful purpose and the transferor claims that he nevertheless remains the beneficial owner of the property. Section 82 speaks of a case where *A* conveys property to *B* for consideration paid by *C* and states that *B* holds the property for the benefit of *C*. This is the distinction between S. 82 and S. 84. (Vol 23) 1936 Mad 165 (167) (DB).

2. Transfer for an illegal purpose.—[1] Lottery —Kurichit fund is lottery—Promoters of chit fund commit offences under S. 294-A, Penal Code—Money paid to stake-holder is held by him as trustee. (Vol 23) 1936 Mad 225 (227) : 59 Mad 562 (FB) ✠ (Vol 12) 1925 Mad 281 (283, 284) (DB).

[2] Agreement to transfer service inam when it would be enfranchised, is void and money received under it must be paid back. (Vol 12) 1925 Mad 885 (886).

3. "And such purpose is not carried into execution." — [1] The rule that a person in *pari delicto* cannot recover is applicable not only where the unlawful agreement has been fully carried out but also where there has been part performance of a substantial character of such agreement. This is the construction of the words "not carried into execution." ('06) 29 Mad 72 (74) (DB).

[2] To enable fraudulent confederate to retain property transferred to effect fraud, fraud must be carried into effect. Then alone fraudulent grantor loses right to recover property. (Vol 11) 1924 Oudh 321 (323) (DB).

[3] If fraudulent object is accomplished, though not entirely, transferee would not be disturbed — If it is continuous act, perpetrator can retract and revoke authority given to confederates. (Vol 16) 1929 Bom 147 (151) : 53 Bom 321 (DB).

[4] As long as an unlawful or void agreement remains unperformed any money paid under it may be recovered back as received to the use of the person who so paid it. (Vol 13) 1926 Lah 159 (160) (DB).

[5] Colourable transfer made with intention to defraud creditors can be set aside by transferor before fraud had taken place. (Vol 16) 1929 Pat 127 (129) (DB).

[6] Where mortgage was taken *benami* with tainted origin for plaintiff's benefit, but fraud was not effected, plaintiff can sue on mortgage. (Vol 5) 1918 Mad 148 (149) (DB).

[7] Partnership between defendant and plaintiff prior to excise bid — Plaintiff to supply funds to defendant and defendant to carry on business — Plaintiff to share profits—Profits earned—Suit by plaintiff for dissolution of partnership and accounts : *Held*, that the partnership was illegal and that neither under S. 84, Trusts Act, nor under S. 65, Contract Act, could the plaintiff recover the money advanced to the defendant. (Vol 31) 1944 Mad 415 (416).

4. Transferor not as guilty as transferee. — [1] Lottery — Kurichit fund is lottery — Promoters of chit funds commit offences under S. 294-A, Penal Code — Subscribers to lottery are not guilty of any offence — Doctrine of *pari delicto* is not applicable. (Vol 23) 1936 Mad 225 (227) : 59 Mad 562 (FB).

[2] Where, for the purpose of inducing the trustee of a public trust of national importance to defraud the trust, sums of money are paid by a person, it cannot be said that the person is not as guilty as the trustee. Such an agreement, being contrary to public policy, the Court will not order a refund of money paid under an arrangement which falls within this category. (Vol 26) 1939 Mad 31 (31) : I L R (1939) Mad 30 (DB).

Bequest for illegal purpose.

85. Where a testator bequeaths certain property upon trust and the purpose of the trust appears on the face of the will to be unlawful, or during the testator's lifetime the legatee agrees with him to apply the property for an unlawful purpose, the legatee must hold the property for the benefit of the testator's legal representative.

Bequest of which revocation is prevented by coercion.

Where property is bequeathed and the revocation of the bequest is prevented by coercion, the legatee must hold the property for the benefit of the testator's legal representative.

Transfer pursuant to rescindable contract.

86. Where property is transferred in pursuance of a contract which is liable to rescission or induced by fraud or mistake, the transferee must, on receiving notice to that effect, hold the property for the benefit of the transferor, subject to repayment by the latter of the consideration actually paid.

Debtor becoming creditor's representative.

87. Where a debtor becomes the executor or other legal representative of his creditor, he must hold the debt for the benefit of the persons interested therein.

Advantage gained by fiduciary.

88. Where a trustee, executor, partner, agent, director of a company, legal adviser, or other person bound in a fiduciary character to protect the interests of another person, by availing himself of his character, gains for himself any pecuniary advantage, or where any person so bound enters into any dealings under circumstances in which his own interests are, or may be, adverse to those of such other person and thereby gains for himself a pecuniary advantage, he must hold for the benefit of such other person the advantage so gained.

Section 84 *(contd.)*

5. Defeating provisions of law. — [1] The possession of property by a transferee under a transfer which has been adjudged to be fraudulent is similar to that of a trustee for the person from whom he takes the transfer under S. 84 of the Trusts Act. (Vol 31) 1944 Nag 37 (40) : I L R (1943) Nag 764 (DB).

6. Transferee to hold the property for the benefit of the transferor. — [1] Where the person who was for the time being in possession of a *Karnam* service inam expected that the same would be enfranchised in his name and agreed to transfer his interest in the property to the plaintiff when the event would take place. *Held*, that the agreement was void and forbidden by law. *Held*, further, that the plaintiff would be entitled to refund of the money advanced by him. (Vol 12) 1925 Mad 885 (886).

[2] Chit fund with arrangement for paying of prize every month by casting lot was held illegal as lottery — *Held* (by Krishnan J., Odgers J, *dissenting*.) that as the prize arrangement was severable from the rest of the contract, money paid could be sued for by way of refund. (Vol 12) 1925 Mad 281 (282, 284) (DB).

[3] Lottery — Kurichit fund is lottery — Promoters of chit fund commit offence under S. 294-A, Penal Code — Subscriber can claim refund of his subscription — Application of S. 84, Trusts Act — Promoters are personally liable. (Vol 23) 1936 Mad 225 (227) : 59 Mad 562 (FB).

7. Fraudulent transfers. — [1] Transferor is disentitled to set aside transfer for fraudulent purpose and to delay creditor. (Vol 3) 1916 Sind 22 (24) : 9 Sind L R 108 ✠ (Vol 16) 1929 Pat 127 (129) (DB).

[But see ('01) 5 Nag L R 146 (148). (The fact that a creditor of the defendant is actually defeated by a sale does not debar the defendant from pleading, in a suit for possession, that the conveyance was *benami* to defeat creditors.)]

[2] Any argument based on S. 84, Trusts Act, proceeds on the assumption that the document in question has been assailed or is liable to be assailed under S. 53, T. P. Act as executed with the intent to commit fraud. (Vol 28) 1941 Oudh 95 (97).

Section 86 — Note 1

[1] By S. 86, a transferee in possession under a voidable transfer must, on receipt of notice of rescission, hold the property for benefit of transferor, subject to repayment of consideration actually paid. (Vol 3) 1916 Mad 350 (353) : 38 Mad 321 (DB).

[2] Section 86, Trusts Act is in *pari materia* with Ss. 19 and 19-A, Contract Act and apparently relates only to the lifetime of the transferor. The legal representative of the transferor cannot take advantage of it. (Vol 5) 1918 Bom 93 (94) : 43 Bom 173 (DB).

Section 87 — Note 1

[1] A person mentioned in a will a debt due by *D* and provided that *D* and *K* should be the executors, after the death of his wife who would be the manager during her life-time: *Held*, that under S. 87, *D* would be a trustee for the sum due by him, and that the Common law doctrine would not apply for such a debt. But he would not thereby become an express trustee of the debt for a specific purpose unless it was so designated in the will. ('09) 11 Bom L R 1187 (1192) (DB).

SECTION 88 — SYNOPSIS

1. Scope.
2. Executor.
3. Partner.
4. Agent.
5. Director of company.
6. Legal adviser.
7. Other person bound in a fiduciary capacity
8. Gains any pecuniary advantage.
9. Adverse dealings.
10. Hold for the benefit of such person.
11. Reimbursement.

1. Scope.—[1] Except in cases otherwise provided by statute, a constructive trust can be held to arise only under S. 88 or S. 90 of the Act. (Vol 25) 1938 Mad 929 (935, 936).

[2] The Trusts Act applies only to Rangoon and does not apply to the Districts, but still the principles enunciated therein can be applied to cases coming from the districts. (Vol 22) 1935 Rang 44 (47, 48) (DB).

[3] Person entitled to profits difficult of ascertainment — Fixed rate of interest should be awarded on

Illustrations.

(a) *A*, an executor, buys at an undervalue from *B*, a legatee, his claim under the will. *B* is ignorant of the value of the bequest. *A* must hold for the benefit of *B* the difference between the price and value.

(b) *A*, a trustee, uses the trust-property for the purpose of his own business. *A* holds for the benefit of his beneficiary the profits arising from such user.

(c) *A*, a trustee, retires from his trust in consideration of his successor paying him a sum of money. *A* holds such money for the benefit of his beneficiary.

(d) *A*, a partner, buys land in his own name with funds belonging to the partnership. *A* holds such land for the benefit of the partnership.

(e) *A*, a partner, employed on behalf of himself and his co-partners in negotiating the terms of a lease, clandestinely stipulates with the lessor for payment to himself of a lakh of rupees. *A* holds the lakh for the benefit of the partnership.

(f) *A* and *B* are partners. *A* dies. *B*, instead of winding up the affairs of the partnership, retains all the assets in the business. *B* must account to *A*'s legal representative for the profits arising from *A*'s share of the capital.

(g) *A*, an agent employed to obtain a lease for *B*, obtains the lease for himself. *A* holds the lease for the benefit of *B*.

(h) *A*, a guardian, buys up for himself incumbrances on his ward *B*'s estate at an undervalue. *A* holds for the benefit of *B* the incumbrances so bought, and can only charge him with what he has actually paid.

Section 88 — Note 1 *(contd.)*

value of property — Court may decree profits on fixed interest which need not be current rate. (Vol 16) 1929 Oudh 134 (145) (DB).

[4] The terms of Ss. 88 and 90 are not exhaustive only in the sense that if a person cannot be brought within these sections, and held liable as a trustee, he must be found to fall under the residuary section *i. e.*, S. 94. In other words, where no trust has been declared, a person would not be accountable as a trustee until obligations are found to have been created which are in the nature of a trust and under which he may be held to be, what is termed in English law, a constructive trustee. (Vol 27) 1940 Mad 779 (781, 782).

2. Executor. — [1] A person mentioned in a will a debt due by *D* and provided that *D* and *K* would be the executors after the death of his wife who would manage the estate during her lifetime : *Held*, *D* would be a trustee for the sum due but not an express trustee of the debt for a specific purpose, unless that was so designated in the will. ('09) 11 Bom L R 1187 (1192) (DB).

3. Partner. — [1] Where partner retains and uses for his business the partnership fund after the death of a partner, he is bound to render accounts of profits (Vol 18) 1931 All 327 (329) : 53 All 479 (DB).

[2] It is not without significance that illus. (d) and (e) to S. 88 refer only to cases where the partner uses funds belonging to the partnership or clandestinely stipulates for a personal benefit in a transaction negotiated by him on behalf of himself and his co-partners. In the circumstances existing in this country, it is difficult to say that a general presumption, that in obtaining the renewal of a lease, the partner 'availed himself of his character' or of the advantage of the old lease will be justified in cases where the lease is not renewable by contract or custom. (Vol 25) 1938 Mad 929 (935, 936) (DB).

[3] The retiring partner can, in the absence of an agreement to the contrary, claim not only interest but at his option either a share of the profits of the business which was continued with his assets or interest on the amount of his share of the partnership assets. (Vol 16) 1929 Mad 456 (457, 458) : 52 Mad 672 (DB).

4. Agent. — [1] Principal is entitled to pecuniary advantage received by agent having adverse interest to those of principal. (Vol 3) 1916 Mad 1133 (1136) (DB).

[2] If attorney or agent entitled to purchase, buys property not openly but in name of his wife by concealing fact, purchase cannot stand. (Vol 11) 1924 P C 34 (35, 36) : 51 Ind App 24 : 51 Cal 299 (P C).

5. Director of company. — [1] Where company with limited liability undertakes to sell shares of shareholder, position of Managing Director is one of fiduciary character. (Vol 17) 1930 All 615 (616) (DB).

[2] Payment of money to insurance company for revival of policy — Company going into liquidation before policy revived — Receipt of money by company is not in fiduciary capacity and no question of trust arises. (Vol 29) 1942 Mad 210 (211).

6. Legal adviser. — [1] Pleader and client — Pleader purchasing client's property in execution sale in his wife's name after his ceasing to be client's pleader—Sale is vitiated owing to concealment. (Vol 11) 1924 P C 34 (35, 36) : 51 Ind App 24 : 51 Cal 299 (PC).

[2] Pleader who has not obtained advantage over clients by using his confidential position is not trustee for his client. (Vol 18) 1931 Cal 144 (150, 151) (DB).

[3] Where pleader has not obtained advantage over his clients by using his confidential position he does not become trustee within meaning of section. (Vol 18) 1931 Cal 144 (150, 151) (DB).

7. Other person bound in a fiduciary capacity. — [1] Assignment for benefit of creditors under Ontario statute (R. S. Ont. 1897 C. 147) — Property vesting in assignee—Inspector appointed under the Act under obligation to see assets were properly realised and to keep watch on assignee—Inspector's position is fiduciary. (Vol 7) 1920 P C 152 (157) (P C).

[2] Hindu joint family owned Abkari business. Family became divided and partition suit was brought, and receivers were appointed for getting in all assets and for winding up. Receivers applied for renewal of Abkari contract and members of family sought to compete with them in getting contract for themselves and receiver applied for injunction restraining them from competing—Members of family could not compete with receiver against interest of family. (Vol 12) 1925 Mad 137 (138) (DB).

[3] Muhammadan trader dying leaving two major sons, widow and some minor sons and daughters—Major sons continuing trade as family trade for benefit of family—Sections 23 *(f)* and 88 apply and eldest son is bound to hold for other members of family any advantage he had gained by utilizing shares of others for his advantage. (Vol 18) 1931 Mad 553 (558) : 54 Mad 543 (DB).

[4] A guardian stands in a fiduciary relation to his ward. Where a father who gave property to his son by

Section 88 — Note 7 *(contd.)*

a deed of gift, subsequently transfers it to another person by registered deed and the transferee has knowledge of the facts, he becomes a constructive trustee having obtained it from a person in a fiduciary position. (Vol 23) 1936 P C 259 (264) (P C).

[5] Superintendent of the State of disqualified Ruling Chief is in fiduciary position towards Political Agent. If he gains any property for himself by concealing fact, he will be affected by S. 88. (Vol 17) 1930 Pat 357 (366) (DB).

[6] *A* realising outstandings of his deceased brother under advice and control of another brother *B* : *Held*, *A* and *B* were both in fiduciary relationship. (Vol 14) 1927 Bom 75 (77) (DB).

[7] Person purchased land from funds jointly belonging to him and others — Purchase enures to benefit of all entitled to share in fund. Others are entitled to share in property on paying proportionate share of costs. (Vol 17) 1930 All 631 (634) : 52 All 954 (DB).

[8] Muhammadan co-heirs—One continuing business and taking minor co-heir under his guardianship—Suit by minor for share of profit : *Held*, co-heirs were in fiduciary position of trustees for daughter. Fact that they were co-owners of estate did not affect their liability as guardians, and daughter was entitled to her share of profits after death of her father. (Vol 26) 1939 Mad 313 (315, 316) (DB).

[9] Person to be held liable must be in fiduciary position to protect interests of another. There is no such relation between co-owners under Muhammadan law. (Vol 12) 1925 Mad 1149 (1151).

[10] Widow could not be said to be a person holding any fiduciary character and of such a nature as to be bound to protect the interest of the creditor of her deceased husband and S. 88, Trusts Act, did not apply. (Vol 27) 1940 Mad 719 (721, 722).

[11] Mortgagee purchasing property in execution of his decree cannot escape liability to be redeemed if his conduct amounts to fraud. If he buys by permission of Court under circumstances not amounting to fraud mortgagor cannot redeem. ('09) 3 Sind L R 17 (25, 26) (DB).

[12] A mortgagee is not a trustee of the power of sale. It is a power given to him for his own benefit, to enable him the better to realize his mortgage debt. If he exercises it *bona fide* for that purpose, without corruption or collusion with the purchaser, the Court will not interfere, even though the sale be very disadvantageous, unless indeed, the price is so low as in itself to be evidence of fraud. ('11) 13 Ind Cas 261 (264) : 10 Mad L Tim 554 (P C).

[13] A co-sharer in the tenure was held not to come within the language of S. 88, as a person bound in a fiduciary character to protect the interest of the other co-sharer. (Vol25) 1938 Cal 500 (502): I L R (1938) 2 Cal 266.

[14] Judgment-debtor's father and uncle had separated—Execution of decree—Uncle buying property in execution sale—Uncle is not in fiduciary position and not prevented from buying—He is not bound to reconvey it on payment of price. (Vol 16) 1929 Pat 585 (586) (DB).

[15] Mother guardian *ad litem* of her son, purchased portion of trust property sold in execution of decree, passed against estate with her own money. Son cannot recover property from his mother and in equity do so only on reimbursing to his mother purchase-money. (Vol 15) 1928 Mad 180 (184, 185) : 51 Mad 291 (DB).

[16] There is no fiduciary relationship between co-heirs or co-owners under the Muhammadan law, as such, but it can be spelled out in the case of a minor living with the other co-sharers under their care and they claim to be legal guardians. ('47) 1947 Mad W N 282 (287, 288).

8. Gains any pecuniary advantage. — [1] The Superintendent of the State of a disqualified Ruling Chief is in a fiduciary position towards the Political Agent who represents the Chief, and his duty as Superintendent is to do his best in the interests of the State. If, therefore, he gains any property for himself by representations to the Political Agent concealing the fact that he is gaining it for himself he will be affected by the provisions of S. 88. (Vol 17) 1930 Pat 357 (366) (DB).

[2] There is ordinarily no fiduciary relation between tenants in common so as to impose an obligation on one co-owner to protect the interest of the other co-owners. Nor can S. 90, Trusts Act, apply unless one co-owner is placed in such a relation to another by the act or consent of another, that he becomes interested for him and with him in any subject of property or business and being in that position, he, acting for himself or as representing another, gains an advantage in derogation of another's rights. 'The basic principle however depends upon whether any duty is owed by the person who obtains the advantage of making over the advantage or sharing that advantage with others". (Vol 30) 1943 Nag 302 (306) : I L R (1943) Nag 658.

9. Adverse dealings. — [1] Trustee acquiring property as such is not allowed to assert adverse title on his own behalf until he obtains proper discharge from entrusted trust. ('11) 34 Mad 257 (265) : 38 Ind App 129 (P C).

[2] Principal is entitled to pecuniary advantage received by agent having adverse interests to those of principal. (Vol 3) 1916 Mad 1133 (1136) (DB).

[3] The defendants-respondents took over the management of the estate of *M* soon after his death and obtained a new contract from Government : *Held* that even assuming that they had obtained a renewal of the contract in personal capacity it would be clearly contrary to public policy to allow them to retain the benefit for themselves. (Vol 22) 1935 Rang 44 (47, 48) (DB).

[4] Per *Mullick and Foster, JJ.* — A trustee who relies on abandonment of the trust by the beneficiary and acquires property by his own exertions need not hold it as a trustee but may hold it for his own benefit. (Vol 12) 1925 Pat 68 (98) (F B).

[5] Trustee cannot bring suit in personal capacity in derogation of trust. (Vol 13) 1926 Mad 367 (367).

[6] A trustee for sale is entirely disabled from purchasing the trust property directly or indirectly. A trustee for purposes other than for sale cannot purchase the property where the purchase would conflict with his duty respecting it or his position in regard to it. Where a decree has been obtained against a *shebait* as a representative of the *debutter* estate, he is not competent, without leave of Court, to purchase the *debutter* property in his personal capacity. Where there is no misconduct on the part of the execution creditor the property reverts to the *debutter* estate, in case of purchase by the *shebait* without such leave, and the surplus sale proceeds should be returned to the *shebait*. (Vol 7) 1920 Cal 210 (217, 218) (D B).

10. Hold for the benefit of such person. — [1] Where there is a fund belonging jointly to several persons and one of these persons makes a purchase of land with that fund that purchase enures to the benefit of all the persons entitled to share in the fund. (Vol 17) 1930 All 631 (634) (D B).

89. Where, by the exercise of undue influence, any advantage is gained in derogation of the interests of another, the person gaining such advantage without consideration, or with notice that such influence has been exercised, must hold the advantage for the benefit of the person whose interests have been so prejudiced.

Advantage gained by exercise of undue influence.

Section 88 — Note 10 *(contd.)*

[2] There is no more certain way of taking advantage than the way of concealment, and if an attorney or agent can show he is entitled to purchase, yet if instead of openly purchasing he purchases in the name of a trustee or agent without disclosing the fact, no such purchase as that can stand for a single moment and the advantage he has acquired by concealing the name of the real purchaser must be given up. Even where the Trusts Act does not apply the above principles hold good. (Vol 11) 1924 P C 34 (34, 35) : 51 Cal 299: 51 Ind App 24 (P C).

[3] Muhammadan trader dying leaving two major sons, widow, and some minor sons and daughters — Major sons continuing trade as family trade for benefit of family. Eldest son is bound to hold for the other members of the family any advantage he had gained by utilising shares of others for his own pecuniary advantage. (Vol 18) 1931 Mad 552 (558).

[4] Trustee purchased mortgage bond which contained part of trust property when other trustees failed to arrive at conclusion on date of sale—*Held*, that purchase by trustee was for benefit of trust. ('12) 34 All. 306 (314) (D B).

[5] Trustee for sale is disabled from purchasing trust property directly or indirectly — Trustee for other purposes cannot purchase, where it would conflict with his duty—Where decree has been obtained against shebait, he as representative of debutter estate cannot without leave of Court purchase debutter property without leave of Court. When there is no misconduct of execution creditor, property reverts to debutter estate in case of purchase by shebait without leave and surplus sale proceeds should be returned to him. (Vol 7) 1920 Cal 210 (217, 218) (D B).

[6] Trustee who relies on abandonment of trust by beneficiary and acquires property by his own exertions, may hold it for his own benefit. (Vol 12) 1925 Pat 68 (98) (F B).

[7] The defendants-respondents took over the management of the estate of *M* soon after his death, and later when they had obtained letters, carried on its administration and obtained a new contract from Government:

Held, that they occupied a fiduciary position when they obtained a new contract from Government and the new agreement must be treated as a graft or addition to the estate of *M*. (Vol 22) 1935 Rang 44 (47, 48) (DB).

[8] Pleader who has not obtained any advantage over his clients by using his confidential position, does not become trustee within meaning of section. (Vol 18) 1931 Cal 144 (150, 151) (D B).

[9] A person in a fiduciary relation procuring a conveyance by taking advantage of his relationship must restore all advantage so gained for the benefit of the other. (Vol 19) 1932 P C 89 (91) : 7 Luck 64 : 59 Ind App 147 (P C).

[10] Plaintiff and her sister sold their land for an inadequate price to their uncle the defendant with whom they were living after the death of their parents. The plaintiff after the death of her sister sued to have the sale-deed cancelled as having been executed through undue influence and to recover possession of the lands. *Held*, that the case fell within the scope of S. 88 of the Act and that the sale deed was void as regards the plaintiff's share and that of her deceased sister. (Vol 5) 1918 Bom 93 (94, 95) : 43 Bom 173 (DB).

[11] The resumption of an inam and the levy of full assessment on the trustee for failure to fulfil the condition of the trust does not amount to a re-grant to the trustee, or extinguish the trust originally created. The advantage gained by the trustee enures for the benefit of the trust. (Vol 6) 1919 Mad 515 (522, 524) : 42 Mad 161 (DB).

[12] Where a company with a limited liability undertakes to sell the shares belonging to one of its share-holders, the position of its Managing Director in negotiating and completing the sale is clearly one of a fiduciary character. Utmost good faith should be expected and should be insisted upon in transactions of this description. If any advantage was obtained by the Managing Director as the fruit of the sale, whether the purchase was made in his name, or in the name of his minor sons, the benefit must go to the owner of the shares. (Vol 17) 1930 All 615 (616) (DB).

[13] Property ceasing to be trust property—Person subsequently becoming trustee, can purchase it if it has become absolute property of another by adverse possession. (Vol 29) 1942 Mad 317 (318).

[14] Under S. 88, a trustee is bound to hold the property on behalf of the trust and cannot therefore bring a suit in his personal capacity in derogation of the trust, but if he is in possession of the trust property he can out of it recoup himself what he has spent for the benefit of the trust. (Vol 13) 1926 Mad 367 (367).

11. Reimbursement. — [1] Where mother acting as guardian *ad litem* of her son whose estate was held by a trustee for him purchased a portion of trust property sold in execution of decree passed against the estate with her own money—*Held*, that the son is not entitled to recover possession of that property from his mother and in any case he could in equity do so only on reimbursing to his mother the purchase money which had gone to the benefit of his estate. (Vol 15) 1928 Mad 180 (188) (DB).

[2] Illustration (f) goes further than operative portion of section itself and does not enunciate good law (Vol 4) 1917 Mad 71 (76) (DB).

[3] If a trustee is in possession of trust property he can recoup himself the amounts spent for benefit of trust. (Vol 13) 1926 Mad 367 (367).

[4] A person purchased land from funds jointly belonging to him and others—Purchase enures to the benefit of all entitled to share in the fund. Others are entitled to share in property on paying proportionate share of costs. (Vol 17) 1930 All 631 (634) : 52 All 954 (D B).

Section 89 — Note 1

[1] The principles of English cases have been adopted by the Indian Legislature in enacting S. 89. (Vol 22) 1935 Mad 726 (731) : 58 Mad 454 (DB).

[2] The true owner cannot claim the restitution of a fraudulent advantage gained by a person in adverse possession because the person in such possession is not "under a duty to speak" as Ss. 89 and 90 contemplate only persons under some fiduciary relationship to the true owner. (Vol 4) 1917 Mad 228 (231): 39 Mad 959 (DB).

[3] Effect of section is to invalidate gifts even if donees were not themselves in position of real or apparent authority provided they had notice that undue influence had been used. (Vol 25) 1938 Bom 97 (99, 100) (DB).

[4] Parties standing as to give rise to confidence between them—Party in fiduciary relationship exercis-

90. Where a tenant for life, co-owner, mortgagee or other qualified owner of any property by availing himself of his position as such, gains an advantage in derogation of the rights of the other persons interested in the property, or where any such owner, as representing all persons interested in such property, gains any advantage, he must hold, for the benefit of all persons so interested, the advantage so gained, but subject to repayment by such persons of their due share of the expenses properly incurred, and to an indemnity by the same persons against liabilities properly contracted, in gaining such advantage.

Advantage gained by qualified owner.

Illustrations.

(a) *A*, the tenant for life of leasehold property, renews the lease in his own name and for his own benefit. *A* holds the renewed lease for the benefit of all those interested in the old lease.

(b) A village belongs to a Hindu family. *A*, one of its members, pays nazrana to Government and thereby procures his name to be entered as the inamdar of the village. *A* holds the village for the benefit of himself and the other members.

(c) *A* mortgages land to *B*, who enters into possession. *B* allows the Government revenue to fall into arrear with a view to the land being put up for sale and his becoming himself the purchaser of it. The land is accordingly sold to *B*. Subject to the repayment of the amount due on the mortgage and of his expenses properly incurred as mortgagee, *B* holds the land for the benefit of *A*.

Section 89 — Note 1 *(contd.)*

ing undue influence over other—Third person deriving benefit of such exercise with knowledge of such relationship — He cannot retain benefit so received. (Vol 27) 1940 Mad 285 (289, 290) (DB).

SECTION 90 — SYNOPSIS

1. Scope.
2. Co-owner.
3. Mortgagee.
4. "Other qualified owner."
4a. "Person interested."
5. Illustration (a).
6. "Gains an advantage in derogation."
7. "Must hold for the benefit of all persons interested."
8. Representative capacity.
9. Co-sharer.
10. Purchase by mortgagee.
11. Lease-renewal.
12. Repayment of expenses.
13. Other illustrative cases.

1. Scope. — [1] The right recognised by S. 90 of the Trusts Act is not a vested right enforceable unconditionally by a decree for joint possession but depends on the nature of the property and the equities, arising from the conduct of the properties. When there is uncertainty in the property, the person must be active in the prosecution of his rights and should not sleep over them. ('10) 6 Nag L R 12 (15).

[2] The terms of Ss. 88 and 90 are not exhaustive only in the sense that if a person cannot be brought within these sections and held liable as a trustee, he must be found to fall under the residuary section i. e., S. 94, i. e., where no trust has been declared, a person would not be accountable as a trustee until obligations are found to have been created which are in the nature of a trust and under which he may be held to be, what is called in English law as a constructive trustee. (Vol 27) 1940 Mad 779 (781, 782).

[3] This section has no application to re-grant on new tenure of property forfeited for non-payment of assessment under S. 56 of the Bombay Land Revenue Code. A clear provision of special statute overrides the section. ('13) 37 Bom 692 (698, 699) (DB).

[4] Section does not invalidate purchase by mortgagee in contravention of O. 34, R. 14, Civil P. C. ('12) 15 Ind Cas 589 (592) (DB) (Mad).

[5] Tenants in common—Sons becoming tenants in common — One of the sons on termination of original lease obtaining renewal for himself and not for anybody or as anybody's heir — After his death, his sons obtaining land on occupancy tenure by paying occupancy price—Sons are not trustees of such land for benefit of family—Section does not apply. (Vol 25) 1938 Bom 250 (252).

[6] Money deposited in Court in *usum jus habentis* and withdrawn by person not entitled to it may properly be held to be received for person entitled to it. ('11) 33 All 450 (452) (DB).

[7] Where the equity of redemption was sold in execution of a decree for money upon a claim independent of the mortgage, it cannot be said that the purchaser holds the property as trustee for the mortgagors. (Vol 10) 1923 Cal 121 (129) (DB).

2. Co-owner.—[1] Person inheriting property as heirs from a common ancestor are deemed as co-sharers and possession of one is deemed to be the possession of the other. (Vol 16) 1929 Oudh 521(523): 4 Luck 261.

[2] A relationship of mutual confidence exists between co-sharers in a joint estate. ('11) 15 Cal W N 776 (780) (D B).

[3] It is not correct to say that, as between co-sharers, a relation of fiduciary character does not exist, and if any co-sharer has acted fraudulently in allowing a default in the payment of revenue and purchasing the properties himself at the revenue sale the other co-sharers are entitled to a re-conveyance on paying to him a share of the purchase money proportionate to their share. ('13) 18 Cal L Jour 97 (107, 108) (D B).

[4] Co-owners—Auction sale for default of payment of land revenue — Purchase by one co owner — Section 90, has no application in absence of suggestion that default was due to machinations on part of purchaser. There is ordinarily no fiduciary relation between tenants-in-common so as to impose an obligation on one co-owner to protect the interest of the other co-owners. (Vol 30) 1943 Nag 302 (306) : I L R (1943) Nag 658.

[5] Though co-heirs of a deceased Muhammadan are tenants-in-common and a co-tenant does not stand in a fiduciary relation to the other co-tenants, a co-heir may, by his dealings with the shares of the others, put himself in a fiduciary relationship. (Vol 21) 1934 Mad 686 (687).

[6] Advantage taken by co-sharer at revenue sale is not by itself ground to give other co-sharers right to reconveyance. (Vol 6) 1919 Cal 431 (432) (D B).

[7] Co-sharer procures default of payment of revenue with a view to purchase it for himself—His liability to reconvey to the owner does not depend on his being directly liable to pay the revenue. (Vol 19) 1932 Cal 434 (434) : 69 Cal 180 (D B).

[8] False statements that other co-owner abandoned claim, made — Occupancy rights acquired by such misrepresentations — Co-owner is within the provisions of S. 90. (Vol 21) 1934 Bom 219 (222) (D B).

Section 90 — Note 2 *(contd.)*

[9] There may be circumstance on grounds of public policy where section should apply to co-owner as for instance where revenue sale is caused by default of co-owner and property is purchased by very co-owner. '13) 18 Cal L Jour 111 (118) (D B).

[10] Winding up of business owned by some persons —Members not allowed to compete so as to interfere with successful winding up—Members of Hindu family not allowed to compete with the receivers appointed to wind up joint family business. (Vol 12) 1925 Mad 137 138) (D B).

[11] *A*, 2-anna co-sharer and mortgagee with possession of 14 annas of village—*A* ejecting tenants from certain plots with consent of mortgagors and cultivating himself and acquiring tenancy rights — Subsequent mortgage of 14-anna share with possession to *B* — *B* redeeming *A*'s mortgage and claiming joint possession of plots—Held whatever rights got in the plots in question were obtained by him in his capacity as motgagee and as owner of a two-anna share and those rights were for the benefit of all the co-sharers of the sixteen anna share in the village and the subsequent mortgagee was entitled to joint possession. (Vol 24) 1937 All 321 (324, 326) (D B).

[12] One of two co-owners of debt obtaining document in his own name in derogation of rights of other holds it for benefit of other also under S. 90 of the Act. (Vol 2) 1915 Mad 129 (130) (D B).

[13] Plaintiff and defendant owned separate plots under joint patta and for default in paying revenue, plaintiff's land was sold in auction and defendant purchased it. Plaintiff claimed benefit of purchase by defendant. In absence of defendant's fraudulent conduct causing property to be sold, plaintiff was not entitled to benefit as plaintiff and defendant were not co-owners. (Vol 12) 1925 Mad 288 (289).

[14] Occupancy rights in *mauza* were acquired by mortgagees of co-sharer who were also co-sharers with him in *mauza* for their own benefit:

Held, to give mortgagor any claim to them it was incumbent on him to show that they were acquired under circumstances which bring them within this section (Vol 19) 1932 P C 199 (201) : 59 Ind App 366 (P C).

[15] Where a member of a joint Hindu family holds a property on behalf of the joint family and subsequently a grant is given to him by the Govt. of that property, he holds the property even after the grant on behalf of the family and if this constitutes a trust, that trust is discharged when the other members who claim a share in the property subsequently accept a *guzara*. (Vol 26) 1939 Oudh 17 (27).

[16] A person who obtains a decree for his brother as well as himself cannot plead that he alone should benefit because his name alone is entered in it. Such a person must be regarded as a trustee for his brother. (Vol 30) 1943 Oudh 177 (180, 181) : 18 Luck 439 (D B).

[17] Renewal of lease for 30 years in favour of one of the heirs of original lessees—Other heir is entitled to participate in profits, notwithstanding Government's refusal to associate him in benefit. (Vol 12) 1925 Oudh 200 (201) : 27 Oudh Cas 281.

[18] Section 90 does not apply unless one co-owner is placed in such a relation to another by the act or consent of another that he becomes interested for him and with him in any subject of property or business and being in that position he, acting for himself or as representing another gains an advantage in derogation of another's rights. (Vol 30) 1943 Nag 302 (306) : ILR (1943) Nag 658.

[19] Assignment by Mahomedan mother of mortgage in favour of minor daughter and herself—Assignment void as regards the interest of daughter—Realisation of full mortgage amount by assignee — Suit by minor daughter —*Held* the assignee is a co-sharer with minor daughter in respect of mortgage-debt and he is liable under this section. (Vol 20) 1933 Mad 806 (814).

[20] Separate possession of common land by one of co-sharers without objectiom by others is not in derogation of rights of the co-sharers within. S. 90. The remedy is by partition and to obtain compensation (Vol 21) 1934 All 193 (196) : 56 All 582 (D B).

3. Mortgagee.— [1] A mortgagee is in the position of a trustee and cannot grant leases or make other dispositions of the mortgaged property in his own favour and of such a kind as to give rise to a possible conflict between his interest and duty. ('10) 7 Mad L Tim 148 (150) (DB).

[2] Mortgagee allows mortgaged property to be sold in consequence of his default and purchases it benami, cannot resist redemption by mortgagor. (Vol 3) 1916 Bom 108 (109) : 40 Bom 483 (DB) ✠ (Vol 5) 1918 Cal 192 (193) (DB).

[But see (Vol 3) 1916 Bom 61 (63) : 41 Bom 357 (DB). (Mortgagee purchasing equity of redemption in execution of money decree cannot be held to have gained undue advantage over mortgagor.)✠(Vol 10) 1923 Cal 121 (129) (DB). (Sale of equity of redemption in execution of money decree independent of mortgage—Purchaser does not hold property as trustee for mortgagors.)]

[3] Mortgage — Revenue sale of mortgaged property — Mortgagor purchasing it benami—Subsequent mortgage sale: *Held*, sale under mortgage-decree was valid and conveyed full title to plaintiff as mortgagor bought property only in benami at revenue sale. (Vol 2) 1915 Mad 760 (761, 762) (DB).

[4] Where a mortgagee had three mortgages on the same property and brought a suit upon the last mortgage alone and purchased the property in court auction subject to his prior mortgage, he cannot by his failure to sue on all the mortgages be said to have gained an advantage within the meaning of S. 90 so as to hold the equity of redemption in trust for the mortgagor's sons. (Vol 2) 1915 Mad 288 (292, 293) (DB).

[5] Minor was mortgagee of a separately owned share of property. Agents of mortgagee intentionally made default in paying revenue, for which he was responsible, to have the whole property sold for arrears and purchased for mortgagee. Co-sharers with mortgagor never knew of default or consequent sale. Purchaser was a trustee for all the co-sharers. (Vol 3) 1916 P C 227 (229) : 44 Cal 573 : 44 Ind App 30 (PC).

4. "Other qualified owner." — [1] Accretions made by a Hindu widow to her husband's estate partake of the nature of that estate. It is of little moment whether this rule of law is one of Hindu law or is based on S. 90 of Trusts Act. (Vol 13) 1926 Oudh 277 (278) : 1 Luck 98 (DB).

[2] A lessee is a qualified owner of the property inasmuch as he exercises the power of the landlord during the continuance of his lease and can give his consent to transfers and therefore, if he gains any advantage in derogation of the interest of the superior landlord, he holds that advantage for the benefit of the latter. (Vol 22) 1935 Pat 360 (364) (DB).

[3] Crown grant for thirty years transferred by grantee — Grant renewed in transferee's favour after period of 30 years — Transfer cannot claim grantee's interest. (Vol 8) 1921 P C 135 (136) (PC).

[4] A Hindu widow is not a qualified owner or a tenant for life in the sense in which these expressions have been used in the section. (Vol 27) 1940 Mad 719 (721, 722).

Section 90 *(contd.)*

4a. "Person interested."—[1] "Person interested" do not cover the creditors of the widow's deceased husband. (Vol 27) 1940 Mad 719 (721, 722).

5. Illustration (a).—[1] As regards *renewals* obtained by a tenant for life, Illustration (a) to S. 90 provides in unqualified terms that the person so renewing "holds the renewed lease for the benefit of all those interested in the old lease." Except in the cases otherwise specially provided for by statute, a constructive trust can be held to arise only under Ss. 88 and 90. (Vol 25) 1938 Mad 929 (935, 937) ✠ (Vol 12) 1925 Oudh 200 (201) : 27 Oudh Cas 281.

6. "Gains an advantage in derogation."—[1] Before the benefit of S. 90 of the Trusts Act can be demanded, it must be shown that (1) the party against whom relief is sought availed himself of his position, (2) he gained an advantage by so doing, and (3) the advantage was gained in derogation of the rights of the person interested in the property. (Vol 30) 1943 Mad 202 (204, 205, 206) : I L R (1943) Mad 418 (DB).

[2] There may be circumstances on grounds of public policy that a co-owner should hold advantage obtained by him in derogation of the rights of others for their benefit as well as his own, as for instance where a revenue sale is caused by the default of co-owner, and the property is purchased at the sale by the very co-owner. ('13) 17 Cal W N 1233 (1239) (DB).

[3] If a co-sharer procures default of payment of revenue with a view to purchase it for himself his liability to reconvey to the owners does not depend on his being directly liable to pay the revenue. (Vol 19) 1932 Cal 434 (434) : 59 Cal 180 (DB),

[4] Land granted to one of several co-owners under Bombay Land Revenue Code, after amendment, is granted individually. If another co-owner wishes to take advantage under section, he must prove that former had gained advantage in derogation of other co-owner's rights. (Vol 16) 1929 Sind 212 (215) : 23 Sind L R 461 (DB) ✠ (Vol 18) 1931 Sind 27 (27, 28) (DB).

[5] A co-sharer who deliberately makes default in paying his share of Government revenue with a view to purchase the estate himself when brought to sale for the arrears cannot be held to have practised fraud upon the other co-sharers when he has done nothing to mislead the latter or to keep from their knowledge the fact, that the estate was to be sold. ('13) 20 Ind Cas 317 (318) (DB) (Cal).

[6] False statements, that other co-owner abandoned claim, made—Occupancy rights acquired by such misrepresentations — Co-owner comes within purview of Section. (Vol 21) 1934 Bom 219 (222) (DB).

[7] Co-owner taking action against another co-owner for breach of trust must prove that co-owner had gained advantage in derogation of his right. (Vol 16) 1929 Sind 212 (215) : 23 Sind L R 461 (DB).

[8] Separate possession of common land by one of co-sharers without objection by others is not in derogation of rights of the co-sharers within S. 90. The remedy is by partition and to obtain compensation. (Vol 21) 1934 All 193 (196) : 56 All 582 (DB).

[9] Where lease is given to and accepted by person in representative capacity gains an advantage for himself he must under section hold advantage as trustee for benefit of all. (Vol 1) 1914 Nag 48 (51) : 10 Nag L R 64 (DB).

[10] The mere fact that the purchaser of an estate at a revenue sale is one of the co-sharers who did not pay his share of the revenue is not in itself sufficient to give the other co-sharer equity to obtain a reconveyance of their shares from their purchaser on their paying to him of their proportion the expenses which he had incurred. To support a claim to this equity there must be something unfair, something amounting at least to sharp practice in the conduct of the purchaser. (Vol 6) 1919 Cal 431 (432) (DB).

[11] Principle that advantage by agent gained behind back of principal should be for principal does not apply where lease of land was given by landlord to defendant who allowed plaintiff to live upon it and pay rent due and plaintiff obtained intermediate lease from landlord. ('09) 1 Ind Cas 66 (68) (DB) (Cal).

[12] Subsequent usufructuary mortgagee required under the mortgage to pay off prior mortgagee and maintenance to third person—Prior mortgage not paid off—Decree for sale on prior mortgage—Subsequent mortgagee purchasing property in execution sale—Subsequent mortgage held not extinguished and his liabilities under it continued and that the subsequent mortgagee refrained from paying off the prior mortgage with a view to gaining an advantage by the purchase of the property at the execution sale. (Vol 34) 1947 Mad 202 (211) (DB).

[13] One of two co-owners of a debt obtaining document in his own name in derogation of the rights of other holds it for the benefit of the other also under the section. The latter is entitled to a declaration to that effect. (Vol 2) 1915 Mad 129 (130) (DB).

[14] A mortgagee who purchases the equity of redemption in execution of a simple money decree against the mortgagor cannot be deemed to be a person who avails himself of his position to gain an undue advantage of the mortgagor. (Vol 1) 1914 Bom 61 (63) : 41 Bom 357 (DB).

7. "Must hold for the benefit of all persons interested."— [1] Where the acquisition of a benefit depends upon the holding of certain position and that position is, in reality, held, not by one but by several persons and yet only one of these several persons comes to acquire that benefit through holding that position, the person acquiring the benefit may be held to be a constructive trustee for those several persons. (Vol 19) 1932 Bom 240 (241).

[2] Heirs of common ancestor inheriting his property are co-sharers. If one, in possession of entire property, derives advantage by virtue of such possession, he cannot appropriate it exclusively to himself. He cannot therefore resist claim for partition by other co-sharers. (Vol 16) 1929 Oudh 521 (523) : 4 Luck 261.

[3] The words "person interested" in S. 90 cannot be held to apply to the case of a Hindu reversioner. Such a reversioner has no vested interest in the estate which is in the possession of a widow. (Vol 8) 1921 All 11 (12) : 43 All 374 (FB).

[4] Where a lease of land for building a *bashabari* in a town was given by the landlord to the defendant who allowed the plaintiff to live on the land and work for the defendant as *mukhtear* and pay the rent due to the landlord and the plaintiff obtained and intermediate lease of the land from the landlord: *Held*, that the principle that a confidential agent is not entitled to take the lease behind the back of the principal and that if he takes it, he must be regarded as a trustee for the principal, did not apply to the present case. ('09) 1 Ind Cas 66 (68) (DB) (Cal).

8. Representative capacity. — [1] Plaintiff and defendant co-owners of 1/5th and 4/5th portions of property — Plaintiff leasing his portion to defendant who becoming *pattadar* of property — Defendant getting two *darkhast* grants of adjacent lands—Plaintiff not entitled to partition — No presumption that grant was in representative capacity. ('36) 1936 Mad W N 984 (984).)

[2] Declaratory suit to set aside an alienation by father by reversioner in representative capacity—Rever-

Property acquired with notice of existing contract.

91. Where a person acquires property with notice that another person has entered into an existing contract affecting that property, of

Section 90 — Note 8 *(contd.)*

sioner allowing suit to be dismissed and acquiring property for himself for valuable consideration—The fact that he sells off half of land in suit and out of sale proceeds besides paying off original vendee, saves money for himself does not attract the application of S. 90. (Vol 25) 1938 Lah 305 (306) (DB).

9. Co-sharer.—[1] Co-sharers — Sale for arrears of revenue — Purchase by mortgagee of share — Intentional default — Purchaser was a trustee for all the co-sharers. (Vol 3) 1916 P C 227 (229) : 44 Ind App 30 : 44 Cal 573 (PC).

[2] Where revenue sale was collusive, purchase prearranged, parties decided to utilize revenue laws for accomplishment of fraudulent object, and to cause injury to proprietor and selected purchaser to hold property for benefit of himself and participators in fraud, Court would strip all disguise from case of fraud. (Vol 7) 1920 Cal 26 (32, 33) (DB).

[But see (Vol 12) 1925 Mad 288 (289).]

10. Purchase by mortgagee. — [1] Subsequent usufructuary mortgagee required under the mortgage to pay off prior mortgages and maintenance to third person — Prior mortgage not paid off — Decree for sale on prior mortgage — Subsequent mortgagee purchasing property in execution sale — Subsequent mortgage held not extinguished and his liabilities under it continued. (Vol 34) 1947 Mad 209 (213) (DB).

[2] After mortgage of certain wargland and Kumaki land, Government assigned Kumaki lands on Dharkhast to Wargdar. Mortgagee does not get benefit of assignment as mortgagor did not obtain Kumaki lands on Dharkhast. Mortgagee was not protected by Trusts Act, S. 90 as the mortgagor obtained the grant of the waste land only for himself and not as one representing on behalf of all persons interested in the mortgaged property. Section does not apply. (Vol 6) 1919 Mad 121 (123) (DB).

[3] *C* obtained on othi over a mortgaged property. *C* neglected to pay the Government assessment and land was put to auction and he purchased it. After revenue sale, *A* acknowledged liability under mortgage to *B*. *C* must be regarded as a trustee in respect of land purchased at revenue sale and must hold it subject to *B*'s mortgage. (Vol 14) 1927 Mad 349 (350).

[4] A mortgagee in possession who allows the mortgaged property to be sold in consequence of his own wilful default and who purchases the property at such sale *benami* in the name of another cannot resist redemption by the mortgagor on the ground of extinction of his position as mortgagee by reason of such sale. (Vol 3) 1916 Bom 108 (109) : 40 Bom 483 (DB).

[5] A collusive transaction by which the mortgagee who is bound to pay revenue wilfully allows the lands to be sold for arrears of revenue and immediately after purchases it from the purchaser in revenue sale, does not affect the mortgagor's right to redeem. (Vol 5) 1918 Cal 192 (193) (DB).

[6] Mortgage — Revenue sale of mortgaged property — Mortgagor purchasing it *benami*—Subsequent mortgage sale — Validity — *Bona fide* lessee was entitled to the crops raised during the continuance of the lease. (Vol 2) 1915 Mad 760 (761, 762) (DB).

[7] Applicability — Mortgage decree — Direction that one item should be sold first and if necessary another item, should be sold thereafter — Purchase by mortgagee of first item for low price at revenue sale — If in trust for owner of second item. (Vol 30) 1943 Mad 202 (204, 205, 206) : I L R (1943) Mad 418.

11. Lease-renewal.—[1] Where principal lessee obtains renewal of it without representing sub-lessees when rights of both are determined, sub-lessees are not entitled to benefit of renewal, as it was not possible to hold that he represented the other tenants. Section does not apply. (Vol 5) 1918 Mad 383 (387) (DB).

[2] Tenants-in-common—Sons becoming tenants in common — One of the sons on termination of original lease by father obtaining renewal for himself and not for anybody or as anybody's heir — After death, the sons obtaining land on occupancy tenure by paying occupancy-price — Sons are trustees of such land for benefit of family — Section does not apply. (Vol 25) 1938 Bom 250 (252).

12. Repayment of expenses.—[1] Co-sharers — Sale for arrears of revenue—Purchase by mortgagee of share — Intentional default—The purchaser being a trustee for all the co-sharers held it for the benefit of all the co-sharers and the mortgagee according to their several interests at the date of sale subject to payment to the mortgagee of the expense properly incurred in the purchase together with interest therein. (Vol 3) 1916 P C 227 (229) : 44 Ind App 30 : 44 Cal 573 (PC).

[2] Section 90 deals with advantages gained by a qualified owner and makes the holding of the advantage to be for the benefit of the other party but subject to repayment of expenses properly incurred. (Vol 12) 1925 Mad 95 (104) (DB).

[3] Subsequent usufructuary mortgagee required under the mortgage to pay off prior mortgage and maintenance to third person — Prior mortgage not paid off — Decree for sale on prior mortgage — Subsequent mortgagee purchasing property in execution sale — *Held* that S. 90 applied and that the usufructuary mortgage was not extinguished and the mortgagee held the property for the mortgagee subject to the same liabilities and rights as obtained at the date of sale except for the obligation on the part of the mortgagors to pay the expenses if any properly incurred by him. (Vol 34) 1947 Mad 209 (213) (DB).

[4] During negotiation between plaintiff and defendant co-sharers for execution of *putni* lease by defendant latter committed default and land being sold under Act, (XI of 1859) was purchased by defendant *benami* for another: *Held*, that conduct of the defendant was fraudulent and suit by plaintiff for damages representing interest paid on the purchase money with a view to set aside sale was claimable from defendant. ('12) 15 Cal L Jour 132 (136) (DB).

[5] A co-landlord refusing to co-operate in contesting a suit by heir of the surrendering tenant cannot on the other landlord getting success demand a part of the holding on payment of his share of the expenses. ('10) 6 Nag L R 12 (17) (DB).

13. Other illustrative cases. — [1] Resulting trust takes place, where several persons jointly furnish purchase money and purchase is made in name of one of them. (Vol 7) 1920 Nag 184 (185).

[2] Where a mortgagee puts up the mortgaged property for sale under a power given him by his mortgage-deed, he cannot sell it to himself, either alone or with others, nor to a trustee for himself. (Vol 16) 1929 Bom 24 (26).

Section 91 — Note 1

[1] Section 91 provides that where a person acquires property with notice that another person has entered into an existing contract affecting that property of which specific performance can be enforced, the former must hold the property for the benefit of the latter

which specific performance could be enforced, the former must hold the property for the benefit of the latter to the extent necessary to give effect to the contract.

Purchase by person contracting to buy property to be held on trust.

92. Where a person contracts to buy property to be held on trust for certain beneficiaries and buys the property accordingly, he must hold the property for their benefit to the extent necessary to give effect to the contract.

Advantage secretly gained by one of several compounding creditors.

93. Where creditors compound the debts due to them, and one of such creditors, by a secret arrangement with the debtor, gains an undue advantage over his co-creditors, he must hold for the benefit of such creditors the advantage so gained.

Constructive trusts in cases not expressly provided for.

94. In any case not coming within the scope of any of the preceding sections, where there is no trust, but the person having possession of property has not the whole beneficial interest therein, he must hold the property for the benefit of the persons having such interest, or the residue thereof (as the case may be), to the extent necessary to satisfy their just demands.

Illustrations.

(a) A, an executor, distributes the assets of his testator B to the legatees without having paid the whole of B's debts. The legatees hold for the benefit of B's creditors, to the extent necessary to satisfy their just demands, the assets so distributed.

(b) A by mistake assumes the character of a trustee for B, and under colour of the trust receives certain money. B may compel him to account for such moneys.

(c) A makes a gift of a lakh of rupees to B, reserving to himself, with B's assent, power to revoke at pleasure the gift as to Rs. 10,000. The gift is void as to Rs. 10,000, and B holds that sum for the benefit of A.

Section 91 — Note 1 *(contd.)*

to the extent necessary to give effect to the contract. Illustration (g) to S. 3, Specific Relief Act, provides the same rule as S. 91, Trusts Act. (Vol 3) 1916 Bom 1 (3): 41 Bom 438 (DB).

[2] The word 'acquire' is quite consistent with the English rule that the purchase should be complete both by payment and conveyance before notice in order to defeat a person having a prior equity. ('12) 16 Ind Cas 680 (682) : 36 Bom 446 (DB).

[3] Attachment of property subject to contract of sale—Creditor is entitled to sell property subject to that obligation—Whether the term 'transferee' in S. 40, T. P. Act includes a purchaser at court auction or not the same principle underlies S. 91, Trust Act. (Vol 4) 1917 Mad 4 (5) (DB).

[4] As purchaser of property with notice of prior contract in another's favour is owner against vendor he should in decree for specific performance be directed to join in executing conveyance. (Vol 22) 1935 Mad 333 (334) (DB).

[5] Person buying property with notice of *bona fide* contract for sale — His title cannot prevail against one claiming under prior contract, notwithstanding his possession and registration of purchase. (Vol 16) 1929 Nag 298 (303).

[6] Vendee of property in possession under registered sale deed can resist suit for possession by prior registered transferee, if former conveyance was made in pursuance of contract to sell. (Vol 4) 1917 Mad 190 (192) (DB).

[7] Contract to sell—Property passing to third party with notice of contract — Suit for specific performance —Law is that property in question shall pass to person entitled and existing at time of contract—Principles of S. 91, are applicable to such case. (Vol 19) 1932 Nag 93 (94).

[8] Contract for sale of immovable property creates no interest in property but right *in personam* and establishes fiduciary relationship Such relationship of trustee of *cestui que trust* subsists till trustee discharges his obligation. (Vol 17) 1930 Mad 84 (94) (DB).

[9] Possession of mortgagee who takes with constructive notice of charge resembles that of trustee under section. (Vol 26) 1939 Nag. 132 (134).

[10] Deed of arrangement between creditors and debtor — Some creditors appointed trustees — One trustee taking mortgage of trust property — Deed of arrangement created, constructive trust but not express trust. Mortgagee bound to hold trust of mortgaged properties for creditors. Section 94 is also applicable. (Vol 24) 1937 Cal 180 (187) : 63 Cal 784.

Section 92 — Note 1

[1] Agent entrusted with property — Stranger purchasing from agent with knowledge of agent's breach of duty — Transferee applying for property according to agent's instructions — Transferee is accountable to principal. (Vol 5) 1918 P C 241 (244, 245, 246) (PC).

[2] If the village was purchased in pursuance of a contract to hold it in trust for the plaintiff, under S. 92 the defendant must be taken to have held the property in trust for plaintiff. ('09) 19 Mad L Jour 106 (111) (DB). (No such contract was made out in the case.)

Section 93—Note 1

[1] Trustee—Liability of— A suing B on bond debt and then transferring 6 anna share therein to C — Subsequent *bona fide* compromise by A with B — A is trustee for C in respect of share transferred and in absence of fraud, is responsible to C for amount actually recovered or which might have been recovered without wilful default. (1848) 4 Moo Ind App 452(464, 465)(PC).

[2] Some creditors appointed as trustees under a deed of assignment between debtor and creditors. Deed neither registered nor containing words conveying property to trustees—One trustee-creditor taking mortgage of trust property — *Held* no express trust but only a constructive trust — Mortgagee creditors held bound to hold in trust for creditors in view of Ss. 91, 93 and 94. (Vol 24) 1937 Cal 180 (187, 188): 63 Cal 784.

SECTION 94—SYNOPSIS

1. "Person in possession not having the whole beneficial interest."
2. "For the benefit of persons having interest."
3. "Property to the extent necessary to satisfy just demands."
4. Liability to pay interest.
5. Other cases.

Section 94 *(contd.)*

1. "Person in possession not having the whole beneficial interest". — [1] G. P. Notes were endorsed to obtain interest due—Endorser did not intend to part with property in them—There is fiduciary relationship between endorser and endorsee. (Vol 12) 1925 Cal 239 (243) (D B).

[2] Mortgage by undivided coparcener of his share in family property—Non-mortgaging coparcener undertaking on partition to pay mortgage debt of another coparcener— Nature of obligation incurred—Non-mortgaging co-parcener is saddled with obligation in nature of trust and must hold property to benefit of mortgagee to extent necessary to satisfy his demand—Term 'beneficial interest' should not be given restricted meaning. (Vol 27) 1940 Nag 149 (155) : ILR (1941) Nag 677 (DB).

2. "For the benefit of persons having interest."— [1] Property of deceased left derelict, taken possession of by Court Officials—Possession is presumably for benefit of rightful claimants. (Vol 1) 1914 P C 243 (244) (P C).

[2] Having regard to provisions of Ss. 94 and 95, person recognized as land-holder by Collector for purposes of Madras Estates Land Act is under liability to account for profits received by him as if he were trustee for true owner. In suit by true owner for rents and profits against land-holder, plaintiff's claim attract equitable jurisdiction of Court to award interest. (Vol 29) 1942 Mad 487 (492, 493): I L R (1942) Mad 562 (D B).

[3] Husband applying for issue of pattah and depositing money for survey stones and growing trees but dying before grant of pattah—His widow making fresh applications and pattah issued in her favour — Land covered by pattah attached by creditor of her husband— *Held* that the widow could not be held to have owned any duty to the husband's creditor or to be holding the property for his benefit. The provisions of S. 94 could not be held to apply. (Vol 27) 1940 Mad 779 (782).

[4] Co-owner in possession of entire estate held in co-ownership is constructive trustee of minor co-owner in respect of his share. (Vol 28) 1941 Sind 50 (61): ILR (1940) Kar 534 (D B).

[5] A person who collects money for charity, whether or not the person from whom the money is collected pays it willingly or with any sympathy or interest in the charity in question, becomes a trustee of such money for the charity. (Vol 24) 1937 Pat 358(360)(DB).

[6] *A* realised outstandings on behalf of the minor son of his deceased brother under advice and control of *B*, another brother. *Held* both *A* and *B* were liable since they were in a fiduciary relationship. (Vol 14) 1927 Bom 75 (77, 78) (D B).

[7] Muhammadan acting *de facto* guardian of his minor brother's property is liable to pay interest on liquid assets held by him for minor by virtue of S. 23 read with Ss. 94 and 95. If guardian dies, his estate would be liable for interest. (Vol 30) 1943 Mad 254 (255): I L R (1943) Mad 654 (D B).

[8] Employee depositing money by way of security in Bank — Money placed on fixed deposit—Agreement to pay interest—Bank subsequently becoming insolvent —Trust money can be followed to reach assets of bank from whatever source they might come. (Vol 25) 1938 Mad 651 (651, 652, 653).

[9] A co-owner collecting rent comes within the section as he has possession of the property not having the whole beneficial interest therein. (Vol 32) 1945 Mad 17 (18).

[10] A right to contribution not being merely a right to sue for damages is assignable. Where a person gets a transfer of all the assets and subjects himself to the payment of debts, a creditor to whom such a transfer is communicated has a right to proceed against the transferee. (Vol 9) 1922 Mad 397 (398).

3. "Property to the extent necessary to satisfy just demands." — [1] Mortgage by undivided coparcener of his share in family property—On partition, non-mortgaging co-parcener to whom mortgaged property was allotted is saddled with obligations in nature of trust and must hold property to benefit of mortgagee to the extent necessary to satisfy his demand. (Vol 27) 1940 Nag 149 (155) : I L R (1941) Nag 677 (DB).

[2] The tendency of the law is to restrict a usufructuary mortgagee to his exact rights under the contract of mortgage. Even if the money in Court is to be impressed with the trust of the real estate, this will be subject to provisions of S. 94 and the general principle is that it operates only to the extent necessary to satisfy the mortgagee's "just demands". (Vol 3) 1916 Sind 37 (43): 10 Sind L R 72.

4. Liability to pay interest.—[1] Having regard to the provisions of S. 94 and S. 95, the person recognised as landholder by the collector for the purpose of the Madras Estates Land Act is under liability to account for profits received by him as if he were trustee for the true owner. In a suit by true owner for rents and profits against the landholder plaintiff's claim attracts equitable jurisdiction of the Court to award interest. (Vol 29) 1942 Mad 487 (492, 493) : I L R (1942) Mad 562 (DB).

[2] Mahomedan acting *de facto* guardian of his minor brother's property — He is liable to pay interest on the liquid assets held by him for minor by virtue of S. 23 read with S. 94 and S. 95. (Vol 30) 1943 Mad 254 (255) : I L R (1943) Mad 654 (DB).

5. Other cases.—[1] Deposit by employee with employer does not constitute trust. (Vol 29) 1942 All 119 (120, 121):I L R (1942) All 242 (FB).

[2] The vendee of property free of encumbrances with whom a portion of the consideration money is reserved to clear the encumbrances is not a trustee or in a position analogous to that of a trustee to the encumbrancer, in respect of the money so reserved. (Vol 12) 1925 Cal 599 (602) : 52 Cal 100 (DB).

[3] Property recovered from thief and kept in custody of person in charge of Malkana — Person absconding: *Held*, section not applicable as no implied trust was created. (Vol 24) 1937 Lah 572 (576) : I L R (1937) Lah 380 (DB).

[4] Co-owner in possession of common property is constructive trustee and is subject to the liabilities as a trustee under S. 95. (Vol 10) 1923 Mad 147 (151) : 46 Mad 47 (DB). (Per *Oldfield J.*)

[5 6] Rents conveyed to charitable trust — Trustee obtaining decree for rent — Trust subsequently declared incapable of being given effect to — Original owner can execute decree without assignment — Principles of S. 94 ill. (b) applicable even where Act is not applicable. (Vol 11) 1924 Pat 343 344, 345) (DB).

[7] The notes in question were endorsed by *K* and were handed by *K* to *D* in order that he might obtain the interest due in respect thereof—*K* did not intend to part with her property in the notes, and they were entrusted to *D* for the above mentioned purpose — This constituted a fiduciary relationship between *K* and *D*. (Vol 12) 1925 Cal 239 (243) (DB).

[8] Co-sharer—Mortgagee and guarantor of debt as joint decree-holders—Latter purchasing property mortgaged in execution sale and allowed to set off purchase price against decretal debt — Decree-holders do not

Obligor's duties, liabilities and disabilities.

95. The person holding property in accordance with any of the preceding sections of this Chapter must, so far as may be, perform the same duties, and is subject, so far as may be, to the same liabilities and disabilities, as if he were a trustee of the property for the person for whose benefit he holds it:

Provided that *(a)* where he rightfully cultivates the property or employs it in trade or business, he is entitled to reasonable remuneration for his trouble, skill and loss of time in such cultivation or employment; and *(b)* where he holds the property by virtue of a contract with a person for whose benefit he holds it, or with any one through whom such person claims, he may, without the permission of the Court, buy or become lessee or mortgagee of the property or any part thereof.

Saving of rights of *bona fide* purchasers.

96. Nothing contained in this Chapter shall impair the rights of transferees in good faith for consideration, or create an obligation in evasion of any law for the time being in force.

THE SCHEDULE.

(See section 2.)

STATUTE.

Year and Chapter.	Short title.	Extent of repeal.
29 Car. II, c. 3 . . .	The Statute of Frauds . . .	Sections 7, 8, 9, 10 and 11.

ACTS OF THE GOVERNOR GENERAL IN COUNCIL.

Number and year.	Short title.	Extent of repeal.
XXVIII of 1866 . . .	The Trustees' and Mortgagees' Powers Act, 1866.	Sections 2, 3, 4, 5, 32, 33, 34, 35, 36 and 37. In section [a][* *] 43 the word "trustee" wherever it occurs; and in section 43 the words "management or" and "the trust-property or".
I of 1877	The Specific Relief Act, 1877 . .	In section 12 the first illustration.

[a] The figures "39", and by implication the word "and", were *repealed* by the Amending Act, 1891 (12 [XII] of 1891), S. 2 and Sch. I.

Section 94 — Note 5 *(contd.)*

become owners in equal shares. (Vol 17) 1930 P C 205 (208) (PC).

[9] Trust is constituted when money is deposited for specific purpose—Provision for payment of interest upon such amount, whether alters its character—Employees of Bank required to furnish cash security for good behaviour—Amount returnable at end of service after deduction of loss, if any, resulting from misbehaviour of employee — Provision to pay interest on deposits — Deposits, held constituted trust money — On liquidation of Bank, employees, held, had preferential claim in respect of such deposits. (Vol 26) 1939 Mad 337 (345).

[10] A Hindu widow does not owe any duty to the creditors of her deceased husband or hold any property for their benefit. Section 94 is not applicable to such cases. (Vol 27) 1940 Mad 719 (721, 722).

[11] Mortgagee putting up mortgaged property for sale cannot sell it to himself, nor be a trustee for himself. Such sale is benami and transaction does not amount to release of equity of redemption by mortgagors acquiescing in it. In suit for redemption S. 94 will apply, not Ss. 90 and 95 : (*Held*, transaction was benami and purchaser was nominee of mortgagees. Sale did not affect relations between mortgagor and mortgagees. Limitation Act, Art. 91 would not apply, sale being void). (Vol 16) 1929 Bom 24 (28).

Section 95—Note 1

[1] Section 95 provides that a person holding property in accordance with S. 91 must, so far as may be, perform the same duties, and is subject, so far as may be, to the same liabilities and disabilities as if he were a trustee of the property for the person for whose benefit he holds it. (Vol 3) 1916 Bom 1 (3):41 Bom 438 (FB).

[2] If a person appointed guardian, in that character possesses himself of any of his ward's property, he becomes a trustee of that property although he is trustee by construction. Under S. 95, a constructive trustee must perform the same duties and is subject to the same liabilities, so far as may be, as a trustee under the Act. The liability of a guardian is that of a trustee and S. 23 is applicable. (Vol 24) 1937 Mad 675 (675, 676):(Vol 30) 1943 Mad 254 (255) : I L R (1943) Mad 654 (DB). (Mahomedan acting as *de facto* guardian of his brother's estate places himself in a fiduciary position and is liable to pay interest on the liquid assets held by him by virtue of S. 23 read with Ss. 94 and 95.)

[But see (Vol 26) 1939 Mad 645 (648) (DB). (Guardian, always comes within purview of S. 94 but cannot be held to fall in S. 95 as to make provisions of Guardians and Wards Act inoperative.)]

[3] A co-owner in possession of the entire estate held in co-ownership is constructive trustee of the minor co-owner in respect of his share. Sections 94 and 95 are clearly applicable to such a case. (Vol 28) 1941 Sind 50 (61) : I L R (1940) Kar 534.

[4] Land purchased by one with money of another — Purchaser is constructive trustee for plaintiff. (Vol 9) 1922 Mad 57 (59) : 45 Mad 415 (DB).

[5] A bailee for specific purpose is not trustee. (Vol 9) 1922 Mad 44 (45) : 45 Mad 173 (DB).

Section 96—Note 1

[1] Section 96 protects the right of transferees in good faith for consideration from persons who have gained an undue advantage. It is the principle of equity

(ACT XXV OF 1866.)

STATEMENT OF OBJECTS AND REASONS.

"Sums amounting to nearly Rs. 6,70,000 in Government Securities and cash, are now in the High Courts of the three Presidency towns, deposited in the course of suits instituted in the late Supreme Courts of Calcutta, Madras and Bombay. There are also funds deposited under similar circumstances in the Supreme Court of the Straits Settlement. These sums have been unclaimed for more than twenty years. The proceeds of certain estates administered by order of the Supreme Court of the Straits Settlement have also been unclaimed for a period of fifteen years.

The object of this Bill is to transfer these sums to the Government of India for the general purposes of Government, subject to any claims which may hereafter be established to the satisfaction of the Court from which the transfer shall have been made.

The present opportunity has been taken to remedy a defect in the existing law regarding unclaimed estates in the hands of the Administrator General of Benga.. All estates administered by the Administrators General of Madras and Bombay, which may be unclaimed for more than fifteen years, are, under Act No. VIII of 1855, S. 51, credited to the general revenues, subject to any claim thereto being afterwards established. But there is no provision of the kind with regard to estates coming into the official charge of the Administrator General of Bengal, subsequent to the passing of that Act."

— Gazette of India, 1866, page 890.

[THE] UNCLAIMED DEPOSITS ACT, 1866[a]

(ACT XXV OF 1866.)

[11th July, 1866.]

An Act to transfer to the Government of India certain securities and moneys deposited in the High Courts of Judicature at Fort William, Madras and Bombay, [b][* * * * *]

WHEREAS it is expedient that certain securities and sums of money deposited in the High Courts of Judicature at Fort William, Madras and Bombay, [c][* * * *] in the course of suits in the said Courts or in the late Supreme Courts at Calcutta, Madras and Bombay, respectively, and now or hereafter appearing to have been in such deposit for a period of twenty years or upwards, without any claim thereto having been made and allowed during that period, should be transferred and paid to the Government of India for the general purposes of government; [d][* * *]; It is hereby enacted as follows :

Preamble.

[a] Short title given by the Indian Short Titles Act, 1897 (XIV [14] of 1897). [b] The words "and the proceeds of certain estates in the charge of the Administrator General of Bengal" were *repealed* by the Administrator General's Act, 1867 (XXIV [24] of 1867), and the words "and in the Supreme Court of the Straits Settlements" were *repealed* by the Repealing Act, 1874 (XVI [16] of 1874), S. 2 and Sch, Part I. [c] The words "and in the Supreme Court of the Straits Settlements" were *repealed* by Act XVI [16] of 1874, S. 2 and Sch., Part I. [d] The second clause was *repealed* by the Repealing Act, 1876 (XII [12] of 1876), S. 1 and Sch., Part I.

1. All securities and sums of money deposited in the said High Courts [a][* * *] or any of them, in the course of suits in any of the said Courts, or of the late Supreme Courts of Calcutta, Madras and Bombay and now or hereafter appearing to have been in such deposit for a period of twenty years or upwards, without any claim thereto having been made and allowed during that period, shall be transferred and paid to [b][the Government of the Province in which the Court has its principal seat.]

Money deposited in High Courts and unclaimed for twenty years transferred to Government.

[a] The words "or Supreme Court of the Straits Settlements" were *repealed* by the Repealing Act, 1874 (XVI [16] of 1874) S. 2 and Sch. Part I. [b] *Substituted* by A. O. for "the Government of India for the general purposes of government".

2. [Proceeds of estates administered under order of Supreme Court of Straits Settlements or in charge of Administrator-General of Bengal.] *Repealed by the Administrator-General's Act, 1867 (24 [XXIV] of 1867), and the Repealing Act, 1874 (XVI [16] of 1874).*

3. Nothing in this Act shall authorize any transfer or payment of any such securities, sums of money or proceeds as aforesaid, pending any suit already instituted or which shall hereafter be instituted in respect thereof.

Transfer not made pending suits.

4. If any claim shall hereafter be made to any part of the securities, money or proceeds which shall be transferred and [a][paid to any Government] under the provisions of this Act, and if such claim shall, in the case of securities and money transferred and paid under section 1 of this Act, be established to the satisfaction of the High Court [b][* * *] from which the transfer shall have been made, [b][* * *] [c][the Government of the Province in which that Court has its principal seat shall pay] to the claimant the

Repayment on subsequent establishment of claim.

Section 96—Note 1 *(contd.)*

recognised in the Trusts Act and in other legislative enactments that a purchaser for value without notice of any defect of title in his transferor is entitled to protection if he obtained the transfer *bona fide*. (Vol 6) 1919 Mad 70 (75) (D B) (Vol 32) 1945 Mad 303 (303).

amount of the principal so transferred and paid as aforesaid, or so much thereof as shall appear to be due[d] to the claimant [e][* * * *].

[a] *Substituted* by A. O. for "paid to the Government of India". [b] Certain words were *repealed* by the Repealing Act, 1874 (XVI [16] of 1874), S. 2 and Schedule Part I. [c] *Substituted* by A. O. for "the Government of India shall pay". [d] As to the costs of petition under this section, *see* the Unclaimed Deposits Act, 1870 (V [5] of 1870). [e] The second sentence was *repealed* by the Administraror-General's Act, 1867 (XXIV [24] of 1867).

[THE] UNCLAIMED DEPOSITS ACT, 1870

(ACT V OF 1870.)

STATEMENT OF OBJECTS AND REASONS.

"The object of this Bill is merely to enable the High Courts at the Presidency Towns to deal with the costs of petitions for securities and moneys transferred to Government under Acts XXV [25] of 1866, XXIV [24] of 1867. Such petitions are sometimes merely speculative and in the absence of power such as the present Bill proposes to confer, the time of the Courts is liable to be wasted."—Gazette of India, 1870, Part V, page 5.

[THE] UNCLAIMED DEPOSITS ACT, 1870.[a]

(ACT V OF 1870.)

[4th February, 1870.]

An Act to enable the High Courts at the Presidency-towns to deal with costs of petitions for certain moneys transferred to Government.

Preamble.

WHEREAS the High Courts of Judicature at Fort William, Madras and Bombay, have no power to deal with the costs of petitions under section 4 of Act No. XXV of 1866 (to transfer to the Government of India certain securities and moneys deposited in the High Courts of Judicature at Fort William, Madras and Bombay [b][* * *)] [c][* * *] for payment of certain securities, moneys, or proceeds transferred to Government ;

And whereas it is expedient to confer such power upon the said High Courts ; It is hereby enacted as follows :—

[a] The title was given by the Indian Short Titles Act XIV [14] of 1897. For the Statement of Objects and Reasons, *see* Gazette of India, 1870, Pt. V, p. 5. [b] The words "and in the Supreme Court of the Straits Settlements and the proceeds of certain estates in the charge of the Administrator-General of Bengal" were *repealed* by the Repealing Act, 1874 (XVI [16] of 1874). [c] The words "or under S. 60 of the Administrator General's Act, 1867" are omitted as the Administrator-General's Act, 1867 (XXIV [24] of 1867) and this Act so far as it relates to the Administrator-General, were *repealed* by the Administrator-General's Act, 1874 (II [2] of 1874).

Power to direct by whom costs are to be paid.

1. Whenever any of the said Courts shall make an order on any such petition, the Court may direct by whom the whole or any part of the costs of each party are to be paid.

[THE] UNITED NATIONS (PRIVILEGES AND IMMUNITIES) ACT, 1947.

(ACT XLVI OF 1947).

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1. Short title.
2. Conferment on United Nations and its representatives and officers of certain privileges and immunities.
3. Power to confer certain privileges and immunities on other international organisations and their representatives and officers.
4. Power to make rules.

THE SCHEDULE.

Article I. — Juridical personality (section 1).
Article II. — Property, funds and assets (sections 2 to 8).
Article III. — Facilities in respect of communications (sections 9, 10).
Article IV. — The representatives of members (sections 11 to 16).
Article V. — Officials (sections 17 to 21).
Article VI. — Experts on missions for the United Nations (sections 22, 23).
Article VII. — United Nations Laissez-passer (sections 24 to 28).
Article VIII.—Settlement of disputes (sections 29 and 30).

STATEMENT OF OBJECTS AND REASONS.

"Articles 104 and 105 of the Charter of the United Nations which has been ratified by the Government of India read as follows :

'*Article 104.* — The organization shall enjoy in the territory of each of its Members such legal capacity as may be necessary for the exercise of its functions and the fulfilment of its purposes.

Article 105.—1. The organization shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfilment of its purposes.

2. Representatives of the Members of the United Nations and officials of the Organization shall similarly enjoy such privileges and immunities as are necessary for the independent exercise of their functions in connection with the Organisation.

3. The General Assembly may make recommendations with a view to determining the details of the application of paras. 1 and 2 of this Article or may propose conventions to the Members of the United Nations for this purpose.'

In pursuance of para. 3 of Art. 105, the 'Convention on the Privileges and Immunities of the United Nation' was adopted by the General Assembly on 13th February 1946 and all members have been asked to accede to it. The accession will be effected by the deposit of an instrument of accession as soon as a Member country is in a position under its own law to give effect to the terms of the Convention.

The purpose of this Bill, which in a Schedule incorporates most of the Convention, is to enable the provisions of the Convention to be operative in this country.

The Organizations referred to in clause 3 of the Bill will be those like the United Nations Educational Scientific and Cultural Organization and the International Civil Aviation Organization."

— Gazette of India, 1947, Part V, page 277.

[THE] UNITED NATIONS (PRIVILEGES AND IMMUNITIES) ACT, 1947.

(ACT XLVI OF 1947.)

[20th December, 1947.]

An Act to give effect to the Convention on the Privileges and Immunities of the United Nations.

WHEREAS it is expedient to give effect to the Convention on the Privileges and Immunities of the United Nations, and to enable similar privileges and immunities to be enjoyed by other international organisations and their representatives and officials;

It is hereby enacted as follows :—

Short title.

1. This Act may be called the United Nations (Privileges and Immunities) Act, 1947.

Conferment on United Nations and its representatives and officers of certain privileges and immunities.

2. *(1)* Notwithstanding anything to the contrary contained in any other law the provisions set out in the Schedule to this Act of the Convention on the Privileges and Immunities adopted by the General Assembly of the United Nations on the 13th day of February 1946, shall have the force of law in India.

(2) The Central Government may, from time to time, by notification in the official Gazette, amend the Schedule in conformity with any amendments, duly made and adopted, of the provisions of the said Convention set out therein.

Power to confer certain privileges and immunities on other international organisations and their representatives and officers.

3. Where in pursuance of any international agreement, convention or other instrument it is necessary to accord to any international organisation and its representatives and officers privileges and immunities in India similar to those contained in the provisions set out in the Schedule, the Central Government may, by notification in the official Gazette, declare that the provisions set out in the Schedule shall, subject to such modifications, if any, as it may consider necessary or expedient for giving effect to the said agreement, convention or other instrument, apply *mutatis mutandis* to the international organisation specified in the notification and its representatives and officers, and thereupon the said provisions shall apply accordingly and, notwithstanding anything to the contrary contained in any other law, shall in such application have the force of law in India.

Power to make rules.

4. The Central Government may make rules for carrying out the purposes of this Act.

THE SCHEDULE

(See sections 2 and 3)

ARTICLE I.

JURIDICAL PERSONALITY

SECTION 1. The United Nations shall possess juridical personality.

It shall have the capacity :—

(a) to contract ;

(b) to acquire and dispose of immovable and movable property ;

(c) to institute legal proceedings.

ARTICLE II.

PROPERTY, FUNDS AND ASSETS.

SECTION 2. The United Nations, its property and assets wherever located and by whomsoever held, shall enjoy immunity from every form of legal process except in so far as in any particular case it has expressly waived its immunity. It is, however, understood that no waiver of immunity shall extend to any measure of execution.

SECTION 3. The premises of the United Nations shall be inviolable. The property and assets of the United Nations, wherever located and by whomsoever held, shall be immune from search, requisition, confiscation, expropriation and any other form of interference whether by executive, administrative, judicial or legislative action.

SECTION 4. The archives of the United Nations, and in general all documents belonging to it or held by it, shall be inviolable wherever located.

SECTION 5. Without being restricted by financial controls, regulations or moratoria of any kind :

(a) the United Nations may hold funds, gold or currency of any kind and operate accounts in any currency ;

(b) the United Nations shall be free to transfer its funds, gold or currency from one country to another or within any country and to convert any currency held by it into any other currency.

SECTION 6. In exercising its rights under Section 5 above, the United Nations shall pay due regard to any representations made by the Government of any Member in so far as it is considered that effect can be given to such representation without detriment to the interests of the United Nations.

SECTION 7. The United Nations, its assets, income and other property shall be :

(a) exempt from all direct taxes ; it is understood, however, that the United Nations will not claim exemption from taxes which are, in fact, no more than charges for public utility services ;

(b) exempt from customs duties and prohibitions and restrictions on imports and exports in respect of articles imported or exported by the United Nations for its official use. It is understood, however, that articles imported under such exemption will not be sold in the country into which they were imported except under conditions agreed with the Government of that country ;

(c) exempt from customs duties and prohibitions and restrictions on imports and exports in respect of its publications.

SECTION 8. While the United Nations will not, as a general rule, claim exemption from excise duties and from taxes on the sale of movable and immovable property which form part of the price to be paid, nevertheless when the United Nations in making important purchases for official use of property on which such duties and taxes have been charged or are chargeable, Members will, whenever possible, make appropriate administrative arrangements for the remission or return of the amount of duty or tax.

ARTICLE III.

FACILITIES IN RESPECT OF COMMUNICATIONS.

SECTION 9. The United Nations shall enjoy in the territory of each Member for its official communications treatment not less favourable than that accorded by the Government of that Member to any other Government including its diplomatic mission in the matter of priorities rates and taxes on mails, cables, telegrams, radiograms, telephotos, telephone and other communications ; and press rates for information to the press and radio. No censorship shall be applied to the official correspondence and other official communications of the United Nations.

SECTION 10. The United Nations shall have the right to use codes and to despatch and receive its correspondence by courier or in bags, which shall have the same immunities and privileges as diplomatic couriers and bags.

ARTICLE IV.

THE REPRESENTATIVES OF MEMBERS.

SECTION 11. Representatives of Members to the principal and subsidiary organs of the United Nations and to conferences convened by the United Nations, shall, while exercising their

functions and during their journey to and from the place of meeting, enjoy the following privileges and immunities :

(a) immunity from personal arrest or detention and from seizure of their personal baggage, and in respect of words spoken or written and all acts done by them in their capacity as representatives, immunity from legal process of every kind ;

(b) inviolability for all papers and documents ;

(c) the right to use codes and to receive papers or correspondence by courier or in sealed bags;

(d) exemption in respect of themselves and their spouses from immigration restrictions, aliens registration or national service obligations in the state they are visiting or through which they are passing in the exercise of their functions ;

(e) the same facilities in respect of currency or exchange restrictions as are accorded to representatives of foreign governments on temporary official missions ;

(f) the same immunities and facilities in respect of their personal baggage as are accorded to diplomatic envoys; and also ;

(g) such other privileges, immunities and facilities not inconsistent with the foregoing as diplomatic envoys enjoy, except that they shall have no right to claim exemption from customs duties on goods imported (otherwise than as part of their personal baggage) or from excise duties or sales taxes.

SECTION 12. In order to secure, for the representatives of Members to the principal and subsidiary organs of the United Nations and to conferences convened by the United Nations, complete freedom of speech and independence in the discharge of their duties, the immunity from legal process in respect of words spoken or written and all acts done by them in discharging their duties shall continue to be accorded, notwithstanding that the persons concerned are no longer the representatives of Members.

SECTION 13. Where the incidence of any form of taxation depends upon residence, periods during which the representatives of Members to the principal and subsidiary organs of the United Nations and to conferences convened by the United Nations are present in a state for the discharge of their duties shall not be considered as periods of residence.

SECTION 14. Privileges and immunities are accorded to the representatives of Members not for the personal benefit of the individuals themselves, but in order to safeguard the independent exercise of their functions in connection with the United Nations. Consequently a Member not only has the right but is under a duty to waive the immunity of its representative in any case where in the opinion of the Member the immunity would impede the course of justice, and it can be waived without prejudice to the purpose for which the immunity is accorded.

SECTION 15. The provisions of Sections 11, 12 and 13 are not applicable as between a representative and the authorities of the state of which he is a national or of which he is or has been the representative.

SECTION 16. In this article the expression ' representatives" shall be deemed to include all delegates, deputy delegates, advisers, technical experts and secretaries of delegations.

ARTICLE V

OFFICIALS.

SECTION 17. The Secretary-General will specify the categories of officials to which the provisions of this Article and Article VII shall apply. He shall submit these categories to the General Assembly. Thereafter these categories shall be communicated to the Governments of all Members. The names of the officials included in these categories shall from time to time be made known to the Governments of Members.

SECTION 18.—Officials of the United Nations shall :

(a) be immune from legal process in respect of words spoken or written and all acts performed by them in their official capacity ;

(b) be exempt from taxation on the salaries and emoluments paid to them by the United Nations;

(c) be immune from national service obligations.

(d) be immune, together with their spouses and relatives dependent on them, from immigration restrictions and alien registration ;

(e) be accorded the same privileges in respect of exchange facilities as are accorded to the officials of comparable ranks forming part of diplomatic missions to the Government concerned;

(f) be given, together with their spouses and relatives dependent on them, the sams repatriation facilities in time of international crisis as diplomatic envoys;

(g) have the right to import free of duty their furniture and effects at the time of first taking up their post in the country in question.

SECTION 19. In addition to the immunities and privileges specified in Section 18, the Secretary-General and all Assistant Secretaries-General shall be accorded in respect of themselves, their spouses and minor children, the privileges and immunities, exemptions and facilities accorded to diplomatic envoys, in accordance with international law.

SECTION 20. Privileges and immunities are granted to officials in the interest of the United Nations and not for the personal benefit of the individuals themselves. The Secretary-General shall have the right and the duty to waive the immunity of any official in any case where, in his opinion, the immunity would impede the course of justice and can be waived without prejudice to the interests of the United Nations. In the case of the Secretary-General, the Security Council shall have the right to waive immunity.

SECTION 21. The United Nations shall co-operate at all times with the appropriate authorities of Members, to facilitate the proper administration of Justice, secure the observance of police regulations and prevent the occurrence of any abuse in connection with the privileges, immunities and facilities mentioned in this Article.

ARTICLE VI.

EXPERTS ON MISSIONS FOR THE UNITED NATIONS.

SECTION 22. Experts (other than officials coming within the scope of Article V) performing missions for the United Nations shall be accorded such privileges and immunities as are necessary for the independent exercise of their functions during the period of their missions, including the time spent on journeys in connection with their missions. In particular they shall be accorded:

(a) immunity from personal arrest or detention and from seizure of their personal baggage,

(b) in respect of words spoken or written and acts done by them in the course of the performance of their mission, immunity from legal process of every kind. This immunity from legal process shall continue to be accorded notwithstanding that the persons concerned are no longer employed on missions for the United Nations;

(c) inviolability for all papers and documents;

(d) for the purpose of their communications with the United Nations, the right to use codes and to receive papers or correspondence by courier or in sealed bags;

(e) the same facilities in respect of currency or exchange restrictions, as are accorded to representatives of foreign governments on temporary official mission;

(f) the same immunities and facilities in respect of their personal baggage as are accorded to diplomatic envoys.

SECTION 23. Privileges and immunities are granted to experts in the interests of the United Nations and not for the personal benefit of the individuals themselves. The Secretary-General shall have the right and the duty to waive the immunity of any expert in any case where, in his opinion, the immunity would impede the course of justice and it can be waived without prejudice to the interests of the United Nations.

ARTICLE VII.

UNITED NATIONS LAISSEZ-PASSER.

SECTION 24. The United Nations may issue United Nations laissez passer to its officials. These laissez-passer shall be recognised and accepted as valid travel documents by the authorities of Members, taking into account the provisions of Section 25.

SECTION 25. Applications for visas (where required) from the holders of United Nations laissez passer, when accompanied by a certificate that they are travelling on the business of United Nations, shall be dealt with as speedily as possible. In addition, such persons shall be granted facilities for speedy travel.

SECTION 26. Similar facilities to those specified in section 25 shall be accorded to experts and other persons who, though not the holders of United Nations laissez passer, have a certificate that they are travelling on the business of the United Nations.

SECTION 27. The Secretary-General, Assistant Secretaries-General and Directors travelling on United Nations laissez-passer on the business of the United Nations shall be granted the same facilities as are accorded to diplomatic envoys.

SECTION 28. The provisions of this article may be applied to the comparable officials of specialized agencies if the agreements for relationship made under Article 63 of the Charter so provide.

ARTICLE VIII.

SETTLEMENT OF DISPUTES.

SECTION 29. The United Nations shall make provisions for appropriate modes of settlement of:

(a) disputes arising out of contracts or other disputes of a private law character to which the United Nations is a party;

(b) disputes involving any official of the United Nations who by reason of his official position enjoys immunity, if immunity has not been waived by the Secretary-General.

SECTION 30. All differences arising out of the interpretation or application of the present convention shall be referred to the International Court of Justice, unless in any case it is agreed by the parties to have recourse to another mode of settlement. If a difference arises between the United Nations on the one hand and a Member on the other hand, a request shall be made for an advisory opinion on any legal question involved in accordance with Article 96 of the Charter and Article 65 of the Statute of the Court. The opinion given by the Court shall be accepted as decisive by the parties.

[THE] UNITED NATIONS (SECURITY COUNCIL) ACT, 1947.

(Act XLIII of 1947)

STATEMENT OF OBJECTS AND REASONS

"Article 41 of the Charter of the United Nations which has been ratified by the Government of India reads as follows :—

"The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio and other means of communication and the severance of diplomatic relations.'

The purpose of this Bill is to enable the Government of India to apply effectively the measures which the Security Council may call upon it to put into force."

— Gazette of India, 1947, Part V, page 271.

[THE] UNITED NATIONS (SECURITY COUNCIL) ACT, 1947.

(ACT XLIII OF 1947)

[20th December, 1947]

An Act to enable effect to be given to certain provisions of the Charter of the United Nations.

WHEREAS it is expedient to enable effect to be given to certain provisions of the Charter of the United Nations;

It is hereby enacted as follows :—

Short title.

1. This Act may be called the United Nations (Security Council) Act, 1947.

Measures under Art. 41 of the Charter of the United Nations.

2. If, under article 41 of the Charter of the United Nations signed at San Francisco on 26th day of June 1945 the Security Council of the United Nations calls upon the Central Government to apply any measures, not involving the use of armed force, to give effect to any decision of that Council, the Central Government may, by order published in the official Gazette, make such provisions (including provisions having extra-territorial operation) as appear to it necessary or expedient for enabling those measures to be effectively applied, and without prejudice to the generality of the foregoing power, provision may be made for the punishment of persons offending against the order.

[THE] USURIOUS LOANS ACT, 1918.

(Act X of 1918)

STATEMENT OF OBJECTS AND REASONS

"The object of this Bill is to prevent the Civil Courts being used for the purpose of enforcing harsh and unconscionable loans carrying interest at usurious rates. This subject has engaged the attention of the Government of India frequently in the past and in 1899 sections 16 and 19 of the Indian Contract Act, 1872, were amended so as to enunciate more clearly the principle on which a contract can be avoided on the ground of undue influence.

Those amendments had the effect of conferring on the Courts in India equitable jurisdiction in cases relating to usurious contracts in which the element of undue influence is established, but where undue influence cannot be established the result has been to emphasize the rigidity of section 2 of the Usury Laws Repeal Act (XXVIII of 1855), however exorbitant the demand, and however unconscionable the bargain.

Further there has been a tendency on the part of the Courts to place upon the word "unconscionable" in section 16 of the Indian Contract Act the technical meaning which it has acquired in English equity, and consequently to limit their own powers of interference.

Lastly the particular transaction before the Court is often merely one of a series and unless there is power to go behind it and examine antecedent agreements and attendant circumstances there is little hope of the Courts being able to come to an equitable decision.

The remedy proposed by this Bill is to empower the Courts on the lines of section 1 of the Money-lenders Act, 1900 (63 & 64 Vict. c. 51) to reopen transactions by way of money or grain loans in cases where the Court is satisfied (1) that the interest or other return is excessive and (2) that the transaction is substantially unfair, and after investigation of the circumstances, both attendant and antecedent, to revise the transaction between the parties and if necessary to reduce the amount payable to such sum as the Court, having regard to the risk and all the circumstances of the case, may decide to be reasonable. The Local Governments have been consulted and legislation in this direction has commanded almost universal approval. Provision has been made to cover the case of loans of grain as well as of money, as loans in kind are often made on very oppressive terms. As there may be urban or rural areas where the proposed law is deemed unnecessary it has been provided that the Act shall not come into force in any Province or part of a Province except by notification."

—Gazette of India, 1917, Part V, page 86.

ACT HOW AFFECTED BY SUBSEQUENT LEGISLATION.

—Amended by Act 28 of 1926.
—Adapted by A. O.
—Amended in its application to—
[a] Central Provinces by C. P. Act 11 of 1934;
[b] Madras by Mad. Act 8 of 1937;
[c] N.-W. F. P. by N.-W. F. P. Act 4 of 1935;
[d] Punjab by Punj. Acts 7 of 1934; 12 of 1940;
[e] United Provinces by U. P. Act 23 of 1934.

[THE] USURIOUS LOANS ACT, 1918.

(ACT X OF 1918.)[a]

[22nd March, 1918.]

An Act to give additional powers to Courts to deal in certain cases with usurious loans of money or in kind.

WHEREAS it is expedient to give additional powers to Courts to deal in certain cases with usurious loans of money or in kind; It is hereby enacted as follows :—

[a] For Report of Select Committee, *see* Gazette of India, 1918, Pt. V, p. 47. This Act has been declared to be in force in Panth Piploda by the Panth Piploda Laws Regulation, 1929 (I [1] of 1929), S. 2. It has been amended in the U. P. by U. P. Act 23 of 1934, in the Punjab by Punjab Act 7 of 1934, in the C. P. by C. P. Act 11 of 1934, in the N.-W. F. P. by N.-W. F. P. Act 4 of 1935, and in Madras by Madras Act 8 of 1937.

Short title and extent.

1. *(1)* This Act may be called the Usurious Loans Act, 1918.

(2) It extends to the whole of British India, including British Baluchistan.

(3) The [a][Provincial Government] may, by notification[b] in the [c][Official Gazette], direct that it shall not apply to any area, class of persons, or class of transactions which it may specify in its notification.

[a] *Substituted* by A. O. for "Local Government". [b] For notification exempting all awards made by the Registrar of Co-operative Societies, Assam, or by arbitrations, *see* Assam Gazette, 1918, Pt. II, p. 966. For notification exempting transaction by way of borrowing or lending by Co-operative Societies in Madras, *see* Fort St. George Gazette, 1918, Pt. I, p. 1126. [c] *Substituted* by A. O. for "local official Gazette".

Definitions.

2. In this Act, unless there is anything repugnant in the subject or context, —

(1) "Interest" means rate of interest and includes the return to be made over and above what was actually lent, whether the same is charged or sought to be recovered specifically by way of interest or otherwise.

Preamble — Note 1

[1] Restricted construction ought not to be placed upon the language of a remedial Act such as this Act. (Vol 15) 1928 Oudh 396 (400) : 4 Luck 1 (F B).

[2] Act is applied to all suits fulfilling conditions in S. 2 (3) (b) as amended in C. P. irrespective of the kind of Court. (Vol 28) 1941 Nag 294 (295) : I L R (1942) Nag 177.

Section 1 — Note 1

[1] Original (Usurious Loans) Act, subject to all amendments in C. P., was made applicable to Berar by Notification. Amending C. P. Act of 1934 is therefore applicable to Berar. (Vol 24) 1937 Nag 101 (101): I L R (1937) Nag 410.

SECTION 2 — SYNOPSIS

1. Section 2 (1).
2. Section 2 (2).
3. Section 2 (3).
4. Local Amendments.

1. Section 2 (1). — [1] When money is borrowed and a larger sum is to be repaid, excess over the principal must be treated as interest. (Vol 27) 1940 Mad 937 (938).

PROVINCIAL AMENDMENT.

UNITED PROVINCES

In sub-section *(1)* of section 2, after the words 'by way of interest' *insert* the words 'or in the form of service to be rendered'. — U. P. Act XXIII of 1934, S. 2 (1).

(2) "Loan" means a loan whether of money or in kind and includes any transaction which is, in the opinion of the Court, in substance a loan.

(3) "Suit to which this Act applies" means any suit —

(a) for the recovery of a loan made after the commencement of this Act; or

(b) for the enforcement of any security taken or any agreement, whether by way of settlement of account or otherwise, made, after the commencement of this Act, in respect of any loan made either before or after the commencement of this Act; [a][or

(c) for the redemption of any security given after the commencement of this Act in respect of any loan made either before or after the commencement of this Act.]

[a] *Inserted* by the Usurious Loans (Amendment) Act, 1926 (28 [XXVIII] of 1926), S. 2.

PROVINCIAL AMENDMENT.

UNITED PROVINCES

In sub-section *(3)* of section 2, —

(a) after the word 'means' *insert* '*(i)*'; and

(b) after clause (c) *add* the following, namely —

"or

(d) for account of a loan by a debtor against his creditor.

(ii) any proceeding for the determination of a claim under the United Provinces Encumbered Estates Act, 1934." — U. P. Act XXIII of 1934, S. 2 (2).

Re-opening of transactions.

3. *(1)* Notwithstanding anything in the Usury Laws Repeal Act, 1855, where, in any suit to which this Act applies, whether heard *ex parte* or otherwise, the Court has reason to believe, —

(a) that the interest is excessive; and

Section 2 — Note 1 *(contd.)*

[2] Stipulation for interest may be inferred in the absence of written agreement to that effect, from what the parties understood and intended to be the terms of payment of the balance acknowledged to be due. ('94) 1894 Pun Re No. 36 page 99 (101) (D B).

2. Section 2 (2). — [1] A security bond executed in respect of future and contingent liability is not a loan. (Vol 28) 1941 Pat 233 (240) (D B).

[2] Building contractor agreeing to find money for transaction and building—Owner agreeing to pay interest on the money found—Transaction is a loan — Physical transfer of money is not necessary. (Vol 33) 1946 P C 145 (149) (PC). (Case decided under Art. 6 of Ottoman Law of Interest.)

3. Section 2 (3). — [1] Provisions are not applicable to a suit by a debtor. (Vol 13) 1926 Bom 65 (66) : 50 Bom 107 (D B).

[2] The Usurious Loans Act can have no application to case in which there is no loan. (Vol 28) 1941 Pat 233 (240) (D B). (Security bond for future contingent liability—*Held* there was no loan).

[3] Act is not applicable to transactions previous to 1918 when it was passed. (Vol 15) 1928 Nag 120 (121)✠ (Vol 31) 1944 Lah 115 (117) (D B). (Debt incurred in 1914—Neither provisions of this Act nor of the Punjab Relief of Indebtedness Act apply.) (Vol 24) 1937 Mad 769 (774) (D B)✠(Vol 16) 1929 All 59 (62) (DB). (Mortgage bond executed before Act came into operation)✠(Vol 14) 1927 Nag 338 (338) (Do.)✠(Vol 13) 1926 Nag 473 (474). (Do.)

[4] Section 2 (3) (b) is wide enough to cover the case of a surety. The question whether the person sought to be bound by the creditor is the principal debtor or surety is not material for the purposes of the Act. (Vol 12) 1925 All 400 (402) : 47 All 745 (DB).

4. Local Amendments. — [1] Sections 5 and 6 of Punjab Relief of Indebtedness Act, have the effect of amending this section and apply to suits instituted after commencement of Punjab Relief of Indebtedness Act. (Vol 27) 1940 Lah 275 (276).

[2] Act as amended by U. P. Usurious Loans (Amendment) Act of 1934, does not apply to suits instituted before that Act was passed. (Vol 23) 1936 All 697 (699) (DB). ✠ (Vol 24) 1937 Oudh 241 (242) : 13 Luck 317 (DB). (Suit instituted one day before U. P. Amending Act XXIII [23] of 1934, received assent of the Governor and three months before it was published in the Gazette is not one instituted after the passing of the Act)

[3] By reason of the provisions of S. 2 (3) (ii) of the Act, as amended in U. P. in proceedings under the U. P. Encumbered Estates Act, it is competent to a Court to reduce the interest even though the loan was incurred prior to the passing of the Act. (Vol 28) 1941 All 293 (294) : I L R (1941) All 567 (DB).

[4] Section 2 (a), Usurious Loans (C. P. Amendment) Act (XI [11] of 1934) is not retrospective in operation so as to enable Court to reopen loan transaction made before June 15, 1934, at any rate, when the amount due under such a loan has become the subject-matter of litigation instituted before that date. (Vol 25) 1938 Nag 112 (116) : I L R (1938) Nag 91 (DB).

[See however (Vol 27) 1940 Nag 363 (365) : I L R (1940) Nag 689. (Suit instituted long after C. P. Amendment of 1934 came into force but in which transactions prior to amendment were questioned on the ground that interest was excessive : *Held* Court was bound to reopen the transaction).]

[5] The C. P. Usurious Loans (Amendment) Act operates in respect of all suits for the enforcement of agreements made after the commencement of the Act in respect of loans made either before or after its commencement. (Vol 28) 1941 Nag 294 (295) : I L R (1942) Nag 177.

[6] Act as amended in 1926 applies to redemption suits even when mortgage is entered into prior to 1926. (Vol 19) 1932 Cal 83 (83) (DB).

SECTION 3 — SYNOPSIS

1. Scope.
2. Court's powers and duties.
3. Necessary conditions for exercise of power.

(b) that the transaction was, as between the parties thereto, substantially unfair,

the Court may exercise all or any of the following powers, namely, may,—

(i) re-open the transaction, take an account between the parties, and relieve the debtor of all liability in respect of any excessive interest;

(ii) notwithstanding any agreement, purporting to close previous dealings and to create a new obligation, re-open any account already taken between them and relieve the debtor of all liability in respect of any excessive interest, and if anything has been paid or allowed in account in respect of such liability, order the creditor to repay any sum which it considers to be repayable in respect thereof;

(iii) set aside either wholly or in part or revise or alter any security given or agreement made in respect of any loan, and if the creditor has parted with the security, order him to indemnify the debtor in such manner and to such extent as it may deem just:

Provided that, in the exercise of these powers, the Court shall not—

(i) re-open any agreement purporting to close previous dealings and to create a new obligation which has been entered into by the parties or any persons from whom they claim at a date more than [a][twelve] years from the date of the transaction;

(ii) do anything which affects any decree of a Court.

Explanation.—In the case of a suit brought on a series of transactions the expression "the transaction" means, for the purposes of proviso (i), the first of such transactions.

(2) (a) In this section "excessive" means in excess of that which the Court deems to be reasonable having regard to the risk incurred as it appeared, or must be taken to have appeared, to the creditor at the date of the loan.

(b) In considering whether interest is excessive under this section, the Court shall take into account any amounts charged or paid, whether in money or in kind, for expenses, inquiries, fines,

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SECTION 3 — SYNOPSIS *(contd.)*

4. Court to have 'reason to believe'.
5. Relief in respect of excessive interest.
6. Excessive interest.
7. Relief where new obligations have been created—Cl. (1) (b) (ii).
8. Relief where transaction is unfair.
9. Restriction on powers of Court — Proviso to S. 3 (1) (b).
10. Debtor invoking aid of Court.
11. Bona fide transferee for value—S. 3, Cl. *(4)*.
12. Evidence.
13. Court-fee.
14. Other cases under Local Amendments.

1. Scope. — [1] The Act contemplates two cases. One is where the interest is excessive and the transaction substantially unfair. The other is where the interest is so excessive that that itself is a sufficient indication of unfairness. (Vol 20) 1933 Nag 224 (226).

[2] The Act is not retrospective and transactions entered into before the coming into force of the Act cannot be reopened. (Vol 16) 1929 All 59 (62) (DB).

[3] Amendment of the Act by C. P. Amending Act XI [11] of 1934 is not retrospective so as to enable Courts to reopen transactions made before the Act. (Vol 31) 1944 Nag 280 (280, 281) : I L R (1944) Nag 838 (DB).

[See however (Vol 23) 1936 Nag 259 (260) : I L R (1937) Nag 119. (Act as amended in 1926—Enhanced powers of re-opening accounts up to 12 years back can be applied to suits instituted prior to date of amendment.)✠(Vol 24) 1937 Nag 101(101) : I L R (1937) Nag 410. (Act as amended by C. P. Act XI [11] of 1934 applies to transactions before coming into force of the amending Act when the suit relating to it comes for hearing after amendment).]

[But see (Vol 27) 1940 Nag 363 (365, 366) : I L R (1940) Nag 689. (Suit instituted after amendment in respect of transaction prior to amendment. Amendment applies and Court is bound to reopen such transactions if interest is excessive).]

[4] U. P. Amendment Act (XXIII [23] of 1934) is inapplicable to suits which are instituted before 27-4-35 when it was published in the Gazette. (Vol 24) 1937 Oudh 241 (242) : 13 Luck 317 (DB).

[5] Court granting relief to judgment-debtor under U. P. Agriculturists' Relief Act in execution of a decree has no jurisdiction to interfere with rate of interest before 1-1-1930 either under U. P. Agriculturists' Relief Act or the Usurious Loans Act. (Vol 23) 1936 All 450 (450).

2. Court's powers and duties. — [1] Section 3 is mandatory and the Court is bound to exercise the powers conferred the moment the facts bring the claim within the ambit of the Act. (Vol 28) 1941 Nag 294 (295) : I L R (1942) Nag 177.

[2] Court is bound to exercise powers under S. 3, irrespective of payment of court-fee. (Vol 28) 1941 Nag 294 (296) : I L R (1942) Nag 177.

[3] The Court is bound to take up the question *suo motu* and consider the applicability of the Act even where the case is heard *ex parte* or the defendant omits to raise it. (Vol 12) 1925 Cal 392 (393) ✠ (Vol 7) 1920 Bom 334 (334) : 44 Bom 775 ✠ (Vol 28) 1941 Nag 177 (177) : I L R (1942) Nag 456. (Decision under the Act as amended by Act XI [11] of 1934 in C. P.)✠ (Vol 17) 1930 Cal 776 (777). (Whether raised by the defence or not.)

[4] Act applies to defendant confessing judgment. (Vol 11) 1924 Rang 144 (145) : 1 Rang 580 (DB).

[5] A Small Cause Court can reopen an account in suits which are cognisable by it. (Vol 28) 1941 Nag 294 (295, 296) : I L R (1942) Nag 177. (Suit to enforce an agreement by way of settlement of accounts.)

[6] Relief merely on ground of hardship is not proper. (Vol 12) 1925 Sind 136 (140) : 18 Sind L R 39 (DB).

[7] In absence of undue influence Court will not give relief to parties who, with their eyes open, entered

bonuses, premia, renewals or any other charges, and if compound interest is charged, the periods at which it is calculated and the total advantage which may reasonably be taken to have been expected from the transaction.

(c) In considering the question of risk, the Court shall take into account the presence or absence of security and the value thereof, the financial condition of the debtor and the result of any previous transactions of the debtor, by way of loan, so far as the same were known, or must be taken to have been known, to the creditor.

(d) In considering whether a transaction was substantially unfair, the Court shall take into account all circumstances materially affecting the relations of the parties at the time of the loan or tending to show that the transaction was unfair, including the necessities or supposed necessities of the debtor at the time of the loan so far as the same were known, or must be taken to have been known, to the creditor.

Explanation.—Interest may of itself be sufficient evidence that the transaction was substantially unfair.

(3) This section shall apply to any suit, whatever its form may be, if such suit is substantially one for the recovery of a loan or for the enforcement of any agreement or security in respect of a loan [b][or for the redemption of any such security].

(4) Nothing in this section shall affect the rights of any transferee for value who satisfies the Court that the transfer to him was *bona fide*, and that he had at the time of such transfer no notice of any fact which would have entitled the debtor as against the lender to relief under this section.

For the purposes of this sub-section, the word "notice" shall have the same meaning as is ascribed to it in section 4 of the Transfer of Property Act, 1882.

(5) Nothing in this section shall be construed as derogating from the existing powers or jurisdiction of any Court.

[a] *Substituted* by the Usurious Loans (Amendment) Act, 1926 (28 [XXVIII] of 1926), S. 3, for "six".
[b] *Inserted, ibid.*

Section 3—Note 2 *(contd.)*

into extortionate bargains. (Vol 13) 1926 Rang 208 (211) : 4 Rang 214 (DB).

[8] Court should act with reference to local conditions and interest of both creditor and debtor should be looked after. (Vol 14) 1927 Oudh 36 (36) (DB).

[9] Discretion vested in Court by U. P. Act XXIII of 1934 to decide whether rate of interest is excessive or not—Where the lower Court has exercised its discretion properly the High Court will not interfere in appeal. (Vol 26) 1939 Oudh 223 (224) : 14 Luck 464 (DB).

3. Necessary conditions for exercise of power. —[1] Two conditions must be satisfied before debtor can be relieved under S. 3; first that interest must be excessive and second that transaction is substantially unfair as between parties. (Vol 17) 1930 Cal 776 (777) ✠ (Vol 28) 1941 Pat 99 (102) : 19 Pat 974 (DB) ✠ (Vol 22) 1935 Pesh 4 (4) ✠ (Vol 17) 1930 Lah 65 (67) (DB) ✠ (Vol 14) 1927 Lah 621 (622). (Regard must be had to prevailing rate of interest, nature of security and the period of outstandings.)

[2] Where it is found that one of the conditions alone is present no relief can be given under the Act. (Vol 26) 1929 Pat 323 (329). (Interest found excessive but transaction not unfair.)

[See however (Vol 24) 1937 Nag 101 (101): I L R (1937) Nag 410. (Act as amended by C. P. Act XI of 1934—If one condition is present S. 3 applies.)]

4. Court to have "reason to believe."—[1] The words 'has reason to believe' mean something more than mere suspicion. (Vol 17) 1930 Cal 776 (777).

[2] 'Reason to believe' does not require evidence but means only judicial notice under the appropriate provisions of the Evidence Act. (Vol 26) 1939 All 323 (326) (DB).

5. Relief in respect of excessive interest.—[1] Operation of Cl. (1) is not restricted to cases where the parties have entered into a subsequent agreement purporting to close previous dealings and to create a new obligation. (Vol 29) 1942 Mad 600 (601) : I L R (1943) Mad 56.

[2] Settlement of final accounts between parties — Account open to review — Court is bound to re-open transaction if interest charged is excessive. (Vol 33) 1946 P C 145 (149) (PC). (Case under Art. 6 of Ottoman Law of Interest.)

[3] Even in cases where custom allows excessive interest the Court has under S. 3 (1), power to re-open transaction and order repayment in respect of excessive interest and no claim for such relief is necessary. (Vol 16) 1929 Nag 348 (348).

[4] Transaction not harsh and unconscionable — Terms not indicating that it was induced by undue influence — Court should allow agreed rate of interest. (Vol 15) 1928 Rang 7 (8) : 5 Rang 619 (DB) ✠ (Vol 16) 1929 Pat 340 (341) (DB).

[5] If rate of interest was neither unfair, nor higher than the prevailing rate, Court should not interfere. (Vol 17) 1930 Cal 207 (208) : 56 Cal 960 (DB).

[6] Unless rate is excessive or transaction substantially unfair interest *pendente lite* and up to date fixed for payment at contract rate should be allowed. (Vol 12) 1925 Cal 268 (269) (DB).

[7] The Court on coming to a conclusion that the rate of interest is usurious must reopen the transactions and find out what is really due at the new rate of interest. It cannot provide for any compensation by lessening future interest. (Vol 29) 1942 Oudh 273 (275) : 18 Luck 81 (DB) ✠ (Vol 14) 1927 Lah 158 (159) : 8 Lah 205 (DB).

[8] Reasonable rate should be fixed by Court having regard to risk incurred. (Vol 22) 1935 Mad 468 (471) (DB).

[9] The following rates were held reasonable in the following cases.

(a) Reduction to 15 per cent simple interest. (Vol 26) 1939 P C 200 (201) (PC).

Objects and Reasons.

"We think it well to commence clause 3 by a specific reference to the Usury Laws Repeal Act, 1855, as the powers conferred by the Bill override *pro tanto* the provisions of that Act. We have accepted the view that the Court may act under the provisions of this clause *suo motu* as we attach considerable weight to the body of opinion which suggests this course and have modified the language of the Bill accordingly.

We gave careful consideration to the question whether there should not be some restriction on the powers of the Court to re-open agreements closing previous dealings and creating new obligations. We think that there is something to be said for the view that the Courts should not be required or allowed in such a case to go back beyond a definite period. In the case of a running account such a restriction is not possible, but we have accepted the view that where there is such an agreement which has been entered into by the parties or by their representatives in interest, the Court should not be allowed to re-open the agreement if it was made more than six years prior to the transaction before the Court. We have therefore inserted a proviso limiting in this way the powers under clause 3 *(1)* of the Bill annexed to this Report. To prevent any misapprehension we have also laid it down that the powers conferred by the clause shall not be used in such a way as to affect the decree of a Court.

We have accepted the view expressed in many opinions that the concluding words of clause 2 (2) *(a)* of the Bill, referred to us should be omitted. We recognize that there is some danger of a local combination creating a prevailing rate which would be an excessive rate. We have amended the closing words of sub-clause (2) *(b)* so as to make it clear that it is for the Court to decide the total advantage which may reasonably be taken to have been expected from any transaction. We have inserted an Explanation to make it clear that interest may of itself be sufficient evidence that a transaction is substantially unfair. By doing so we have deliberately adopted the view set forth in the House of Lords in *Samuel* v. *Newbold*, (1906) A. C. 461.

We have modified the provision in the Bill by which protection is afforded to a transferee for value so as to make it clear that it only extends to a case where a Court is satisfied that the transfer is *bona fide*, and that the transferee had at the time of the transfer no notice of any fact which would have entitled the debtor as against the lender to relief under clause 3".

—S. C. R.

PROVINCIAL AMENDMENTS.

CENTRAL PROVINCES

(1) In sub-section *(1)* of section 3 —

(a) for the word 'and' in clause (*a*), the word 'or' shall be *substituted*; and

(b) for the words "the Court may exercise all or any of the following powers, namely, may" occurring after clause *(b)*, the words "the Court shall exercise all or any of the following powers, namely, shall" shall be *substituted*.

Section 3 — Note 5 *(contd.)*

(b) 2 Per cent interest. (Vol 12) 1925 Sind 136 (140): 18 Sind L R 39 (DB).

(c) Security good — Unreasonble delay in bringing suit for a number of years—Reduction from 1 per cent. compound to one per cent simple interest. (Vol 27) 1940 Nag 156 (157) : ILR (1941) Nag 607 (DB).

[10] In estimating the risk for determining proper rate of interest it is the position of the debtor and not that of the creditor that should be considered. (Vol 29) 1942 Oudh 273 (275) : 18 Luck 81 (DB).

[11] Creditor should prove necessity for high interest and principal. (Vol 6) 1919 All 268 (269) : 41 All 609 (DB).

[12] Market rate of 12 per cent. with yearly rests was awarded where plaintiff was unable to prove that 24 per cent. with yearly rests was market rate. (Vol 11) 1924 Pat 580 (582) : 3 Pat 465 (DB).

[13] Compound interest presumed to be excessive under proviso to S. 3 (2) (b) (Madras)—Presumption not rebutted — Compound interest, however reasonable, cannot be allowed to stand. (Vol 31) 1944 Mad 105 (108).

[14] Where the suit promissory note provides for the payment of compound interest the fact that the plaintiff has not claimed compound interest in his plaint will not remove the contract from the purview of S. 3. (Vol 33) 1946 Mad 111 (112).

[15] Apart from any circumstance vitiating the contract and even if the contract is quite valid and operative the Court has powers under S. 3 to reduce the rate of interest if it finds on facts that the interest is excessive. (Vol 18) 1931 Nag 25 (26).

[16] Mortgage executed before the Act — Mortgage sought to be redeemed after the Act took effect—Court can reduce the interest payable to the mortgagee. (Vol 19) 1932 Cal 83 (83) (DB).

[17] Court has power to reduce a usurious rate of interest in negotiable instruments. (Vol 18) 1931 All 662 (662) : 53 All 776 (DB). (Section 79 of Negotiable Instruments Act does not exclude Court's jurisdiction.)

[18] "Transaction" includes dealings by way of advances and repayments though promissory notes have been taken as collateral securities on settlement of account from time to time. (Vol 31) 1944 Mad 105 (108). ✠ (Vol 29) 1942 Oudh 273 (275) : 18 Lucks 81 (DB). (Creditor willingly accepting pronote towards debt — Payment is not different from cash payment.)

[19] Mortgage for a term of two years was executed, binding one half of a house and bearing interest at $18\frac{3}{4}$ per cent. After settling accounts and closing the same finally another mortgage mortgaging the entire house with different terms was executed — *Held* that the two mortgages were not one transaction even though the consideration for the latter was the amount due on the first. (Vol 25) 1938 Lah 729 (730).

[20] Mortgage deed executed for certain debts — A secured deed was executed for a higher amount part of which was received in cash and the balance set off against the first deed — Third deed for a still higher amount for paying off the earlier mortgage — Balance received in cash — *Held* that Act applied to series of transactions and the three transactions could be re-opened. (Vol 26) 1939 Oudh 287 (288):15 Luck 145 (DB).

[21] Where suit is not based on series of transactions but on one transaction, explanation to proviso does not apply. (Vol 14) 1927 Lah 621 (622) ✠ (Vol 25) 1938 Lah 729 (730).

6. Excessive interest.—[1] 'Excessive' is a relative term and what is excessive in one case will not be so in another and will depend upon the surrounding circumstances of each case. (Vol 20) 1933 Nag 224 (225) ✠ (Vol 16) 1929 Pat 383 (384) (DB).

[2] Whether interest is excessive or not should be decided by taking into account such matters as the financial condition of the debtor, the nature of the

(2) After clause *(a)* of sub-section *(2)* of section 3, the following provisos shall be *inserted*, namely :—

"*(i)* Provided that compound interest in excess of ten *per cent.* on any loan made after such date, as the Local Government may, by notification, fix, shall be deemed to be excessive;

(ii) Provided further that, where in any suit the Court finds that the rate of interest exceeds twelve *per cent. per annum* in the case of a secured loan or eighteen *per cent per annum* in the case of an unsecured loan or that there is a stipulation for rents at intervals of less than six months, it shall, until the contrary is proved, presume that such rate is excessive, but this provision shall be without prejudice to the powers of the Court under sub-section (*1*) where the Court is satisfied that the interest charged, though not exceeding twelve *per cent. per annum* or eighteen *per cent. per annum*, as the case may be, is excessive."

— C. P. Act XI of 1934, Ss. 2 and 3 [15-6-1934].

MADRAS

(1) Sub-section *(3)* of section 1 of the Usurious Loans (Madras Amendment) Act, 1936, is as follows :—

"*(3)* The provisions of this Act shall apply to all suits to which the Usurious Loans Act, 1918,.....would apply and which are pending on, or are instituted on or after, the date of the commencement of this Act."

(2) In section 3 —

(i) in sub-section (*1*), for the words, letters and brackets beginning with "has reason to believe" and ending with "any of the following powers, namely, may," the following shall be *substituted*, namely :—

"has reason to believe that the transaction was, as between the parties thereto, substantially unfair, the Court shall exercise one or more of the following powers, namely,—";

(ii) the *Explanation* to the same sub-section shall be *renumbered* as *Explanation II* and the following shall be *inserted* as *Explanation I*, namely :—

"*Explanation I.*—If the interest is excessive, the Court shall presume that the transaction was substantially unfair; but such presumption may be rebutted by proof of special circumstances justifying the rate of interest.";

(iii) to clause *(b)* of sub-section (*2*), the following proviso shall be *added*, namely :—

"Provided that in the case of loans to agriculturists, if compound interest is charged, the Court shall presume that the interest is excessive."; and

(iv) the *Explanation* to clause *(d)* of the same sub-section shall be *omitted*.

— Mad. Act VIII of 1937, S. 2 [2-3-1937].

Section 3—Note 6 *(contd.)*

security etc., the risk incurred by the creditor and the extra amounts not paid but incorporated into the principal as expenses. In the case of compound interest, the periods of rests, also have to be considered, lastly the total advantages that may be reasonably expected to accrue to the respective parties from the transaction have to be taken into account. (Vol 17) 1930 Cal 776 (777, 778) ✠ (Vol 17) 1930 Lah 65 (67) (DB).

[3] Lender securing for himself compound interest is not wrongful—Merely because interest is capitalised, debtor cannot complain. (Vol 22) 1935 Lah 38 (39) (DB).

[*See also* (Vol 26) 1939 Pat 360 (361) (DB). (Stipulation to pay compound interest at same rate as on principal is not a stipulation by way of penalty within S. 74, Contract Act).]

[4] The larger is the amount of loan the lesser should be the rate of interest. (Vol 25) 1938 Oudh 156 (159) : 14 Luck 49 (DB).

[5] Usurious Loans Act as amended by Act 23 of 1934 in U. P. — Question whether rate of interest is excessive or not—In cases coming before Court after the amendment the question must be decided on the principles laid down in the Amending Act. (Vol 25) 1938 Oudh 156 (159) : 14 Luck 49 (D B).

[6] Under the second proviso contained in S. 3 of the C.P. Act XI of 1934 any interest in excess of 18 per cent shall be presumed to be excessive but that merely lays down the maximum. (Vol 24) 1937 Nag 101 (101) : ILR (1937) Nag 410.

[7] On a loan secured by a first mortgage interest must be deemed excessive if the rate exceeds 12% per annum but is not to be deemed excessive if it does not exceed 7% per annum. (Vol 26) 1939 Oudh 287 (288) : 15 Luck 145 (D B).

[8] 9 per cent simple interest is a liberal remuneration for a secured debt. (Vol 32) 1945 Mad 196 (197).

[9] The Act as amended by U. P. Government in 1934 says that the rate of interest for unsecured debts shall not necessarily be deemed to be excessive if it does not exceed 24 per cent per annum. (Vol 32) 1945 All 235 (236) : I L R (1945) All 123 (D B).

[10] In the following cases interest charged was held excessive.

(a) Interest at the rate of 24 per cent capitalised and made payable by monthly instalments, when loan is amply secured. (Vol 27) 1940 P C 60 (62) (P C).

(b) 2 per cent compound interest is excessive as the section stands amended in Central Provinces. (Vol 28) 1941 Nag 177 (177) : I L R (1942) Nag 456.

(c) Rate of 24 per cent. per annum without some special cause for a promissory note, held excessive. (Vol 26) 1939 All 308 (309) : I L R (1939) All 329 (D B).

(d) Suit on mortgage resulting in compromise—Decree for payment by instalments with interest at 8¼% — Punctual payments of instalments — Security very ample and creditor running no risk — Amount paid double that of principal originally advanced—*Held* rate of interest was excessive. (Vol 28) 1941 All 293 (294, 295) : I L R (1941) All 567 (D B).

[11] In the following cases the rate of interest charged was held to be not excessive:

(a) Interest on a mortgage of 1933 at the usual rate prevailing in the locality. (Vol 29) 1942 Pat 419 (420) (D B).

(b) 2 per cent a month charged on a coparcenary. (Vol 16) 1929 Lah 242 (244).

(c) 12 per cent compound interest per annum on hand note for Rs. 10,000. (Vol 25) 1938 Pat 324 (326) (D B).

(d) Loan advanced for the purpose of saving property at Re. 1-4-0 per cent per annum without security. (Vol 24) 1937 Lah 16 (17) (D B).

(e) Two and half per cent per mensem. (Vol 5) 1918 P C 249 (252) : 1918 Pun Re No 124 (P C).

(f) 25 per cent compound interest per annum. (Vol 17) 1930 Cal 776 (778).

(g) 25 per cent compound interest is *prima facie* excessive. (Vol 21) 1934 All 938 (939).

(h) 15 per cent interest per annum. (Vol 32) 1945 Pat 297 (298) : 24 Pat 195 (D B).

(i) Interest charged at the rate of 0-12-0 per cent per mensem before pro-note and capitalised again bear-

PUNJAB

In section 3 —

(i) for the word 'and' in clause *(a)* of sub-section *(1)* the word 'or' shall be *substituted*;

(ii) for the word 'may' where it appears for the first time in sub-section *(1)* the word 'shall' shall be *substituted*;

(iii) for the word 'may' after the word 'namely' in sub-section *(1)* the word 'shall' shall be *substituted*;

(iv) to sub-section *(2)* the following clause shall be *added*, namely :—

"*(e)* The Court shall deem interest to be excessive if it exceeds seven and a half *per centum per annum* simple interest or is more than two *per centum* over the Bank rate, whichever is higher at the time of taking the loan, in the case of secured loans, or twelve and a half *per centum per annum* simple interest in the case of unsecured loans;

Provided that the Court shall not deem interest in excess of the above rates to be excessive if the loan has been advanced by the Imperial Bank of India or any bank included in the Second Schedule, Reserve Bank of India Act, 1934, or any banking company registered under the Indian Companies Act, 1913, prior to the first day of April 1937, or any co-operative society registered under the Co-operative Societies Act, 1912."

— Punj. Act VII of 1934, S. 5 [19-4-1935] as amended by Punj. Act XII of 1940, S. 3.

(2) Section 6 of the Punjab Relief of Indebtedness Act, 1934 (Punj. Act VII of 1934) is as follows :— "The provisions of this Part (i. e. Part III) of the Act shall apply to all suits pending on or instituted after the commencement of this Act."

(Note :—Part III contains section 5 given above.)

UNITED PROVINCES

In section 3 —

(1) in sub-section *(1)* —

(a) in clause *(a)* for the word 'and' *substitute* the word 'or';

(b) after clause *(b)* for the words "the Court may exercise all or any of the following powers, namely, may" *substitute* the words "the Court shall exercise one or more of the following powers, namely, may"; and

(c) in clause *(i)* of the proviso to the same sub-section for the word 'twelve' *substitute* the word 'seventeen'

Section 3 — Note 6 *(contd.)*

ing 0-12-0 per cent per month — *Held* not excessive. (Vol 22) 1935 Pesh 4 (4).

7. Relief where new obligations have been created—Cl. (1) (b) (ii).—[1] Section 3 (1) (ii) is applicable only when there is agreement to close previous dealings and to create new obligation. (Vol 27) 1940 Cal 211 (212). (Transaction merely a mortgage under which mortgagor received consideration money: *Held* the sub cl. (ii) did not apply.)

[2] Court can exercise power even though the parties have by agreement closed their previous dealings and created a new obligation. (Vol 29) 1942 Mad 600 (601): I L R (1943) Mad 56.

[3] Under the provisions of the Usurious Loans Act, the Court is bound to reopen any agreement purporting to close previous dealings and to create a new obligation which has been entered into by the parties within a period of twelve years from the date of the transaction. (Vol 33) 1946 Lah 6 (9).

[4] Court can reduce the excessive interest in spite of an agreement where such an agreement serves merely as a device for getting excessive interest. (Vol 28) 1941 Lah 212 (213).

8. Relief where transaction is unfair.—[1] Disapproval with which extortionate claims are viewed in Courts is based on inherent inequity of transaction and not on capacity in which plaintiff seeks to enforce it. (Vol 28) 1941 Nag 294 (294) : I L R (1942) Nag 177.

[2] For a transaction to be unfair it is not necessary that some moral blameworthiness should be ascribed to the creditor. Taking undue advantage of the position of the debtor is enough. (Vol 22) 1935 Mad 468 (472) (D B) ✠ (Vol 23) 1936 All 697 (699) (DB). (As amended by U. P. Amendment Act, 1934 — Mortgagor in embarrassed financial condition — Mortgagee dictating high rate of interest—Section 3 applies.)

[3] The words "substantially unfair" relieves Courts from necessity of going into the intricate questions arising under Ss. 16 and 19A, Contract Act. (Vol 17) 1930 Cal 776 (778).

[4] Test to determine whether a bargain is fair or unfair is to take into consideration circumstances as they existed at time it was made. (Vol 27) 1940 Lah 275 (276) ✠ (Vol 20) 1933 Nag 224 (226). (A bargain which is fair at its inception cannot become unfair by the happening of subsequent events.) ✠ (Vol 19) 1932 Lah 252 (253) : 13 Lah 542. (Mortgagee put in possession of three-fourths of the property under usufructuary mortgage with a condition that mortgagor will pay interest on the entire amount till the former was put in possession of the balance also is unconscionable.)

[5] Covenant to pay interest at 12 per cent. at the end of the year and in default to pay compound interest is not unreasonable. (Vol 14) 1927 Lah 158 (159): 8 Lah 205 (DB).

[6] Where the interest on a bond was fixed at Rs. 2 per cent. per mensem and in case of default the same was payable from the date of the execution of the bond and not from the date of the default, the transaction was held substantially unfair within the meaning of S. 3. (Vol 28) 1941 Lah 23 (25) (DB).

[7] Two per cent. per mensem compound rate with monthly rests held unconscionable. (Vol 12) 1925 All 31 (32).

[8] Where interest on the whole sum borrowed continues at the rate fixed though the principal is being progressively discharged by instalments, the provision as to interest is unconscionable and unfair. (Vol 7) 1920 Bom 334 (334, 335) : 44 Bom 775.

[9] All the circumstances should be taken into account in deciding about the unfairness of a transaction The interest may of itself be sufficient evidence but the creditor can show that the high rate is justified in view of the risk involved. (Vol 17) 1930 All 76 (76, 77) (DB).

[10] The mere fact that the rate of interest is somewhat high would not be itself a ground for interference in the absence of anything to suggest that the transaction was unconscionable or unduly hard. (Vol 28) 1941 Pat 233 (240) (DB) ✠ (Vol 16) 1929 All 680 (683) (DB). (No undue influence — Interest at Rs. 2-8-0 per cent. per mensem compoundable quarterly was held not unconscionable.)

[11] Fact that the borrower has previously borrowed on similar onerous terms is no evidence to show that

(2) in sub-section *(2)* after clause *(b) add* the following provisos, namely,—

"Provided that in the case of loans secured by a first mortgage the Court shall deem the interest excessive if —

(1) the rate exceeds 12 *per cent. per annum*, or

(2) the amount of interest that might become due at any time exceeds the amount that would become due at that time if the rate were 12 *per cent. per annum* and the interval between rests were six months :

Provided also that in the case of loans secured otherwise than by a first mortgage the Court may, if it considers that the nature of the security warrants it, deem that the interest is not excessive even though the rate exceeds twelve *per cent. per annum* or the amount of interest that might become due at any time exceeds the amount that would become due at that time if the rate were 12 *per cent. per annum* and the interval between rests six months :

Provided also that in the case of unsecured loans the Court shall, unless the contrary is proved, deem the interest excessive if —

(1) the rate exceeds 24 *per cent. per annum*, or

(2) the amount of interest that might become due at any time exceeds the amount that would become due at that time if the rate were 24 *per cent. per annum* and the interval between rests were six months :

Provided also that in the case of secured loans the Court shall not deem the interest excessive if —

(1) the rate does not exceed 7 *per cent. per annum*, and

(2) the amount of interest that might become due at any time does not exceed the amount that would become due at that time if the rate were 7 *per cent. per annum* and the interval between rests were six months :

Provided also that in the case of unsecured loans the Court shall not deem the interest excessive if —

(1) the rate does not exceed 9 *per cent. per annum*, and

(2) the amount of interest that might become due at any time does not exceed the amount of interest that would become due at that time if the rate were 9 *per cent. per annum* and the interval between rests were six months."

— U. P. Act XXIII of 1934, Ss. 3 to 6.

Section 3 — Note 8 *(contd.)*

the transaction is reasonable and proper. (Vol 15) 1928 P C 64 (68) : 7 Pat 294 : 55 Ind App 85 (PC).

[12] Borrower in need of money — Creditor only person who could advance it — Undue influence is not established thereby. (Vol 9) 1922 Pat 491 (492) : 1 Pat 263 (DB).

[13] Creditor lending money to expectant heir is in a position to dominate and must prove that he has not used that position. (Vol 5) 1918 P C 249 (254) : 1918 Pun Re No 124 (PC).

[14] Amount claimed exceeding enormously sum advanced — Transaction, held not unconscionable and Act did not apply. (Vol 22) 1935 Lah 38 (39) (DB).

9. **Restriction on powers of Court—Proviso to S. 3 (1) (b).** — [1] Both proviso (i) to S. 3 (1) of Act (as amended by U. P. Act 23 of 1934) and sub-s. (5) of S. 14 of Encumbered Estates Act deal with renovations of contract and not with original contract. (Vol 26) 1939 Oudh 110 (111) : 14 Luck 430 (DB).

[2] There is no conflict between S. 3 of this Act and S. 6, Punjab Relief of Indebtedness Act. Even if it were so proviso to S. 3 containing specific provisions dealing with the particular matter referred to therein shall prevail over the general provision contained in the Relief of Indebtedness Act. (Vol 28) 1941 Lah 364 (367) : I L R (1942) Lah 199 (DB).

[3] Where the effect of reducing the interest or re-opening a hard and harsh bargain would be to affect the decree of another Court, the Court cannot under S. 3 do so, whether such decree is *inter partes* or not. (Vol 23) 1936 All 611 (612) (DB).

[4] Section 3 *(1)*, Proviso *(ii)* does not take away power of the Special Judge under S. 14 read with S. 15, U. P. Encumbered Estates Act, to interfere with findings of Court which passed decree. (Vol 26) 1939 Oudh 184 (186) (DB).

[5] A decree obtained by a creditor prior to the institution of proceedings under the Encumbered Estates Act ceases to be operative as a decree when the debt which merged in the decree becomes the subject of adjudication by the special Judge. Hence there is no decree in existence and S. 3 of the Usurious Loans Act can be applied to reduce the interest. (Vol 28) 1941 All 293 (294, 295) : I L R (1941) All 567 (DB).

10. **Debtor invoking aid of Court.** — [1] Section should not be applied to a suit by a debtor for enforcing an agreement whether by way of settlement of account or otherwise in respect of a loan brought by debtor. (Vol 13) 1926 Bom 65 (65, 66) : 50 Bom 107 (DB).

[2] The fact that a person himself has charged high rate of interest from his mortgagor does not debar him from claiming reduction of interest when he pays off a mortgage. (Vol 23) 1936 All 697 (699) (DB).

[3] Debtor is not entitled to invoke aid of Court merely because, by his own default in repayment, the amount has swelled considerably. (Vol 22) 1935 Mad 468 (472) ✠ (Vol 29) 1942 Mad 428 (429) (DB) ✠ (Vol 26) 1939 Pat 360 (361) (DB).

[4] Debtor claiming relief under Act should prove that interest is excessive and that transaction is substantially unfair. (Vol 22) 1935 Mad 468 (470) (DB) ✠ (Vol 16) 1929 Pat 383 (384) (DB) ✠ (Vol 24) 1937 Oudh 241 (242) : 13 Luck 317 (DB) ✠ (Vol 26) 1939 Pat 360 (361) (DB).

[5] Transferee of a debtor is a debtor within the meaning of S. 3 (1) (b) (i). Court can therefore relieve the transferee. (Vol 15) 1928 Oudh 396 (399) : 4 Luck 1 (FB). (Case decided under the Act as amended by Oudh Act 28 of 1926.)

11. **Bona fide transferee for value—S. 3, Cl (4).** —[1] Transferee of a creditor is a creditor within the meaning of S. 3, cl. (4). (Vol 15) 1928 Oudh 396 (399) : 4 Luck 1 (FB).

[2] Section 3 (4) does not protect transferee from operation of S. 3 (2) (b) proviso as amended in Madras. (Vol 32) 1945 Mad 196 (197).

12. **Evidence.**—[1] The powers conferred by the Act on the Courts do not dispense with the usual rules about evidence and proof. (Vol 20) 1933 Nag 224 (226).

[2] Parties must be presumed to know difference between interest on interest and compound interest and, if they choose to use one expression, they cannot be permitted to prove that they meant other. (Vol 18) 1931 Nag 25 (26).

4. On any application relating to the admission or amount of a proof of a loan in any insolvency proceedings, the Court may exercise the like powers as may be exercised under section 3 by a Court in a suit to which this Act applies.

Insolvency proceedings.

[THE] USURY LAWS REPEAL ACT, 1855.[a]

(ACT XXVIII of 1855).

[19th September, 1855.]

An Act for the repeal of the Usury Laws.

WHEREAS it is expedient to repeal the laws now in force relating to usury; It is enacted as follows :—

Preamble.

[a] The Act has been *declared* to be in force in the whole of British India, except the Scheduled Districts, by the Laws Local Extent Act (XV of 1874), S. 3.

Short title has been *given* by the Indian Short Titles Act (XIV of 1897)

It has been declared, under the Scheduled Districts Act (XIV of 1874), to be in force in the following Scheduled Districts :—

Sind	See *Gazette of India*	...	1880, Pt. I., p 672.
West Jalpaiguri, the Western Dvars, the Western Hills of Darjiling, the Darjiling Tarai, and the Damson Sub-division of the Darjiling District ...	Ditto	...	1881, Pt. I., p. 74.
The District of Hazaribagh	Ditto	...	1881, Pt. I., p. 507.
Ditto Lohardaga (now the Ranchi District, *see* Calcutta Gazette, 1899, Pt. I, p. 44 ...	Ditto	...	1881, Pt. I., p. 508.
Ditto Manbhum	Ditto	...	1881, Pt. I., p. 509.
Pargana Dhalbhum in the District of Singbhum ...	Ditto	...	1881, Pt. I., p. 510.
The scheduled portion of the Mirzapur District ...	Ditto	...	1879, Pt. I., p. 383.
Jaunsar Bawar	Ditto	...	1879, Pt. I., p. 382.
The Districts of Hazara, Peshawar, Kohat, Bannu, Dera Ismail Khan, and Dera Ghazi Khan [Portion of the Districts of Hazara, Bannu, Dera Ismail Khan and Dera Ghazi Khan and the Districts of Peshawar and Kohat now form the N.-W F.-P., *see* Gazette of India, 1901, Pt. I, p. 857 and *ibid.*, 1902, Pt. I, p. 575; but its application to that part of the Hazara District, known as Upper Tanawal has been barred by the Hazara (Upper Tanawal) Regulation, 1900 (2 of 1900)]	Ditto	...	1886, Pt. I., p. 48.
The District of Lahaul	Ditto	...	1886, Pt. I., p. 301.
The Scheduled Districts of the Central Provinces...	Ditto	...	1879, Pt. I., p. 771.
The Scheduled Districts in Ganjam and Vizagapatam	Ditto	...	1898, Pt. I., p. 870.
The District of Sylhet	Ditto	...	1879, Pt. I., p. 631.
The Districts of Kamrup, Naugong, Darrang, Sibsagar, Lakhimpur, [Goalpara (excluding the Eastern Dvars), and Kachar (excluding the North Kachar Hills)	Ditto	...	1878, Pt. I., p. 533.

It has been extended, under the same Act, to the following Scheduled Districts :—

Kumaon and Garhwal	Ditto	...	1876, Pt. I., p. 606.
The Tarai of the Province of Agra ...	Ditto	...	1876, Pt. I., p. 505.

1. [Repeal of enactments.] *Repealed by the Repealing Act, 1870 (14 [XIV] of 1870).*

Section 3 *(contd.)*

13. Court-fee.—[1] Application under S. 3 is only a miscellaneous application requiring a fee of Rs. 2. (Vol 28) 1941 Lah 364 (365) : I L R (1942) Lah 199 (DB). (*Ad valorem* court-fee is not payable.)

14. Other cases under Local Amendments. — [1] Whether minor son of a Government servant who owns lands is an agriculturist depends upon the circumstances of the family. (Vol 30) 1943 Mad 35 (35) : I L R (1943) Mad 294 (DB).

[2] 'Agriculturist' in S. 3 as amended in Madras is used of a person who actually follows the calling of agriculture. (Vol 29) 1942 Mad 533 (534) (D B) & (Vol 33) 1946 Mad 437 (443) : I L R (1947) Mad 141 (D B).

[3] Persons who grow produce on their extensive lands for the purpose of sale in their shops and for this purpose carry on business do not cease to be agriculturists. (Vol 31) 1944 Mad 105 (107).

Section 4 —Note 1

[1] Insolvency Court can exercise power under S. 3 (Vol 24) 1937 Lah 629 (630).

Preamble—Note 1

[1] The Act is conclusive proof that intention of legislature is that parties shall be left to make and be compelled to stand by their own bargains. (1864-65) 2 Mad H C R 451 (453) (D B). (Doctrine of English and Roman law on the subject of penalties and liquidated damages explained.)

[2] Section 80, Negotiable Instruments Act does not curtail freedom of contract as regards interest and to recover interest at rate agreed on between parties under the Act. ('07) 29 All 33 (36) : 34 Ind App 6 (P C). (Hundis silent as to interest — Collateral agreement to pay interest in a written agreement at 30%. *Held* dealing with interest by collateral agreement was in accordance with custom.)

2. In any suit in which interest is recoverable, the amount shall be adjudged or decreed by the Court at the rate (if any) agreed upon by the parties; and if no rate shall have been agreed upon, at such rate as the Court shall deem reasonable.

Rate of interest to be decreed by Courts.

3. Whenever a Court shall direct that a judgment or decree shall bear interest, or shall award interest upon a judgment or decree, it may order the interest to be calculated at the rate allowed in the judgment or decree upon the principal sum adjudged, or at such other rate as the Court shall think fit.

Rate of interest upon a judgment or decree.

4. A mortgage or other contract for the loan of money, by which it is agreed that the use or usufruct of any property shall be allowed in lieu of interest, shall be binding upon the parties.

Contract for usufruct of property, in lieu of interest.

SECTION 2—SYNOPSIS.

1. Scope and applicability.
2. Power of Court to grant relief.
3. Delay and interest.

1. Scope and applicability. — [1] In a country like India, where there is so much borrowing by the ignorant lower classes, who as much require to be protected against themselves as against money-lenders, a too literal application of provisions of S. 2 could only be productive of oppression and injustice of the most grievous kind. Court of equity will grant relief against oppressive rate. ('81) 3 All 260 (265) (F B).

[2] Section 2 of the Act is law applicable to suits on contracts whereby interest is recoverable irrespective of creed of contracting parties; but Court may give relief if interest agreed is penal. ('74) 6 N W P H C R 358 (362, 363, 365) (F B).

[3] Section 209 C. P. C., 1877, (now S. 34) does not expressly refer to suits in which interest has been contracted for; and S. 2 directs Court to give contract rate up to date of decree. ('81) 3 Mad 125 (126) (D B).

[4] Section 11 of Bihar Money-lenders Act is repugnant to S. 2 of Usury Laws Repeal Act and must to that extent be treated as void under S. 107 of Government of India Act. (Vol 26) 1939 Pat 55 (62) : 18 Pat 13 (F B).

[5] Stipulation in a bond for payment of interest at a certain rate from date of bond in case amount promised to be paid on a certain date is not paid within that time and for no interest in case it is duly paid falls within S. 2 of the Act and not under S. 74, Contract Act. ('86) 13 Cal 200 (201) (D B) ✠ ('02) 25 Mad 343 (346, 349, 350) (D B) ✠ ('94) 1894 Pun Re No. 99, page 364 (371) (D B). (Bond payable by instalments — Interest payable on default from date of bond whether 'penalty'.)

[6] Bond providing for a certain rate if paid by a certain date; higher rate of interest provided for in case of default ; *Held* that S. 2 of the Act providing for decree of interest at rate agreed on between parties does not affect question of penalty or no penalty and that it was still open for Court to decide whether enhanced rate stipulated was agreed upon by parties as interest or whether it was intended as a penalty. ('73) 11 Beng L R 135 (140) (D B)

[7] Mere fact of rate of interest being exhorbitant is not sufficient to disentitle plaintiff to claim interest at agreed rate in the absence of any circumstances such as fiduciary relation existing between parties at time of transaction or want of sufficient capacity in the defendant to understand the nature of transaction. ('02) 29 Cal 823 (825) (D B)✠(Vol 17) 1930 Lah 733 (734) (D B). (Absence of fraud or undue influence—No discretion to Courts to modify interest agreed.)✠(Vol 15) 1928 Rang 7 (8): 5 Rang 619 (D B). (Court bound to decide interest at contract rate unless transaction is shown to be harsh and unconscionable.)✠(Vol 1) 1914 Mad 131 (133) : 36 Mad 533 (D B.) (High rate of interest may be evidence of the unconscionable nature of bargain and creditor's domination over the debtor.) ✠('02) 25 Mad 343 (346, 350) (D B). (Do) ✠ (04) 31 Cal 233 (240) (D B). (Mere fact that a person is in urgent need of money is not sufficient in itself to raise the presumption that persons to whom he applies for loan will take unfair advantage of his necessity—Rule stated.) ✠ (70) 7 Bom H C R (O C) 19 (21) (D B). (Promissory note, payable two months after date, given for money lent and interest in advance at the rate of 12½% per mensem, containing agreement to pay that rate after the due date if money is not then repaid.)

2. Power of Court to grant relief. — [1] As a Court of equity, judges are bound to inquire into nature of agreement entered into between persons who stand to each other in the relation of mortgagor and mortgagee, trustee and cestui que trust, and if it should appear that such agreements have been obtained under any pressure, owing to existence of this relation, they should not be given effect to. ('67-68) 4 Bom H C Rep (A C) 202 (204) (D B).

[2] There is no rule of law precluding Court from affording relief to a debtor, independently of S. 74, Contract Act, even when bond provides for increased rate of interest prospectively and not retrospectively, where proper ground for such relief is made out. ('99) 26 Cal 300 (303) (D B). (Per Ghose J.).

[3] It is open to the Court to decide notwithstanding provisions of S. 2 of the Act, whether stipulation as to enhanced interest was agreed upon between parties as interest, properly so called, or as a penalty and to give equitable relief against stipulations to pay increased rates of interest. ('99) 26 Cal 300 (303, 306, 307) (D B) ✠ ('93) 17 Bom 106 (113) (F B). (Proviso for retrospective enhancement of interest, in default of payment of interest at due date, is a penalty which should be relieved against.)

[4] The question as to whether "interest" as expressed in a document, is to be regarded as interest or as a penalty should be decided according as the intention of the parties can be gathered from the document as a whole. ('81) 3 All 260 (265) (F B) ✠ ('73) 10 Bom H C R 382 (383) (D B). (Where a promissory note stipulated that in default of payment of principal within three months after date, interest should run at the rate of 75 per cent per annum, the increased rate is a penalty and should be relieved against.) ✠ ('73) 11 Beng L R 135 (137) (D B) ✠ (1864-65) 2 Mad H C R 451 (457) (DB).

3. Delay and interest.—[1] A bargain which in itself is not open to objection as hard and unconscionable cannot be held to have assumed that character in consequence of delay on part of creditor in suing on bond. ('04) 31 Cal 233 (238) (DB) ✠ (Vol 17) 1930 Lah 733 (734) (DB)✠(Vol 4) 1917 Lah 432 (434) : 1917 Pun Re No. 66 (DB).

Amount of interest to be deposited in certain cases of conditional sales under Bengal Regulations.

5. Whenever, under the [a]Regulations of the Bengal Code, a deposit may be made of the principal sum and interest due upon any mortgage or conditional sale of land hereafter to be entered into, the amount of interest to be deposited shall be at the rate stipulated in the contract, or, if no rate has been stipulated, and interest be payable under the terms of the contract, at the rate of twelve per centum per annum : Provided that in the latter case, the amount deposited shall be subject to the decision of the Court as to the rate at which interest shall be calculated.

Proviso.

[a] *See* Bengal Regulation I of 1798, S. 2. This Regulation is, however, now in force only in the Sonthal Parganas and with the exception of the parts which relate to interest, the Regulation is also in force in the Punjab.

Rate of interest on future adjustments of accounts.

6. In any case in which an adjustment of accounts may become necessary between the lender and the borrower of money upon any mortgage, conditional sale of landed property, or other contract whatsoever, which may be entered into after the passing of this Act, interest shall be calculated at the rate stipulated therein; or, if no rate of interest shall have been stipulated, and interest be payable under the terms of the contract, at such rate as the Court shall deem reasonable.

7. [Saving of prior transactions.] *Repealed by the Repealing Act, 1870 (XIV [14] of 1870).*

8. [Commencement of Act.] *Repealed, ibid.*

Schedule of Repealed Enactments. *[Repealed by the Repealing Act, 1870 (XIV [14] of 1870).]*

[THE] VACCINATION ACT, 1880.

(ACT XIII of 1880.)

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SECTIONS.

   Renewal of postponement certificates.
14. Certificates of insusceptibility of successful vaccination.
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18. Order by Magistrate when notice not complied with.
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   Magistrates to be non-official Natives.
19. Power to make rules for municipalities.
20. Power to make rules for cantonments.
21. What rules under sections 19 and 20 may provide for.
22. Punishment of offences.
23. Municipal funds to receive fees and meet expenditure.

STATEMENT OF OBJECTS AND REASONS.

"Owing to the vast number of deaths caused every year by small-pox in India, it has been found necessary to enact special measures for checking the growth and spread of the disease and preventing the ravages caused by it.

This Bill has been drafted with the object of providing the required law. Its provisions are intended to extend to the municipalities and military cantonments of all those provinces which do not possess local legislatures. But it has been left to the power of the Local Governments to extend the provisions of the proposed law to any municipality and, with the previous sanction of the Governor General of India in Council, to any military cantonment of British forces situate in British India and to the power of the Governor-General in Council to extend them to any cantonment situate within the territories of Native States.

Most of the provisions of this Bill have been taken

from the Bengal Inoculation Act of 1865 and the Bombay Vaccination Act of 1877, with such modifications as are deemed necessary in consideration of the circumstances of the provinces in which the proposed law is intended to be promulgated.

In preparing the draft, it has been especially kept in view that the proposed law should find popularity among the people, and not interfere with their customs and ways of life.

Provision is made to enable municipalities to establish vaccination quarters and stations which would facilitate the vaccination of children and render the operation of the proposed law free from practical difficulties. In order to secure the success of the proposed legislation, it has been provided that children may be vaccinated at their own residences, whilst the co-operation of Municipal Commissioners (most of whom usually are Native gentlemen of respectability and local influence, required by the Bill is calculated to secure its popularity. For similar reasons, the provisions of sections 16 and 17 have been framed to restrict as far as possible the interference of the police; and, by entrusting Municipal Commissioners and the Superintendent of Vaccinators with the duty of keeping registers of the names of unprotected children and making investigations, it is expected that all unnecessary inconvenience will be avoided which would arise from enforcing the attendance of children and their guardians before Magistrates.

Considering the physical constitution and the notions of the natives of India, the minimum age for vaccination has been fixed at one year and the maximum at fourteen years.

In consideration of the prejudices (whether well-founded or not) of the Native gentry against the extraction of virus from the arms of their children, the Bill expressly prohibits such a practice; and provision is made for securing the virus under special circumstances with the consent of the parents or guardians of children, by payment of compensation.

Special care has been taken in providing punishments for the contravention of the proposed law, and they have been restricted for the most part to pecuniary fines.

As the circumstances of different parts of the country are not alike, it has been left to the discretion of the Local Governments, and in case of military cantonments of British forces in Native States to the Governor General of India in Council, to frame rules, not inconsistent with the proposed law, for facilitating its practical working. At the same time, the essential principles which should be kept in mind in framing such rules have been expressly specified in section 21 of the Bill." —Gazette of India, 1880, Part V, page 80.

Act how affected by subsequent legislation.

—Amended by Act 4 of 1914.
—Adapted by A. O.
—Amended in its application to—
(a) Central Provinces and Berar by C. P. Acts 3 of 1915; 6 of 1932; 4 of 1933; 44 of 1947.
(b) North-West Frontier Province by N-W.F.P. Act 11 of 1947.
(c) the Punjab by Punjab Acts 9 of 1925; 2 of 1929.
(d) United Provinces by U. P. Act 2 of 1907.
(e) Ajmer-Merwara by Act 6 of 1945.
—Repealed in part by Act 38 of 1920.

[THE] VACCINATION ACT, 1880.

(ACT XIII OF 1880)[a]

[9th July, 1880.]

An Act to give power to prohibit inoculation and to make the vaccination of children compulsory in certain Municipalities and Cantonments.

WHEREAS it is expedient to give power to prohibit inoculation, and make the vaccination Preamble. of children compulsory in certain municipalities and cantonments; It is hereby enacted as follows : —

[a] For Report of Select Committee, *see* Gazette of India, 1880, Part V, page 205.

This Act has been declared to be in force in British Baluchistan by the British Baluchistan Laws Regulation, 1913 (2 of 1913), S. 3.

PROVINCIAL AMENDMENTS.

Central Provinces.

(1) In the long title and the preamble *omit* the word 'and' occurring before the word 'cantonments'.

—C. P. Act III of 1915, Ss. 2 and 3.

(2) In the long title, for the words "and notified areas" (which were inserted by C. P. Act III of 1915) *substitute* the words "notified areas and local areas under the authority of district councils".

(3) In the preamble, after the word, "cantonments' for the words and figures "notified areas as defined in section 169 of the Central Provinces Municipal Act, 1903" (which were inserted by C. P. Act III of 1915), *substitute* the words and figures "notified areas as defined in section 240 of the Central Provinces Municipalities Act, 1922 and local areas under the authority of district councils".

—C. P. Act VI of 1932, Ss. 2 and 3.

N.-W.F.P.

In the long title and the preamble after the word 'municipalities', the words "local areas under the authority of district boards" shall be *inserted*.

—N.-W.F.P. Act XI of 1947, Ss. 2 and 3.

Punjab.

Same as that of N.-W.F. P.

—Punj. Act II of 1929, Ss. 2 and 3.

United Provinces.

(1) In the long title and the preamble *omit* the word 'and' occurring before the word 'cantonments'.

(2) At the end of the long title *add* the words "and notified areas".

(3) In the preamble after the word 'cantonments' *insert* the words and figures "and notified areas as defined in section 193 of the [a]United Provinces Municipalities Act, 1900."

— U. P. Act II of 1907, Ss. 2, 3 and 4.

[a] *See* now U. P. Municipalities Act, 1916 (U. P. Act II of 1916).

Short title.

1. This Act may be called THE VACCINATION ACT, 1880; and

Application.

It shall apply only to such municipalities and cantonments situate in the [a]territories administered respectively by the Lieutenant Governors of the North-Western Provinces, and the Punjab, and the Chief Commissioners of Oudh, the Central Provinces, [b][* *] Assam, Ajmer and Coorg as it may be extended to in manner hereinafter provided.

[a] *Now* the U. P., the Punjab, the N.-W.F.P., the C. P., Assam, Ajmer-Merwara and Coorg. [b] The words "British Burma" were *repealed* by A. O.

PROVINCIAL AMENDMENTS.

Central Provinces.

(1) The word 'and' occurring before the word 'cantonments' shall be *omitted*.

—C. P. Act III of 1915, S. 4.

(2) For the words "and notified areas" (which were inserted by C. P. Act III of 1915), *substitute* the words "notified areas under the authority of district councils".

—C. P. Act VI of 1932, S. 4.

N.-W.F.P.

After the word 'municipalities' the words "local areas under the authority of district boards" shall be *inserted*.

—N.-W.F.P. Act XI of 1947, S. 4.

Punjab.

Same as that of N.-W.F.P.

—Punjab Act II of 1929, S. 4.

Interpretation-clause.

2. In this Act, unless there is something repugnant in the subject or context,—

"Municipal commissioners".

(1) the expression "municipal commissioners" means a body of municipal commissioners or a municipal committee constituted under the provisions of any enactment for the time being in force :

"parent" :

(2) "parent" means the father of a legitimate child and the mother of an illegitimate child :

"guardian" :

(3) "guardian" includes any person who has accepted or assumed the care or custody of any child :

"unprotected child" :

(4) "unprotected child" means a child who has not been protected from small-pox by having had that disease either naturally or by inoculation, or by having been successfully vaccinated, and who has not been certified under this Act to be insusceptible to vaccination :

"inoculation" :

(5) "inoculation" means any operation performed with the object of producing the disease of small-pox in any person by means of variolous matter :

"vaccination-circle" :

(6) "vaccination-circle" means one of the parts into which a municipality or cantonment has been divided under this Act for the performance of vaccination :

"vaccinator" :

(7) "vaccinator" means any vaccinator appointed under this Act to perform the operation of vaccination, or any private person authorised [a][* * *] in manner hereinafter provided to perform the same operation; and includes a "Superintendent of vaccination" :

"vaccination-season".

(8) "vaccination-season" means the period from time to time fixed by the [b][Provincial Government] for any local area under its administration by notification in the Official Gazette, during which alone vaccination may be performed under this Act.

[a] The words "by the Local Government" were *repealed* by the Decentralization Act, 1914 (4 [IV] of 1914), S. 2 and Sch., Pt. I. [b] *Substituted* by A. O. for "Local Government."

PROVINCIAL AMENDMENTS.

Central Provinces.

In section 2—

(a) after sub-section (1) *add* the following, namely,—

"(1-a) 'district council' means a district council or an independent local board constituted under the Central Provinces Local Self-Government Act 1920."—C. P. Act VI of 1932.

(b) in sub-section (6) *omit* the word 'or' occurring after the word 'municipality'.

— C. P. Act III of 1915.

(c) in the same sub-section after the word 'cantonment' for the words "or notified area" *substitute* the words "notified area or local area under the authority of a district council".

—C. P. Act VI of 1932.

N.-W.F.P.

In section 2—

(i) after clause (1) the following new clause shall be *inserted*, namely,—

"(1-a) 'District Board' means the local authority constituted under section 10 of the Punjab District Boards Act, 1883, as applicable to the North-West Frontier Province;"

(ii) in clause (6) after the word 'municipality' the words "area under the authority of a district board" shall be *inserted*.

—N.-W.F.P. Act XI of 1947, S. 5.

Punjab.

In section 2—

(i) for clause (1) *substitute* the following, namely,—

"(1) The expression 'municipality' means any local area declared by, or under the provisions of the Punjab Municipal Act, 1911, to be a municipality, or in respect of which a notification has been issued under section 241 of that Act, or which has been declared to be a small town under the provisions of the Punjab Small Towns Act, 1921, and the expression 'municipal commissioners' means a committee or the members of a committee established or appointed under the provisions of section 11 or section 242 of the Punjab Municipal Act, 1911, or section 4 of the Punjab Small Towns Act, 1921."

—Punjab Act IX of 1925, S. 2.

(ii) after clause (1) *add* the following, namely,—

"(1a) 'District Board' means the Local Authority constituted under section 10 of the Punjab District Boards Act."

—Punjab Act II of 1929, S. 5.

(iii) in clause (6) after the word 'municipality' *insert* the words "area under the authority of a District Board".

—Punjab Act II of 1929, S. 5.

United Provinces.

In clause (6) of section 2 the word 'or' occurring after the word 'municipality' shall be *omitted* and after the word 'cantonment' the words "or notified area" shall be *inserted*.

—U. P. Act II of 1907, S. 5.

Extension of Act to municipalities.

3. A majority in number of the persons present at a meeting of the Municipal Commissioners specially convened in this behalf may apply to the [a][Provincial Government] to extend this Act to the whole or any part of a municipality, and thereupon the [a][Provincial Government] may, if it thinks fit, by notification published in the Official Gazette, declare its intention to extend this Act in the manner proposed.

Any inhabitant of such municipality or part thereof who objects to such extension may within six weeks from the date of such publication send his objection in writing to the Secretary to the [a][Provincial Government,] and the [a][Provincial Government] shall take such objection into consideration. When six weeks from the said publication have expired, the [a][Provincial Government], if no such objections have been sent as aforesaid, or (when such objections have been so sent) if in its opinion they are insufficient, may by like notification effect the proposed extension.

[a] *Substituted* by A. O. for "Local Government."

PROVINCIAL AMENDMENTS.

Central Provinces.

After section 3, *add* the following sections, namely,—

Extension of Act to notified areas.

"3-A. The Provincial Government may, by notification in the official Gazette, declare its intention to extend this Act to the whole or any part of a notified area.

Any inhabitant of such notified area or part thereof who objects to such extension may, within six weeks from the date of such publication, send his objection in writing to the Secretary to the Provincial Government, and the Provincial Government shall take such objection into consideration. When six weeks from the said publication have expired, the Provincial Government, if no such objections have been sent as aforesaid, or when such objections have been so sent if in its opinion they are insufficient, may by like notification effect the proposed extension.

—C. P. Act III of 1915.

Extension of Act to local areas and villages under authority of district council.

3-B. (1) A majority in number of the members present at a meeting of a district council specially convened in this behalf may apply to the Provincial Government to extend this Act to the whole or any part of a local area or to specified villages under the authority of the district council.

(2) The district council, when making such an application, shall submit to the Provincial Government a scheme for carrying out the proposed extension.

(3) Any such scheme shall, before submission, be published locally by the district council in the manner prescribed by rules made under this Act.

(4) Upon receipt of any such scheme the Provincial Government may, if it thinks fit, by notification published in the official Gazette, declare its intention to extend this Act in the manner proposed.

(5) Any inhabitant of such local area or part thereof who objects to such scheme may, within six weeks from the date of such publication, send his objections in writing to the Secretary to the Provincial Government, and the Provincial Government shall take such objections into consideration. If within six weeks from the said publication no such objections are received or such objections as are received are, in the opinion of the Provincial Government, insufficient, the Provincial Government may by like notification effect the proposed extension.

Scheme for extending Act to areas and villages under authority of district council.

3-C. (1) The Provincial Government may at any time prepare a scheme for extending this Act to the whole or any part of the area or to specified villages under the authority of any district council and give notice to such district council of its intention to extend the Act in such manner.

(2) Upon receipt of notice under sub-section (1), a district council may either accept the scheme prepared by the Provincial Government or may prepare an alternative scheme.

(3) If the district council fails within one month either to accept the Provincial Government's scheme or to submit an alternative scheme, or if it submits a scheme which, in the opinion of the Provincial Government, is inadequate, the Provincial Government may bring into operation the scheme which it has prepared, with such modifications, if any, as it thinks fit.

(4) The Provincial Government, before bringing into operation any scheme prepared under this section, shall publish it locally in the manner prescribed by rules made under this Act, and, by notification in the official Gazette, shall declare its intention to extend this Act in the manner proposed.

(5) The district council or any inhabitant of such local area or part thereof who objects to such scheme may submit objections in the manner provided in sub-section (5) of section 3 B, and the Provincial Government, after taking such objections into consideration in the manner therein provided, may, by notification in the official Gazette, effect the proposed extension.

(6) If the district council at any time before the expiry of one month from the notification extending the Act in this manner undertakes to carry out such scheme, the Provincial Government shall give the district council such opportunity as it considers reasonable to carry out such scheme. If the district council thereafter fails to carry out such scheme, the Provincial Government may carry it out.

(7) If, after an extension of the Act has been notified in the Official Gazette, the district council fails to bring into operation the scheme effecting such extension or fails to continue to keep it in operation, the Provincial Government may, after one month's notice to the district council, appoint a person to bring into operation or to continue to keep it in operation, as the case may be, and the expenses thereof shall be met in the manner prescribed by rules made under this Act.

—Sections 3-B and 3-C were inserted by C. P. Act VI of 1932.

Authority empowered to make rules.

3-D. All rules for which provisin is made in sections 3 B and 3 C shall be made by the Provincial Government after previous publication."

—C. P. Act IV of 1933.

N.-W. F. P.

After section 3 the following section shall be *inserted* :—

Extension of Act to local areas administered by local boards.

"3-A. A majority in number of the members present at a meeting of the District Board specially convened in this behalf by Administrator of the District Board—if the District Board is under suspension—may apply to the Provincial Government to extend this Act to the whole or any part of a local area under the authority of the District Board and thereupon the Provincial Government may, if it thinks fit, by notification published in the official Gazette, declare its intention to extend this Act in the manner proposed; and any inhabitant of such local area or part thereof who objects to such extension, may within six weeks from the date of such publication, send his objections in writing to the Secretary to the Provincial Government and the Provincial Government shall take such objections into consideration; and when six weeks from such publication have expired, the Provincial Government, if no such objections have been sent as aforesaid or (when such objections have been so sent) if in its opinion they are insufficient or invalid, may by like notification effect the porposed extension :

Provided that when the provisions of the Act have been extended at the request of the Administrator, the decision of the Provincial Government shall be placed before the board within six months of its restoration, for confirmation or for a recommendation to the Provincial Government that its former orders be cancelled and vaccination be no longer compulsory in the particular area concerned."

—N.-W. F. P. Act XI of 1947, S. 6

Punjab.

Section 3-A *inserted* after section 3 in the Punjab is substantially similar to S. 3-A of the N.-W. F. P. *except*, the proviso. There is no proviso in S. 3-A of the Punjab.

—Punj. Act II of 1929, S. 6.

United Provinces.

After section 3 *insert* the following section, namely:—

Extension of Act to notified areas.

"3-A. The Provincial Government may, by notification in the official Gazette, declare its intention to extend this Act to the whole or any part of a notified area.

Any inhabitant of such notified area or part thereof who objects to such extension may, within six weeks from the date of such publication, send his objection in writing to the Secretary to the Provincial Government, and the Provincial Government shall take such objection into consideration. When six weeks from the said publication have expired, the Provincial Government, if no such objections have been sent as aforesaid, or (when such objections have been so sent) if in its opinion they are insufficient, may by like notification effect the proposed extension."

—U. P. Act II of 1907, S. 6.

Extension to cantonments.

4. The [a][Provincial Government] may, [b][* *] by notification in the [c][Official Gazette], extend this Act to the whole or any part of a military cantonment.

[a] *Substituted* by A. O, for "Local Government." [b] The words "subject to the control of the Governor-General in Council" were *repealed* by the Devolution Act, 1920 (XXXVIII [38] of 1920.) [c] *Substituted* by A. O. for "local official Gazette."

5. The [a][Provincial Government] may, by notification in the Official Gazette, withdraw any local area in a municipality, or [b][ ] any local area in a cantonment, from the operation of this Act.

Power to withdraw local area from operation of Act.

[a] *Substituted* by A. O., for "Local Government." [b] The words "subject to the control of the Governor-General in Council" were *repealed* by the Devolution Act, 1920 (XXXVIII [38] of 1920)

PROVINCIAL AMENDMENTS.

Central Provinces.

In section 5 after the word 'municipality' *insert* the words "or notified area under the authority of a district council". —C. P. Acts III of 1915 and VI of 1932.

N.-W. F. P.

In section 5 after the word 'municipality' *insert* the words "or under the authority of a District Board". —N.-W. F. P. Act XI of 1947, S. 7.

Punjab.

Same as that of N.-W. F. P. — Punj. Act II of 1923, S. 5.

United Provinces.

In section 5 after the word 'municipality' *insert* the words 'or notified area'. —U. P. Act II of 1907, S. 7.

6. In any local area to which the provisions of this Act apply, inoculation shall be prohibited; and

Prohibition of inoculation.

no person who has undergone inoculation shall enter such area before the lapse of forty days from the date of the operation, without a certificate from a medical practitioner, of such class as the [Provincial Government][a] may from time to time by written order authorise to grant such certificates stating that such person is no longer likely to produce small pox by contact or near approach.

Inoculated persons not to enter, without certificate, local area subject to Act.

[a] *Substituted* by A. O. for "Local Government."

7. Every local area to which this Act applies shall be a vaccination circle, or shall in manner hereinafter provided be divided into a number of such circles;

Vaccination-circles.

one or more vaccinators shall be appointed in manner hereinafter provided for each such circle; and

Vaccinators.

one or more Superintendents of vaccination shall be appointed in manner hereinafter provided for each such local area.

Superintendent of vaccination.

8. The [a][Commissioner] may by written licence authorise private vaccinators to perform vaccination in any vaccination circle, and may suspend or cancel any such licence.

Private vaccinators.

[a] *Substituted* by the Decentralization Act, 1914 (4 [IV] of 1914), S. 2 and Sch., Pt. I, for "Local Government."

PROVINCIAL AMENDMENTS

Ajmar-Merwara

For the word "Commissioner" *substitute* the word "Deputy Commissioner."—Act VI of 1945, S. 3.

N.-W.F.P.

The word "Commissioner" should be construed as "Revenue Commissioner." —The N.-W. F. P. Law and Justice Regulation, 1901 (Reg. 7 [VII] of 1901), S. 6 (1) (f).

9. When any unprotected child, having attained the age of six months, has resided for a period of one month during the vaccination season in any local area to which the provisions of this Act apply and has not at the expiration of such period attained the age, if a boy, of fourteen years, and if a girl, of eight years, the parent or guardian of such child shall take it, or cause it to be taken, to a vaccinator to be vaccinated, or send for a vaccinator to vaccinate it.

Unprotected children to be vaccinated.

Such vaccinator shall vaccinate the child and deliver to its parent or guardian a memorandum stating the date on which the vaccination has been performed and the date on which the child is to be inspected in order to ascertain the result of the operation, or shall, if he finds such child in a state unfit for vaccination, deliver to its parent or guardian a certificate under his hand to the effect that the child is in a state unfit for vaccination for the whole or part of the current vaccination-season.

Vaccinator to vaccinate children, or deliver certificates of postponement.

10. The parent or guardian of every child which has been vaccinated under section 9 shall, on the date of inspection stated in the memorandum, taken the child, or cause it to be taken, to a vaccinator for inspection, or get it inspected at his own house by a vaccinator ; and

Inspection after vaccination.

such vaccinator shall then append to the memorandum a certificate stating that the child has been inspected and the result of such inspection.

Section 7 — Note 1

[1] Vaccinators are public servants and bound to make true returns to their superiors. ('70-71) 6 Mad H C R (App) 48 (49). (Case under S. 177, Penal Code.)

Procedure when vaccination is successful.

11. When it is ascertained at the time of inspecting a child under section 10 that the vaccination has been successful, a certificate shall be delivered by the vaccinator to the parent or guardian of such child to that effect, and such child shall thereafter be deemed to be protected.

Procedure when vaccination is unsuccessful.

12. When it is ascertained as aforesaid that the vaccination has been unsuccessful the parent or guardian shall, if the vaccinator so direct, cause the child to be forthwith again vaccinated and subsequently inspected in manner hereinbefore provided.

Procedure when child is unfit for vaccination.

13. A certificate granted under section 9 showing the unfitness of a child for vaccination shall remain in force for the period stated therein, and on the termination of that period or, if that period terminates after the vaccination season is over, when the next vaccination-season begins, the parent or guardian of such child shall take the child, or cause it to be taken, to a vaccinator to be vaccinated, or procure its vaccination at his own house by a vaccinator :

Renewal of postponement certificates.

Provided that, if the child is still found to be in a state unfit for vaccination, the certificate granted under section 9 shall be renewed.

Certificates of Insusceptibility of successful vaccination.

14. If the Superintendent of vaccination is of opinion that a child which has been three times unsuccessfully vaccinated is insusceptible of successful vaccination, he shall deliver to the parent or guardian of such child a certificate under his hand to that effect and the parent or guardian shall thenceforth not be required to cause the child to be vaccinated.

What lymph to be used.

15. The vaccination of a child shall ordinarily be performed with such lymph as may be prescribed by the rules to be made under this Act.

Provided that,

1st, if animal-lymph is so prescribed and the parent or guardian of any child desires that such child shall be vaccinated with human-lymph, it shall be so vaccinated ; and

2nd, if in any local area in which animal-lymph is procurable human-lymph is so prescribed, and the parent or guardian of any child desires that such child should be vaccinated with animal-lymph, and tenders to the vaccinator the amount of such fee, not exceeding one rupee, as may be fixed by such rules in this behalf, such child shall be so vaccinated.

No fee to be charged except by private vaccinator.

16. No fee shall be charged by any vaccinator except a private vaccinator to the parent or guardian of any child for any of the duties imposed on such vaccinator by or under the provisions of this Act :

Proviso.

Provided that it shall be lawful for a vaccinator to accept a fee for vaccinating a child by request of the parent or guardian elsewhere than in the circle for which such vaccinator is appointed.

Duties of Superintendent of vaccination.

Notice to parent or guardian neglecting to comply with Act.

17. The Superintendent of vaccination, in addition to the other duties imposed on him by or under the provisions of this Act, shall ascertain whether all unprotected children, under the age of fourteen years if boys, and under the age of eight years if girls, within the local area under his superintendence have been vaccinated ; and, if he has reason to believe that the parent or guardian of any such child is bound by the provisions hereinbefore contained to procure the vaccination of such child or to present it for inspection, and has omitted so to do, he shall personally go to the house of such parent or guardian, and there make enquiry, and shall, if the fact is proved, forthwith deliver to such parent or guardian, or cause to be affixed to his house, a notice requiring that the child be vaccinated, or (as the case may be) that it be presented for inspection, at a time and place to be specified in such notice.

PROVINCIAL AMENDMENT.

Central Provinces.

In Section 17—

(i) after the words 'shall ascertain' the words "or cause to be ascertained" shall be *inserted* ; and

(ii) for the words "he shall personally go" the words "he or any other person authorized by him in this behalf shall personally go" shall be *substituted*.

—C. P. & Berar Act XLIV of 1947, S. 2. [28-11-1947.]

Order by Magistrate when notice not complied with.

18. If such notice is not complied with, the Superintendent of vaccination shall report the matter to the [a]Magistrate of the District, or such Magistrate as the [Provincial Government][b] or the [a]Magistrate of the District may from

Section 18 — Note 1

[1] Child above six months — Parent refusing to allow child to be vaccinated — Parent cannot be convicted under S. 13 of Burma Vaccination Act, 1909 — Section 9 of this Act applies but procedure under Ss. 17 and 18 (of Act of 1880) must be followed before prosecut-

time to time appoint in this behalf; and the Magistrate receiving such report shall summon the parent or guardian of the child and demand his explanation, and shall, if such explanation is not satisfactory, make an order in writing directing such parent or guardian to comply with the notice before a date specified in the order.

Procedure when order not obeyed.

If on such date the order has not been obeyed, the Magistrate shall summon the parent or guardian before him, and unless just cause or excuse is shown, shall deal with the disobedience as an offence punishable under section 22.

Magistrates to be non-official natives.

The Magistrates appointed under this section shall, as far as is conveniently practicable, be natives of India, and not paid servants of the [c][Crown].

[a] *Read* District Magistrate, *see* the Code of Criminal Procedure, 1898 (Act 5 [V] of 1898), S. 3 (2).
[b] *Substituted* by A. O., for "Local Government." [c] *Substituted* by A. O. for "Government."

Power to make rules for municipalities.

19. When this Act has been applied to any municipality or any part thereof, the Municipal Commissioners may, from time to time, make rules consistent with this Act for the proper enforcement of this Act within the limits to which it applies. Such rules shall be made in the manner in which, under the law for the time being in force, the [a][Municipal] Commissioners make rules or bye-laws for the regulation of other matters within the limits of the municipality, and shall, when confirmed by the [b][Commissioner] and published in the Official Gazette, have the force of law:

Provided that the [b][Commissioner] may at any time rescind or modify any such rule.

[a] *Inserted* by the Decentralization Act, 1914 (4 [IV] of 1914), S. 2 and Sch., Pt. I. [b] *Substituted, ibid*, for "Local Government."

PROVINCIAL AMENDMENTS.

Ajmer-Merwara.

In section 19, for the word 'Commissioner' wherever it occurs, the words 'Deputy Commissioner' shall be *substituted*. —Act VI of 1945, S. 3.

Punjab.

(1) Renumber the present section 19 as sub-section *(1)* and in the sub-section so renumbered in the second sentence *omit* the word 'Municipal' occurring before the word 'Commissioners' and for the words "rules or bye-laws *substitute* the words "rules, bye-laws or general orders." —Punj. Act IX of 1925, S. 3.

(2) Omit sub-section *(2)* (which was added by Punj. Act IX of 1925, S. 3.) —Punj. Act II of 1929.

SECTION 19-A.

Central Provinces.

After section 19, *insert* the following section, namely:—

Power to make rules for notified areas.

"19-A. When this Act has been applied to any local area or any part thereof or to any area under the authority of a district council or part thereof, the Provincial Government may, from time to time, make rules consistent with this Act for the proper enforcement of this Act, within the limits to which it applies. Such rules when published in the local official Gazette shall have the force of law." —C. P. Acts III of 1915 and VI of 1932.

N.-W. F. P.

After section 19, *insert* the following section, namely:—

Power of district board to make rules.

"19-A. When this Act has been applied to any local area under the authority of a district board, the district board or the Administrator, as the case may be, may from time to time make rules consistent with this Act within the limits to which it applies. Such rules shall be made in the manner in which under the law for the time being in force the district board makes regulations for the regulation of other matters within the area under the authority of the district board, and shall when confirmed by the Revenue and Divisional Commissioner and published in the official Gazette have the force of law provided that the Revenue and Divisional Commissioner may at any time rescind or modify any such rules."
—N.-W. F. P. Act XI of 1947, S. 3.

Punjab.

After section 19, *insert* the following section, namely:—

Power of district board to make rules.

"19-A. When this Act has been applied to any local area under the authority of a district board, the district board may from time to time make rules consistent with this Act within the limits to which it applies. Such rules shall be made in the manner in which under the law for the time being in force the district board makes regulations for the regulation of other matters within the area under the authority of the district board, and shall when confirmed by the Commissioner and published in the official Gazette have the force of law, provided that the Commissioner may at any time rescind or modify any such rules." —Punj. Act II of 1929, S. 9.

Section 18 — Note 1 *(contd.)*

ing parent under S. 22 of the Act. (Vol 16) 1929 Rang 150 (151) : 7 Rang 14 : 30 Cri L Jour 750.

[*See also* ('03 04) 2 Low Bur Rul 279(279). (Section 7 is not a penal section.)

[2] Superintendent of vaccination reporting to Magistrate that notice by him was not complied with — Magistrate directing parent to present child for vaccination and ordering payment of cost of notice — *Held*, Superintendent's report was not a complaint of any offence and no order for paying cost could be made. ('07) 6 Cri L Jour 124 (124) : 4 Low Bur Rul 12.

United Provinces.

After section 19, *insert* the following section, namely:—

Power to make rules for notified areas.

"19-A. When this Act has been applied to any notified area or any part thereof, the Provincial Government may, from time to time, make rules consistent with this Act, for the proper enforcement of this Act within the limits to which it applies. Such rules, when published in the official Gazette, shall have the force of law." —U. P. Act II of 1907, S. 8.

SECTION 19-B.

Central Provinces.

After section 19-A, *insert* the following section, namely:—

Power to make rules for local areas.

"19-B. When this Act has been applied to any local area under the authority of a district council or to any part thereof or to specified villages therein, the district council may, from time to time, make rules consistent with this Act for the proper enforcement of this Act within the limits to which it applies. Such rules shall be made in the manner in which, under the law for the time being in force, the district council makes rules or bye-laws for the regulation of other matters within the limits of the district council, and shall, when confirmed by the Provincial Government and published in the official Gazette, have the force of law." —C. P. Act VI of 1932.

Power to make rules for cantonments.

20. When this Act has been applied to any cantonment or any part thereof, the [a][Provincial Government] may, from time to time, [b][* * *] make such rules.

[a] *Substituted* by A. O. for "Local Government." [b] The words "subject to the control of the Governor-General in Council" were *repealed* by the Devolution Act, 1920 (38 [XXXVIII] of 1920).

What rules under sections 19 and 20 may provide for.

21. The rules to be made for any local area under section 19 or 20 may, among other matters, provide for—

(a) the division of such local area into circles for the performance of vaccination;

(b) the appointment of a place in each vaccination circle as a public vaccine-station, and the posting of some distinguishing mark in a conspicuous place near such station;

(c) the qualifications to be required of public vaccinators, and Superintendents of vaccination;

(d) the authority with which their appointment, suspension and dismissal shall rest;

(e) the time of attendance of public vaccinators at the vaccine-stations, and their residence within the limits of the vaccination-circles;

(f) the distinguishing mark or badge to be worn by them;

(g) the amount of fee chargeable by private vaccinators, and their guidance generally in the performance of their duties;

(h) the facilities to be afforded to people for procuring the vaccination of their children at their own houses;

(i) the grant and form of certificates of successful vaccination, of unfitness for vaccination or of insusceptibility of vaccination;

(j) the nature of the lymph to be used and the supply of a sufficient quantity of such lymph;

(k) the fee to be paid for vaccination with animal-lymph under section 15;

(l) the fee to be paid to a public vaccinator for vaccinating a child beyond the vaccination-circle at the request of the parent or guardian of the said child;

(m) the preparation and keeping of registers showing—

the names of children born in such local area on or after the date of the application of this Act;

the names of unprotected children born in such local area previous to the application of this Act, and who are, at the time this Act is applied, under the age of fourteen years if boys, and of eight years if girls;

the names of unprotected boys and girls respectively under those ages brought within such local area at any time after the application of this Act and who have resided there for a month;

the result of each vaccination or its postponement, and the delivery of certificates, if any;

(n) the assistance to be given by the Municipal Commissioners and municipal servants in the preparation of these registers, and in other matters; and

(o) the preparation of vaccination-reports and returns.

PROVINCIAL AMENDMENTS.

Central Provinces.

In section 21:—

(a) after the figures '19' *insert* the figures and letters '19-A, 19 B.' —C. P. Acts III of 1915; VI of 1932.

(b) in clause (n) after the word 'servants' *insert* the words "or by members of the district council and district council servants." —C. P. Act VI of 1932.

N.-W. F. P.

In section 21:—

(a) after the word 'nineteen' the word and letter 'nineteen A' shall be *inserted*;

(b) in clause (n) after the word 'servants' the words "or members of the district board and district board servants" shall be *inserted*. —N.-W. F. P. Act XI of 1947, S. 9.

Punjab.
Same as that of N.-W. F. P. —Punjab Act II of 1929, S. 10.
United Provinces.
Same as that of (a) in N.-W. F. P. —U. P. Act II of 1907, S. 9.

Punishment of offences.

22. Whoever commits any of the undermentioned offences (that is to say) :—

(a) violates the provisions of section 6,
(b) neglects without just excuse to obey an order made under section 18,
(c) breaks any of the rules made under section 19 or 20, or
(d) neglects without just cause to obey an order made under section 18 after having been previously convicted of so neglecting to obey a similar order made in respect of the same child,

shall be punished as follows (that is to say):—

in the case of the offence mentioned in clause *(a)*, with simple imprisonment for a term which may extend to three months, or with fine which may extend to two hundred rupees, or with both:

in the case of the offences mentioned in clauses *(b)* and *(c)*, with fine which may extend to fifty rupees; and

in the case of the offence mentioned in clause *(d)*, with simple imprisonment for a term which may extend to six months, or with fine which may extend to one thousand rupeees, or with both.

PROVINCIAL AMENDMENTS.

Central Provinces.
In section 22, in clause (c) after the figures '19' *insert* the figures and letters '19-A, 19-B.'
—C. P. Acts III of 1915; VI of 1932.

N.-W. F. P.
In section 22, in clause (c) after the word 'nineteen' the word and letter 'nineteen A' shall be *inserted*.
—N.-W. F. P. Act XI of 1947, S. 10.

Punjab.
Same as that of N.-W. F. P. —Punj. Act II of 1929, S. 11.

United Provinces.
Same as that of N.-W. F. P. —U. P. Act II of 1907, S. 10.

Municipal funds to receive fees and meet expenditure.

23. The amount of all fees [a][* *] realized, and the amount of all expenditure incurred, under this Act in any municipality shall respectively be credited to and paid from the municipal fund.

[a] The words "and fines" were *repealed* by A. O.

PROVINCIAL AMENDMENTS.

Central Provinces.
In section 23:—
(a) after the word 'municipality,' for the words 'or notified area' (which were inserted by C. P. Act III of 1915) *substitute* the words "notified area or any local area under the authority of a district council;"
(b) after the words 'municipal fund,' for the words 'or notified area fund,' (which were added by C. P. Act III of 1915) *substitute* the words "notified area fund or district fund, as the case may be".
—C. P. Act VI of 1932.

N.-W. F. P.
In section 23:—
(a) after the word 'municipality,' the words "or area under the authority of a district board" shall be *inserted*;
(b) after the words 'municipal fund' the words 'district fund' shall be *inserted*.
—N.-W. F. P. Act XI of 1947, S. 11.

Punjab.
In section 23:—
(a) same as that of (a) in N.-W. F. P.
(b) after the words 'municipal fund' *add* "notified area fund or town fund, as the case may be."
—Punj. Act II of 1929, S. 12.

United Provinces.
In section 23:—
(a) after the word 'municipality' *insert* the words 'or notified area';
(b) after the words 'municipal fund' *add* the words "or notified area fund."
—U. P. Act II of 1907, S. 11.

(Act XXIII of 1943).

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Statement of Objects and Reasons

"The War Injuries Ordinance, 1941, empowered the Central Government to make a scheme providing for the grant of relief in respect of war injuries. It also provided that no compensation should be payable under the Workmen's Compensation Act in respect of a war injury. Workmen under that Act are now entitled to receive relief from Government under the War Injuries Scheme.

In more highly industrialised countries where variations in the industrial wage scale are not so large as in India, payments under the Personal Injuries Scheme are, in respect of labour, both relief and compensation. In India the amount of relief under the War Injuries Scheme does not at present give higher paid labour adequate compensation. It is impossible for Government themselves, either to increase generally the scale of relief under the War Injuries Scheme or to undertake a liability to pay further compensation to a particular class of employees from Government funds. It is, however, reasonable that that obligation should be put on certain employers. There is also probably more danger to employees in factories and other industrial concerns (which may be a target for enemy attack) than there is elsewhere.

The Bill imposes on employers of essential services, of factory and mine labour, in major ports and other employments to be specified, an obligation to pay compensation in respect of war injury to their workmen, calculated to amount to the difference between the amount paid by Government under the War Injuries Scheme and the amount which would have been payable under the Workmen's Compensation Act if the war injury had given a right to compensation thereunder. This will mean additional payment in respect of labour drawing roughly over Rs. 24 a month.

Many employers are prepared to undertake the extra liability but the liability may prove either an embarrassment or impossibility in the case of a factory which might be seriously damaged by enemy action, unless insurance can be taken to cover the risk. It is understood that few insurance companies are now prepared to cover such risks although in a few cases insurance in this matter has been effected. The Bill, therefore, provides for compulsory insurance with the Central Government, of the liability referred to above, by employers throughout British India.

A provision has also been made to extend the scheme of insurance to employers in States provided that provisions substantially corresponding to the provisions of this Bill are made in that State.

The Bill follows closely the War Risks (Goods) Insurance Ordinance and the War Risks (Factories) Insurance Ordinance."

—Gazette of India, 1943, Part V, page 97.

ACT HOW AFFECTED BY SUBSEQUENT LEGISLATION.

—Amended by Ordinances 54 of 1944; 41 of 1945.

[THE] WAR INJURIES (COMPENSATION INSURANCE) ACT, 1943.

(ACT XXIII OF 1943.)[a]

[2nd September, 1943.]

An Act to impose on employers a liability to pay compensation to workmen sustaining war injuries and to provide for the insurance of employers against such liability.

WHEREAS it is expedient to impose on employers a liability to pay compensation to workmen sustaining war injuries and to provide for the insurance of employers against such liability :

It is hereby enacted as follows :—

[a] For Report of Select Committee, *see* Gazette of India, 1943, Pt. V, p. 127.

Short title, extent and commencement.

1. *(1)* This Act may be called the War Injuries (Compensation Insurance) Act, 1943.

(2) It extends to the whole of British India, and applies also to British subjects in any part of India.

(3) It shall come into force on such [a]date as the Central Government may, by notification in the official Gazette, appoint.

[a] The 16th November 1943, *see* Gazette of India, 1943, Pt. I, p. 1258.

Definitions.

2. In this Act, unless there is anything repugnant in the subject or context, —

(a) "adult" and "minor" have the meanings assigned to those expressions in the Workmen's Compensation Act, 1923;

(b) 'employer' includes any body of persons whether incorporated or not and any managing agent of an employer and the legal representative of a deceased employer, and when the services of a workman are temporarily lent or let on hire to another person by the person with whom the workman has entered into a contract of service or apprenticeship, means the latter person while the workman is working for that other person;

(c) "the Fund" means the War Injuries Compensation Insurance Fund constituted under section 10;

(d) "gainfully occupied person" and "war injury" have the meanings assigned to those expressions in the War Injuries Ordinance, 1941;

(e) "partial disablement" means, where the disablement is of a temporary nature such disablement as reduces the earning capacity of a workman in any employment in which he was engaged at the time the injury was sustained, and where the disablement is of a permanent nature, such disablement as reduces his earning capacity in any employment which he was capable of undertaking at that time :

Provided that every injury specified in items 2 to 9 of the [a][First] Schedule shall be deemed to result in permanent partial disablement;

(f) "prescribed" means prescribed by rules made under section 20;

[b][*(ff)* "termination of the present hostilities" means such date as the Central Government may, by notification in the Official Gazette, declare to be the date on which the said hostilities terminated;]

(g) "total disablement" means such disablement, whether of a temporary or permanent nature, as incapacitates a workman for all work which he was capable of performing at the time the injury was sustained :

Provided that permanent total disablement shall be deemed to result from the permanent total loss of the sight of both eyes or from an injury specified in item 1 of the [a][First] Schedule or from any combination of injuries specified in items 2 to 9 of the [a][First] Schedule where the aggregate percentage of disability as specified in that Schedule against those injuries amounts to one hundred per cent.;

(h) the "Scheme" means the War Injuries Compensation Insurance Scheme referred to in sub-section *(1)* of section 7;

(i) "wages" means wages as defined in the Workmen's Compensation Act, 1923 (8 [VIII] of 1923), and "monthly wages" has the meaning assigned to that expression by section 5 of the Workmen's Compensation Act, 1923, and shall be calculated for the purposes of this Act in the manner laid down in that section;

(j) "workman" means any person (other than a person whose employment is of a casual nature and who is employed otherwise than for the purposes of the employers' trade or business) who is employed in any of the employments specified in section 6.

[a] *Inserted* by the War Injuries (Compensation Insurance) Amendment Ordinance, 1944 (54 [LIV] of 1944), S. 2. [18-12-1944.] [b] *Inserted, ibid*, 1945 [41 [XLI] of 1945]. S. 2. [27-10-1945.]

Compensation payable under the Act by whom and how payable.

3. *(1)* There shall, subject to such conditions as may be specified in the Scheme, be payable by an employer, in respect of a war injury sustained by a gainfully occupied person who is a workman to whom this Act applies, compensation, in addition to any relief provided under the War Injuries Ordinance, 1941 (7 [VII] of 1941), of the amount and kind provided by section 5;

Provided that where an employer has taken out a policy of insurance as required by sub-section *(1)* of section 9 and has made all payments by way of premium thereon which are subsequently due from him in accordance with the provisions of the Scheme, or where by the provisions [a][of sub-section *(1)* of section 9 or] of sub-section *(2)* of section 12 the employer is not

required to insure, the Central Government shall assume and discharge on behalf of the employer the employer's liability to pay compensation under this sub-section.

(2) The compensation payable under this Act shall be payable in accordance with the provisions made in this behalf contained in the Scheme.

(3) This section shall be binding on the Crown.

[a] *Inserted* by the War Injuries (Compensation Insurance) Amendment Ordinance, 1944 (54 [LIV] of 1944), S. 3. [18-12-1944].

Limitation on right to receive compensation otherwise than under this Act and Ordinance VII of 1941.

4. Where any person has a right apart from the provisions of this Act and of the War Injuries Ordinance, 1941, to receive compensation (whether in the form of gratuity, pension, compassionate payment or otherwise) or damages from an employer in respect of a war injury in respect of which compensation is payable under this Act, the right shall extend only to so much of such compensation or damages as exceeds the amount of compensation payable under this Act.

Amount of compensation.

5. *(1)* The compensation payable under this Act shall be as follows, namely :—

(a) where death results from the injury —

(i) in the case of an adult—the amount payable in a like case under the Workmen's Compensation Act, 1923, reduced by seven hundred and twenty rupees, and

(ii) in the case of a minor—two hundred rupees ;

(b) where permanent total disablement results from the injury —

(i) in the case of an adult—the amount payable in a like case under the Workmen's Compensation Act, 1923, reduced by one thousand and eight rupees, and

(ii) in the case of a minor—the monthly payment payable in a like case to an adult under the Scheme made under the War Injuries Ordinance, 1941, for so long as he remains a minor, and thereafter as in the foregoing sub-clause ;

(c) where permanent partial disablement results from the injury —

(i) in the case of an injury specified in the [a][First] Schedule—such percentage of the compensation which would have been payable in the case of permanent total disablement as is specified therein as being the percentage of disablement ;

(ii) in the case of an injury not specified in the [a][First] Schedule—the percentage of such compensation specified in the [a][First] Schedule for a disablement held by a competent medical authority acting under the Scheme made under the War Injuries Ordinance, 1941, to be of corresponding degree ;

(iii) where more injuries than one are sustained—the aggregate of the compensation payable in respect of those injuries, so however as not to exceed in any case the compensation which would have been payable if permanent total disability had resulted from the injuries ;

(d) where temporary disablement, whether total or partial, results from the injury —

(i) in the case of an adult—the half-monthly payments payable in a like case under the Workmen's Compensation Act, 1923, reduced in each case for so long as he receives any payment under the Scheme made under the War Injuries Ordinance, 1941, by seven rupees, and

(ii) in the case of a minor—the half-monthly payments payable in a like case under the Workmen's Compensation Act, 1923, for so long as he remains a minor, and thereafter as in the foregoing sub-clause.

(2) Where the monthly wages of a workman are more than three hundred rupees, the compensation payable under this Act shall be the amount payable under the provisions of sub-section *(1)* in the case of a workman whose monthly wages are more than two hundred rupees.

[a] *Inserted* by Ordinance 54 [LIV] of 1944, S. 4. [18-12-1944].

Workmen to whom the Act applies.

6. The workmen to whom this Act applies are —

(a) workmen employed in any employment or class of employment to which the Essential Services (Maintenance) Ordinance, 1941, has been declared under section 3 of that Ordinance to apply, whether such declaration is or is not subsequently revoked ;

(b) workmen employed in any factory as defined in clause *(j)* of section 2 of the Factories Act, 1934 ;

(c) workmen employed in any mine within the meaning of the Indian Mines Act, 1923 ;

(d) workmen employed in any major port ;

(e) workmen employed on any estate which is maintained for the purpose of growing cinchona, coffee, rubber or tea, and on which on any one day in the preceding twelve months twenty-five or more persons have been employed as workmen ;

(f) workmen employed in any employment specified in this behalf by the Central Government by notification in the Official Gazette.

War Injuries Compensation Insurance Scheme.

7. (1) The Central Government shall, by notification in the Official Gazette, put into operation a scheme to be called the War Injuries Compensation Insurance Scheme whereby provision is made for all matters necessary to give effect to the purposes of this Act and whereby the Central Government undertakes, in relation to employers of workmen to whom this Act applies, the liabilities of insuring such employers against liabilities incurred by them to workmen under this Act and the Scheme.

(2) The Scheme shall secure that any liability of the Central Government as insurer under the Scheme is determined by a policy of insurance issued in the prescribed form by a person acting on behalf of the Central Government.

(3) The Scheme may provide that it shall come into operation or shall be deemed to have come into operation on such date as may be specified therein.

(4) The Scheme may be amended at any time by the Central Government.

(5) Without prejudice to the generality of the provisions of sub-section (1), the Scheme may—

(a) make provisions regulating the payment of the compensation payable under this Act and the Scheme, including provision for punishment by fine not exceeding one thousand rupees for the contravention of any requirement of the Scheme ;

(b) make provisions specifying the persons to whom and the proportions and manner in which payments under this Act shall be made :

(c) specify conditions or circumstances which will disentitle a workman to the compensation payable under this Act, and make it an express or implied condition of any policy of insurance issued under the Scheme that the payment of compensation in defiance of such specification is not covered by the policy ;

(d) Specify the conditions or circumstances under which the compensation payable to a workman may be withheld, cancelled, reduced or reviewed if the award made under the Scheme made under the War Injuries Ordinance, 1941, is withheld, cancelled, reduced or reviewed ;

(e) provide for cases in which an employer has of his own accord undertaken a part or the whole of the liability imposed by this Act ;

(f) provide for the final assessment of the total premium due on a policy of insurance under the Scheme [a][either as the equivalent of all advance payments of premium already made by an employer or as a percentage of the total wages bills of an employer for the periods with reference to which the amount of any advance payments made by him was fixed or] as a percentage of the total wages bill of an employer for a period of not less than twelve or more than fifteen months immediately preceding the termination of the present hostilities, and for the assessment of the total premium due on a policy which has ceased to be in force before the termination of the present hostilities owing to the employer having gone out of business ;

(g) provide for the recovery from an employer of the total premium due on a policy of insurance including provision for its recovery by periodic advance payments of an amount based on a percentage of his total wages bill for any prescribed period, the separate funding of the payments so made by each employer, and the eventual adjustment of the total premium as finally assessed against the total of such periodic payments :

[a][Provided that, where the amount of the periodic payment based on the total wages bill of the prescribed period is less than eight rupees, it shall be increased to eight rupees :]

Provided [a][further] that the first of such periodic payments shall [a][subject to the aforesaid minimum of eight rupees] be an amount representing not more than four annas per hundred rupees of the wages bill for the period by reference to which the amount of the payment is fixed :

Provided further that such periodic payments shall not be more frequent than once in each quarter of a year :

Provided further that the rate of any periodic payment after the first shall [a][subject to the aforesaid minimum of eight rupees] not be higher than the rate estimated to raise the amount in

the Fund after repayment of the advances, if any, paid into the Fund by the Central Government under sub-section *(2)* of section 11, to a sum of rupees fifteen lakhs.

[a] *Inserted* by Ord. 54 of 1944, S. 5. [18-12-1944.]

Employment of agents by the Central Government.

8. The Central Government may employ or authorise the employment of any person or firm to act as its agents for any of the purposes of this Act, and may pay to persons or firms so employed such remuneration as the Central Government thinks fit.

Compulsory insurance.

9. *(1)* Every employer of workmen to whom this Act applies or is subsequently made applicable [a][except an employer whose total wages bill for any quarter after the commencement of this Act has never exceeded fifteen hundred rupees] shall, before such date as may be prescribed, or before the expiry of such period as may be prescribed after his having first become such an employer, take out a policy of insurance issued in accordance with the Scheme whereby he is insured until the termination of the present hostilities or until the date, if any, prior to the termination of the present hostilities at which he ceases to be an employer to whom this section applies, against all liabilities imposed on him by this Act.

(2) Whoever contravenes the provisions of sub-section *(1)* or, having taken out a policy of insurance as required by that sub-section, fails to make any payment by way of premium thereon which is subsequently due from him in accordance with the provisions of the Scheme shall be punishable with fine which may extend to one thousand rupees and shall also be punishable with a further fine which may extend to five hundred rupees for every day after having been so convicted on which the contravention or failure continues.

(3) This section shall not bind the Crown nor, unless the Central Government by notification in the official Gazette otherwise orders, any Federal Railway.

[a] *Inserted* by Ordinance 54 of 1944, S. 6. [18-12-1944.]

Prohibition of certain insurance business.

10. *(1)* After the date on which the Scheme is put into operation no person shall, except as a person authorised by the Central Government as its agent to issue policies in pursuance of the Scheme, carry on the business of insuring employers in British India against the liabilities for insurance against which the Scheme provides

(2) Nothing in sub section *(1)* applies to any policy of insurance entered into before the date on which the Scheme is put into operation and current after that date or to any policy of insurance covering liabilities undertaken in excess of the liabilities imposed by this Act.

(3) Whoever contravenes the provisions of sub-section *(1)* shall be punishable with fine which may extend to five thousand rupees and with a further fine which may extend to one thousand rupees for every day after the first on which the contravention continues.

War Injuries Compensation Insurance Fund.

11. *(1)* The Central Government shall establish a fund for the purposes of this Act to be called the War Injuries Compensation Insurance Fund into which shall be paid all sums received by the Central Government by way of insurance premiums under the Scheme or by way of payments made on composition of offences under section 17 [a][or any provision of law corresponding thereto in force in an Indian State or in the French Establishments in India or in the territories (hereinafter referred to as Administered Areas) set out in the Second Schedule] or by way of expenses or compensation awarded by a Court under section 545 of the Code of Criminal Procedure, 1898 (V of 1898), out of any fine imposed under this Act, or by way of penalties imposed under the Scheme, and out of which shall be paid all sums required for the discharge by the Central Government of any of its liabilities under this Act or the Scheme, or for the payment by the Central Government of the remuneration and expenses of agents employed for the purposes of the Scheme, or for the payment by the Central Government of the costs of administering the Scheme:

Provided that no payment from the Fund shall be made in discharge of any liability of the Crown to pay compensation to workmen employed by it.

(2) If at any time the sum standing to the credit of the Fund is less than the sum for the time being necessary for the adequate discharge of the purposes of the Fund, the Central Government shall pay into the Fund as an advance out of general revenues such amount as the Central Government considers necessary.

(3) If when all payments which have to be made out of the Fund have been defrayed, any balance remains in the Fund, the balance shall be constituted into a Fund to be utilised and administered by the Central Government for the benefit of workmen.

(4) The Central Government shall prepare in such form and manner as may be prescribed and shall publish every six months an account of all sums received into and paid out of the Fund.

[a] *Inserted* by Ordinance 54 of 1944, S. 7 [18-12-1944.]

12. *(1)* Where a person (in this section referrred to as the principal) uses, in the course of or for the purposes of his trade or business, the services of workmen temporarily lent or let on hire to him by arrangement with another person with whom the workmen have entered into contracts of service or apprenticeship, or in the course of or for the purposes of his trade or business, contracts with any other person for the execution by or under such other person of the whole or any part of any work which is ordinarily part of the trade or business of the principal (either such other person being in this section referred to as the contractor) the principal shall obtain from the contractor the name of the agent of the Central Government acting under section 8 with whom he intends to insure, and shall report to that agent the existence of his arrangement or contract with the contractor.

Principals and contractors.

(2) Notwithstanding anything elsewhere contained in this Act, in any such case as is referred to in sub-section *(1)*, it shall not be necessary for the contractor to insure against the liabilities imposed on him by this Act in respect of workmen employed by him whose services are lent or let on hire on such an arrangement or used in the execution of work on such a contract as is referred to in sub-section *(1)*, where the arrangement or contract is for a term of less than one month.

(3) The Scheme may make provision for the supply by a contractor to a principal of any information necessary to enable the purposes of this section to be carried out including provision for punishment by fine not exceeding one thousand rupees for the contravention of any requirement of the Scheme.

13. *(1)* Any person authorised in this behalf by the Central Government may, for the purpose of ascertaining whether the requirements of this Act and of the Scheme have been complied with, require any employer to submit to him such accounts, books or other documents or to furnish to him such information or to give such certificates as he may reasonably think necessary.

Power of Central Government to obtain information.

(2) Whoever wilfully obstructs any person in the exercise of his powers under this section or fails without reasonable excuse to comply with any request made thereunder shall, in respect of each occasion on which any such obstruction or failure takes place, be punishable with fine which may extend to one thousand rupees.

(3) Whoever in purporting to comply with his obligations under this section knowingly or recklessly makes a statement false in a material particular shall be punishable with fine which may extend to one thousand rupees.

14. *(1)* Without prejudice to the provisions of sub-section *(2)* of section 9, where any person has failed to insure as or to the full amount required by this Act and the Scheme and has thereby evaded the payment by way of premium of any money which he would have had to pay in accordance with the provisions of the Scheme but for such failure, an officer authorised in this behalf by the Central Government may determine the amount payment of which has been so evaded, and the amount so determined shall be payable by such person and shall be recoverable from him as provided in sub-section *(2)*.

Recovery of premium unpaid.

(2) Any sum payable in accordance with the provisions of the Scheme by way of premium on a policy of insurance issued under the Scheme and any amount determined as payable under sub section *(1)* shall be recoverable as an arrear of land-revenue.

(3) Any person against whom a determination is made under sub-section *(1)* may, within the prescribed period, appeal against such determination to the Central Government whose decision shall be final.

15. Where an employer has failed to take out a policy of insurance as required by sub-section *(1)* of section 9. or having taken out a policy of insurance as required by that sub-section has failed to make the payments by way of premium thereon which are subsequently due from him in accordance with the provisions of the Scheme, payment of any compensation for the payment of which he is liable under this Act may be made out of the Fund, and the sum so paid together with a penalty of such amount not exceeding the sum so paid as may be determined by an officer authorised in

Payment of compensation where employer has failed to insure.

this behalf by the Central Government shall be recoverable from the employer as an arrear of land revenue for payment into the Fund.

Limitation of prosecutions.

16. No prosecution for any offence punishable under this Act shall be instituted against any person except by or with the consent of the Central Government or an authority authorised in this behalf by the Central Government.

Composition of offences.

17. Any offence punishable under sub-section *(2)* of section 9 may, either before or after the institution of the prosecution, be compounded by the Central Government or by any authority authorised in this behalf by the Central Government on payment for credit to the Fund of such sum as the Central Government or such authority, as the case may be, thinks fit.

Bar of legal proceedings.

18. *(1)* No suit, prosecution or other legal proceeding shall lie against any person for anything which is in good faith done or intended to be done under this Act.

(2) No suit shall be maintainable in any civil Court against the Central Government or a person acting as its agent under section 8 for the refund of any money paid or purporting to have been paid by way of premium on a policy of insurance taken out or purporting to have been taken out under this Act.

Power to exempt employers.

19. The Central Government shall exempt any employer from the provisions of this Act on the employer's request, if satisfied that he has before the commencement of this Act entered into a contract with insurers substantially covering the liabilities imposed on him by this Act, for so long as that contract continues.

Power to make rules.

20. *(1)* The Central Government may, by notification in the official Gazette, make rules to carry into effect the provisions of this Act.

(2) Without prejudice to the generality of the foregoing power such rules may prescribe—

(a) the principles to be followed in ascertaining the total wages bill of an employer, including provision for the exclusion therefrom of certain categories of wages or of certain elements included in the definition of wages;

(b) the form of the policies of insurance referred to in sub-section *(2)* of section 7;

(c) the period referred to in clause *(g)* of sub-section *(5)* of section 7;

[a] * * * * * *]

(e) the date and the period referred to in sub-section *(1)* of section 9;

(f) the form of and the manner of preparing and publishing the account referred to in sub-section *(4)* of section 11;

(g) the periods referred to in sub-section *(3)* of section 14.

[a] Clause *(d)*, namely, "*(d)* the associations referred to in the proviso to section 8;" was *omitted* by Ord. 54 of 1944, S. 8. [18-12-1944.]

Application of the Scheme to Indian States.

21. *(1)* If the Central Government is satisfied that by the law of an Indian State [a][or of the French Establishments in India or of the Administered Areas] provision has been made substantially corresponding to the provision made by this Act imposing liabilities upon empolyers and requiring them to take out policies of insurance covering such liabilities, the Central Government may by notification in the official Gazette, declare that this section shall apply [b][to the territory of that State or of those Establishments or comprising the Administered Areas].

(2) On the application of this section to any [c][such territory] the Scheme made under this Act shall extend to the undertaking by the Central Government in respect of employers in that [c][territory] of the same liabilities in the same manner, to the same extent and subject to the same conditions as if such employers were in British India.

(3) On the application of this section to any [c][such territory] the provisions of section 10 shall be deemed to prohibit any person except a person authorised by the Central Government as its agent to issue policies in pursuance of the Scheme from carrying on after the date of the notification by which this section is applied the business of insuring employers in that [c][terriory] against liabilities insurance against which is provided under the Scheme.

[a] *Inserted* by Ordinance 54 of 1944, S. 9. [18-12-1944.] [b] *Substituted ibid.*, for "to that State." [c] *Substituted, ibid.*, for "State."

THE [a][FIRST] SCHEDULE.

[*See* sections 2 *(1)* and 5 *(1)*.]

Item No.	Injury.	Percentage of disability.
1	Loss of two or more limbs. Lunacy. Jacksonian epilepsy. Very severe facial disfigurement.	100
2	Loss of right arm above or at the elbow.	90
3	Severe facial disfigurement. Total loss of speech. Loss of left arm above or at the elbow. Loss of right arm below the elbow. Loss of leg at or above the knee.	70
4	Loss of left arm below the elbow. Loss of leg below the knee. Permanent total loss of hearing.	60
5	Loss of one eye. Loss of right thumb or four fingers of right hand.	50
6	Loss of all toes of both feet above knuckle. Loss of left thumb or four fingers of left hand or three fingers of right hand.	40
7	Loss of all toes of one foot above knuckle. Loss of all toes of both feet at or below knuckle.	30
8	Limited restriction of movement of joints through injury without penetration, limited function of limb through fracture. Loss of two fingers of either hand. Compound fracture of thumb or two or more fingers of either hand with impaired function.	20
9	Loss of one phalanx of thumb. Loss of index finger. Loss of great toe.	10

[a] *Inserted* by Ord. 54 of 1944, S. 10. [18-12-1944.]

THE SECOND SCHEDULE.[a]

[*See* Section 11 (1).]

1. The Cantonment of Baroda.
2. The Administered Areas in the Western India States Agency specified in the Western India States Administered Areas (Application of Laws) Order, 1937.
3. The Administered Areas in the Central India Agency specified in the Central India Administered Areas (Application of Laws) Order, 1937.
4. The Gwalior Residency Area.
5. The District of Abu.
6. The Administered Areas in the Hyderabad State specified in the Hyderabad Administered Areas (Application of Laws) Order, 1937.
7. The Civil and Military Station of Bangalore.
8. The Kolhapur Residency Area and the Wadi Jaghir.
9. The railway lands in the Western India States Agency specified in the notification of the Political Department Nos. 189-I, B. and 190-I. B. dated 8th September 1937.
10. The Rajputana and Central India Railway lands specified in the Rajputana and Central India Railway Lands (Application of Laws) Order, 1937.
11. The Punjab States railway lands specified in the Punjab States Railway Lands (Application of Laws) Order, 1939.
12. The Thana Circles in the Rewa Kantha Agency in the Gujrat States Agency and the Dangs.
13. The British Reserve in Manipur.
14. The Shillong Administered Areas.

[a] The second Schedule was *added* by Ordinance 54 of 1944, S. 10. [18-12-1944.]

(ACT XXIII of 1863.)

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—Short title given by Act 14 of 1897.
—Adapted by A. O.
—Repealed in part and amended by Act 4 of 1914.
—Repealed in part by Acts 9 of 1871; 10 of 1914.
—Repealed in part in its application to the United Provinces by U. P. Act, 12 of 1922.
—Repealed in its application to Bombay by Bombay Act, 47 of 1947.

[THE] WASTE LANDS (CLAIMS) ACT, 1863.[a]

(ACT NO. XXIII OF 1863.)

[10th March, 1863.]

An Act to provide for the adjudication of claims to waste lands.

Preamble.

WHEREAS it is expedient to make special provision for the speedy adjudication of claims which may be preferred to waste lands proposed to be sold, or otherwise dealt with, on account of [b][the Provincial] Government, and of objections taken to the sale or other disposition of such lands; It is enacted as follows:—

[a] The Act has been *declared* to be in force in the whole of British India, except as regards the Scheduled Districts—See Act XV of 1874, S. 3.
Short title has been given by the Indian Short Titles Act (XIV of 1897).

Preamble — Note 1

[1] This Act is drastic in its character and makes great invasion on private rights; party relying on it has onus of strict proof on it. (Vol 3) 1916 P C 141 (145) : 43 Ind App 303 : 44 Cal 328 (PC).

[2] Applicability not confined only to lands held by Government. (Vol 3) 1916 P C 141 (144) : 44 Cal 328 : 43 Ind App 303 (PC).

[But see ('86) 12 Cal 279 (286) (DB). (*Quære.*—Whether Act applies at all to any lands which are not waste at date of sale or whether it applies to any lands except those which are property of Government.)

[3] Act must be strictly construed. (Vol 3) 1916 P C 141 (144, 145) : 44 Cal 328 : 43 Ind App 303 (PC).

[4] The only claims dealt with by Act 23 of 1865 are claims set up by persons objecting to or complaining of sale lands as waste lands. ('86) 12 Cal 279 (285) (DB).

It has been declared under the Scheduled Districts Act (XIV of 1874) to be in force in the following Scheduled Districts:—

West Jalpaiguri	See *Gazette of India* ...	1881, Pt. I., p. 1.
The Districts of Hazaribagh, Lohardaga (now the Ranchi District, *see* Calcutta Gazette, 1899, Pt. I, p. 44) and Manbhum, and Pargana Dhalbhum, and the Kolhan in the District of Singbhum	Ditto	... 1881, Pt. I, p. 504.
The Porahat estate in the Singbhum District ...	Ditto	... 1897, Pt. I, p. 1059.
Kumaon and Garhwal	Ditto	... 1876, Pt. I, p. 605.
The scheduled portion of the Mirzapur District	Ditto	... 1879, Pt. I, p. 383.
Jaunsar Bawar	Ditto	... 1879, Pt. I, p. 382.
The Districts of Hazara, Peshawar, Kohat, Bannu, Dera Ismail Khan, and Dera Ghazi Khan. (Portions of the Districts of Hazara, Bannu, Dera Ismail Khan and Dera Ghazi Khan and the District of Peshawar and Kohat now form the N.-W. F. P., *see* Gazette of India, 1901, Pt. I, p. 857, and *ibid.*, 1902, Pt. I, p. 575; but its application to that part of the Hazara District known as Upper Tanawal has been barred by the Hazara (Uppar Tanawal) Regulation, 1900 (Reg. 2 [II] of 1900).)	Ditto	1886, Pt. I, p. 45.
The District of Lahaul	Ditto	1886, Pt. I, p. 301.
The District of Sylhet	Ditto	1879, Pt. I, p. 631.
The Districts of Kamrup, Naugong, Darrang, Sibsagar, Lakhimpur, Goalpara (excluding the Eastern Dvars), and Kachar (excluding the North Kachar Hills)	Ditto	... 1878, Pt. I, p. 533.
It has been declared, under the same Act, S. 3 *(b)*, *not* to be in force in the Scheduled Districts of Ganjam and Vizagapatam	Ditto	... 1898, Pt. I, p. 872.
It has been extended, under the same Act, to the following Scheduled Districts:—		
The Western Dvars	Ditto	... 1875, Pt. I, p. 497.
The Tarai of the Province of Agra	Ditto	... 1876, Pt. I, p. 505.

This Act has been repealed in its application to Bombay by the Waste Lands (Claims) (Bombay Repeal) Act, 1947 (Bom. Act XLVII of 1947.)

[b] *Inserted* by A. O.

Provision for enquiry in claims to land or objections to sale of same.

1. When any claim shall be preferred to any waste land proposed to be sold or otherwise dealt with on account of [a][the Provincial Government], or when any objection shall be taken to the sale or other disposition of such land, the Collector of the district in which such land is situate, or other officer performing the duties of a Collector of Land Revenue in such district, by whatever name his office is designated, shall, if the claim or objection be preferred within the period mentioned in the advertisement to be issued for the sale or other disposition of such land, which period shall not be less than three months, proceed to make an enquiry into the claim or objections.

[a] *Substituted* for 'Government' by A. O.

Procedure in such cases.

2. The Collector or other officer as aforesaid shall call upon the claimant or objector to produce any evidence, or documents, upon which he may rely in proof of his claim or objection, and, after considering the same, and making any further enquiry that may appear proper, shall dispose of the case by an order for the admission or rejection of the claim or objection, and if the land is proposed to be sold, for the sale of the same subject to any condition or reservation which, to such Collector or other officer as aforesaid, shall appear to be proper.

Notification of conditions.

If the land is ordered to be sold subject to any condition or reservation, such condition or reservation shall be notified to intending purchasers at the time of sale.

Postponement of sale pending enquiry, to allow claimant to contest rejection of claim.

3. Pending an enquiry into any claim or objection under the last preceding section, the Collector or other officer as aforesaid shall postpone the sale or other disposition of the land;

and, if he shall order that such claim or objection be rejected, he shall further postpone the sale or other disposition of the land, to allow the claimant or objector to contest the order of rejection in the manner hereinafter provided.

Sale to be stopped if claim appear to be established, but may afterwards be proceeded with.

4. If the Collector or other officer as aforesaid shall consider the claim or objection to be established, and that the sale or other disposition of the land should not take place, he shall stop the sale or other disposition of the land:

but such sale or other disposition of the land may afterwards be proceeded with if, on an order issued [a][* * * *] to try the claim or objection, as provided in section 6 of this Act, the claimant or objector shall fail to establish the same.

[a] The words "by the Local Government" were *repealed* by the Decentralization Act, 1914 (4 [IV] of 1914), Sch. Pt. I.

Delivery to claimant of copy of order of rejection or of sale.

5. If the Collector or other officer as aforesaid shall order that the claim or objection be rejected, or that the land be sold subject to any condition or reservation, or that it be otherwise dealt with, he shall cause a copy of such order to be delivered to the claimant or objector;

Order when final.

and, if such claimant or objector shall not within one week from the delivery of such copy, or within such further time as the Collector or other officer as aforesaid, for any special reason to be recorded, shall see fit to grant, give notice in writing to such Collector or other officer as aforesaid, that he intends to contest such order, the order shall be final.

Report to Board.

If the claimant or objector shall, within the time allowed, give such notice, the Collector or other officer as aforesaid shall immediately make a report to the [a][* * * *] superior revenue-authority [b][to which he is immediately subordinate]; and shall forward with such report a copy of his order, stating fully all the circumstances of the case, and the evidence adduced in support, or otherwise, of the claim or objection;

Decision of Board.

and such [c][* * *] authority on the receipt of such report, and after calling for any further information which it may consider necessary, may confirm, modify or reverse the order of the Collector or other officer as aforesaid.

Certification to Court.

If the [c][* * *] authority as aforesaid confirm the order of the Collector or other officer as aforesaid, or modify such order in such manner as to leave any part of such order in force adverse to the claimant or objector, the Collector or other officer as aforesaid shall certify such order to the Court constituted as hereinafter provided;

Notice to claimant.

and such Court shall forthwith give notice to the claimant or objector;

Decision when final.

and, if such claimant or objector shall not [d][* * * *] institute a suit in such Court to establish his claim or objection, the order of the [c][* * *] authority aforesaid shall be final.

[a] The words "Board of Revenue or other" were *repealed* by the Decentralization Act, 1914 (4 [IV] of 1914), Sch., Pt. I. [b] *Inserted, ibid.* [c] The words "Board or other" were *repealed, ibid.* [d] The words "within thirty days from the delivery of such notice from the Court" were *repealed* by the Indian Limitation Act, 1871 (9 [IX] of 1871); For limitation, *see* now the Indian Limitation Act, 1908 (9 [IX] of 1908).

Power to order suit to try claim admitted by Collector.

6. The [a][Provincial] Government may, within twelve months after the date on which the claim of any claimant of waste land, or the objection of any objector as aforesaid, shall have been admitted under this Act by the Collector or other officer as aforesaid, direct a suit to be brought to try the claim or objection of the claimant or objector, in a Court constituted as hereinafter provided.

[a] *Substituted* by A. O. for "Local."

Special Court for trying claims.

7. For the investigation and trial of claims under this Act the [a][Provincial] Government shall constitute, in every district in which there may be any waste lands capable of being sold or otherwise dealt with, on account of [b][the Provincial] Government, a Court consisting of an uneven number of persons, not less than three, of whom the Judge of the district, or the officer presiding in the principal civil Court of original jurisdiction in the district, by whatever name his office may be designated, shall be one.

Power of members.

Any one or more of the members of which such Court shall consist shall have power to make all such orders in the case as may be necessary prior to the hearing of the suit:

Exclusion of officer making original enquiry.

Provided that, whenever the Collector or other officer by whom the original enquiry was held is the officer presiding in the principal civil Court of original jurisdiction in the district, such officer shall not be a member of such Court.

[a] *Substituted* by A. O. for "Local." [b] *Inserted, ibid.*

8. Whenever any Court is constituted under this Act, notice thereof shall be given by written proclamation, copies of which shall be affixed in the several Courts, and in the offices of the several Collectors and Magistrates of the district:

Notice of constitution of special Courts.

and from the date of the issue of such proclamation no other Court shall be competent to entertain any claim or objection belonging to the class of claims or objections for the trial and determination of which such Court is constituted.

Claims not cognizable in other Courts.

9. The Courts constituted under this Act shall be held at such place, or places, within the limits of their respective jurisdictions, as shall be considered most convenient.

Special Courts where held.

10. In every suit instituted under section 5 of this Act the claimant of the waste land, or objector to the sale or other disposition of such land, shall appear as plaintiff; and the Collector or other officer as aforesaid shall appear as defendant on the part of [a][the Provincial] Government.

Plaintiff and defendant in suit under section 5.

Appearance

Either party may appear by pleader or by agent:

Proviso.

Provided that, if such other officer as aforesaid be the presiding officer of the principal civil Court of original jurisdiction in the district, the [b][Provincial] Government shall appoint some other officer to appear as defendant in the case on its behalf.

Plaintiff and defendant in suit under section 6.

In any suit ordered to be instituted [c][ ] under section 6 of this Act, the [a][Provincial] Government, by any officer to be appointed for the purpose, shall appear as plaintiff; and the claimant or objector as aforesaid shall appear as defendant.

[a] *Inserted* by A. O. [b] *Substituted, ibid.*, for "Local." [c] The words "by the Local Government" were *omitted* by the Decentralization Act, 1914 (4 [IV] of 1914), Sch , Pt. I.

Regulation of proceedings.

11. In suits instituted under this Act, except as hereinafter provided, the proceedings shall be regulated, so far as they can be, by the Code of Civil Procedure.

Procedure before hearing.

12. The Court shall fix a day for the appearance of the parties, and for the hearing of the suit, of which due notice shall be given to the parties or their agents; and on the day so fixed, the parties or their agents shall bring their witnesses into Court, together with any documents on which they may intend to rely in support of their respective statements.

Procuring attendance of witnesses.

If either party require the assistance of the Court to procure the attendance of a witness on such day, he shall apply to the Court in sufficient time before the day fixed for the hearing of the suit; and the Court shall issue a subpœna requiring such witness to attend the Court on that day.

Power to require attendance of claimant.

It shall be competent to the Court to require the personal attendance of the claimant of the waste land, or objector, as aforesaid, on the day fixed for the hearing, or at any subsequent stage of the suit.

Procedure on hearing.

13. On the day fixed for the hearing of the suit, or as soon after as may be practicable, the Court shall proceed to examine the claimant of the waste land, or the objector, or his agent (when his personal attendance is not required), and the witnesses of the parties: and upon such examination, and after inspecting the documents of the parties, and making any further enquiry that may appear necessary, shall proceed to pass such order in the case as it may consider just and proper.

No appeal or revision.

14. No appeal shall lie from any decision or order passed under this Act, nor shall any such decision or order be open to revision.

Reference of question of law etc., to High Court etc.

15. If, on the trial of any suit under this Act, any question of law, or of usage having the force of law, or the construction of a document affecting the merits of the case, shall arise, on which the Court shall entertain reasonable doubts, the Court may, either of its own motion, or on the application of any of the parties to the suit, draw up a statement of the case and submit it, with its own opinion, for the opinion of the High Court of Judicature, or of the highest civil Court of Appeal and Revision in the territory in which the land is situate:

Section 8 — Note 1

[1] This section does not disable any person from asserting his rights in any way whatever except in the one case in which the act forbids it and that is where he is the claimant. It does not bar a person from defending his position. ('86) 12 Cal 279 (286) (DB).

[2] Notice to be given under the Act must be clear and not misleading where lands were wrongly described in notice of sale, the whole of proceedings under the Act fail for want of proper basis. (Vol 3) 1916 P C 141 (145) : 44 Cal 328 : 43 Ind App 303 (PC).

Provided that it shall be the duty of every Court held under this Act to make such reference to such High Court, or Court of Appeal, if, in any suit under this Act, any question shall arise involving any principle of general importance, or the rights of a class.

When reference obligatory.

16. The Court may proceed in the case notwithstanding a reference to the High Court, or other highest civil Court of Appeal as aforesaid; and may pass an order contingent upon the opinion of the High Court, or other Court as aforesaid, on the point referred;

Court may proceed notwithstanding reference.

but no final order for the sale or other disposition of the land in question in the suit, or for the admission or rejection of any claim or objection which shall be before the Court in such suit, shall be passed until the receipt of the order of the said High Court, or highest civil Court of Appeal.

but not make final order.

17. The record of cases disposed of by Courts constituted under this Act shall be deposited amongst the records of the principal civil Court of original jurisdiction in the district in which the property in dispute is situate.

Records of cases where deposited.

18 No claim to any land, or to compensation or damages in respect of any land, sold or otherwise dealt with on account of [a][the Provincial] Government as waste land, shall be received after the expiration of three years from the date on which such land shall have been delivered by the [a][Provincial] Government to the purchaser, or otherwise dealt with.

Limitation as to claims to land sold or dealt with.

If within three years after any lands have been delivered by the [a][Provincial] Government to the purchaser, or otherwise dealt with, any claimant or objector shall prefer a claim to the land so delivered or otherwise dealt with, or an objection to such sale, or to compensation or damages in respect thereof, in the Court constituted under this Act for the district in which the land is situate, and shall show good and sufficient reason for not having preferred his claim or objection to the Collector, or other officer as aforesaid within the period limited under section 1 of this Act; such Court shall file the claim or objection, making the claimant or objector plaintiff, and the Collector of the district or other officer as aforesaid (with the like provision as aforesaid if such other officer be the presiding officer of the principal civil Court of original jurisdiction in the district) the defendant in the suit;

Provision for such claims if preferred within time.

and the foregoing provisions of this Act shall be applicable to the trial and determination of the suit.

The report of the officer employed to give delivery, or to take possession, on the part of [a][the Provincial] Government, of the land sold or otherwise dealt with, shall be conclusive evidence as to the date on which such delivery was made, or possession was taken.

[a] *Inserted* by A. O.

19. In any case in which the land has been sold, if the Court shall be of opinion that the claim of the claimant is established, the Court shall not award the claimant possession of the land in dispute; but shall order him to receive from the [a][Provincial] Government treasury, by way of compensation, a sum equal to the price at which the land was sold, in addition to the costs of suit.

If claim established, possession not to be given, but compensation.

[a] *Inserted* by A. O.

20. If the land shall have been sold subject to any condition or reservation, or shall not have been sold, but shall have been otherwise dealt with on account of the [a][Provincial] Government, and the Court shall be of opinion that the claim to such land, or the objection of an objector, is established, the Court shall award the claimant or objector to receive such sum, in respect of his interest in such

When land sold not absolutely, or not sold, but otherwise dealt with.

Section 18 — Note 1

[1] Limitation of three years is applicable to special Courts alone. (Vol 3) 1916 P C 141 (145) : 44 Cal 328 : 43 Ind App 303 (PC).

[2] There is nothing in the Act (Waste Lands Act) to prevent a person, who has a good title and has throughout been in possession, or who has a good title, and at any time succeeds in peaceably getting possession and is not ousted in a possessory suit, or who, for any other reason, is in the advantageous position of a defendant, from defending his rights, in spite of any sale by Government under the Act. ('86) 12 Cal 279 (285) (DB).

[3] A purchaser of land sold as waste land under Act XXIII of 1863 cannot be compelled to grant a pattah to a person alleging himself to have been in occupation before the sale. If the claimant has omitted to come in due time to stay the sale, and the land has actually been sold his only remedy is by a suit under S. 18 for compensation, making the collector a defendant. ('67) 7 Suth W R 474 (475) (DB).

[4] A trespasser may cultivate waste land and in that case he is liable to assessment. But want of assessment does not conclusively disprove title as against parties who are assessed. (Vol 12) 1925 Rang 87 (88) : 2 Rang 488.

land, as shall be awarded in that behalf under the provisions of Act VI of 1857;[b] *(for the acquisition of land for public purposes)*,

and thereupon the [c][Provincial] Government shall proceed under the said Act to obtain an award of the value of such interest.

[a] *Inserted* by A. O. [b] *See* now the Land Acquisition Act, 1894 (1 [I] of 1894), S. 2. [c] *Substituted* by A. O. for "Local".

Award under two last sections to be in full satisfaction.

21. An award under any of the provisions of the two last preceding sections shall be in full satisfaction of the claim of the claimant or objector; and shall bar any future claim on his part, in respect to the land in suit resting on the same cause of action, or on a cause of action which existed prior to the date of the sale or other disposition of the land on account of [a][the Provincial] Government.

[a] *Inserted* by A. O.

Government not barred from awarding compensation for land absolutely sold, though claim be not preferred in time.

22. Nothing in this Act shall be held to prevent the [a][Provincial] Government from awarding to any claimant of waste land sold on account of [b][the Provincial] Government, on proof to the satisfaction of the [a][Provincial] Government of the claim of such claimant (notwithstanding that he may not have preferred his claim either to the Collector or other officer as aforesaid, or to the proper Court constituted under this Act, within the period prescribed by this Act), such amount as compensation for the said land, within the limit as to amount mentioned in section 19 of this Act, if the land have been sold not subject to any condition or reservation, as to such [a][Provincial] Government may seem proper.

[a] *Substituted* by A. O. for "Local". [b] *Inserted, ibid.*

Compensation for land sold subject to condition, if claim proved, though not preferred in time.

23. If the land have been sold subject to any condition or reservation, or have been otherwise disposed of, on account of [a][the Provincial] Government, and any claim to such land, or objection to the sale or other disposition of the land, shall be proved to the satisfaction of the [b][Provincial] Government, although not preferred to the Collector or other officer as aforesaid, or to the Court constituted under this Act, within the period prescribed by the Act, the [b][Provincial] Government may award to such claimant or objector such amount as to such [b][Provincial] Government may appear to be the value of the interest of such claimant or objector in such land.

[a] *Inserted* by A. O. [b] *Substituted, ibib.*, for "Local".

Exercise of power of the Provincial Government by the Board of Revenue or the Financial Commissioner.

[a][**23A.** In a Province for which there is a Board of Revenue or a Financial Commissioner, the powers and duties of the [b][Provincial Government] under sections 6, 10, 22 and 23 may be exercised by such Board or Financial Commissioner, as the case may be.][c]

[a] *Inserted* by the Decentralization Act, 1914 (IV of 1914), Sch., Part I. [b] *Substituted* for 'Local Government' by A. O. [c] This section has been omitted in its applications to the United Provinces, *see* U. P. Board of Revenue Act, 1922 (U. P. Act XII of 1922).

24. [Interpretation-clause. Number. Gender.] *Repealed by the Repealing and Amending Act, 1914 (X of 1914), S. 3 and Sch. II.*

[THE] WEEKLY HOLIDAYS ACT, 1942.

(ACT XVIII OF 1942).

CONTENTS.

SECTIONS.

1. Short title, extent and commencement.
2. Definitions.
3. Closing of shops.
4. Weekly holidays in shops, restaurants and theatres.
5. Additional half-holiday closing or holiday.
6. No deduction or abatement to be made from wages.
7. Inspectors.
8. Powers of inspectors.
9. Penalties.
10. Rules.
11. Power of exemption and suspension.

STATEMENT OF OBJECTS AND REASONS.

"It was suggested at the first conference of Labour Ministers held in January, 1940 that the Central Government should consider the question of passing an enabling measure giving Provincial Governments power by notification to provide for the compulsory closing of shops and commercial establishments for a minimum period of one day in the week, leaving it to the Provincial Governments to provide an extra half-holiday, if they considered it necessary. The present Bill has been drafted after consultation with Provincial Governments

and further discussion at the second Conference of Labour Ministers held in January, 1941. The Bill will not come into effect in any Province until the Government for that Province directs its application by notification, either to the whole Province or any specified area within it. A further notification of the Provincial Government will be necessary to bring into application the provisions about an extra half-holiday. It is considered desirable that Provincial Governments should have power to introduce by notification certain minimum provisions on uniform lines as embodied in the Bill. The Bill provides for payment of wages for holidays declared under it. Certain classes of persons and establishments are excluded from its purview. It proposes to leave power with the Central Government in respect of establishments under its control and with Provincial Governments in respect of all other establishments within the Province, to make exceptions from or temporary suspension of the provisions of the proposed Act."

— Gazette of India, 1941, Part V, page 142.

[THE] WEEKLY HOLIDAYS ACT, 1942.

(ACT XVIII OF 1942).[a]

[3rd April, 1942.]

An Act to provide for the grant of weekly holidays to persons employed in shops, restaurants and theatres.

WHEREAS it is expedient to provide for the grant of weekly holidays to persons employed in shops, restaurants and theatres;

It is hereby enacted as follows:—

[a] For Report of Select Committee, *see* Gazette of India 1942, Pt. V, p. 55.

Short title, extent and commencement.

1. *(1)* This Act may be called the Weekly Holidays Act, 1942.

(2) It extends to the whole of British India.

(3) It shall come into force in a Province or in a specified area within a Province only if the Provincial Government by notification in the official Gazette so directs.

Definitions.

2. In this Act, unless there is anything repugnant in the subject or context,—

(a) "establishment" means a shop, restaurant or theatre;

(b) "day" means a period of twenty-four hours beginning at midnight;

(c) "restaurant" means any premises in which is carried on principally or wholly the business of supplying meals or refreshment to the public or a class of the public for consumption on the premises but does not include a restaurant attached to a theatre;

(d) "shop" includes any premises where any retail trade or business is carried on, including the business of a barber or hair dresser, and retail sales by auction, but excluding the sale of programmes, catalogues and other similar sales at theatres;

(e) "theatre" includes any premises intended principally or wholly for the presentation of moving pictures, dramatic performances, or stage entertainments;

(f) "week" means a period of seven days beginning at midnight on Saturday.

Closing of shops.

3. *(1)* Every shop shall remain entirely closed on one day of the week, which day shall be specified by the shop-keeper in a notice permanently exhibited in a conspicuous place in the shop.

(2) The day so specified shall not be altered by the shop-keeper more often than once in three months.

Weekly holidays in shops, restaurants and theatres.

4. Every person employed otherwise than in a confidential capacity or in a position of management in any shop, restaurant or theatre shall be allowed in each week a holiday of one whole day :

Provided that nothing in this section shall apply to any person whose total period of employment in the week including any days spent on authorised leave is less than six days or entitle to an additional holiday a person employed in a shop who has been allowed a whole holiday on the day on which the shop has remained closed in pursuance of section 3.

Additional half-day closing or holiday.

5. *(1)* The Provincial Government may, by notification in the official Gazette, require in respect of shops or any specified class of shops that they shall be closed at such hour in the afternoon of one week-day in every week in addition to the day provided for by section 3 as may be fixed by the Provincial Government, and, in respect of theatres and restaurants or any specified class of either or both, that every person employed therein otherwise than in a confidential capacity or in a position of management shall be allowed in each week an additional holiday of one-half day commencing at such hour in the after-noon as may be fixed by the Provincial Government.

(2) The Provincial Government may, for the purposes of this section, fix different hours for different shops or different classes of shops or for different areas or for different times of the year.

(3) The weekly day on which a shop is closed in pursuance of a requirement under sub-section *(1)* shall be specified by the shop-keeper in a notice permanently exhibited in a conspicuous place in the shop and shall not be altered by the shop-keeper more often than once in three months.

No deduction or abatement to be made from wages.

6. No deduction or abatement of the wages of any person employed in an establishment to which this Act applies shall be made on account of any day or part of a day on which the establishment has remained closed or a holiday has been allowed in accordance with sections 3, 4 and 5, and if such person is employed on the basis that he would not ordinarily receive wages for such day or part of a day he shall none the less be paid for such day or part of a day the wages he would have drawn had the establishment not remained closed or the holiday not been allowed on that day or part of a day.

Inspectors.

7. *(1)* The Provincial Government may, by notification in the official Gazette, appoint persons to be inspectors for the purposes of this Act within such local limits as it may assign to each such person.

(2) Every inspector appointed under this section shall be deemed to be a public servant within the meaning of section 21 of the Indian Penal Code (XLV of 1860).

Powers of Inspectors.

8. *(1)* Subject to any rules made in this behalf by the Provincial Government, an inspector may, within the local limits for which he is appointed,—

(a) enter and remain in any establishment to which this Act applies with such assistants, if any, being servants of the Crown, as he thinks fit;

(b) make such examination of any such establishment and of any record, register or notice maintained therein in pursuance of rules made under clause *(c)* of sub-section *(2)* of section 10, and take on the spot or otherwise such evidence of any person as he may deem necessary for carrying out the purposes of this Act;

(c) exercise such other powers as may be necessary for carrying out the purposes of this Act.

(2) Any person having the custody of any record, register or notice maintained in pursuance of rules made under clause *(c)* of sub section *(2)* of section 10 shall be bound to produce it when so required by the inspector, but no person shall be compellable to answer any question if the answer may tend directly or indirectly to criminate himself.

Penalties.

9. In the event of any contravention of the provisions of section 3, of section 4, of a requirement imposed by notification under sub-section *(1)* of section 5, of section 6, or of the rules made under clause *(c)* of sub-section *(2)* of section 10, the proprietor or other person responsible for the management of the establishment in which such contravention takes place shall be punishable with fine which may extend, in the case of the first offence, to twenty-five rupees, and, in the case of a second or subsequent offence, to two hundred and fifty rupees.

Rules.

10. *(1)* The Provincial Government may, subject to the condition of previous publication by notification in the official Gazette, make rules for carrying out the purposes of this Act.

(2) In particular and without prejudice to the generality of the foregoing power, such rules may—

(a) define the persons who shall be deemed to be employed in a confidential capacity or in a position of management for the purpose of sections 4 and 5;

(b) regulate the exercise of their powers and the discharge of their duties by inspectors;

(c) require registers and records to be maintained and notices to be displayed in establishments to which this Act applies and prescribe the form and contents thereof.

Power of exemption and suspension.

11. The Central Government in respect of establishments under its control, and the Provincial Government in respect of all other establishments within the Province may, subject to such conditions, if any, as it thinks fit to impose, exempt any establishment to which this Act applies from all or any specified provisions of this Act, and may, on any special occasion in connection with a fair or festival or a succession of public holidays, suspend for a specified period the operation of this Act.

(ACT XXXI OF 1871.)

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ACT HOW AFFECTED BY SUBSEQUENT LEGISLATION.

—Adapted by A. O.
—Repealed in part by Act 9 of 1939.
—Repealed in its application to—
(a) Bombay by Bom. Act 15 of 1932;
(b) Central Provinces by C. P. Act 2 of 1928;
(c) Coorg by Coorg Act 1 of 1931;
(d) Orissa by Orissa Act 7 of 1943;
(e) The Punjab by Punjab Act 12 of 1941.

[THE INDIAN] WEIGHTS AND MEASURES OF CAPACITY ACT, 1871.

(ACT XXXI OF 1871)[a]

[30th October, 1871.]

An act to regulate the Weights and Measures of Capacity of British India.

Preamble.

WHEREAS it is expedient to provide for the ultimate adoption of a uniform system of Weights and Measures of Capacity throughout British India; It is hereby enacted as follows:—

[a.] For Statement of Objects and Reasons, *see* Gazette of India, 1871, Part V, page 398.

This Act has been repealed in its application to—

[a] the Bombay Presidency by the Bombay Weights and Measures Act, 1932 (Bom. Act XV of 1932), S. 47 and Sch. II, Pt. II. [b] The Central Provinces by the C. P. Weights and Measures of Capacity Act, 1928 (C. P. Act II of 1928), S. 16. [c] Coorg by the Coorg Weights and Measures of Capacity Act, 1931 (Coorg Act I of 1931). [d] Orissa by the Orissa Weights and Measures Act, 1943 (Orissa Act VII of 1943), S. 40 and Sch. II. [e] The Punjab by the Punjab Weights and Measures Act, 1941 (Punj. Act XII of 1941), S. 40 and Sch. II.

This Act, in so far as it relates to the establishment of standards of Weight, is repealed by the Standards of Weight Act, 1939 (IX of 1939), S. 6.

I.—Preliminary.

Short title. Local extent.

1. This Act may be called "the Indian Weights and Measures of Capacity Act, 1871" and extends to the whole of British India.

II.—Standards.

Standard of weight.

[a]2. The primary standard of weight shall be called a ser, and shall be a weight of metal in the possession of the [b][Central Government], equal, when weighed in a vacuum, to the weight known in France as the Kilogramme de Archives.

[a] *See* Preamble. f. n. [a], last para. [b] *Substituted* for "Government of India". by A. O.

Section 2 — Note 1

[1] In comparing weights used in bazar allowance must be made for wear and tear. (Vol 1) 1914 Lah 42 (44) : 15 Cri L Jour 11 : 1913 Pun Re No. 20 Cr.

[2] Section 153, Cr. P. C., expressly authorises an inspection of weights and measures by an officer in charge of a police-station; until a set of standard weights is provided for purposes of comparison, it is impossible to say with accuracy whether any particular set of bazar weights differs so widely from that standard as to justify an inference of fraud. (Vol 1) 1914 Lah 42 (43, 44): 15 Cri L Jour 11: 1913 Pun Re No. 20(Cr.)

[3] "Ser"—Meaning of, explained with reference to S. 2 of Act XI of 1870. ('81) 3 All 404(406, 407)(DB).

Units of weights and measures of capacity.

3. The units for weight and of measures of capacity shall be—

for weights, the said ser;

for measures of capacity, a measure containing one such ser of water at its maximum density weighed in a vacuum.

Special weights and measures of capacity may be authorized.

4. The [a][appropriate Government] may, from time to time, by notification in the [b][Official Gazette] declare the magnitude and denominations of the weights and measures of capacity, other than the said units to be authorized under this Act:

Provided that every such weight or measure of capacity shall be an integral multiple or integral sub-multiple of one of the units aforesaid.

The [a][appropriate Government] may, in like manner, revoke such notification.

Unless it be otherwise ordered in any such notification, the sub-divisions of all such weights and measures of capacity shall be expressed in decimal parts.

[a] *Substituted* by A. O. for "Governor-General in Council" for definition, *see* S. 18, *infra*. [b] *Substituted* by A. O. for "Gazette of India".

Districts how defined.

5. The [a][appropriate Government] may, from time to time, by notification in the [b][Official Gazette], define the limits of districts for the purposes of this Act.

Sub-districts how defined.

The [c][appropriate Government] may, from time to time, by notification in the Official Gazette, define the limits of sub-districts for the purposes of this Act.

[a] *Substituted* for "Governor-General in Council" by A. O. for definition of this term, *see* section 18. [b] *Substituted* for "Gazette of India" by A. O. [c] *Substituted* for "Local Government" by A. O.

Primary standards to be provided.

6. The [a][appropriate Government] may provide, for such districts as [b][it] thinks fit, proper primary standards and sets of the said authorized weights and measures of capacity.

Such standards shall, for the purposes of this Act, be deemed the standards for such districts.

[a] *Substituted* for "Governor-General in Council" by A. O. [b] *Substituted* for "he" by A. O.

Local standards to be provided.

7. The [a][appropriate] Government may provide, for such sub-districts as it thinks fit, copies of such of the said authorized weights, and measures of capacity as shall be necessary to serve as local standards in such sub-districts.

Such local standards shall be deemed correct, until they are provided to be otherwise.

[a] *Substituted* by A. O. for "Local".

III.—Use of new Weights and Measures of Capacity.

Use of new weights and measures of capacity in Government offices, etc.

8. Whenever the [a][appropriate Government] considers that proper standard weights and measures of capacity have been made available for the verification of the weights and measures of capacity to be used by any Government office or municipal body or railway company, the [a][appropriate Government] may, by notification in the [b][Official Gazette] direct that, after a date to be fixed therein, all or any of the weights and measures of capacity, authorized as aforesaid, shall be used in dealings and contracts by such office, body or company; and may, in like manner, from time to time, alter or revoke such direction.

[a] *Substituted* by A. O., for "Governor-General in Council." [b] *Substituted* by A. O. for "Gazette of India."

Contracts by weight or measure of capacity.

9. After the date fixed in any notification under section 8, all dealings and contracts had and made by the officers, bodies, or companies, mentioned in such notification, for any work to be done or goods to be sold or delivered by weight or measure of capacity, shall, in the absence of a special agreement to the contrary, be deemed to be had and made according to the weights or measures of capacity directed in such notification to be used by such officers, bodies or companies.

IV.—Wardens.

Appointment of Wardens.

10. The [a][appropriate Government] shall appoint Wardens for the custody of the primary and local standards and sets of authorized weights and measures of capacity hereinbefore mentioned.

The [a][appropriate Government] may, at any time, suspend or remove any such Warden, and appoint another.

[a] *Substituted* by A. O. for "Governor-General in Council, and the Local Government, respectively."

Powers to make rules.

11. The [a][appropriate Government] may, from time to time, make rules consistent with this Act for regulating the following matters :—

(a) the appointment of Wardens;

(b) the guidance of Wardens in all matters connected with the performance of their duties;

(c) the provision, replacement, custody, and use of the standards;

(d) the method of verifying local standards and weights, weighing machines and measures of capacity authorized under this Act, and balances, and of certifying such verification : provided that such verification shall not be required to be made oftener than once in two years;

(e) the errors which may be tolerated in weights, weighing machines, and measures of capacity authorized under this Act, and in balances;

(f) the shapes, proportions, and dimensions to be given to weights, weighing machines and measures of capacity authorized under this Act, and to balances, and the materials of which they may be made;

(g) marking weights and measures of capacity authorized under this Act with their several denominations;

(h) the conditions under which Government offices, municipal bodies, and railway companies, shall be subject to inspection and verification of the weights, weighing machines, and measures of capacity authorized uuder this Act, and of the balances used by them;

(i) the fees to be paid for verifying, correcting, and certifying the verification of weights, weighing machines and measures of capacity authorized under this Act, and of balances

[a] *Substituted* by A. O., for "Governor-General in Council."

Publication of rules.

12. Such rules shall be published in the [a][Official Gazette].

Rules, when specially applied, to have force of law.

And the [b][appropriate Government] may, by notification in the [a][Official Gazette] declare that, from and after a day to be named therein, all or any of the said rules shall come into force in respect of any Government office, municipal body or railway company : and thereupon, to the extent specified in such notification, such rules or rule shall have the force of law.

[a] *Substituted* by A. O., for "Gazette of India". [b] *Substituted ibid*, for "Governor-General in Council".

Officers of Government and others to comply with rules.

13. All officers of Government, municipal officers, and officers and servants of railway companies shall comply with such rules so far as they concern them, and pay such fees as the said rules shall prescribe.

Warden may refuse to verify or correct things unfit.

14. The Warden may deface, or render incapable of use, or refuse to verify, correct or mark, anything brought to him for verification or correction, which appears to him unfit for verification or correction.

Exercise of any of Warden's powers.

15. Any of the powers and duties conferred and imposed by this Act on a Warden may be exercised and performed by any other officer whom the [a][appropriate] Government may, from time to time, appoint.

[a] *Substituted* by A. O. for "Local".

Counterfeiting Warden's marks.

16. Whoever knowingly counterfeits any mark used by a Warden under section 11, shall be punished with imprisonment for a term which may extend to three years, and shall also be liable to fine.

Tables of equivalents.

17. The [a][appropriate Government] may, from time to time, prepare tables of the equivalents of weights and measures of capacity, other than those authorized under this Act, in terms of the weights and measures of capacity so authorized, and the equivalents so stated, after notification in the [b][Official Gazette] shall be deemed the true equivalents.

[a] *Substituted* by A. O. for "Local". [b] *Substituted. ibid*, for "Local Official Gazette".

Definition of appropriate Government.

[a][**18.** In this Act the appropriate Government means, in relation to standards of weight, the Central Government, and in relation to measures of capacity, the Provincial Government.]

[a] *Added* by A. O.

(Act IV of 1909).

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2. Whipping added to punishments described in Act XLV of 1860.
3. Offences punishable with whipping in lieu of other punishment.
4. Offences punishable with whipping in lieu of or in addition to other punishment.
5. Juvenile offenders when punishable with whipping.
6. Special provision as to punishment with whipping in frontier districts.
7. [*Repealed.*]
8. [*Repealed.*]
The Schedule — [*Repealed.*]

Statement of Objects and Reasons.

The first paragraph of the Statement of Objects and Reasons is as follows : "The object of this Bill is to amend the law relating to the punishment of whipping so as to restrict the classes of offences for which that punishment may be inflicted and to limit the number of officers who may be empowered to award it." (Gazette of India, 1908, Part V, page 222.)

However, the Select Committee in their Report state: "The Whipping Act, 1864, has already been the subject of various partial repeals and amendments, and very little of the original Act now remains on the statute-book. A further amending Act does not in the circumstances seem to be desirable. We have, therefore, prepared a consolidating Bill, which repeals the Whipping Act, 1864, with its amending enactments, and reproduces the law as contained therein with the amendments proposed in the Bill as introduced and certain further amendments now suggested by us." (Gazette of India, 1909, Part V, page 47).

ACT HOW AFFECTED BY SUBSEQUENT LEGISLATION.

—Adapted by A. O.
—Supplemented in Bombay by Bom. Act 27 of 1947.
—Repealed in part by Acts 17 of 1914 ; 1 of 1938.

[THE] WHIPPING ACT, 1909.

(ACT IV OF 1909.)[a]

[22nd March, 1909.]

An Act to consolidate and amend the law relating to the punishment of whipping.

WHEREAS it is expedient to consolidate and amend the law relating to the punishment of whipping ; It is hereby enacted as follows :—

[a] For S. O. R. *see* Gazette of India, 1908, Pt. V, p. 222 ; for Report of Select Committee, *see ibid*, 1909, Pt, V, p. 47 ; This Act has been declared to be in force in the Khandmals District by the Khandmals Laws Regulation, 1936 (Reg. 4 [iv] of 1936), S. 3 and Sch.; and in the Angul District by the Angul Laws Regulation, 1936 (Reg. 5 [v] of 1936), S. 3 and Sch.

Short title and extent.

1. *(1)* This Act may be called the Whipping Act, 1909 ; and

(2) It extends to the whole of British India, inclusive of British Baluchistan and the Santhal Parganas.

Section 1 — Note 1

[1] The Act applies only to offences under Penal Code; and not to offences made punishable by special and Local Laws. ('97-01) 1 Upp Bur Rul 392 (392).

[2] As the Act is a highly penal enactment, it must be construed in the sense most favourable to the subject. (Vol 1) 1914 Low Bur 145 (146) : 7 Low Bur Rul 63 : 15 Cri L Jour 3.

[3] The Act is not a special law; it creates no fresh offences, but merely provides a supplementary or alternative form of punishment for offences which are already punishable primarily under the Penal Code or (in case of juvenile offender) other enactments. (Vol 1) 1914 Low Bur 145 (146) : 7 Low Bur Rul 63 : 15 Cri L Jour 3.

[4] The Act does not empower a Court after passing sentence of imprisonment, to commute it to a sentence of whipping; sentence of whipping should be passed directly. ('09) 10 Cri L Jour 120 (121) : 5 Low Bur Rul 22. (1900-1902) 1 Low Bur Rul 92, *Rel. on.*)

[5] The Act does not deal with attempts to commit offences punishable with whipping. (*See* Ss. 2, 3 and 4 of Act VI of 1864). ('72-1892) Low Bur Rul 531 (532) ('72-1892) Low Bur Rul 399 (399). (In case of males under certain age, whipping may not be awarded for offence of attempting to commit offence.)

[6] Act has no application to an offence under S. 354, Penal Code, where the accused is eighteen years old. (Vol 29) 1942 Bom 78 (78) : 43 Cri L Jour 475 (DB).

[7] The Indian Penal Code and Code of Criminal Procedure must be read as if Whipping Act formed part of Penal Code from date of its enactment; in passing a sentence of whipping, a Magistrate is exercising his ordinary jurisdiction. ('71) 7 Beng L R 165 (169) (FB).

[8] Reading preamble and first section together of Act VI of 1864 the effect is that S. 53, Penal Code, must be read as if whipping were mentioned in it as one of the punishments to which offenders are liable under the provisions of the Code and that all whipping under Act VI of 1864 must be deemed to be whipping under the provisions of Penal Code. ('68) 9 Suth W R Cr 41 (41, 43) (FB).

Whipping added to punishments described in Act XLV, 1860.

2. In addition to the punishments described in Section 53 of the Indian Penal Code, offenders are also liable to the punishment of whipping.

SECTION 2 — SYNOPSIS

1. Whipping as penalty.
2. Postponement of sentence.
3. Substitution and enhancement.

1. Whipping as penalty. — [1] Whipping is one of penalties presented by Penal Code within the meaning of S. 46, Criminal P. C. ('68) 9 Suth W R (Cr) 41 (42) (FB).

[2] Section 2 only lays down as a general proposition that offenders are also liable to punishment of Whipping in addition to punishment described in S. 53, Penal Code, which does not include whipping. (Vol 26) 1939 Oudh 222 (223): 40 Cri L Jour 521 : 14 Luck 634.

[3] If a person is convicted at some time of two or more offences punishable under the Penal Code, Court can award sentence of whipping in addition to penalties prescribed by Penal Code. ('71) 7 Beng L R 165 (167) (FB).

[4] Word "Punishments" in S. 2 of Act VI of 1864 may be interpreted to mean total of punishments awarded, and so, where whipping is inflicted no other punishment as prescribed by Penal Code is allowable. ('91) Rat Un Cr C 564 (564) (DB).

[5] If a person has been convicted of two offences arising out of same facts and terms of imprisonment awarded in these two cases exceed seven years, he cannot be punished with whipping. ('35)36 Cri L Jour 1050 (1051) (Rang). ((Vol 17) 1930 Rang 138 : 7 Rang 769 : 31 Cri L Jour 176, *Followed.*)

[6] The Act is one in the construction and carrying out of which very many difficult questions arise; in no case can a Magistrate be justified in passing a sentence of whipping if he has any doubt as to his legal competency to do so. ('68) 9 Suth W R (Cr) 41 (43, 45) (FB)✠('83) 7 Bom 303 (304) (DB). (A person appointed as a second class Magistrate under Act X of 1872, is not competent after passing of Act X of 1882 to pass a sentence of whipping unless he is specially empowered to do so.)

[7] Section 565, Criminal P. C., must be construed strictly and Court's power is limited to cases therein specifically described and does not extend to cases where a sentence of whipping instead of transportation or imprisonment is passed. ('11) 11 Cri L Jour 691 (692) : 35 Bom 137 (DB).

[8] Section 395, Criminal P. C. — Words "Court which passed sentence" do not mean same officer who passed original sentence—District Magistrate can commute sentences of whipping to one of imprisonment if accused is physically unfit to receive stripes. ('01) 1901 Pun Re No. 33 (Cr.) Page 96 (97, 98).

[9] Effect of Whipping Act is to make whipping a punishment under Penal Code and it is competent to Magistrate on a second conviction at the same time to award a sentence of whipping either in substitution for or in addition to imprisonment subject to restrictions in Whipping Act itself. ('69-70) 5 Mad H C R (App) 18 (23) (FB).

[10] Double sentences of whipping are not contemplated by the Whipping Act. Double sentences of whipping are illegal and concurrent sentences are also illegal. When a person is convicted of two offences at one trial, the proper course is to sentence the accused to one of whipping in lieu of any other punishment and not to pass a sentence of whipping on each charge and order that they should run concurrently. (Vol 24) 1937 Rang 286 (286, 287) : 38 Cri L Jour 878 : 1937 Rang L R 366. ✠ (Vol 24) 1937 Rang 310 (311) : 38 Cri L Jour 1013. (('11) 12 Cri L Jour 465 : 6 Low Bur Rul 22, *Rel. on.*) ✠ ('11) 12 Cri L Jour 465 (465) : 6 Low Bur Rul 22 (Rang)

[11] If a person is convicted at the same time of two or more offences punishable under the Penal Code, it is lawful for Courts in addition to penalties prescribed by Penal Code to sentence prisoner to whipping. ('71) 7 Beng L R 165 (171) (FB).

[*See also* (1870) 14 Suth W R (Cr) 7 (7) (DB).✠(1868) 9 Suth W R (Cr) 41 (47) (FB).]

[12] Sentence of whipping in addition to other punishment is not legal for one of two offences of the same character of which a prisoner is simultaneously convicted. ('85) 1885 Pun Re No. 8 (Cr) p. 19 (20)(DB).

2. Postponement of sentence.—[1] Section 390, Criminal Procedure Code authorises court to pass a sentence of whipping and to fix place and time of execution. It does not contemplate postponement of execution of sentence to any day other than that of sentence. (1897) Rat Un Cr C. 906 (907) (DB) ✠('81)1881 All W N 138 (138) ✠ ('80) 1880 Pun Re No 34 (Cr.) Page 81 (82) (DB)(Order postponing whipping until release is illegal.) ✠(1873) 20 Suth W R (Cr) 72 (73) (DB)✠(1872) Rat Un Cr C 68 (68) (DB).

[2] Sentence of whipping cannot be carried out after expiry of 15 days fixed in S. 9 of Act VI of 1864; any direction to contrary in a warrant addressed to jail Superintendant is illegal. (1870-71) 6 Mad H C R (App) 38 (38).

[3] Meaning of words "execution shall be stayed" in S. 11 of Act VI of 1864—Reading sections 11 and 12 together it means that whipping cannot be executed in instalments. (1866-68) 3 Mad H C R (App) 1 (1).

[4] Criminal Procedure Code makes no provision whereby a Magistrate imposing sentence of whipping only can suspend its execution; it is only where whipping is added to imprisonment in an appealable case that whipping may and ought to be postponed under S. 391, Criminal Procedure Code. ('03) 26 Mad 465 (466) (D B).

[But see ('02) 4 Bom L R 436 (437) (D B).]

3. Substitution and enhancement. — [1] Granting that whipping is a degrading punishment, substitution of rigorous imprisonment for whipping would, in some circumstances amount to enhancement of punishment. ('71) 6 Beng L R App 95 (96) (DB).

[2] In case of adults substitution of a sentence of 30 stripes for a sentence of one year's rigorous imprisonment or more or a substitution of a sentence of 25 stripes for a sentence of nine months' rigorous imprisonment or more or a substitution of a sentence of 20 stripes for a sentence of six months' imprisonment or more is not ordinarily an enhancement of sentence within the meaning of S. 423 (1) (b) of Criminal P. C. and in the case of a person under 16 years of age the substitution of a sentence of 15 stripes for a sentence of imprisonment for six months or more or a substitution of a sentence of 10 stripes for a sentence of imprisonment for three months or more is not ordinarily an enhancement of sentence. But the substitution of a sentence of 30 stripes for a sentence of three months' rigorous imprisonment is an enhancement and therefore an illegal sentence under S. 423 (1) (b) of the Code. (Vol 16) 1929 Rang 177 (179) : 7 Rang 319 : 30 Cr. L Jour 986 (F B).

[3] Where a Magistrate has ordered detention in Borstal School of an offender, the Sessions Judge has no power to substitute for it a sentence of whipping as that would be enhancing the sentence. (Vol 27) 1940 Rang 81 (82) : 1939 Rang L R 744 : 41 Cr. L Jour 455 (D B).

Offences punishable with whipping in lieu of other punishment.

3. Whoever commits any of the following offences, namely :

(a) theft, as defined in section 378 of the Indian Penal Code other than theft by a clerk or servant of property in possession of his master ;

(b) theft in a building, tent or vessel, as defined in section 380 of the said Code ;

(c) theft after preparation for causing death or hurt, as defined in section 382 of the said Code ;

(d) lurking house-trespass, or house-breaking, as defined in sections 443 and 445 of the said Code, in order to the committing of any offence punishable with whipping under this section ;

(e) lurking house-trespass by night, or house-breaking by night, as defined in sections 444 and 446 of the said Code, in order to the committing of any offence punishable with whipping under this section ;

may be punished with whipping in lieu of any punishment to which he may for such offence be liable under the said Code.

Section 2—Note 3 *(contd.)*

[4] Substitution of legal sentence in lieu of whipping which is illegal amounts to enhancement of sentence. (Vol 22) 1935 Rang 64 (65) : 12 Rang 607 : 36 Cri. L Jour 366. (('71) 6 Beng L R (App) 95 (D B) *Relied on.*)

[5] There is no express provision of law which prohibits an appellate Court from passing a sentence of whipping in appeal; there is nothing in the Whipping Act or in the Criminal Procedure Code apart from provision against enhancement of sentence, which forbids it. (Vol 16) 1929 Rang 177 (179) : 7 Rang 319 : 30 Cri. L Jour 986 (F B).

[6] Appellate Court reducing sentence of imprisonment and awarding whipping — Sentence of whipping amounts to enhancement of sentence and is illegal. ('05) 2 Weir 487 (487) (D B).

[7] Power of Magistrate in appeal to alter sentence in such a way as to enhance sentence discussed. ('95) 17 All 67 (68) (D B).

[8] No general rule can be laid down to determine what is or what is not an enhancement of sentence where only a portion of sentence is altered to a punishment of a lesser degree of severity; in each case Court has to consider what is the effect of alteration. (Vol 1) 1914 All 530 (531) : 36 All 485 : 15 Cri. L Jour 519. ✠ (1900) 27 Cal 175 (176, 178) (D B).

[*See* ('99) 23 Bom 439 (441) (DB) ✠ ('07) 30 Mad 103 (105) (F B).]

[9] Sentencing offender to some punishment under Penal Code and then converting it into whipping is plainly illegal. ('97) 1897 Rat Un Cri Cas 906 (907) (DB).

[10] Conviction under S. 411, I. P. C.—Sentence of fine or in default imprisonment — On appeal sentence altered to one of whipping in lieu of term of imprisonment awarded in default of payment of fine — *Held* whipping could be substituted for fine and not in lieu of remaining term of imprisonment which accused was to suffer for default of payment of fine. ('77) 1877 Rat Un Cri. Cas 131 (131) (D B).

SECTION 3—SYNOPSIS

1. Scope and applicability.
2. Whipping in lieu of any other punishment.
3. Section 3 (d) and (e).

1. Scope and applicability.—[1] Section 3 of Act VI of 1964 (Whipping Act) applies to juvenile as well as to adult offenders. ('70) 7 Bom H C R (Cr) 70 (71) (D B).

[2] A comparison of Ss. 3 and 4 makes it clear that in regard to the offences mentioned in S. 3, the intention of the Legislature was that whipping should be inflicted, if at all, in lieu of any punishment to which the offender may be liable under the Penal Code (Vol 26) 1939 Oudh 222 (223) : 40 Cri L Jour 521:14 Luck 634.

[3] Section 3 permits whipping in lieu of any punishment for which the offender is liable under the Criminal Procedure Code to imprisonment, irrespective of age. (Vol 28) 1941 Sind 48 (48) : 42 Cri L Jour 403 : I L R (1940) Kar 477 (DB).

[4] Difference between Ss. 3 and 4 pointed out. (Vol 22) 1935 Pat 435 (436) : 36 Cri L Jour 1497 : 15 Pat 44 (DB).

[5] Sections 5 and 3 should be read together and these sections must be read with the sections of Criminal Procedure Code relating to whipping. (Vol 28) 1941 Sind 48 (48) : 42 Cri L Jour 403:I L R (1940) Kar 477 (DB).

[6] The order passed under S. 25, Burma Prevention of Crime Act, 1930, is a punishment within the meaning of S. 3 of the Whipping Act. (Vol 27) 1940 Rang 81 (82) : 41 Cri L Jour 455:1939 Rang L R 744 (DB).

[7] Sentence of whipping for attempt to commit theft, when accused is not a juvenile, is illegal. ('03-04) 2 Low Bur Rul 123 (123)✠('72-'92) 1872-92 Low Bur Rul 338 (338). (Conviction first of an attempt under S. 379, I. P. C. and then a conviction of an effected theft under S. 379, I. P. C. will not justify a double sentence of whipping and imprisonment.)

[8] Sentence of whipping passed for offence under S. 380 read with S. 109, I. P. C. is not legal. (Vol 24) 1937 Rang 310 (310):38 Cri L Jour 1013. ((Vol 1) 1914 Low Bur 145 : 7 Low Bur Rul 63 : 15 Cri L Jour 3 and (Vol 16) 1929 Rang 203, 7 Rang 329 : 30Cri L Jour 961 (FB), *Rel. on*;.) ✠ (Vol 1) 1914 Low Bur 145 (146) : 7 Low Bur Rul 63 : 15 Cri L Jour 3 ✠ ('99) 12 C P L R (Cr) 1 (1).

2. Whipping in lieu of any other punishment.—[1] Word 'punishment' in S. 3 of the Whipping Act refers to the total of punishment awardable. In lieu of punishing the offender by imprisoning him or fining him the Court may punish him with whipping. But a fine in addition to whipping is illegal. (Vol 12) 1925 Mad 183 (184) : 25 Cri L Jour 1185 ✠ (Vol 26) 1939 Oudh 222 (223) : 40 Cri L Jour 521 : 14 Luck 634✠(Vol 24) 1937 Rang 310 (310, 311): 38 Cri L Jour 1013✠(Vol 22) 1935 Pat 435 (436) : 15 Pat 44 : 36 Cri L Jour 1497 (DB). (An order under S. 565, Criminal P. C. in addition to sentence of whipping and in the absence of a sentence of imprisonment is illegal, being contrary to S. 565 of the Code.)✠(Vol 4) 1917 Low Bur 76 (76) : 8 Low Bur Rul 466 : 18 Cri L Jour 773. (Intention of the law is frustrated by ordering a man to be whipped after he has already served part of a sentence of imprisonment.)✠(Vol 5) 1918 Upp Bur 1 (1): 3 Upp Bur Rul 32:19 Cri L Jour 207 (Do.)✠('97-01) 1 Upp Bur Rul 391 (391) ✠ ('97) 1897 Rat Un Cr C 906 (907) (DB). (Meaning of S. 2, Act No. VI of 1864, (now S. 3) is that whipping may be awarded in lieu of total punishment provided for offence in Penal Code.)✠('92) 16 Bom

Offences punishable with whipping in lieu of or in addition to other punishment.

4. Whoever :—

(a) abets, commits or attempts to commit, rape, as defined in section 375 of the Indian Penal Code ;

(b) compels, or induces any person by fear of bodily injury, to submit to an unnatural offence as defined in section 377 of the said Code ;

(c) voluntarily causes hurt in committing or attempting to commit robbery, as defined in section 390 of the said Code ;

(d) commits dacoity as defined in section 391 of the said Code ;

may be punished with whipping in lieu of or in addition to any other punishment to which he may for such offence, abetment or attempt be liable under the said Code.

PROVINCIAL AMENDMENT.

BOMBAY.

Section 2 of the Bombay (Emergency Powers) Whipping Act, 1947, (Bom. Act XVII of 1947) is as follows:—

Punishment of whipping for certain offences.

"2. In addition to the persons who may be punished with whipping under section 4 of the Whipping Act, 1909, whoever commits or abets the commission of any offence punishable under sections 147, 148, 324, 325, 326, 435 or 436 of the Indian Penal Code may be punished with whipping in addition to any punishment to which he may be liable for such offence or for abetment of such offence under the said Code."

Section 3 — Note 2 *(contd.)*

357 (358) (D B). (Whipping in addition to fine for conviction for theft is illegal.)

[2] Conviction under S. 382, Penal Code — First offence of the kind — Sentence of whipping passed is legal and cannot be enhanced by addition to it of term of imprisonment or by adding to it additional number of stripes. ('91) 1891 Rat Un Cr C 537 (537) (DB). (Section 393, Criminal P. C. prohibits execution of sentence of whipping in instalments.)

3 Section 3 (d) and (e). — [1] Section 3 (d) of Act IV of 1909 does not make every house-trespass or house-breaking punishable with whipping, but only where commission of offence is "in order to the committing of any offence punishable with whipping under this section." (Vol 12) 1925 All 591 (592) : 26 Cri L Jour 1282.

[('97-01) 1 Upp Bur Rul 354 (354).

See also ('71) 6 Beng L R (App) 95 (96) (DB). (Case under old Act.)]

[2] The offence of outraging a woman's modesty not being punishable with whipping, house-breaking in order to commit that offence cannot be so punished. (Vol 12) 1925 All 591 (592) : 26 Cri L Jour 1282.

[3] Conviction for attempting to commit house-breaking by night with intent to commit theft—Sentence of 18 months rigorous imprisonment and 50 lashes—*Held* sentence of whipping was illegal. ('66-67) 3 Bom H C R (Cr) 37 (37).

Section 4 — Note 1

[1] A comparison of Ss. 3 and 4 of Act leaves no room for doubt that in regard to offences mentioned in S. 3 intention was that whipping should be inflicted in lieu of any other punishment and it is only in cases of offences under Ss. 375, 377, 390 and 391, Penal Code and of abetment of or attempt at an offence under S. 375 that a person can be punished with whipping in addition to any punishment that can be awarded under Penal Code. (Vol 26) 1939 Oudh 222 (223) : 14 Luck 634 : 40 Cri L Jour 521.

[2] According to the Whipping Act, the sentence of whipping in lieu of imprisonment is regarded as a sentence reserved for graver form of offences, and S. 4 (4) of the Act does not contemplate the offence of sodomy only. It imposes a special penalty upon the offence of sodomy combined with aggravating circumstances. (Vol 19) 1932 Sind 143 (144) : 33 Cri L Jour 900 (DB).

[3] Section 4, cl. (b) does not apply to convictions under S. 377 read with S. 511, Penal Code. (Vol 25) 1938 All 16 (17) : 39 Cri L Jour 233.

[4] Section 3, Whipping Act VI of 1864 (now S. 4) as amended by Act III of 1895 must be read subject to provisions of S. 391 (3), Criminal P. C. ('02) 4 Bom L R 436 (437) (DB).

[5] Theft is not an offence which is punishable with whipping in addition to imprisonment by S. 4, though it may, under S. 3, be punished with whipping in lieu of imprisonment. (Vol 22) 1935 Rang 64 (64) : 12 Rang 607 : 36 Cri L Jour 366.

[6] When a person inflicts pain upon another and when the offence is one which permits of the penalty of whipping, it is a good thing to inflict that penalty. There are, of course, circumstances in which the actual hurt caused is very slight and that is a circumstance to which attention has to be paid. (Vol 9) 1922 All 245 (246) : 23 Cri L Jour 274 : 44 All 538 (DB).

[7] Under S. 4 of the Whipping Act a sentence of whipping may be imposed where in the commission of a robbery, hurt is caused. (Vol 9) 1922 All 245 (246) : 23 Cri L Jour 274 : 44 All 538 (DB).

[8] Conviction under Ss. 326 and 324, I. P. C.—Direction to send accused to Borstal School for first offence and whipping for second offence held not illegal. (Vol 21) 1934 Rang 125 (126): 12 Rang 344: 35 Cri L Jour 959 (DB). (Detention in Borstal School may be valuable to avoid accused acquiring criminal habit such as thieving but doubtful in cases where accused gives way to violence or fails to control his passions.) ⊕ (Vol 21) 1934 Rang 123 (123, 124): 12 Rang 349 : 35 Cri L Jour 903 (DB).

(Sentence of whipping in addition to punishment under S. 25, Prevention of Crime (Young Offenders) Act, 1930, is illegal.)

[9] An additional punishment of whipping cannot be passed on a person who has received an adequate substantive sentence for an offence under S. 436, Penal Code. (Vol 15) 1928 Oudh 111 (111) : 29 Cri L Jour 666.

[10] There can be no justification for taking into account period of imprisonment to which a man has already been sentenced before commission of offence for which sentence of whipping with or without imprisonment is passed in the computation of maximum period of imprisonment fixed by S. 393, Cr. P. C. as amended by Whipping (Burma Amendment) Act 1927. (Vol 21) 1934 Rang 58 (59, 60) : 12 Rang 404: 35 Cri L Jour 1027.

[But see (Vol 17) 1930 Rang 138 (139): 7 Rang 769: 31 Cri L Jour 176.]

Juvenile offenders when punishable with whipping.

5. Any juvenile offender who abets, commits or attempts to commit—

(a) any offence punishable under the Indian Penal Code, except offences specified in Chapter VI and in sections 153A and 505 of that Code and offences punishable with death, or

(b) any offence punishable under any other law with imprisonment which the [a][Provincial Government] may, by [b]notification in the [c][Official Gazette], specify in this behalf,

may be punished with whipping in lieu of any other punishment to which he may for such offence, abetment or attempt be liable.

Explanation.—In this section the expression "juvenile offender" means an offender whom the Court, after making such enquiry (if any) as may be deemed necessary, shall find to be under sixteen years of age, the finding of the Court in all cases being final and conclusive.

[a] *Substituted* by A. O., for "Governor-General in Council". [b] *See* Gazette of India, 1920, Pt. I, p. 1868.
[c] *Substituted* by A. O., for "Gazette of India".

Special provision as to punishment with whipping in frontier districts.

6. Whenever any [a][Provincial Government] has, by notification in the Official Gazette, declared the provisions of this section to be in force in any frontier district or any wild tract of country within the jurisdiction of such [a][Provincial Government], any person who in such district or tract of country after such notification as aforesaid commits any offence punishable under the Indian Penal Code with imprisonment for three years or upwards, may be punished with whipping in lieu of any other punishment to which he may be liable under the said Code.

[a] *Substituted* by A. O., for "Local Government".

7. *[Amendment of section 392, Act V, 1898.] Repealed by the Repealing Act, 1938 (1 [1] of 1938), S. 2 and Sch.*

Section 4 — Note 1 *(contd.)*

[11] Section 4 is analogous to Ss. 397 and 398 I. P.C. in this respect. (Vol 15) 1928 Rang 112 (112) : 6 Rang 48 : 29 Cri L Jour 618.

[12] A sentence of whipping plus fine is not legal in the case of an offence where imprisonment is imperative under Penal Code. (Vol 22) 1935 Rang 219 (221) : 13 Rang 115 : 36 Cri L Jour 1129 (DB).

[13] Sentence of imprisonment with whipping added might be passed on offender, though juvenile, under S. 3 of old Act (but now S. 4). ('92-96) 1 Upp Bur Rul 331 (331).

[14] A Magistrate should not reject sentence of whipping merely on ground that accused is young and frail unless he has medical opinion in support of his own. (Vol 26) 1939 Rang 383 (384): 41 Cri L Jour 22.

[15] Section 3 of Act VI of 1864 corresponding to present Section 4 applies to juvenile as well as to adult offenders. ('70) 7 Bom H C R (Cr) 70 (71) (DB).

SECTION 5 — SYNOPSIS

1. Scope and applicability.
2. Explanation.

1. Scope and applicability. — [1] Section 5, Whipping Act, is meant to be applied in proper cases alternatively with Ss. 3 and 4 which apply to juvenile offenders as well as to offenders who are not within the definition of juvenile offenders. Section 5 does not supersede S. 4. (Vol 19) 1932 Pat 334 (335) : 34 Cri L Jour 10 (DB) ✠ ('73) 1873 Rat Un Cr C 78 (78) (DB). (Sections 2, 3 and 4 apply to juvenile offenders as well as 5th.)

[2] Section 5 of Act (VI of 1864) as amended by Act III of 1895 applies only to offences punishable under Indian Penal Code and not to offences under Railways Act. ('98) 11 C P L R 8 (8).

[3] A sentence of whipping in one case cannot be ordered to run concurrently with another sentence passed in another case. ('11) 12 Cri L Jour 465 (465): 6 Low Bur Rul 22. (Word "concurrent" properly applies only to sentences of imprisonment.)

[4] If the sentence of whipping is passed, no other sentence can be passed, for the whipping is considered to be in lieu of either a single punishment or a combined punishment. (Vol 11) 1924 All 455 (455, 456): 46 All 174: 25 Cri L Jour 772 (DB) ✠ (Vol 27) 1940 Rang 81 (82) : 1939 Rang L R 744: 41 Cri L Jour 455 (DB). (Alternatives for Magistrates in case of juvenile offenders under S. 380, I. P. C. stated.) ✠ (Vol 21) 1934 All 976 (977) : 57 All 395 : 36 Cri L Jour 368. (Distinction between Ss. 5 and 4 pointed out) ✠ (Vol 1) 1914 Low Bur 212 (213) : 8 Low Rul 143 : 15 Cri L Jour 538 ✠ ('09) 10 Cri L Jour 120 (121) : 5 Low Bur Rul 22. (Section 5 does not authorise Court to pass sentence of whipping in lieu of transportation or imprisonment under Whipping Act and at the same time to pass sentence of fine under Penal Code.) ✠ ('92-96) 1 Upp Bur Rul 331 (331) ✠ ('85) 1885 All W N 178 (178).

[But see (Vol 16) 1929 All 322 (324) : 30 Cri L Jour 1087 (DB). (A sentence of imprisonment can be inflicted in the case of a juvenile in addition to whipping and the High Court has power to inflict a sentence of imprisonment, even when the sentence of whipping passed by the lower Court has already been carried out. 7 Bom H C R Cri 70, *Dissing*.]

[5] To bring a case under S. 5, it is essential to come to a finding that the offender is under sixteen years of age. (Vol 19) 1932 Pat 334 (335) : 34 Cri L Jour 10 (DB) ✠ ('84) 6 All 482 (483).

2. Explanation.—[1] Finding of Magistrate as to age of accused is final under S. 5, Explanation. (Vol 1) 1914 Low Bur 212 (213): 8 Low Bur Rul 143 : 15 Cri L Jour 538. (Whipping under S. 5 is in "lieu of any other punishment" and it would not be lawful to add any other punishment to the punishment which has already been inflicted.)

[2] Expression "juvenile offender" in S. 5 means an offender under 16 years of age. ('72-92) 1872-92 Low Bur Rul 355 (355) ✠ ('94) 7 C P L R 32 (33). (A Magistrate could not inflict sentence of whipping for offences under S. 307, Penal Code on person between 16 and 17 years of age.)

[3] The word "Court" does not exclude the Appellate Court. (Vol 16) 1929 All 322 (324) : 30 Cri L Jour 1087 (DB).

8. [Repeals.] *Repealed by the Second Repealing and Amending Act, 1914 (17 [XVII] of 1914), S. 3 and Sch. II.*

THE SCHEDULE. — [Enactments repealed.] *Repealed by the Second Repealing and Amending Act, 1914 (17 [XVII] of 1914), S. 3 and Sch. II.*

[THE] WHITE PHOSPHORUS MATCHES PROHIBITION ACT, 1913 (ACT V OF 1913).

STATEMENT OF OBJECTS AND REASONS

"The object of this Bill is to prohibit the importation into, and the manufacture and sale in, British India of matches which contain white (yellow) phosphorus.

The provisions of the Bill follow, so far as is necessary and practicable, the lines of the English White Phosphorus Matches Prohibition Act, 1908 (8 Edw. 7, ch. 42).

The Bill was introduced into the Council of the Governor-General for making Laws and Regulations on the 22nd September 1911. At the Council meeting of the 1st March 1912, however, objections were raised to its passage on the ground that the necessity for the proposed legislation had not been substantiated; and it was decided to postpone the consideration of the Bill for one year and to obtain, in the meantime, additional information regarding (1) the accuracy or otherwise, of the statement that modern methods of manufacture have eliminated the danger of necrosis, and (2) the availability of suitable brands of non-phosphorus strike-anywhere matches for use in India, having in view the climatic conditions and the importance of not increasing the cost of matches to consumers of the lower classes. The Bill was accordingly withdrawn on the understanding that it would be re-introduced in the cold weather of 1913.

With reference to the first point the following facts have been ascertained regarding the continued occurrence of necrosis in Sweden, Norway, Belgium and the United States of America, which have not joined the Berne International Convention and which profess to have adopted the latest and most improved methods of manufacture. In Sweden, between the years 1902 and 1910, as shown by the official reports of the Inspectors of match factories in that country, there were 16 admitted cases of necrosis besides a number of doubtful cases. In 1905 there were no cases, and the Inspectors' reports announced the extinction of the disease; but in 1906 there were no less than seven cases, and there was one case in each of the years 1908 to 1910. In Norway, the number of persons exposed to poisonous fumes in match manufacture is only about 250. In their report for 1907-08, the factory Inspectors in that country stated that it might be assumed that the precautionary measures adopted, the introduction of new systems of ventilation, and the observance of the special regulations had resulted in the complete elimination of the disease. Notwithstanding, there was a case of necrosis in each of the years 1909 and 1910. In Belgium, where four factories use white phosphorus, there was a case of necrosis in 1908, and the Belgian Annual Report on Factory Inspection in 1909 discloses the fact that there were two cases of phosphorus poisoning in that year in spite of strict observance of the required precautions. In the United States of America, in a joint investigation recently undertaken by the American Bureau of Labour and the American Section of the International Association of Labour Legislation, 15 cases of phosphorus necrosis were discovered by Federal officials in an investigation covering 15 out of the 16 American match factories; and subsequent personal enquiries conducted by the President of the American Section indicated that for four of these factories alone the number should have been increased to 80. In view of these and similar disclosures an Act was passed in the United States of America on the 9th April 1912 imposing a tax on white phosphorus matches and prohibiting their import and export. The facts stated above show that the latest informaiton available does not substantiate the assertion that improved methods of manufacture are sufficient to stamp out necrosis.

The Vienna Medical Society in 1908, also, in reporting after detailed enquiry that about 20 deaths from phosphorus necrosis occurred annually in Austria, declared that the best regulations fail to stamp out the disease. The experience of the United Kingdom was similar, the Chief Inspector of Factories in England reporting in June 1910 that the absence of known cases of necrosis is itself inconclusive, the cases which occurred in Great Britain being (at first) ascertained with difficulty.

That a similar view is held in almost all civilized countries is indicated by the list of countries which have joined the Convention or have, without joining it, effectually controlled the manufacture of matches. The European countries adhearing to the Convention are France, Germany, Holland, Denmark, Switzerland, Luxembourg, Italy, Finland, Spain and the United Kingdom. In Austria, an Act prohibiting the use and manufacture of white phosphorus matches was passed in July 1909, and in Hungary and Mexico similar Acts were passed in 1912. In Russia, as now in the United States of America, a differential tax is imposed on white phosphorus matches and in the latter country, as already stated, their import and export is prohibited. In Greece, Portugal, Rumania, Bulgaria, Servia and Venezuela the manufacture of matches is a State monopoly and is therefore under control, and in Sweden the importation and consumption of white phosphorus matches is prohibited though their manufacture for export is allowed. The Convention has also been joined by almost all the French, Dutch and British Colonies, including the Union of South Africa and New Zealand. Australia also has prohibited the importation of white phosphorus matches since December 1908, and Tasmania has prohibited both their sale and manufacture.

With regard to the second question, it has been ascertained that a large proportion of the brands of strike-anywhere matches in use in the United Kingdom do not contain white phosphorus. The results of the official tests made in England by the Board of Customs and Excise for the purpose of distinguishing white phosphorus matches, up to December 1911, showed, that, out of 271 brands of strike-anywhere matches tested, only eleven were found to contain white phosphorus. Figures have been obtained from the Indian Custom Houses of the imports of matches during the year 1911-12. The proportion of strike-anywhere matches imported was *nil* in Rangoon, 25 per cent. at Calcutta, 51·8 per cent. at Karachi, 60 per cent. at Bombay and 76·8 per cent. at Madras. All these, with the exception of half a dozen brands from Austria, were found by chemical test to contain white phosphorus. The fact that the use of white

phosphorus matches is smaller in Bengal than in other parts of India, and has for years been non-existent in Burma without causing any practical inconvenience, goes to disprove the assertion that the white phosphorus match is the only one which is suitable for a damp climate such as India in the monsoon, Bengal and Burma being two of the provinces with the heaviest rainfall. An additional argument to this effect is provided by the list of tropical countries which, as already stated, have joined the Berne Convention; for instance—British East Africa, Mauritius, the Seychelles, Southern and Northern Nigeria, Uganda, Fiji, Gambia, the Gold Coast, Sierra Leone, Bermuda, Somaliland, Madagascar, etc. Morever, as a result of experiments made in England on behalf of the Home Office, it has been definitely stated that there is no evidence that a match containing white phosphorus is of necessity, as regards resistance to damp, in any way superior to a phosphorus sesqui-sulphide match not containing white phosphorus. Figures have been obtained of the prices in different parts of India, during 1911-12, of cheap safety matches, and strike-anywhere matches with and without white phosphorus. It has been ascertained that there is practically no difference in price between the cheap safety match and the lucifer match (whether containing white phosphorus or not)."

—Gazette of India, 1912, Part V, page 220.

[THE] WHITE PHOSPHORUS MATCHES PROHIBITION ACT, 1913.

(ACT V OF 1913)[a]

[7th March, 1913.]

An Act to prohibit the importation, manufacture and sale of matches made with white phosphorus.

WHEREAS it is expedient to prohibit the importation, manufacture and sale of matches made with white phosphorus; It is hereby enacted as follows :—

[a] For Report of Select Committee, *see* Gazette of India, 1913, Pt. V, p. 35.

The Act has been *declared* to be in force in British Baluchistan by the British Baluchistan Laws Regulation, 1913 (Reg. 2 [II] of 1913), S. 3; in the Sonthal Parganas by Notification under the Sonthal Parganas Settlement Regulation, 1872 (Reg. 3 [III] of 1872), *See* Bihar and Orissa Gazette, 1914, Pt. II, p. 413.

Short title, extent and commencement.

1. *(1)* This Act may be called the White Phosphorus Matches Prohibition Act, 1913.

(2) It extends to the whole of British India; and

(3) It shall come into force on the first day of July, 1913, with the exception of section 6, which shall come into force on the first day of July, 1914.

Definition.

2. In this Act, "white phosphorus" means the substance commonly known as white or yellow phosphorus.

3. [Prohibition of importation by addition to section 18, Act VIII of 1878] *Repealed by the Repealing Act, 1938 (I [1] of 1938), S. 2 and Sch.*

Prohibition of use of white phosphorus in manufacture of matches.

4. *(1)* No person shall use white phosphorus in the manufacture of matches.

(2) Any person who uses, or permits the use by any person under his control, of white phosphorus in the manufacture of matches, shall be punishable with fine which may extend to two hundred rupees.

Power of Inspector of Factories to take samples of material used in manufacture.

5. *(1)* Every person who manufactures matches shall allow an Inspector of Factories appointed under the Indian Factories Act, 1911,[a] at any time to take for analysis sufficient samples of any material in use or mixed for use, in such manufacture :

Provided that any such person may, at the time the sample is taken, and on providing the necessary appliances, require the Inspector to divide the sample so taken into two parts, and to mark, seal and deliver to him one part.

(2) Any person who refuses to permit any such Inspector of Factories as aforesaid to take a sample, in accordance with the provisions of sub-section *(1)*, shall be punishable with fine which may extend to two hundred rupees.

[a] *See* now the Factories Act, 1934 (25 [XXV] of 1934).

Prohibition of sale.

6. *(1)* No person shall sell, or offer or expose for sale, or have in his possession for the purposes of sale, any matches made with white phosphorus.

(2) Any person who contravenes the provisions of sub-section *(1)* may, on complaint to a Presidency Magistrate, Sub-divisional Magistrate or Magistrate of the first class, be ordered to forfeit any such matches in his possession, and any matches so forfeited shall be destroyed or otherwise dealt with as the Magistrate may direct.

(Act VIII of 1912)

CONTENTS

SECTIONS.
1. Short title and extent.
2. Application of Act.
3. Closetime.
4. Penalties.
5. Confiscation.
6. Cognizance of offence.
7. Power to grant exemption.
8. Savings.
9. *[Repealed.]*
The Schedule.

STATEMENT OF OBJECTS AND REASONS.

"The Wild Birds Protection Act, 1887 (XX of 1887), enables rules to be made prohibiting the possession or sale, during the breeding season, of any kind of wild bird recently killed or taken, or the importation of the plumage of any kind of wild bird during such season. Power is also given to Local Governments to declare these provisions to apply to any animals of game other than birds. The Act applies only to municipalities and cantonments, and rules framed under it are practically inoperative in checking the wholesale slaughter of birds in rural districts throughout British India. The need for a general law which should have the effect of protecting these wild birds and animals which are threatened with extermination has been exhaustively considered, and the present Bill is the outcome of that discussion.

It will apply, in the first instance, to the birds and animals specified in the Schedule. As, however, it would be difficult to provide, for the whole of India, a single list sufficiently exhaustive to cover all the kinds of birds and animals, the protection of which widely varying local conditions may render desirable, it is proposed to permit Local Governments to add to the list at their discretion.

The Bill will empower Local Governments to declare, if necessary, an absolute prohibition, either throughout the year or for any specified part of the year, and extending to the whole or any part of its territories, against the capture or killing of any animals or birds to which the Act applies, or the possession of such animals or birds, or the plumage of the latter.

It is proposed, however, to exempt from the operation of the measure any person who captures or kills a wild animal in defence of himself or of any other person, or who captures or kills any wild bird or animal in *bona fide* protection of a standing crop or a growing fruit."

—Gazette of India, 1912, Part V, page 2.

ACT HOW AFFECTED BY SUBSEQUENT LEGISLATION.

—Adapted by A. O.
—Amended in its application to—
(a) Bengal by Beng. Act 8 of 1932;
(b) Central Provinces by C. P. Act 27 of 1935;
(c) United Provinces by U. P. Act 13 of 1934.
—Repealed in part by Act 17 of 1914.

[THE] WILD BIRDS AND ANIMALS PROTECTION ACT, 1912.

(ACT VIII OF 1912)[a]

[18th September, 1912.]

An Act to make better provision for the protection and preservation of certain wild birds and animals.

WHEREAS it is expedient to make better provision for the protection and preservation of certain wild birds and animals; It is hereby enacted as follows :—

[a] For S. O. R., *see* Gazette of India, 1912, Pt. V, p. 2; for Report of Select Committee, *see ibid*, 1912, Pt. V, p. 173.

Short title and extent.

1. *(1)* This Act may be called the Wild Birds and Animals Protection Act, 1912 ; and

(2) It extends to the whole of British India, including Baluchistan, the Sonthal Parganas and the Pargana of Spiti.

Application of Act.

2. *(1)* This Act applies, in the first instance, to the birds and animals specified in the Schedule, when in their wild state.

(2) The [a][Provincial Government] may, by notification[b] in the [c][Official Gazette], apply the provisions of this Act to any kind of wild bird or animal, other than those specified in the Schedule, which, in its opinion, it is desirable to protect or preserve.

[a] *Substituted* by A. O., for "Local Government." [b] *See* Coorg District Gazette, 1913, Pt. I, p. 185; U. P. Gazette, 1914, Pt. I, p. 169 and Madras Rules and Orders, 1923, Vol I, p. 439. [c] *Substituted* for "Local Official Gazette."

PROVINCIAL AMENDMENTS

CENTRAL PROVINCES

At the end of section 2 *substitute* comma for fullstop and *add* "or transfer any kind of wild bird or animal from any clause of the Schedule to any other clause."

—C. P. Act XXVII of 1935, S. 2.

UNITED PROVINCES.

At the end of section 2, *add* "or transfer any kind of wild bird or animal from any clause of the Schedule to any other clause." —U. P. Act XIII of 1934, S. 3

Close time.

3. The [a][Provincial Government] may, by notification[b] in the [c][Official Gazette], declare the whole year or any part thereof to be a close time throughout the whole or any part of its territories for any kind of wild bird or animal to which this Act applies or for female or immature wild birds or animals of such kind ; and, subject to the provisions hereinafter contained, during such close time, and within the areas specified in such notification, it shall be unlawful—

(a) to capture any such bird or animal, or to kill any such bird or animal which has not been captured before the commencement of such close time ;

(b) to sell or buy, or offer to sell or buy, or to possess, any such bird or animal which has not been captured or killed before the commencement of such close time, or the flesh thereof ;

(c) if any plumage has been taken from any such bird captured or killed during such close time, to sell or buy, or to offer to sell or buy, or to possess, such plumage.

[a] *Substituted* by A. O., for "Local Government." [b] *See* Madras Rules and Orders 1923, Vol. 1, p. 439. [c] *Substituted* by A. O., for "Local Official Gazette."

PROVINCIAL AMENDMENTS

CENTRAL PROVINCES

To clause (b) of section 3, *add* the following proviso—

"Provided that, in all cases in which a person is accused of having sold or bought or exposed for sale any such bird or animal or the flesh thereof, it shall be presumed that the bird or animal was captured or killed after the commencement of the close time unless the contrary is proved." —C. P. Act XXVII of 1935, S. 3.

UNITED PROVINCES

Same as in C. P., except the words "or bought" are *omitted* and the word 'season' is *substituted* for the word 'time.' —U. P. Act XIII of 1934, S. 4.

SECTION 3A.

CENTRAL PROVINCES

After section 3, *add* the following new section—

Prohibition to capture certain birds and animals.

"3A. No bird or animal specified in clause (i) (a) or clause (ii) (a) of the Schedule shall be captured by means of a net, trap or snare at any time of the year." —C. P. Act XXVII of 1935, S. 4.

UNITED PROVINCES

After section 3, *insert* the following section—

Prohibition of netting certain birds and animals.

"3A. The netting of birds or animals specified in clause (i) (a) or clause (ii) (a) of the schedule at any time of the year is prohibited." —U. P. Act XIII of 1934, S. 5.

Penalties.

4. *(1)* Whoever does or attempts to do, any act in contravention of section 3, shall be punishable with fine which may extend to fifty rupees.

(2) Whoever, having already been convicted of an offence under this section, is again convicted thereunder shall, on every subsequent conviction, be punishable with imprisonment for a term which may extend to one month, or with fine which may extend to one hundred rupees, or with both.

PROVINCIAL AMENDMENTS

CENTRAL PROVINCES

In sub-section (1) of section 4, after the word and figure 'section 3,' *insert* the words, figure and letter "or section 3 A." —C. P. Act XXVII of 1935, S. 5.

UNITED PROVINCES

Same as that of C. P. —U. P. Act XIII of 1934, S. 6.

SECTION 4A.

CENTRAL PROVINCES

After section 4, the following section shall be *inserted* namely :—

Award of portion of fine to person giving information leading to conviction.

"4A. Where on any conviction for an offence against this Act a fine is imposed, the Court may award any portion, not exceeding half the amount of the fine recovered, as a reward to any person other than a Government servant, who gave information leading to the conviction." —C. P. Act XXVII of 1935, S. 6.

Confiscation.

5. *(1)* When any person is convicted of an offence punishable under this Act, the convicting Magistrate may direct that any bird or animal in respect of which such offence has been committed, or the flesh or any other part of such bird or animal, shall be confiscated.

(2) Such confiscation may be in addition to the other punishment provided by section 4 for such offence.

Section 4 — Note 1

[1] Proof that accused has either killed or attempted to kill one of animals or birds mentioned in the schedule to the Act is necessary for conviction under Act; it is no offence for a licensed person to go about with a loaded gun in his possession. ('28) 29 Cri L Jour 238 (238).

Cognizance of offences.

6. No Court inferior to that of a Presidency Magistrate or a Magistrate of the second class shall try any offence against this Act.

PROVINCIAL AMENDMENTS

UNITED PROVINCES

Renumber the present section as sub-section (1) and *add* the following as sub-section (2) —

"(2) The offences referred to in section 3A and in the proviso to clause (b) of section 3 shall be cognizable offences." —U. P. Act XIII of 1934, S. 7.

SECTION 6A.

CENTRAL PROVINCES

After section 6, the following section shall be *inserted* namely :—

Restrictions on Courts to take cognizance of offences.

"6A. *(1)* No Court shall take cognizance of any offence against this Act except on the complaint or report of a police officer, not below the rank of sub-inspector, or of any other person or class of persons authorised by the Provincial Government in this behalf.

(2) Except with the special sanction of the Provincial Government, no Court shall take cognizance of any offence against this Act, unless the prosecution is instituted within three months from the date on which the offence is alleged to have been committed." —C. P. Act XXVII of 1935, S. 7.

Power to grant exemption.

7. Where the [a][Provincial Government] is of opinion that, in the interests of scientific research, such a course is desirable, it may grant to any person a license, subject to such restrictions and conditions as it may impose, entitling the holder thereof to do any act which is by section 3 declared to be unlawful.

[a] *Substituted* by A. O., for "Local Government."

PROVINCIAL AMENDMENTS

CENTRAL PROVINCES

For section 7, the following section shall be *substituted* namely :—

"7. Where the Provincial Government is of opinion that such a course is desirable, it may grant to any person a licence, subject to such restrictions and conditions as it may impose, entitling the holder thereof to do any act which is by section 3 or section 3A, declared to be unlawful or may, by notification, exempt any person or class of persons from the operation of the said sections." —C. P. Act XXVII of 1935, S. 8.

UNITED PROVINCES

Delete the words "in the interests of scientific research" and after the word and figure "section 3" *insert* the words, figure and letter "or section 3A." —U. P. Act XIII of 1934, S. 8.

Savings.

8. Nothing in this Act shall be deemed to apply to the capture or killing of a wild animal by any person in defence of himself or any other person, or to the capture or killing of any wild bird or animal in *bona fide* defence of property.

OBJECTS AND REASONS

"We have amended clause 6 (now section 8) of the Bill by exempting from punishment any person who captures or kills any wild bird or animal in contravention of the Act if he does so in the *bona fide* defence of any property, as it is necessary in our opinion to provide for cases where such birds or animals are captured or killed in the protection of property other than standing crops or growing fruit, which alone was included in the clause of the Bill as introduced."

—S. C. R.

PROVINCIAL AMENDMENTS

CENTRAL PROVINCES

After section 8, the following sections shall be *inserted* namely :—

Seizure of net, trap of other instrument.

"8A. The Provincial Government may authorise any police officer, not below the rank of sub-inspector, or any person or class of persons to seize a net, trap or other instrument which he has reason to believe has been used for the commission of an offence against this Act.

Power to make rules.

"8B. *(1)* The Provincial Government may, after previous publication, make rules consistent with this Act for the purpose of carrying out the provisions of this Act.

(2) In particular and without prejudice to the generality of the foregoing power, the Provincial Government may make rules to regulate the disposal of property confiscated under section 5 or seized under section 8A."

—C. P. Act XXVII of 1935, S. 9.

9. [Repeal.] *Repealed by the Second Repealing and Amending Act, 1914 (XVII [17] of 1914), S. 3 and Sch. II.*

PROVINCIAL AMENDMENT

CENTRAL PROVINCES

Section 11 of the Wild Birds and Animals Protection (Central Provinces Amendment) Act, 1935 (C. P. Act XXVII of 1935) is as follows :—

Sanctuary.

"11. *(1)* The Provincial Government may, by notification, declare any area, which is the property of Government, and subject to the consent of the owner and to such conditions as may be determined by mutual agreement, any area, which is private property, to be a sanctuary for the birds or animals in such area, when in their wild state, and it shall be unlawful for any person to kill or capture any such birds or animals within that area at any time.

Explanation. — Where such private property is under the superintendence of the Court of Wards, the Court of Wards shall, for the purpose of this provision, be deemed to be the owner of the property.

(2) Whoever does any act in contravention of sub-section (1) shall be punishable with fine which may extend to fifty rupees."

THE SCHEDULE

(i) Bustards, ducks, floricans, jungle fowl, patridges peafowl, pheasants, pigeons, quail, sand-grouse, painted snipe, spur-fowl, wood-cock, herons, egrets, rollers, and king-fishers.

(ii) Antelopes, asses, bison, buffaloes, deers, gazelles, goats, hares, oxen, rhinoceroses and sheep.

PROVINCIAL AMENDMENTS

BENGAL

In clause (ii) of the schedule the word 'rhinoceroses' shall be omitted. —Beng. Act VIII of 1932, S. 7.

CENTRAL PROVINCES

For the schedule, the following schedule shall be *substituted* namely :—

"THE SCHEDULE

(*Vide* Sections 2 and 3A)

Serial No.	Scientific name.	English name.	Vernacular name.
		Clause (i) (a) — List of Birds.	
1	Pavo cristatus.	The peafowl.	Mor.
2	Gallus sonnerat.	The Grey jungle fowl.	Jungli murgi.
3	Gallus ferrugineus.	The red jungle fowl.	Jungli murgi.
4	Galloperdix spadicea.	The red spur fowl.	Choti Jungli murgi.
5	Galloperdix lunulata.	The painted spur fowl.	Choti Jungli murgi.
6	Pterocles faciatus.	The painted sand grouse.	Bhat titar.
7	Pterocles exustus.	The common Indian sand grouse.	Bhat Titar.
8	Perdicula asiatica.	The jungle bush quail.	Lawa.
9	Turnix dussumieri.	The little button quail.	Chota lawa.
10	Coturnix commun.	The grey quail.	Bater.
		Clause (i) (b) — List of Birds.	
1	Coturnix coromandelica.	The rain quail.	Lawa.
2	Francolinus pondicerianus.	The greypartridge.	Titar.
3	Francolinus Pictus.	The painted patridge.	Kala Titar.
4	Anser ferus.	The grey leg goose.	Rajhans and bath.
5	Anser indicus.	The bar-headed goose.	Rajhans and jungli quaz.
6	Casarca rutila.	The ruddy sheldrake or Brahminy duck.	Chakwa.
7	Rhodonessa caryophyllacea.	The pink-headed duck.	Gulabi badag.
8	Chaulelasmus strep rus.	The gadwall.	Gairi.
9	Nettium crecca.	The common teal.	Urki or Eri.
10	Dafila acuta.	The pintail.	Nanda.
11	Querquedula circia.	The garganey or blue winged teal.	Urki or Eri.
12	Spatula clypeata.	The shoveller.	Ghirah.
13	Netta rufina.	The red crested pochard.	Lal sir.
14	Nyroca ferina.	The pochard.	Lal sir.
15	Nyroca ferruginea.	The white eyed pochard.	Kurchiya.
16	Sarcidiornis melanonotus.	The comb duck.	Nukta.
17	Nettopus coromandelianus.	The cotton teal.	Girria.
18	Dendrocygna javanica.	The whistling teal.	Silhi.
19	Dendrocygna fulva.	The large whistling teal.	Silhi.
20	Anas boscas.	The mallard.	Nilsir.
21	Anas poecilorhyncha.	The Indian spot bill.	Gugral, buth.
22	Mareca penelope.	The wigeon.	Chota lal sir.
		Clause (i) (c) — List of Birds.	
1	Crocopus phoenicopterus Crocopus chlorogaster.	The green pigeon.	Harilal.
2	Columba intermedia.	The blue rock pigeon.	Kabutar.
3	Carpophaga aenea.	The imperial pigeon.	Barra Kabutar.
4	Pterocles faso ia.	The painted sand grouse.	Bhat Titar.
5	Pterocles exustus.	The common Indian sand grouse.	Bhat Titar.
6	Pavo cristatus.	The peafowl.	Mor.
7	Gallus sonnerati.	The grey jungle fowl.	Jungli murgi.
8	Gallus ferrugineus.	The red jungle fowl.	Jungli murgi.
9	Galloperdix spadicea.	The red super fowl.	Choti Jungli murgi.
10	Galloperdix lunulata.	The painted super fowl.	Choti Jungli murgi.

Serial No.	Scientific name.	English name.	Vernacular name.
11	Perdicula Asiatica.	The bush quail.	Lawa.
12	Francolinus pondicerianus.	The grey partridge.	Titar.
13	Francolinus pictus.	The painted partridge.	Kala titar.
14	Coturnix communis.	The common or grey quail.	Bater.
15	Coturnix coromandelica.	The rain quail.	Lawa.
16	Turnix dussumieri.	The little button quail.	Chota lawa.
17	Anthropoides virgo.	The demoiselle crane.	Karaka or kular.
18	Eupoditis Edwardsi.	The bustard.	Hom, bherar.
19	Sypheotis aurita.	The likflorican.	Tan mor, likh.
20	Gallinago coelestis.	The common snipe.	Chaha, panlawa.
21	Gallinago stenura.	The pintail snipe.	Chaha.
22	Gallinago gallinula.	The jack snipe.	Chota chaha.
23	Rostratula capensis.	The painted snipe.	Chaha.
	Clause (ii) (a) — List of Animals,		
1	Cervus axis.	The chital or spotted deer.	Chital.
2	Antelope cervicapra.	The black buck.	Hiran, kala hiran, kalehwit.
3	Gazella bennetti.	The Indian gazelle.	Chinkara.
4	Cervulus muntjac.	The barking deer.	Kakar, bherki, jangli bakri.
5	Tetracerus quadri-cornis.	The four-horned antelope.	Jangli bakri, chausingha.
	Clause (ii) (b) — List of Animals.		
1	Bos bubalus.	Wild buffalo.	Jangli bhainsa.
2	Bos gaurus.	Bisan.	Ran boda.
3	Tetracerus quadri-cornis.	Four-horned antelope.	Jangli bekari, chausingha.
4	Antelope cervicapra.	Black buck.	Hiran, kala hiran, kalewit.
5	Gazella bennetti.	Indian Gazelle.	Chinkara.
6	Cervulus muntjac.	Barking deer.	Kakar, bherki, Jangli bakri.
7	Cervus duvauceli.	Swamp deer.	Barasingha.
8	Cervus unicolor.	Sambhar.	Sambhar.
9	Cervus axis.	Chital or spotted deer.	Chital.
10	Lepus ruficaudatus.	Common Indian hare.	Khargosh, Sasa.
11	Lepus simcoxi.	Simcox's hare.	Karra.
12	Tragulus memiuna.	Mouse deer.	Rai hiran, musa hiran."

—C. P. Act XXVII of 1935, S. 10.

UNITED PROVINCES.

For the existing Schedule *substitute* the following Schedule, namely:—

"THE SCHEDULE

(i) (a) Partridges, pigeons, duck, teal and jungle fowl.
(b) Bustard, florican, peafowl, pheasants, sandgrouse, painted snipe, spurfowl, woodcock, herons, egrets rollers, kingfishers and quail.
(ii) (a) Antelope.
(b) Asses, bison, buffaloes, deer, gazelles, goats, hares, oxen, rhinoceroses and sheep."

— U. P. Act 13 [XIII] of 1934, S. 9.

[THE INDIAN] WIRELESS TELEGRAPHY ACT, 1933. (ACT XVII OF 1933).

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SECTIONS
1. Short title, extent and commencement.
2. Definitions.
3. Prohibition of possession of wireless telegraphy apparatus without licence.
4. Power of Central Government to exempt persons from provisions of the Act.
5. Licences.

SECTIONS
6. Offence and penalty.
7. Power of search.
8. Apparatus confiscated or having no owner to be property of Central Government.
9. *[Repealed.]*
10. Power of Central Government to make rules.
11. Saving of Indian Telegraph Act, 1885.

STATEMENT OF OBJECTS AND REASONS.

"An important source of revenue to the Indian State Broadcasting Service is the fees on licenses for wireless apparatus. These licenses are issued under the Indian Telegraph Act which, however, only gives power to control establishment, maintenance and working of such apparatus in British India. The detection of unlicensed apparatus and the successful prosecution of offenders is therefore difficult in practice as it is first necessary to locate unlicensed apparatus and then to prove that it has actually been established, maintained and worked. It is believed that the revenue lost at present owing to the use of unlicensed wireless apparatus is considerable, thus adversely affecting the financial position of the Indian State Broadcasting Service. It is now proposed to remedy this state of affairs by legislation to prohibit the possession without license of wireless apparatus as distinct from the establishment, maintenance and working of such apparatus, and the present Bill has been drafted with this object."

— Gazette of India, 1933, Part V, page 8.

ACT HOW AFFECTED BY SUBSEQUENT LEGISLATION

— Adapted by A. O.
— Repealed in part by Act 32 [XXXII] of 1940.

[THE INDIAN] WIRELESS TELEGRAPHY ACT, 1933.

(ACT XVII OF 1933).[a]

[11th September, 1933.]

An Act to regulate the possession of wireless telegraphy apparatus.

WHEREAS it is expedient to regulate the possession of wireless telegraphy apparatus in British India; It is hereby enacted as follow :—

[a] For Statement of Objects and Reasons, *see* Gazette of India, 1933, Pt. V, p. 8.

Short title, extent and commencement.

1. *(1)* This Act may be called the Indian Wireless Telegraphy Act, 1933.

(2) It extends to the whole of British India, including British Baluchistan and the Sonthal Parganas.

(3) It shall come into force on such date[a] as the [b][Central Government] may, by notification in the [c][Official Gazette], appoint.

[a] 1st January 1934 : *See* Gazette of India, 1933, Pt. I, p. 1131. [b] *Substituted* by A. O. for "Governor-General in Council". [c] *Substituted* by A. O. for "Gazette of India".

Definitions.

2. In this Act, unless there is anything repugnant in the subject or context,—

(1) "wireless communication" means the making, transmitting or receiving of telegraphic, telephonic or other communications by means of electricity or magnetism without the use of wires or other continuous electrical conductors between the transmitting and the receiving apparatus;

(2) "wireless telegraphy apparatus" means any apparatus, appliance, instrument or material used or capable of use in wireless communication, and includes any article determined by rule made under section 10 to be wireless telegraphy apparatus, but does not include any such apparatus, appliance, instrument or material commonly used for other electrical purposes, unless it has been specially designed or adapted for wireless communication or forms part of some apparatus, appliance, instrument or material specially so designed or adapted, nor any article determined by rule made under section 10 not to be wireless telegraphy apparatus; and

(3) "prescribed" means prescribed by rules made under section 10.

Prohibition of possession of wireless telegraphy apparatus without license.

3. Save as provided by section 4, no person shall possess wireless telegraphy apparatus except under and in accordance with a license issued under this Act.

Section 2 — Note 1

[1] Complete wirless set includes incomplete set when parts necessary to complete it are of description specified, ærials, valves, etc. (Vol 27) 1940 Nag 263 (264) : 41 Cr L Jour 580.

Section 3 — Note 1

[1] Possession of wireless without license—License issued by Postmaster subsequently to take effect from a date prior to possession cannot convert offence into non-offence. (Vol 25) 1938 Mad 821 (822) : 39 Cri L Jour 991. (Delay in paying license fee was due to fact that he was not satisfied with wireless he got or to get it changed—Nominal fine sufficient.)

[But see (Vol 30) 1943 Nag 115 (116) : I L R (1943) Nag 283 : 44 Cr L Jour 293 (DB) (Where a person was prosecuted under S. 6 (1) of the Wireless Telegraphy Act in respect of a period between the expiry of a license and its renewal after the allowed 14 days of grace it was held that the offence did not consist in possessing a set without a license but in possessing one 'except under and in accordance with a license issued under this Act' and that as the Act when read with the rules states that the licence shall be valid for a period of 12 calendar months beginning from the first day of the month of issue, if the person charged was issued a license covering the period in question he could not be said to have contravened the section. What might have been an illegal possession would be cured by the subsequent issue of a license validating that possession.)]

Objects and Reasons.

"Clause 3 prohibits the possession without licence of wireless telegraphy apparatus. The Indian Telegraph Act, 1885, controls only the establishing, maintenance and working of telegraphs, but does not restrict or control mere possession of apparatus, or penalise such possession without licence unless it can be shown that the apparatus is used."—S. O. R.

Power of Central Government to exempt persons from provisions of the Act.

4. The [a][Central Government] may by rules made under this Act exempt any person or any class of persons from the provisions of this Act either generally or subject to prescribed conditions, or in respect of specified wireless telegraphy apparatus.

[a] *Substituted* by A. O. for "Governor-General in Council".

Licenses.

5. The telegraph authority constituted under the Indian Telegraph Act, 1885, shall be the authority competent to issue licenses to possess wireless telegraphy apparatus under this Act, and may issue licenses in such manner, on such conditions and subject to such payments as may be prescribed.

Offence and penalty.

6. *(1)* Whoever possesses any wireless telegraphy apparatus in contravention of the provisions of section 3 shall be punished, in the case of the first offence, with fine which may extend to one hundred rupees, and, in the case of a second or subsequent offence, with fine which may extend to two hundred and fifty rupees.

(2) For the purposes of this section a Court may presume that a person possesses wireless telegraphy apparatus if such apparatus is under his ostensible charge, or is located in any premises or place over which he has effective control.

(3) If in the trial of an offence under this section the accused is convicted the Court shall decide whether any apparatus in respect of which an offence has been committed should be confiscated, and, if it so decides, may order confiscation accordingly.

Power of search.

7. *(1)* A Presidency Magistrate, or a Magistrate of the first class or a Magistrate of the second class specially empowered by the [a][Central Government] in this behalf, may issue a warrant for the search, at any time between sunrise and sunset, of any building, vessel or place in which he has reason to believe that any wireless telegraphy apparatus, in respect of which an offence punishable under section 6 has been committed, is kept or concealed.

(2) The officer to whom a search warrant under sub-section *(1)* is addressed may enter into any building, vessel or place mentioned in the warrant and seize any wireless telegraphy apparatus in respect of which he had reason to believe an offence under section 6 has been committed.

[a] *Substituted* by A. O. for "Local Government".

Apparatus confiscated or having no owner to be property of Central Government.

8. All wireless telegraphy apparatus confiscated under the provisions of sub-section *(3)* of section 6, and all wirelees telegraphy apparatus having no ostensible owner shall be the property of the [a][Central Government].

[a] *Substituted* by A. O. for "Governor-General in Council".

9. [Power of Court to direct payment of fines to prescribed authority.] *Declared to cease to have effect by A. O. and repealed by the Repealing and Amending Act, 1940 (32 [XXXII] of 1940), S. 2 and Sch. I.*

Power of Central Government to make rules.

10. *(1)* The [a][Central Government] may, by notification in the [b][Official Gazette], make rules[c] for the purpose of carrying into effect the provisions of this Act.

(2) In particular and without prejudice to the generality of the foregoing power, such rules may provide for —

(i) determining that any article or class of article shall be or shall not be wireless telegraphy apparatus for the purposes of this Act;

(ii) the exemption of persons or classes of persons under section 4 from the provisions of this Act;

(iii) the manner of and the conditions governing the issue, renewal, suspension and cancellation of licenses, the form of licenses and the payments to be made for the issue and renewal of licenses;

Section 6 — Note 1

[1] "Complete wireless set" includes incomplete set which becomes complete when articles mentioned in definition in R. 2 (c) are added to it—Wireless set with one valve broken and plug connections wanting and incapable of receiving sound falls under "complete wireless set" (Vol 27) 1940 Nag 263 (264) : 41 Cri L Jour 580.

[2] License expiring on 31-5-1941 — License not renewed till 27-6-1941 — Licence granted by Postmaster expiring on 31-5-1942—*Held*, licensee could not be prosecuted under S. 6 (1) as illegal possession for 13 days was cured by subsequent issue of license validating that possession. (Vol 30) 1943 Nag 115 (116) : I L R (1943) Nag 283 : 44 Cri L Jour 193 (DB).

(iv) the maintenance of records containing details of the acquisition and disposal by sale or otherwise of wireless telegraphy apparatus possessed by dealers in wireless telegraphy apparatus;

(v) the conditions governing the sale of wireless telegraphy apparatus by dealers in and manufacturers of such apparatus; [d][*]

[e][* * * * * *]

(3) In making a rule under this section [a][Central Government] may direct that a breach of it shall be punishable with fine which may extend to one hundred rupees.

[a] *Substituted* by A. O. for "Governor-General in Council." [b] *Substituted* by A. O. for "Gazette of India." [c] The Indian Wireless Telegraphy (Possession) Rules, 1933, *see* Gazette of India, 1933, Pt. I, p. 1131. [d] The word "and" was *omitted* by the Repealing and Amending Act, 1940 (32 [XXXII] of 1940), S. 2 and Sch. I. [27-11-1940.] [e] The cl. (vi), namely, "determining the authority referred to in section 9" was *repealed, ibid.*

11. Nothing in this Act contained shall authorise the doing of anything prohibited under the Indian Telegraph Act, 1885, and no license issued under this Act shall authorise any person to do anything for the doing of which a license or permission under the Indian Telegraph Act, 1885, is necessary.

Saving of Indian Telegraph Act, 1885.

[THE] WORKMEN'S COMPENSATION ACT, 1923.

(ACT VIII OF 1923.)

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STATEMENT OF OBJECTS AND REASONS.

"The general principles of workmen's compensation command almost universal acceptance, and India is now nearly alone amongst civilised countries in being without legislation embodying these principles. For a number of years the more generous employers have been in the habit of giving compensation voluntarily, but this practice is by no means general. The growing complexity of industry in this country, with the increasing use of machinery and consequent danger to workmen, along with the comparative poverty of the workmen themselves, renders it advisable that they should be protected, as far as possible. from hardship arising from accidents.

An additional advantage of legislation of this tpye is that, by increasing the importance for the employer of adequate safety devices, it reduces the number of accidents to workmen in a manner that cannot be achieved by official inspection. Further, the encouragement given to employers to provide adequate medical treatment for their workmen should mitigate the effects of such accidents as do occur. The benefits so conferred on the workman added to the increased sense of security which he will enjoy, should render industrial life more attractive and thus increase the available supply of labour. At the same time, a corresponding increase in the efficiency of the average workman may be expected. A system of insurance would prevent the burden from pressing too heavily on any particular employer.

After a detailed examination of the question by the Government of India, Local Governments were addressed in July 1921, and provisional views of the Government of India were published for general information. The advisability of legislation has been accepted by the great majority of Local Governments and of employers' and workers' associations, and the Government of India believe that public opinion generally is in favour of legislation.

In June 1922, a committee was convened to consider the question. This committee was composed, for the most part, of members of the Imperial Legislature. After considering the numerous replies and opinions received by the Government of India, the committee was unanimously in favour of legislation, and drew up detailed recommendations regarding the lines which, in its opinion, such legislation should follow. The Bill now presented follows these recommendations closely. A number of supplementary provisions have been added where necessary, but practically no variations of importance have been made.

The Bill contains two distinct proposals. In Chapter II modifications are made in the ordinary civil law affecting the liability of employers for damages in respect of injuries sustained by their workmen; these clauses will operate only in actions before the ordinary civil Courts. The main part of the Bill makes provision for workmen's compensation and sets up special machinery to deal with claims falling under this category.

Both parts of the Bill, however, apply to the same classes of workmen. If the scope of the employers' liability clauses was made wider than the scope of the workmen's compensation provisions, there would be considerable danger of a great increase in litigation. The classes included are those whose inclusion was recommended by the committee, and are specified in Schedule II. Two criteria have been followed in the determination of the classes to be included :—

(1) that the Bill should be confined to industries which are more or less organised ;

(2) that only workmen whose occupation is hazardous should be included.

The general principle is that compensation should ordinarily be given to workmen who sustained personal injuries by accidents arising out of and in the course of their employment. Compensation will also be given in certain limited circumstances for disease. The actual rates of compensation payable are based on the unanimous recommendation of the committee. They are in every case subject to fixed maxima, in accordance with the committee's recommendations. It should be remembered, however, that the more highly paid workmen will be enabled, in cases to which the employers' liability clauses will apply to obtain damages on a scale considerably in excess of the maximum fixed for workmen's compensation.

A consistent endeavour has been made to give as little opportunity for disputes as possible. Throughout the Bill, in the definitions adopted, the scales selected, and the exceptions permitted, the great aim has been precision, in order that, in as few cases as possible should the validity of a claim for compensation or the amount of that claim be open to doubt. At the same time, on the unanimous recommendation of the committee, provision has been made for special Tribunals to deal cheaply and expeditiously with any disputes that may arise, and generally to assist the parties in a manner which is not possible for the ordinary civil Courts."

— Gazette of India, 1922, Part V, page 313.

ACT HOW AFFECTED BY SUBSEQUENT LEGISLATION.

— Amended by Acts 7 of 1924 ; 37 of 1925 ; 29 of 1926 ; 5 of 1929; 15 of 1933 ; 7 of 1937 ; 9 of 1938; 13 of 1939; 42 of 1939; 1 of 1942; 1 of 1946.
—Adapted by A. O.
—Amended in its application to —
(a) Bengal by Beng. Acts 5 of 1942: 6 of 1942.
—Repealed in part by Act 7 of 1924.

[THE] WORKMEN'S COMPENSATION ACT, 1923.

(ACT VIII OF 1923.)[a]

[5th March, 1923.]

An Act to provide for the payment by certain classes of employers to their workmen of compensation for injury by accident.

WHEREAS it is expedient to provide for the payment by certain classes of employers to their workmen of compensation for injury by accident; It is hereby enacted as follows :—

[a] For Statement of Objects and Reasons, *see* Gazette of India, 1922, Pt. V, p. 313, and for Report of Joint Committee, *see ibid.*, 1923, Pt. V, p. 37.

CHAPTER I.

PRELIMINARY.

Short title, extent and commencement.

1. *(1)* This Act may be called the Workmen's Compensation Act, 1923.

(2) It extends[a] to the whole of British India, including British Baluchistan and the Sonthal Parganas.

(3) It shall come into force on the first day of July, 1924.

[a] This Act has been *declared* to be in force in the Khondmals District by the Khondmals Laws Regulation, 1936 (4 of 1936), S. 3 and Sch., and in the Angul District by the Angul Laws Regulation, 1936 (5 of 1936), S. 3 and Sch.

Definitions.

2. *(1)* In this Act, unless there is anything repugnant in the subject or context,—

(a) "adult" and "minor" mean respectively a person who is not and a person who is under the age of fifteen years;

(b) "Commissioner" means a Commissioner for Workmen's Compensation appointed under section 20;

(c) "compensation" means compensation as provided for by this Act;

[a][*(d)* "dependant" means any of the following relatives of a deceased workman, namely:—

(i) a [b][widow], minor legitimate son, and unmarried legitimate daughter, or a widowed mother; and

(ii) if wholly or in part dependent on the earnings of the workman at the time of his death, a [c][widower], a parent other than a widowed mother, a minor illegitimate son, an unmarried illegitimate daughter, a daughter legitimate or

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SECTION 1 — SYNOPSIS

1. Scope and applicability of the Act.
2. Interpretation.

1. Scope and applicability of the Act. — [1] There is difference between the English and the Indian statutes. While the former applies to all workmen, the latter only applies to certain defined classes of workmen. (Vol 24) 1937 Rang 45 (46) : 14 Rang 753 (DB).

[2] Act does not forbid compensation being paid otherwise than through commissioner. (Vol 17) 1930 Rang 1 (4) : 7 Rang 660 (SB).

[3] The Act may or may not apply to apprentices, the deciding factor being nature of contract. Contract of service is necessary to bring apprentices under the category of "workmen." (Vol 16) 1929 Lah 573 (575). (Student of B Class of Maclagan College is neither apprentice nor workman.)

2. Interpretation. — [1] Act being a quasi penal statute, the provisions ought not to receive a benevolent or strained interpretation in the interest of the beneficiaries thereunder. (Vol 18) 1931 Rang 173 (174) : 9 Rang 46 (SB) ✠ (Vol 24) 1937 Rang 45 (46) : 14 Rang 753 (DB).

[2] Principle regulating award of compensation has to be determined in accordance with provisions of Act and cannot be departed from on sentimental grounds. (Vol 26) 1939 All 29 (31) : I L R (1939) All 1.

Section 2 (1) (b) — Note 1

[1] Commissioner is a Court subordinate to High Court within S. 115, Civil P. C. (Vol 29) 1942 Pat 33 (34) : 21 Pat 173 (DB).

SECTION 2 (1) (d) — SYNOPSIS

1. Scope.
2. Dependants — Who are.
3. Dependants — Who are not.
4. Adoptive relations.
5. 'Dependent on the earnings.'

1. Scope. — [1] The expression "dependent" as defined in S. 2 (1) (*d*) includes wife, husband, parent and some other near relatives. But certain relatives are expressly excluded. Therefore it follows that gratuities are to be paid to particular persons who do not or may not include certain heirs to the deceased. (Vol 16) 1929 Sind 177 (178) : 23 Sind Law Rep 359 (DB). (Major son though heir is not 'dependant'.)

[2] Where a son is not "minor" the fact of his having been actually maintained by father on account of some infirmity does not make him "dependent" within Act. (Vol 17) 1930 Lah 657 (657) (DB).

2. Dependants—Who are. — [1] The following are 'dependants' within the meaning of this section :

(a) Widowed daughter. (Vol 20) 1933 Cal 358 (361) : 60 Cal 820 (DB).

(b) Widowed sister. (Vol 19) 1932 Lah 1 (2) : 13 Lah 228. (Case before amendment of 1933.) ✠ (Vol 21) 1934 Lah 115 (115) (DB). (Do—(Vol 19) 1932 Lah 1 : 13 Lah 228 ; (Vol 20) 1933 Cal 358, *Rel. on.*); (Vol 16) 1929 Oudh 483 : 5 Luck 380 (FB), *Dissented.*)

(c) An illegitimate child even though born of adulterous intercourse is a dependant of the deceased if it was supported by him. (Vol 33) 1946 Bom 110 (113) : I L R (1945) Bom 871 (DB).

(d) Father, if he shows that he was wholly or in part dependent on the earnings of his son at the time of his death. (Vol 29) 1942 Mad 401 (401) (DB).

3. Dependants—Who are not.—[1] The following are held not to be 'dependants' :

(a) Widowed step-mother. (Vol 27) 1940 Cal 285 (285) (DB) ✠ (Vol 29) 1942 Pat 33 (35) : 21 Pat 173 (DB).

(b) Minor half-brother. (Vol 18) 1931 Rang 173 (174) : 9 Rang 46 (SB).

[But see (Vol 18) 1931 Lah 752 (753). (Minor brother includes brother of half blood.)]

4. Adoptive relations.—[1] Minor adopted son is a dependant. (Vol 18) 1931 Lah 661 (661) : 12 Lah 50.

[2] A widowed mother includes an adoptive widowed mother for the purposes of S. 2 (1) (*d*). (Vol 32) 1945 Nag 238 (238) : I L R (1945) Nag 697.

[3] "Adopted daughter" is not a dependant. (Vol 18) 1931 Lah 399 (400) : 12 Lah 658 (DB).

5. 'Dependant on the earnings.'—[1] Question of dependency is question of fact in each case. Mere evidence that husband and wife pooled their resource does not establish that husband was dependant on wife. (Vol 26) 1939 Rang 369 (370, 371) (DB).

illegitimate if married and a minor or if widowed, a minor brother, an unmarried or widowed sister, a widowed daughter-in-law, a minor child of a deceased son, [d][a minor child of a deceased daughter where no parent of the child is alive], or where no parent of the workman is alive, a paternal grandparent;]

[a] *Substituted* by the Workmen's Compensation (Amendment) Act, 1933 (15 [XV] of 1933), S. 2. [b] *Substituted, ibid.*, 1938 (9 [IX] of 1938), S. 2, for "wife". [5-4-1938.] [c] *Substituted, ibid.*, for "husband". [d] *Inserted, ibid.*

(e) "employer" includes any body of persons whether incorporated or not and any managing agent of an employer and the legal representative of a deceased employer and, when the services of a workman are temporarily lent or let on hire to another person by the person with whom the workman has entered into a contract of service or apprenticeship, means such other person while the workman is working for him;

(f) "managing agent" means any person appointed or acting as the representative of another person for the purpose of carrying on such other person's trade or business, but does not include an individual manager subordinate to an employer;

PROVINCIAL AMENDMENT.

Bengal

After Cl. (f) of sub-section (1) of section 2, the following clause shall be *inserted*, namely;—

"*(ff)* 'medical referee' means a qualified medical practitioner appointed under section 24A as a medical referee for the purposes of this Act." —Beng. Act VI of 1942, S. 3. [19-11-1942.]

(g) "partial disablement" means, where the disablement is of a temporary nature, such disablement as reduces the earning capacity of a workman in any employment in which he was engaged at the time of the accident resulting in the disablement, and, where the disablement is of a permanent nature, such disablement as reduces his earning capacity in every employment which he was capable of undertaking at that time: provided that every injury specified in Schedule I shall be deemed to result in permanent partial disablement;

(h) "prescribed" means prescribed by rules made under this Act;

(i) "qualified medical practitioner" means any person registered under the Medical Act, 1858,[a] or any Act amending the same, or under any Act of any Legislature in British India providing for the maintenance of a register of medical practitioners, or, in any area where no such last-mentioned Act is in force, any person declared by the [b][Provincial Government], by notification in the [c][Official Gazette], to be a qualified medical practitioner for the purposes of this Act;

[d][* * * * * * *].

[a] (1858) 21 & 22 Vict., c. 90. [b] *Substituted* by A. O. for "Local Government". [c] *Substituted* by A. O. for "local official Gazette". [d] Clause *(j)* was *repealed* by the Workmen's Compensation (Amendment) Act, 1933 (15 [XV] of 1933), S. 2.

(k) "seaman" means any person forming part of the crew of any [a][* *] ship, but does not include the master of [b][the] ship;

[a] The word "registered" was *repealed* by the Workmen's Compensation (Amendment) Act, 1933 (15 [XV] of 1933), S. 2. [b] *Substituted, ibid.*, for "any such".

(l) "total disablement" means such disablement, whether of a temporary or permanent nature, as incapacitates a workman for all work which he was capable of performing at the time of the accident resulting in such disablement: provided that permanent total disablement shall be deemed to result from the permanent total loss of the sight of both eyes or from any combination of injuries specified in Schedule I where the aggregate percentage of the loss of earning capacity, as specified in that Schedule against those injuries, amounts to one hundred per cent.;

(m) "wages" includes any privilege or benefit which is capable of being estimated in money, other than a travelling allowance or the value of any travelling concession

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Section 2 (1) (g) — Note 1

[1] In cases of permanent partial disablement Court has to see whether earning capacity has been reduced in every employment and not merely in particular employment at the time of the accident. (Vol 23) 1936 All 493 (494) : 58 All 976.

Section 2 (1) (m) — Note 1

[1] "Wages" involves notion of contract of service or employment and that manual labour which person does must be solely for benefit of his employer. (Vol 16) 1929 Lah 573 (575). (Labour done by students in college workshop does not satisfy either of these conditions.)

or a contribution paid by the employer of a workman towards any pension or provident fund or a sum paid to a workman to cover any special expenses entailed on him by the nature of his employment;

(n) "workman" means any person (other than a person whose employment is of a casual nature and who is employed otherwise than for the purposes of the employer's trade or business) who is—

(i) a railway servant as defined in section 3 of the Indian Railways Act, 1890, not permanently employed in any administrative, district or sub-divisional office of a railway and not employed in any such capacity as is specified in Schedule II, or

(ii) employed [a][* * * *] on monthly wages not exceeding [b][four] hundred rupees, in any such capacity as is specified in Schedule II,

whether the contract of employment was made before or after the passing of this Act and whether such contract is expressed or implied, oral or in writing; but does not include any person working in the capacity of a member of His Majesty's naval, military or air forces [* * * *][c]; and any reference to a workman who has been injured shall, where the workman is dead, include a reference to his dependants or any of them.

[a] The words "either by way of manual labour or" were *repealed* by Workmen's Compensation (Amendment) Act, 1933 (15 [XV] of 1933), S. 2. [b] *Substituted, ibid.*, 1946 (1 [1] of 1946), S. 2 for "three". [28-2-1946.]
[c] The words "or of the Royal Indian Marine Service" were *repealed* by A. O.

Section 2 (1) (m)—Note 1 *(contd.)*

[2] "Wages" — Profit sharing bonus scheme of a Company under which its employees were declared entitled to certain bonus in good years — Bonus held included within term "wages." (Vol 33) 1946 Pat 437 (439) (DB).

[3] Where workman lost two-thirds of the index and middle fingers of right hand and whole of third and fourth fingers but his thumb and hand were intact, it was held that there was no permanent "total disablement" and workman was not entitled to compensation. (Vol 18) 1931 Lah 319 (320).

SECTION 2 (1) (n) — SYNOPSIS

1. Scope.
2. "Of a causal nature."
3. "For purposes of .... business."
4. Clause (i).
5. Clause (ii)—"Monthly wages."
6. Other illustrative cases.

1. Scope. — [1] The definitions in S. 2 (1) (n) and cl. (ii) in Sch. II, must be read together. (Vol 27) 1940 Sind 185 (186, 187) : I L R (1940) Kar 370 (DB) ✠ (Vol 30) 1943 Lah 52 (55) : I L R (1943) Lah 813 (DB).

[2] To exclude workman from definition, employment must be of casual nature and it should also be otherwise than for purposes of employer's trade or business. (Vol 33) 1946 All 473 (475) : I L R (1946) All 628 (DB) ✠ (Vol 22) 1935 Mad 721 (722) : 58 Mad 804 (DB).

[3] Even if the employment is of a casual nature, if a man be employed for the purpose of employer's trade or business, he is a workman. (Vol 20) 1933 Rang 244 (244) : 11 Rang 433 (DB) ✠ (Vol 20) 1933 Rang 208 (209) (DB). (Employed for two days.)

[4] In order to be workman within Act, person claiming to be workman must be under contract of service with some other person. (Vol 23) 1936 Rang 89 (90) (S B).

[5] If persons are allowed to do work of their own in their own time and are not subject to orders of any master as to way in which or time at which, they shall do it, they do not fall within Act. (Vol 27) 1940 Rang 219 (219, 220) (DB) (Tributor is not a workman.)

[6] The Act may or may not apply to apprentices. Contract of service is necessary to bring apprentices under the category of "workmen." (Vol 16) 1929 Lah 573 (575).

[7] A mere licensee upon the mine who is paid by piece work rates for the work which he did and over whom there is no control by the mine authorities is not a 'workman' within the meaning of the Act. (Vol 28) 1941 Rang 61 (61) (SB).

[*See also* (Vol 27) 1940 Rang 125 (125, 126) (DB).]

[8] To see whether person is workman, his occupation at time when he met his death is to be considered. (Vol 24) 1937 Rang 45 (46) : 14 Rang 753 (DB).

2. "Of a casual nature."—[1] Whether employment of a workman is of casual nature depends on nature of employment. Onus in such cases would be on employer to prove the condition necessary for excluding a person from category of workman. (Vol 20) 1933 Bom 270 (271, 272) (DB).

3. "For purposes of ..... business."—[1] The words "employed for the purpose of" and the words "employed in" do not mean exactly the same thing. Where a labourer is riding a lorry which is being driven to a brick field for the purpose of picking up bricks, his travelling to the brick field is within the scope of his employment. Such labourer is a workman within the meaning of the Act. (Vol 33) 1946 Bom 169 (170) (DB).

[2] If man is employed for purpose of the trade or business of employer, though the employment is of a casual nature, he is a workman. (Vol 23) 1936 Rang 493 (494) (DB). (Cooly employed for manual labour is a workman.)

[3] Hotel-keeper employed his profits in purchase of buildings and their reconstruction and repair for purpose of letting them—Workman falls down while repairing and dies: *Held* that repairing such building was part of his business and even if it was of a casual nature, workman was employed for the purpose of hotel-keeper's trade or business. (Vol 23) 1936 Mad 941 (941, 942) (DB).

[4] Protection under the Act is meant for the workmen who are actually engaged in the process of handling the bales, so as to transfer them from the wharf to the hold of a ship which is actually being loaded. But where a workman is injured while stacking certain bales in a shed alongside the wharf he is not engaged for the purpose of loading a ship. (Vol 17) 1930 Bom 44 (45) : 54 Bom 114 (DB).

(2) The exercise and performance of the powers and duties of a local authority or of any department [a][acting on behalf of the Crown] shall, for the purposes of this Act, unless a contrary intention appears, be deemed to be the trade or business of such authority or department.

[b][*(3)* The [c][Provincial Government], after giving, by notification[d] in the [e][Official Gazette] not less than three months' notice of [f][its] intention so to do, may, by a like notification, add to Schedule II any class of persons employed in any occupation which [g][it] is satisfied is a hazardous occupation, and the provisions of this Act shall thereupon apply [h][within the Province] to such classes of persons:

Provided that in making such addition the [c][Provincial Government] may direct that the provisions of this Act shall apply to such classes of persons in respect of specified injuries only.]

[a] *Substituted* by A. O. for "of the Government". [b] *Substituted* by the Workmen's Compensation (Amendment) Act, 1933 (15 [XV] of 1933), S. 2. [c] *Substituted* by A. O. for "Governor-General in Council". [d] *See* Gazette of India, 1935, Pt. I, p. 745. [e] *Substituted* by A. O for "Gazette of India". [f] *Substituted* by A. O. for "his". [g] *Substituted* by A. O. for "he". [h] *Inserted* by A. O.

CHAPTER II.

WORKMEN'S COMPENSATION.

3. *(1)* If personal injury is caused to a workman by accident arising out of and in the course of his employment, his employer shall be liable to pay compensation in accordance with the provisions of this Chapter:

Employer's liability for compensation.

Provided that the employer shall not be so liable—

(a) in respect of any injury which does not result in the total or partial disablement of the workman for a period exceeding [a][seven] days;

Section 2 (1) (n) — Note 3 *(contd.)*

[*See also* (Vol 16) 1929 Mad 698 (701) : 52 Mad 747 (FB). (Workman employed in godown, quarter mile away from wharf where steamers are moored — Intervention of cartman necessary to take goods to quay side for handing them over to stevedores : *Held* workman was not workman within the meaning of S. 2 (1) (n) read with Sch. 2 (5))]

[5] No man who is employed to repair cases containing goods or to unload and repack goods is employed in handling of goods and is therefore "workman." (Vol 25) 1938 Bom 110 (111) : I L R (1938) Bom 44 (DB).

4. Clause (i). — [1] Expression "not permanently employed . . . . in any office of a railway" in S. 2 (1) (n) (i) contemplates such servants as are not required to perform their duties continuously or habitually in office. Expression "permanently employed" is not used as opposed to "temporarily employed." (Vol 25) 1938 Nag 91 (93).

[2] The word "administrative" is not an adjective qualifying "District" and "Sub-Divisional Office." (Vol 25) 1938 Nag 91 (92).

5. Clause (ii)—"Monthly wages."—[1] The reference to employment on monthly wages in S. 2 (1) (n) means employment at wages which do not exceed an average of Rs. 300 a month. It is not limited to workmen who are employed by the month but also includes workmen employed by the day or by the week or by the year. (Vol 30) 1943 Lah 52 (55, 56) : I L R (1943) Lah 813 (DB) ✻ (Vol 33) 1946 Bom 169 (170) (D B) ✻ (Vol 25) 1938 Bom 110 (111) : I L R (1938) Bom 44 (DB).

[2] The real purpose of insistence on employment on monthly wages not exceeding Rs. 300 is merely to fix a financial upper limit of means in the case of the deceased workman and it does not make any difference whether as a means of payment he was paid daily, weekly, monthly or even yearly. (Vol 33) 1946 All 473 (476) : I L R (1946) All 628. (Workman employed at wages at eight annas a day is a workman within this section.)

6. Other illustrative cases. — [1] Person employed for the purpose of employer's business in the construction, working or repairs of pipe-line otherwise than in clerical capacity, is workman though officiating in leave vacancy. (Vol 23) 1936 All 690 (691) : ILR (1937) All 15 (DB).

[2] The conductor of motor omnibus is a workman. (Vol 25) 1938 Mad 485 (486) : I L R (1938) Mad 636 (DB).

[3] Compositor in press in United Provinces can be workman. (Vol 30) 1943 All 273 (274) : I L R (1943) All 595 (DB).

[4] The claimant employed in works where sand was dredged from the creek and sifted so as to remove mud and stone is a workman. (Vol 21) 1934 Bom 28 (29) : 58 Bom 128 (DB).

Section 2 (2) — Note 1

[1] Section 2 (2) was intended to include Government departments which are engaged in work with a commercial object, but it does not impose on such a Government department a duty other than that imposed on private traders or corporations, so as to deprive such a department of the saving contained in S. 12 (1). (Vol 16) 1929 Bom 179 (183) : 53 Bom 203 (DB).

SECTION 3 — SYNOPSIS

1. Scope.
2. Accident arising out of and in the course of employment.
3. Proviso (b) (ii)
   4. Wilful disobedience.
   5. Employee's negligence.
6. Section 3 (5) (a).
7. Principles governing grant of compensation.
8. Burden of proof.

1. Scope. — [1] Where a man is employed for purposes of trade or business, employer is liable even if the employment is of casual nature. (Vol 20) 1933 Rang 244 (244) : 11 Rang 433 (DB) ✻ (Vol 20) 1933 Rang 208 (209) (DB). (Fact that workman had been employed only for two days for employer's trade or business when accident occurred does not disentitle him to compensation.)

(b) in respect of any [b][injury, not resulting in death, caused by] an accident which is directly attributable to—

(i) the workman having been at the time thereof under the influence of drink or drugs, or

(ii) the wilful disobedience of the workman to an order expressly given, or to a rule expressly framed, for the purpose of securing the safety of workmen, or

(iii) the wilful removal or disregard by the workman of any safety guard or other device which he knew to have been provided for the purpose of securing the safety of workmen [c][* * *].

(2) [d][If a workman employed in any employment specified in Part A of Schedule III contracts any disease specified therein as an occupational disease peculiar to that employment], or if a workman, whilst in the service of an employer in whose service he has been employed for a continuous period of not less than six months in any employment specified in [e][Part B of] Schedule III, contracts any disease specified therein as an occupational disease peculiar to that employment, the contracting of the disease shall be deemed to be an injury by accident within the meaning of this section and, unless the employer proves the contrary, the accident shall be deemed to have arisen out of and in the course of the employment.

Explanation.—For the purposes of this sub-section a period of service shall be deemed to be continuous which has not included a period of service under any other employer, [in the same kind of employment].[f]

(3) The [g][Provincial Government], after giving, by notification in the [h][Official Gazette] not less than three months' notice of [i][its] intention so to do, may, by a like notification, add

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Section 3 — Note 1 *(contd.)*

[2] Workman receiving injuries as a result of negligence and breach of duty of employer — Compensation according to actual loss and injury can be obtained. (Vol 24) 1937 Rang 451 (452) (DB).

2. Accident arising out of and in the course of employment. — [1] An accident in order to give rise to a claim for compensation must have some relation to the workmen's employment and must be due to a risk incidental to that employment as opposed to which all members of the public are alike exposed. (Vol 30) 1943 Mad 353 (354) : I L R (1944) Mad 29 (DB) ✠ (Vol 27) 1940 Pat 599 (600, 601) : 19 Pat 514 (DB). (A workman in a colliery is not in course of his employment when he is riding in a vehicle provided by his employer unless, by the terms of his contract, he is bound to travel in that vehicle).

[2] It does not follow that because a man is injured during the time of his employment, the accident arose out of or in the course of such employment. (Vol 29) 1942 Pat 453 (455) : 21 Pat 218 (DB).

[3] There is no difference between the English and Indian Statutes as to the type of accidents which gives the workman a claim to compensation. (Vol 27) 1940 Pat 599 (600, 601) : 19 Pat 514 (DB).

[4] Expression 'arising out of the employment' applies to employment as such, to its nature, its conditions, its obligations and its incidents and if, by reason of any of these, workman is brought within zone of special danger and so injured or killed, statute applies. (Vol 20) 1933 Cal 220 (221): 60 Cal 421 (DB).

[5] Question whether an accident arose out of the employment is dependant on the facts of each particular case. One test is whether it was part of the injured person's employment to hazard, to suffer or to do that which caused his injury. (Vol 20) 1933 Cal 513 (514, 515) (DB) ✠ (Vol 24) 1937 Nag 397 (399) : I L R (1938) Nag 200 (DB).

(a) General illustative cases.

[6] Hotel-keeper purchasing, reconstructing and repairing buildings for letting them out — Workman receiving injuries while employed in re-construction of building — Re-construction and repair of buildings, is business of hotel-keeper and he is liable. (Vol 23) 1936 Mad 941 (941) (DB).

[7] Workman employed to pour oil on shaft in ginning factory — While oiling bevel-wheel, his hand coming in contact with machinery and losing thumb — Accident is in course of employment. (Vol 24) 1937 Nag 311 (314) : ILR (1937) Nag 88.

[8] Person employed as gin-fitter for the up-keep and repair of gins and required to perform such duties as the manager or engineer might allot to him—Person not excluded from liability to perform such other duties as might be allotted to him by any one else set over him— Accident occurring while performing such duty — *Held* accident occurred while in the course of the employment of such workman. (Vol 20) 1933 Nag 272 (273).

[9] Deceased workman an expert swimmer engaged on a barge tied up alongside a steamer in the dock — The workmen to prepare their food and eat it on the barge and also to sleep in the barge — Workman so sleeping found missing and subsequently the body was found floating in the dock — *Held* that he met with an accident which arose out of his duty in sleeping on the barge. (Vol 29) 1942 Bom 175 (176, 177) : I L R (1942) Bom 225 (DB).

[10] Fitter injured while collecting scrap from under running machine — Collection of scrap not a part of his duty — No compensation can be allowed. (Vol 24) 1937 Sind 288 (289, 290) : 32 Sind L R 32 (DB).

(b) Accident during temporary cessation of work.

[11] During temporary halt driver, while doing repairs to engine, meeting accidental death—Accident is out of and in course of employment. (Vol 25) 1938 Rang 439 (440) (DB).

(c) Accident while doing something incidental to the work.

[12] Deceased employed in Electric Supply Company to put up and change posts and to connect and disconnect wires — On day of accident deceased, while returning from his work stopping to help other workmen employed to do same work and meeting with death while so helping—Such helping customary and without objection by employee — Accident, held arose

any description of employment to the employments specified in Schedule III, and shall specify in the case of the employments so added the diseases which [within the Province] shall be deemed for the purposes of this section to be occupational diseases peculiar to those employments respectively, and the provisions of sub-section *(2)* shall thereupon apply [j][within the Province] as if such diseases had been declared by this Act to be occupational diseases peculiar to those employments.

(4) Save as provided by sub-sections *(2)* and *(3)*, no compensation shall be payable to a workman in respect of any disease unless the disease is [k][* *] directly attributable to a specific injury by accident arising out of and in the course of his employment.

(5) Nothing herein contained shall be deemed to confer any right to compensation on a workman in respect of any injury if he has instituted in a Civil Court a suit for damages in respect of the injury against the employer or any other person; and no suit for damages shall be maintainable by a workman in any Court of law in respect of any injury—

(a) if he has instituted a claim to compensation in respect of the injury before a Commissioner; or

(b) if an agreement has been come to between the workman and his employer providing for the payment of compensation in respect of the injury in accordance with the provisions of this Act.

[a] *Substituted* by Act 15 of 1933, S. 3 for "ten". [b] *Substituted, ibid.*, for "injury to a workman resulting from". [c] The word "or" and cl. *(c)* were *repealed* by the Workmen's Compensation (Amendment) Act, 1929 (5 [V] of 1929), S 2. [d] *Substituted, ibid.*, 1938 (9 [IX] of 1938), S. 3, for "If . . . . anthrax". [e] *Inserted, ibid.* [f] *Added, ibid.* [g] *Substituted* by A. O. for "Governor-General in Council." [h] *Substituted* by A. O. for "Gazette of India". [i] *Substituted* by A. O. for "his". [j] *Inserted* by A. O. [k] The words "solely and" were *repealed* by the Workmen's Compensation (Amendment) Act, 1933 (15 [XV] of 1933), S. 3.

Section 3 — Note 2 *(contd.)*

out of and in course of employment. (Vol 25) 1938 Rang 414 (415) (DB).

[13] Repair to roof of weaving shed of a mill — Temporary hessian cloth covering put up under roof to protect cloth under manufacture — Jobber meeting with death while trying to cut a portion of cover to admit more lighting — *Held* the accident occurred in the course of employment as what he did was incidental to the performance of his duty. (Vol 14) 1927 Bom 223 (224) (DB).

[14] *A*, an employee in a shop where repairs of electrical goods were undertaken, after completing the job on a cooling tank collected his tools and while passing by a compressor which was nearby received a fatal electric shock — *Held* that he could not be said to have went out of his way or took any extra risk in passing the compressor and that the accident occurred while in the course of his employment. (Vol 30) 1943 Lah 52 (55) : I L R (1943) Lah 813 (DB).

[15] A workman in a harbour whose hours of work were from 2 P. M. to 6 P. M. worked from 2 to 7-30 P. M. He left to take some coffee and while returning to work crossed a railway line and was killed by an engine running into him. In crossing the railway line he was following the usual practice of the workmen engaged in the harbour and that the notice prohibiting the crossing of the railway line was not an effective prohibition—*Held* that the accident was one which arose out of and in the course of his employment within the meaning of the Workmen's Compensation Act. (Vol 30) 1943 Mad 353 (354) : I L R (1944) Mad 29 (DB).

(d) Accident due to non-observance of general warnings.

[16] Workmen in harbour at liberty to go by any way —Notice warning persons against going near working crane, held did not amount to prohibition — Accident, held arose out of and in course of workman's employment. (Vol 30) 1943 Mad 352 (353) : I L R (1944) Mad 61 (DB).

[17] Railway officer directing a workman to go from *K* to *B* — Workman being directed by another officer returning to *K* — Workman holding an iron bar near open door way thrown down from train and killed— Notice warning passengers not to stand near the door : *Held* the warning applied only to passengers and the workman was killed by an accident while in the course of and arising out of his employment. (Vol 15) 1928 Bom 1 (3) : 52 Bom 45 (DB).

(e) Place of accident where act is within the scope of employment.

[18] Injury by natural force—Workman must prove association of such injury with his employment—If injury is due to physical contact with some part of place where he works, accident is associated with employment and no further inquiry is essential. (Vol 20) 1933 P C 225 (228, 229, 230) (P C).

[19] Where workman met with his death when he was doing very thing which he was employed to do, mere fact that he had no right to be working in place where he was when he met his death, does not show that accident did not arise out of and in course of employment. (Vol 26) 1939 Rang 428 (431) (DB).

(f) Accident while proceeding to or returning from employment.

[20] A person who with the knowledge and permission of employer lives at some distance from his work spot, must be allowed a reasonable time within which to proceed from his residence to the place of work. If in proceeding in a reasonable time and in a reasonable manner he meets with a fatal accident, such accident would be held to arise out of and in the course of his employment. (Vol 22) 1935 Rang 173 (174) (SB).

[21] Servant going to duty much before time and selecting route to his convenience — Servant bitten by snake on way—Death on that account : *Held*, accident did not occur in the course of or out of employment. (Vol 22) 1935 Rang 428 (429, 433) : 13 Rang 553 (DB).

[22] Accident occurring while returning from work by recognized conveyance — Accident is in course of employment. (Vol 20) 1933 Rang 208 (DB).

[23] Deceased a bus driver travelling at the time of accident as a passenger—No evidence that he was going to or from his duty or for the purpose of his employ-

Amount of compensation.

4. [a][*(1)* Subject to the provisions of this Act, the amount of compensation shall be as follows, namely:

A. Where death results from the injury—

(i) in the case of an adult in receipt of monthly wages falling within limits shown in the first column of Schedule IV—the amount shown against such limits in the second column thereof, and

(ii) in the case of a minor—two hundred rupees;

Section 3 — Note 2 *(contd.)*

ment: *Held* no compensation can be recovered. (Vol 27) 1940 Mad 207 (207) (DB).

(g) Death due to act outside the scope of employment and expressly prohibited.

[24] Workman's death due to act for which he was not employed, and warned not to do — Injury not caused by accident out of and in course of employment. (Vol 23) 1936 Rang 250 (251) : 14 Rang 305 (DB).

3. Proviso (b) (ii). — [1] In considering breaches of rules, distinction is of importance between rules which define what work shall be done and rules which define how work shall be done. The former, if employers' rules, would normally be regarded as delimiting the sphere of employment; the latter as not relating to the sphere of employment but the mode of working. The latter might let in a defence based on disobedience; the former can found the argument that the act was outside the employment. (Vol 24) 1937 Nag 397 (399) : I L R (1938) Nag 200 (DB).

[2] Before Proviso *(b) (ii)* of S. 3 (1), can operate in an employer's favour, each of seven distinct conditions must be satsified. First, an order or rule must have been given or framed; a mere warning or disclaimer of responsibility is not enough. Secondly, its substantial purpose must have been that of securing the safety of workmen as such. Thirdly, the order or rule must contain words which, on the face of them, fairly and clearly indicate that its purpose is that of securing the safety of workmen; otherwise it is not "expressly" so given or framed. Fourthly, its terms must have been brought to the notice of the individual workman who is injured. Fifthly, it must have been disobeyed. Sixthly, the disobedience must have been wilful, neither, for example, merely negligent, nor due to a mistaken mode of doing a particular task, nor due to a wrong decision in an emergency, but deliberate. Seventhly, the accident must have been directly attributable to the disobedience. (Vol 27) 1940 Rang 250 (251) : 1940 Rang L R 759 : 42 Cri L Jour 56 (S B).

[3] In fatal accident case, where fatality was due to accident occurring in inclined roadway in coal mine wherein deceased was employed as signalling trammer, in determining whether act done arose out of employment, it is irrelevant to consider whether it was or was not forbidden by Regulation which formed no part of the contract of employment but was safety measure provided by Government to secure the well-being of employed. (Vol 24) 1937 Nag 397 (398) : I L R (1938) Nag 200 (DB).

4. Wilful disobedience. — [1] Under Act, the sole question is whether workmen wilfully disobeyed rule devised for securing safety of workmen and not whether disobedience amounted to misconduct under English Act. (Vol 25) 1938 Rang 289 (290) : 1938 Rang L R 299 (DB).

[2] The word "wilful" imports that the misconduct is deliberate and not merely a thoughtless act done on the spur of the moment. (Vol 15) 1928 Pat 508 (512) : 8 Pat 24 (DB).

[3] A man does a thing wilfully when he does it intentionally because he expects some benefit to himself, either some convenience or an easy way of doing a piece of work and so forth. (Vol 17) 1930 Cal 58 (59) (DB).

[4] Employer ordering workman to insert back lagging in mine — Workman excavating beneath dangerous boulder in course of his work and receiving injuries — Absence of instructions to contrary.—No wilful disobedience—Employer liable to pay compensation. (Vol 27) 1940 Rang 220 (221) (DB).

5. Employee's negligence. — [1] Accident due to employee's negligence but arising out of and in the course of employment — Employer not exempt. (Vol 24) 1937 Nag 311 (314) : I L R (1937) Nag 88.

[2] Contributory negligence on the part of the employee does not exonerate the employer from liability to compensate the employee if the accident could have been avoided by the exercise of ordinary care and diligence. (Vol 22) 1935 Lah 670 (671) (DB).

6. Section 3 (5) (a). — [1] Claim, even if rejected *in limine* by Commissioner, must be regarded as claim instituted before the Comm'ssioner within S. 3 (5) *(a)*. (Vol 29) 1942 Mad 116 (118).

7. Principles governing grant of compensation. — [1] Award of compensation is not to give solatium to a relative of the employee who has been fatally injured but something to replace the actual loss which he or she has suffered. (Vol 26) 1939 Rang 369 (370) (DB).

[2] Compensation is not remedy for negligence on the part of employer but is a sort of insurance of the workman against certain risks of accident. (Vol 25) 1938 Nag 91 (92).

[3] Where Commissioner finds that neither workman nor his dependants had any claim on employer, he cannot order small compensation to be paid by employer. (Vol 22) 1935 Rang 303 (304) (DB).

8. Burden of proof.—[1] In claiming compensation the onus lies on the applicant for compensation to prove that the accident arose out of the employment. (Vol 27) 1940 Rang 18 (20) (DB) ✠ (Vol 29) 1942 Bom 175 (177) : I L R (1942) Bom 225 (DB).

[2] Facts proved giving rise to conflicting inferences of equal degrees of probability as to cause of death — Onus on applicant not discharged. (Vol 25) 1938 Rang 349 (350) (DB).

[3] Where the work is within the scope of employment the exemption under proviso has to be proved by employer. (Vol 21) 1934 Pat 630 (631, 632) (DB).

[*See also* (Vol 23) 1936 P C 158 (159, 160) (P C). (Workmen's Compensation Act providing for compensation in the case of workmen contracting disease other than disease caused by silica dust, in the course of employment — Workman claiming compensation has only to prove that he contracted disease during employment—It is for the employer to prove that it was caused by silica dust — Case decided under Australian Workmen's Compensation Act.)]

Section 4 — Note 1

[1] Principle on which compensation is to be awarded, to be in accordance with Act — Principle not to be departed from on grounds of sentiment. (Vol 26) 1939 All 29 (31) : I L R (1938) All 1.

[2] The words "result from" in S. 4 are wider than "solely and directly attributable" and the requirement

B. Where permanent total disablement results from the injury—

(i) in the case of an adult in receipt of monthly wages falling within limits shown in the first column of Schedule IV—the amount shown against such limits in the third column thereof, and

(ii) in the case of a minor—twelve hundred rupees;

C. Where permanent partial disablement results from the injury—

(i) in the case of an injury specified in Schedule I, such percentage of the compensation which would have been payable in the case of permanent total disablement as is specified therein as being the percentage of the loss of earning capacity caused by that injury, and

(ii) in the case of an injury not specified in Schedule I, such percentage of the compensation payable in the case of permanent total disablement as is proportionate to the loss of earning capacity permanently caused by the injury;

Explanation.—Where more injuries than one are caused by the same accident, the amount of compensation payable under this head shall be aggregated but not so in any case as to exceed the amount which would have been payable if permanent total disablement had resulted from the injuries;

D. Where temporary disablement, whether total or partial, results from the injury, a half-monthly payment payable on the sixteenth day after the expiry of a waiting period of seven days from the date of the disablement, and thereafter half-monthly during the disablement or during a period of five years, whichever period is shorter,

(i) in the case of an adult in receipt of monthly wages falling within limits shown in the first column of Schedule IV—of the sum shown against such limits in the fourth column thereof, and

(ii) in the case of a minor—of one-half of his monthly wages, subject to a maximum of thirty rupees:

Provided that—

(a) there shall be deducted from any lump sum or half-monthly payments to which the workman is entitled the amount of any payment or allowance which the workman has received from the employer by way of compensation during the period of disablement prior to the receipt of such lump sum or of the first half-monthly payment, as the case may be : and

(b) no half-monthly payment shall in any case exceed the amount, if any, by which half the amount of the monthly wages of the workman before the accident exceeds half the amount of such wages which he is earning after the accident.]

(2) On the ceasing of the disablement before the date on which any half-monthly payment falls due, there shall be payable in respect of that half-month a sum proportionate to the duration of the disablement in that half-month.

[a] *Substituted* by the Workmen's Compensation (Amendment) Act, 1933 (15 [XV] of 1933), S. 4, for the original sub-section.

Section 4 — Note 1 *(contd.)*

of the law is satisfied even if the injury can be traced to the accident as the unnatural cause thereof. (Vol 14) 1927 Cal 286 (288) (DB).

[3] Payments made to an injured workman before his death under S. 4 (1) (*d*) cannot be deducted from the compensation-payable under S. 4 (1) (*a*) after death of workman as the right of the dependants to compensation upon the death of a workman is independent of the workman's right to compensation. (Vol 20) 1933 Rang 33 (35) : 11 Rang 154 (FB).

[4] While considering whether disablement is the result of the injury the true test is not whether disablement is direct or even probable result of injury or injury natural cause thereof but whether disablement can be traced to injury even as an unusual, but not unconnected result thereof. (Vol 14) 1927 Cal 286 (288) (DB).

[5] If workman has suffered total disablement as defined in cl. (1) of S. 2 (2), then under cl. B of S. 4 (1) he is entitled to compensation as laid down in Sch. IV. ('41) 1941 Nag L Jour 532.

[6] Workman losing $\frac{2}{3}$ of index and middle finger and whole of third and fourth fingers of right hand, thumb and hand remaining intact — *Held*, he was not entitled to compensation there being no total disablement. (Vol 18) 1931 Lah 319 (319).

[7] What the Court has to see in case of permanent partial disablement is whether earning capacity of workman has been reduced in every employment which he was capable of undertaking at time of accident and not merely particular employment in which he was engaged at that time. (Vol 23) 1936 All 493 (494) : 58 All 976.

[8] Loss in earning capacity and not in physical capacity of workman has to be estimated —Railway, held best judge of loss in earning capacity of injured workman—Railway discharged workman on ground that he was physically unfit and permanently incapacitated. *Held*, there was 100% loss-of earning capacity and workman entitled to full compensation. (Vol 24) 1937 Cal 526 (528) (DB).

5. [a][*] [b][In this Act and for the purposes thereof the expression "monthly wages" means the amount of wages deemed to be payable for a month's service (whether the wages are payable by the month or by whatever other period or at piece rates), and calculated] as follows, namely:—

Method of calculating wages.

(a) where the workman has, during a continuous period of not less than twelve months immediately preceding the accident, been in the service of the employer who is liable to pay compensation, the monthly wages of the workman shall be one-twelfth of the total wages which have fallen due for payment to him by the employer in the last twelve months of that period;

[c][*(b)* where the whole of the continuous period of service immediately preceding the accident during which the workman was in the service of the employer who is liable to pay the compensation was less than one month, the monthly wages of the workman shall be [d][* * *] the average monthly amount which, during the twelve months immediately preceding the accident, was being earned by a workman employed, on the same work by the same employer, or, if there was no workman so employed by a workman employed on similar work in the same locality;]

[e][*(c)*] in other cases, the monthly wages shall be thirty times the total wages earned in respect of the last continuous period of service immediately preceding the accident from the employer who is liable to pay compensation, divided by the number of days comprising such period.

[f][* * * * * * * *]

Explanation.—A period of service shall, for the purposes of this [g][*] section be deemed to be continuous which has not been interrupted by a period of absence from work exceeding fourteen days.

[h][* * * * * * *]

[a] The figure "(1)", *inserted* by Act 5 of 1929, S. 3, was *omitted* by the Workmen's Compensation (Amendment) Act, 1938 (9 [IX] of 1938), S. 4. [5-4-1938.] [b] *Substituted, ibid*, 1939 (13 [XIII] of 1939), S. 2, for "for the purposes of this Act the monthly wages of a workman shall be calculated." [*Effective* from 30-6-1934.] [c] *Inserted, ibid*, 1933 (15 [XV] of 1933), S. 5. [d] The words "deemed to be" were *omitted* by Act 13 of 1939, S. 2. [e] *Substituted* by Act 15 of 1933, S 5, for "*(b)*." [f] Proviso was *repealed, ibid*. [g] The word "sub" *inserted* by Act 5 of 1929, S. 3, was *omitted* by Act 9 of 1938, S. 4. [h] Sub-s. (2) *inserted* by Act 5 of 1929, S. 3 was *omitted* by Act 15 of 1933, S. 5.

Objects and Reasons.

Amendment made by Act XIII of 1939 — "Conflicting decisions of High Courts have raised doubts as to whether on account of the expression 'employed on monthly wages' occurring in the definition of 'workman' in the Workmen's Compensation Act, 1923, a worker whose wages are paid otherwise than by the month or on a monthly basis can under any circumstances claim the benefits of that Act. That a worker should be so debarred on that ground alone was never the intention of the Act, and to remove these doubts a more formal definition of the expression 'monthly wages' is now proposed."

— S. O. R., Gazette of India, 1939, Part V, page 85.

6. *(1)* Any half monthly payment payable under this Act, either under an agreement between the parties or under the order of a Commissioner, may be reviewed by the Commissioner, on the application either of the employer or of the workman accompanied by the certificate of a qualified medical practitioner that there has been a change in the condition of the workman or, subject to rules made under this Act, on application made without such certificate.

Review.

(2) Any half-monthly payment may, on review under this section, subject to the provisions of this Act, be continued, increased, decreased or ended, or if the accident is found to have resulted in permanent disablement, be converted to the lump sum to which the workman is entitled less any amount which he has already received by way of half-monthly payments.

Section 5 — Note 1

[1] Commissioner has no jurisdiction to award less compensation than what is provided for in the Act merely because workman has asked for less. (Vol 19) 1932 Rang 141 (142) (DB).

[2] Bonus to workman declared after date of accident — Workman being in continuous employment for full official year ending before accident entitled to bonus — Bonus held formed part of 'total' wages falling due for payment for purposes of compensation. (Vol 33) 1946 Pat 437 (440) (DB).

[3] Medical estimate of disablement—Compensation to be at same percentage. (Vol 21) 1934 Pat 630 (631) (DB).

[4] For bringing a case under S. 5 (*a*), burden is on employer to show that service of the deceased was continuous without break of more than 14 days. (Vol 17) 1930 Sind 49 (51) : 24 Sind L R 199 (DB).

[5] In the case of a workman who is employed only for a day, compensation to be awarded for injuries suffered by her should be on the basis of monthly average wages, calculated on the basis of her average daily wages multiplied by thirty and divided by the number of days of continuous employment. (Vol 33) 1946 Bom 169 (170, 171) (DB).

Commutation of half-monthly payments.

7. Any right to receive half-monthly payments may, by agreement between the parties or, if the parties cannot agree and the payments have been continued for not less than six months, on the application of either party to the Commissioner be redeemed by the payment of a lump sum of such amount as may be agreed to by the parties or determined by the Commissioner, as the case may be.

Distribution of compensation.

8. [a][*(1)* No payment of compensation in respect of a workman whose injury has resulted in death, and no payment of a lump sum as compensation to a woman or a person under a legal disability, shall be made otherwise than by deposit with the Commissioner, and no such payment made directly by an employer shall be deemed to be a payment of compensation :

[b][Provided that, in the case of a deceased workman, an employer may make to any dependant advances on account of compensation not exceeding an aggregate of one hundred rupees, and so much of such aggregate as does not exceed the compensation payable to that dependant shall be deducted by the Commissioner from such compensation and repaid to the employer.]

(2) Any other sum amounting to not less than ten rupees which is payable as compensation may be deposited with the Commissioner on behalf of the person entitled thereto.

(3) The receipt of the Commissioner shall be a sufficient discharge in respect of any compensation deposited with him.]

(4) On the deposit of any money under sub-section *(1)* [c][as compensation in respect of a deceased workman] the Commissioner [d][shall deduct] therefrom the actual cost of the workman's funeral expenses, to an amount not exceeding [e][twenty-five rupees] and pay the same to the person by whom such expenses were incurred, and shall, if he thinks necessary, cause notice to be published or to be served on each dependant in such manner as he thinks fit, calling upon the dependants to appear before him on such date as he may fix for determining the distribution of the compensation. If the Commissioner is satisfied after any inquiry which he may deem necessary, that no dependant exists, he shall repay the balance of the money to the employer by whom it was paid. The Commissioner shall, on application by the employer, furnish a statement showing in detail all disbursements made.

[f][*(5)* Compensation deposited in respect of a deceased workman shall, subject to any deduction made under sub-section *(4)*, be apportioned among the dependants of the deceased workman or any of them in such proportion as the Commissioner thinks fit, or may, in the discretion of the Commissioner, be allotted to any one dependant.

SECTION 8 — SYNOPSIS

1. Scope.
2. Right of dependants to compensation.
3. Refund to employer.
4. Deductions.
5. Jurisdiction of Civil Court.

1. Scope.—[1] The whole scheme of S. 8 seems to be designed for protection of employer in cases where liability is admitted or established. (Vol 17) 1930 Rang 1 (4) : 7 Rang 660 (SB).

[2] The Act does not forbid compensation being paid otherwise than through the Commissioner. (Vol 17) 1930 Rang 1 (4) : 7 Rang 660 (SB).

[3] Subject to the observance of the provisions of S. 8 Commissioner has power to order re-deposit of compensation. (Vol 17) 1930 Rang 1 (4) : 7 Rang 660 (SB).

2. Right of dependants to compensation. — [1] Section 8 makes it quite clear that compensation is payable only to dependants of deceased. (Vol 16) 1929 All 707 (707) (DB).

[2] Right to compensation payable under this Act vests in the workman's dependant or dependants actually existing at the time of his death and on the death of such dependant before making of the claim, the right passes on to his heirs or legal representatives, as they are included in the word 'dependant' in S. 8. (Vol 24) 1937 Cal 495 (497) : I L R (1937) 2 Cal 518 (DB).

[3] When once allotment of compensation to dependant or a distribution of compensation money among several dependants is made under S. 8, compensation so allotted or distributed becomes property of the dependant and if dependant dies, said sum will devolve on heirs. (Vol 25) 1938 Mad 402 (402) : I L R (1938) Mad 716 (D B).

[4] When mother, widow and minor son of deceased Muhammadan were awarded compensation, held death of mother and minor constitutes variation of circumstances, and Commissioner may make new order; fact that widow had remarried was immaterial. (Vol 27) 1940 Cal 580 (581) (D B).

3. Refund to employer.—[1] Under S. 8, if there are no dependants of the deceased the amount cannot be paid to more distant relatives though next of kin. The amount then is to be refunded to the employer. (Vol 16) 1929 All 707 (707) (D B).

4. Deductions. — [1] Payments made to injured workman before his death under S. 4 (1) (d) cannot be deducted from the compensation payable under S. 4 (1) (a) after death of workman. (Vol 20) 1933 Rang 33 (34) : 11 Rang 154 (F B).

5. Jurisdiction of Civil Court.—[1] The Commissioner for Workmen's Compensation is the proper authority to make a re-distribution of the money which has been allotted to the share of a deceased minor. Consequently, the Civil Court had no jurisdiction to deal with the matter at all. Hence, as far as the Commissioner of Workmen's Compensation is concerned, the decree of the Civil Court (though a consent decree) is of no effect. (Vol 27) 1940 Cal 580 (581) (D B).

(6) Where any compensation deposited with the Commissioner is payable to any person, the Commissioner shall, if the person to whom the compensation is payable is not a woman or a person under a legal disability, and may, in other cases, pay the money to the person entitled thereto.

(7) Where any lump sum deposited with the Commissioner is payable to a woman or a person under a legal disability, such sum may be invested, applied or otherwise dealt with for the benefit of the woman, or of such person during his disability, in such manner as the Commissioner may direct; and where a half-monthly payment is payable to any person under a legal disability, the Commissioner may, of his own motion or on an application made to him in this behalf, order that the payment be made during the disability to any dependant of the workman or to any other person whom the Commissioner thinks best fitted to provide for the welfare of the workman.]

[e][*(8)*] Where, on application made to him in this behalf or otherwise, the Commissioner is satisfied that, on account of neglect of children on the part of a parent or on account of the variation of the circumstances of any dependant or for any other sufficient cause, an order of the Commissioner as to the distribution of any sum paid as compensation or as to the manner in which any sum payable to any such dependant is to be invested, applied or otherwise dealt with, ought to be varied, the Commissioner may make such orders for the variation of the former order as he thinks just in the circumstances of the case :

Provided that no such order prejudicial to any person shall be made unless such person has been given an opportunity of showing cause why the order should not be made, or shall be made in any case in which it would involve the repayment by a dependant of any sum already paid to him.

[f][*(9)* Where the Commissioner varies any order under sub-section *(8)* by reason of the fact that payment of compensation to any person has been obtained by fraud, impersonation or other improper means, any amount so paid to or on behalf of such person may be recovered in the manner hereinafter provided in section 31.]

[a] *Substituted* by the Workmen's Compensation (Amendment) Act, 1929 (5 [V] of 1929), S. 4. [b] *Substituted, ibid.*, 1933 (15 [XV] of 1933), S. 6. [c] *Inserted* by Act 5 of 1929, S. 4. [d] *Substituted* by Act 15 of 1933, S. 6, for "may deduct". [e] *Substituted, ibid.* [f] *Substituted* by Act 5 of 1929, S. 4, for sub-s. (5). [g] *Substituted, ibid.*, for (6).

Compensation not to be assigned, attached or charged.

9. Save as provided by this Act, no lump sum or half-monthly payment payable under this Act shall in any way be capable of being assigned or charged or be liable to attachment or pass to any person other than the workman by operation of law, nor shall any claim be set off against the same.

Notice and claim.

10. *(1)* [a][No claim for compensation shall be entertained by a Commissioner unless notice of the accident has been given in the manner hereinafter provided as soon as practicable after the happening thereof and unless the claim is preferred before him within one year of the occurrence of the accident or, in case of death, within one year from the date of death :]

Provided that, where the accident is the contracting of a disease in respect of which the provisions of sub-section *(2)* of section 3 are applicable, the accident shall be deemed to have

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Section 9 — Note 1

[1] The first part of the section is enacted for the purpose of securing the benefit which the Workmen's Compensation Act is intended to provide for the workman or the dependants of the workman. (Vol 25) 1938 Mad 402 (403) : I L R (1938) Mad 716 (D B).

[2] The latter part of the section contemplates that the compensation is payable to a workman and cannot be claimed by any person by operation of law; therefore before that clause can come into operation there must be an existing workman to whom it is payable and it has no application to a case where the workman died before the award of compensation. (Vol 25) 1938 Mad 402 (403) : I L R (1938) Mad 716 (D B).

[3] In the case of a workman who is alive and to whom the compensation is payable, the Act says that it must be paid to him and it should not go to any other person; for example, if he becomes an insolvent his trustee in bankruptcy cannot claim the sum for the benefit of his creditors. (Vol 25) 1938 Mad 402 (403) : I L R (1938) Mad 716 (D B).

SECTION 10—SYNOPSIS

1. Claims.
2. Notice.
3. Limitation—Sufficient cause.
4. "As soon as practicable."

1. Claims.—[1] Claim within S. 10 is communication by or on behalf of workman from which the employer can see that demand is being made upon him to pay compensation in respect of accident. (Vol 25) 1938 Cal 348 (350) : I L R (1938) 2 Cal 52 (D B).

[2] Claim referred to in S. 10 (1) and S. 22 means formal claim made before Commissioner and not claim made of employers. (Vol 29) 1942 Mad 116 (117).

[3] Demand for compensation to superior fellow workman like foreman is no claim under S. 10. Claim is to be made to some higher authority who can have it brought to notice of branch charged with administration of matters arising out of Act. (Vol 25) 1938 Cal 348 (350) : I L R (1938) 2 Cal 52 (D B).

[4] A claim, even if rejected *in limine*, by Commissioner must be regarded as claim instituted before the

occurred on the first of the days during which the workman was continuously absent from work in consequence of the disablement caused by the disease :

[b][Provided further that the want of or any defect or irregularity in a notice shall not be a bar to the [c][entertainment of a claim]—

(a) if the claim is [d][preferred] in respect of the death of a workman resulting from an accident which occurred on the premises of the employer, or at any place where the workman at the time of the accident was working under the control of the employer or of any person employed by him, and the workman died on such premises or at such place, or on any premises belonging to the employer, or died without having left the vicinity of the premises or place where the accident occurred, or

(b) if the employer [e][or any one of several employers or any person responsible to the employer for the management of any branch of the trade or business in which the injured workman was employed] had knowledge of the accident from any other source at or about the time when it occurred :]

Provided, further, that the Commissioner may [f][entertain] and decide any claim to compensation in any case notwithstanding that the notice has not been given, or the claim has not been [g][preferred], in due time as provided in this sub-section, if he is satisfied that the failure so to give the notice or [h][prefer] the claim, as the case may be, was due to sufficient cause.

Section 10—Note 1 *(contd.)*

Commissioner within S. 3 (5) (a). (Vol 29) 1942 Mad 116 (118).

2. Notice.—[1] Commissioner is sole judge as to whether want of or defact in notice shall bar proceedings. Omission to state in notice cause of injury is not material when manager of factory was already aware of it. (Vol 20) 1933 Nag 272 (273).

[2] Notice addressed to employer's office or business place and sent by registered post coming back with endorsement 'left' is valid notice. (Vol 16) 1929 Bom 400 (403) (D B).

[3] The words "notice of the accident" appearing in S. 10 do not mean "notice of the details of the accident." A wide and unnecessary extension to the word "accident" which might defeat the claim to compensation ought not to be lightly given. (Vol 33) 1946 Bom 169 (170) (DB).

[4] The expression "notice shall state in ordinary language the cause of the injury" does not mean that notice must state in language to the same effect as application before the Commissioner. (Vol 20) 1933 Cal 130 (131) (DB).

[5] Notice must be served upon employer or person directly responsible to employer. Notice to fellow workman not valid. (Vol 28) 1941 Bom 296 (298) (DB).

[6] Notice — Accident trivial at first but becoming serious — Notice to be given when serious consequences ensue. (Vol 28) 1941 Bom 296 (298) (DB).

[7] Claim for compensation was made by the dependants of deceased labourer in a Railway Company's employment for accidental death against contractor employing the deceased but Commissioner, served notice on Company :

Held, that the Company was directly liable to the dependants as if it were employer :

Held also that Commissioner ought to have served notice under S. 10A, on contractor and not on Railway Company. (Vol 22) 1935 Cal 683 (683) : 63 Cal 547.

[8] Proviso would apply even where no notice has been given. (Vol 16) 1929 Bom 400 (404) (DB).

[9] A notice of accident given within week was held as given as soon as practicable after happening of the accident. (Vol 15) 1928 Bom 1 (2).52 Bom 45 (DB).

[10] Notice under S. 10 is not necessary where workman does not voluntarily leave service of employer and want of written notice can also be excused if there was sufficient cause for failure to give notice or to institute claim. (Vol 20) 1933 Bom 109 (111):57 Bom 150 (DB).

3. Limitation—Sufficient cause.—[1] The Limitation Act does not apply to proceedings under the Act. (Vol 25) 1938 Cal 348 (351) : I L R (1938) 2 Cal 52 (DB).

[2] Proceedings under the Act were governed by S. 10 and not by the general provisions of the Limitation Act, and hence Art. 22, Limitation Act, which applies to a suit for damages for personal injury did not apply to proceedings under the Workmen's Compensation Act. (Vol 21) 1934 Bom 28 (30, 31) : 58 Bom 128 (D B).

[3] Held that workman re-employed after accident by same employer on same wages and remaining in employment for ten years was sufficient cause for not instituting proceedings within six months of accident. (Vol 25) 1938 Cal 348 (351) : I L R (1938) 2 Cal 52 (DB).

[4] Workman whose ordinary duties were to spread sand in barges but was employed one day in turning pontoons so as to get manholes upwards was workman within Act. Once there is sufficient reason for not making claim within six months, bar to proceedings under Act is removed. (Vol 21) 1934 Bom 28 (30, 31) : 58 Bom 128 (DB).

[5] Question whether there is sufficient cause is substantial question of law. (Vol 27) 1940 Lah 227 (228).

[6] That plaintiff did not know rules about Act is not sufficient cause, even in case of ignorant and illiterate persons for admitting claim for compensation after expiry of the 6 months prescribed. (Vol 18) 1931 Rang 175 (176) : 9 Rang 118 (DB).

[7] Words "has been instituted within six months" in S. 10, do not mean a claim against the employer or the institution of legal proceedings before the Commissioner. (Vol 26) 1939 Pat 181 (182):17 Pat 658 (DB).

[See however (Vol 26) 1939 Nag 106 (106) : I L R (1939) Nag 460. (Word 'institute' in S. 10 (1), does not refer to the proceedings before the Commissioner but only to the workman's claim for compensation against employer. Consequently, S. 10 cannot be interpreted as laying down period of limitation in respect of proceedings for recovery of compensation before Commissioner.)]

(2) Every such notice shall give the name and address of the person injured and shall state in ordinary language the cause of the injury and the date on which the accident happened, and shall be served on the employer or upon [i][any one of] several employers, or upon any person [j][*] responsible to the employer for the management of any branch of the trade or business in which the injured workman was employed.

[k][*(3)* The [l][Provincial Government] may require that any prescribed class of employers shall maintain at their premises at which workmen are employed a notice book, in the prescribed form, which shall be readily accessible at all reasonable times to any injured workman employed on the premises and to any person acting *bona fide* on his behalf.

(4) A notice under this section may be served by delivering it at, or sending it by registered post addressed to, the residence or any office or place of business of the person on whom it is to be served, or, where a notice-book is maintained, by entry in the notice-book.]

[a] *Substituted* by the Workmen's Compensation (Amendment) Act, 1938 (9 [IX] of 1938), S. 5. [5-4-1938]. [b] *Substituted, ibid* 1933 (15 [XV] of 1933), S. 7. [c] *Substituted* by Act 9 of 1938, S. 5, for "maintenance of proceedings". [d] *Substituted, ibid.*, for "made". [e] *Inserted, ibid.* [f] *Substituted, ibid.* for "admit". [g] *Substituted, ibid.*, for "instituted". [h] *Substituted, ibid.*, for "institute". [i] *Substituted* by the Repealing and Amending Act, 1924 (7 [VII] of 1924) S. 2 and Sch. I, for "any one or". [j] The word "directly" was *omitted* by Act IX of 1938, S. 5. [k] *Substituted* by Act 15 of 1933, S. 7, for sub-s. (3). [l] *Substituted* by A. O., for "Local Government."

Power to require from employers statements regarding fatal accidents.

[a][**10A.** *(1)* Where a Commissioner receives information from any source that a workman has died as a result of an accident arising out of and in the course of his employment, he may send by registered post a notice to the workman's employer requiring him to submit, within thirty days of the service of the notice, a statement, in the prescribed form, giving the circumstances attending the death of the workman, and indicating whether, in the opinion of the employer, he is or is not liable to deposit compensation on account of the death.

(2) If the employer is of opinion that he is liable to deposit compensation, he shall make the deposit within thirty days of the service of the notice.

(3) If the employer is of opinion that he is not liable to deposit compensation, he shall in his statement indicate the grounds on which he disclaims liability.]

(4) Where the employer has so disclaimed liability, the Commissioner, after such enquiry as he may think fit, may inform any of the dependants of the deceased workman that it is open to the dependants to prefer a claim for compensation, and may give them such other further information as he may think fit.]

[a] *Inserted* by the Workmen's Compensation (Amendment) Act, 1933 (15 [XV] of 1933), S. 8.

Section 10—Note 3 *(contd.)*

[8] Ignorance of workman of rules or law cannot be reasonable or sufficient cause. (Vol 26) 1939 Pat 181 (183) : 17 Pat 653 (DB).

[9] Where injured workman was finally informed that he could not be re employed and even after this he continued correspondence and made claim for compensation two years after final order: *Held* that delay till final order be excused but not subsequent delay. (Vol 23) 1936 Pat 307 (308) (DB).

[10] Where injured workman did not realise until particular date that he had permanently lost sight of one eye, it is sufficient cause for his not giving notice earlier. (Vol 20) 1933 Nag 272 (273).

[11] Rejection of claim by Commissioner, after condoning delay in filing same, on ground of its being time-barred without giving any decision on the merits is illegal. (Vol 29) 1942 Mad 116 (118).

[12] Fact that after his discharge from hospital, the the man had been ill and was complete wreck, is sufficient cause. (Vol 25) 1938 Mad 485 (486):I L R (1938) Mad 636 (DB).

[13] Under the proviso to S 10 (1) it is open to the Commissioner to admit and decide a claim if he was satisfied that there was sufficient reason for not instituting it within six months from the death. Once the claim is instituted it lies open to the Commissioner whether on his own motion or on the suggestion of the Financial Commissioner or any one else to satisfy himself whether or not the applicant came within the proviso. (Vol 17) 1930 Rang 1 (3) : 7 Rang 660 (SB).

[14] Where injured workman considers his injury to be trivial and one for which he is not entitled to compensation, sufficient cause is made out for failurs to give notice under S. 10. (Vol 20) 1933 Bom 197 (199) (DB).

[15] Question whether facts found by arbitrator under Act constitute reasonable cause for failure of workman to give notice of accident or claim compensation is one of law. (Vol 20) 1933 Bom 197 (199) (DB).

[16] Period of six months to which S. 10 refers relates to claim for compensation made by workman against his employer and has no reference to period within which an application for settlement of the matter by Commissioner can be made. (Vol 21) 1934 Cal 460 (461) : 61 Cal 508 (SB).

4. "As soon as practicable". — [1] A workman employed as a cooly in a factory met with an accident on 23rd February 1927. On 28th March 1927, while he was admitted in a hospital as an indoor patient, he sent a notice addressed to the solicitors of the proprietors of the factory. This letter was received by them on 21st April 1927. *Held*, that having regard to the ignorance of, and serious nature of the injury received by the workman, the notice of the accident was given as soon as practicable after the happening thereof within the meaning of S. 10(1).(Vol 16) 1929 Bom 400 (404) (DB).

[a][**10B.** *(1)* Where, by any law for the time being in force, notice is required to be given to any authority, by or on behalf of an employer, of any accident occurring on his premises which results in death, the person required to give the notice shall, within seven days of the death, send a report to the Commissioner giving the circumstances attending the death:

Reports of fatal accidents.

Provided that where the [b][Provincial Government] has so prescribed the person required to give the notice may instead of sending such report to the Commissioner send it to the authority to whom he is required to give the notice.

(2) The [b][Provincial Government] may, by notification in the [c][Official Gazette], extend the provisions of sub-section *(1)* to any class of premises other than those coming within the scope of that sub-section, and may, by such notification, specify the persons who shall send the report to the Commissioner.]

[a] *Inserted* by the Workmen's Compensation (Amendment) Act 1933, (XV [15] of 1933) S. 8. [b] *Substituted* by A. O. for "Local Government". [c] *Substituted* by A. O. for "local official Gazette".

11. *(1)* Where a workman has given notice of an accident, he shall, if the employer, before the expiry of three days from the time at which service of the notice has been effected, offers to have him examined free of charge by a qualified medical practitioner, submit himself for such examination, and any workman who is in receipt of a half-monthly payment under this Act shall, if so required, submit himself for such examination from time to time:

Medical examination.

Provided that a workman shall not be required to submit himself for examination by a medical practitioner otherwise than in accordance with rules made under this Act, or at more frequent intervals than may be prescribed.

(2) If a workman, on being required to do so by the employer under sub-section *(1)* or by the Commissioner at any time, refuses to submit himself for examination by a qualified medical practitioner or in any way obstructs the same, his right to compensation shall be suspended during the continuance of such refusal or obstruction unless, in the case of refusal, he was prevented by any sufficient cause from so submitting himself.

(3) If a workman, before the expiry of the period within which he is liable under sub-section *(1)* to be required to submit himself for medical examination, voluntarily leaves without having been so examined the vicinity of the place in which he was employed, his right to compensation shall be suspended until he returns and offers himself for such examination.

(4) Where a workman, whose right to compensation has been suspended under sub-section *(2)* or sub-section *(3)*, dies without having submitted himself for medical examination as required by either of those sub-sections, the Commissioner may, if he thinks fit, direct the payment of compensation to the dependants of the deceased workman.

(5) Where under sub-section *(2)* or sub section *(3)* a right to compensation is suspended, no compensation shall be payable in respect of the period of suspension, and, if the period of suspension commences before the expiry of the waiting period referred to in clause *D* of sub-section *(1)* of section 4, the waiting period shall be increased by the period during which the suspension continues.

(6) Where an injured workman has refused to be attended by a qualified medical practitioner whose services have been offered to him by the employer free of charge or having accepted such offer has deliberately disregarded the instructions of such medical practitioner, then, [a][if it is proved that the workman has not thereafter been regularly attended by a qualified medical practitioner or having been so attended has deliberately failed to follow his instructions and that such refusal, disregard or failure was unreasonable] in the circumstances of the case and that the injury has been aggravated thereby, the injury and resulting disablement shall be deemed to be of the same nature and duration as they might reasonably have been expected to be if the workman had been regularly attended by a qualified medical practitioner [b][whose instructions he had followed] and compensation, if any, shall be payable accordingly.

[a] *Substituted* by the Workmen's Compensation (Amendment) Act, 1938 (9 [IX] of 1938) for "if it is thereafter proved that the workman has not been regularly attended by a qualified medical practitioner and that such refusal, failure or disregard was unreasonable." [b] *Inserted, ibid.*

Section 11 — Note 1

[1] **The phrase "that the workman has not been regularly attended by a qualified medical practitioner"** should be construed as if it read: "by another qualified medical practitioner." (Vol 15) 1928 Cal 481 (483) : 55 Cal 1259 (DB).

12. *(1)* Where any person (hereinafter in this section referred to as the principal) in the course of or for the purposes of his trade or business contracts with any other person (hereinafter in this section referred to as the contractor) for the execution by or under the contractor of the whole or any part of any work which is ordinarily part of the trade or business of the principal, the principal shall be liable to pay to any workman employed in the execution of the work any compensation which he would have been liable to pay if that workman had been immediately employed by him; and where compensation is claimed from the principal, this Act shall apply as if references to the principal were substituted for references to the employer except that the amount of compensation shall be calculated with reference to the wages of the workman under the employer by whom he is immediately employed.

Contracting.

(2) Where the principal is liable to pay compensation under this section, he shall be entitled to be indemnified by the contractor, [a][or any other person from whom the workman could have recovered compensation and where a contractor who is himself a principal is liable to pay compensation or to indemnify a principal under this section he shall be entitled to be indemnified by any person standing to him in the relation of a contractor from whom the workman could have recovered compensation] and all questions as to the right to and the amount of any such indemnity shall, in default of agreement, be settled by the Commissioner.

(3) Nothing in this section shall be construed as preventing a workman from recovering compensation from the contractor instead of the principal.

(4) This section shall not apply in any case where the accident occurred elsewhere than on, in or about the premises on which the principal has undertaken or usually undertakes, as the case may be, to execute the work or which are otherwise under his control or management.

[a] *Inserted* by the Workmen's Compensation (Amendment) Act, 1933 (15 [XV] of 1933), S. 9.

SECTION 12 — SYNOPSIS

1. Scope.
2. Contractor.
3. Liability of contractor to indemnify.
4. "Part of ordinary business."
5. Suits.
6. Nature and effect of order under cl. (1).
7. Liability of principal.

1. Scope. — [1] Selling agent agreeing to take delivery of goods from manufacturer's godowns — Employment of contractor for such work — Workmen employed by contractor in such work—Accident resulting in death — Liability of selling agent for compensation. (Vol 29) 1942 Bom 18 (20, 21) : 43 Cri L Jour 315 : I L R (1942) Bom 139 (FB).

[2] General notion of S. 12 of Act is that, if it is ordinarily part of business of person to execute certain work, then ordinarily he will do that work by his own servants; he is not to escape liability for accident that takes place merely by interposing contractor. (Vol 20) 1933 Cal 63 (64) : 60 Cal 24 (DB).

2. Contractor.—[1] A tindal who was a monthly paid servant and who also received extra wages per day for supervising a gang of coolies working for his employers, is not a contractor. (Vol 17) 1930 Sind 49 (50) : 24 Sind L R 199 (DB).

[2] The contractor referred to in sub-section (2) of the section is the contractor who contracts directly with the principal as defined in cl. (1). (Vol 15) 1928 Cal 399 (400) (DB).

3. Liability of contractor to indemnify.— [1] Indemnity is restricted under the Act between principal and original contractor and not between contractor and sub-contractor. If there is any further sub-letting of the contract indemnity must be sought by recourse to the civil Court. (Vol 20) 1933 Bom 338 (340, 341) : 57 Bom 699.

[2] Where *A* undertakes work which is ordinarily part of his trade or business, but, he contracts with *B* for the execution of part of his work, and *B* similarly contracts with *C* for the whole or part of the work he himself has contracted for, and one of *C's* workmen is killed by accident, the principal for the purpose of S. 12 is *A*, and he is entitled to be indemnified by *B*, and whether *B* is entitled in turn to be indemnified by *C* the Act does not provide for such a contingency. (Vol 15) 1928 Cal 399 (400) (DB).

[3] Where the employers who are cooly contractors engage a sub-contractor for the execution of work which is ordinarily part of their own trade or business, the employers are liable under Act and not sub-contractor. (Vol 20) 1933 Rang 208 (209) (DB).

[4] Right of principal to be indemnified by contractor disputed — It is to be settled by Commissioner. (Vol 33) 1946 Mad 113 (115) (DB).

4. "Part of ordinary business." — [1] Word "ordinarily" applies just as much to a Government department as it does to any other principal. (Vol 16) 1929 Bom 179 (181, 182) : 53 Bom 203 (DB).

[2] Railway granting contract to another company to erect powers to conduct electric line for supplying power to engines — Workmen serving the contractor company and dying due to knocking by train — Construction of works was not ordinary work of railway and railway was not liable. (Vol 16) 1929 Bom 179 (180) : 53 Bom 203 (DB).

[3] The business of keeping the line in order is normal and essential feature of running Railway. A coolie working under a contractor employed by railway Company in construction of a bridge sustained fatal injury while attending to work done to bridge. Work was for the line. *Held*, that workman sustained the injury in the course of work which was ordinarily part of the principal business of company and the company was liable to pay compensation. (Vol 22) 1935 Mad 721 (722) : 58 Mad 804 (DB).

[4] Selling agent employing contractor for transport —Workman employed by contractor—Workman accidentally killed. *Held*, selling agents liable as work was essential part of their business and selling agents could not escape liability by employing contractor. (Vol 29) 1942 Bom 18 (20, 21) : 43 Cri L Jour 315 : ILR (1942) Bom 139 (FB).

5. Suits. — [1] The contractor referred to in subs. (2) is the contractor who contracts directly with the principal as defined in cl. (1). If there is any further

13. Where a workman has recovered compensation in respect of any injury caused under circumstances creating a legal liability of some person other than the person by whom the compensation was paid to pay damages in respect thereof, the person by whom the compensation was paid and any person who has been called on to pay an indemnity under section 12 shall be entitled to be indemnified by the person so liable to pay damages as aforesaid.

Remedies of employer against stranger.

14. *(1)* Where any employer has entered into a contract with any insurers in respect of any liability under this Act to any workman, then in the event of the employer becoming insolvent or making a composition or scheme of arrangement with his creditors or, if the employer is a company, in the event of the company having commenced to be wound up, the rights of the employer against the insurers as respects that liability shall, notwithstanding anything in any law for the time being in force relating to insolvency or the winding up of companies, be transferred to and vest in the workman, and upon any such transfer the insurers shall have the same rights and remedies and be subject to the same liabilities as if they were the employer, so, however, that the insurers shall not be under any greater liability to the workman than they would have been under the employer.

Insolvency of employer.

(2) If the liability of the insurers to the workman is less than the liability of the employer to the workman, the workman may prove for the balance in the insolvency proceedings or liquidation.

(3) Where in any case such as is referred to in sub-section *(1)* the contract of the employer with the insurers is void or voidable by reason of non-compliance on the part of the employer with any terms or conditions of the contract (other than a stipulation for the payment of premia,) the provisions of that sub-section shall apply as if the contract were not void or voidable, and the insurers shall be entitled to prove in the insolvency proceedings or liquidation for the amount paid to the workman:

Provided that the provisions of this sub-section shall not apply in any case in which the workman fails to give notice to the insures of the happening of the accident and of any resulting disablement as soon as practicable after he becomes aware of the institution of the insolvency or liquidation proceedings.

(4) There shall be deemed to be included among the debts which under section 49 of the Presidency-towns Insolvency Act, 1909, or under section 61 of the Provincial Insolvency Act, 1920, or under section 230 of the Indian Companies Act, 1913, are in the distribution of the property of an insolvent or in the distribution of the assets of a company being wound up to be paid in priority to all other debts, the amount due in respect of any compensation the liability wherefor

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Section 12 — Note 5 *(contd.)*

subletting of the contract, indemnification cannot be obtained under the Act and must be sought by recourse to the civil Courts. (Vol 15) 1928 Cal 399 (400) (DB).

[2] Order under S. 12 (1) making principal liable for compensation payable to defendants of deceased workman employed by contractor — Contractor not party to order—Principal deducting as indemnity amount of compensation for work done and not getting its right to indemnify decided by commissioner — Suit by contractor to recover amount deducted. (Vol 33) 1946 Mad 113 (115).

6. Nature and effect of order under cl. (1). — [1] An order awarding compensation was distinct and different from an order allowing or disallowing a claim for indemnity for the amount of compensation paid. An order holding the principal liable to pay compensation under S. 12 (1) did not give the principal an absolute right to claim indemnity from the contractor under S. 12 (2). As the contractor was not a party to the order under S. 12 (1) he was not bound by it and therefore it could not make liable to indemnify the principal. (Vol 33) 1946 Mad 113 (114, 115).

7. Liability of principal.—[1] Selling agent employing contractor for transport — Workman employed by contractor—Workman accidentally killed — Selling agent liable as the work was ordinarily part of their business and selling agents could not escape liability by employing contractor. (Vol 29) 1942 Bom 18 (20, 21); ILR (1942) Bom 139 : 43 Cri L Jour 315 (DB).

[2] To make principal liable under S. 12 when he employs contractor, it must be established that contractor was entitled to expect workman to do work at his orders and was entitled to dismiss them. Where select persons could come when they choose and do work, principal is not liable. (Vol 26) 1939 Rang 428 (429, 430) (DB).

[3] Railway Contractor's employee died — *Held* the company was liable as if it was the employer. Since Contractor is to indemnify the Railway Company under sub-s. (2) he is entitled to notice of the claim and he can certainly dispute the claim. (Vol 22) 1935 Cal 683 (683) : 63 Cal 547.

[4] Workman employed through muccadams—Control of work retained by contractor—Death of workman due to defective materials supplied by contractor—Suit by contractor to recover compensation ordered against him under the act from muccadams — Contractor held not entitled to recover the same. (Vol 20) 1933 Bom 338 (340, 341) : 57 Bom 699.

Section 13 — Note 1

[1] Indemnity is restricted between principal and original contractor and does not apply between contractor and sub-contractor. (Vol 20) 1933 Bom 338 (340) : 57 Bom 699.

accrued before the date of the order of adjudication of the insolvent or the date of the commencement of the winding up, as the case may be, and those Acts shall have effect accordingly.

(5) Where the compensation is a half-monthly payment, the amount due in respect thereof shall, for the purposes of this section, be taken to be the amount of the lump sum for which the half-monthly payment could, if redeemable, be redeemed if application were made for that purpose under section 7, and a certificate of the Commissioner as to the amount of such sum shall be conclusive proof thereof.

(6) The provisions of sub-section *(4)* shall apply in the case of any amount for which an insurer is entitled to prove under sub-section *(3)*, but otherwise those provisions shall not apply where the insolvent or the company being wound up has entered into such a contract with insurers as is referred to in sub-section *(1)*.

(7) This section shall not apply where a company is wound up voluntarily merely for the purposes of reconstruction or of amalgamation with another company.

Special provisions relating to masters and seamen.

15. This Act shall apply in the case of workmen who are masters of [a][*] ships or seamen subject to the following modifications, namely :—

(1) The notice of the accident and the claim for compensation may, except where the person injured is the master of the ship, be served on the master of the ship as if he were the employer, but where the accident happened and the disablement commenced on board the ship, it shall not be necessary for any seaman to give any notice of the accident.

(2) In the case of the death of a master or seaman, the claim for compensation shall be made within six months after the news of the death has been received by the claimant or where the ship has been or is deemed to have been lost with all hands, within eighteen months of the date on which the ship was, or is deemed to have been, so lost.

(3) Where an injured master or seaman is discharged or left behind in any part of His Majesty's dominions or in a foreign country, any depositions taken by any Judge or Magistrate in that part or by any Consular Officer in the foreign country and transmitted by the person by whom they are taken to the [b][Central Government] or any [c][Provincial Government] shall, in any proceedings for enforcing the claim, be admissible in evidence—

(a) if the deposition is authenticated by the signature of the Judge, Magistrate or Consular Officer before whom it is made ;

(b) if the defendant or the person accused as the case may be, had an opportunity by himself or his agent to cross-examine the witness ; and

(c) if the deposition was made in the course of a criminal proceeding, on proof that the deposition was made in the presence of the person accused ;

and it shall not be necessary in any case to prove the signature or official character of the person appearing to have signed any such deposition and a certificate by such person that the defendant or the person accused had an opportunity of cross examining the witness and that the deposition if made in a criminal proceeding was made in the presence of the person accused shall, unless the contrary is proved, be sufficient evidence that he had that opportunity and that it was so made.

[d][* * * * *]

[e][*(4)*] No [f][half monthly payment] shall be payable in respect of the period during which the owner of the ship is, under any law in force for the time being in British India relating to merchant shipping, liable to defray the expenses of maintenance of the injured master or seaman.

[g][*(5)* No compensation shall be payable under this Act in respect of any injury in respect of which provision is made for payment of a gratuity allowance or pension under the War Pensions and Detention Allowances (Mercantile Marine, etc) Scheme, 1939, or the War Pensions and Detention Allowances (Indian Seamen, etc,) Scheme, 1941, made under the Pensions (Navy, Army, Air Force and Mercantile Marine) Act, 1939, or under the War Pensions and Detention Allowances (Indian Seamen) Scheme, 1942, made by the Central Government.

(6) Failure to give a notice or make a claim or commence proceedings within the time required by this Act shall not be a bar to the maintenance of proceedings under this Act in respect of any personal injury, if—

(a) an application has been made for payment in respect of that injury under any of the schemes referred to in the preceding clause, and

(b) the Provincial Government certifies that the said application was made in the reasonable belief that the injury was one in respect of which the scheme under which

the application was made makes provision for payments, and that the application was rejected or that payments made in pursuance of the application were discontinued on the ground that the injury was not such an injury, and

(c) the proceedings under this Act are commenced within one month from the date on which the said certificate of the Provincial Government was furnished to the person commencing the proceedings.]

[a] The word "registered" was *repealed* by the Workmen's Compensation (Amendment) Act, 1933 (15 [XV] of 1933), S. 10. [b] *Substituted* by A. O. for "Governor-General in Council". [c] *Substituted* by A. O. for "Local Government."

[d] Clause (4) was *omitted* by the Workmen's Compensation (Amendment) Act, 1938 (9 [IX] of 1938), S. 7, [5-4-1938]. [e] *Substituted, ibid*, for "(5)". [f] *Substituted* by the Repealing and Amending Act, 1924 (7 [VII] of 1924), S. 2 and Sch. I for "monthly payment." [g] *Substituted, ibid*, 1942 (1 [I] of 1942), S. 2, for Cl. (5) which was *inserted* by Act 42 of 1939, S. 2 (both amendments to be effective from 3-9-1939).

Returns as to compensation.

16. The [a][Provincial Government] may, by notification in the [b][Official Gazette], direct that every person employing workmen, or that any specified class of such persons, shall send at such time and in such form and to such authority, as may be specified in the notification, a correct return specifying the number of injuries in respect of which compensation has been paid by the employer during the previous year and the amount of such compensation, together with such other particulars, as to the compensation as the [a][Provincial Government] may direct.

[a] *Substituted* by A. O. for "Governor-General in Council." [b] *Substituted* by A. O. for "Gazette of India."

Contracting out.

17. Any contract or agreement whether made before or after the commencement of this Act, whereby a workman relinquishes any right of compensation from the employer for personal injury arising out of or in the course of the employment, shall be null and void in so far as it purports to remove or reduce the liability of any person to pay compensation under this Act.

Proof of age.

18. Where any question arises as to the age of a person injured by accident arising out of and in the course of his employment in a factory, [a][a valid certificate granted in respect of such person under section 12 or section 52 of the Factories Act, 1934,] before the occurrence of the injury shall be conclusive proof of the age of such person.

[a] *Substituted* by the Workmen's Compensation (Amendment) Act, 1938 (9 [IX] of 1938), S. 8 for "a certificate granted in respect of such person under section 7 or section 8 of the Indian Factories Act, 1911." [5-4 1938]

Penalties.

[a][**18A.** *(1)* Whoever—

(a) fails to maintain a notice-book which he is required to maintain under sub-section *(3)* of section 10, or

(b) fails to send to the Commissioner a statement which he is required to send under sub-section *(1)* of section 10A, or

(c) fails to send a report which he is required to send under section 10B, or

(d) fails to make a return which he is required to make under section 16,

shall be punishable with fine which may extend to one hundred rupees.

(2) No prosecution under this section shall be instituted except by or with the previous sanction of a Commissioner, and no Court shall take cognizance of any offence under this section, unless complaint thereof is made within six months of the date on which the offence is alleged to have been committed.]

[a] Section 18A was *inserted* by the Workmen's Compensation (Amendment) Act, 1933 (15 [XV] of 1933), Section 11.

CHAPTER III.
COMMISSIONERS.

Reference to Commissioners.

19. *(1)* If any question arises in any proceedings under this Act as to the liability of any person to pay compensation (including any question as to whether a person injured is or is not a workman) or as to the amount or duration of compensation (including any question as to the nature or extent of disablement), the question shall, in default of agreement, be settled by [a][a Commissioner.]

Section 19 — Note 1

[1] The scheme of the Workmen's Compensation Act clearly shows that the matters which are set out in S. 19 of the Act are to be decided by the commissioner judicially and while deciding them he is performing judicial functions. He derives his authority from a statute passed by a competent authority and in exercising his jurisdiction he has the sanction of the law behind him. The commissioner acts as a Court and is a Court, and not a *persona designata*. (Vol 28) 1941 Pat 65 (67 to 70) : 20 Pat 373 (FB).

[2] Section 8 (1) provides that compensation shall be deposited with the commissioner—The employer may dispute his liability—In that event under S. 19 (1) the

(2) No Civil Court shall have jurisdiction to settle, decide or deal with any question which is by or under this Act required to be settled, decided or dealt with by a Commissioner or to enforce any liability incurred under this Act.

[a] *Substituted* by the Workmen's Compensation (Amendment) Act, 1933 (15 (XV) of 1933), S. 12, for "the Commissioner."

Appointment of Commissioners.

20. *(1)* The [a][Provincial Government] may, by notification in the [b][Official Gazette], appoint any person to be a Commissioner for Workmen's Compensation for such local area as may be specified in the notification.

[c][*(2)* Where more than one Commissioner has been appointed for any local area, the [a][Provincial Government] may, by general or special order, regulate the distribution of business between them.]

[c][*(3)*] Any Commissioner may, for the purpose of deciding any matter referred to him for decision under this Act, choose one or more persons possessing special knowledge of any matter relevant to the matter under inquiry to assist him in holding the inquiry.

[c][*(4)*] Every Commissioner shall be deemed to be a public servant within the meaning of the Indian Penal Code.

[a] *Substituted* by A. O. for "Local Government". [b] *Substituted* by A. O. for "local official Gazette". [c] A new sub-section *(2)* was *inserted*, and the old sub-sections *(2)* and *(3)* were re-numbered *(3)* and *(4)* by Act 15 of 1933, S. 13.

Venue of proceedings and transfer.

21. *(1)* Where any matter is under this Act to be done by or before a Commissioner, the same shall, subject to the provisions of this Act and to any rules made hereunder, be done by or before [a][a Commissioner] for the local area in which the accident took place which resulted in the injury :

Provided that, where the workman is the master of a [b][*] ship or a seaman, any such matter may be done by or before [a][a Commissioner] for the local area in which the owner or agent of the ship resides or carries on business.

(2) If a Commissioner is satisfied [c][that any matter arising out of any proceedings pending before him] can be more conveniently dealt with by any other Commissioner, whether in the same Province or not, he may, subject to rules made under this Act, order such matter to be transferred to such other Commissioner either for report or for disposal, and, if he does so, shall forthwith transmit to such other Commissioner all documents relevant for the decision of such matter and, where the matter is transferred for disposal, shall also transmit in the prescribed manner any money remaining in his hands or invested by him for the benefit of any party to the proceedings :

[d][Provided that the Commissioner shall not where any party to the proceedings has appeared before him, make any order of transfer relating to the distribution among dependants of a lump sum without giving such party an opportunity of being heard :"]

Provided [d][further] that no matter other than a matter relating to the actual payment to a workman or the distribution among dependants of a lump sum shall be transferred for disposal,

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Section 19 — Note 1 *(contd.)*

question of liability has to be decided by the Commissioner. Till it is decided against him, there is no obligation to pay the amount. The employer who has admitted liability is in no better position than who has not. Even if by a mistake of fact the Commissioner refunds the deposit, the Commissioner can order redeposit. (Vol 17) 1930 Rang 1 (3, 4) : 7 Rang 660 (SB).

[3] In writing an order Commissioner should state his findings as to what that applicant's employment or duty was and state his finding as to how the accident happened and whether it arose out of employments. (Vol 20) 1933 Cal 220 (221) : 60 Cal 421 (DB).

[4] Commissioner has no power to set aside an order made by him, in review. But where order on application is incomplete Commissioner can make it complete by further order. (Vol 22) 1935 All 408 (409).

[5] Commissioner has no power to set aside previous order for compensation made by him under mistake. (Vol 17) 1930 Lah 657 (658) (DB).

[6] Compensation or damages on account of arrears of pay cannot be awarded by Commissioner. (Vol 26) 1939 All 29 (31) : ILR (1939) All 1.

[7] Question referred to Commissioner and claim made for compensation — Notice issued to employer— Commissioner cannot reject the application merely on the strength of medical report which is inadmissible unless Surgeon himself proves it. (Vol 20) 1933 Pat 532 (532, 533) (DB).

[8] Money allotted by Commissioner — Suit for its redistribution — Consent decree as far as the Commissioner of Workmen's Compensation is concerned is of no effect and cannot be executed. (Vol 27) 1940 Cal 580 (581) (DB).

[9] Compensation paid by principal under S. 12 (1)— Dispute as to right of indemnity from contractor—No decision of Commissioner—Suit by contractor to recover amount deducted by principal as indemnity is not barred. (Vol 33) 1946 Mad 113 (114, 115) (DB).

Section 20 — Note 1

[1] Where Commissioner adjudicates claim made under the Act, the Commissioner is "Court subordinate to the High Court" within S. 115, Civil P. C., or S. 4, Punjab Courts Act. (Vol 25) 1938 Lah 855(855,856)(DB).

[2] The law in India is somewhat different from that of England as regards using the services of expert for the determination of workmen's compensation cases. So far as it is different it gives greater latitude to the Commissioner. (Vol 24) 1937 Cal 697 (701) : ILR (1937) 2 Cal 714 (DB).

under this sub section to a Commissioner in the same Province save with the previous sanction of the [e][Provincial Government] or to a Commissioner in another Province save with the previous sanction of [f][the Provincial Government of that Province], unless all the parties to the proceedings agree to the transfer.

(3) The Commissioner to whom any matter is so transferred shall, subject to rules made under this Act, inquire thereinto and, if the matter was transferred for report, return his report thereon or, if the matter was transferred for disposal, continue the proceedings as if they had originally commenced before him.

(4) On receipt of a report from a Commissioner to whom any matter has been transferred for report under sub-section *(2)*, the Commissioner by whom it was referred shall decide the matter referred in conformity with such report.

[g][*(5)* The [e][Provincial Government] may transfer any matter from any Commissioner appointed by it to any other Commissioner appointed by it.]

[a] *Substituted* by the Workmen's Compensation (Amendment) Act, 1933 (15 [XV] of 1933), S. 14, for "the Commissioner." [b] The word " registered " was *repealed*, *ibid*. [c] *Substituted* by the Workmen's Compensation (Amendment) Act, 1938 (9 [IX] of 1938), S 9, for "by any party to any proceedings under this Act pending before him that such matter." [5-4-1938.] [d] *Inserted*, *ibid*. [e] *Substituted* by A. O. for "Local Government". [f] *Substituted* by A. O. for "the Governor-General in Council". [g] *Inserted* by Act 15 of 1933, Section 14

Form of application.

22. *(1)* No application for the settlement of any matter by a Commissioner, [a][other than an application by a dependant or dependants for compensation] shall be made unless and until some question has arisen between the parties in connection therewith which they have been unable to settle by agreement.

(2) [b][An application to a Commissioner] may be made in such form and shall be accompanied by such fee, if any, as may be prescribed, and shall contain, in addition to any particulars which may be prescribed, the following particulars, namely :—

(a) a concise statement of the circumstances in which the application is made and the relief or order which the applicant claims;

(b) in the case of a claim for compensation against an employer, the date of service of notice of the accident on the employer and, if such notice has not been served or has not been served in due time, the reason for such omission;

(c) the names and addresses of the parties; and

(d) [a][except in the case of an application by dependants for compensation] a concise statement of the matters on which agreement has and [c][of] those on which agreement has not been come to.

(3) If the applicant is illiterate or for any other reason is unable to furnish the required information in writing, the application shall, if the applicant so desires, be prepared under the direction of the Commissioner.

[a] *Inserted* by the Workmen's Compensation (Amendment) Act, 1933 (XV [15] of 1933), S. 15. [b] *Substituted*, *ibid*, for "where any such question has arisen, the application". [c] *Substituted* by the Repealing and Amending Act, 1925 (XXXVII [37] of 1925), S. 2 and Sch. I, for "on".

Power of Commissioner to require further deposit in cases of fatal accident.

[a][**22A.** *(1)* Where any sum has been deposited by an employer as compensation payable in respect of a workman whose injury has resulted in death, and in the opinion of the Commissioner such sum is insufficient, the Commissioner may, by notice in writing stating his reasons, call upon the employer to show cause why he should not make a further deposit within such time as may be stated in the notice.

(2) If the employer fails to show cause to the satisfaction of the Commissioner, the Commissioner may make an award determining the total amount payable, and requiring the employer to deposit the deficiency.]

[a] *Inserted* by the Workmen's Compensation (Amendment) Act, 1933 (XV [15] of 1933), S. 16.

Powers and procedure of Commissioners.

23. The Commissioner shall have all the powers of a Civil Court under the Code of Civil Procedure, 1908, for the purpose of taking evidence on oath (which such Commissioner is hereby empowered to impose) and of enforcing the

Section 22 — Note 1

[1] "Claim" referred to in Ss. 10 (1) and 22 means formal claim made before Commissioner and not claim made on employers. (Vol 29) 1942 Mad 116 (117).

[2] No particulars under S. 22, nor certificate under R. 19—Defect not fatal—Particulars and certificate can be obtained after claim. (Vol 29) 1942 Mad 116 (118).

Section 23 — Note 1

[1] The mere fact that it has been expressly stated that the Commissioner will have the power of a Court cannot by itself justify the inference that he is not a Court (Vol 28) 1941 Pat 65 (70) : 20 Pat 373 (FB). (The Commissioner is a Court—Powers discussed.)

attendance of witnesses and compelling the production of documents and material objects, [a][and the Commissioner shall be deemed to be a Civil Court for all the purposes of section 195 and of Chapter XXXV of the Code of Criminal Procedure, 1898.]

[a] *Added* by the Workmen's Compensation (Amendment) Act, 1929 (V [5] of 1929), S. 5.

Appearance of parties.

24. Any appearance, application or act required to be made or done by any person before or to a Commissioner (other than an appearance of a party which is required for the purpose of his examination as a witness) may be made or done on behalf of such person by a legal practitioner or [a][by an official of an Insurance Company or registered Trade Union authorized in writing by such person or, with the permission of the Commissioner, by any other person so authorized.]

[a] *Substituted* by the Workmen's Compensation (Amendment) Act, 1938 (IX [9] of 1938), S. 10, for "other person authorised in writing by such person."

PROVINCIAL AMENDMENTS.

Sections 24A and 24B.

Bengal.

After section 24, the following sections shall be *inserted* namely:—

Reference of disputed medical questions to a medical referee.

"24A. *(1)* If any question arises in any proceedings under this Act pending before the Commissioner as to—

(a) the nature and extent of the permanent disablement of a workman, or

(b) the duration of his temporary disablement, or

(c) whether the incapacity of a workman is due to personal injury by accident, or

(d) whether a workman has contracted any occupational disease specified in Schedule III,

the question shall, in default of agreement, on the joint application of both parties or on the application of either party in the prescribed manner, and on payment in the prescribed manner by the parties, or the party making the application, as the case may be, of the prescribed fees and expenses, be referred by the Commissioner to a medical referee appointed by him in his discretion from amongst the medical practitioners included in the list prepared under section 24B :

Provided that where an application is made by only one of the parties, if the Commissioner is of the opinion that the question is one which ought not on account of the exceptional difficulty of the case or for any other sufficient reason be referred to a medical referee, he may after recording his reasons in writing reject the application :

Provided further that if the parties themselves jointly select any medical practitioner included in the said list for appointment as the medical referee, the Commissioner shall, on payment of the prescribed fees and expenses in the prescribed manner, appoint that medical practitioner :

Provided further that a medical practitioner whose services have been used for the medical treatment of an injury by accident to a workman, or of an occupational disease specified in Schedule III contracted by such workman, by or on behalf of such workman or his employer or by or on behalf of any insurers interested in any proceeding under this Act arising out of such injury or disease, shall not act as a medical referee in any proceedings under this Act in respect of such injury or disease.

(2) The medical referee to whom such a reference is made under sub-section (1) shall, in accordance with the prescribed rules, require the workman to submit to a medical examination by him or under his personal direction and shall personally or with such medical assistance as he may deem necessary examine the workman medically and send to the Commissioner who has made the reference a report in respect of the question specifically mentioned in the order of reference.

(3) If a workman refuses to submit himself for medical examination by or under the personal direction of the medical referee to whom a reference has been made under this section, or if a workman in any way obstructs

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Section 23 — Note 1 *(contd)*

[2] It is clear from Ss. 23 to 30A that the Commissioner acts judicially and for several purposes he has all the powers of a Civil Court. The Commissioner is a Court subordinate to the High Court. A revision is competent under S. 115, Civil P. C. (Vol 25) 1938 Lah 855 (855) (DB).

[3] Commissioner does not possess any inherent power under S. 151, Civil P. C. (Vol 17) 1930 Lah 657 (658) (DB).

[4] It is not desirable thing for the Commissioner to order parties, in local inspection to re-enact scene just before accident, to decide whether the machine was in motion or not at time of accident. (Vol 16) 1929 Cal 774 (774) (DB),

[5] Rules framed under Act do not preclude Commissioner from framing issues which legitimately arise in the case even if written statement does not specifically raise them. (Vol 15) 1928 Pat 508 (511) : 8 Pat 24 (DB).

[6] A Commissioner appointed under the Act has no power to issue a commission for the examination of witnesses. (Vol 17) 1930 Sind 221 (223) (DB) ✠(Vol 26) 1999 Rang 70 (72) : 1938 Rang L R 641 (DB).

[7] A Commissioner has no power to review but if he orders compensation an appeal lies under S. 30 (1) (a). (Vol 22) 1935 All 408 (409).

[8] In proceeding under Act, Commissioner cannot dismiss claim for compensation summarily on the basis of letter written by the Surgeon to the effect that claimant was not entitled to compensation. Surgeon's report is not admissible in such cases unless the Surgeon himself comes to prove it. (Vol 20) 1933 Pat 532 (532, 533) (DB).

[9] High Court can interfere with decision of Commissioner in compensation case only when it considers decision to be wrong in law. (Vol 20) 1933 Bom 270 (272).

[10] Failure of Commissioner to consider whether particular person has status of any persons referred to in S. 2 (1) (d)—High Court can interfere in revision. (Vol 29) 1942 Pat 33 (34) : 21 Pat 173.

Section 24 — Note 1

[1] Words "other person" in S. 24 indicate formal appearance on behalf of persons claiming. (Vol 22) 1935 All 408 (410).

the medical examination by or under the personal direction of the medical referee the workman's right to compensation under this Act and his right to continue any proceedings under this Act shall be suspended until such examination has taken place.

(4) In any proceedings under this Act in which evidence is recorded, the report of the medical referee shall as between the parties to the proceedings be conclusive proof of the facts related therein within the meaning of section 4 of the Indian Evidence Act, 1872:

Provided that such report shall not so be regarded as conclusive proof of the facts related therein if in the particular proceedings the Commissioner, either of his own motion or on application being made to him by either party, for reasons to be recorded by him in writing, deems it expedient in the interests of justice to allow the parties to adduce further evidence on such facts.

List of qualified medical practitioners for appointment as medical referees.

"24B. The Provincial Government shall prepare a list of qualified medical practitioners who may be appointed as medical referees under section 24A and shall publish the said list in the Official Gazette."

—Beng. Act VI of 1942, S. 4. [19-11-1942.]

25. The Commissioner shall make a brief memorandum of the substance of the evidence of every witness as the examination of the witness proceeds, and such memorandum shall be written and signed by the Commissioner with his own hand and shall form part of the record:

Method of recording evidence.

Provided that, if the Commissioner is prevented from making such memorandum, he shall record the reason of his inability to do so and shall cause such memorandum to be made in writing from his dictation and shall sign the same, and such memorandum shall form part of the record:

Provided further that the evidence of any medical witness shall be taken down as nearly as may be word for word.

26. All costs, incidental to any proceedings before a Commissioner, shall, subject to rules made under this Act, be in the discretion of the Commissioner.

Costs.

27. A Commissioner may, if he thinks fit, submit any question of law for the decision of the High Court and, if he does so, shall decide the question in conformity with such decision.

Power to submit cases.

28. *(1)* Where the amount of any lump sum payable as compensation has been settled by agreement, whether by way of redemption of a half-monthly payment or otherwise, or where any compensation has been so settled as being payable [a][to a woman or a person under a legal disability] [b][* * * *] a memorandum thereof shall be sent by the employer to the Commissioner, who shall, on being satisfied as to its genuineness, record the memorandum in a register in the prescribed manner:

Registration of agreements.

Provided that—

(a) no such memorandum shall be recorded before seven days after communication by the Commissioner of notice to the parties concerned;

[c][* * * * * * *]

(c) the Commissioner may at any time rectify the register;

Section 25 — Note 1

[1] Section 25 precludes reception of report from any person as evidence. (Vol 30) 1943 Mad 608 (608, 609): I L R (1944) Mad 301 (DB).

[2] The joint effect of R. 20 of rules framed under the Act in 1924 and S. 25 is that before proceeding with the matter of an application, the Commissioner must first of all, either by himself or officer authorized by Local Government, take evidence from the applicant to ascertain whether there is *prima facie* case. Medical certificates are not of themselves admissible in evidence. They should be proved by calling person giving certificate. (Vol 24) 1937 Cal 697 (699, 700): I L R (1937) 2 Cal 714 (DB).

[3] Duty of Commissioner to hear evidence himself and decide dispute — Power cannot be delegated. (Vol 29) 1942 Pat 453 (454, 455): 21 Pat 218 (DB).

[4] The Commissioner is constituted the tribunal under the Act to hear and determine the cases in the manner provided by the Act, and he is bound to do so and to follow the terms of the Act. If the Commissioner fails to comply with the mandatory provisions of the Act and hears no evidence but only considers a report submitted by his subordinate or statements not taken on oath, there is no hearing of the case in the judicial sense and the order passed in such proceedings cannot be sustained. (Vol 29) 1942 Pat 453 (454, 455): 21 Pat 218 (DB).

[5] A Commissioner for Workmen's Compensation has no power either under the Workmen's Compensation Act or under the rules made under it, to direct a Revenue Divisional Officer or any one to make a local inspection or to make a report after local inspection, The Commissioner may himself make a local inspection, if one has to be made, as provided by Rr. 32 and 33. Section 25 of the Act precludes the reception of a report from any person as evidence in the case. (Vol 30) 1943 Mad 608 (608, 609): I L R (1944) Mad 301.

Section 27 — Note 1

[1] Question whether fatal accident arose out of and in the course of employment is for the commissioner to decide. It is not one which High Court can be called upon to decide or is entitled to decide. (Vol 22) 1935 Rang 173 (174) (SB).

Section 28 — Note 1

[1] Section 28 refers primarily to cases where parties have arrived at agreement prior to hearing before Court. (Vol 16) 1929 Bom 68 (69) (DB).

[2] Commissioner has power in contested proceedings before him to pass any order or decree by consent and appeal from such decree or order does not lie to High Court. (Vol 16) 1929 Bom 68 (69) (DB).

(d) where it appears to the Commissioner that an agreement as to the payment of a lump sum whether by way of redemption of a half-monthly payment or otherwise, or an agreement as to the amount of compensation payable [d][to a woman or a person under a legal disability] [e][* * *] ought not to be registered by reason of the inadequacy of the sum or amount, or by reason of the agreement having been obtained by fraud or undue influence or other improper means, he may refuse to record the memorandum of the agreement [f][and may make such order] including an order as to any sum already paid under the agreement, as he thinks just in the circumstances.

(2) An agreement for the payment of compensation which has been registered under sub-section *(1)* shall be enforceable under this Act notwithstanding anything contained in the Indian Contract Act, 1872, or in any other law for the time being in force.

[a] *Substituted* by the Workmen's Compensation (Amendment) Act, 1929 (V [5] of 1929), S. 6, for "to a person under a legal disability". [b] The words "or to a dependant" were *repealed* by the Repealing and Amending Act, 1924 (7 [VII] of 1924), S. 3 and Sch. II. [c] Clause *(b)* was *repealed* by Act 5 of 1929, S. 6. [d] *Substituted, ibid*, for "to a person under any legal disability." [e] The words "or to any dependant" were *repealed* by the Repealing and Amending Act, 1924 (VII [7] of 1924), S. 3 and Sch. II. [f] *Substituted* by S. 2 and Sch. I, *ibid*, for "or may make such order".

Effect of failure to register agreement.

29. Where a memorandum of any agreement the registration of which is required by section 28, is not sent to the Commissioner as required by that section, the employer shall be liable to pay the full amount of compensation which he is liable to pay under the provisions of this Act, and notwithstanding anything contained in the proviso to sub-section *(1)* of section 4, shall not, unless the Commissioner otherwise directs be entitled to deduct more than half of any amount paid to the workman by way of compensation whether under the agreement or otherwise.

Appeals.

30. *(1)* An appeal shall lie to the High Court from the following orders of a Commissioner, namely:—

(a) an order awarding as compensation a lump sum whether by way of redemption of a half-monthly payment or otherwise or disallowing a claim in full or in part for a lump sum;

(b) an order refusing to allow redemption of a half monthly payment;

(c) an order providing for the distribution of compensation among the dependants of a deceased workman, or disallowing any claim of a person alleging himself to be such dependant;

(d) an order allowing or disallowing any claim for the amount of an indemnity under the provisions of sub-section *(2)* of section 12; or

(e) an order refusing to register a memorandum of agreement or registering the same or providing for the registration of the same subject to conditions :

SECTION 30 — SYNOPSIS

1. Powers of the High Court.
2. Question of law.
3. Findings of fact.
4. When appeal maintainable.
5. Plea.
6. Court-fee.
7. Proviso.

1. Powers of the High Court.—[1] The question whether an employment is of a casual nature is one of evidence. The High Court will interfere with the decision of the Commissioner only if the statement of law by him or its application to the facts is obviously wrong. (Vol 20) 1933 Bom 270 (271, 272) (DB).

[2] In appeal under S. 30 if substantial question of law arises, High Court can consider case as whole on facts as well as law. (Vol 24) 1937 Sind 288 (289) : 32 Sind L R 32 (DB).

[3] The High Court is not entitled to interfere with the findings of fact arrived at by the Commissioner for Workmen's Compensation except on a substantial question of law, and that includes a finding of fact which is not based upon evidence. (Vol 33) 1946 Bom 169 (169) (DB).

[4] Even if an appeal under the Act has been admitted under S. 30 (*a*) on substantial question of law, it is open to High Court to remand case to the Commissioner to pass his order on record of admissible evidence or to form its own opinion on facts. (Vol 24) 1937 Sind 126 (128) : 31 Sind L R 71 (DB).

[5] No authority is conferred on any Government officer to direct the Commissioner to reverse his decision. (Vol 17) 1930 Rang 1 (3) : 7 Rang 660 (SB).

[6] Question whether fatal accident arose out of and in the course of employment is question for Commissioner and it is not one which High Court is called upon or entitled to determine. (Vol 22)1935 Rang 173 (174) (SB).

[7] The question whether the facts found by the Commissioner constitute reasonable cause for failure of the injured workman to give notice of accident within statutory period is a question of law and is open to review by the High Court. (Vol 20) 1933 Bom 197 (199) (D B).

[8] When an order of direction is made by a Commissioner for a stay or for the retaining of the money in Court pending an appeal, an application shall be made by the appellant to the High Court within one month, asking for expedition of the appeal and also for the giving of any directions which the High Court may seem fit to give with regard to the maintenance of the dependants in the meantime. (Vol 33) 1946 Bom 110 (112) : I L R (1945) Bom 871 (D B).

Provided that no appeal shall lie against any order unless a substantial question of law is involved in the appeal and in the case of an order other than an order such as is referred to in clause *(b)*, unless the amount in dispute in the appeal is not less than three hundred rupees :

Provided, further, that no appeal shall lie in any case in which the parties have agreed to abide by the decision of the Commissioner, or in which the order of the Commissioner gives effect to an agreement come to by the parties :

[a][Provided further that no appeal by an employer under clause *(a)* shall lie unless the memorandum of appeal is accompanied by a certificate by the Commissioner to the effect that the appellant has deposited with him the amount payable under the order appealed against.]

(2) The period of limitation for an appeal under this section shall be sixty days.

(3) The provisions of section 5 of the Indian Limitation Act, 1908, shall be applicable to appeals under this section.

[a] *Inserted* by the Workmen's Compensation (Amendment) Act, 1933 (XV [15] of 1933), S. 17.

Section 30 — Note 1 *(contd.)*

[9] The High Court has power to interfere only with such findings of fact as may be necessary for determination of the question of law involved. (Vol 30) 1943 Lah 52 (54) : I L R (1943) Lah 813 (DB).

2. Question of law. — [1] The question whether the facts found by the Commissioner constitute reasonable cause for failure of the injured workman to give notice of accident within statutory period is a question of law and is open to review by the High Court. (Vol 20) 1933 Bom 197 (199) (D B).

[2] Although facts must be found by first tribunal, question whether such facts constitute reasonable cause for delay is matter of law. (Vol 23) 1936 Pat 307 (308) (D B).

[3] Whether there is sufficient cause for extension of limitation to enable application under S. 10 to be heard on merits is substantial question of law. (Vol 27) 1940 Lah 227 (227) ✠ (Vol 18) 1931 Rang 175 (176): 9 Rang 118 (D B).

[4] Where, in appeal under the Act, the question involved is, whether claimant is entitled to compensation for loss of left arm below elbow when evidence shows that he has suffered loss only of index and middle finger—Appeal involves substantial question of law. (Vol 26) 1939 All 29 (31) : I L R (1939) All 1.

[5] Where finding is based upon no evidence, substantial question of law arises. (Vol 16) 1929 Cal 774 (775) (D B).

[6] Where claim has been disallowed in full, claimant is entitled to appeal under S. 30 (1) (a) and appeal involves substantial question of law. (Vol 26) 1939 Nag 106 (107) : I L R (1939) Nag 460.

[7] Whether there was any evidence before Commissioner on which he could properly be satisfied that there was sufficient cause for not giving notice in proper time is question of law. (Vol 28) 1941 Bom 296 (297) (D B).

[8] Whether finding by Commissioner that there was no evidence on which he could base finding that accident occurred out of employment, is right is question of law. (Vol 29) 1942 Bom 175 (176) : I L R (1942) Bom 225 (D B).

[9] The quantum of evidence necessary to discharge the onus of proof is not a substantial question of law. (Vol 33) 1946 Bom 110 (112) : 1 L R (1945) Bom 871 (D B).

3 Findings of facts. — [1] Question whether workman has become subject to disability or permanent disability is one of fact. (Vol 24) 1937 Cal 697 (702) : I L R (1937) 2 Cal 714 (DB).

[2] Finding as to 'wilful disobedience' is a finding of fact. (Vol 17) 1930 Cal 58 (59) (DB).

[3] Findings of fact by Commissioner—High Court when can interfere. (Vol 33) 1946 Bom 169 (169) (DB).

[4] There is no question of law in finding by Commissioner that deceased workman worked for certain number of days only. (Vol 17) 1930 Sind 49 (51) : 24 Sind L R 199 (DB).

[5] Whether two parties have agreed or not to certain decree is not in general question of law. (Vol 16) 1929 Bom 68 (69) (DB).

(6) Question whether petitioner claiming compensation is or is not widow of deceased workman is question of fact and Commissioner's finding is final. (Vol 30) 1943 Lah 52 (54) : I L R (1943) Lah 813 (DB).

[7] The finding that workman lost sight by a particle of dust entering his eye is a finding of fact that cannot be challenged. (Vol 20) 1933 Nag 272 (273).

[8] Where there is any evidence to support the finding of the Commissioner, that the employement is, or is not, casual, then the finding must be treated as a finding of fact, and is not subject to appeal. (Vol 23) 1936 Bom 199 (200) : 60 Bom 701 (DB).

4. When appeal maintainable.—[1] Section 30 allows an appeal from the order of the Commissioner when any substantial question of law is involved. The wording is not happy. It leaves a loophole for argument that if a substantial question of law is involved in the appeal, an appeal would lie not only on a question of law but also on facts. (Vol 15) 1928 Pat 508 (509) : 8 Pat 24 (DB).

[*See also* (Vol 20) 1933 Nag 272 (273).]

[2] But where legality of procedure followed by Commissioner is challenged, appeal is maintainable under S. 30. (Vol 24) 1937 Cal 697 (702) : I L R (1937) 2 Cal 714 (DB).

[3] When a claim has been disallowed in full claimant is entitled to appeal under S. 30 (1) (a). (Vol 26) 1939 Nag 106 (107) : I L R (1939) Nag 460.

[4] Order awarding compensation is appealable under S. 30 (1) (a). (Vol 22) 1935 All 408 (409).

[5] Except as provided by S. 30 no appeal lies from orders of Commissioners. Financial Commissioners or other officer cannot direct Commissioner to reverse his decision. (Vol 17) 1930 Rang 1 (3) : 7 Rang 660 (SB).

[6] Where the Commissioner rejects a claim for compensation on the ground of limitation under S. 10 (1) of the Workmen's Compensation Act after condoning the delay in making the claim, without giving any decision on the merits, the order is illegal. But the remedy of the applicant is to appeal to the High Court under S. 30, and not to file a suit for damages and for compensation. (Vol 29) 1942 Mad 116 (117).

[7] Where compensation is awarded to two workmen, to one of whom it is more than Rs. 300 and to other less and employer appeals against such award the Court must treat each of these cases as separate cases and appeal in case of workman awarded less than Rs. 300 is not competent. (Vol 26) 1939 Pat 181 (182) : 17 Pat 658 (DB).

Withholding of certain payments pending decision of appeal.

[a][30A. Where an employer makes an appeal under clause *(a)* of sub-section *(1)* of section 30, the Commissioner may, and if so directed by the High Court shall, pending the decision of the appeal, withhold payment of any sum in deposit with him.]

[a] *Inserted* by the Workmen's Compensation (Amendment) Act, 1933 (XV [15] of 1933), S. 18.

Recovery.

31. The Commissioner may recover as an arrear of land-revenue any amount payable by any person under this Act, whether under an agreement for the payment of compensation or otherwise, and the Commissioner shall be deemed to be a public officer within the meaning of section 5 of the Revenue Recovery Act, 1890.

Section 31A.
Bengal.

PROVINCIAL AMENDMENT.

After section 31, the following section shall be *inserted* namely:—

'31A. (1) The provisions of section 36 of the Legal Practitioners Act, 1879, shall subject to the provisions of this section, be applicable, so far as may be, to the framing and publication of a list of touts, to the exclusion of touts included in the list from the precincts of the Court of the Commissioner and to the arrest, detention, trial and punishment of such touts.

Application of section 36 of Act XVIII [18] of 1879 to touts in office of the Commissioner.

(2) A Commissioner shall, for the purposes of the said section 36, be deemed to be an authority referred to in sub-section (1) of that section.

(3) For the purposes of this section 'tout' means—

(a) a 'tout' as defined in clause (a) of section 3 of the Legal Practitioners Act, 1879, or

(b) a person who habitually frequents the precincts of the Court of a Commissioner—

(i) for the purpose of procuring work as an agent under section 24, or

(ii) otherwise than as a party to or a witness in any proceedings before the Commissioner or as a *bona fide* agent appointed under section 24."

Beng. Act V of 1942, S. 12.

CHAPTER IV.

RULES.

Power of the Provincial Government to make rules.

32. *(1)* The [a][Provincial Government] may make rules[b] to carry out the purposes of this Act.

Section 30 — Note 4 *(contd.)*

[8] Order of Commissioner giving effect to agreement between parties—Appeal not competent. (Vol 24) 1937 Sind 6 (6) : 30 Sind L R 351 (DB).

5. Plea.—[1] In a case the Commissioner had recourse to services of the medical expert whom he had called to assist in the adjudication. Appellant's Pleader not only did not raise any objection to what took place but actually acquiesced in procedure adopted by the Commissioner : *Held* it was not open to applicant in appeal to raise objection. (Vol 24) 1937 Cal 697 (702) : I L R (1937) 2 Cal 714 (DB).

6. Court-fee.—[1] In an appeal under S. 30, against an order of the Commissioner awarding compensation court-fee payable is that fixed by Art. 11, Sch. II, Court fees Act. (Vol 31) 1944 Oudh 83 (83,84): 19 Luck 460.

7. Proviso.—[1] The proper interpretation to be put upon the proviso to S. 30, is to limit the power of the High Court in appeal to interfere only in such findings of fact as may be necessary for the determination of the questions of law involved. Where the question of fact is wholly independent of any question of law, the High Court is bound by the finding of fact arrived at by the Commissioner. (Vol 30) 1943 Lah 52 (54) : I L R (1943) Lah 813 (DB) & (Vol 20) 1933 Sind 273 (275, 276) : 27 Sind L R 377 (DB). (*Obiter.*— Proper interpretation to be put on proviso to S. 30 is to limit power of Court to interfere only with such findings of fact as depend on questions of law.)

[2] The object of the proviso to S. 30, is clearly that in the cases involving relief to the dependants of persons in a humble station of life there should be a quick and final decision and that the compensation arising under the Act from the death of the supporter of poor dependants should be quickly available to supply such dependants with the necessities of daily life (Vol 33) 1946 Bom 110 (112) : ILR (1945) Bom 871 (DB).

Section 30A — Note 1

[1] The discretion vested in the Commissioner by S. 30A, to withhold the payment of money pending the appeal ought to be properly exercised having regard to all the circumstances of the case. In particular, a matter of primary importance is for the Commissioner to be satisfied that there is some substantial question of law involved on which alone the right to appeal is given. (Vol 33) 1946 Bom 110 (112) : I L R (1945) Bom 871 (DB).

Section 31 — Note 1

[1] Section 31 contemplates that Commissioner shall himself recover arrears and for that purpose, is Public Officer within S 5, Revenue Recovery Act, 1890, He is civil Court only for limited purposes set out in S. 23. (Vol 24) 1937 Sind 6 (7): 30 Sind L R 351 (DB).

Section 32 — Note 1

[1] Commissioner appointed under the Act has no power to issue a Commission for the examination of witnesses. (Vol 17) 1930 Sind 221 (223) (DB).

[2] There is nothing in Act or rules which entitles Commissioner to direct anyone to make local inspection or make report after local inspection. (Vol 30) 1943 Mad 608 (608) : ILR (1944) Mad 301.

[3] Where Commissioner does not reduce result of examination to writing R. 24 (2) omission is substantial error in procedure. (Vol 26) 1939 Rang 70 (74) : 1938 Rang L R 641 (DB).

[4] Commissioner's failure to comply with rules referred to in S. 26 of Act is no ground for ordering re-trial unless there has been failure of justice. (Vol 20) 1933 Sind 273 (275) : 27 Sind L R 377 (DB).

(2) In particular and without prejudice to the generality of the foregoing power, such rules may provide for all or any of the following matters, namely:—

(a) for prescribing the intervals at which and the conditions subject to which an application for review may be made under section 6 when not accompanied by a medical certificate;

(b) for prescribing the intervals at which and the conditions subject to which a workman may be required to submit himself for medical examination under sub-section *(1)* of section 11;

(c) for prescribing the procedure to be followed by Commissioners in the disposal of cases under this Act and by the parties in such cases;

(d) for regulating the transfer of matters and cases from one Commissioner to another and the transfer of money in such cases;

(e) for prescribing the manner in which money in the hands of a Commissioner may be invested for the benefit of dependants of a deceased workman and for the transfer of money so invested from one Commissioner to another;

(f) for the representation in proceeding before Commissioners of parties who are minors or are unable to make an appearance;

(g) for prescribing the form and manner in which memoranda of agreements shall be presented and registered;

(h) for the withholding by Commissioners, whether in whole or in part of half-monthly payments pending decision on applications for review of the same; [c][*]

[c][* * * * * *]

[c][*(i)* for regulating the scales of costs which may be allowed in proceedings under this Act;

(j) for prescribing and determining the amount of the fees payable in respect of any proceedings before a Commissioner under this Act;

(k) for the maintenance by Commissioners of registers and records of proceedings before them;

(l) for prescribing the classes of employers who shall maintain notice-books under sub-section *(3)* of section 10, and the form of such notice-books;

(m) for prescribing the form of statement to be submitted by employers under section 10A; and

(n) for prescribing the cases in which the report referred to in section 10B may be sent to an authority other than the Commissioner].

[a] *Substituted* by A. O. for "Governor-General in Council." [b] For the Workmen's Compensation Rules, 1924 *see*, General Statutory Rules and Orders, Vol V, page 262. [c] The word " and " at the end of cl. *(h)* and the original cl. *(i)* were *repealed* and the new cls. *(i)* to *(n)*, which were the same as cls. *(a)* to *(f)* of S. 33, were *inserted* by A. O.

PROVINCIAL AMENDMENT.

BENGAL.

After clause (f) of sub-section (2) of section 32, the following clauses shall be *inserted* namely :—

"(ff) for prescribing the procedure relating to the reference of medical questions to medical referees under sub-section (1) of section 24A;

(ff-1) for regulating the procedure relating to the medical examination of a workman by or under the personal direction of a medical referee and the submission of the report of such medical referee, under sub-section (2) of section 24A;

(ff 2) for prescribing and determining the fees and expenses payable in connection with references of medical questions to medical referees under sub-section (1) of section 24A;"

—Bengal Act VI of 1942, S. 5. [19-11-1942.]

33. [Power of Local Government to make rules.] *Repealed by A. O.*

Section 32 — Note 1 *(contd.)*

[5] The joint effect of R. 20 and S. 25 is that before proceeding with the matter of an application, the Commissioner must first of all either by himself or by some officer authorised by the Local Government to take evidence from the applicant in order to ascertain whether there is a *prima facie* case for the employees to answer. (Vol 24) 1937 Cal 697 (699, 700) : I L R (1937) 2 Cal 714 (DB).

[6] It has been laid down in England that medical certificates are not of themselves admissible in evidence. If the workman on his side and the employers on their side desire to put medical testimony before the Court they must do so by calling medical witnesses. There is irregularity of procedure in that the learned Commissioner allowed himself to be influenced into thinking that there was a *prima facie* case by the fact that there was a doctor's certificate. That certificate ought to have been disregarded altogether and the commissioner should have proceeded as directed by R. 20. (Vol 24) 1937 Cal 697 (700) : ILR (1937) 2 Cal 714 (DB).

[7] Proviso (b) to R. 38 cannot be read as authorising Commissioner to issue commissions to examine witnesses. (Vol 26) 1939 Rang 70 (72) : 1938 Rang L R 641 (DB).

Publication of rules.

34. *(1)* The power to make rules conferred by [a][section 32] shall be subject to the condition of the rules being made after previous publication.

(2) The date to be specified in accordance with clause *(3)* of section 23 of the General Clauses Act 1897, as that after which a draft of rules proposed to be made under section 32 [b][* * *] will be taken into consideration, shall not be less than three months from the date on which the draft of the proposed rules was published for general information.

(3) Rules so made shall be published in [c][* * *] the [d][Official Gazette] [e][* * *] and, on such publication, shall have effect as if enacted in this Act.

[a] *Substituted* by A. O. for "sections 32 and 33". [b] The words and figures "or section 33" were *repealed* by A. O. [c] The words "the Gazette of India or" were *repealed* by A. O. [d] *Substituted* by A. O. for local official Gazette". [e] The words "as the case may be" were *repealed* by A. O.

Rules to give effect to arrangements with other countries for the transfer of money paid as compensation.

[a][**35.** [b][*(1)*] The [c][Central Government] may, by notification in the [d][Official Gazette], make rules for the transfer to any part of His Majesty's Dominions or to any other country of money [e][deposited with] a Commissioner under this Act [f][which has been awarded to, or may be due to,] any person residing or about to reside in such part or country and for the receipt [b][distribution] and administration in British India of any money [g][deposited] under the law relating to workmen's compensation in any part of His Majesty's Dominions or in any other country, [h][which has been awarded to, or may be due to,] any person residing or about to reside in British India :]

[b][Provided that no sum deposited under this Act in respect of fatal accidents shall be so transferred without the consent of the employer concerned until the Commissioner receiving the sum has passed orders determining its distribution and apportionment under the provisions of sub-sections *(4)* and *(5)* of section 8.

(2) Where money deposited with a Commissioner has been so transferred in accordance with the rules made under this section, the provisions elsewhere contained in this Act regarding distribution by the Commissioner of compensation deposited with him shall cease to apply in respect of any such money.]

[a] *Inserted* by the Workmen's Compensation (Amendment) Act, 1933 (15 [XV] of 1933), s. 15. [b] *Inserted, ibid.*, 1937 (7 [VII] of 1937), s. 2. [c] *Substituted* by A. O. for "Government-General in Council." [d] *Substituted* by A. O. for "Gazette of India". [e] *Substituted* by Act 7 of 1937, s. 2, for "paid to". [f] *Substituted, ibid.*, for "for the benefit of". [g] *Substituted, ibid* for "awarded". [h] *Substituted, ibid.*, for "and applicable for the benefit of".

SCHEDULE I.

[See sections 2 (1) and (4).]

List of injuries deemed to result in permanent partial disablement.

Injury.	Percentage of loss of earning capacity.
Loss of right arm above or at the elbow	70
Loss of left arm above or at the elbow	60
Loss of right arm below the elbow	60
Loss of leg at or above the knee	60
Loss of left arm below the elbow	50
Loss of leg below the knee	50
Permanent total loss of hearing	50
Loss of one eye	30
Loss of thumb	25
Loss of all toes of one foot	20
Loss of one phalanx of thumb	10
Loss of index finger	10
Loss of great toe	10
Loss of any finger other than index finger	5

NOTE. — Complete and permanent loss of the use of any limb or member referred to in this Schedule shall be deemed to be the equivalent of the loss of that limb or member.

Sch. I — Note 1

[1] In order to claim 70 per cent. of loss of earning capacity as compensation, workman has to bring his case within words "complete and permanent loss of the use of any limb or member" referred to in footnote to schedule. (Vol 20) 1933 Sind 273 (276) : 27 Sind L R 377 (DB).

[2] Where applicant has received injury whereby he is deprived of use of index and the middle fingers of left hand, applicant is not entitled to compensation for loss of the left arm below elbow if there is no evidence to show that there has been complete and permanent loss of arm below the elbow. (Vol 26) 1939 All 29 (30): ILR (1939) All 1 (DB).

SCHEDULE II.

[See section 2 (1) (n).]

List of persons who, subject to the provisions of section 2 (1) (n), are included in the definition of workmen.

The following persons are workmen within the meaning of section 2 *(1) (n)* and subject to the provisions of that section, that is to say, any person who is :

[a][*(i)* employed, otherwise than in a clerical capacity or on a railway, in connection with the operation or maintenance of [b][a lift or a vehicle propelled by steam or other mechanical power or by electricity] ; or

(ii) employed otherwise than in a clerical capacity in any premises wherein, or within the precincts whereof, on any one day of the preceding twelve months, ten or more persons have been employed in any manufacturing process, as defined in [c][clause *(g)* of section 2 of the Factories Act, 1934], or in any kind of work whatsoever incidental to or connected with any such manufacturing process or with the article made, and steam, water or other mechanical power or electrical power is used ; or

(iii) employed for the purpose of making, altering, repairing, ornamenting, finishing or otherwise adapting for use, transport or sale any article or part of an article in any premises wherein or within the precincts whereof on any one day of the preceding twelve months, fifty or more persons have been so employed; or

(iv) employed in the manufacture or handling of explosives in any premises wherein, or within the precincts whereof, on any one day of the preceding twelve months, ten or more persons have been so employed; or

(v) employed, in any mine as defined in clause *(f)* of section 3 of the Indian Mines Act, 1923, in any mining operation, or in any kind of work, other than clerical work, incidental to or connected with any mining operation or with the mineral obtained, or in any kind of work whatsoever below ground ;

Provided that any excavation in which on no day of the preceding twelve months more than fifty persons have been employed or explosives have been used and whose depth from its highest to its lowest point does not exceed twenty feet shall be deemed not to be a mine for the purpose of this clause ; or

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Sch. II — General — Note 1

[1] Schedule II does not limit the scope of the definition given in S. 2 (1) (n) but it merely illustrates it. (Vol 24) 1937 Nag 311 (314) : ILR (1937) Nag 88.

[2] Word 'employment' has a two-fold meaning : It may mean (1) engagement, that is contract of service, or (2) work in course of employment. It is in the latter sense that the word appears to have been used in the list of persons described in Sch. II. (Vol 25) 1938 Nag 91 (93).

[3] Material qualification of a person to be a "workman" is that he must be employed in premises wherein on any one day in the preceding 12 months, ten or more persons have been employed and that those other persons must be workmen employed like him on contract service. (Vol 30) 1943 Lah 52 (56) : I L R (1943) Lah 813 (DB).

Sch. II cl. (i) — Note 1

[1] Conductor of motor omnibus, held "workman." (Vol 25) 1938 Mad 485 (486) : I L R (1938) Mad 636 (DB).

Sch. II, cl. (ii) — Note 1

[1] A person in regular employment paid by the day is a workman. Section 2 (1) (n) must be read with Sch. 2 (ii). The qualification in the latter regarding number of persons in the premises governs the whole of Sch. 2 (ii) Other "persons" must be "workmen" employed like the workman in question on a contract of service. (Vol 30) 1943 Lah 52 (55, 56) : I L R (1943) Lah 813 (D B).

[2] The word employed in cl (ii) is tautologous. It means employed on a contract of service and not 'engaged in' and if his qualification is dependent on his employment with other workmen, they must also be employed on a contract of service. (Vol 27) 1940 Sind 185 (186, 187) : I L R (1940) Kar 370 (DB).

[3] Ginning and pressing cotton is a manufacturing process within Factories Act and a person employed in it is a 'workman.' (Vol 24) 1937 Nag 311 (314) : I L R (1937) Nag 88 (DB).

Sch. II, cl. (iii)—Note 1

[1] Workman claiming compensation under S. 2 (1) (n) and Sch. 2, cl. (iii) — It is not necessary for him to show that the number of persons employed is fifty or more in the whole business or the factory concerned. But he must show that this number should be employed in the premises or within the 'precincts.' (Vol 25) 1938 Lah 855 (856).

[2] If whole process of work on which or part of which workman is employed comes within description of "adapting goods for transport or sale" workman falls within schedule, Sch. II, cl. (iii), although it may not be shown that he himself actually took part in that portion of process which involves any physical work on or alteration of article in question. (Vol 25) 1938 Bom 171 (172) : I L R (1938) Bom 145 (DB).

(vi) employed as the master or as a seaman of :

(a) any ship which is propelled wholly or in part by steam or other mechanical power or by elertricity or which is towed or intended to be towed by a ship so propelled, or

(b) any ship not included in sub-clause *(a)* of fifty tons net tonnage or over ; or

(vii) employed for the purpose of loading, unloading, fuelling, constructing, repairing, demolishing, cleaning or painting any ship of which he is not the master or a member of the crew, or in the handling or transport within the limits of any port subject to the Indian Ports Act, 1908, of goods which have been discharged from or are to be loaded into any vessel ; or

(viii) employed in the construction, repair or demolition of :

(a) any building which is designed to be or is or has been more than one storey in height above the ground or twenty feet or more from the ground level to the apex of the roof ; or

(b) any dam or embankment which is twenty feet or more in height from its lowest to its highest point ; or

(c) any road, bridge, or tunnel ; or

(d) any wharf, quay, sea-wall or other marine work including any moorings of ships ; or

(ix) employed in setting up, repairing, maintaining, or taking down any telegraph or telephone line or post or any overhead electric line or cable or post or standard for the same ; or

(x) employed, otherwise than in a clerical capacity, in the construction, working, repair or demolition of any aerial ropeway, canal pipe-line, or sewer ; or

(xi) employed in the service of any fire brigade ; or

(xii) employed upon a railway as defined in clause *(4)* of section 3, and sub-section *(1)* of section 148 of Indian Railways Act, 1890, either directly or through a sub-contractor, by a person fulfilling a contract with the railway administration ; or

(xiii) employed as an inspector, mail guard, sorter or van peon in the Railway Mail Service, or employed in any occupation ordinarily involving outdoor work in the Indian Posts and Telegraphs Department ; or

(xiv) employed, otherwise than in a clerical capacity, in connection with operations for winning natural petroleum or naturul gas ; or

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Sch II, cl. (vii)—Note 1

[1] Work of loading does not begin until there is collaboration between cargo owners' servants in charge of cargo on shore and ship's crew or stevedores employed in their place are ready on board ship to receive goods as they come over the ship's rail and stow them in hold. (Vol 16) 1929 Mad 698 (701):52 Mad 747 (FB).

[2] Protection under the Act is meant for the workmen actually engaged in the process of handling the bales, so as to transfer them from the wharf to the hold of a ship. (Vol 17) 1930 Bom 44 (45):54 Bom 114 (DB).

[3] The words "for the purpose of loading" do not amount to more than "in loading." (Vol 16) 1929 Mad 698 (701) : 52 Mad 747 (SB).

[4] Workman was employed in godown quarter of a mile from wharf. His duty was to take goods out of slings of crane in godown, hand them over to cart-man, who would take them to quay and hand over to stevedores: *Held* workman was not employed for loading of ship. (Vol 16) 1929 Mad 698 (701) : 52 Mad 747 (SB).

[5] Clerk who prepares bill of lading relating to goods cannot be said to be handling goods within the cl. (vii) of Sch. II, as amended. (Vol 25) 1938 Bom 110 (111) : I L R (1938) Bom 44 (DB).

Sch. II, cl. (viii)—Note 1

[1] Repair includes renewal of paint of building. Finding of Commissioner that employment is or is not casual is one of fact. (Vol 23) 1936 Bom 199 (200, 201): 60 Bom 701 (D B).

[2] Workman employed in whitewashing walls and ceiling is employed in repair. (Vol 33) 1946 All 473 (474, 475) : I L R (1946) All 628 (DB).

Sch. II, cl. (x)—Note 1

[1] Where a person is employed for purpose of employer's business otherwise than in a clerical capacity in the construction, working or repair of a pipe line, the mere fact that he was officiating in a leave vacancy would not take him out of the definition of workman. (Vol 23) 1936 All 690 (691) : I L R (1937) All 15 (DB).

[2] Court has to give a wider than a narrower interpretation to the expression to "working of pipe line" used in cl. (x), Sch. II. The test is whether when a man meets with an accident arising out of and in the course of his employment, he was in the position in which he was when the accident occurred because of work specified in the schedule. Where in order to test pressure of water in the main for 24 hours, to work pipe line efficiently, the Municipality fixed a recording instrument to a pipe to test the pressure and some coolies were employed to guard the instrument during night: *Held* (Per *Beaumont C. J.* and *Sen J.*, *Norman J.*, *contra*) that coolies came within the expression "working a pipe line" and consequently were workmen within Act. (Vol 25) 1938 Bom 155 (156, 157):ILR (1938) Bom 164 (SB).

Sch. II, cl. (xii) — Note 1

[1] Workman employed in hand-dug well may fall under cl. (xii), but whether he falls within that clause is to be determined by the proper authority and not by High Court. (Vol 20) 1933 Rang 418 (418):11 Rang 404 (S B).

(xv) employed in any occupation involving blasting operations ; or

(xvi) employed in the making of any excavation in which on any one day of the preceding twelve months more than fifty persons have been employed or explosives have been used, or whose depth from its highest to its lowest point exceeds twenty feet ; or

(xvii) employed in the operation of any ferry boat capable of carrying more than ten persons; or

(xviii) employed, otherwise than in a clerical capacity, on any estate which is maintained for the purpose of growing cinchona, coffee, rubber or tea, and on which on any one day in the preceding twelve months twenty-five or more persons have been so employed ; or

(xix) employed, otherwise than in a clerical capacity, in the generating, transforming or supplying of electrical energy or in the generating or supplying of gas ; or

(xx) employed in a lighthouse as defined in clause *(d)* of section 2 of the Indian Lighthouse Act, 1927 ; or

(xxi) employed in producing cinematograph pictures intended for public exhibition or in exhibiting such pictures ; or

(xxii) employed in the training, keeping or working of elephants or wild animals ; or

[d][*(xxiii)* employed in the tapping of palm-trees or the felling or logging of trees, or the transport of timber by inland waters, or the control or extinguishing of forest fires ; or

(xxiv) employed in operations for the catching or hunting of elephants or other wild animals ; or]

[e][*(xxv)*] employed as a diver.

[f][or

(xxvi) employed in the handling or transport of goods, in or within the precincts of,—

(a) any warehouse or other place in which goods are stored, and in which on any one day of the preceding twelve months ten or more persons have been so employed, or

(b) any market in which on any one day of the preceding twelve months one hundred or more persons have been so employed ; or

(xxvii) employed in any occupation involving the handling and manipulation of radium or X-rays apparatus, or contact with radioactive substances]

Explanation. — In this Schedule, "the preceding twelve months" relates in any particular case to the twelve months ending with the day on which the accident in such case occurred.]

[a] *Substituted* by the Workmen's Compensation (Amendment) Act, 1933 (15 [XV] of 1933), S. 21 for "the clauses." [b] *Substituted, ibid.*, 1938 (9 [IX] of 1938), S. 11, for "mechanically propelled vehicles". [5-4-1938].
[c] *Substituted, ibid,* for "clause (4) of section 2 of the Indian Factories Act, 1911". [d] *Inserted, ibid.*
[e] *Substituted, ibid,* for "*(xxiii)*". [f] *Added, ibid.*

SCHEDULE III.

(See section 3.)

List of occupational diseases.

Occupational disease.	Employment.
	[a][PART A.
Anthrax. . . .	Any employment— *(a)* involving the handling of wool, hair, bristles or animal carcases or parts of such carcases, including hides, hoofs and horns ; or *(b)* in connexion with animals infected with anthrax ; or *(c)* involving the loading, unloading or transport of any merchandise.
Compressed air illness or its sequelæ.	Any process carried on in compressed air.
Poisoning by lead tetra-ethyl.	Any process involving the use of lead tetra-ethyl.
Poisoning by nitrous fumes.	Any process involving exposure to nitrous fumes.

Sch. II, cl. (xxii)—Note 1

[1] A person employed as elephant-rider is a workman within Act but he ceases to be workman when he is employed as mere messenger and when he dies during his employment as messenger his dependants are not entitled to compensation. (Vol 24) 1937 Rang 45 (46, 47): 14 Rang 753 (D B).

PART B.]

Occupational disease.	Employment.
Lead poisoning or its sequelæ [b][excluding poisoning by lead tetra-ethyl.]	Any process involving the use of lead [c][or any of its preparations or compounds except lead tetra-ethyl]
Phosphorus poisoning or its sequelæ.	Any process involving the use of phosphorus or its preparations or compounds.
[d][Mercury poisoning or its sequelæ.	Any process involving the use of mercury or its preparations or compounds.
Poisoning by benzene and its homologues, or the sequelæ of such poisoning.	Handling benzene or any of its homologues and any process in the manufacture or involving the use of benzene or any of its homologues.
Chrome ulceration or its sequelæ.	Any process involving the use of chromic acid or bichromate of ammonium, potassium or sodium, or their preparations.
[e][Arsenical poisoning or its sequelæ.	Any process involving the production, liberation or utilisation of arsenic or its compounds
Pathological manifestations due to— (a) radium and other radio-active substances; (b) X-rays.	Any process involving exposure to the action of radium, radioactive substances or X-rays.
Primary epitheliomatous cancer of the skin.	Any process involving the handling or use of tar, pitch, bitumen, mineral oil, paraffin, or the compounds, products or residues of these substances.]]

[a] *Inserted* by the Workmen's Compensation (Amendment) Act, 1938 (9 [IX] of 1938), S. 12, [5-4-1938]. [b] *Added, ibid.* [c] *Substituted, ibid.*, for "or its preparations or compounds." [d] *Added ibid.* 1933 (15 [XV] of 1933), S. 22. [e] *Substituted* by Act 9 of 1938, S. 12, for "Compressed air illness . . , air."

[a][SCHEDULE IV.

(See section 4.)

Compensation payable in certain cases.

Monthly wages of the workman injured.		Death of Adult.	Permanent total Disablement of Adult.	Half-monthly payment as compensation for temporary Disablement of Adult.
1		2	3	4
More than	But not more than	Amount of Compensation for—		
Rs.	Rs.	Rs.	Rs.	Rs. A.
0	10	500	700	Half his monthly wages.
10	15	550	770	5 0
15	18	600	840	6 0
18	21	630	882	7 0
21	24	720	1,008	8 0
24	27	810	1,134	8 8
27	30	900	1,260	9 0
30	35	1,050	1,470	9 8
35	40	1,200	1,680	10 0
40	45	1,350	1,890	11 4
45	50	1,500	2,100	12 8
50	60	1,800	2,520	15 0
60	70	2,100	2,940	17 8
70	80	2,400	3,360	20 0
80	100	3,000	4,200	25 0
100	200	3,500	4,900	30 0
[b][200	300	4,000	5,600	30 0
300	. . .	4,500	6,300	30 0]].

[a] *Substituted* by the Workmen's Compensation (Amendment) Act, 1933 (15 [XV] of 1933), S. 23.
[b] *Substituted, ibid.*, 1946 (1 [I] of 1946), S. 3, for "200 ... 4,000, 5,600, 30 0". [28-2-1946.]

[THE INDIAN] WORKS OF DEFENCE ACT, 1903.

(ACT VII OF 1903)

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— Amended by Acts 5 of 1909; 11 of 1921; 20 of 1940
— Adapted by A. O.

[THE INDIAN] WORKS OF DEFENCE ACT, 1903.

(ACT VII OF 1903.)[a]

[20th March, 1903.]

An Act to provide for imposing restrictions upon the use and enjoyment of land in the vicinity of works of defence in order that such land may be kept free from buildings and other obstructions, and for determining the amount of compensation to be made on account of such imposition.

WHEREAS it is expedient to provide for imposing restrictions upon the use and enjoyment of land in the vicinity of works of defence in order that such land may be kept free from buildings and other obstructions, and for determining the amount of compensation to be made on account of such imposition; It is hereby enacted as follows:—

[a] For Statement of Objects and Reasons, *see* Gazette of India, 1902, Pt. V, p. 84; for Report of the Select Committee. *see ibid.*, 1903, p. 105.

This Act has been *declared* to be in force in the Khondmals District by the Khondmals Laws Regulation, 1936 (4 of 1936), s. 3 and Sch., and in the Angul District by the Angul Laws Regulation, 1936 (5 of 1936), s. 3 and Sch.

PART I.

PRELIMINARY.

Short title and extent.

1. *(1)* This Act may be called the Indian Works of Defence Act, 1903 and

(2) It extends to the whole of British India, including British Baluchistan, the Santhal Parganas and the Pargana of Spiti.

Definitions.

2. In this Act, unless there is something repugnant in the subject or context, —

(a) the expression "land" includes benefits to arise out of land, and things attached to the earth or permanently fastened to anything attached to the earth:

(b) the expression "person interested" includes all persons claiming an interest in compensation to be made on account of the imposition of restrictions upon the use and enjoyment of land under this Act; and a person shall be deemed to be interested in land if he is interested in an easement affecting the land:

[a][*(c)* the expression "District" means one of the Districts into which India is, for military purposes for the time being, divided; it includes a Brigade area which does not form part of any District, and any area which the [b][Central Government] may, by notification in the [c][Official Gazette], declare to be a District for all or any of the purposes of this Act:

(d) the expression "General Officer Commanding the District" means the officer for the time being in command of the forces in a District:

[a] *Substituted* by the Indian Works of Defence (Amendment) Act, 1921 (11 [XI] of 1921), S. 2. [b] *Substituted* by A. O. for "Governor-General in Council". [c] *Substituted* by A. O. for "Gazette of India".

(e) the expression "Commanding Officer" means the officer for the time being in command of a work of defence:

(f) the expression "Collector" includes any officer specially appointed by the [a][Central Government] to perform the functions of a Collector under this Act:

(g) the expression "Court" means a principal civil Court of original jurisdiction, unless the [a][Central Government] has appointed (as it is hereby empowered to do) a special judicial officer within any specified local limits to perform the functions of the Court under this Act:

[a] *Substituted* by A. O. for "Local Government".

(h) "maintain", with its grammatical variations and cognate expressions, does not, when used in relation to a house or other construction, include the doing of any act necessary for keeping such house or construction, until the making of the award referred to in section 12 or until the exercise, prior to the making of the award, of the powers of demolition conferred, in case of emergency, by section 6, sub-sections *(1)* and *(3)*, in the state in which it was at the time of the publication of the notice referred to in section 3, sub-section *(2)*:

OBJECTS AND REASONS.

"*Clause 2.* — Owing to the altered procedure which we, propose for adoption in Part II, the maximum period, which may elapse between the publication of the preliminary notice of a declaration to impose restrictions and the issue of the subsequent notice calling for the presentation of claims to compensation, will, in ordinary cases, amount to eighteen months, and this period may, with the previous sanction of the Governor-General in Council, be extended to three years. The actual proceedings in assessment up to the making of the award may not impossibly, at any rate in complicated cases, occupy a further period of a year, in these circumstances, houses and other constructions, which will be affected by the restrictions imposed under clause 7, may, unless the owner is given facilities for keeping them in repair, fall into ruin long before the investigation for purposes of assessment is completed, with the result that the difficulty of proving the actual amount of damage occasioned by proceedings under the Bill will be greatly enhanced. Even where the emergent powers conferred by clause 6, sub-clause (3), are exercised, a period of several months, during which the condition more especially of small and unsubstantial structures may be seriously altered by rain, may easily elapse before demolition commences; and, in these cases the report of the demolishing officer with respect to the buildings demolished by him is not unlikely, from the necessity of the case, to be most tangible evidence to which the parties can afterwards appeal. We think it desirable, therefore, to define the expression "maintained" for the purposes of clauses 6 and 7, in such a manner as to leave unaffected the liberty to repair buildings and other constructions during the interval from the publication of the preliminary notice to the making of the award or, in case of emergency, to demolition in anticipation of the award." — S. C. R.

Preamble — Note 1

[1] Cantonment authorities acquiescing in existence of platform within cantonment for 30 years—*Held* that they were not entitled to demolish it. (Vol 9) 1922 All 86 (86): 23 Cri L Jour 199.

[2] Where existence of platform in the defence zone could not be considered danger to defence, Act VII of 1903 would not apply. (Vol 9) 1922 All 86 (86) : 23 Cri L Jour 199.

(i) the following persons shall be deemed "entitled to act" as and to the extent hereinafter provided, that is to say,—

trustees for other persons beneficially interested shall be deemed the persons entitled to act with reference to any case, and that to the same extent as the persons beneficially interested could have acted if free from disability:

a married woman, in cases to which the English law is applicable, shall be deemed the person so entitled to act, and, whether of full age or not, to the same extent as if she were unmarried and of full age; and

the guardians of minors and the committees or managers of lunatics or idiots shall be deemed respectively the persons so entitled to act, to the same extent as the minors, lunatics or idiots themselves, if free from disability, could have acted:

Provided that—

(i) no person shall be deemed "entitled to act" whose interest in the subject matter is shown to the satisfaction of the Collector or Court to be adverse to the interest of the person interested for whom he would otherwise be entitled to act;

(ii) in every case the person interested may appear by a next friend or, in default of his appearance by a next friend, the Collector or Court, as the case may be, shall appoint a guardian for the case to act on his behalf in the conduct thereof;

(iii) the provisions of Chapter XXXI of the Code of Civil Procedure[a] shall, *mutatis mutandis*, apply in the case of persons interested appearing before a Collector or Court by a next friend, or by a guardian for the case, in proceedings under this Act; and

(iv) no person "entitled to act" shall be competent to receive the compensation-money payable to the person for whom he is entitled to act, unless he would have been competent to alienate the land upon the use and enjoyment of which restrictions are to be imposed and receive and give a good discharge for the purchase-money on a voluntary sale.

[a] *See* now the Code of Civil Procedure, 1908 (Act 5 [V] of 1908), Sch. I, Order XXXII.

PART II.

IMPOSITION OF RESTRICTIONS.

Declaration and notice that restrictions will be imposed.

3. *(1)* Whenever it appears to the [a][Central Government] that it is necessary to impose restrictions upon the use and enjoyment of land in the vicinity of any work of defence or of any site intended to be used or to be acquired for any such work, in order that such land may be kept free from buildings and other obstructions, a declaration shall be made to that effect under the signature of a Secretary to such Government or of some officer duly authorised to certify its orders.

(2) The said declaration shall be published in the [b][Official Gazette] and shall state the district or other territorial division in which the land is situate and the place where a sketch plan of the land, which shall be prepared on a scale not smaller than six inches to the mile and shall distinguish the boundaries referred to in section 7, may be inspected; and the Collector shall cause public notice of the substance of the said declaration to be given at convenient places in the locality.

(3) The said declaration shall be conclusive proof that it is necessary to keep the land free from buildings and other obstructions.

[a] *Substituted* by A. O. for "Local Government". [b] *Substituted* by A. O. for "local official Gazette".

OBJECTS AND REASONS.

"*Clause 3.*—To prevent the recurrence of misconception, we have sought to render it clear that the initial declaration under this clause need only be accompanied by a "sketchplan", illustrating, by way of general notice to the public, the outline of the zones within which all or any of the restrictions specified in clause 7 will attach. The "detailed plan" referred to in clause 8 is a separate document which is required for the purposes of minute and detailed attachment of compensation and for the preparation of which the initial declaration cannot be postponed."

— S. C. R.

Power to do preliminary acts after publication of notice under section 3, sub-section (2).

4. It shall be lawful for such officer as the [a][Central Government] may, by general or special order, authorise in this behalf, and for his servants and workmen, at any time after publication of the notice mentioned in section 3, sub-section *(2)*, to enter upon and survey and take levels of any land in such locality, to dig or bore into the sub-soil, to do all other acts necessary to ascertain whether any and, if so, what restrictions should be imposed on the use and enjoyment of the land,

to set out the boundaries of the land upon the use and enjoyment of which restrictions are to be imposed, or of any part of such land, to mark such levels, boundaries and line by placing marks and cutting trenches, and, where otherwise the survey cannot be completed and the levels taken and the boundaries and line marked, to cut down and clear away any part of any standing crop, fence or jungle:

Provided that no person shall enter into any building or upon any enclosed court or garden attached to a dwelling-house (unless with the consent of the occupier thereof) without previously giving such occupier at least seven days' notice in writing of his intention to do so.

[a] *Substituted* by A. O. for "Local Government".

Payment for damage.

5. The officer so authorised shall at the time of such entry pay or tender payment for all necessary damage to be done as aforesaid, and, in case of dispute as to the sufficiency of the amount so paid or tendered, he shall at once refer the dispute to the decision of the Collector or other chief revenue-officer of the district, and such decision shall be final.

Further powers exercisable after publication of notice under section 3, sub-section (2).

6. *(1)* Whenever a declaration has been made and public notice thereof has been given under section 3, it shall, subject to the provisions of sub-sections *(2)* to *(4)*, be lawful for such officer as the [a][Central Government] may, by general or special order, authorise in this behalf, and for his servants and workmen, to enter and demolish any buildings or other constructions on the surface, to cut down or grub up all or any of the trees, to remove or alter all or any of the banks, fences, hedges and ditches, to make underground and other drains, to fill up all excavations, and demolish all buildings and other constructions below the surface, and generally to level and clear the said land and do all such acts for levelling and clearing the same as he may deem necessary or proper, but in such manner nevertheless that evidence of the boundaries of the lands held by different owners may be preserved.

(2) The powers conferred by sub-section *(1)* shall not be exercised, —

(a) save as otherwise provided by sub-section *(3)*, before the making of the award hereinafter referred to in section 12, nor

(b) save as otherwise provided by sub-section *(4)*, after the expiration of six months from the making of the said award, or any shorter period on the expiration of which the officer exercising such powers gives notice to the Collector that there will be no further exercise of them.

(3) In case of emergency, the [a][Central Government] [b][* * *] may, by notification in the [c][Official Gazette], declare that all or any powers conferred by sub-section *(1)* may be exercised at any time within six months after the publication of the notice referred to in section 3, sub-section *(2)*, and such powers may be exercised accordingly, and the said notification shall be conclusive proof of emergency.

(4) Nothing in sub-section *(2)* shall be deemed to preclude any such officer or his servants or workmen from exercising at any time the said powers for the purpose of removing, wholly or in part, any building or other obstruction maintained, created, added to, altered, planted, stacked, stored or otherwise accumulated in contravention of this Act or of any rule or order made thereunder or of any condition prescribed in accordance therewith.

[a] *Substituted* by A. O. for "Local Government". [b] The words "with the previous sanction of the Governor-General in Council" were *repealed* by A. O. [c] *Substituted* by A. O. for "local official Gazette".

OBJECTS AND REASONS.

"*Clause 6.*—The original Bill, following the lines of the Defence Act, 1860 (23 & 24 Vict., c. 112), section 34, purported, in all cases, to authorize the exercise of the powers of demolition conferred thereby after the expiration of fourteen days from the preliminary notice. On the other hand, it restricted to six months the period of three years during which, under the English Statute, acts in pursuance of those powers must be completed. One result of this abridgment of time was that the issue of the notice calling upon persons affected to present their claims for compensation was postponed until after the demolition was complete. We think that this procedure is, in several respects, capable of improvement. At the outset, we see no necessity, in ordinary cases, for exercising any power of demolition until after the Collector has completed his assessment and made his award. On the contrary, it will be difficult, if not impossible, to arrive at a really reliable estimate on the basis of statements relating to structures which have ceased to exist. In the case of emergency, the exigencies of defence in this country may render impracticable the delay of fourteen days, which, on the analogy of peace conditions in England, the original Bill would have rendered obligatory in all circumstances alike. We propose to recognize the distinction by enacting expressly that the acts of demolition, for the completion of which we would retain the very abridged period of six months, shall not commence until after the making of the award; and from this rule we would except only the case, not of mere urgency as contemplated by the Land Acquisition Act, 1894, section 17, but of actual emergency sufficiently grave to warrant a notification to which the previous sanction of the Governor-General in Council is required. As an additional safeguard, we

suggest that emergent powers, so notified, shall not be exercised after the expiration of a period of six months after the publication of the preliminary notice. Having thus narrowed down these powers to absolutely extreme cases, we consider it inexpedient to hamper the discretion of the officer exercising them by accepting a suggestion to enact a proviso directing, on the analogy of the Land Acquisition Act, 1894, section 17, sub-section (1), that no building shall be entered or demolished without giving the occupier reasonably sufficient notice to enable him to remove his moveable property without unnecessary inconvenience. To give as much notice as appears reasonably practicable is always a convenience to all parties concerned; but we are reluctant to prescribe, for cases of emergency, a proviso, necessarily in general terms, which would only result in claims raising the difficult question of fact whether, in the particular circumstances, an hour or two longer might or might not have been allowed."

— S. C. R.

Restrictions.

7. From and after the publication of the notice mentioned in section 3, sub section *(2)*, such of the following restrictions as the [a][Central Government] may in its discretion declare therein shall attach with reference to such land namely:—

(a) Within an outer boundary which, except so far as is otherwise provided in section 39, sub-section *(4)*, may extend to a distance of two thousand yards from the crest of the outer parapet of the work,—

(i) no variation shall be made in the ground-level, and no building, wall, bank or other construction above the ground shall be maintained, erected, added to or altered otherwise than with the written approval of [b][General Officer Commanding the District], and on such conditions as he may prescribe;

(ii) no wood, earth stone, brick, gravel, sand or other material shall be stacked, stored or otherwise accumulated :

Provided that, with the written approval of the [c][General Officer Commanding the District] and on such conditions as he may prescribe, road-ballast, manure and agricultural produce may be exempted from the prohibition:

Provided also that any person having control of the land as owner, lessee or occupier shall be bound forthwith to remove such road-ballast, manure or agricultural produce, without compensation, on the requisition of the Commanding Officer;

(iii) no surveying operation shall be conducted otherwise than by or under the personal supervision of a public servant duly authorised in this behalf, in the case of land under the control of military authority, by the Commanding Officer and, in other cases, by the Collector with the concurrence of the Commanding Officer ; and

(iv) where any building, wall, bank or other construction above the ground has been permitted under clause *(i)* of this sub-section to be maintained, erected, added to or altered, repairs shall not, without the written approval of the [b][General Officer Commanding the District], be made with materials different in kind from those employed in the original building, wall. bank or other construction.

(b) Within a second boundary which may extend to a distance of one thousand yards from the crest of the outer parapet of the work, the restrictions enumerated in clause *(a)* shall apply with the following additional limitations, namely:—

(i) [d][no building, wall, bank or other construction of permanent materials above the ground shall be maintained otherwise than with the written approval of the General Officer Commanding the District and on such conditions as he may prescribe, and no such building, wall, bank or other construction shall be erected:]

Provided that, with the written approval of the [b][General Officer Commanding the District] and on such conditions as he may prescribe, huts, fences or other constructions of wood or other materials, easily destroyed or removed, may be maintained, erected, added to or altered :

Provided also that any person having control of the land as owner, lessee or occupier shall be bound forthwith to destroy or remove such huts, fences or other constructions, without compensation, upon an order in writing signed by the [c][General Officer Commanding the District] ; and

(ii) live hedges, rows or clumps of trees or orchards shall not be maintained, planted, added to or altered otherwise than with the written approval of the [b][General Officer Commanding the District] and on such conditions as he may prescribe.

(c) Within a third boundary which may extend to a distance of five hundred yards from the crest of the outer parapet of the work, the restrictions enumerated in clauses *(a)* and *(b)* shall apply with the following additional limitation, namely :—

no building or other construction on the surface, and no excavation, building or other construction below the surface, shall be maintained or erected :

Provided that, with the written approval of the Commanding Officer and on such conditions as he may prescribe, [e][a building or other construction on the surface may be maintained and] open railings and dry brush-wood fences may be exempted from this prohibition.

[a] *Substituted* by A. O for "Local Government." [b] *Substituted* by the Indian Works of Defence (Amendment) Act, 1921 (11 [XI] of 1921), S. 3, for "General Officer Commanding the Division". [c] *Substituted, ibid.*, for "General Officer Commanding the Division, District or Brigade". [d] *Substituted, ibid.*, 1940 (28 [XXVIII] of 1940), S. 2, for "no building, wall, bank or other construction of permanent materials above the ground shall be maintained or erected." [27-11-1940.] [e] *Inserted, ibid.*

Land to be marked out measured, registered and planned.

8. As soon as may be after the publication of the declaration aforesaid, the Collector shall cause the land to be marked out and measured, and shall also prepare a register and a detailed plan, which shall be on a scale not smaller than six inches to the mile, showing accurately every building, tree and other obstruction.

Notice to persons interested.

9. *(1)* At any time before the expiration of—

(a) the period of eighteen months from the publication of the declaration referred to in section 3, or

(b) such other period not exceeding three years from the said publication as the [a][Central Government] [b][* * *] may, by notification in the [c][Official Gazette], direct in this behalf,

the Collector shall cause public notice to be given at convenient places on or near the land, stating the effect of the said declaration and that claims to compensation for all interests in such land affected by anything done or ordered in pursuance of such declaration may be made to him :

Provided that, where anything has been done in exercise of the powers conferred, in case of emergency, by section 6, sub section *(3)*, the notice prescribed by this section shall be given as soon as may be thereafter.

(2) Such notice shall state the particulars of any damage ordered to be done or, in the case referred to in section 6, sub-section *(3)*, done in exercise of any of the powers conferred by the said section, and the particulars of any restrictions attaching to the land under section 7, and shall require all persons interested in the land to appear personally or by agent before the Collector at a time and place therein mentioned (such time not being earlier than fifteen days after the date of publication of the notice), and to state the nature of their respective interests in the land and the amount and particulars of their claims to compensation for damage to such interest and their objections (if any) to the measurements made under section 8. The Collector may in any case require such statement to be made in writing and signed by the party or his agent.

(3) The Collector shall also serve notice to the same effect on the occupier (if any) of such land and on all such persons known or believed to be interested therein, or to be entitled to act for persons so interested, as reside or have agents authorised to receive service on their behalf, within the revenue-district in which the land is situate.

(4) In case any person so interested resides elsewhere, and has no such agent, the notice shall be sent to him by post in a letter addressed to him at his last known residence, address or place of business.

[a] *Substituted* by A. O. for "Local Government." [b] The words "with the previous sanction of the Governor-General in Council," were *repealed* by A. O. [c] *Substituted* by A. O. for "local official Gazette".

Objects and Reasons.

"*Clause 9.*—Our proposal, as explained under clause 6, to postpone the exercise of powers of demolition, except in emergent cases, until after the award referred to in clause 11, removes the principal reason for fixing at six months the period after which the second notice calling for claims to compensation must issue. It is necessary to fix some definite period because clause 38 invests the Local Government with a power of withdrawal from the initial declaration and, if the survey, planning and valuing operations preliminary to the actual assessment are unduly prolonged, we apprehend that owners, whose property is transferred in the interim and who cannot, therefore, claim compensation, may suffer owing to the depreciated market-value. There seems to be a consensus of opinion that six months will often be insufficient for the purpose; but a period of three years over which the proceedings under the Statute may extend, will not usually be required; and we would, therefore, suggest eighteen months which, with the previous sanction of the Governor-General in Council, may be extended to three years. Where emergent powers are exercised under clause 6, sub-clause (3), any lapse of time after the demolition of a building increases the difficulty of proof of damage; and in such cases, therefore, we think it reasonable to impose upon the periods defined in sub clause (1) the further limitation that notice must be given as soon as may be after the exercise of any such power.

We have defined with greater distinctness, in sub-clause (2), the particulars to be contained in the second notice calling for claims. A precise statement of damage caused or to be caused under clause 6 will be necessary in

view of the altered procedure by which the award will ordinarily precede such damage. A consequential amendment has been made in clause 13, sub-clause (1).

From sub-clause (4), the reference to registration under the Indian Post Office Act, 1898 (VI of 1898), has been omitted as sufficiently covered by the General Clauses Act, 1897 (X of 1897), section 27. A similar alteration will be found in the proviso to clause 31, sub-clause (3)."—S. C. R.

Power to require and enforce the making of statements as to names and interest.

10. The Collector may also require any such person to make or deliver to him, at a time and place mentioned (such time not being earlier than fifteen days after the date of the requisition), a statement containing so far as may be practicable, the name of every other person possessing any interest in the land or any part thereof as co-proprietor, sub-proprietor, mortgagee, tenant or otherwise, and of the nature of such interest, and of the rents and profits (if any) received or receivable on account thereof for three years next preceding the date of the statement.

Application of certain sections of the Indian Penal Code.

11. Every person required to make or deliver a statement under section 9 or section 10 shall be deemed to be legally bound to do so within the meaning of sections 175 and 176 of the Indian Penal Code.

Inquiry and award by Collector.

12. On the day fixed under section 9 or on any other day to which the inquiry has been adjourned, the Collector shall proceed to inquire into the objections (if any) which any person interested has stated pursuant to a notice given under the said section to the measurements made under section 8, and into the decrease in the value of the land and into the respective interests of the persons claiming the compensation, and shall make an award under his hand of—

(a) the true area of the land and the nature of the obstructions from which the land is to be kept free ;

(b) the compensation which in his opinion should be allowed for any damage caused or to be caused under section 6 and for any restrictions imposed under section 7; and

(c) the apportionment of the said compensation among all the persons known or believed to be interested in the land, of whom or of whose claims he has information, whether they have respectively appeared before him or not.

Award of Collector when to be final.

13. *(1)* Such award shall be filed in the Collector's office and shall, except as hereinafter provided, be final and conclusive evidence, as between the Collector and the persons interested, whether they have respectively appeared before the Collector or not, of the true area of the land, the nature of the said obstructions from which the land is to be kept free, the damage caused or to be caused under section 6, the value of the rights restricted under section 7, and the apportionment of the compensation among the persons interested.

(2) The Collector shall give immediate notice of his award to such of the persons interested as are not present personally or by their representatives when the award is made.

Adjournment of inquiry.

14. The Collector may, for any cause he thinks fit, from time to time adjourn the inquiry to a day to be fixed by him.

Power to summon and enforce attendance of witnesses and production of documents.

15. For the purpose of inquiries under this Act the Collector shall have power to summon and enforce the attendance of witnesses, including the parties interested or any of them, and to compel the production of documents, by the same means, and (so far as may be) in the same manner, as is provided in the case of a Civil Court under the Code of Civil Procedure[a].

[a] *See* now the Code of Civil Procedure, 1908 (Act V [5] of 1908).

Matters to be considered and neglected.

16. In determining the amount of compensation, the Collector shall be guided by the provisions contained in sections 23 and 24.

Supplementary proceedings.

17. Whenever the officer exercising powers conferred by section 6 considers it necessary that anything in respect of which any person is or may be entitled to compensation but of which no notice has been given or compensation awarded, under sections 9 and 12, respectively, should be done in pursuance of the said powers, the Collector shall cause supplementary notice to be given, as nearly as may be, in the manner prescribed by section 9 and subject to the limit of time imposed by sub-section *(1)* of that section, and the provisions of sections 10 to 16 shall, so far as they are applicable, be deemed to apply to any further inquiry and award which may be held or made in consequence of such supplementary notice.

PART III.

REFERENCE TO COURT AND PROCEDURE THEREON

Reference to Court.

18. *(1)* Any person interested who has not accepted the award may, by written application to the Collector, require that the matter be referred by the Collector for the determination of the Court, whether his objection be to the measurement of the land, the amount of the compensation, the persons to whom it is payable, or the apportionment of the compensation among the persons interested:

Provided that every such application shall be made,—

(a) if the person making it was present or represented before the Collector at the time when he made his award, within six weeks from the date of the Collector's award;

(b) in other cases, within six weeks of the receipt of the notice from the Collector under section 13, sub-section *(2)*, or within six months from the date of the Collector's award, whichever period shall first expire.

(2) The application shall state the grounds on which objection to the award is taken.

Collector's statement to the Court.

19. *(1)* In making the reference the Collector shall state, for the information of the Court, in writing under his hand,—

(a) the situation and extent of the land with particulars of any damage caused under section 6 or of restrictions imposed under section 7;

(b) the names of the persons whom he has reason to think interested in such land;

(c) the amount of compensation awarded under section 12; and,

(d) if the objection be to the amount of the compensation, the grounds on which the amount of compensation was determined.

(2) To the said statement shall be attached a schedule giving the particulars of the notices served upon, and of the statements in writing made or delivered by, the parties interested respectively

Service of notice.

20. The Court shall thereupon cause a notice specifying the day on which the Court will proceed to determine the objection, and directing their appearance before the Court on that day, to be served on the following persons, namely:—

(a) the applicant;

(b) all persons interested in the objection, except such (if any) of them as have consented without protest to receive payment of the compensation awarded; and

(c) if the objection is in regard to the area of the land, the nature of the obstructions or the amount of the compensation, the Collector.

Restriction on scope of proceedings.

21. The scope of the inquiry in every such proceeding shall be restricted to a consideration of the interests of the persons affected by the objection.

Proceedings to be in open Court.

22. Every such proceeding shall take place in open Court, and all persons entitled to practise in any civil Court in the Province shall be entitled to appear, plead and act, as the case may be, in such proceeding.

Matters to be considered in determining compensation.

23. *(1)* In determining the amount of compensation to be awarded for damage caused, or to be caused, or for restrictions imposed under this Act, the Court shall take into consideration—

(a) the actual decrease in market-value of the land owing to the publication of the declaration relating thereto under section 3 and any damage caused or to be caused under section 6,

(b) the damage sustained by the person interested, by reason of the removal of any standing crops in the exercise of any power conferred by section 6;

(c) the damage (if any) sustained by the person interested, by reason of ceasing to be able to use such land conjointly with his other land;

(d) the damage (if any) sustained by the person interested by anything done or ordered under sections 6 and 7 injuriously affecting his other property, moveable or immoveable, in any other manner, or his earnings; and,

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Section 23—Note 1

[1] Second declaration under S. 3 cancelling first one — Date of second declaration is to be considered for determining value of property whose use is restricted. (Vol 28) 1941 Rang 225 (226) : 1941 Rang L R 40 (D B).

(e) if, in consequence of the imposition of restrictions, the person interested is compelled to change his residence or place of business, the reasonable expenses (if any) incidental to such change.

(2) In addition to the amount representing the actual decrease in the market-value of the land as above provided, the Court shall in every case award a further sum of fifteen per centum on such amount.

OBJECTS AND REASONS.

"*Clause 23.*—We have recast the wording of sub-clause (*1*), paragraph (*a*), to preclude argument to the effect that Court must take into consideration the decrease in market-value which has actually occurred between the two points of time specified, irrespective of the question whether such decrease was occasioned by the publication of the declaration under clause 3 or any damage caused or to be caused under clause 6. From paragraph (*b*) we have removed the reference to "trees" which, in the case of removal of obstruction, must, we think, be taken into consideration under paragraph (*a*)." — S. C. R.

Matters not to be considered in determining compensation.

24. In determining the amount of compensation to be awarded for damage caused, or to be caused, or for restrictions imposed under this Act, the Court shall not take into consideration—

(a) the degree of urgency which has led to the damage or the imposition of restrictions;

(b) any disinclination of the person interested to submit to damage or restrictions;

(c) any damage sustained by him, which, if caused by a private person, would not render such person liable to a suit;

(d) any increase to the value of the other land of the person interested, accruing or likely to accrue from anything done under this Act; or

(e) any outlay or improvements on, or disposal of, the land commenced, made or effected without the sanction of the Collector after the date of the publication of the declaration under section 3.

OBJECTS AND REASONS.

"*Clause 24* —We have omitted the words 'of the land or', which the original Bill reproduced from the fifth clause of the Land Acquisition Act, 1894, section 24. The position in the two cases appears to us to be essentially different. Under the enactment cited, the land is acquired by the Government which benefits by the increase. The Bill, however, contemplates a continuance of the owner's title and occupation with compensation for any damage occasioned by restrictions upon use and enjoyment; but, if the value of any portion of the land is actually increased, the damage must, of necessity, be proportionately reduced, and the point must, therefore, be taken into account under clause 23, sub-clause (*1*), paragraph (*a*)." — S. C. R.

Rules as to amount of compensation.

25. *(1)* When the applicant has made a claim to compensation, pursuant to any notice given under section 9, the amount awarded to him by the Court shall not exceed the amount so claimed or be less than the amount awarded by the Collector under section 12.

(2) When the applicant has refused to make such claim or has omitted without sufficient reason (to be allowed by the Judge) to make such claim, the amount awarded by the Court shall in no case exceed the amount awarded by the Collector.

(3) When the applicant has omitted for a sufficient reason (to be allowed by the Judge) to make such claim, the amount awarded to him by the Court shall not be less than, and may exceed, the amount awarded by the Collector.

Form of awards.

26. Every award under this Part shall be in writing signed by the Judge, and shall specify the amount awarded under section 23, sub-section *(1)*, clause *(a)*, and also the amounts (if any) respectively awarded under each of the other clauses of the same sub-section, together with the grounds of awarding each of the said amounts.

Costs.

27. *(1)* Every such award shall also state the amount of costs incurred in the proceedings under this Part, and by what persons and in what proportion they are to be paid.

(2) When the award of the Collector is not upheld, the costs shall ordinarily be paid by the Collector, unless the Court is of opinion that the claim of the applicant was so extravagant or that he was so negligent in putting his case before the Collector that some deduction from his costs should be made or that he should pay a part of the Collector's costs.

Collector may be directed to pay interest on excess compensation.

28. If the sum which, in the opinion of the Court, the Collector ought to have awarded as compensation is in excess of the sum which the Collector did award as compensation, the Court may direct that the Collector shall pay interest on such excess at the rate of six per centum per annum from the date of his award to the date of payment of such excess into Court.

PART IV.

APPORTIONMENT OF COMPENSATION.

Particulars of apportionment to be specified.

29. Where there are several persons interested, if such persons agree in the apportionment of the compensation, the particulars of such appointment shall be specified in the award, and as between such persons the award shall be conclusive evidence of the correctness of the apportionment.

Dispute as to apportionment.

30. When the amount of compensation has been settled under section 12, if any dispute arises as to the apportionment of the same or any part thereof, or as to the persons to whom the same or any part thereof is payable, the Collector may refer such dispute to the decision of the Court.

PART V.

PAYMENT.

Payment of compensation or deposit of same in Court.

31. *(1)* On making an award under section 12, the Collector shall tender payment of the compensation awarded by him to the persons interested entitled thereto according to the award, and shall pay it to them unless prevented by some one or more of the contingencies mentioned in sub-section *(2)*.

(2) If they do not consent to receive it, or if there is no person competent to alienate the land, or if there is any dispute as to the title to receive the compensation or as to the apportionment of it, the Collector shall deposit the amount of the compensation in the Court to which a reference under section 18 would be submitted :

Provided, first, that any person admitted to be interested may receive such payment under protest as to the sufficiency of the amount :

Provided, secondly, that no person who has received the amount otherwise than under protest shall be entitled to make any application under section 18 :

Provided, thirdly, that nothing herein contained shall affect the liability of any person, who may receive the whole or any part of any compensation awarded under this Act, to pay the same to the person lawfully entitled thereto.

(3) Notwithstanding anything in this section, the Collector may, with the sanction of the [a][Central Government], instead of awarding a money-compensation in respect of any land, make any arrangement with a person having a limited interest in such land, either by the grant of other lands in exchange, or by the remission of land-revenue on the same or on other lands held under the same title, or in such other way as may be equitable having regard to the interest of the parties concerned.

(4) Nothing in sub section *(3)* shall be construed to interfere with or limit the power of the Collector to enter into any arrangement with any person interested in the land and competent to contract in respect thereof.

[a] *Substituted* by A. O., for "Local Government".

Investment of money deposited in respect of lands belonging to persons incompetent to alienate.

32. *(1)* If any money is deposited in Court under section 31, sub-section *(2)* and it appears that the land in respect of which the same was awarded belonged to any person who had no power to alienate the same, the Court shall order the money to be invested—

(a) in the purchase of other lands to be held under the like title and conditions of ownership as the land in respect of which such money was deposited is held, or,

(b) if such purchase cannot be effected forthwith, then in such Government or other approved securities as it thinks fit ;

and shall direct the payment of the interest or other proceeds arising from such investment to the person or persons who would for the time being have been entitled to the possession of the said land, and such moneys shall remain so deposited and invested until the same are applied—

(i) in the purchase of such other lands as aforesaid ; or

(ii) in payment to any person or persons becoming absolutely entitled thereto.

(2) In all cases of moneys deposited to which this section applies the Court shall order the cost of the following matters, including therein all reasonable charges and expeness incident thereto, to be paid by the Collector, namely :—

(a) the costs of such investments as aforesaid ;

(*b*) the costs of the orders for the payment of the interest or other proceeds of the securities in which such moneys are for the time being invested, and for the payment out of Court of the principal of such moneys and the costs of all proceedings relating thereto, except such as may be occasioned by litigation between adverse claimants.

Investment of money deposited in other cases.

33. If any money is deposited in Court under this Act for any cause other than that mentioned in section 32, the Court may, on the application of any party interested or claiming an interest in such money, order the same to be invested in such Government or other approved securities as it thinks fit, and may direct the interest or other proceeds of any such investment to be accumulated and paid in such manner as will, in its opinion, give the parties interested therein the same benefit therefrom as they might have had from the land in respect of which such money was deposited or as near thereto as may be.

Payment of interest.

34. When the amount of any compensation awarded under this Act is not paid or deposited within fifteen days of making the award, the Collector shall pay the amount awarded with interest thereon at the rate of six per centum per annum from the date of the award until it is so paid or deposited.

PART VI.

MISCELLANEOUS.

Service of notices

35. *(1)* Service of any notice under this Act shall be made by delivering or tendering a copy thereof signed, in the case of a notice under section 3, sub-section *(2)*, by the officer therein mentioned, and, in the case of any other notice, by or by order of the Collector or the Judge.

(2) Whenever it may be practicable, the service of the notice shall be made on the person therein named.

(3) When such person cannot be found, the service may be made on any adult male member of his family residing with him ; and, if no such adult male member can be found, the notice may be served by fixing the copy on the outer door of the house in which the person therein named ordinarily dwells, or carries on business, or by fixing a copy thereof in some conspicuous place in the office of the officer aforesaid or of the Collector or in the court-house and also in some conspicuous part of the land upon which restrictions are to be imposed :

Provided that, if the Collector or Judge so directs, a notice may be sent by post in a letter addressed to the person named therein at his last known residence, address or place of business and service of it may be proved by the production of the addressee's receipt.

Penalties.

36. Whoever wilfully—

(*a*) obstructs any person in doing any of the acts authorised by section 4, section 6 or section 8, or

(*b*) destroys, damages, alters or otherwise interferes with the ground-level or any work done under section 6, or

(*c*) contravenes any of the provisions of section 7 or any condition prescribed thereunder,

shall be punishable with imprisonment for a term which may extend to one month, or with fine which may extend to fifty rupees, or with both, and, in the case of a continuing offence, with an additional fine which may extend to five rupees for every day after the first in regard to which he is convicted of having persisted in the offence ; and any expenses incurred in removing the effects of his offence may be recovered from him in the manner provided by the law for the time being in force for the recovery of fines.

Magistrate to enforce the terms of the Act.

37. If the Collector or officer authorised under section 6 is opposed or impeded in doing anything directed or permitted by this Act, he shall, if a Magistrate, enforce compliance, and, if not a Magistrate, he shall apply to a Magistrate or (within the towns of Calcutta, Madras [a][and Bombay]) to the Commissioner of Police, and such Magistrate or Commissioner (as the case may be) shall enforce compliance.

[a] *Substituted* by A. O. for "Bombay and Rangoon."

Section 36 — Note 1

[1] Conviction for persistence in offence essential for imposition of continuing fine. (Vol 15) 1928 All 687 (688) : 29 Cri L Jour 739.

Completion of imposition of restrictions not compulsory, but compensation to be awarded when not completed.

38. *(1)* The [a][Central Government] shall be at liberty to withdraw from the imposition of any declared restrictions before any of the measures authorised by section 6 have been taken.

(2) Whenever the [a][Central Government] withdraws the imposition of any declared restrictions the Collector shall determine the amount of compensation due for the damage suffered by the owner in consequence of the notice or of any proceedings thereunder, and shall pay such amount to the person interested, together with all costs reasonably incurred by him in the prosecution of the proceedings under this Act relating to the said restrictions.

(3) The provisions of Part III shall apply, so far as may be, to the determination of the compensation payable under this section.

[a] *Substituted* by A. O for "Local Government".

Demolition of part of house or building and imposition of restrictions on part of land.

39. *(1)* The provisions of this Act shall not be put in force for the purpose of demolishing or acquiring the right to demolish a part only of any house, manufactory or other building, if the owner desires that the whole of such house, manufactory or building shall be demolished or that the right to demolish the whole of it shall be acquired :

Provided that the owner may at any time before the Collector has made his award under section 12, by notice in writing, withdraw or modify his expressed desire that the whole of such house, manufactory or building shall be demolished, or that the right to demolish the whole of it shall be acquired :

Provided, also, that, if any question shall arise as to whether any building or other construction proposed to be demolished under this Act does or does not form part of a house, manufactory or building within the meaning of this section, the Collector shall refer the determination of such question to the Court, and such building or other construction shall not be demolished until after the question has been determined.

In deciding on such a reference the Court shall have regard to the question whether the building or other construction proposed to be demolished is reasonably required for the full and unimpaired use of the house, manufactory or building.

(2) If, in the case of any claim of the kind referred to in section 23, sub-section *(1)*, clause *(c)* by a person interested, on account of ceasing to be able to use the land, upon the use and enjoyment of which restrictions are to be imposed, conjointly with his other land, the [a][Central Government] is of opinion that the claim is unreasonable or excessive, it may, at any time before the Collector has made his award, order the imposition of restrictions upon the whole of the land of which the land upon the use and enjoyment of which it was first sought to impose restrictions forms a part.

(3) In the case provided for by sub-section *(2)* no fresh declaration or other proceeding under sections 3 to 10 shall be necessary ; but the Collector shall without delay furnish a copy of the order of the [a][Central Government] to the person interested, and shall thereafter proceed to make his award under section 12.

(4) Notwithstanding anything contained in section 7, clause *(a)*, any land, upon the use and enjoyment of which restrictions are imposed under this section, may be included in the outer boundary, even though its distance from the crest of the outer parapet of the work exceeds two thousand yards.

[a] *Substituted* by A. O. for "Local Government".

Exemption from stamp-duty and fees.

40. No award or agreement made under this Act shall be chargeable with stamp-duty, and no person claiming under any such award or agreement shall be liable to pay any fee for a copy of the same.

Notice in case of suits for anything done in pursuance of Act.

41. No suit or other proceeding shall be commenced or prosecuted against any person for anything done in pursuance of this Act, without giving to such person a month's previous notice in writing of the intended proceeding, and of the cause thereof, nor after tender of sufficient amends.

Code of Civil Procedure to apply to proceedings before Court.

42. Save in so far as they may be inconsistent with anything contained in this Act, the provisions of the Code of Civil Procedure[a] shall apply to all proceedings before the Court under this Act.

[a] *See* now the Code of Civil Procedure, 1908 (Act 5 [V] of 1908).

43. Subject to the provisions of the Code of Civil Procedure[a] applicable to appeals from original decrees, an appeal shall lie to the High Court from the award or from any part of the award of the Court in any proceeding under this Act.

Appeals in proceedings before Court.

[a] *See* now the Code of Civil Procedure, 1908 (Act 5 [V] of 1908).

44. *(1)* The [a][Central Government] [b][* * * *] may make rules for the guidance of officers in all matters connected with the enforcement of this Act.

Power to make rules

(2) The power to make rules under sub-section *(1)* shall be subject to the condition of the rules being made after previous publication.

(3) All rules made under sub section *(1)* shall be published in the [c][Official Gazette], and shall thereupon have effect as if enacted in this Act.

[a] *Substituted* by A. O. for "Governor-General in Council". [b] The words "and the Local Government with the previous sanction of the Governor-General in Council" were *repealed* by A. O. [c] *Substituted* by A. O. for "local official Gazette".

INTERPRETATION OF STATUTES

SYNOPSIS

1. Interpretation of Statutes — General.
2. Rules as to interpretation of statutes.
3. Construction of consolidating statutes.
4. Retrospective operation of statutes.
5. Procedural statutes, how far exhaustive.
6. Reference to pre-existing state of the law.
7. Reference to proceedings of the Legislature.
8. Reference to preamble and headings prefixed to the sections.
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10. Illustrations.
11. Punctuation marks.
12. Proviso.
13. Explanation.
14. Judicial precedents.
15. English and American decisions.
16. Interpretation of fiscal statutes.
17. Interpretation of penal statutes.
18. Interpretation of statutes of limitation.

1. Interpretation of statutes—General.—It is a cardinal rule of construction of statutes in general that the intention of an enactment should be gathered from the *language* employed by it,[1] and that where words used are *clear and unambiguous*, it is the duty of the Court to give effect to them according to their *plain meaning*, neither adding to nor subtracting from them.[2] Due meaning must be given to every part of the language employed.[3] The language must be taken as a whole and detached words should not be given undue importance.[4] The ordinary and grammatical sense of the words is to be adhered to, unless it would lead to repugnance with the rest of the statute.[5] Even if the result of the construction were absurd[6] or anomalous[7] there would be no

Note 1.

1. (Vol 30) 1943 F C 36 (58, 63) : I L R (1943) Kar (F C) 48 : I L R (1943) 2 Cal 1 : (1943) 5 F C R 96 (F C).
(Vol 30) 1943 Bom 169 (174) : I L R (1943) Bom 331 (F B).
(Vol 29) 1942 All 153 (155) : I L R (1942) All 174 (F B).
(Vol 28) 1941 F C 16 (33) : I L R (1941) Kar (F C) 72 : 1940 F C R 110 (F C).
(Vol 27) 1940 Oudh 67 (71) : 15 Luck 209 (F B).
(Vol 15) 1928 P C 2 (4) : 7 Pat 221 : 55 Ind App 18 (P C).
(Vol 7) 1920 P C 56 (60) : 43 Mad 550 : 47 Ind App 33 (P C).
(Vol 8) 1921 Pat 193 (198) : 6 Pat L Jour 373 (F B).
2. (Vol 30) 1943 Bom 169 (174) : I L R (1943) Bom 331 (F B).
(Vol 29) 1942 Mad 690 (691) : I L R (1942) Mad 9 (S B).
(Vol 26) 1939 P C 47 (51) : 66 Ind App 66 : I L R (1939) Kar (P C) 123 : 18 Pat 234 (P C).
(Vol 25) 1938 P C 130 (133) : I L R (1938) 2 Cal 295 : 32 Sind L R 476 : 65 Ind App 158 (P C).
(Vol 25) 1938 P C 281 (283) : 66 Ind App 1 : I L R (1939) 1 Cal 222 : I L R (1939) Kar (P C) 1 (P C).
(Vol 23) 1936 P C 5 (8) : 63 Ind App 74 : 59 Mad 175 (P C).
(Vol 22) 1935 All 723 (725) : 58 All 191 (F B).
(Vol 20) 1933 Nag 193 (199) : 29 Nag L R 278 (F B).
(Vol 23) 1936 Oudh 32 (40) : 11 Luck 611 (F B).
3. (Vol 22) 1935 Mad 442 (443, 444) : 58 Mad 787.
(Vol 14) 1927 Mad 998 (999).
4. (Vol 30) 1943 All 281 (282) : I L R (1943) All 507. (Reading of section in light of another section — Reading should be *mutatis mutandis*.)
('07) 9 Bom L R 359 (361) (D B).
5. (Vol 20) 1933 Mad 207 (210) : 56 Mad 177 (D B).
(Vol 29) 1942 Mad 558 (561) (D B).
(Vol 28) 1941 All 243 (249) : I L R (1941) All 471 (F B). (Conversion of 'and' into 'or' is permissible.)
(Vol 27) 1940 Lah 27 (28).
(Vol 25) 1938 All 456 (460) : I L R (1938) All 702 (F B).
(Vol 5) 1918 Mad 1187 (1192) : 40 Mad 989 (F B).
6. (Vol 29) 1942 Nag 5 (7) : I L R (1941) Nag 581 (D B).
(Vol 26) 1939 Nag 150 (154) : I L R (1939) Nag 185 (D B).
('10) 32 All 427 (440) (F B).
(Vol 20) 1933 Mad 207 (210) : 56 Mad 177 (D B).
[See however (Vol 26) 1939 Nag 227 (229) : I L R (1939) Nag 503 (D B). (Grammatical and ordinary sense of words leading to absurdity or inconsistency — It can be modified so as to avoid these consequences.)
(1913) 1913 App Cas 107 (117) : 82 L J Q B 232 : *Vacher & Sons, Ltd.* v. *London Society of Compositors.*]
7. (Vol 30) 1943 F C 13 (17) : I L R (1943) Kar (F C) 10 : (1943) 5 F C R 20 (F C).
(Vol 28) 1941 All 68 (70) : I L R (1941) All 127 (D B).

reason to depart from clear and unequivocal language capable of only one meaning. In other words, the interpretation should not, where the language is clear, be influenced by extraneous considerations, such as the previous state of the law,[8] or hardship,[9] or expediency,[10] or the policy or the intention of the law,[11] or the reference to or the analogy of other enactments,[12] or the terms of the enactment being against general principles of law or equity,[13] or that the giving effect to the words leads to absurdity or inconvenience or injustice[14] or that the law is different elsewhere.[15] Nor can the advantages of liberal construction be balanced against the advantages of literal construction.[16]

The Court's function is, in fact, to say not what the Legislature meant or ought to have meant but what it has said that it meant.[17] It is always dangerous to paraphrase an enactment even if badly worded[18] and no modification of the language to meet the intention can be made[19] unless it is impossible to resist the conviction that the Legislature could not possibly have intend-

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Note 1 *(contd.)*
(Vol 27) 1940 All 507 (510) : I L R (1940) All 771 (F B).
(Vol 27) 1940 Mad 127 (129) : I L R (1940) Mad 349 (F B).
(Vol 19) 1932 Mad 369 (371) : 55 Mad 622 (F B).

8. (Vol 21) 1934 Lah 1013 (1014).
(Vol 15) 1928 Bom 35 (37) : 52 Bom 88 (F B).
('11) 34 Mad 505 (510) (F B).
(Vol 15) 1928 P C 16 (18) : 55 Cal 519 : 55 Ind App 96 (P C).
(Vol 15) 1928 P C 2 (4) : 7 Pat 221 : 55 Ind App 18 (P C).
(Vol 23) 1936 All 222 (237) : 55 All 413 (S B).
(Vol 8) 1921 Cal 397 (399) : 48 Cal 556 (F B).
(Vol 19) 1932 Mad 8 (13) : 55 Mad 151 (D B).
(Vol 23) 1936 Nag 55 (60) (D B).
(Vol 17) 1930 Oudh 148 (159) : 5 Luck 552 (F B).
(Vol 23) 1936 Rang 105 (106) : 14 Rang 146 (D B).
(Vol 22) 1935 Sind 62 (64) : 28 Sind L R 366 (D B).

9. (Vol 29) 1942 Bom 61 (63, 64) (D B)
(Vol 25) 1938 P C 130 (133, 134) : I L R (1938) 2 Cal 295 : 32 Sind L R 476 : 65 Ind App 158 (P C).
(Vol 9) 1922 Cal 454 (456) : 49 Cal 721 (S B).
(Vol 16) 1929 Lah 593 (594) : 10 Lah 596 (F B).
(Vol 19) 1932 All 494 (498) : 54 All 954 (F B).
(Vol 24) 1937 Mad 667 (670) : I L R (1937) Mad 841 (D B).
(Vol 6) 1919 Mad 972 (979) : 40 Mad 1040 (F B).

10. (Vol 17) 1930 All 263 (264).

11. (Vol 30) 1943 Bom 169 (174) : I L R (1943) Bom 331 (F B).
(Vol 29) 1942 All 394 (396) : I L R 1943 All 48 (F B).
(Vol 29) 1942 Lah 19 (26) : I L R (1942) Lah 217 (F B).
(Vol 28) 1941 P C 109 (111, 112) (P C).
(Vol 28) 1941 F C 16 (24) : 1940 F C R 110 : I L R (1941) Kar (F C) 72 (F C).
(Vol 28) 1941 All 110 (112) : I L R (1941) All 77 (F B).
(Vol 27) 1940 Sind 97 (100) : I L R (1940) Kar 287 (D B). (Intention.)
(Vol 26) 1939 P C 47 (51) : 18 Pat 234 : I L R (1939) Kar (P C) 123 : 66 Ind App 66 (P C).
(Vol 24) 1937 Oudh 312 (317) (F B).
(Vol 19) 1932 Pat 293 (295) : 12 Pat 46 (S B).
(Vol 3) 1916 Mad 1 (2) : 38 Mad 419 (F B). (Policy.)
(Vol 15) 1928 Rang 326 (327) : 6 Rang 533. (Policy)
(Vol 3) 1916 Sind 17 (19) : 9 Sind L R 126 (D B). (Intention.)

12. (Vol 28) 1941 Mad 713 (718) : I L R (1941) Mad 824 (D B). (English law.)
(Vol 25) 1938 P C 152 (158) : I L R (1938) 2 Cal 381 : 32 Sind L R 502 : 65 Ind App 263 (P C). (Do.)
('99) 22 All 149 (159) : 27 Ind App 58 (P C).
(Vol 21) 1934 Mad 75 (79) : 57 Mad 472 (DB). (English law).
(Vol 19) 1932 P C 138 (140) : 59 Cal 1343 : 59 Ind App 206 (P C).
(Vol 18) 1931 Bom 50 (53) : 50 Bom 110 (D B).
(Vol 12) 1925 Cal 116 (138) (D B).
(Vol 25) 1938 Nag 292 (294) : I L R (1940) Nag 190 (D B).
(Vol 20) 1933 Rang 275 (277). (Provincial enactment.)

13. ('01) 11 Mad L Jour 91 (105) (D B). (International law contravened — Still Act must be given effect to.)
(Vol 10) 1923 P C 211 (216) : 51 Cal 86 : 1 Rang 637 : 50 Ind App 283 (P C)
(1900) 23 All 152 (156, 157) : 27 Ind App 209 (P C).
(Vol 19) 1932 P C 165 (167) : 60 Cal 1 : 59 Ind App 283 (P C).
(Vol 18) 1931 All 277 (291) : 53 All 334 (F B).
(Vol 6) 1919 Cal 989 (991) (D B).
(Vol 16) 1929 Sind 225 (226) : 24 Sind L R 167 (D B). [*See also* (Vol 6) 1919 P C 192 (193) (P C). (Question of public policy is irrelevant.)]

14. (Vol 30) 1943 P C 76 (83) (P C).
(Vol 29) 1942 All 153 (155) : I L R (1942) All 174 (F B).
(Vol 28) 1941 Bom 327 (328) : I L R (1941) Bom 544 (D B).
(Vol 28) 1941 Mad 713 (718) : I L R (1941) Mad 824 (D B).
(Vol 25) 1938 P C 130 (133, 134) : 65 Ind App 158 : I L R (1938) 2 Cal 295 (P C).
(Vol 25) 1938 Pat 403 (408) : 17 Pat 632 (F B).
(Vol 18) 1931 Lah 87 (92) : 12 Lah 129 (F B).
(Vol 19) 1932 Nag 105 (106) : 28 Nag L R 98.
(Vol 15) 1928 Sind 1 (11) : 22 Sind L R 157 (F B). [But see (Vol 15) 1928 Sind 149 (158) : 22 Sind L R 349 (F B).
(Vol 8) 1921 Cal 397 (399) : 48 Cal 556 (F B)]

15. (Vol 28) 1941 Pat 70 (83) : 20 Pat 223 (D B). (English law)
(Vol 26) 1939 P C 63 (65) (P C). (Law of Ceylon and Roman Law.)
(Vol 19) 1932 Mad 21 (21) (D B).
(Vol 24) 1937 Lah 507 (510) : I L R (1937) Lah 171 (D B). (English law.)
[*See also* (Vol 30) 1943 Pat 73 (75) : 21 Pat 794 (D B). (Court should refuse to be guided by effect of another section)]

16. (Vol 26) 1939 P C 47 (51, 52) : 18 Pat 234 : I L R (1939) Kar (P C) 123 : 66 Ind App 66 (P C).
(Vol 16) 1929 Oudh 526 (526) : 5 Luck 440.
[*See also* (Vol 10) 1923 Mad 114 (119) (D B). (A liberal construction can be adopted only where two constructions are possible.)]

17. (Vol 18) 1931 Lah 283 (287) : 12 Lah 345 (F B).
(1879) 4 Q B D 245 (263), *The Queen* v. *Bishop of Oxford.*
(1846) 4 Moo Ind App 179 (187) (P C).
(Vol 19) 1932 All 110 (111) : 54 All 1.
(Vol 17) 1930 P C 120 (126) (P C).
(Vol 11) 1924 Cal 881 (882) (D B).
(Vol 26) 1939 Lah 70 (72) : I L R (1939) Lah 283 (FB).

18. ('91) 18 Cal 23 (30): 17 Ind App 122 (P C).

19. ('74) 1 Ind App 167 (176) (P C).

ed what its words signify and that the modifications thus to be made are mere corrections of careless language and really give the true meaning.[20] Where, however, the language of the enactment is not itself precise or is ambiguous or of doubtful import, or the question arises to what extent changes in the pre-existing law have been effected by any particular amendment, recourse may be had to extraneous considerations.[21] Thus, the provisions of the other statutes which are in *pari materia*,[22] or the previous state of the law,[23] or the scope and intention of the Act,[24] may be considered in such cases. It is not, however, permissible to construe the provisions of one statute in the light of judicial decisions on another statute not in *pari materia* with the statute in question.[25]

2. Rules as to interpretation of statutes. — Subject to the general principles mentioned in the last note, the following general rules of interpretation of statutes should also be borne in mind in construing the provisions of an enactment :—

(1) Where an Act, such as the Code of Civil Procedure, is divided into sections and rules, the sections must be taken to lay down *general principles* and the rules as providing the machinery or the means of *applying* them.[1]

(2) Where the language of an enactment is difficult and ambiguous, the Court may, for its assistance in its construction, refer to rules made under the provisions of the Act, especially where such rules are, by the statute authorising them directed to be read as part of the Act.[2] But where rules are framed under a power given by the enactment such rules cannot govern or control the words of the enactment,[3] though in the case of a conflict between such rules and a bye-law, the

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Note 1 *(contd.)*

20. (Vol 29) 1942 Pat 1 (27, 28): 21 Pat 1 (F B).
(Vol 27) 1940 All 500 (503) : ILR (1940) All 681(DB).
(Vol 20) 1933 Mad 207 (211): 56 Mad 177 (D B).
(Vol 11) 1924 Bom 412 (416): 48 Bom 625.
('01) 28 Cal 744 (747) (D B).

21. (Vol 15) 1928 P C 16 (18): 55 Ind App 96 : 55 Cal 519 (P C). (Substantial changes in law pleaded—Pre-existing law should be looked to.)
(Vol 11) 1924 All 328 (335, 336) : 46 All 489 (F B). (Comparison with old law.)
('99) 21 All 391 (396, 403) (F B).
(Vol 7) 1920 Bom 121 (127): 44 Bom 986. (The Judge may infer that no change in the law is intended unless the contrary inference is necessary)
(Vol 11) 1924 Cal 257 (272) (F B).

22. (Vol 29) 1942 Lah 102 (103) : I L R (1942) Lah 349 (F B).
(Vol 28) 1941 Bom 85 (89): ILR(1941) Bom 191 (DB).
(Vol 26) 1939 All 403 (405, 412) : I L R (1939) All 647 (F B).
('80) 4 Bom 515 (526) (F B).
(Vol 12) 1925 Pat 1 (S) : 3 Pat 371 (FB). (Limitation Act and the Civil Procedure Code.)
('10) 32 All 351 (362, 363): 37 Ind App 124 (P C) (Oudh Laws Act and Oudh Land Revenue Act)
(Vol 19) 1932 Oudh 210 (216): 7 Luck 601 (F B).
(Vol 18) 1931 Pat 241 (246) : 10 Pat 670 (F B). (Per Jwala Prasad J.)

23. (Vol 28) 1941 Mad 449 (452) : I L R (1941) Mad 599 (F B). (Per Venkataramana Rao J., in Order of Reference.)
(Vol 27) 1940 P C 105 (109) : I L R (1940) Mad 599 : I L R (1940 Kar (P C) 194: 67 Ind App 222 (P C).
(Vol 14) 1927 Bom 278 (300): 51 Bom 516 (F B).
(Vol 15)1928 PC 16(18): 55 Cal 519:55 Ind App 96(PC).
(Vol 11) 1924 Cal 257 (272) (F B).
(Vol 11) 1924 All 328 (335): 46 All 489 (F B).
(Vol 8) 1921 Cal 397 (399): 48 Cal 556 (F B).

24. (Vol 30) 1943 Lah 65 (68) : I L R (1943) Lah 257 (F B).
(Vol 30) 1943 Lah 148 (154): ILR (1943) Lah 497(FB).
(Vol 28) 1941 Mad 558 (559) (D B). (Scheme of Act.)
(Vol 27) 1940 Bom 172 (177) : I L R (1940) Bom 225 (D B).
(Vol 26) 1939 Cal 435 (451): ILR(1939) 2 Cal 93 (FB).
('81) 3 Mad 271 (280, 287) (F B). (Proceedings of Legislature etc., may be considered.)
(Vol 11) 1924 All 328 (336): 46 All 489 (F B).
(Vol 5) 1918 Pat 398 (407): 3 Pat L Jour 1 (F B).

25. (Vol 28) 1941 Pat 465 (471, 472): 20 Pat 280 (DB).
(Vol 27) 1940 P C 105 (110): I L R (1940) Mad 599: 67 Ind App 222 : I L R (1940) Kar (P C) 194 (P C).
(Vol 23) 1936 Bom 49 (51): 60 Bom 232 (D B). (Even though the actual phrase in the several Acts may be the same.)
(Vol 22) 1935 Lah 570 (586): 16 Lah 829 (F B). (Reference to English Rulings bearing on English statutes.)
(Vol 19) 1932 All 293 (307): 54 All 646 (F B).
[*See* (Vol 22) 1935 P C 143 (146) : 14 Pat 552 (P C). (Income-tax Act of one country not to be construed in the light of decisions on income tax legislation of another country.)]
[*See also* (Vol 23) 1936 Nag 278 (279) : I L R (1937) Nag 108. (Tendency on the part of the Subordinate Courts of the Central Provinces to take recourse to the decisions of the Allahabad High Court in matters specifically provided for by any local enactments of the C. P. deprecated.)]

Note 2

1. (Vol 4) 1917 Cal 657 (658): 43 Cal 148 (D B).
(Vol 1) 1914 Cal 163 (164) : 41 Cal 108 (D B). (Rules restrict sections.)
(Vol 4) 1917 Cal 44 (46) : 44 Cal 929 (F B). (View that rules restrict sections is dissented from by Mookerjee J.)
[*See* (Vol 21) 1934 Sind 110 (111) (D B). (Courts cannot put a forced construction upon the language of the Act to bring it into conformity with a rule)]

2. (Vol 24) 1937 Mad 481 (483) : I L R (1937) Mad 1023.
[*See also* (Vol 18) 1931 Lah 320 (323, 331) (F B). (Per Addison, J.—Departmental instruction issued on the working of Act may be referred to—Per Tek Chand, J. *Contra.*)]
[But see (Vol 13) 1926 Cal 856 (858): 53 Cal 615 (DB). (Bengal Cess Manual cannot be looked at for construing Bengal Cess Act.)]

3. (Vol 29) 1942 Sind 65 (71) : I L R (1942) Kar 127 (S B).
(Vol 23) 1936 Pesh 57 (59) (D B).
[*See also* (Vol 26) 1939 Sind 293 (294) : I L R (1939) Kar 779 (D B). (Statutory rules framed under Act must be interpreted with the section under which they are made.)]

rule prevails over the bye law.[4]

(3) Where two constructions are possible, a section should be construed so as to avoid *inconsistency* of meaning, [5] or the making of a word, clause or sentence either superfluous or insignificant.[6] A section which is clear in itself will be affected by previous or succeeding sections only when those sections are capable of an interpretation which is repugnant to or startling in juxtaposition with the section in question.[7] In other words, the statute should be examined as a self-contained unit, the different sections being considered simultaneously in view of each other.[8] It follows from this that where two remedies or two procedures are provided for, one must not be taken as operating in derogation of the other [9]

(4) Everything is to be taken as permissible unless there is some prohibition against it.[10] In the case of consolidating statutes, like the Civil Procedure Code, the *statute itself* must be consulted in order to find the authority or the prohibition.[11]

(5) Where the statute is not clear, reasonable construction should be adopted.[12] In the case of ambiguity that meaning should be preferred which is more in accord with justice and convenience.[13] A construction which leads to an absurd result,[14] or unjust consequences entailing hardship,[15] or produces injustice,[16] or defeats the object of the Act itself[17] should, if possible, be avoided.

Note 2 *(contd.)*

4. (Vol 25) 1938 Lah 8 (10) (D B).

5. (Vol 29) 1942 Lah 114 (117): I L R (1942) Lah 364 (F B).
(Vol 27) 1940 Nag 39 (42): I L R (1940) Nag 141 (FB).
(Vol 4) 1917 Mad 958 (960) : 40 Mad 529 (S B).
(Vol 15) 1928 Lah 609 (613): 9 Lah 701 (F B).
(Vol 11) 1924 Bom 219 (225, 226) : 48 Bom 214 (F B).
(Vol 20) 1933 Nag 193 (197): 29 Nag L R 278 (F B).
[*See also* (Vol 27) 1940 Mad 674 (675). (Where a section primarily intended to apply to suits is also to be applied to appeals, the ordinary canon of construction is that necessary changes in the wording should be made so as to make the section good sense.)
(Vol 5) 1918 Pat 103 (105) : 3 Pat L Jour 581 (F B). (That construction is to be accepted which will avoid consequences which the Legislature did not intend to bring about.)]

6. (Vol 29) 1942 Bom 191 (193): I L R (1942) Bom 287.
(Vol 27) 1940 Cal 47(50) : ILR (1940) 1 Cal 168 (DB).
('05) 28 Mad 466 (471) (F B).
(Vol 17) 1930 Sind 265 (279) : 24 Sind L R 277 (F B).
(Vol 13) 1926 All 653 (656) (D B).
(Vol 12) 1925 Cal 1 (3): 52 Cal 275 (F B).
(Vol 25) 1938 Nag 180 (181): I L R (1940) Nag 441.
(Vol 21) 1934 Oudh 145 (148): 9 Luck 670 (D B).

7. (Vol 19) 1932 Mad 391 (395): 55 Mad 903 (F B).
[*See* (Vol 22) 1935 Oudh 427 (428, 429): 11 Luck 289 (D B). (Words not found held as "understood" in order to avoid inconsistency between two provisions of the section.)]

8. (Vol 29) 1942 Pat 1 (27) : 21 Pat 1 (FB).
(Vol 9) 1922 Bom 247 (252) : 46 Bom 663 (FB).
(1886) 11 App Cas 286 (291) : 55 L J Q B 417, *Turquand* v. *Board of Trade.*
(Vol 19) 1932 P C 168 (171) : 56 Bom 313 : 59 Ind App 258 (PC).
(Vol 23) 1936 Cal 506 (512) : ILR (1937) 1 Cal 25 (FB).
(Vol 20) 1933 Nag 193 (197, 199, 200) : 29 Nag L R 278 (FB).
(Vol 22) 1935 Pat 342 (345) : 14 Pat 785 (SB).
(Vol 25) 1938 Sind 1 (5) : 32 Sind L R 185 (FB). (More literal construction ought not to prevail if opposed to the intention of Legislature as apparent from the statute.)
(Vol 22) 1935 Bom 402 (403) : 60 Bom 55 (FB). (Violence to language in order to give effect to the enactment as a whole is permissible.)

9. (Vol 27) 1940 Nag 104 (106).
('86) 8 All 354 (361) (FB).
(Vol 9) 1922 P C 17 (19) : 44 All 185 : 49 Ind App 60 (PC).

10. ('89) 11 All 267 (287) (FB) (Per *Mahmood J.*)
(Vol 12) 1925 Mad 42 (44) : 48 Mad 494.
('82) 5 All 163 (172) (FB).
(Vol 23) 1936 Nag 55 (61) (DB).

11. ('89) 11 All 267 (288) (FB).

12. (Vol 29) 1942 Oudh 39 (44, 45) : 17 Luck 52 (DB).
(Vol 28) 1941 F C 16 (31) : I L R (1941) Kar (FC) 72 : 1940 F C R 110 (FC).
(Vol 8) 1921 P C 240 (242) (PC).
(Vol 18) 1931 P C 24 (26) (PC).
(Vol 23) 1936 All 576 (578) : 58 All 1064 (FB).
(Vol 15) 1928 All 207 (210) : 50 All 625 (FB).
(Vol 6) 1919 Cal 551 (569) : 45 Cal 343 (FB).
(Vol 26) 1939 Lah 81 (85) (FB).
(Vol 13) 1926 Sind 1 (3) : 20 Sind L R 34 (FB).

13. (Vol 25) 1938 P C 130 (133) : I L R (1938) 2 Cal 295 : 65 Ind App 158 : 32 Sind L R 476 (PC).

14. (Vol 30) 1943 Lah 148 (154) : I L R (1943) Lah 497 (FB).
(Vol 29) 1942 Bom 191 (193) : I L R (1942) Bom 287.
(Vol 29) 1942 Lah 114(117): ILR (1942) Lah 364(FB).
(Vol 28) 1941 Cal 540 (541) : I L R (1941) 2 Cal 73.
(Vol 14) 1927 Mad 166 (169) : 50 Mad 239 (DB).
(Vol 14) 1927 Nag 68 (70) : 23 Nag L R 9.
(Vol 8) 1921 Cal 397 399) : 48 Cal 556 (FB).
(Vol 20) 1933 Sind 151 (154) : 27 Sind L R 121 (FB).

15. (Vol 29) 1942 Lah 257 (259) : I L R (1943) Lah 601 (SB).
(Vol 29) 1942 Pat 1 (14) : 21 Pat 1 (FB).
(Vol 27) 1940 Mad 62 (65).
(Vol 17) 1930 Mad 200 (205) : 52 Mad 866 (DB).
(Vol 9) 1922 Bom 257 (260) : 46 Bom 470 (DB).
(Vol 9) 1922 Nag 89 (93, 94) (FB).
(Vol 21) 1934 All 626 (639) (FB).

16. (Vol 30) 1943 Lah 148 (154) : I L R (1943) Lah 497 (FB).
(Vol 29) 1942 Cal 476 (477):ILR (1942) 2 Cal 389 (DB).
(Vol 29) 1942 Lah 257 (259):I L R (1943) Lah 601(SB).
(Vol 28) 1941 Bom 327 (328) : I L R (1941) Bom 544 (DB).
(Vol 27) 1940 Mad 62 (65).
(Vol 25) 1938 Cal 51 (66):I L R (1938) 1 Cal 290 (DB).
(Vol 14) 1927 Mad 166 (169) : 50 Mad 239 (DB).
(Vol 13) 1926 All 617 (622) : 49 All 8 (FB).
(Vol 25) 1938 Bom 484 (488):ILR (1939) Bom 53 (FB).
(Vol 22) 1935 Nag 168 (170) : 31 Nag L R 386.

17. (Vol 30) 1943 Lah 65 (68, 78) : I L R (1943) Lah 257 (FB).
(Vol 29) 1942 Lah 257 (259):ILR (1943) Lah 601 (SB).
(Vol 28) 1941 All 110 (112) : I L R (1941) All 77 (FB).
(Vol 28) 1941 All 243 (249, 275) : I L R (1941) All 471 (FB). (Conversion of 'and' into 'or' is permissible.)

(6) Words operating in derogation of the rights of the subject[18] or imposing pecuniary burden,[19] should be strictly construed.

(6A) In the case of reasonable doubt as to the expression contained in a penal provision, the benefit of doubt must be given to the subject.[20]

(7) A restricted construction ought not to be placed upon the language of a remedial Act.[21]

(8) General words must be given the broadest possible effect unless there is some specific reason to the contrary.[22] But general words and phrases, however comprehensive and wide they may be in their literal sense, must be usually construed as limited to the actual objects of the Act and not as altering the law beyond.[23] Specific words of importance like "mortgage" should be given their appropriate meaning.[24]

(9) A *general* provision must yield to a *special* provision providing for particular cases.[25] If the Legislature makes a special Act dealing with a particular case and later makes a general Act which by its terms would include the subject of the special Act and is in conflict with the special Act, nevertheless unless it is clear that in making the general Act the Legislature intended to abrogate the special Act, the provisions of the general Act do not override the provisions of special Act.[26] As a matter of fact a repeal of the special Act by the general Act by implication will not be admitted if the two can be read together.[27] The same rule applies to general and special expressions used in different clauses of a section[28] as also to two special Acts.[29] But such special provision must be applied only

Note 2 *(contd.)*
(Vol 26) 1939 Cal 435 (451):I L R (1939) 2 Cal 93 (FB).
(Vol 24) 1937 Bom 275 (278) : I L R (1937) Bom 655 (FB).
(Vol 12) 1925 Mad 248 (249) : 48 Mad 656 (DB).
(Vol 5) 1918 Pat 103 (105) : 3 Pat L Jour 581 (FB). (Defence of India Act.)
(Vol 19) 1932 Oudh 210 (211) : 7 Luck 601 (FB).
(Vol 20) 1933 Sind 151 (154) : 27 Sind L R 121 (FB).
18. (Vol 26) 1939 Bom 305 (307) : I L R (1939) Bom 586 (FB).
(1882) 7 App Cas 178 (188) : 51 L J P C 43 *Western Counties Rly. Co.* v. *Windsor & Annapolis Rly. Co.*
('86) 8 All 354 (361) (FB).
(Vol 21) 1934 P C 36 (40) (PC).
(Vol 8) 1921 P C 224 (227) (PC).
('87) 14 Cal 67 (87) (FB).
[*See also* (Vol 30) 1943 Cal 285 (318) : 44 Cri L Jour 673 (SB). (Ordinance taking rights from subject — Courts should see that all necessary conditions are complied with (Per Sen J).)]
19. (Vol 28) 1941 Rang 212 (219) (SB).
(Vol 25) 1938 Mad 498 (499) : I L R (1938) Mad 981 (DB). (Fiscal statutes)
(Vol 24) 1937 Cal 551 (552) : I L R (1938) 1 Cal 35 (DB). (Taxing statute.)
(Vol 24) 1937 Mad 604 (605) : I L R (1938) Mad 63.
(Vol 24) 1937 Nag 11 (12).
(Vol 24) 1937 Pat 550 (553) : 16 Pat 600 (SB).
(Vol 24) 1937 Sind 93 (93, 94) (DB). (Court-fees Act.)
(Vol 23) 1936 Oudh 180 (181) : 11 Luck 704 (DB). (Court-fees Act.)
(Vol 22) 1935 Bom 256 (257) : 59 Bom 469 (SB).
(Vol 22) 1935 Lah 570 (576, 578) : 16 Lah 829 (FB). (Per Jai Lal and Skemp JJ., in judgment of Division Bench)
20. (Vol 22) 1935 Sind 102 : 29 Sind L R 19 (DB).
(Vol 18) 1931 Lah 283 (285) : 12 Lah 345 (DB). (Reasonable construction should be put.)
(Vol 19) 1932 Nag 174 (176) : 28 Nag L R 302,
(Vol 17) 1930 All 265 (267) : 52 All 568 (FB). (Principle is applicable to fiscal statutes as well.)
(Vol 26) 1939 Lah 81 (85) (FB).
('30) 1930 Mad W N 249 (280) (SB).
21. (Vol 15) 1928 Oudh 396 (400) : 4 Luck 1 (FB). (Per Srivastava, J. on construction of Usurious Loans Act.)
(1906) 1906 App Cas 461 (467) : 75 L J Ch 705:95 L T 202, *Samuel* v. *Newbold*. (Money-lenders Act.)
22. (1877) 2 C P D 469 (486) : 36 L T 812, *Tuycross* v. *Grant*. (General language of statute passed to prevent fraud ought not to be cut down so as to leave a large portion of such fraud entirely undetected.)
('86) 8 All 354 (360, 361) (FB).
('11) 35 Bom 412 (417). (Definition clauses—When to be used.)
(Vol 3) 1916 Pat 133 (134):2 Pat L Jour 91 (FB). (Do.)
23. (Vol 28) 1941 Pat 465 (470) : 20 Pat 280 (DB). (Words should be given natural meaning—Restricted meaning must be given where it is clearly intended.)
(Vol 26) 1939 Lah 388 (392):I L R (1940) Lah 23 (FB).
(Vol 9) 1922 Bom 416 (419, 420) : 47 Bom 18.
(Vol 16) 1929 Nag 246 (249) : 25 Nag L R 19.
24. (Vol 16) 1929 All 174 (176).
25. (Vol 29) 1942 Cal 607 (609).
(Vol 17) 1930 Bom 490 (492) : 55 Bom 59 (FB).
(Vol 9) 1922 Bom 247 (251) : 46 Bom 663 (FB).
(Vol 12) 1925 All 230 (232) : 47 All 268.
(Vol 13) 1926 Lah 88 (89) : 7 Lah 84 (DB).
(Vol 19) 1932 Mad 605 (608) : 56 Mad 212.
(Vol 23) 1936 Nag 180 (180) : I L R (1936) Nag 5.
(Vol 19) 1932 Oudh 193 (195) : 8 Luck 1 (FB).
26. (Vol 28) 1941 Lah 364 (367) : I L R (1942) Lah 199 (DB).
(Vol 19) 1932 P C 252 (254) (PC).
(Vol 16) 1929 Nag 17 (21) : 24 Nag L R 158 (FB).
[See however (Vol 24) 1937 Pat 1 (2) : 15 Pat 792 (DB). (Earlier treaty exempting a Raja from taxation —Later general provisions of income-tax without any specified exemption of any person — Two provisions inconsistent — *Held* general provisions of income-tax will prevail.)]
27. (Vol 29) 1942 Cal 607 (609).
(Vol 27) 1940 Lah 129 (134) : I L R (1940) Lah 242 (FB). (But if the general statute is so worded that the repeal flows from it as a necessary consequence, Courts should give effect to it)
('38) 1938 Nag L Jour 133 (135).
(Vol 24) 1937 Pat 1 (2) : 15 Pat 792 (DB).
(Vol 17) 1930 Pat 301 (304) : 9 Pat 747.
28. (Vol 29) 1942 Bom 191(193):ILR (1942) Bom 287.
29. (Vol 29) 1942 Rang 30 (36) : 1941 Rang L R 615.
(Vol 15) 1928 All 186 (189, 190) : 50 All 430 (DB). (The former enactment must be specifically repealed or its continuance must be inconsistent with a provision of a later Act, in which case, repeal will be deemed by necessary implication.)
(Vol 17) 1930 Mad 963 (968) : 54 Mad 92.

to those cases to which it is confined by the Legislature.[30] Thus, a special Act of the Legislature as the Sale of Goods Act cannot possibly, except in the branch of the law to which it relates, overrule a statute of the nature of the General Clauses Act.[31] Again, when on the same subject two incompatible provisions are in force, one general and the other particular, the particular provision must be taken to be an exception to the general one.[32]

(10) Where there are general words following particular and specific words in a section, the general words must be confined to things of the same kind *(ejusdem generis)* as those specified.[33] The applicability of this rule, however, will not arise if the class of cases intended to be provided for by the section is clear from the language of the section[34] or by the general object of the Act[35] or where the specific words are of different genera.[36]

(11) Where a statute has adopted part of the language of the old statute, the interpretation put upon such language by the Courts must be taken to have been accepted by the Legislature.[37] When legislation follows a continuous practice and repeats the very words on which that practice was founded, it may be inferred that the Legislature in re-enacting the statute intended those words to be understood in their received meaning.[38]

(12) Provisions ousting the jurisdiction of the Courts[39] and those conferring jurisdiction on special bodies or persons or Courts[40], should be strictly construed. The grant of a special jurisdiction does not carry with it the power to act outside such jurisdiction.[41]

(13) In the absence of any context indicating a contrary intention, the Legislature must be taken to attach the same meaning to the same words used in different parts of the statute[42] or in subsequent statutes in a similar connexion.[43] But, if sufficient reasons exist, a word can be construed

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Note 2 *(contd.)*
(Vol 17) 1930 Bom 554 (563) : 54 Bom 902 (DB).
30. (Vol 2) 1915 Mad 781 (784) : 38 Mad 738.
(Vol 4) 1917 Mad 951 (954) : 39 Mad 981 (DB).
(Vol 16) 1929 Oudh 389 (392) : 4 Luck 539 (FB).
31. *See* (Vol 16) 1929 Nag 246 (249) : 25 Nag L R 19. (General statute cannot be impliedly repealed by local or special statute.)
32. (Vol 27) 1940 Pat 577 (578).
(Vol 20) 1933 All 241 (244, 245) : 55 All 432 (FB).
[*See* (Vol 29) 1942 Cal 587 (592) (DB). (The one test of repugnancy between two provisions of law is to see if the two can co-exist.)]
33. (Vol 30) 1943 Lah 140 (143) (FB). (The rule of *ejusdem generis* applies also to terms or phrases appearing in parts of the same section or in different sections in the same chapter.)
(Vol 29) 1942 Cal 343 (347):ILR (1942) 1 Cal 211 (DB).
(Vol 28) 1941 All 345 (346):I L R (1941) All 691 (FB).
(Vol 25) 1938 Bom 41 (42):I L R (1937) Bom 830(DB).
('13) 17 Cal W N 735 (738) (PC).
(Vol 15) 1928 P C 16 (18) : 55 Cal 519 : 55 Ind App 96 (PC).
(Vol 26) 1939 Nag 186 (189) : I L R (1939) Nag 250 (FB).
(Vol 6) 1919 Pat 541 (542) : 4 Pat L Jour 561.
[But see (Vol 12) 1925 Cal 116 (135) (DB). (*Prima facie* to be taken in general sense.)]
34. (Vol 29) 1942 Mad 462 (463).
('02) 29 Cal 890 (907, 909) (FB).
(Vol 7) 1920 Mad 413 (413) : 43 Mad 65 (DB).
(Vol 19) 1932 Lah 239 (241) : 13 Lah 528 (DB).
35. (Vol 28) 1941 All 345 (347) : I L R (1941) All 691 (FB).
36. (Vol 26) 1939 Bom 421 (422).
37. (Vol 25) 1938 Mad 638 (640) (DB).
(Vol 18) 1931 All 489 (490) : 53 All 687 (FB).
(Vol 18) 1931 All 294 (299) : 53 All 612 (FB).
(Vol 25) 1938 Bom 484 (488):ILR (1939) Bom 53 (FB).
(Vol 18) 1931 Cal 560 (562, 563) : 58 Cal 761.
(Vol 17) 1930 Lah 764 (767) : 11 Lah 481 (FB).
(Vol 20) 1933 Sind 179 (181, 182) : 27 Sind L R 230 (DB). (English statute reproduced by the Indian Legislature.)
38. (Vol 29) 1942 Cal 442 (443) (DB).
(Vol 26) 1939 Mad 421 (427) : I L R (1939) Mad 566 (FB).
(Vol 25) 1938 Bom 231 (232) : I L R (1938) Bom 655 (FB).
('07) 30 Mad 426 (433) : 34 Ind App 186 (PC).
(Vol 20) 1933 Mad 489 (490) : 56 Mad 837 (SB).
(Vol 21) 1934 Rang 27 (29) : 11 Rang 521 (SB).
39. (Vol 29) 1942 Lah 217 (227) : I L R (1943) Lah 191 (FB).
(Vol 28) 1941 Nag 226 (230):ILR (1941) Nag 279 (DB).
(Vol 26) 1939 Cal 435 (446):I L R (1939) 2 Cal 93(FB).
(Vol 15) 1928 Lah 121 (122) : 9 Lah 504 (FB).
(Vol 15) 1928 Pat 615 (626) : 8 Pat 122 (DB).
(Vol 17) 1930 All 225 (230) : 52 All 619 (FB).
(Vol 23) 1936 Mad 574 (575) : 59 Mad 895 (DB).
(Vol 22) 1935 Oudh 96 (106) (DB).
(Vol 14) 1927 Sind 173 (175) (DB).
[*See also* (Vol 30) 1943 Cal 285 (318) : 44 Cri L Jour 673 (SB).]
40. ('09) 6 Ind Cas 857 (857) : 3 Sind L R 221.
(Vol 18) 1931 Nag 48 (50).
('12) 23 Mad L Jour 726 (727).
(Vol 17) 1930 Nag 205 (206).
(Vol 20) 1933 Oudh 100 (102) : 8 Luck 295.
(Vol 19) 1932 Rang 123 (127) : 10 Rang 412 (FB).
41. (Vol 17) 1930 Nag 205 (205).
(Vol 20) 1933 Nag 193 (196) : 29 Nag L R 278 (FB).
42. (Vol 29) 1942 Bom 57 (58) : I L R (1942) Bom 94 (DB).
(Vol 29) 1942 Bom 191 (192) : I L R (1942) Bom 287.
(Vol 29) 1942 Lah 102 (103) : I L R (1942) Lah 349 (FB).
(Vol 26) 1939 Cal 435 (446): ILR (1939) 2 Cal 93(FB).
(Vol 23) 1936 Oudh 115 (116) : 11 Luck 583 (DB).
(Vol 16) 1929 All 977 (980) : 52 All 225 (FB).
(Vol 23) 1936 All 495 (502) : 58 All 949 (FB).
(Vol 24) 1937 Mad 385 (390) : I L R (1937) Mad 616 (FB).
(Vol 24) 1937 Nag 17 (22) : ILR (1937) Nag 315 (FB).
(Vol 23) 1936 Sind 108 (112) : 29 Sind L R (382) (DB).
43. (Vol 29) 1942 Lah 102 (103) : I L R (1942) Lah 349 (FB).
(Vol 29) 1942 Sind 45 (46):I L R (1941) Kar 557 (DB).

in one part of an Act in a sense different from that it bears in another part.[44] Where an expression is *defined* in an Act, it must be given the same meaning throughout the Act,[45] unless there is some provision which makes it clear that for certain purposes, the expression must be given a different meaning.[46] But definitions are of limited scope being framed only for the purpose of the Act in which they occur, unless specially extended.[47] Where, however, the Legislature has not defined a legal expression it would be wrong for a Court to lay down a rigid definition of it.[48]

(14) *Prima facie* when two different expressions are used in a statute the Court ought to assume that they are intended to bear distinct meanings,[49] but, on the other hand, it may appear from the context that the two expressions are used interchangeably and are not intended to have different meaning.[50]

(15) All rules of law are founded on the assumption that the constituted tribunals are fairly competent and have power to carry out the provisions of Acts.[51] They should, therefore, be construed so as to further and not so as to restrict the purposes of the Act.[52] Where jurisdiction is given to a Court to make a particular order, the Legislature must be deemed to have granted also the power to enforce such order.[53]

(16) Where a statute creates a right and provides a remedy, that remedy and *no other* is available.[54] This rule, however, does not apply where the right exists *independently* of the statute.[55] Where, again, a statute gives power to any person for a public purpose from which an individual may receive an injury, and where the mode of redress for such injury is also specified in the statute, the jurisdiction of the ordinary Courts will be ousted.[56]

(17) Where a statute confers rights on a party in general terms, the cutting down of those rights by a rule would make the rule repugnant to the Act.[57] But such rules must be supported unless they are manifestly unreasonable or unfair.[58] If a new rule is in conflict with the previous existing rule, the new rule must by implication be deemed to have annulled or altered that rule.[59]

(18) A change in the language of an Act from that of the old Act may be presumed to indicate a change of intention on the part of the Legislature.[60] In regard to the matters dealt with by the

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Note 2 *(contd.)*
(Vol 15) 1928 Bom 69 (71).
(Vol 6) 1919 P C 142 (142, 143) (PC).
(Vol 7) 1920 Pat 349 (350).
44. (Vol 29) 1942 Mad 495 (500).
(Vol 24) 1937 Sind 129 (144) : 32 Sind L R 567 (FB).
(Vol 22) 1935 Lah 570 (575) : 16 Lah 829 (FB). (Per Jai Lal J. in judgment of Division Bench.)
('93) 13 All 224 (245, 246) (DB).
(Vol 24) 1937 Mad 385 (390): ILR (1937) Mad 616(FB).
45. (Vol 27) 1940 Mad 385 (390) : I L R (1940) Mad 526 (FB). (Per Krishnaswami Ayyangar J. in Order of Reference.)
(Vol 26) 1939 P C 63 (65) (PC).
(Vol 26) 1939 All 1 (3) : ILR (1939) All 6.
(Vol 15) 1928 Lah 325 (328) : 9 Lah 649 (DB).
('85) 12 Cal 430 (433) (DB).
(Vol 25) 1938 All 613 (615) : ILR (1938) All 957.
(Vol 24) 1937 Pat 531 (532).
[See however (1880) 5 Q B D 386 (389), *R.* v. *Pearce.* (Interpretation clause should be used for the purpose of interpreting words which are ambigous or equivocal, and not so as to disturb the meaning of such as are plain.)]
46. (Vol 29) 1942 All 50 (65) : ILR (1942) All 185 (FB). (Per Dar J.)
(Vol 25) 1938 All 613 (615) : ILR (1938) All 957.
47. ('93) 15 All 141 (143).
(Vol 12) 1925 Lah 415 (416) : 6 Lah 276 (DB).
('78) 4 Cal 665 (666, 667).
[*See* (Vol 16) 1929 P C 181 (183) (PC). (Seeking meaning of words in one Act from definition even in another cognate Act is unsatisfactory.)]
48. (Vol 4) 1917 Cal 502 (507) : 44 Cal 162 (DB).
49. (Vol 26) 1939 Bom 478(479): ILR (1939) Bom 701.
(Vol 29) 1942 Bom 191 (192, 193): ILR(1942) Bom 287.
(Vol 16) 1929 All 33 (37) : 50 All 909 (FB).
50. (Vol 26) 1939 Bom 478 (479): ILR (1939) Bom 701
51. (Vol 9) 1922 Cal 118 (120) : 47 Cal 354 (DB).
52. (Vol 8) 1921 Cal 85 (86) : 48 Cal 378 (DB).
53. (Vol 20) 1933 Mad 689 (689) : 57 Mad 35 (DB).
(Vol 20) 1933 Mad 748 (750) : 57 Mad 237 (DB).
54. (Vol 26) 1939 Mad 967(968).
(Vol 22) 1935 Lah 406 (408) : 16 Lah 975 (DB).
(Vol 14) 1927 Cal 149 (150) : 53 Cal 929 (DB).
(Vol 11) 1924 Mad 521 (522) (DB).
(Vol 20) 1933 All 358 (363) : 55 All 406 (DB).
(Vol 5) 1918 Cal 850 (856) : 44 Cal 804 & 816 (DB).
(Vol 20) 1933 Nag 193 (195) : 29 Nag L R 278 (FB).
55. (Vol 4) 1917 Lah 75(78):1917 Pun Re No. 22(DB).
[*See also* (Vol 20) 1933 Nag 193 (196) : 29 Nag L R 278 (FB).]
56. (Vol 26) 1939 Mad 967 (968).
(Vol 25) 1938 Mad 972 (974) : ILR (1939) Mad 81.
(Vol 23) 1936 Lah 901 (903) : ILR (1937) Lah 92 (DB). (The principle will not apply where there is no matter in existence with which the person empowered is authorised to deal.)
(Vol 15) 1928 Lah 562 (564) : 10 Lah 338 (DB).
(Vol 18) 1931 Mad 574 (575) : 54 Mad 928 (DB).
57. (Vol 15) 1928 Mad 1182 (1186) : 52 Mad 92 (FB).
58. (Vol 20) 1933 Cal 243 (245) : 60 Cal 689.
59. (Vol 18) 1931 All 567 (567) : 54 All 263 (FB).
60 (Vol 1) 1914 Sind 11 (12) : 8 Sind L R 215 (DB).
('08) 35 Cal 34 (44) (FB).
[*See* (Vol 15) 1928 Bom 69 (71). (Change of language is indication of change of intention of Legislature.)
(Vol 25) 1938 Rang 317 (317) : 1938 Rang L R 580 (DB). (Do.)]
[*See also* (Vol 27) 1940 Mad 385 (392) : I L R (1940) Mad 526 (FB). (If words of a later statute differ materially from those of an earlier one effect should be given to the change especially where to do so would be to advance the policy underlying it.)]

change, only the new provisions should be looked to,[61] and the Court in construing the later statute is not bound by the decisions under the earlier one.[62] But it is also a recognised presumption that the Legislature does not intend to make any alteration beyond what it expressly declares[63] and where the language used is doubtful no change will be deemed to have been made.[64] Any change in the language of the statute would be presumed to have been made by the Legislature with the knowledge of the course of decisions previous to the change.[65] However, a change in the wording of a section of an enactment does not necessarily involve a change in the law as amendments are often made to clear up ambiguities.[66]

(19) Where a question arises as to whether any particular provision is mandatory or directory, the general test is the relation which the provision has to the general object intended to be secured by the Act.[67] Another test is to see whether a party may waive the benefit of the particular provision.[68] In deciding the question, the Court should take into account the possibility of justice suffering from a too rigid application of the rule.[69] A provision that a certain thing shall be done may be held to be only directory. But a provision that a certain thing shall not be done should be treated as prohibitive.[70]

(20) Words in singular should be read as including the plural unless there is anything in the context to the contrary.[71]

(21) In following decided cases in regard to the interpretation placed by them upon words in a statute, the danger of diverting attention from what has been enacted to what has been judicially said about the enactment must be avoided.[72]

(22) Forms given in the Schedule do not control the clear words of the Code itself.[73]

(23) Where certain provisions from an existing Act have been incorporated into a subsequent Act, no addition to the former Act which is not expressly made applicable to the subsequent Act can be deemed to be incorporated in it, at all events, if it is possible for the subsequent Act to function effectively without the addition, nor can the repeal of the first statute affect the second.[74]

(24) Provisions of Acts passed by the same Legislature, when apparently inconsistent, should so far as possible be reconciled with each other[75] by reading one as a qualification to the other. If that is not possible the later Act should prevail.[76] The same rule applies to two apparently inconsistent sections in the same Act.[77]

(25) A repealing section should not be interpreted with reference to the reading of the repealed section.[78] The effect of repal of a statute, in the absence of saving clauses, is that it has to be con-

Note 2 *(contd.)*

61. (Vol 19) 1932 All 188 (190) : 54 All 416.
62. (Vol 27) 1940 Mad 385 (392) : I L R (1940) Mad 526 (FB).
63. (Vol 27) 1940 Oudh 138 (142) : 15 Luck 229 (FB).
(Vol 26) 1939 Nag 35 (38).
(Vol 25) 1938 P C 191 (194) : 65 Ind App 286 : ILR (1938) Bom 502 : 32 Sind L R 786 (PC).
(Vol 6) 1919 Mad 7 (8) : 42 Mad 540 (FB).
(Vol 17) 1930 Sind 265 (279) : 24 Sind L R 277 (FB).
64. (Vol 5) 1918 Mad 1100 (1102) (DB).
(Vol 17) 1930 All 193 (197) : 52 All 501 (FB).
(Vol 18) 1931 Pat 1 (3).
65. (Vol 17) 1930 All 225 (240) : 52 All 619 (FB).
66. ('13) 40 Cal 123 (135) (DB).
67. (Vol 30) 1943 Cal 266 (277, 278) (DB).
(Vol 28) 1941 Lah 310 (311) : I L R (1942) Lah 275. (Use of "shall" does not necessarily indicate mandatory provision.)
(Vol 27) 1940 Lah 266 (267) : I L R (1940) Lah 649 (DB). (Do.)
(Vol 25) 1938 Pat 539 (541) : 17 Pat 726 (DB).
(Vol 24) 1937 Mad 51 (57, 58, 77) : I L R (1937) Mad 383 (DB).
('77) 3 Cal 47 (57) : 4 Ind App 127 (PC). ("Must" or "shall" may be substituted for "may.")
68. ('10) 11 Cal L Jour 489 (499) (DB).
(Vol 16) 1929 Cal 433 (435) : 56 Cal 252.
69. (Vol 2) 1915 Mad 920 (921) : 39 Mad 485 (DB).
(Vol 18) 1931 Lah 15 (16).
[*See* (Vol 30) 1943 Cal 266 (278) (DB).]
70. ('90) 12 All 510 (517, 521) (FB).
71. (Vol 12) 1925 Rang 94 (95) : 2 Rang 579 (DB).
72. (Vol 19) 1932 P C 36 (40) (PC).
73. (Vol 28) 1941 Rang 135 (140) : 1941 RangLR 65 (DB).
(Vol 5) 1918 Cal 631 (632).
(Vol 19) 1932 Mad 523 (524) : 55 Mad 982.
74. (Vol 18) 1931 P C 149 (152) : 58 Ind App 259 : 59 Cal 55 (PC).
75. (Vol 28) 1941 Bom 158 (159) : I L R (1941) Bom 147. (Adjective law cannot control substantive law.)
(Vol 14) 1927 Cal 432 (443) : 54 Cal 863 (FB).
(Vol 13) 1926 Nag 491 (492). (Provision of adjective law, e. g. S. 115, Evidence Act, cannot defeat the provision of a statute, e. g. S. 11, Contract Act.)
('76) 1 Mad 89 (110, 114, 116) (FB).
(1875) L R 10 Ch App 479 (484) : 44 L J Ch 691, *Ebbs* v. *Boulnois*.
(Vol 18) 1931 Sind 124 (126) : 25 Sind L R 222.
(Vol 15) 1928 Lah 609 (614) : 9 Lah 701 (FB).
76. (Vol 28) 1941 F C 16 (31) : 1940 F C R 110 : ILR (1941) Kar (FC) 72 (FC).
(Vol 17) 1930 Pat 442 (445) : 10 Pat 63 (DB).
(Vol 14) 1927 Lah 435 (438) : 8 Lah 617.
(Vol 11) 1924 Cal 980 (980) (DB).
(Vol 18) 1931 Sind 124 (126) : 25 Sind L R 222.
[See however (Vol 13) 1926 Sind 115 (116). (Where there are two conflicting provisions of the Legislature, that provision, the terms of which are more appropriate to the circumstances of the case, governs it.)]
77. (Vol 26) 1939 Mad 361 (365) : I L R (1939) Mad 151 (FB).
(Vol 8) 1921 Cal 603 (604) (DB).
78. (Vol 19) 1932 P C 92 (94) : 59 Ind App 112 : 55 Mad 443 (PC).
(Vol 15) 1928 Nag 136 (142) (DB).

sidered as if the statute so repealed has never existed.[79] Unless so repealed or altered the prior existing law will continue in force.[80] Where the Act repealed is a parent Act, all the laws passed under that Act also stand repealed, unless there is a saving provision in the repealing Act.[81]

(26) A repealing Act does not affect any legal proceedings in respect to rights acquired before the repeal.[82] When an Act is in force on the date of a transaction, a subsequent repealment of the Act does not affect the merits, rights or liabilities of the parties on the date of the transaction.[83]

(27) It is not proper to use one Act for the purpose of interpreting another Act.[84]

(28) In interpreting foreign statutes Courts should not be guided by outside opinion, however eminent such opinion may be.[85]

(29) Technical language must have technical meaning attached to it, unless the contrary manifestly appears.[86].

(30) Special Acts must be strictly construed.[87]

(31) Where the terms of a statute are not imperative, the use of general powers conferred by that statute should be in strict conformity with private rights.[88]

(32) In enactments which confer powers upon public authorities, the language of permission may not preclude the existence of a duty.[89]

(33) The words in an Act are used correctly and exactly and not loosely and inexactly. Upon those who assert that the rule has been broken the burden of establishing their proposition lies heavily and they can discharge it only by pointing to something in the context which goes to show that the loose and inexact meaning must be preferred.[90]

(34) Where the matter admits of doubt, the construction against overlapping of powers on different persons should be adopted ordinarily.[91]

(35) A statute should be given a meaning, in all cases of ambiguity, which will make it consonant to, rather than in disagreement with other Acts.[92] Similarly, where two constructions are possible, the interpretation that will promote the object of the statute should be preferred.[93] The Legislature is presumed not to intend to make any substantial alteration in the law beyond what it explicitly declares either in express terms or by clear implication, or in other words, beyond the immediate scope and object of the statute.[94]

(36) In the case of statutes the maxim *expressio unius est exclusio alterius* (mention of one thing is the exclusion of others) is to be applied with great caution.[95]

See also the cases mentioned below.[96]

Note 2 *(contd.)*

79 (Vol 21) 1934 Cal 80 (82) : 60 Cal 1438 (DB).

80. (Vol 28) 1941 F C 16 (31) : 1940 F C R 110 : ILR (1941) Kar (FC) 72 (FC). (Repeal, alteration or amendment can be effected by necessary implication also.)

81. (Vol 27) 1940 All 272 (280) : I L R (1940) All 455 (FB).

82. (Vol 20) 1933 Mad 57 (58).
(Vol 14) 1927 Pat 203 (205) : 6 Pat 296 (DB).

83. (Vol 20) 1933 Bom 262 (265).
(Vol 12) 1925 Pat 346 (349) : 4 Pat 272 (DB).

84. (Vol 29) 1942 All 440 (441) : ILR (1942) All 933.
(Vol 29) 1942 Cal 47 (48) : ILR (1941) 2 Cal 273 (DB). (Especially not *in pari materia.*)
(Vol 28) 1941 Nag 292 (293) : ILR (1942) Nag 269.
(Vol 27) 1940 All 291 (300) (DB).
(Vol 26) 1939 Cal 435 (444, 447) : ILR (1939) 2 Cal 93 (FB).
(Vol 26) 1939 Pat 55 (57) : 18 Pat 13 (FB).
(Vol 22) 1935 Mad 600 (601) (DB).

85. (Vol 17) 1930 Mad 146 (146) (DB).

86. (Vol 20) 1933 Cal 467 (468) : 60 Cal 379 (DB).
(Vol 24) 1937 Lah 178(179): ILR (1937) Lah 415 (DB).
('82) 5 All 121 (137) (FB).
(1854) 5 Moo Ind App 234 (250) (PC).

87. (Vol 28) 1941 Nag 249 (251) : I L R (1941) Nag 428. (Statute harsh and effecting departure from ordinary law must be construed strictly in favour of subject relying on ordinary law.)
(Vol 17) 1930 Lah 333 (334).

88. (Vol 24) 1937 Mad 51 (78) : I L R (1937) Mad 383 (DB).
(Vol 18) 1931 Rang 95 (96).

89. (Vol 24) 1937 Mad 51 (78) : ILR (1937) Mad 383. ("May" construed as obligatory.)
(Vol 21) 1934 Pat 670 (672) : 14 Pat 24 (FB).
(Vol 17) 1930 Rang 297 (300) : 8 Rang 333 (FB).

90. (Vol 20) 1933 P C 216 (217) (PC).
(Vol 21) 1934 Pat 304 (305) (DB).

91. (Vol 22) 1935 Lah 742 (753) : 16 Lah 937 (FB).

92. (Vol 26) 1939 Nag 50(52): ILR (1938)Nag 558(FB).
(Vol 26) 1939 Pat 49 (54) : 18 Pat 141 (DB).
(Vol 22) 1935 Pat 508 (513) : 15 Pat 8 (DB).
(Vol 1) 1914 Oudh 199 (200) : 17 Oudh Cas 99 (DB).

93. (Vol 27) 1940 Nag 337 (340): ILR (1941) Nag 150

94. (Vol 30) 1943 Bom 213.
(Vol 27) 1940 Oudh 138 (142, 143) : 15 Luck 229 (FB).
(Vol 18) 1931 Cal 580 (581) : 58 Cal 801.

95. (Vol 13) 1926 Sind 133 (134) : 20 Sind L R 197.
(Vol 10) 1923 Cal 66 (69) (DB).

96. (Vol 30) 1943 Cal 108 (110) : I L R (1943) 1 Cal 297 (DB). ("Include" is very generally used in interpretation clause in order to enlarge meaning of words and phrases occurring in body of statute and in such cases the word or phrase must be construed as comprehending not only such things as it signifies according to its natural import but also things which the interpretation clause declares that it shall include.)
(Vol 24) 1937 Bom 15 (16). (The word "include" in interpretation clause is enumerative and not exhaustive.)

3. Construction of consolidating statutes. — The object of consolidation is 'to collect the statutory law bearing upon a particular subject and to bring it down to date in order that it may form a useful Code applicable to the circumstances existing at the time when the consolidating Act was passed."[1] In the case, therefore, of a consolidating statute the construction must be not with reference to the circumstances existing at the time of the preceding Acts but in relation to those existing at the time of the consolidating Act itself[2] and the law should thenceforth be ascertained from that enactment itself instead of being searched for in prior decisions.[3] But in applying a consolidating Act, statutes not expressly repealed should be held to continue in force without modification.[4]

4. Retrospective operation of statutes.—It is a general principle of law that no statute shall be construed so as to have a retrospective operation unless its language is such as plainly to require such a construction.[1] Similarly, a statute is not to be construed so as to have a greater retrospective operation than its language renders necessary.[2] In fact a statute which takes away or affects vested rights, imposes a new disability or confers a new right, must be *presumed* not to have a retrospective operation[3] although it is competent to the Legislature to make an Act retrospective so as to affect even vested rights.[4] If a statute affecting rights at the time of its passing is expressed in a language which is fairly capable of either interpretation, it ought to be construed only as a prospective one.[5] The fact that some of the provisions of a statute have been made definitely not retrospective must not be taken as implying that other provisions have retrospective operation.[6]

Statutes, which are in their nature *declaratory* or *explanatory* are, however, an exception to this rule and are to be construed so as to have retrospective operation,[7] although nothing in a

Note 2 *(contd.)*
(Vol 24) 1937 Pat 185 (187) : 16 Pat 60(FB). (When in an interpretation clause, it is stated that a certain term includes so and so, it is implied that the term retains its ordinary meaning whatever else it may mean.)
(Vol 30) 1943 Cal 285 (301) : 44 Cri L Jour 673 (SB). (Validity of statute—Court can take judicial notice of historical facts. (Per Derbyshire, C. J. and Khundkar, J.; Sen J. *contra.*)
(Vol 29) 1942 Cal 607 (609). (Earlier and later enactments so inconsistent that they cannot stand together and effect cannot be given to both at same time—There must be implied repeal of earlier Act.)
(Vol 27) 1940 Oudh 138 (142, 143) : 15 Luck 229 (FB). (There is no presumption that when one view as to the meaning of an Act would apply the Act to a larger number and another view to a smaller number, the Legislature meant it to affect the larger number.)
(Vol 22) 1935 Pat 243 (247) : 14 Pat 799 (DB). (The current meaning of any particular word may differ widely from that of the word from which it was derived and no useful purpose is served by the method of considering etymological derivations of a word.)
(Vol 20) 1933 Bom 234 (237) : 57 Bom 441 (DB). (Government resolution cannot override the law.)

Note 3
1. ('95) 22 Cal 788 (798) : 22 Ind App 107 (PC).
(Vol 17) 1930 All 225 (230) : 52 All 619 (FB). ("Consolidation" means reduction to a systematic form of the whole of the statute law relating to the same subject-matter as illustrated by judicial decisions.)
2. ('95) 22 Cal 788 (798) : 22 Ind App 107 (PC).
3. ('96) 23 Cal 563 (571, 572) : 23 Ind App 18 (PC).
('01) 28 Cal 517 (528, 529, 530) (SB).
('09) 36 Cal 354 (364) (SB).
(Vol 13) 1926 Mad 906 (908) : 49 Mad 728 (FB). (A reference to earlier case-law is however permitted for construing the words of the statute but not for the purpose of adding something to it.)
(Vol 10) 1923 Mad 523 (525) : 46 Mad 605 (FB).
4. (Vol 17) 1930 All 225 (230) : 52 All 619 (FB).

Note 4
1. (Vol 29) 1942 All 19 (29) : ILR (1942) All 45 (FB).
(Vol 28) 1941 Pat 59 (61) : 20 Pat 202 (SB).
(Vol 27) 1940 Pat 385 (387) : 19 Pat 752 (FB).
(1901) 1901 App Cas 297 (305), *Smith* v. *Callandar.*
(Vol 23) 1936 Bom 37 (40) : 60 Bom 125 (DB).
('77) 2 Bom 148 (158) (FB).
(Vol 18) 1931 Cal 321 (322) : 58 Cal 817 (DB).
('88) 15 Cal 376 (382) (FB).
(Vol 15) 1928 Lah 627 (631) : 10 Lah 165 (FB).
(Vol 18) 1931 Mad 83 (85, 91) : 54 Mad 627 (DB).
2. (Vol 29) 1942 All 50 (70) : ILR (1942) All 185 (FB). (*Laurie* v. *Renad,* (1892) 3 Ch 402, *Followed.*)
(Vol 28) 1941 FC 16 (46, 47) : ILR (1941) Kar (FC) 72: 1940 F C R 110 (FC).
3. (Vol 14) 1927 P C 242 (244):9 Lah 284: 54 Ind App 421 (PC). (Provisions which deprive orders of their finality, touch existing rights and hence cannot operate retrospectively.)
(Vol 29) 1942 F C 17 (21) : I L R (1942) Kar (FC) 21 : 21 Pat 587 (FC).
(Vol 29) 1942 Lah 102 (103, 104) : ILR (1942) Lah 349 (FB).
('04) 26 All 119 (130) : 7 Oudh Cas 254 : 31 Ind App 30 (PC). (Right of succession cannot be divested by later statutes.)
(Vol 1) 1914 P C 66 (67) : 36 All 350 (PC). (It cannot revive a barred right.)
(Vol 22) 1935 All 706 (710) : 58 All 63 (FB).
(Vol 1) 1914 Cal 806 (810) : 41 Cal 1125 (FB).
(Vol 15) 1928 Lah 627 (631) : 10 Lah 165 (FB).
[See however (Vol 27) 1940 Bom 90 (91): ILR (1940) Bom 50 (DB). (When construing an Act introduced for the purpose of applying an equitable doctrine to certain transactions considered *ex hypothesi* to be lacking in equity one should not assume that the Legislature intended that the Act should not have retrospective effect, but wished to preserve rights acquired in such transactions.)]
4. (Vol 28) 1941 Cal 432 (433). (Whenever the intention is clear that the Act shall have retrospective operation it must be so construed even if the consequences may appear unjust and hard.)
5. (Vol 20) 1933 Cal 435 (437) : 60 Cal 1037 (SB).
6. (Vol 19) 1932 Rang 197 (198) : 10 Rang 465.
7. (Vol 29) 1942 Cal 442 (443) (DB).

declaratory statute can render void that which has been declared by the Courts to have been done rightly under the law for the time being in force.[8] So also, enactments dealing with *procedure* are always retrospective in the sense that their provisions will apply to proceedings already commenced at the time of their enactment.[9] The reason is that no one can have a vested right in forms of procedure.[10] But where some of the provisions of the enactment of procedure do affect vested rights, whether substantive or remedial, the rule against retrospective operation of statute will apply[11] unless there is an indication to the contrary in the Act.[12]

Such indications can be found in the following circumstances:

(1) When the commencement of the Act is *postponed* to a particular day, the object of the *postponement* is to enable persons to enforce their rights, if any, before the new Act, negativing such rights, comes into force.[13]

(2) When the language of the enactment implies it.

Penal statutes are not to be interpreted as having retrospective effect, so as to punish an act done at a time when no illegality was attached to it.[14]

5. Procedural statutes, how far exhaustive.—It is a rule of construction of procedural statutes, that the Court ought not to act on the principle that every procedure is to be taken as *prohibited* unless it is expressly provided for, but should proceed on the opposite principle that every procedure is to be understood as *permissible* till it is shown to be prohibited by law.[1]

6. Reference to pre-existing state of the law. — Where the language of a statute is *plain and clear*, it cannot be qualified or neutralised by indications of intention gathered from the previous state of law.[1] But where the language is not clear or the statute has made no provision

Note 4 *(contd.)*

(Vol 28) 1941 Lah 291 (292). (Dissolution of Muslim Marriages Act (1939) not declaratory and not retrospective.)

(Vol 28) 1941 Lah 22 (23). (Dissolution of Muslim Marriages Act (1939) is declaratory and retrospective.)

(Vol 27) 1943 Pat 385 (396) : 19 Pat 752 (FB).

(Vol 25) 1938 Oudh 127 (128) : 14 Luck 71 : 13 Luck 761 (FB). (Declaratory statutes passed to remedy defects in form have retrospective effect.)

(Vol 14) 1927 Mad 85 (86). (Act may be declaratory or explanatory, though it is not called declaratory or explanatory.)

(Vol 14) 1927 Cal 748 (750) (DB).

('13) 5 Sind L R 184 (188, 190).

8. (Vol 24) 1937 Pat 605 (606).

(Vol 14) 1927 Mad 85 (86).

9. (Vol 30) 1943 Bom 169 (172) : ILR (1943) Bom 331 (FB).

(Vol 29) 1942 Mad 474 (477).

(Vol 27) 1940 Cal 423 (425) : ILR (1940)2 Cal 148(DB).

(Vol 27) 1940 Pat 567 (568) : 19 Pat 289 (DB).

(Vol 18) 1931 All 635 (639) : 54 All 299 (FB).

(Vol 23) 1936 All 3 (5) : 58 All 495 (DB). (S. 74, Partnership Act, applies to substantive right.)

(Vol 22) 1935 All 706 (716) : 58 All 63 (FB).

(Vol 19) 1932 All 30 (31) (DB). (Choice of forum is a matter of procedure.)

(Vol 18) 1931 All 489 (490) : 53 All 687 (FB). (S. 276 of the Succession Act is only of procedure)

(Vol 17) 1930 Cal 34 (36) : 56 Cal 1117 (DB). (Limitation Act is mere procedural law.)

('86) 12 Cal 583 (586, 587) (FB).

(Vol 16) 1929 Nag 282 (283). (Change in forum of suit operates retrospectively)

(Vol 25) 1938 Rang 130 (134):1938 Rang L R 176 (FB).

10. (Vol 29) 1942 Mad 474 (477).

(Vol 29) 1942 Pat 1 (15) : 21 Pat 1 (FB).

(Vol 27) 1940 Pat 385 (392) : 19 Pat 752 (FB). (If an alteration is made in a rule of evidence, the alteration shall be ordinarily deemed to be retrospective.)

('84) 6 All 262 (268) (FB). (*Wright* v. *Hale*, (1861) 30 L J Ex 40, *Republic of Costa Rica* v. *Erlanger* (1876) 3 Ch D 69 and *Warner* v. *Murdoch* (1877) 4 Ch D 752, *Approved.*)

(Vol 17) 1930 Cal 422 (423) : 57 Cal 148 (DB).

(Vol 1) 1914 Oudh 125 (126).

11. (Vol 29) 1942 Lah 102 (104) : ILR (1942) Lah 349 (FB).

('10) 7 Mad L Tim 296 (299) (SB). (Party having become entitled to hold decree cannot be deprived of it.)

(Vol 14) 1927 P C 242 (244) : 9 Lah 284 : 54 Ind App 421 (PC). (Provisions which deprive orders of their finality are those which touch existing rights)

(Vol 18) 1931 All 635 (649) : 54 All 299 (FB). (Limitation Act is not pure procedural law — Rights vested under old Act cannot be divested under the new Act.)

(Vol 17) 1930 All 706 (709) : 52 All 886 (DB).

(Vol 15) 1928 All 437 (438) : 50 All 965 (FB). (Rights of appeal not taken away by the repealing Act.)

(Vol 20) 1933 Cal 435 (437) : 60 Cal 1037 (SB).

(Vol 15) 1928 Cal 640 (643) : 56 Cal 512 (FB). (Letters Patent—Amendment restricting appeal is not retrospective.)

(Vol 15) 1928 Lah 627 (631) : 10 Lah 165 (FB).

(Vol 16) 1929 Mad 381 (382):52 Mad 361 (SB). (Vested right of Letters Patent Appeal cannot be taken away.)

(Vol 17) 1930 Oudh 148 (153) : 5 Luck 552 (FB). (Per Wazir Hasan J.)

12. (Vol 14) 1927 Mad 85 (88). (If the language of the statute is clear and express.)

('79) 3 Bom 161 (166).

('79) 4 Cal 825 (828) (DB).

13. (Vol 26) 1939 Pat 122 (125) : 18 Pat 1 (DB).

(Vol 24) 1937 Pat 311 (313).

(Vol 3) 1916 Lah 146 (148) : 1916 Pun Re No. 88.

(Vol 9) 1922 Mad 417 (418, 419) (DB).

14. (Vol 18) 1931 Lah 145 (152).

Note 5

1. ('82) 5 All 163 (172) (FB).

(Vol 12) 1925 Mad 42 (44) : 48 Mad 494.

('89) 11 All 267 (287) (FB).

('10) 37 Cal 399 (404).

[*See* (Vol 18) 1931 All 162 (173) : 53 All 239 (FB).]

Note 6

1. ('95) 22 Cal 788 (797) : 22 Ind App 107 (PC). (Reversing 21 Cal 732.)

(Vol 7) 1920 P C 140 (142) (PC). (Mere omission in later statute of negative provision in earlier one cannot by itself effect substantive affirmation.)

for any particular case, the previous legislation may be referred to for the purpose of ascertaining the object and intention of the Legislature.[2]

7. Reference to proceedings of the Legislature. — The proceedings of the Legislature cannot be referred to as legitimate *aids* to the construction of the *statute*.[1]

Where the language is doubtful or ambiguous, such proceedings may of course be looked into.[2]

The proceedings of the Legislature will include —

(1) The Statement of Objects and Reasons;
(2) The Report of the Select Committee;
(3) The Draft stages of the Bill, and
(4) The Debates of the Legislature.

8. Reference to Preamble and headings prefixed to the sections. — Where the language of the enactment itself is clear, its construction cannot be affected in any way by a consideration of the title of an Act,[1] the preamble or the headings prefixed to the sections.[2] In cases of ambiguity of the language of the enactment, however, they may be usefully referred to for the purpose of finding out the object and intention of the enactment.[3]

Headings are not to be treated as if they were marginal notes or were introduced merely for the purpose of classifying the enactments. They constitute an important part of the Act itself and

Note 6 *(contd.)*

(Vol 15) 1928 P C 2 (4) : 7 Pat 221 : 55 Ind App 18 (PC).
(1891) 1891 App Cas 107 (120), *Bank of England* v. *Vagliano*.
(Vol 8) 1921 Cal 397 (399, 402) : 48 Cal 556 (FB).
[*See also* (Vol 9) 1922 Nag 207 (208). (Alteration of provisions in new Act—Reference to new Act cannot be of any help in interpreting old Act.)
(Vol 26) 1939 Oudh 131 (137) : 14 Luck 492 (FB). (Heading and the preamble are to be taken into consideration in interpreting the clauses of the Contempt of Courts Act, 1926, but they are not the operative portions of the Act.)]

2. (Vol 30) 1943 F C 36 (70) : ILR (1943) Kar (FC) 48: ILR (1943) 2 Cal 1 : (1943) 5 F C R 96 (FC). (History of legislation and facts giving rise to enactment can be referred to.)
(Vol 28) 1941 Mad 449 (452, 468) : I L R (1941) Mad Mad 599 (FB).
(Vol 28) 1941 Rang 135 (139) : 1941 Rang L R 65 (DB).
(Vol 27) 1940 P C 105 (109) : ILR (1940) Mad 599 : 67 Ind App 222 (PC).
(Vol 27) 1940 Oudh 138 (143) : 15 Luck 229 (FB).
('90) 17 Cal 590 (599, 602) : 17 Ind App 40 (PC).
(Vol 20) 1933 Pat 435 (437, 438) : 12 Pat 665 (SB).
(Vol 11) 1924 All 328 (335) : 46 All 489 (FB).

Note 7

1. ('95) 22 Cal 788 (798, 799) : 22 Ind App 107 (PC).
(Vol 29) 1942 Nag 5 (7) : ILR (1941) Nag 581 (FB).
(Vol 29) 1942 Sind 65 (69) : ILR (1942) Kar 127 (SB).
(Vol 28) 1941 Cal 673 (675) : I L R (1941) 1 Cal 499 (DB).
(Vol 27) 1940 Oudh 138 (143, 145) : 15 Luck 229 (FB). (Statement of Objects and Reasons.)
(Vol 26) 1939 Pesh 40 (40). (Objects and reasons.)
(Vol 7) 1920 P C 56 (59) : 43 Mad 550 : 47 Ind App 33 (PC). (Statement made on the introduction of the measure or its discussion.)
('94) 21 Cal 732 (753) (FB).
(Vol 24) 1937 Lah 497 (499) : ILR (1937) Lah 69 (SB). (Statement of Objects and Reasons.)
(Vol 22) 1935 Pat 346 (348): 14 Pat 720 (SB). (Speeches in Assembly)
(Vol 6) 1919 Sind 80 (80) : 13 Sind L R 23 (FB).

2. ('84) 8 Bom 241 (246, 247) (DB). (Statement of Objects and Reasons.)
('92) 19 Cal 544 (567, 569) (FB).
(Vol 15) 1928 Lah 337 (340) : 9 Lah 689 (DB).
('11) 7 Nag L R 165.
(Vol 6) 1919 Sind 80 (89) : 13 Sind L R 23 (FB).
('87) 14 Cal 721 (728, 729) (FB).
(1871) L R 3 P C 605 (648, 649) : 40 L J (Eccl) 33, *Hebbert* v. *Purchas*. (Proceedings in the House of Lords and House of Commons referred to)
[*See also* (Vol 17) 1930 All 225 (238):52 All 619 (FB).]

Note 8

1. (Vol 30) 1943 F C 36 (71) : ILR (1943) Kar (FC) 48: ILR (1943) 2 Cal 1:(1943) 5 F C R 96 (FC). (Rule that preamble cannot be made use of to control the enactment—Scope and meaning of rule, explained.)
2. (Vol 30) 1943 Cal 285 (312): 44 Cri L Jour 673 (SB).
(Vol 27) 1940 P C 105 (109) : ILR (1940) Mad 599 : 67 Ind App 222 (PC). (Heading of chapter.)
(Vol 29) 1942 Sind 65 (69) : ILR (1942) Kar 127 (SB). (Act is not controlled by its preamble.)
(Vol 27) 1940 Oudh 138 (147) : 15 Luck 229 (FB).
(Vol 25) 1938 Nag 134 (141) : I L R (1938) Nag 115 (FB).
(Vol 23) 1936 All 507 (511) : 58 All 1041 (FB). (Preamble)
(Vol 6) 1919 P C 52 (53) : 43 Mad 529 : 46 Ind App 302 (PC). (Section beyond preamble governs preamble.)
(Vol 25) 1938 Mad 441(445) : ILR(1938) Mad 841 (FB).
[See however (Vol 19) 1932 Oudh 152 (153): 7 Luck 648 (FB).]
[But see (Vol 5) 1918 Pat 398 (408, 409) : 3 Pat L Jour 1 (FB).]
3. (Vol 30) 1943 Lah 1 (2) : ILR (1943) Lah 95 (DB). (Per Ram Lall J., in Order of Reference to Division Bench.)
(Vol 29) 1942 F C 17 (21) : 21 Pat 587 : ILR (1942) Kar (FC) 21 (FC). (But it is very doubtful whether a preamble retrospectively inserted in 1940 in an Act passed 25 years before can be looked at for discovering the true intention of the Legislature at the earlier date.)
(Vol 27) 1940 Oudh 138 (140, 141) : 15 Luck 229 (FB).
(Vol 18) 1931 All 597 (599) : 54 All 220 (FB). (Headings.)
(Vol 4) 1917 Pat 305 (315) (FB). (Per Jwala Prasad J.)
(1857) 7 Moo Ind App 72 (99) (PC).
(Vol 23) 1936 All 507 (511) : 58 All 1041 (FB). (Preamble.)
(Vol 20) 1933 Bom 417 (420) : 57 Bom 537 (FB).
(Vol 6) 1919 Cal 551 (560) : 45 Cal 343 (FB). (Preamble.)

they may be read, not only as explaining the sections which immediately follow them, as a preamble to a statute may be looked to, but as affording a better key to the construction of the sections which follow than might be afforded by a mere preamble.[4]

9. **Marginal notes to sections.** — Marginal notes to sections *do not form part of the statute* itself and cannot be referred to for explaining or construing the section.[1]

Where, however, there is *ambiguity* in the section the marginal note can be referred to for solving the ambiguity.[2]

In the undermentioned cases[3] it has been held that there can be no objection to the reference to marginal notes for the purposes of construing or interpreting the sections of an Act, *if they are inserted by or under the authority of or assented to by the Legislature.*

10. **Illustrations.** — Illustrations, unlike marginal notes, are to be considered as part of the statute itself.[1] They are to be accepted, if that can be done, as being both of relevance and of value, in the construction of the section.[2] The rule, however, is subject to two limitations —

(1) An illustration only exemplifies the section and cannot be taken to *restrict* or modify the sense of the section.[3]

(2) Where the illustration is in *conflict* with the main section, the illustration must give way to the section.[4] But it would require a very special case to warrant its rejection on the ground of its assumed repugnance to the section itself.[5]

11. **Punctuation marks.** — Before the year 1849, the English Acts of Parliament were not punctuated by any stops and the then accepted rule of interpretation was that such marks could not be relied upon in construing Acts of Parliament.[1] In *Maharani of Burdwan* v. *Krishna Kamini Dasi*,[2] which was a case under the Bengal Regulation of 1819, their Lordships of the Privy Council held that "it is an error to rely on punctuation in construing Acts of the Legislature"

Since the constitution of the regular Legislatures in India, however, the practice has been to insert stops in Bills before the Legislatures and to retain them in the authentic copies of the Acts

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Note 8 *(contd.)*

4. (Vol 25) 1938 Mad 449 (454) : I L R (1938) Mad 1063 (DB).
(1862) 9 H L C 32 (41) : 8 W R (Eng) 748, *Eastern Counties etc. Companies* v. *Francis Marriage.*
[*See also* (1882) 10 Q B D 309 (321) 52 L J M C 4, *R.* v. *Local Government Board.* (Heading of a series of sections must be considered as a part of the section and used for construing any doubtful matter in the sections under that very heading)]

Note 9

1. ('04) 26 All 393 (406) : 31 Ind App 132 : 7 Oudh Cas 248 (PC).
(Vol 29) 1942 All 19 (34) : ILR (1942) All 45 (FB).
(Vol 28) 1941 Bom 397 (402) : ILR (1942) Bom 39 (SB).
(Vol 27) 1940 Mad 8 (9) : ILR (1939) Mad 977 (DB).
(Vol 27) 1940 Nag 377 (380) : ILR (1942) Nag 53 (DB).
[But see (Vol 28) 1941 Nag 292 (293) : I L R (1942) Nag 269. (Can be taken into consideration as showing intention of section.)
(Vol 26) 1939 Cal 313 (314) : I L R (1939) 1 Cal 425 (DB). (Side note is of some assistance in interpreting the section inasmuch as it shows the drift of the section.)
(Vol 22) 1935 Bom 347 (349) : 59 Bom 681 (DB). (Can be looked at to see general trend of section.)
(Vol 16) 1929 Nag 17 (20) : 24 Nag L R 158 (FB). (Some assistance in properly construing a section,)]
2. (Vol 27) 1940 Bom 363 (364) : ILR (1940) Bom 709 (DB).
(Vol 26) 1939 Nag 230 (231) (DB).
(Vol 12) 1925 All 503 (515) : 47 All 637 (FB). (Obiter.)
(Vol 12) 1925 Cal 329 (330) : 52 Cal 463 (DB).
(Vol 13) 1926 Mad 749 (751) : 49 Mad 716 (DB).
(Vol 14) 1927 Sind 39 (43) : 21 Sind L R 107.
[But see (Vol 2) 1915 Lah 271 (272) : 1916 Pun Re No. 36 (DB). (Marginal note cannot be relied upon in clearing up the ambiguity but it may be referred to when it confirms the conclusion warranted by the language of the section.)]
3. (Vol 16) 1929 All 53 (58) : 51 All 411 (FB).
(Vol 20) 1933 Bom 417 (421) : 57 Bom 537 (FB).
(Vol 22) 1935 Cal 287 (289) : 62 Cal 266 (DB).
(Vol 22) 1935 Oudh 337 (342) : 11 Luck 123 (FB).

Note 10

1. (Vol 5) 1918 P C 249 (250) : 1918 Pun Re No. 124 (PC).
(Vol 15) 1928 Oudh 15 (17) : 3 Luck 244 (DB).
(Vol 24) 1937 Oudh 57 (60) : 13 Luck 1 (DB).
[But see (Vol 21) 1934 Cal 402 (403) : 61 Cal 148 (DB).
(Vol 22) 1935 Sind 145 (157) : 28 Sind L R 397.
('77) 1 All 487 (495) (DB).]
2. (Vol 30) 1943 P C 34 (38) : I L R (1943) 2 Cal 213 : 70 Ind App 35 : ILR (1943) Kar (PC) 30 (PC).
(Vol 14) 1927 Mad 99 (108) : 50 Mad 94 (FB).
(Vol 3) 1916 P C 242 (244) : 43 Ind App 256 (PC).
(Vol 8) 1921 Cal 1 (4) : 48 Cal 388 (SB).
(Vol 3) 1916 Low Bur 114 (116) : 8 Low Bur Rul 306 (FB).
3. (Vol 25) 1938 P C 67 (70) : 65 Ind App 66 : 32 Sind L R 374 : ILR (1938) 2 Cal 72 (PC).
(Vol 8) 1921 Cal 1 (4) : 48 Cal 388 (SB).
4. (Vol 17) 1930 Rang 173 (174) : 8 Rang 320 (DB). (Illustration in conflict with the section was treated as a bad statement of law.)
(Vol 2) 1915 Lah 16 (50) (DB). (The illustration in the case was contrary to the section)
5. (Vol 14) 1927 Mad 99 (108, 109) : 50 Mad 94 (FB).
(Vol 3) 1916 P C 242 (244) : 43 Ind App 256 (PC).

Note 11

1. *See* (Vol 2) 1915 Bom 50 (52, 53): 39 Bom 182 (DB).
2. ('87) 14 Cal 365 (372) (PC).

signed by the Governor-General and published in the Gazette of India.[3] In these circumstances, it was held by the High Court of Bombay,[4] that punctuation marks may be considered as aids to the interpretation of the statute *where the language thereof might otherwise be doubtful.* The High Court of Madras took the view that the marks were part of the statute and should be considered as such.[5] On the other hand it was held by the High Courts of Allahabad[6] and Calcutta[7] following the case of the *Maharani of Burdwan* that punctuation marks could not be taken into consideration in construing the statute.

The question came again before the Privy Council in *Lewis Pugh* v. *Ashutosh Sen*,[8] a case under Arts. 48 and 49 of the Indian Limitation Act and it was held that a Court was *bound to read those articles without the commas inserted in the print.* This view as to the use of punctuation marks has now been followed by the High Courts of Allahabad,[9] Bombay[10] and Lahore.[11] In the undermentioned case,[12] however, the High Court of Calcutta has held that where it is not contended that the punctuation is wrongly placed, there is no reason why the punctuation should not be taken as a good guide for the purpose for which it is there, namely, to understand the sense of the passage.

12. **Proviso.** — A proviso is subordinate to the main enactment[1] to which it is appended either to allay unfounded fears,[2] or as a condition precedent to the enforcement of the operative clause,[3] or for explaining what particular matters are not within the meaning of the enactment, or for providing exceptions and qualifications for the enactment.[4]

A proviso should be taken together with the language of the previous portion of the enactment[5] and construed in the ordinary manner.[6] As a general rule, it must be taken to govern the main proposition of law which *immediately precedes* such proviso, unless the language of the statute shows a different intention.[7]

But in no case can a proviso *extend* or *enlarge* the operative effect of the substantive portion, unless there is an ambiguity therein.[8] Likewise, exceptions should not be enlarged in their scope more than what their words properly justify.[9]

13. **Explanation.** — An explanation added to the section does not enlarge the scope of the section.[1]

When any word, phrase or expression in an enactment is explained by the Legislature, the section has to be understood in the light of the explanation.[2]

14. **Judicial precedents.**—Judicial precedents constitute an important guide to the proper interpretation of statutes. It is a general principle of construction of statutes that the Courts should follow existing rulings so as not to upset or disturb existing and *settled* practice,[1] unless

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Note 11 *(contd.)*
3. (Vol 2) 1915 Bom 50 (53) : 39 Bom 182 (DB).
4. (Vol 2) 1915 Bom 50 (53) : 39 Bom 182 (DB).
5. (Vol 11) 1924 Mad 455 (456) (DB).
6. (1900) 22 All 270 (277) (FB).
7. (Vol 6) 1919 Cal 551 (563) : 45 Cal 343 (FB).
8. (Vol 16) 1929 P C 69 (71) : 56 Ind App 93 : 8 Pat 516 (PC).
9. (Vol 18) 1931 All 154 (156, 157) : 53 All 374.
(Vol 20) 1933 All 521 (522) : 55 All 700.
10. (Vol 24) 1937 Bom 39 (41) : ILR (1937) Bom 763.
11. (Vol 28) 1941 Lah 28 (30) (DB).
12. ('36) 62 Cal L Jour 349 (351, 352).

Note 12
1. (Vol 5) 1918 Mad 1210 (1230) : 39 Mad 1085 (SB).
2. ('10) 37 Cal 697 (702) (DB).
3. (Vol 5) 1918 Mad 1266 (1278) : 39 Mad 1164 (SB).
4. (Vol 14) 1927 Bom 149 (150) : 51 Bom 224 (DB).
(Vol 14) 1927 Nag 68 (70) : 23 Nag L R 9.
(Vol 5) 1918 Mad 1210 (1230) : 39 Mad 1085 (SB).
(Vol 20) 1933 Oudh 491 (500) (DB).
[But see (Vol 2) 1915 Mad 750 (755) : 39 Mad 341 (DB). (A proviso is in the nature of a substantive rule and should not be treated as an exception to the proposition stated in the section.)]
5. (Vol 1) 1914 P C 140 (144) : 42 Cal 116 : 41 Ind App 197 (PC).
6. (Vol 6) 1919 P C 31 (33) : 43 Mad 146 : 46 Ind App 176 (PC).
(Vol 19) 1932 Mad 46 (52) (DB). (It is not open to Court to add words to a proviso with a view to enlarge the scope of the proviso.)
[See however ('82) 8 Cal 637 (641, 642) (DB).]
7. ('84) 6 All 509 (531, 540) (FB).
('10) 37 Cal 697 (DB). (Two constructions possible — Proviso may be taken as a guide to choose one of the two)
8. (Vol 26) 1939 Cal 669 (670) : ILR (1939) 2 Cal 401 (DB).
(Vol 19) 1932 Mad 46 (52) (DB).
(Vol 17) 1930 Cal 38 (40) : 57 Cal 162 (DB).
9. (Vol 29) 1942 Lah 243 (248) (DB).
(Vol 19) 1932 Mad 120 (123) (DB).
(Vol 17) 1930 Mad 124 (125) : 53 Mad 702 (SB). (Proviso should not by implication withdraw what the main provisions have given.)

Note 13
1. ('40) 1940 Nag L Jour 638 (645) (DB).
(Vol 26) 1939 Lah 587 (589) : ILR (1940) Lah 223.
2. (Vol 14) 1927 Mad 85 (88).

Note 14
1. (Vol 28) 1941 Mad 161 (171) : I L R (1941) Mad 438 (FB).
(Vol 27) 1940 Pat 633 (640) : 20 Pat 13 (SB).

such practice is *clearly contrary* to an express enactment or is inconsistent with it.[2] This rule is based, in the case of statutes enacting substantive law, on the ground that otherwise it would embarrass trade and commerce, affect the status of persons and unsettle many titles.[3] Though that particular ground does not apply in the case of statutes of procedure which cannot be considered to affect any rights in or titles to property,[4] it is nevertheless of great practical importance that on questions of procedure the law should be certain rather than that it should be logical[5] and that there should be uniformity of decisions.[6]

But it is necessary that the Courts should ascertain the facts with accuracy before turning their attention to the authorities.[7] They should also bear in mind the rules that no decision can cut down the express and clear words used by the section,[8] that a decision is applicable only to the facts of that particular case[9] and that a decision is only an authority for what it actually decides and not for every proposition that may seem to follow logically from it.[10]

The only use of the authorities or decided cases is the establishment of some principle of law which the Judge can follow in deciding the case before him.[11] There can be no precedent on questions of fact and matters of discretion.[12] Nor can the *dicta* of Judges, however eminent, be cited as establishing authoritatively propositions of law unless such *dicta* form the integral part of the train of reasoning directed to the real question decided.[13] It should also be noted that in relying on decided cases in regard to the interpretation of the words of any statute, the danger of the terms of the statute being unduly extended by such reliance, the diversion of attention from

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Note 14 *(contd.)*

('82) 8 Cal 593 (597) (FB). (Especially where the subject is of every day occurrence like court-fees.)

(Vol 11) 1924 P C 50 (55) : 51 Ind App 129 : 46 All 95 (PC). (Particular plea not being raised in a series of cases — Irresistible conclusion is that the plea was felt to be bad.)

(Vol 3) 1916 P C 182 (184) : 44 Cal 759 : 44 Ind App 65 (PC)

(Vol 19) 1932 All 617 (620) : 55 All 24 (FB).

(Vol 18) 1931 Pat 241 (251) : 10 Pat 670 (FB).

2. (Vol 3) 1916 P C 182 (184) : 44 Cal 759 : 44 Ind App 65 (PC).

(Vol 16) 1929 Mad 53 (57) : 52 Mad 105 (FB).

(Vol 2) 1915 P C 127 (130) (PC).

(Vol 19) 1932 All 617 (620) : 55 All 24 (FB).

(Vol 9) 1922 All 467 (469) : 45 All 115 (FB).

(Vol 4) 1917 Bom 254 (257, 258) : 41 Bom 588 (FB).

(Vol 14) 1927 Mad 1043 (1051) : 51 Mad 46 (FB).

(Vol 12) 1925 Rang 340 (344) : 3 Rang 549 (FB).

[*See* (Vol 22) 1935 Pat 291 (301) : 14 Pat 672 (FB). (Principle of *cursus curiæ* or the rule of practice can only be applied when (1) the statute is ambiguous ; (2) when decisions are consistent throughout and (3) when titles are dependent on those decisions.)]

3. (Vol 28) 1941 Bom 1 (3) : ILR (1941) Bom 34 (DB).

(Vol 8) 1921 Cal 15 (29) : 48 Cal 184 (SB).

(Vol 12) 1925 Bom 12 (18) : 49 Bom 99 (DB).

(Vol 14) 1927 Mad 636 (639) : 50 Mad 687 (FB).

4. (Vol 15) 1928 All 629 (630) : 51 All 237 (FB).

(Vol 16) 1929 Rang 41 (43) : 6 Rang 703 (FB).

5. (Vol 4) 1917 PC 156 (159) : 45 Cal 94 : 44 Ind App 218 : 1917 Pun Re No. 104 (PC).

6. (Vol 12) 1935 Cal 966 (969) (DB). (A I R (2) 1915 Cal 126 : 41 Cal 825, Referred.)

(Vol 1) 1914 P C 87 (89) : 37 Mad 443 : 41 Ind App 258 (PC).

(Vol 4) 1917 P C 156 (159) : 45 Cal 94 : 1917 Pun Re No. 104 : 44 Ind App 218 (PC).

7. (Vol 11) 1924 PC 126 (132) : 5 Lah 92 : 51 Ind App 163 (PC).

(Vol 12) 1925 Cal 845 (848) : 52 Cal 894 (FB).

8. (Vol 25) 1938 All 91 (94).

(Vol 4) 1917 Cal 9 (10) (DB).

9. (Vol 8) 1921 P C 59 (61) : 48 Cal 30 : 16 Nag L R 187 : 47 Ind App 213 (PC).

(Vol 18) 1931 All 490 (493) : 54 All 25 (FB).

(Vol 11) 1924 Cal 257 (275) (FB).

(Vol 16) 1929 Lah 609 (611) : 10 Lah 657 (FB).

(Vol 13) 1926 Mad 1038 (1039) : 49 Mad 903 (FB).

(Vol 3) 1916 Low Bur 114 (123) : 8 Low Bur Rul 306 (FB).

(Vol 27) 1940 P C 230 (234) : ILR (1940) Lah 685 : 67 Ind App 464 : ILR (1940) Kar (PC) 447 (PC).

10. (Vol 29) 1942 P C 13 (17) : I L R (1942) Kar (PC) 33 (PC).

(1901) 1901 App Cas 495 (506), *Quinn* v. *Leathem*.

(Vol 18) 1931 All 277 (280) : 53 All 334 (FB).

(Vol 16) 1929 All 625 (630) : 52 All 11 (FB).

[*See also* (Vol 30) 1943 Pat 194 (205) : 22 Pat 382 (FB). (Principles laid down in case which make an inroad into the general principles of law and rights of ownership should not be further extended.)]

11. (Vol 2) 1915 All 360 (362) : 37 All 496.

(Vol 12) 1925 All 658 (660). (Authorities are not safe guides on questions of fact.)

(Vol 6) 1919 Bom 40 (41) (DB). (Decision is no authority for its application to different set of facts.)

(Vol 11) 1924 Cal 508 (509) : 51 Cal 124 (DB).

(Vol 15) 1928 Pat 304 (310) : 7 Pat 520 (DB). (Similar facts both in the authority cited and cases decided.)

[*See also* (Vol 2) 1915 P C 139 (142) (PC). (The plainer a proposition, the more difficult it is to find a decision actually in point.)]

12. (Vol 13) 1926 Rang 109 (110) : 4 Rang 18.

(Vol 15) 1928 Pat 316 (317) : 7 Pat 275 (DB).

(Vol 15) 1928 Oudh 430 (435) (DB).

('14) 1927 Bom 660 (661) (DB). (Matter of discretion.)

[*See also* (Vol 28) 1941 Rang 60 (66) : 1940 Rang L R 685. (Decision as to existence of personal law or custom not *res judicata*.)]

13. (Vol 6) 1919 Mad 75 (86) (FB).

(Vol 28) 1941 Nag 3 (4) : ILR (1942) Nag 172 (DB).

(Vol 15) 1928 Cal 148 (150) : 55 Cal 551 (DB).

(Vol 9) 1922 Nag 1 (7) : 19 Nag L R 81 (FB).

(Vol 19) 1932 Bom 122 (124) : 56 Bom 242 (FB).

(Vol 12) 1925 All 230 (232) : 47 All 268.

(Vol 16) 1929 Pat 392 (395) : 8 Pat 471 (DB). (It will be an abuse of precedents to apply isolated dicta to cases entirely different on facts.)

[*See* (Vol 22) 1935 All 247 (250) : 57 All 357 (DB). (Though entitled to great weight, obiter dicta of Full Bench are not binding.)]

[But see (Vol 20) 1933 Lah 159 (160) (DB). (Obiter dicta containing reasoning.)]

what has been enacted to what has been judicially said about the enactment is to be avoided.[14]

Subject to the principles mentioned above, the following rules may be remembered :

(1) All Courts in India are bound by the decisions of the Privy Council.[15] A considered decision of the Privy Council cannot be ignored as being *obiter*.[16]

In the case of different views among the High Courts on any point of law, the view of the Privy Council, even if *obiter*, is to be accepted.[17]

(2) A Judge of the High Court sitting alone is not bound on a question of law by the decision of another Judge sitting alone;[18] but a Single Judge of the High Court is bound by the decision of a Bench of two or more Judges[19] and a Bench of two or more Judges is itself bound by the decisions of the Full Bench of the same Court until they are overruled by the Privy Council or by another Full Bench.[20] Similarly, a decision of a Bench of Judges is also binding on other Division Benches of the same Court.[21] When a Division Bench disagrees with the decision of another Division Bench it is its duty to refer the matter to a Full Bench and it cannot simply ignore the earlier decision. But when there is a decision of the Judicial Committee on the point the previous Division Bench ruling need not be acted upon and the point need not be referred to a Full Bench.[22] As to whether, when a Bench differs from the decision of a Full Bench, it has got the power to refer the Full Bench decision to a fuller Bench itself or to refer the matter to the Chief Justice who is to consider if a fuller Bench should consider the question, see the undermentioned case.[23]

(3) Subordinate Courts are bound to follow the rulings of the High Court to which they are subordinate,[23a] and, in the absence of such rulings, they should follow the rulings, if any, of the other High Courts.[24] If there are two decisions of a High Court, one of a single Judge and another

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Note 14 *(contd.)*

14. (Vol 25) 1938 All 91 (94).
(Vol 22) 1935 Mad 70 (71).
(Vol 8) 1921 Cal 40 (43) : 48 Cal 161 (SB) (Fact that a mistaken interpretation has been put upon it cannot alter the law)
(Vol 19) 1932 P C 36 (40) (PC).
[*See also* (Vol 20) 1933 Mad 782 (784). (Unintentional wrong interpretation which is against authorities not binding.)]

15. (Vol 12) 1925 P C 272 (279) : 47 All 883: 28 Oudh Cas 352 : 52 Ind App 398 (PC).
(Vol 18) 1931 Rang 113 (116) : 9 Rang 217 (FB).
(Vol 16) 1929 Nag 98 (105) : 25 Nag L R 144 (FB).
[*See also* (Vol 27) 1940 Pat 707 (712) : 19 Pat 688 (DB). (It is not open to the Indian Courts to attempt to draw fine distinctions in the pronouncements of their Lordships of the Judicial Committee.)]

16. (Vol 27) 1940 All 544 (550) : I L R (1941) All 153 (FB).
(Vol 12) 1925 Oudh 94 (95) : 27 Oudh Cas 161.
(Vol 22) 1935 Cal 419 (442) : 63 Cal 217 (FB).
(Vol 3) 1916 Cal 693 (696). (Even general remarks are binding)
(Vol 2) 1915 Mad 208 (209) : 37 Mad 22 (DB). (Decision on mixed question of law and fact carries great weight.)
(Vol 16) 1929 Nag 211 (212) : 26 Nag L R 39 (DB).
(Vol 8) 1921 Low Bur 37 (41) : 11 Low Bur Rul 163 (DB).
[*See* (Vol 18) 1931 All 162 (172) : 53 All 239 (FB). (Long course of decisions should not be departed from on the basis of an obiter dictum of the Privy Council.)]

17. (Vol 27) 1940 Lah 129 (130) : I L R (1940) Lah 242 (FB). (Per *Abdul Rashid J.*, in Order of Reference.)
(Vol 13) 1926 Nag 154 (155).

18. (Vol 27) 1940 Mad 356 (362) : I L R (1940) Mad 454 (FB).
(Vol 8) 1921 Cal 169 (171) : 48 Cal 69 (77) (DB).

19. (Vol 27) 1940 Cal 584 (584).
('40) 42 Pun L R 101 (102).
(Vol 12) 1925 Mad 441 (442).
(Vol 20) 1933 Pat 38 (39) : 11 Pat 697 (DB). (Even if contrary to his view.)
(Vol 23) 1936 All 555 (556) (DB).
(Vol 16) 1929 Cal 572 (574) (DB).
(Vol 19) 1932 Mad 693 (694).
(Vol 21) 1934 Sind 95 (95).
[*See* (Vol 20) 1933 Pat 81 (83) : 12 Pat 188. (Obiter dictum of Division Bench must be treated with respect)]
[See however ('83) 9 Cal 604 (607). (Decision of Appellate Bench though not binding should receive respectful consideration by single Judge on original side)
(Vol 16) 1929 All 896 (896). (Obvious error in a Bench decision)]
[But see (Vol 11) 1924 Cal 733 (738) : 51 Cal 588. (Judge on original side not bound by Division Bench on appellate side.)]

20. ('07) 34 Cal 735 (741) (DB).
(Vol 19) 1932 All 293 (303) : 54 All 646 (FB).
(Vol 8) 1921 Oudh 217 (219) : 24 Oudh Cas 361. (Considered dictum of Full Bench should not be ignored as being obiter.)
[See however (Vol 19) 1932 All 149 (150) : 54 All 89. (Decisions of Board of Revenue not binding on High Court.)]

21. (Vol 21) 1934 Pat 173 (174) : 13 Pat 303.
(Vol 27) 1940 Mad 356 (362) : I L R (1940) Mad 454 (FB).
(Vol 21) 1934 Pat 85 (86).
(Vol 22) 1935 Rang 370 (375) : 13 Rang 570 (FB).
[See however (Vol 15) 1928 Bom 130 (133): 52 Bom 385 (DB). (Practice of Bombay High Court is that no Bench has power to bind all other Benches as to the practice to be adopted in cases coming before them.)]

22. (Vol 30) 1943 Cal 114 (118) : ILR (1943) 1 Cal 22.

23. (Vol 19) 1932 Mad 612 (614 & 617) : 55 Mad 883 (FB).

23a. (Vol 30) 1943 Mad 471 (473): IL R (1944) Mad 95 (DB). (Fact that some argument was overlooked in the judgment binding on him is immaterial)

24. (Vol 28) 1941 Sind 221 (223) : ILR (1941) Kar 431 (DB). (But they are not bound.)
(Vol 2) 1915 P C 15 (17) : 37 All 359 : 42 Ind App 155 (PC).
(Vol 10) 1923 All 392 (393) : 45 All 425 (FB).
('98) 25 Cal 488 (491) (SB).

of a Bench of two Judges, then, unless the subordinate Court finds some grounds for distinguishing one from the other, it is bound to follow the decision of the Bench.[25]

(4) Where there are conflicting rulings both binding on the Court and they cannot be reconciled, the authority which is at once the more recent and more consistent with general principles and equity should prevail.[26]

(5) In a matter which is open to divergence of view among various High Courts, the Court should follow its own *cursus curiæ* unless it is of opinion that the former decisions of the Court are clearly wrong.[27]

(6) Section 3, Law Reports Act, enacts that no Court is bound to treat as authority any unauthorised report quoted before it.[28] But the Judges, in exercising their discretion under this section, would generally have regard to the practice prevailing in their Courts with regard to the particular report quoted before them.[29]

(7) Where the authorities have laid down a rule, it is not always necessary to discover the original basis of it.[30]

15. English and American decisions. — English and American decisions are not precedents and are not binding as authority upon Courts in India not administering English law,[1] and where the law in India has been codified it is not open to the Courts in India to ignore the enacted law and follow the English law, simply because in certain cases the enforcement of such statute law might create hardship.[2] But, if an Indian Act is silent on any question or there is

Note 14 *(contd.)*

25. (Vol 18) 1931 Mad 71 (72) (DB).

26. (1880) 5 App Cas 787 (798), *Campbell* v. *Campbell*.
('11) 21 Mad L Jour 263 (268) (FB). (But as far as possible the authority of all former decisions ought to be supported and later decisions must be treated as interpreting and limiting the application of the earlier cases.)

27. (Vol 28) 1941 Mad 161 (171) : I L R (1941) Mad 438 (FB).
(Vol 26) 1939 Mad 369 (370) : I L R (1939) Mad 456 (SB).
('33) 9 Cal 82 (87) (FB). (Especially where the measure relates to some technical or fiscal rule.)
(Vol 20) 1933 All 634 (638) : 55 All 743 (DB).
(Vol 16) 1929 Lah 174 (175).
(Vol 14) 1927 Oudh 1 (2) (DB). (Old-Oudh Judicial Commissioner's Court decisions are not binding on the Chief Court.)
(Vol 15) 1928 Pat 641 (649) : 7 Pat 613 (DB). (It is the practice of the Patna High Court not to depart from the *cursus curiæ* established by the Calcutta High Court.)
(Vol 14) 1927 Rang 4 (14) : 4 Rang 313 (FB). (Rangoon High Court not bound to follow the decisions of the Lower Burma Chief Court — But Subordinate Courts are bound by authorized reports of Chief Court.)
(Vol 15) 1928 Sind 166 (167) (DB). (Bombay decisions are considered by the Sind Courts as of more authority than those of other High Courts.)
(Vol 11) 1924 Sind 75 (83) : 17 Sind L R 133 (FB). (Sind Sadar Court judgments are not binding on Judicial Commissioner's Court but are entitled to great respect.)

28. (Vol 21) 1934 Rang 39 (40).
(Vol 19) 1932 Nag 137 (138) : 28 Nag L R 116.
(Vol 18) 1931 Rang 279 (280) : 9 Rang 561. (Two decisions of the High Court — One in official report, the other in unauthorized report — Subordinate Court can follow officially reported case.)

29. (Vol 18) 1931 Mad 71 (72) (DB).
(Vol 17) 1930 Bom 320 (326) (DB).
See also the following cases:
(Vol 19) 1932 Cal 550 (551) (DB). (Bench decision in unauthorized report preferred to single Judge's decision in athorized report.)
(Vol 18) 1931 Mad 782 (784) : 55 Mad 251.
(Vol 19) 1932 Nag 137 (138) : 12 Nag L R 116.
(Vol 17) 1930 Nag 270 (270) : 26 Nag L R 178.
(Vol 17) 1930 Oudh 57 (58) : 4 Luck 721 (DB).
(Vol 20) 1933 Rang 75 (76). (Courts should fall back on unofficially reported cases only when they can find no officially reported case on the point.)
(Vol 16) 1929 Rang 273 (273) : 7 Rang 361 (DB).

30. (Vol 15) 1928 All 596 (598) : 51 All 136 (FB).

Note 15

1. (Vol 29) 1942 All 302 (307) (DB).
(Vol 28) 1941 Mad 713 (718) : I L R (1941) Mad 824 (DB).
(Vol 28) 1941 Nag 282 (284) : ILR (1941) Nag 397.
(Vol 26) 1939 Pat 323 (329) (SB).
(Vol 5) 1918 P C 11 (20) : 45 Cal 878 : 45 Ind App 73 (PC).
(Vol 19) 1932 PC 207 (211) : 7 Luck 442 : 59 Ind App 376 (PC).
(Vol 11) 1924 PC 40 (41) : 51 Cal 304 : 51 Ind App 28 (PC).
(Vol 10) 1923 Bom 321 (350) : 47 Bom 843 (FB). (English judgments are in no better position than the opinion of eminent jurists.)
(Vol 11) 1924 Lah 513 (522, 524) : 5 Lah 147 (FB).
(Vol 7) 1920 Mad 427 (432) : 42 Mad 821 (FB). (Following American decisions deprecated.)
(Vol 14) 1927 Sind 130 (131) : 23 Sind L R 137 (FB). (Especially in partnership suits English cases are not good guide.)
[*See* (Vol 24) 1937 Sind 129 (144) : 32 Sind L R 567 (FB). (Decisions on expressions used in an English Act are hardly a guide in the interpretation of similar words used in an Indian Act.)]

2. (Vol 23) 1936 Cal 356 (367) : I L R (1937) 1 Cal 711 (FB).
('99) 22 All 149 (159) : 27 Ind App 58 (PC).
(Vol 18) 1931 All 183 (185) : 53 All 114 (FB).
(Vol 19) 1932 P C 207 (211) : 7 Luck 442 : 59 Ind App 376 (PC).
(Vol 18) 1931 P C 79 (82) : 58 Cal 1235 : 58 Ind App 91 (PC).
(Vol 16) 1929 Lah 344 (354) : 10 Lah 283 (FB).
(Vol 22) 1935 Mad 528 (532) : 58 Mad 642 (FB).
(Vol 18) 1931 Rang 235 (243) : 9 Rang 404 (SB).
[*See* (Vol 20) 1933 PC 145 (147) : 60 Cal 1029 : 60 Ind App 196 (PC). (Application of decisions on Imperial Income-tax Code is misleading.)]

ambiguity, it may be necessary to apply English principles.[3]

They may, however, be referred to with advantage as affording analogies in the following cases :

(1) Where an Indian statute has been passed in the *same terms* and on the *same lines* as those of an English statute and the latter has been authoritatively construed by English decisions.[4] But where the terms of a section in an Indian Act are taken from the English law, such section should be construed strictly in relation to the immediate context of the Indian Act, and the Court should decline to be guided by evidence as to their meaning or judicial interpretations of them when they occur in another context or other statutes.[5]

(2) Where an English or American decision is based upon *general legal principles* recognised by the laws of all civilised countries.[6] But it must be applied with reference to Indian conditions,[7] and where the law of this country is different from that of England or America, English or American decisions should be quoted with greatest care.[8]

(3) Where the point is a novel one and there is no precedent in India dealing with it.[9]

(4) Where the Indian Act makes express reference to the Court in England and to the principles and rules on which such Court acts.[10]

See also the undermentioned cases.[11]

16. **Interpretation of fiscal statutes.** — See Vol. III, Notes on S. 1 of the Court-fees Act and Vol. VII, Notes on Preamble to the Stamp Act.

17. **Interpretation of penal statutes.** — See Vol. III, Notes on Preamble to the Code of Criminal Procedure.

18. **Interpretation of statutes of limitation.** — See Vol. V, Notes on Preamble to the Limitation Act.

Note 15 *(contd.)*

3. (Vol 24) 1937 Rang 302 (307) (DB).

4. (Vol 28) 1941 Pat 151 (152) : 20 Pat 75 (DB).
(Vol 22) 1935 Lah 570 (572) : 16 Lah 829 (FB). (Guidance as to meaning of same expressions as used in the Indian Acts.)
(Vol 18) 1931 Lah 578 (581) : 12 Lah 725 (FB).
('75) 2 Ind App 169 (181) (PC).
(Vol 20) 1933 All 789 (793) : 55 All 912 (FB).

5. (Vol 9) 1922 Mad 263 (265) : 46 Mad 177 (DB). (Per Coutts-Trotter J.)

6. ('87) 11 Bom 551 (561) : 14 Ind App 89 (PC).
(Vol 29) 1942 All 302 (307) (DB).
(Vol 28) 1941 Mad 129 (145) (DB).
(Vol 27) 1940 Cal 429 (432) : ILR (1940) 1 Cal 197.
('74) 22 Suth W R 279 (281) : 1 Ind App 364 (PC).
('83) 7 Bom 341 (359) (FB).

7. (Vol 15) 1928 Mad 23 (23) (DB).
(Vol 19) 1932 Mad 445 (452) : 55 Mad 727 (DB).
(Vol 11) 1924 Cal 240 (242) : 50 Cal 667.
(Vol 17) 1930 Lah 920 (926) : 11 Lah 564 (DB).
(Vol 12) 1925 Oudh 337 (346) : 28 Oudh Cas 8 (DB).
[*See* ('85) 11 Cal 301 (310) : 12 Ind App 23 (PC). (There is no room in India for the rule of English law in favour of a tenancy in common; the presumption is generally the reverse.)]

8. (Vol 29) 1942 Bom 18 (19) : I L R (1942) Bom 139 (FB).
(Vol 25) 1938 Rang 289 (289) : 1938 Rang L R 299 (DB).
(Vol 25) 1938 Sind 116 (121) : 32 Sind L R 622 (DB).
(Vol 20) 1933 Mad 293 (296) : 56 Mad 546 (DB).
[*See* (Vol 29) 1942 All 344 (347) : I L R (1942) All 848 (DB).
(Vol 22) 1935 Cal 316 (327) : 62 Cal 749 (DB).]

9. (Vol 22) 1935 Cal 33 (34) : 61 Cal 986. (Principles of equity.)

10. (Vol 18) 1931 PC 234 (239) : 54 Mad 774 : 58 Ind App 350 (PC).

11. (Vol 30) 1943 P C 34 (38) : 70 Ind App 35 : I L R (1943) Kar (P C) 30 : I L R (1943) 2 Cal 213 (PC). (Though the Indian Act is to be interpreted according to the meaning of the words used in it, passages from English decisions laying down general principles can be referred to in interpreting the sections of the Indian Act when the meaning is not clear.)
(Vol 23) 1936 Lah 337 (338) : 16 Lah 651 (DB). (It may be permissible to refer to the principles of English law, if there is any ambiguity in the language used by the statute, and to adopt the interpretation which is in conformity with those principles.)

APPENDIX

I. — PRINCIPAL ACTS, 1947 — 1948

[THE] ANTIQUITIES (EXPORT CONTROL) ACT, 1947

(Act XXXI of 1947)

[18th April, 1947]

An Act to control the export of antiquities.

WHEREAS it is expedient to make better provision for controlling the export of objects of antiquarian or historical interest or significance:

It is hereby enacted as follows :—

Short title and extent.

1. *(1)* This Act may be called the Antiquities (Export Control) Act, 1947.

(2) It extends to the whole of British India.

Interpretation.

2. In this Act, unless there is anything repugnant in the subject or context,—

(a) "antiquity" includes—

(i) any coin, sculpture, manuscript, epigraph, or other work of art or craftsmanship,

(ii) any article, object or thing detached from a building or cave,

(iii) any article, object or thing illustrative of science, art, crafts, literature, religion, customs, morals or politics in bygone ages,

(iv) any article, object or thing declared by the Central Government by notification in the official Gazette to be an antiquity for the purposes of this Act,—

which has been in existence for not less than one hundred years ;

(b) "export" means export from British India by sea, land or air.

Prohibition of export.

3. No person shall export any antiquity except under the authority of a licence granted by the Central Government.

Application of Act VIII of 1878.

4. All antiquities the export of which is prohibited under section 3 shall be deemed to be goods of which the export has been prohibited under section 19 of the Sea Customs Act, 1878, and all the provisions of that Act shall have effect accordingly, except that, the provisions of section 183 of that Act notwithstanding, any confiscation authorised under that Act shall be made, unless the Central Government, on application to it in such behalf, otherwise directs.

Penalty and procedure.

5. *(1)* If any person exports or attempts to export an antiquity in contravention of section 3, he shall without prejudice to any confiscation or penalty to which he may be liable under the provisions of the Sea Customs Act, 1878 (VIII of 1878) as applied by section 4, be punishable with imprisonment for a term which may extend to one month, or with fine which may extend to five thousand rupees, or with both.

(2) No Court shall take cognizance of an offence punishable under this section except upon complaint in writing made by an officer generally or specially authorised in this behalf by the Central Government, and no Court inferior to that of a Presidency Magistrate or a Magistrate of the first class shall try any such offence.

Power to determine whether or not an article is an antiquity.

6. If any question arises whether any article, object or thing is or is not an antiquity for the purposes of this Act, it shall be referred to the Director General of Archaeology in India, and his decision thereon shall be final.

Power to make rules.

7. *(1)* The Central Government may, by notification in the official Gazette, make rules to carry out the purposes of this Act.

(2) In particular and without prejudice to the generality of the foregoing power, such rules may prescribe the procedure for granting licences for the export of antiquities, and fix the fees payable on applications therefor.

Protection of action taken under this Act.

8. No suit, prosecution or other legal proceeding shall lie against any person for anything in good faith done or intended to be done under this Act.

Application of other laws not barred.

9. The provisions of this Act shall be in addition to, and not in derogation of, the provisions of the Ancient Monument Preservation Act, 1904, or any other law for the time being in force.

(Act XV of 1947)[a]

[20th March, 1947]

An Act to enalle duties in connection with vital services to be imposed in an emergency on the Armed Forces of the Crown.

WHEREAS it is expedient to enable duties in connection with vital services to be imposed in an emergency on the Armed Forces of the Crown;

It is hereby enacted as follows :—

[a] This Act is amended by Act 4 of 1948.

Short title and extent.

1. [*][a]This Act may be called the Armed Forces (Emergency Duties) Act, 1947.

[a][* * *]

[a] Brackets and Figure '(1)' and sub-section (2) were *omitted* by Act 4 of 1948, S. 2 [5-1-1948.]

Emergency duties of Armed Forces.

2. *(1)* The Central Government may, by notification in the official Gazette, declare any specified service [a][in a Province, or if so requested by the Government of an Acceding State, any specified service in that State] to be a service of vital importance to the community :

Provided that such notification shall remain in force for one month in the first instance, but may be extended, from time to time, by a like notification.

(2) Upon a declaration being made under sub-section *(1)* and until it is rescinded, it shall be the duty of every person subject to the Indian Army Act, 1911, or the Indian Air Force Act, 1932, or the Naval Discipline Act, in the form in which it is set forth in the First Schedule to the Indian Navy (Discipline) Act, 1934, to obey any command given by any superior officer in relation to employment upon or in connection with the service specified in the declaration, and evey such command shall be deemed to be a lawful command within the meaning and for the purposes of the said Acts.

[a] *Inserted* by Act 4 of 1948, S. 3. [5-1-1948.]

Validation of certain past commands.

3. Every command given, after the 30th day of September, 1946 and before the commencement of this Act, to any person referred to in sub-section *(2)* of section 2 by any superior officer in relation to employment upon or in connection with any such service as the Central Government may, by notification in the Official Gazette, specify in this behalf, shall be deemed to have been a lawful command within the meaning and for the purposes of the Acts referred to in that sub-section, so however that no such person shall be punished by reason only of his not having obeyed any such command.

[THE] ARMED FORCES (SPECIAL POWERS) ACT, 1947
(Act III of 1948)

Statement of Objects and Reasons

"Certain special powers have been conferred on the Armed Forces in certain disturbed areas of the country to enable them more efficiently to discharge their duties in connection with the maintenance of law and order. These powers have been conferred by means of Ordinances, a separate Ordinance being issued in respect of each Province in which the need for such special powers is felt.

It is desirable to replace these Ordinances by an Act which would apply to all the Provinces of India. This is a temporary piece of legislation, as it will be in force only for one year, or, if the Central Government by notification so directs, for a further period not exceeding one year. In effect, however, a Provincial Government can at any time put the measure out of operation in its Province by the cancellation of the Proclamation or Declaration referred to in clause 2 of the Bill, the existence of which is an essential condition to the exercise of the powers conferred by the Bill."

— Gaz. of India, 1947, Part V, page 605.

[THE] ARMED FORCES (SPECIAL POWERS) ACT, 1947
(ACT III OF 1948.)

[5th January, 1948]

An Act to enable certain special powers to be conferred upon officers of the armed forces in disturbed areas.

WHEREAS it is expedient to enable certain special powers to be conferred upon officers of the armed forces in disturbed areas :

It is hereby enacted as follows :—

Short title, extent and duration.

1. *(1)* This Act may be called the Armed Forces (Special Powers) Act, 1947.

(2) It extends to all the Provinces of India.

(3) It shall remain in force only for a period of one year :

Provided that the Central Government may, by notification in the official Gazette, direct that it shall remain in force for a further period not exceeding one year.[a]

[a] Ministry of Defence Notfn. No. 2305 directs that the provisions of this Act shall remain in force for a

further period of one year from the date of the expiry of its present life; — *See* Gazette of India, Extra., 28-12-1948, page 2023.

Special powers of officers of military or air forces.

2. Any commissioned officer, warrant officer or non-commissioned officer of His Majesty's military or air forces may, in any area in respect of which a proclamation under sub-section *(1)* of section 15 of the Police Act, 1861 is for the time being in force or which is for the time being by any form of words declared by the Provincial Government under any other law to be a disturbed or dangerous area,—

(a) if in his opinion it is necessary so to do for the maintenance of public order, after giving such warning, if any, as he may consider necessary, fire upon or otherwise use force, even to the causing of death, against any person who is acting in contravention of any law or order for the time being in force in the said area prohibiting the assembly of five or more persons or the carrying of weapon or of things capable of being used as weapons ;

(b) arrest without warrant any person who has committed a cognizable offence, or against whom a reasonable suspicion exists that he has committed or is about to commit a cognizable offence;

(c) enter and search, without warrant, any premises to make any such arrest as aforesaid, or to recover any person believed to be wrongfully restrained or confined, or any property reasonably suspected to be stolen property, or any arms believed to be unlawfully kept, in such premises.

Protection of persons acting under this Act.

3. No prosecution, suit or other legal proceeding shall be instituted, except with the previous sanction of the Central Government, against any person in respcet of anything done or purporting to be done in exercise of the powers conferred by section 2.

Repeal of certain Ordinances.

4. The Bengal Disturbed Areas (Special Powers of Armed Forces) Ordinance, 1947, the Assam Disturbed Areas (Special Powers of Armed Forces) Ordinance, 1947, the East Punjab and Delhi Disturbed Areas (Special Powers of Armed Forces) Ordinance, 1947, and the United Provinces Disturbed Areas (Special Powers of Armed Forces) Ordinance, 1947, are hereby repealed.

Effect of expiry of Act.

5. On the expiry of this Act section 6 of the General Clauses Act, 1897, shall apply as if this Act were then repealed by a Central Act.

[THE] ATOMIC ENERGY ACT, 1948.
(Act XXIX of 1948).

STATEMENT OF OBJECTS AND REASONS.

"Among the many branches of science the newest and one of the most important is atomic science. Its military aspects have unfortunately overshadowed its peaceful ones, but the course of history will show that, because of the powerful tools it has provided for unravelling and understanding the processes of life because of the new weapons it has given us for fighting disease and for the alleviation of human suffering, and because of the concentrated sources of power it has put in our hands for peaceful purposes, man took one of the greatest strides forward in his history by discovering how to release atomic energy. The development and use of atomic energy is a question of national importance. This was recognised by the Government and led to the setting up of Board of Research on Atomic Energy.

The Atomic Energy Bill would give the Government powers to control the development of atomic energy in India and the disposal of the relevant raw materials, so that these may be used for the advantage of the people as a whole.

The provisions of the Bill are drafted on the lines of the Atomic Energy Act, 1946 (in U. K.) 9 & 10 Geo. VI, Ch. 80.

The Bill gives Government powers for the control and development of atomic energy for purposes connected therewith, particularly control of plants designed or adopted for the production or use of atomic energy, the working or export of fissible substances such as uranium, thorium, plutonium, neptunium and substances like beryllium and other compounds.

While every endeavour would be made to keep fundamental scientific discoveries outside the limits of any secrecy provision it is recognised that information given by foreign atomic energy agencies may have conditions attached to it. In order to ensure secrecy, while members of the Board of Research on Atomic Energy will be able to have free discussions among themselves, provision has been made in the Bill for security measures which would be necessary."

—Gazette of India, 1948, Part V, p. 354.

[THE] ATOMIC ENERGY ACT, 1948.
(ACT XXIX OF 1948.)[a]

[15th April, 1948.]

An Act to provide for the development and control of atomic energy and for purposes connected therewith.

WHEREAS it is expedient to provide for the development and control of atomic energy and for purposes connected therewith ;

It is hereby enacted as follows :—

[a] This Act is made applicable to—

(a) the Chota Nagpur Division and the Sonthal

Parganas District—*see* Bihar Gazette, 1948, Part II, page 2213 ;

(b) the Darjeeling District with effect from 8th July 1948 — *see* Calcutta Gazette, 1948, Part I, page 894 ;

(c) all partially excluded areas in C. P. and Berar subject to certain modifications — *see* C. P. & Berer Gazette, 1948, Part I, page 548.

Short title and extent.

1. *(1)* This Act may be called the Atomic Energy Act, 1948.

(2) It extends to all the Provinces of India.

Declaration as to expediency of Central Government's control.

2. It is hereby declared that it is expedient in the public interest that the Central Government should take under its control the development of—

(a) any industry connected with the production or use of atomic energy, and

(b) any mineral which is or may be used for the production or use of atomic energy or research into matters connected therewith.

Definitions.

3. In this Act, unless there is anything repugnant in the subject or context,—

(a) "atomic energy" means the energy released from atomic nuclei as a result of any process, including the fission process, but does not include energy released in any process of natural transmutation or radio-active decay which is not accelerated or influenced by external means;

(b) "minerals" includes all substances obtained or obtainable from the soil by underground or surface working ;

(c) "plant" includes any machinery, equipment or appliance, whether affixed to land or not ;

(d) "prescribed substance" means uranium, thorium, plutonium, neptunium or beryllium or any of their respective compounds or any other substance which the Central Government may, by notification in the official Gazette, prescribe, being a substance which in its opinion is or may be used for the production or use of atomic energy or research into matters connected therewith.

General powers of the Central Government.

4. The Central Government shall have power—

(a) to produce, use and dispose of atomic energy and carry out reseach into any matters connected therewith ;

(b) to manufacture or otherwise produce, buy or otherwise acquire, store and transport any articles which in its opinion are, or are likely to be required for or in connection with the production or use of atomic energy or such research as aforesaid, and to dispose of any articles manufactured, produced, bought or acquired by it; and

(c) to do all such things (including the erection of buildings and the execution of works and the working of minerals) as the Central Government considers necessary or expedient for the exercise of the foregoing powers.

Power to obtain information of materials, plant and processes.

5. *(1)* The Central Government may, by notice in writing served upon any person, require him to make such periodical and other returns, at such times and containing such particulars and accompanied by such plans, drawings and other documents as may be specified in the notice—

(a) of any prescribed substance, specified in the notice in his possession or under his control;

(b) of any minerals so specified in his possession or under his control or present in or on land owned or occupied by him, being minerals from which in the opinion of the Central Government, any of the prescribed substances can be obtained ;

(c) of any plant in his possession or under his control designed or adapted for the production or use of atomic energy or research into matters connected therewith ;

(d) of any contract entered into by him or any licence granted by or to him relating to the production or use of atomic energy or research into matters connected therewith ;

(e) any other information in his possession relating to any work carried out by him, or on his behalf or under his direction, in connection with the production or use of atomic energy or research into matters connected therewith.

(2) If any person—

(a) fails to comply with any notice served on him under this section or

(b) knowingly makes any untrue statement in any return made in pursuance of any such notice,

he shall be guilty of an offence under this Act.

Power of entry and inspection.

6. *(1)* Any person authorised by the Central Government may, on producing, if so required, a duly authenticated document showing his authority, enter any premises where he has reasonable grounds for believing that work is being carried out for the purpose of or in connection with the production or use of atomic energy or research into matters connected therewith, or that any of the prescribed substances, or any minerals from which any such substance can be obtained, or any such plant as is mentioned in clause *(c)* of sub-section *(1)* of the last foregoing section are situate, and may inspect the premises and any articles found therein.

(2) The person carrying out the inspection may make copies of, or extracts from, any drawing, plan or other document found in the premises and, for the purpose of making such

copies or extracts, may remove any such drawing, plan or other document after giving a duly signed receipt for the same and retain possession thereof for a period not exceeding seven days.

(3) If any person wilfully obstructs any person exercising powers under this section, he shall be guilty of an offence under this Act.

Power to do work for purpose of discovering minerals.

7. *(1)* The Central Government may, subject to the provisions of this section, do on, over or below the surface of any land such work as it considers necessary for the purpose of discovering whether there is present in or on the land, either in a natural state or in a deposit of waste material obtained from any underground or surface working, any mineral from which in its opinion any of the prescribed substances can be obtained, and the extent to which such mineral is so present.

(2) Before any powers are exercised under sub-section *(1)* in relation to any land, the Central Government shall serve on every owner, lessee and occupier of the land a notice in writing specifying the nature of the work proposed to be done and the extent of the land affected, and the time, not being less than twenty eight days, within which and the manner in which objections can be made thereto, and no such power shall be exercised otherwise than in pursuance of the notice or before the expiration of the time specified therein for making objections.

(3) The Central Government may, after giving the person making the objection an opportunity of appearing before and being heard by a person appointed by the Central Government for the purpose and after considering any such objection and the report of the person so appointed, make such orders as it may deem proper but not so as to increase the extent of the land affected.

(4) Compensation shall be determined and paid in accordance with section 16 of this Act in respect of any diminution in the value of any land or property situate thereon resulting from the exercise of powers under this section.

(5) If any person wilfully obstructs or interferes with the exercise of powers under this section, he shall be guilty of an offence under this Act.

Compulsory acquisition of prescribed substances, stock of minerals and plant.

8. *(1)* The Central Government may, subject to such rules as may be made in this behalf, compulsorily acquire—

(a) any prescribed substance ;

(b) any minerals, being minerals from which in the opinion of the Central Government any of the prescribed substances can be obtained ;

(c) any plant not affixed to land which is designed or adapted for the production or use of atomic energy or research into matters connected therewith.

(2) Compensation in respect of the acquisition of any article under this section shall be paid in accordance with the provisions of section 16 of this Act.

Compulsory acquisition of certain other rights.

9. *(1)* The Central Government may serve on any person who is a party to a contract relating to the production or use of atomic energy or research into matters connected therewith, not being a contract for the rendering of personal services a notice in writing stating that on such date as may be specified in the notice his rights and liabilities under the contract will be transferred to the Central Government, and thereupon, subject to any withdrawal of the notice under the following provisions of this section, the contract shall, as regards any rights exercisable, or liabilities incurred, on or after the said date, have effect as if the Central Government were a party to the contract instead of the person on whom the notice was served, and as if for any reference in the contract to that person there were substituted a reference to the Central Government.

(2) A notice served under sub-section *(1)* shall contain a statement to the effect that an objection may be made thereto within such time and in such manner as may be specified, and if any such objection is duly made and not withdrawn, the Central Government shall afford an opportunity to the person making the objection of appearing before and being heard by a person appointed by the Central Government for the purpose.

(3) After considering any such objection and the report of the person appointed by it under sub-section *(2)*, the Central Government may make such orders as it may deem proper.

(4) Where the rights and liabilities of a party to a contract are transferred to the Central Government under this section, there shall be paid to that party such compensation in respect of any loss suffered by that party as may be agreed between him and the Central Government, and in default of such agreement, as may be determined by arbitration.

Control of production and use of atomic energy.

10. *(1)* The Central Government may, by order published in the official Gazette, prohibit except under a licence granted by it,—

(a) the working of any minerals specified in the order, being minerals from which in the

opinion of the Central Government any of the prescribed substances can be obtained ;

(b) the acquisition, production, treatment, possession, use, disposal, export or import—

(i) of any of the prescribed substances ; or

(ii) of any minerals specified in the order, being minerals from which in the opinion of the Central Government any of the prescribed substances can be obtained ; or

(iii) of any plant designed or adapted or manufactured for the production or use of atomic energy or for research into matters connected therewith ;

and any such order may contain such incidental and supplementary provisions, including provisions for seizure, retention and disposal of any article in respect of which there are reasonable grounds for suspecting that a contravention of the order has been committed, as the Central Government considers necessary.

(2) Any person who contravenes or fails to comply with an order made under this section or any conditions subject to which a licence is granted under this section shall be guilty of an offence under this Act.

Restriction on disclosure of information relating to plant.

11. *(1)* Subject to the provisions of this section, any person who without the consent of the Central Government communicates to any other person not being an authorised person, or obtains or attempts to obtain, any document, drawing, photograph, plan, model or other information whatsoever which to his knowledge describes, represents or illustrates—

(i) an existing or proposed plant used or proposed to be used for the purpose of producing or using atomic energy, or

(ii) the purpose or method of operation of any such existing or proposed plant, or

(iii) any process operated or proposed to be operated in any such existing or proposed plant,

shall be guilty of an offence under this Act :

Provided that it shall not be such an offence to communicate information with respect to any plant of a type in use for purposes other than the production or use of atomic energy unless the information discloses that plant of that type is used or proposed to be used for the production or use of atomic energy or research into any matters connected therewith.

Explanation.—In this sub section "authorised person" means in relation to information on any subject to which this sub-section applies a person to whom, by virtue of a general authority granted by the Central Government, information on that subject may be communicated.

(2) The Central Government may, by order, grant exemption from this section in such classes of cases and to such extent and subject to such conditions, as may be specified in the order.

(3) Where any information has been made available to the general public otherwise than in contravention of this section, any subsequent communication of that information shall not constitute an offence under this Act.

Special provisions as to inventions.

12. *(1)* Where an application has been made to the Controller of Patents and Designs (hereafter in this section referred to as the Controller) for the grant of a patent and it appears to the Controller that the invention which is the subject-matter of the application relates to the production or use of atomic energy or research into matters connected therewith, he shall serve a notice in writing on the Central Government to that effect and may, notwithstanding anything in any law, omit or delay the doing of anything which he would otherwise be required to do in relation to the application, and give directions for prohibiting or restricting the publication of information with respect to the subject-matter of the application, or the communication of such information to particular persons or classes of persons.

(2) Upon receipt of notice under sub-section *(1)* the Central Government may make such orders as it may deem proper.

(3) Any person who contravenes any direction given by the Controller or any order made by the Central Government shall be guilty of an offence under this Act.

Delegation of powers.

13. The Central Government may by order direct that any power conferred on it by this Act shall be exercised or discharged by such officer or officers in such circumstances and under such conditions as may be specified in the order.

Disclosure of information obtained under Act.

14. Any person who, without the authority of the Central Government, discloses any information obtained in the exercise of powers under this Act, shall be guilty of an offence under this Act.

Offences and penalties.

15. *(1)* Any person guilty of an offence under this Act shall be punishable with imprisonment for a term which may extend to three months or with fine which may extend to five hundred rupees or with both.

(2) Where any offence under this Act has been committed by a body corporate, every person who at the time of the commission of the offence was a director, general manager, secretary or other similar officer of the body corporate, or was purporting to act in any such capa-

city, shall be deemed to be guilty of that offence unless he proves that the offence was committed without his consent or connivance and that he exercised all such diligence to prevent the commission of the offence as he ought to have exercised having regard to the nature of his functions in that capacity and to all the circumstances.

(3) Proceedings in respect of an offence under section 11 shall not be instituted except with the consent of the Advocate-General of India.

Principles relating to payment of compensation.

16. *(1)* Where by reason of the exercise of any powers under this Act, any compensation is payable, the amount of such compensation shall be determined in the manner and in accordance with the principles hereinafter set out, that is to say,—

(a) where the amount of compensation can be fixed by agreement, it shall be paid in accordance with such agreement ;

(b) where no such agreement can be reached, the Central Government shall appoint as arbitrator a person having expert knowledge as to the nature of the right affected who shall determine the amount of compensation payable.

(2) In making his award, the arbitrator appointed under sub-section *(1)* shall have regard—

(a) in the case of any compensation payable under section 7 of this Act,—

(i) to the nature of the work done,

(ii) the manner, extent and duration of the exercise of any powers under that section.

(iii) the diminution in the rent at which the land and the property situated thereon might reasonably be expected to let for any period or in the market value of the land and property on the date when the exercise of powers comes to an end, and

(iv) the provisions of sub-section *(1)* of section 23 of the Land Acquisition Act, 1894 (I of 1894), in so far as such provisions can be made applicable to the exercise of powers under section 7 of this Act ; and

(b) in the case of any compensation payable under section 8 of this Act, to the price which the owner might reasonably have been expected to obtain on a sale of the article effected by him immediately prior to the date of the acquisition.

(3) An appeal shall lie to the High Court against an award of the arbitrator except in cases where the amount claimed thereof does not exceed an amount prescribed in this behalf by the Central Government.

(4) The Central Government may make rules prescribing the procedure to be followed in arbitrations under this Act and the principles to be followed in the apportionment of the costs of proceedings before the arbitrator and on appeal.

(5) Save as provided in this Act nothing in any law for the time being in force relating to arbitration shall apply to arbitrations under this Act.

[THE] BUSINESS PROFITS TAX ACT, 1947
(Act XXI of 1947)

STATEMENT OF OBJECTS AND REASONS

"The object of this Bill is to impose a special income-tax on the profits exceeding one lakh of rupees of business, professions and vocations. . . . ."
—Gazette of India, 1947, Part V, page 211.

THE BUSINESS PROFITS TAX ACT, 1947
(ACT XXI OF 1947)[a]

[11th April, 1947.]

An Act to impose a special tax on a certain class of income.

WHEREAS it is expedient to impose a special tax on income arising from business;

It is hereby enacted as follows :—

[a] This Act is amended by the India (Adaptation of Income-tax, Profits-tax and Revenue Recovery Acts) Order, 1947 and by Acts 44 of 1947, 20 of 1948 and 48 of 1948.

Short title, extent and commencement.

1. *(1)* This Act may be called the Business Profits Tax Act, 1947.

(2) It extends to the whole of British India.

(3) It shall come into force on such date[a] as the Central Government may, by notification in the official Gazette, appoint.

[a] The Act came into force on 12-4-1947 — *See* Gazette of India, 1947 Part I, page 537.

Interpretation.

2. In this Act, unless there is anything repugnant in the subject or context,—

(1) "abatement" means, in respect of any chargeable accounting period, [a][ending on or before the 31st day of March 1947,] a sum which bears to a sum equal to—

(a) in the case of a company, not being company deemed for the purposes of section 9 to be a firm, six per cent. of the capital of the company on the first day of the said period computed in accordance with Schedule II, or one lakh of rupees, whichever is greater, or

(b) in the case of a firm having—

(i) not more than two working partners, one lakh of rupees, or

(ii) three working partners, one and a half lakhs of rupees, or

(iii) four or more working partners, two lakhs of rupees, or

(c) in the case of a Hindu undivided family two lakhs of rupees, or

(d) in any other case, one lakh of rupees,—

the same proportion as the said period bears to the period of one year [b][and, in respect of any chargeable accounting period beginning after the 31st day of March, 1947, such sum as may be fixed by the annual Finance Act.]

[a] *Inserted* by Act 20 of 1948, S. 10. [30 3-1948.]
[b] *Added* ibid.

(2) "accounting period" in relation to any business means any period which is or has been determined as the previous year for that business for the purposes of the Indian Income-tax Act, 1922 ;

[a][*(2A)* "British India" means, as respects any period before the 15th day of August 1947, the territories then referred to as British India, and as respects any period after the 14th day of August 1947, the territories for the time being comprised in the Provinces of India :]

[a] *Inserted* by the India (Adaptation of Income-tax, Profits Tax and Revenue Recovery Acts) Order, 1947. [10-12 1947.]

(3) "business" includes any trade, commerce or manufacture, or any adventure in the nature of trade, commerce or manufacture, or any profession or vocation the profits of which are chargeable according to the provisions of section 10 of the Indian Income-tax Act, 1922 :

Provided that where the functions of a company or of a society incorporated by or under any enactment consist wholly or mainly in the holding of investments or other property, the holding of the investments or property shall be deemed for the purpose of this definition to be a business carried on by such company or society:

Provided further that all businesses to which this Act applies carried on by the same person shall be treated as one business for the purposes of this Act ;

(4) "chargeable accounting period" means—

(a) any accounting period falling wholly within the terms beginning on the first day of April 1946, and ending on the 31st day of March, [a][1948];

(b) where any accounting period falls partly within and partly without the said term, such part of that accounting period as falls within the said term :

[b][Provided that where an accounting period falls partly before, and partly after, the end of March 1947, so much of that accounting period as falls before, and so much of that accounting period as falls after, the end of March 1947, shall be deemed each to be a separate chargeable accounting period;]

[a] *Substituted* for '1947' by Act 20 of 1948, S. 10. [30-3-1948]. [b] *Added*, ibid.

(5) "Company" means a company as defined in the Indian Companies Act, 1913, or formed in pursuance of an Act of Parliament or of Royal Charter or Letters Patent, or of an Act of the Legislature of a British possession or of a law of an Indian State, and includes any foreign association, whether incorporated or not, which the Central Board of Revenue may, by general or special order, declare to be a company for the purposes of this Act ;

(6) "control of a company" means control direct or indirect of more than one-half of the voting power attached to the total issued paid-up share capital of the company, or control vested by its Memorandum and Articles of Association otherwise than by reference to such voting power :

Provided that the voting power attached to shares held by a nominee or trustee for any person shall be deemed for the purpose of this definition to be held by that person ;

(7) "deficiency of profits" means—

(i) where profits have been made in any chargeable accounting period, the amount by which such profits fall short of the abatement in respect of that period ;

(ii) where a loss has been made in any chargeable accounting period, the amount of the loss added to the abatement in respect of that period ;

(8) "director" includes any person occupying the position of a director by whatever name called and also includes any person who—

(i) is a manager of the company or concerned in the management of the business, and

(ii) is remunerated out of the funds of the business, and

(iii) is the beneficial owner of not less than twenty per cent. of the ordinary share capital of the company ;

[a][*(8A)* "director's remuneration" includes all remuneration payable by a company to a director thereof in respect of any services rendered

to or employment with the company in any capacity whatever;]

[a] This clause was *inserted* by S. 13 of Act 48 of 1948 (with retrospective effect).

(9) "dividend" has the same meaning as in section 2 of the Indian Income-tax Act, 1922 ;

(10) "firm," "partner" and "partnership" have the same meanings respectively as in the Indian Partnership Act, 1932 ;

(11) "fixed rate" in relation to dividends on share capital, other than ordinary share capital, includes a rate fluctuating in accordance with the maximum rate of income-tax ;

(12) "loss" means a loss computed in the same manner as for the purposes of this Act, profits are to be computed ;

(13) "ordinary share capital," in relation to a company, means all the issued share capital (by whatever name called) of the company, other than capital the holders whereof have a right to a dividend at a fixed rate but have no other right to share in the profits of the company;

(14) "person" includes a Hindu undivided family ;

(15) "prescribed" means prescribed by rules made under this Act ;

(16) "profits" means profits as determined in accordance with Schedule I ;

(17) 'taxable profits" means the amount by which the profits during a chargeable accounting period exceed the abatement in respect of that period ;

(18) "working partner" of a firm means a partner thereof who is required by the terms of the contract of partnership to devote substantially the whole of his time to the business of the firm.

3. *(1)* Every Commissioner of Income-tax, Appellate Assistant Commissioner of Income-tax, Inspecting Assistant Commissioner of Income-tax and Income-tax Officer shall have the like powers under this Act and in relation to the same area and cases as he exercises under the Indian Income-tax Act, 1922.

Tax Authorities.

(2) All officers and persons employed in the execution of this Act shall observe and follow the orders, instructions and directions of the Central Board of Revenue :

Provided that no such orders, instructions or directions shall be given so as to interfere with the discretion of the Appellate Assistant Commissioner of Income-tax in the exercise of his appellate functions.

4.[a] Subject to the provisions of this Act, there shall, in respect of any business to which this Act applies, be charged, levied and paid on the amount of the taxable profits during any chargeable accounting period, a tax (in this Act referred to as "business profits tax") [b][which shall, in respect of any chargeable accounting period ending on or before the 31st day of March 1947, be equal to sixteen and two-thirds per cent. of the taxable profits, and in respect of any chargeable accounting period beginning after that date, be equal to such percentage of the taxable profits as may be fixed by the annual Finance Act :]

Charge of tax.

Provided that—

(a) any profits which are, under the provisions of sub-section *(3)* of section 4 of the Indian Income-tax Act, 1922, exempt from income-tax,

(b) all profits from any business of life insurance,

(c) any sum paid to a business by or through the Central Government by way of bonus or subsidy,—shall be totally exempt from business profits tax under this Act.

[a] *See* Section 11 of Act 20 of 1948. [b] *Substituted* by S. 10 of Act 20 of 1948. [30-3-1948.]

5. This Act shall apply to every business of which any part of the profits made during the chargeable accounting period is chargeable to income-tax by virtue of the provisions of sub-clause *(1)* or sub-clause *(ii)* of clause *(b)* of sub-section *(1)* of section 4 of the Indian Income tax Act, 1922, or of clause *(c)* of that sub-section :

Application of Act.

Provided that this Act shall not apply to any business the whole of the profits of which accrue or arise without British India where such business is carried on by or on behalf of a person who is resident but not ordinarily resident in British India, unless the business is controlled in India :

[a][Provided further that where the profits of a part only of a business carried on by a person who is not resident in British India or not ordinarily so resident accrue or arise in British India or are deemed under the Indian Income tax Act, 1922, so to accrue or arise, then, except where the business being the business of a person who is resident, but not ordinarily resident, in British India is controlled in India, this Act shall apply only to such part of the business, and such part shall for all the purposes of this Act be deemed to be a separate business.]

Provided further that this Act shall not apply to any income, profits or gains of business accruing or arising within an Indian State unless such income, profits or gains are received or deemed under the provisions of the aforesaid Act to be received in or are brought into British India in any chargeable accounting period, or are assessable under section 42 of that Act.

[a] *Inserted* by S. 3 of Act 44 of 1947. [The amendment is deemed to have effect from the date on which the main Act came into force.]

Relief on occurrence of deficiency of profits.

6. Where a deficiency of profits occurs in any chargeable accounting period in any business, the taxable profits of the business shall be deemed to be reduced and relief shall be granted in accordance with the following provisions:—

(a) the aggregate amount of the taxable profits for the previous chargeable accounting periods shall be deemed to be reduced by the amount of the deficiency of profits and the amount of business profits tax payable in respect thereof shall be deemed to be reduced accordingly and the relief necessary to give effect to the reduction shall be given by repayment or otherwise;

(b) where the amount of the deficiency of profits exceeds the aggregate amount of the taxable profits for the previous chargeable accounting periods or where there is no previous chargeable accounting period, the balance of the deficiency of profits or the whole of the deficiency, as the case may be, shall be applied in reducing any taxable profits for the next subsequent chargeable accounting period, and if and so far as it exceeds the amount of those profits, any taxable profits for the next subsequent chargeable accounting period and so on.

Change in persons carrying on business.

7. As from the date of any change in the persons carrying on a business, the business shall be deemed for all the purposes of this Act to have been discontinued and a new business to have been commenced :

Provided that where a change takes place in the persons carrying on a business and where except for such change relief would be allowable under section 6, the Central Board of Revenue may, if it thinks fit, allow such relief under that section as it considers just, having regard to the extent to which the persons directly or indirectly interested in the business before the change remain interested therein after the change.

Interconnected companies.

8. *(1)* Where any interest, annuity or other annual payment or any royalty or rent is payable by one company to another company, and one of those companies is a subsidiary of the other or both are subsidiaries of a third company, and the recipient company is resident outside British India, no allowance shall be made in respect of such payment in computing the profits or losses of the paying company.

(2) Where—

(a) a company (hereinafter referred to as "the principal") is resident in British India and is not a subsidiary of any other company resident in British India : and

(b) during the whole or any part of any chargeable accounting period of the principal another company resident or carrying on business within British India (hereinafter referred to as "the subsidiary") is a subsidiary of the principal, the capital or profits or losses of the subsidiary for such chargeable accounting period or part thereof shall be treated for the purposes of this Act as if they were the capital of, or as the case may be, profits or losses arising from the business of the principal :

Provided that the profits of the subsidiary so treated shall not be exempted from business profits tax in the hands of the principal by reason of any exemption applicable to the principal under the proviso to section 4.

(3) Where the chargeable accounting periods of the principal and subsidiary are not coterminous, such division and apportionment of the profits or losses of the subsidiary for any chargeable accounting period shall be made as will allocate the due proportion thereof to the relative chargeable accounting period or periods of the principal : and such division and apportionment shall be by reference to the proportion that the number of days of the chargeable accounting period of the subsidiary falling within the relative chargeable accounting period or periods of the principal bears to the total number of days in the chargeable accounting period of the subsidiary.

(4) For the purposes of this section a company shall be deemed to be a subsidiary of another company if and so long as not less than four-fifths of its ordinary share capital is beneficially owned by that other company, whether directly or through another company or other companies, or partly directly and partly through another company or other companies.

(5) The business profits tax payable by virtue of this section by the principal shall, for the purposes of section 10, be allocated by the Income tax Officer to the repective companies concerned in such proportion as in his opinion is just:

Provided that the principal shall have the same rights of appeal against an order of allocation made under this sub-section as it has under this Act against the amount of its business profits tax assessment.

Aggregation of profits in certain cases.

9. Where an individual [a][or a Hindu undivided family] is entitled to profits arising from more than one business, of which at least one is carried on by a firm in which he [b][or it] is a partner [c][or by a company which for the purposes of this section is deemed to be a firm in which he or it is interested], the Income-tax Officer may with the prior sanction of the In-

specting Assistant Commissioner of Income tax, aggregate the shares of such individual [d][or Hindu undivided family] in the profits or losses of all of such businesses and treat the sum of such aggregation as the profits of a business carried on by such individual [d][or Hindu undivided family] and assess him [b][or it] accordingly:

Provided that if the accounting periods of such businesses are not co-terminous, the Income-tax Officer shall determine in respect of such individual [d][or Hindu undivided family] his [e][or its] chargeable accounting period and shall make such divisions, apportionments and aggregation of the shares of such individual [d][or Hindu undivided family] in the profits or losses of the several businesses as may be necessary to determine for such chargeable accounting period the total profits and gains of such individual [d][or Hindu undividual family] therefrom:

Provided further that for the purposes of this section, a company, which is neither one in which the public are substantially interested, as defined in the *Explanation* to sub-section *(1)* of section 23A of the Indian Income-tax Act, 1922, nor a subsidiary company as defined in sub-section *(4)* of section 8 of this Act, shall be deemed to be a firm in which the persons having an interest in the company are partners, or in the case of a sole-share-holder, a business carried on by that sole-share-holder, and the profits of such company shall be computed accordingly:

Provided further that any profits or losses so aggregated for assessment upon an individual [a][or a Hindu undivided family] shall be excluded from the profits or losses of the respective businesses for the purposes of this Act; and no assessment under this Act shall be made in respect of any such business save in the names of the other partners therein [f][and such individual or Hindu undivided family shall not be treated as a working partner in relation to such business for the purposes of sub-clause *(b)* of clause *(1)* of section 2.]

[a] *Inserted* by S. 14 of Act 48 of 1948 (with retrospective effect). [b] [c] [d] [e] *Inserted*, ibid. [f] *Added*, ibid.

Allowance of business profits tax in computing income for income-tax purposes.

10. The amount of the business profits tax payable by any person for any chargeable accounting period shall, in computing total income for the purposes of the relevant income-tax or super-tax assessment, be allowed as a deduction:

Provided that where, under the provisions of this Act relating to deficiencies of profits relief is given by way of repayment from business profits tax chargeable for any chargeable accounting period previous to that in which the deficiency occurs, the amount of the deduction allowed shall not be altered, but the amount repayable shall be taken into account in computing the profits and gains of the business for the purposes of income-tax as if it were a profit of the business accruing in the previous year (as determined for that business for the purposes of the Indian Income-tax Act, 1922) in which the deficiency of profits occurs.

Issue of notice for assessment.

11. *(1)* The Income-tax Officer may, for the purposes of this Act, require any person whom he believes to be engaged in any business to which this Act applies, or to have been so engaged during any chargeable accounting period, or to be otherwise liable to pay business profits tax, to furnish within such period, not being less than forty-five days from the date of the service of the notice, as may be specified in the notice a return in the prescribed form and verified in the prescribed manner setting forth (along with such other particulars as may be provided for in the notice) with respect to any chargeable accounting period specified in the notice the profits [a][and taxable profits] of the business or the amount of deficiency, if any, available for relief under section 6:

Provided that the Income-tax Officer may, in his discretion, extend the date for the delivery of the return.

(2) The Income-tax Officer may serve on any person, upon whom a notice has been served under sub section *(1)*, a notice requiring him on a date to be therein specified to produce, or cause to be produced, such accounts or documents as the Income-tax Officer may require, and may from time to time serve further notices in like manner requiring the production of such further accounts or documents or other evidence as he may require.

[a] *Inserted* by S. 3 of Act 44 of 1947 (with retrospective effect).

Assessments.

12. *(1)* The Income tax Officer shall, by an order in writing after considering such evidence, if any, as he has required under section 11, assess to the best of his judgment the profits liable to business profits tax and the amount of business profits tax payable on the basis of such assessment, or if there is a deficiency of profits, the amount of that deficiency and the amount of business profits tax, if any repayable, and shall furnish a copy of such order to the person on whom the assessment has been made.

(2) Business profits tax payable in respect of any chargeable accounting period shall be payable by the person carrying on, or treated as carrying on, the business in that period.

(3) Where two or more persons were carrying on the business jointly in the chargeable accounting period, the assessment shall be made upon them jointly and, in the case of a partnership, may be made in the partnership name.

(4) Where by virtue of the foregoing provisions an assessment could, but for his death, have been made on any person either solely or jointly with any other person or persons, the assessment may be made on his legal representative either solely or jointly with that other person or persons, as the case may be.

Power to make provisional assessments.

13. *(1)* The Income tax Officer, before proceeding to make an assessment (in this section referred to as the regular assessment) under section 12, may, at any time after the expiry of the period specified in the notice issued under sub-section *(1)* of section 11 as that within which the return therein referred to is to be furnished, and whether the return has or has not been furnished, proceed to make in summary manner a provisional assessment of the taxable profits and the amount of business profits tax payable thereon.

(2) Before making such provisional assessment, the Income-tax Officer shall give notice in the prescribed form to the person on whom assessment is to be made of his intention to do so, and shall with the notice forward a statement of the amount of the proposed assessment, and the said person shall be entitled to deliver to the Income tax Officer at any time within fourteen days of receipt of the said notice a statement of his objections, if any, to the amount of the proposed assessment.

(3) On expiry of one month from the date of service of the notice referred to in sub-section *(2)*, or earlier if the assessee agrees to the proposed assessment, the Income-tax Officer may, after taking into account the objections, if any, made under sub-section *(2)*, make a provisional assessment, and shall furnish a copy of the order of assessment to the assessee:

Provided that assent to the amount of the assessment, or failure to make objection to it, shall in no way prejudice the assessee in relation to the regular assessment.

(4) In making any such provisional assessment the Income-tax Officer shall make allowance for any deficiencies of profits for previous chargeable accounting periods which are under the provisions of section 6 to be set off against the taxable profits of the chargeable accounting period in respect of which the assessment is being made:

Provided that, where such deficiencies of profits have not been determined under sub-section *(1)* of section 12, the Income-tax Officer shall estimate the amount thereof to the best of his judgment.

(5) There shall be no right of appeal against a provisional assessment made under this section, and it shall, until a regular assessment is made in due course under section 12, determine the amount of business profits tax due from the assessee.

(6) If, when a regular assessment is made in due course under section 12, the amount of business profits tax payable thereunder is found to exceed that determined as payable by the provisional assessment, it shall be reduced by the amount determined as payable by the provisional assessment.

(7) If, when a regular assessment is made in due course under section 12, the amount of business profits tax payable thereunder is found to be less than that determined as payable by the provisional assessment, any excess of tax paid as a result of the provisional assessment shall be refunded to the assessee, together with interest at two *per cent. per annum* calculated from the date of payment of such excess tax to the date of the order of refund, both days inclusive.

Profits escaping assessment.

14. If, in consequence of definite information which has come into his possession, the Income-tax Officer discovers that profits of any chargeable accounting period chargeable to business profits tax have escaped assessment, or have been under-assessed, or have been the subject of excessive relief, he may at any time within four years of the end of the chargeable accounting period in question serve on the person liable to such tax a notice containing all or any of the requirements which may be included in a notice under section 11, and may proceed to assess or reassess the amount of such profits liable to business profits tax, and the provisions of this Act shall, so far as may be, apply as if the notice were a notice issued under that section.

Penalties.

15. If the Income-tax Officer, the Appellate Assistant Commissioner of Income-tax or the Commissioner of Income-tax, in the course of any proceedings under this Act, is satisfied that any person has, without reasonable cause, failed to furnish the return required under sub-section *(1)* of section 11, or to produce or cause to be produced the accounts or documents or other evidence required by the Income-tax Officer under sub-section *(2)* of that section, or has concealed particulars of the profits of the business, or has deliberately furnished inaccurate particulars of such profits, he may direct that such person shall pay by way

of penalty, in addition to the amount of any business profits tax payable, a sum not exceeding—

(a) where the person has failed to furnish the return required under sub section *(1)* of section 11, the amount of the business profits tax payable;

(b) in any other case, the amount of business profits tax which would have been avoided if the return made had been accepted as correct:

Provided that the Income-tax Officer shall not impose any penalty under this section without the previous approval of the Inspecting Assistant Commissioner of Income-tax.

Appeals to appellate Assistant Commissioner of Income-tax.

16. *(1)* Any person objecting to the amount of business profits tax for which he is liable as assessed by the Income-tax Officer or denying his liability to be assessed under this Act, or objecting to any penalty imposed by the Income-tax Officer, or to the amount of any deficiency of profits as assessed by the Income-tax Officer, or to the amount allowed by the Income-tax Officer by way of relief under any provision of this Act or to any refusal by the Income-tax Officer to grant relief, may appeal to the Appellate Assistant Commissioner of Income-tax.

(2) An appeal shall ordinarily be presented within forty-five days of receipt of the notice of demand relating to the assessment or penalty objected to, or in the case of an appeal against the assessment of a deficiency of profits, within thirty days of the receipt of the copy of the order determining the deficiency, or in the case of an appeal against the amount of a relief granted or a refusal to grant relief, within forty-five days of the receipt of the intimation of the order granting or refusing to grant the relief, but the Appellate Assistant Commissioner of Income-tax may admit an appeal after the expiration of that period if he is satisfied that the appellant had sufficient cause for not presenting it within that period.

(3) An appeal shall be in the prescribed form and shall be verified in the prescribed manner.

(4) The Appellate Assistant Commissioner of Income-tax shall hear and determine the appeal and, subject to the provisions of this Act, shall pass such orders as he thinks fit, and such orders may include an order enhancing the assessment or a penalty:

Provided that an order enhancing an assessment or penalty shall not be made unless the person affected thereby has been given a reasonable opportunity of showing cause against such enhancement.

(5) The procedure to be adopted in the hearing and determination of appeals shall be in accordance with the rules made by the Central Board of Revenue in relation to income-tax.

Appeal to Appellate Tribunal.

17. Any Income-tax Officer or any person in respect of whose business an order under section 12 has been passed and who objects to an order passed by an Appellate Assistant Commissioner of Income-tax under section 15 or section 16 may, within the prescribed time and in the prescribed manner, appeal against such order to the Appellate Tribunal constituted under the Indian Income-tax Act, 1922, and that Tribunal shall have all such powers in disposing of the appeal as it has in respect of appeals preferred to it under the said Act.

Rectification of mistakes.

18. The Commissioner of Income-tax may, at any time within four years from the date of any order passed by any Appellate Assistant Commissioner of Income-tax or Income-tax Officer under this Act, rectify any mistake in any evidence recorded during assessment or appellate proceedings, or any mistake apparent from the record and shall within the like period rectify any mistake apparent from the record which has been brought to his notice by a person to whose business this Act applies:

Provided that no such rectification shall be made having the effect of enhancing the liability of any person unless that person has been given a reasonable opportunity of being heard.

Agreement for avoidance of double taxation in India and Pakistan.

[a][**18A.** The Central Government may enter into an agreement with Pakistan for the avoidance of double taxation of profits under this Act and under the corresponding law in force in Pakistan, and may, by notification in the official Gazette, make such provision as may be necessary for implementing the agreement.]

[a] This section was *added* by the India (Adaptation of Income-tax, Profits Tax and Revenue Recovery Acts) Order, 1947. [10-12-1947.]

Application of provisions of Act XI of 1922.

19. The sections of the Indian Income tax Act, 1922, as applied to excess profits tax by virtue of [a][sections 21 and 21A] of the Excess Profits Tax Act, 1940, shall, in so far as they are not repugnant to the provisions of this Act, [b][and with such modifications, if any, as may be prescribed] apply to business profits tax as they apply to excess profits tax.

[a] *Substituted* for 'section 21' by the India (Adaptation of Income-tax, Profits-tax and Revenue Recovery Acts) Order, 1947. [10-12-1947]. [b] *Inserted* by S. 3 of Act 44 of 1947 (with retrospective effect.)

Income-tax papers to be available for the purposes of this Act.

20. *(1)* Notwithstanding anything contained in the Indian Income-tax Act, 1922, all information contained in any statement or return made or furnished under the provisions of that Act or obtained or collected for the purposes of that Act may be used for the purposes of this Act.

(2) All information contained in any statement for return made or furnished under the provisions of this Act or obtained or collected for the purposes of this Act may be used for the purposes of the Indian Income-tax Act, 1922.

Failure to deliver returns or statements.

21. If any person fails, without reasonable cause or excuse, to furnish in due time any return or statement, or to produce, or cause to be produced, any accounts or documents required to be produced under section 11, he shall be punishable with fine which may extend to five hundred rupees, and with a further fine which may extend to fifty rupees for every day during which the default continues.

False statements.

22. If a person makes in any return required under section 11 any statement which is false, and which he either knows or believes to be false or does not believe to be true, he shall be punishable with simple imprisonment which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

Institution of proceedings and composition of offences.

23. *(1)* A person shall not be proceeded against for an offence under section 21 or section 22 except at the instance of the Inspecting Assistant Commissioner of Income-tax.

(2) No prosecution for an offence punishable under section 21 or section 22 or under the Indian Penal Code shall be instituted in respect of the same facts as those in respect of which a penalty has been imposed under this Act.

(3) The Inspecting Assistant Commissioner of Income-tax may, either before or after the institution of proceedings, compound any offence punishable under section 21 or section 22.

Power to make rules.

24. *(1)* The Central Board of Revenue may, subject to the control of the Central Government, make rules for carrying out the purposes of this Act.

(2) Without prejudice to the generality of the foregoing power, such rules may —

(a) prescribe the procedure to be followed on appeals, applications for rectification of mistakes, and applications for refunds;

(b) provide for any matter which by, or under, this Act is to be prescribed.

(3) The power to make rules conferred by this section shall be exercised in like manner as the power to make rules under section 59 of the Indian Income-tax Act, 1922.

SCHEDULE I

[See SECTION 2 *(16)]*

Rules for the computation of profits for purposes of Business Profits Tax

1. The profits of a business during any chargeable accounting period shall be separately computed, and shall, subject to the provisions of this Schedule, be computed in accordance with the provisions of section 10 of the Indian Income-tax Act, 1922 :

Provided that any sums other than any interest paid by a firm to a partner of the firm excluded under the proviso to clause *(iii)* of sub-section *(2)* or clause *(a)* of sub section *(4)* of that section from the allowances made in computing the profits of the business for the purposes of income-tax shall, if paid, be included in those allowances when computing the profits of the business for the purposes of business profits tax :

Provided further —

(a) that any sums received or credited in a chargeable accounting period which by virtue of rule 9 of Schedule I to the Excess Profits Tax Act, 1940, have been treated as business receipts for the purpose of assessment to excess profits tax, and

(b) any expenditure or loss incurred in any chargeable accounting period, allowance in respect of which has been made for excess profits tax purposes,—

shall be disregarded in computing the profits or losses of the chargeable accounting period :

Provided further that where a chargeable accounting period is not an accounting period, the profits or losses of the business during the accounting periods wholly or partly included within the chargeable accounting period shall be so computed as aforesaid, and such division and apportionment to specific periods of those profis or losses and such aggregation of those profits and losses, or any apportioned part thereof, shall be made as appears necessary to arrive at the profit during the chargeable accounting period; and any such apportionment shall be made in proportion to the number of days in the respective periods.

2. *(1)* The principle of adding the allowance for depreciation for any one period to the allowance for depreciation for any subsequent period and deeming it to be part of the allowance for such subsequent period shall not be followed.

(2) Nothing in this Act shall be construed as permitting the application, in computing profits for the purposes of business profits tax, of the provisions of sub-section *(2)* of section 24 of the Indian Income-tax Act, 1922.

3. Income received from investments or other property shall be included in the profits only as provided in this rule, that is to say, —

(a) in the case of the business of a building society, or a banking business, insurance business or business consisting wholly or mainly in the dealing in or holding of investments or other property, the profits shall include all income received from investments or other property; or

(b) in the case of a business part of which consists in banking, insurance or dealing in investments or other property, not being a business to which clause *(a)* applies, the profits shall include all income received from investments or other property held for the purposes of that part of that business :

Provided that —

(i) income received directly or indirectly by way of dividend or distribution of profits from a body corporate carrying on business as defined in this Act, and

(ii) income to which the persons carrying on the business are not beneficially entitled, shall in no case be included.

4. *(1)* In the case of a business carried on in any accounting period which constitutes or includes a chargeable accounting period, by a company, the directors whereof have throughout that accounting period a controlling interest therein, no deduction shall be made in respect of directors' remuneration in computing the profits for that accounting period.

(2) Where, in the case of a business carried on by a company in any accounting period which constitutes or includes a chargeable accounting period, the directors of the company have during any part of that accounting period a controlling interest therein, and the case is not one to which sub-rule *(1)* applies, the profits of the accounting period shall be computed as if the directors of the company had no controlling interest therein, and to the part thereof appropriate to the chargeable accounting period ascertained in accordance with the third proviso to rule 1 shall be added the directors' remuneration for that part of the chargeable accounting period during which the directors of the company had a controlling interest therein.

(3) In this rule the expression "directors' remuneration" does not include—

(a) the remuneration of any director who is required to devote substantially the whole of his time to the service of the company in a managerial or technical capacity and is not the beneficial owner of, or able, either directly or through the medium of other companies or by any other indirect means, to control more than five per cent. of the ordinary share capital of the company, or

(b) the remuneration of any managing agent where such remuneration is included in the profits of the managing agent's business for the purposes of the business profits tax.

5. *(1)* In computing the profits of any chargeable accounting period no deduction shall be allowed in respect of expenses in excess of the amount which the Income-tax Officer considers reasonable and necessary, having regard to the requirements of the business, and, in the case of directors' fees or other payment for services, to the actual services rendered by the person concerned :

Provided that no disallowance under this rule shall be made by the Income-tax Officer unless he had obtained the prior authority of the Inspecting Assistant Commissioner of Income-tax.

(2) Any person who is dissatisfied with the decision of the Income-tax Officer under this rule may appeal in the prescribed time and manner to the Appellate Tribunal referred to in section 17.

SCHEDULE II.

[*See* SECTION 2 (1)].

Rules for computing the capital of a company for purposes of Business Profits Tax.

1. For the purposes of ascertaining the abatement under this Act in respect of any chargeable accounting period, the capital of a company shall be computed in accordance with the following rules.

2. [a][*(1)* Where the company is one to which rule 3 of Schedule I applies, its capital shall be the sum of the amounts of its paid-up share capital and of its reserves in so far as they have not been allowed in computing the profits of the company for the purposes of the Indian Income-tax Act, 1922, diminshed by the cost to it of its investments or other property the income from which is not includable in the profits, so far as that cost exceeds any debt for money borrowed by it.]

[b][*(2)*] In all other cases, the capital shall be the sum ascertained in accordance with the said sub-rule, diminished by the cost to the company of its investments so far as that cost exceeds any debt for money borrowed by it.

[a] *Substituted* for sub-rules (1) and (2) by S. 15 of Act 48 of 1948 [with retrospective effect]. [b] Sub-rule (3) was *renumbered* as sub-rule (2), *ibid.*

[a][*(2A)* Notwithstanding anything contained in rule 2, where only a part of the profits of a company is chargeable under the provisions of the Act, its capital shall be the sum ascertained in accordance with the said rule diminished by an amount which bears to that sum the same proportion as the amount of its profits not so chargeable bears to its total profits.]

[a] *Added* by S. 3 of Act 44 of 1947 [with retrospective effect].

3. So much of the premium realized by a company from the issue of any of its shares as is retained in the business shall be regarded as forming part of its paid-up capital for the purposes of rule 2.

4. Any deposits with the Central Government under section 10 of the Indian Finance Act, 1942, or section 2 of the Excess Profits Tax Ordinance, 1943, shall not be regarded as investment or other property for the purposes of this Schedule.

[THE] CAPITAL ISSUES (CONTINUANCE OF CONTROL) ACT, 1947.
(Act XXIX of 1947).

STATEMENT OF OBJECTS AND REASONS.

"The object of this measure is to keep in existence... the control over capital issues which was imposed by Rule 94-A of the Defence of India Rules in May, 1943, and continued in force after the expiry of the Defence of India Act by Ordinance No. XX of 1946. Although there has been an appreciable change in the general conditions which constituted the principal reason for the introduction of the control during war-time, it is thought in the light of experience gained that the control is still necessary to secure a balanced investment of the country's resources in industry, agriculture and the social services."

—Gazette of India, 1947, Part V, page 267.

[THE] CAPITAL ISSUES (CONTINUANCE OF CONTROL) ACT, 1947.
(ACT XXIX OF 1947).

[18th April, 1947.]

An Act to provide for the continuance of control over issues of capital.

WHEREAS it is expedient to provide for the continuance of control over issues of capital ;

It is hereby enacted as follows :—

Short title, extent and duration.

1. *(1)* This Act may be called the Capital Issues (Continuance of Control) Act, 1947.

(2) It extends to the whole of British India, and applies also to British subjects and servants of the Crown in any part of India and to British subjects who are domiciled in any part of India wherever they may be.

(3) It shall cease to have effect on the first day of April, 1950.

Definitions.

2. In this Act,—

(a) "issue of capital" means the issuing of any securities whether for cash or otherwise;

(b) "securities" means any of the following instruments issued, or to be issued, by or for the benefit of a company, whether incorporated in British India or not, namely :—

(i) shares, stocks and bonds;

(ii) debentures;

(iii) other instruments creating a charge or lien on the assets of the company; and

(iv) instruments acknowledging loan to or indebtedness of the company and guaranteed by a third party or entered into jointly with a third party.

Control over issues of capital.

3. *(1)* No company incorporated in British India shall, except with the consent of the Central Government, make an issue of capital outside British India.

(2) No company, whether incorporated in British India or not, shall except with the consent of the Central Government,—

(a) make an issue of capital in British India;

(b) make in British India any public offer of securities for sale;

(c) renew or postpone the date of maturity or repayment of any security maturing for payment in British India.

(3) The Central Government may on application make an order according recognition to an issue of capital made or to be made outside British India by a company not incorporated in British India.

(4) The Central Government may qualify any consent or recognition accorded by it under sub-section *(2)* or sub-section *(3)* with such conditions, whether for immediate or future fulfilment, as it may think fit to impose; and where a company acts in pursuance of such consent or recognition, it shall comply with the terms of any condition so imposed.

(5) Where an application for the consent or recognition of the Central Government under any of the provisions of this section is refused, the Central Government shall, upon the request of the applicant, communicate to him in writing the reasons for such refusal.

Control over prospectuses and other advertisements.

4. No person shall issue in British India any prospectus or other document offering for subscription or publicly offering for sale any securities which does not includs a statement that the consent or recognition, as the case may be, of the Central Government has been obtained to the issue or offer of the securities, and no person shall without the consent of the Central Government issue in British India any document publicly offering for sale any security issued with the consent or recognition of the Central Government if such issue was made by a private company or if the order according its consent or recognition contained a condition that the securities should be privately subscribed.

Purchase and sale of securities.

5. *(1)* No person shall accept or give any consideration for any securities in respect of an issue of capital made or proposed to be made in British India or elsewhere unless the consent or recognition of the Central Government has been accorded to such issue of capital.

(2) No person shall sell or purchase or otherwise transfer or accept transfer of any securities issued by a company in respect of any issue of capital made after the 17th day of May 1943 in British India or elsewhere unless such issue has been made with the consent or recognition of the Central Government.

Power to exempt and to condone contraventions.

6. *(1)* The Central Government may, by general order which shall be notified in the official Gazette, provide for the granting of exemption from all or any of the provisions of sections 3, 4 and 5.

(2) The Central Government may by order condone a contravention of any of the provisions of section 3 or section 4, and on the making of such order the provisions of this Act, shall have effect as if an exemption had been granted under sub-section *(1)* of this section in respect of the thing done or omitted to be done in contravention of section 3 or section 4, as the case may be.

Power to call for information.

7. Any officer authorised in this behalf by the Central Government may, for the purpose of enquiring into the correctness of any statement made in an application for consent or recognition to an issue of capital or for the purpose of ascertaining whether or not the requirements of any condition attached to an order according such consent or recognition have been complied with, require any company, or any officer of a company, which has made such application or obtained such order to submit to him such accounts, books or other documents, or to furnish to him such information, as he may reasonably think necessary.

False statements.

8. No person shall, when complying with any requisition under section 7 or when making any application for consent or recognition to an issue of capital, give any information or make any statement which he knows, or has reasonable cause to believe, to be false or not true in any material particular.

Prohibition against disclosing information.

9. No person who obtains any information by virtue of this Act shall, otherwise than in connection with the execution of the provisions of this Act or of any order made in pursuance thereof, disclose that information to any other person except with the permission of the Central Government.

Power to delegate function.

10. The Central Government may by order direct that any power or duty which by or under any of the preceding provisions of this Act is conferred or imposed upon the Central Government shall, in such circumstances and under such conditions, if any, as may be specified in the direction, be exercised or discharged by any officer subordinate to that Government.

Committee to advise Government.

11. The Central Government, shall, by notification in the official Gazette, constitute an Advisory Committee consisting of not more than five members, and may from time to time refer to it for advice any such matters arising out of the administration of this Act as the Central Government may think fit.

Power to make rules.

12. The Central Government may by notification in the official Gazette make rules for carrying out the purposes of this Act.

Penalties.

13. *(1)* Whoever contravenes, or attempts to contravene, any of the provisions of this Act or of any order made thereunder shall be punishable with imprisonment for a term which may extend to one year or with fine or with both.

(2) If the person committing an offence punishable under this section is a company or other body corporate, every director, manager, secretary or other officer thereof shall, unless he proves that the offence was committed without his knowledge or that he exercised all due diligence to prevent its commission, be deemed to be guilty of such offence.

Burden of proof in certain cases.

14. Where any person is prosecuted for contravening any provision of this Act or of any order made thereunder which prohibits him from doing an act without the consent or permission of any authority the burden of proving that he had the requisite consent or permission shall be on him.

Protection of action taken under Act.

15. No suit, prosecution or other legal proceedings shall lie against any person for anything in good faith done or intended to be done under this Act or any rule or order made thereunder.

Continuance of existing orders and savings.

16. *(1)* All orders made or deemed to be made under the provisions of the Capital Issues (Continuance of Control) Ordinance, 1947 and in force immediately before the commencement of this Act shall continue to be in force and be deemed to be orders made under the corresponding provisions of this Act.

(2) Section 6 of the General Clauses Act, 1897, shall apply upon the expiration of the said Ordinance as if it had then been repealed by this Act.

[THE] CENSUS ACT, 1948
(Act XXXVII of 1948)

STATEMENT OF OBJECTS AND REASONS.

"Legislation alone can confer the powers to put questions, mark buildings, etc., for the purposes of a census. There is no Census Act in force at the moment since all the former Census Acts were confined to the specific census undertaken in particular years. Legislation is, therefore, necessary to provide for the census operations now to be undertaken. The present Bill is intended to be a measure for all time, unlike the previous Census Acts. It differs from the Indian Census Act, 1939 (XXIV of 1939) in that it provides for a general continuous cover for census operations to be undertaken at any time, raises the fine limit from Rs. 200 to Rs. 1,000, makes abetment of census offences punishable, provides against tampering by the tabulation staff and makes it obligatory on persons nominated as census officers by the Provincial Governments to serve in the capacity directed. In other respects it follows the Census Act of 1939."

—Gazette of India, 1948, Part V, page 475.

[THE] CENSUS ACT, 1948.
(ACT XXXVII OF 1948)[a]

[3rd September 1948.]

An Act to provide for certain matters in connection with the taking of census.

WHEREAS it is expedient to provide for the taking of census in the Provinces and Acceding States of India or any part thereof whenever necessary or desirable and to provide for certain

matters in connection with the taking of such census;

It is hereby enacted as follows :—

[*] This Act has been applied to—

(a) all the partially excluded areas in Assam specified in the schedule to the Government of India (Excluded and Partially Excluded Areas) Order, 1936 *See* Assam Gazette, 1948, Part II, page 1269 ;

(b) all the partially excluded areas in the Central Provinces and Bear subject to certain modification— *See* C. P. and Berar Gazette, 1948, Part I, page 622.

Short title and extent.

1. *(1)* This Act may be called the Census Act, 1948.

(2) It extends to all the Provinces of India and also to any Acceding State of which the Central Legislature has for the time being the power to make laws as respects census.

Interpretation.

2. In this Act, all references to the Provinces of India shall be construed as including reference to the Acceding States to which this Act for the time being extends, and in relation to any such Acceding State, all references to the Provincial Government shall be construed as references to the Government of that Acceding State.

Central Government to take census.

3. The Central Government may, by notification in the official Gazette declare its intention of taking a census in the whole or any part of territories to which this Act extends, whenever it may consider it necessary or desirable so to do and thereupon the census shall be taken.

Appointment of census staff.

4. *(1)* The Central Government may appoint a Census Commissioner to supervise the taking of the census throughout the area in which the census is intended to be taken, and Superintendents of Census Operations to supervise the taking of the census within the several Provinces.

(2) The Provincial Government may appoint persons as census-officers to take, or aid in, or supervise the taking of the census within any specified local area and such persons, when so appointed, shall be bound to serve accordingly.

(3) A declaration in writing, signed by any authority authorised by the Provincial Government in this behalf, that any person has been duly appointed a census-officer for any local area shall be conclusive proof of such appointment.

(4) The Provincial Government may delegate to such authority as it thinks fit the power of appointing census-officers conferred by sub-section *(2)*.

Status of census authorities as public servants.

5. The Census Commissioner, all Superintendents of Census Operations and all census-officers shall be deemed to be public servants within the meaning of the Indian Penal Code (XLV of 1860).

Discharge of duties of census-officers in certain cases.

6. *(1)* Where the District Magistrate, or such authority as the Provincial Government may appoint in this behalf, by a written order so directs—

(a) every officer in command of any body of men belonging to the naval, military or air forces or of any vessel of war, of India,

(b) every person (except a pilot or harbour-master) having charge or control of a vessel,

(c) every person in charge of a lunatic asylum, hospital, workhouse, prison, reformatory or lock-up or of any public, charitable, religious or educational institution,

(d) every keeper, secretary or manager of any *sarai*, hotel, boarding-house, lodging-house, emigration depot or club,

(e) every manager or officer of a railway or any commercial or industrial establishment, and

(f) every occupant of immovable property wherein at the time of the taking of the census persons are living,

shall perform such of the duties of a census-officer in relation to the persons who at the time of the taking of the census are under his command or charge, or are inmates of his house, or are present on or in such immovable property or are employed under him as may be specified in the order.

(2) All the provisions of this Act relating to census-officers shall apply, so far as may be, to all persons while performing such duties under this section, and any person refusing or neglecting to perform any duty which under this section he is directed to perform shall be deemed to have committed an offence under section 187 of the Indian Penal Code.

Power to call upon certain persons to give assistance.

7. The District Magistrate, or such authority as the Provincial Government may appoint in this behalf for any local area, may, by written order which shall have effect throughout the extent of his district or of such local area, as the case may be, call upon—

(a) all owners and occupiers of land, tenure-holders, and farmers and assignees of land revenue, or their agents,

(b) all members of the district, municipal, *panchayat* and other local authorities and officers and servants of such authorities, and

(c) all officers and members of staff of any factory, firm or establishment,

to give such assistance as shall be specified in the order towards the taking of a census of the persons who are, at the time of the taking of the census, on the lands of such owners, occupiers, tenure-holders, farmers and assignees, or in the premises of factories, firms and other establish-

ments, or within the area for which such local authorities are established, as the case may be, and the persons to whom an order under this section is directed shall be bound to obey it and shall, while acting in pursuance of such order, be deemed to be public servants within the meaning of the Indian Penal Code.

Asking of questions and obligation to answer.

8. *(1)* A census-officer may ask all such questions of all persons within the limits of the local area for which he is appointed as, by instructions issued in this behalf by the Provincial Government and published in the official Gazette, he may be directed to ask.

(2) Every person of whom any question is asked under sub-section *(1)* shall be legally bound to answer such question to the best of his knowledge or belief.

Provided that no person shall be bound to state the name of any female member of his household, and no woman shall be bound to state the name of her husband or deceased husband or of any other person whose name she is forbidden by custom to mention.

Occupier to permit access and affixing of numbers.

9. Every person occupying any house, enclosure, vessel or other place shall allow census officers such access thereto as they may require for the purposes of the census and as, having regard to the customs of the country, may be reasonable and shall allow them to paint on, or affix to, the place such letters, marks or numbers as may be necessary for the purposes of the census.

Occupier or manager to fill up schedule.

10. *(1)* Subject to such orders as the Provincial Government may issue in this behalf, a census-officer may, within the local area for which he is appointed, leave or cause to be left a schedule at any dwelling-house or with the manager or any officer of any commercial or industrial establishment, for the purpose of its being filled up by the occupier of such house or of any specified part thereof or by such manager or officer with such particulars as the Provincial Government may direct regarding the inmates of such house or part thereof, or the persons employed under such manager or officer, as the case may be, at the time of the taking of the census.

(2) When such schedule has been so left, the said occupier, manager or officer, as the case may be, shall fill it up or cause it to be filled up to the best of his knowledge or belief so far as regards the inmates of such house or part thereof or the persons employed under him, as the case may be, at the time aforesaid, and shall sign his name thereto and, when so required, shall deliver the schedule so filled up and signed to the census-officer or to such person as the census-officer may direct.

Penalties.

11. *(1) (a)* Any census-officer or any person lawfully required to give assistance towards the taking of a census who refuses or neglects to use reasonable diligence in performing any duty imposed upon him or in obeying any order issued to him in accordance with this Act or any rule made thereunder or any person who hinders or obstructs another person in performing any such duty or in obeying any such order, or

(b) any census-officer who intentionally puts any offensive or improper question or knowingly makes any false return or, without the previous sanction of the Central Government or the Provincial Government, discloses any information which he has received by means of, or for the purposes of a census return, or

(c) any sorter, compiler or other member of the census staff who removes, secretes, damages or destroys any census document or deals with any census document in a manner likely to falsify or impair the tabulations of census results, or

(d) any person who intentionally gives a false answer to, or refuses to answer to the best of his knowledge or belief, any question asked of him by a census officer which he is legally bound by section 8 to answer, or

(e) any person occupying any house, enclosure, vessel or other place who refuses to allow a census officer such reasonable access thereto as he is required by section 9 to allow, or

(f) any person who removes, obliterates, alters, or damages any letters, marks or numbers which have been painted or affixed for the purposes of the census, or

(g) any person who, having been required under section 10 to fill up a schedule knowingly and without sufficient cause fails to comply with the provisions of that section, or makes any false return thereunder, or

(h) any person who trespasses into a census office,

shall be punishable with fine which may extend to one thousand rupees and in case of a conviction under part *(b)* or *(c)* shall also be punishable with imprisonment which may extend to six months.

(2) Whoever abets any offence under sub-section *(1)* shall be punishable with fine which may extend to one thousand rupees.

Sanction required for prosecution.

12. No prosecution under this Act shall be instituted except with the previous sanction of the Provincial Government or of an authority

authorised in this behalf by the Provincial Government.

Operation of other laws not barred.

13. Nothing in this Act shall be deemed to prevent any person from being prosecuted under any other law for any act or omission which constitutes an offence under this Act:

Provided that no such prosecution shall be instituted except with the previous sanction referred to in section 12.

Jurisdiction.

14. No Court inferior to that of a Presidency Magistrate or a Magistrate of the second class shall try, whether under this Act or under any other law, any act or omission which constitutes an offence under this Act.

Records of census not open to inspection nor admissible in evidence.

15. No person shall have a right to inspect any book, register or record made by a census-officer in the discharge of his duty as such, or any schedule delivered under section 10, and notwithstanding anything to the contrary in the Indian Evidence Act, 1872 (I of 1872), no entry in any such book, register, record or schedule shall be admissible as evidence in any civil proceeding whatsoever or in any criminal proceeding other than a prosecution under this Act or any other law for any act or omission which constitutes an offence under this Act.

Temporary suspension of other laws as to mode of taking census in municipalities.

16. Notwithstanding anything in any enactment or rule with respect to the mode in which a census is to be taken in any municipality, the municipal authority, in consultation with the Superintendent of Census Operations or with such other authority as the Provincial Government may authorise in this behalf, shall, at the time appointed for the taking of any census cause the census of the municipality to be taken wholly or in part by any method authorised by or under this Act.

Grant of statistical abstracts.

17. The Census Commissioner or any Superintendent of Census Operations or such person as the Provincial Government may authorise in this behalf may, if he so thinks fit, at the request and cost (to be determined by him) of any local authority or person, cause abstracts to be prepared and supplied containing any such statistical information as can be derived from the census returns for the Provinces of India or the Province as the case may be, being information which is not contained in any published report and which in his opinion it is reasonable for that authority or person to require.

Power to make rules.

18. *(1)* The Central Government may make rules for carrying out the purposes of this Act.

(2) In particular, and without prejudice to the generality of the foregoing power, the Central Governmet may make rules providing for the appointment of census-officers and of persons to perform any of the duties of census officers or to give assistance towards the taking of a census, and for the general instructions to be issued to such officers and persons.

[THE] CENTRAL SILK BOARD ACT, 1948.
(Act LXI of 1948).

STATEMENT OF OBJECTS AND REASONS.

"The Report of the Silk Panel appointed by the Government recommended —

(a) improvement of mulberry cultivation, adequate supplies of disease free seed, and improvement of rearing and reeling, and

(b) expansion of the industry's present capacity of about 2 million pounds a year to 4 million pounds a year.

To implement these recommendations it has been decided to set up a Central Silk Board. The functions of the Board would be to advise Government generally on matters relating to silk, e g, on import, export and tariff policy; to supervise the expansion of the silk industry; and to improve the quality standards of the industry and the processing of cocoons and by-products.

The proposed Bill is designed to give effect to this decision."

— Gazette of India, 1948, Part V, page 449.

[THE] CENTRAL SILK BOARD ACT, 1948.
(ACT LXI OF 1948).[a]

[20th September, 1948.]

An Act to provide for the development under Central control of the raw silk industry and for that purpose to establish a Central Silk Board.

WHEREAS it is expedient to provide for the development under Central control of the raw silk industry and for that purpose to establish a Central Silk Board;

It is hereby enacted as follows:—

[a] For Report of Select Committee, *see* Gazette of India, Part V, page 645.

Short title and extent.

1. *(1)* This Act may be called the Central Silk Board Act, 1948.

(2) It extends to all the Provinces of India, and also to any Acceding State for which the Dominion Legislature has for the time being

power to make laws as respects the development of the raw silk industry.

Declaration as to expediency of Central Government's control

2. It is hereby declared that it is expedient in the public interest that the Central Government should take under its control the development of the raw silk industry.

Definitions.

3. In this Act, unless there is anything repugnant in the subject or context,—

(a) "Board" means the Central Silk Board constituted under this Act;

(b) "*charkha* raw silk" means raw silk reeled from silk worm cocoons with the help of any instrument not worked by power;

(c) "filature raw silk" means raw silk reeled from silk worm cocoons with the help of any instrument worked power;

(d) "power" means any form of energy which is mechanically transmittted and is not generated by human or animal agency, and includes electrical energy;

(e) "prescribed" means prescribed by rules made under this Act;

(f) "spun silk" means silk yarn spun from pierced or spoilt cocoons, fluff from cocoons, pieces of silk, noils or other silk waste;

(g) "Standing Committee" means the Standing Committee of the Board constituted under sub-section *(2)* of section 6.

Constitution of the Board.

4. *(1)* As soon as may be after the commencement of this Act, the Central Government shall, by notification in the official Gazette, constitute for the purposes of this Act a Board to be called the Central Silk Board.

(2) The Board shall be a body corporate by the name aforesaid, having perpetual succession and a common seal, with power to acquire, hold and dispose of property, both movable and immovable, and to contract, and shall by the said name sue and be sued.

(3) The Board shall consist of the following members, namely:—

(a) the Minister in charge of Industry and Supply in the Central Government, who shall *ex officio* be Chairman of the Board;

(b) not more than three officials to be nominated by the Central Government;

(c) two persons elected by the members of the Central Legislature, from among themselves, in such manner as may be prescribed;

(d) four persons to be nominated by the Government of Mysore, of whom one shall be a representative of the filature raw silk industry and two shall be representatives of the rest of the sericulture industry;

(e) two persons to be nominated by the Government of Madras, of whom at least one shall be a non-official;

(f) two persons to be nominated by the Government of West Bengal, of whom at least one shall be a non-official;

(g) one person to be nominated by the Government of Jammu and Kashmir;

(h) one person to be nominated by each of the Governments of Assam, the Central Provinces and Berar, the United Provinces, Bombay, and Bihar;

(i) not more than three persons to be nominated by the Central Government to represent (i) producers of raw silk, and (ii) areas other than the Provinces and States specified in clauses *(d)* to *(h)*;

(j) five persons to be nominated by the Central Government, of whom one shall be a representative of the spun silk industry, one of the silk throwing and twisting industry and one of the silk weaving industry, and two shall be sericultural experts.

(4) The members of a Board shall receive from its funds such travelling and other allowances as may be prescribed.

Power of the Central Government in default of nominations.

5. *(1)* If any Government other than the Central Government fails to make any nomination which it is entitled to make under sub-section *(3)* of section 4 within the time prescribed in that behalf, the Central Government may make the nomination itself.

(2) Where a member of the Board dies, resigns, is removed, ceases to reside in India, or becomes incapable of acting, the authority or body entitled to nominate the member under sub-section *(3)* of section 4 may nominate a person to fill the vacancy; and where such nomination is not made within the time prescribed in that behalf, the Central Government on its own initiative, may make the nomination itself.

(3) No act done by the Board shall be questioned on the ground merely of the existence of any vacancy in, or defect in the constitution of, the Board.

Vice-Chairman and Standing Committee.

6. *(1)* The Board shall elect from among its members a Vice-Chairman who shall exercise such of the powers and perform such of the duties of the Chairman as may be prescribed or as may be delegated to him by the Chairman.

(2) The Board may, it its discretion, constitute a Standing Committee for the purpose of exercising such of its powers and performing

such of its duties as may be delegated by it, not being powers or duties the delegation of which is prohibited by rules made under this Act.

(3) The Standing Committee shall consist of the Chairman, the Vice-Chairman, and five others elected by the Board from among its members.

Secretary of the Board.

7. The Central Government shall, in consultation with the Board, appoint a Secretary to the Board who shall, under the control and direction of the Board, exercise such powers and perform such duties as may be prescribed or as may be delegated to him by the Board or the Chairman.

Functions of the Board.

8. (1) It shall be the duty of the Board to promote the development of the raw silk industry by such measures as it thinks fit.

(2) Without prejudice to the generality of the foregoing provision, the measures referred to therein may provide for —

(a) undertaking, assisting or encouraging scientific, technoloigcal and economic research ;

(b) devising means for improved methods of mulberry cultivation rearing, developing and distributing healthy silkworm seeds, reeling of silkworm cocoons, improving the quality and production of raw silk, if necessary, by making it compulsory for all raw silk to be marketed only after the same has been tested and graded in properly equipped raw silk conditioning houses ;

(c) the supply of technical advice to filature and *charkha* reelers;

(d) improving the marketing of raw silk ;

(e) the collection of statistics from such persons as may be prescribed.

(3) It shall also be the duty of the Board —

(a) to advise the Central Government on all matters relating to the development of the raw silk industry, including the import and export of raw silk;

(b) to submit to the Central Government and such other authorities as may be prescribed half-yearly reports on its activities and the working of this Act;

(c) to prepare and furnish such other reports relating to the raw silk industry as may be required by the Central Government from time to time.

Funds of the Board.

9. (1) The Central Government shall from time to time make grants to the Board of such sums as the Central Government may consider necessary for enabling the Board to exercise its powers and discharge its duties under this Act.

(2) The funds of the Board shall be kept in such bank, or invested in such manner, as may be prescribed, and shall be expended by the Board only in the performance of its functions under this Act or for meeting such expenses as are authorised by this Act or by rules made thereunder.

Imposition of cess on certain kinds of silk.

10. (1) With effect from such date as the Central Government may, by notification in the official Gazette appoint, there shall be levied, and collected as a cess for the purposes of this Act a duty of excise on all filature raw silk, and on all spun silk, reeled in the territories to which this Act for the time being extends at such rate as the Central Government may, by notification in the official Gazette, from time to time fix.

(2) The said duty of excise shall be payable by the reelers of filature raw silk or spun silk and shall be paid by them to the Board within one month from the date of the receipt of the notice of demand from the Board in that behalf.

(3) The said duty of excise may be recovered as if it were an arrear of land revenue.

(4) For the purpose of enabling the Board to assess the amount of the duty of excise payable under this section by the reelers of filature raw silk or spun silk,

(a) the Board shall, by notification in the official Gazette, fix the period in respect of which assessments shall be made, and

(b) every reeler of filature raw silk or spun silk shall furnish to the Board within the prescribed time a return specifying the total amount of filature raw silk or spun silk reeled during such period.

(5) If any reeler of filature raw silk or spun silk fails to furnish such return within the prescribed time or furnishes a return which the Board has reason to believe to be incorrect or defective, the Board may assess the amount payable by such reeler in such manner as may be prescribed.

(6) Any reeler feeling himself aggrieved by an assessment made under this section may, within three months of the receipt of the notice under sub-section (2), apply to the District Judge or such other civil judicial officer as may be prescribed, for the cancellation or modification of the assessment; and such District Judge or judicial officer shall, after giving the Board an opportunity of being heard, pass such order as he thinks proper; and such order shall be final.

Control by the Central Government.

11. (1) All acts of the Board shall be subject to the control of the Central Government which may cancel, suspend or modify as it thinks fit any action taken, or order passed, by the Board.

(2) The records of the Board shall be open to inspection at all reasonable times by any officer

authorised in this behalf by the Central Government.

Accounts of the Board.

12. *(1)* The Board shall keep such accounts, and in such manner and form, as may be prescribed, in respect of all moneys received and expended by it.

(2) The Board shall cause the accounts to be audited annually by auditors appointed by the Central Government, and the auditors shall have the power to disallow any item of expenditure which in their opinion has not been properly incurred for the purposes of this Act.

(3) The Central Government may, on the application of the Board, allow any item of expenditure disallowed by the auditors under sub-section *(2)*.

Power of Central Government to make rules.

13. *(1)* The Central Government may, by notification in the official Gazette, make rules to carry out the purposes of this Act.

(2) In particular and without prejudice to the generality of the foregoing power, such rules may provide for—

(a) the procedure to be followed at meetings of the Board or Standing Committee;

(b) the election of the Vice-Chairman of the Board; and the delegation to the Standing Committee, to the Vice-Chairman, or to members or officers of the Board, of any of the powers and duties of the Board under this Act;

(c) the staff to be employed by the Board;

(d) the pay, allowances, leave and other conditions of service of officers and servants of the Board;

(e) the travelling and other allowances of the members of the Board;

(f) the establishment and maintenance of offices by the Board;

(g) the term of office of members of the Board, and the circumstances in which, and the authority by which, they may be removed;

(h) the quorum at meetings of the Board or Standing Committee;

(i) the maintenance by the Borad or Standing Committee of records of its business and the submission of copies thereof to the Central Government;

(j) the purposes for which the funds of the Board may be expended;

(k) the maintenance of the accounts of the income and expenditure of the Board and the audit of such accounts;

(l) the preparation of annual estimates of the income and expenditure of the Board;

(m) the deposit of the funds of the Board in banks and the investment of such funds;

(n) the registers and other records to be maintained by the Board or Standing Committee;

(o) the manner in which raw silk shall be graded and marketed;

(p) any other matter which is to be or may be prescribed under this Act.

Penalties.

14. If any person—

(a) in any return to be furnished under this Act makes any statement which is false and which he knows to be false or does not believe to be true, or

(b) obstructs any officer of the Board in the exercise of any power conferred, or the discharge of any duty imposed, on him by or under this Act, or

(c) having the control or custody of any account book or other record, fails to produce such book or record when required so to do under this Act, he shall be punishable with imprisonment for a term which may extend to one year, or with fine which may extend to one thousand rupees, or with both.

Prosecution to be with consent of Central Government.

15. No prosecution for any offence punishable under this Act shall be instituted except by, or with the consent of the Central Government.

Bar of legal proceedings.

16. No suit, prosecution or other legal proceeding shall lie against the Board, or any member or officer of the Board, for anything in good faith done or intended to be done under this Act.

Temporary powers of the Central Government.

17. Until such time as the Board is constituted under section 4, the Central Government may, notwithstanding anything contained in this Act, exercise any of the powers conferred, or discharge any of the duties imposed, by this Act upon the Board.

[THE] COAL MINES LABOUR WELFARE FUND ACT, 1947. (ACT XXXII OF 1947)

STATEMENT OF OBJECTS AND REASONS.

"The Coal Mines Labour Welfare Fund Ordinance promulgated in 1944 provides for the levy of an excise duty at a rate not exceeding Re. /4/ per ton of coal and coke despatched from collieries in British India. The proceeds making up the Fund are earmarked exclusively for promoting the welfare of labour employed in the coal mining industry. The Government of India are now satisfied that for reasons explained below, the limit of this Cess should be further increased, the

maximum being raised to Re.-/8/- per ton on all despatches of coal and coke.

The present housing conditions in the coalfields are extremely unsatisfactory. No other scheme of welfare can be given higher 'priority'. Government do not consider that the housing problem can be tackled piecemeal. In their opinion a target figure of 50,000 houses for miners should be the aim of the housing scheme in the coalfields and that provision should be made for 15,000 houses to be completed before the end of the next financial year.

Careful calculations have been made in the light of prevalent costs and it is reckoned that by levy of a Cess at Re.—/3/4 per ton of coal and coke and a subsidy of Rs. 400 per house from general revenues, adequate funds will be forthcoming for financing a comprehensive housing-scheme of 50,000 houses. There are various other welfare measures like establishment of hospitals, anti-malarial measures, public health and sanitation, adult education propaganda, anti-tuberculosis, etc. which will absorb, when all the schemes are in final form, practically the whole of the present limit of Cess of Re. -/4/- per ton. Therefore, an increase in this limit is urgently required to provide funds for the housing scheme. The Bill provides that when the rate of Cess reaches the maximum of Re.-/8/- per ton not less than Re. /3/4 thereof will be earmarked to a separate housing fund.

Colliery owners have in many cases provided dispensary services for the benefit of the miners employed by them and the employer' responsibility in the direction is well recognised. But with the establishment of Central and Regional Hospitals by the Coal Mines Welfare Fund a tendency is likely to arise by which the responsibility for providing dispensary services will be shifted on to the Fund in the absence of any statutory provision requiring the employers to provide such facilities. A provision has, therefore, been made in the Bill by which employers who provide dispensary services up to standards prescribed will be given the grants-in-aid not exceeding the amount equivalent to Cess of 8 pies per ton in respect of coal or coke despatches from the respective colliery or the amount actually spent by the employer whichever is less. Where employers have not provided adequate dispensary services the Fund will itself provide them and to meet this expenditure as well as the costs of grants-in-aid to the employers, a further levy of a cess equivalent to 8 pies per ton is necessary. This is estimated to yield approximately Rs. 9 lakhs a year which should ensure reasonably efficient dispensary services, it being noted that the existing Cess will provide funds in addition for the larger hospital schemes.

The result of these measures is that the limit of the Cess should be raised to Re.-/8/- per ton. It is not, however intended to levy this maximum rate forthwith, and during the year 1947-48, it is not proposed to levy a total Cess in excess of Re.-/6/- per ton. There. after with the further progress in the housing scheme, rates will have to be increased gradually and up to the maximum of Re.-/8/-.

The cost of construction is expected to average Rs. 2,500 per house for which the economic rent may be as high as about Rs. 14/- a month. Miners have, by tradition, occupied quarters. where provided, rentfree and it is not, at present intended to levy a rent or at any rate more than a nominal rent from the occupants. Some provision is, therefore, necessary in order to ensure that the houses constructed by the Fund are occupied only by genuine and steady workers and that those who cease to be so, do not continue to occupy the houses rent-free or on nominal rent. The details regarding these will be discussed with representatives of employers and workers who will be associated with the administration of the Housing Fund. But as a precautionary measure a legal provision has been included for summary recovery of rent at full rates in addition to the liability under the ordinary law, for eviction."

—Gazette of India, 1947, Part V, page 317.

[THE] COAL MINES LABOUR WELFARE FUND ACT, 1947

(ACT XXXII OF 1947)

[18th April 1947.]

An Act to make better provision for financing measures for promoting the welfare of labour employed in the coal-mining industry.

WHEREAS it is expedient to make better provision for financing measures for promoting the welfare of labour employed in the coal-mining industry, including housing and the provision of dispensary services, and for such purposes to impose a cess and constitute a fund ;

It is hereby enacted as follows :—

Short title, extent and commencement.

1. *(1)* This Act may be called the Coal Mines Labour Welfare Fund Act, 1947.

(2) It extends to the whole of British India.

(3) It shall come into force on such date as the Central Government may, by notification in the official Gazette, appoint.[a]

[a] The Act came into force on 14-6-1947 — *See* Gazette of India, 1947, Part I, page 838.

Interpretation

2. In this Act, unless there is anything repugnant in the subject or context,—

(a) "Advisory Committee" means the Advisory Committee constituted under section 8 ;

(b) "Commissioner" means the Coal Mines Labour Welfare Commissioner appointed under section 9, and includes any officer authorised in writing by the Commissioner to exercise any of his functions under this Act ;

(c) "Housing Board" means the Coal Mines Labour Housing Board constituted under section 6 ;

(d) "Fund" means the Coal Mines Labour Housing and General Welfare Fund constituted under section 4 :

(e) "prescribed" means prescribed by rules made under this Act.

Imposition and collection of duty.

3. *(1)* There shall be levied and collected as a cess for the purposes of this Act a duty of excise on all coal and coke despatched from collieries in British India, at such rate not less than four annas and not more than eight annas per ton, as may from time to time be fixed by the Cen-

tral Government by notification in the official Gazette:

Provided that the Central Government may, by notification in the official Gazette, exempt from liability to the duty any specified class or classes of coal or coke.

(2) The duty levied under sub-section *(1)* shall, subject to and in accordance with rules made in this behalf, be collected by such agencies and in such manner as may be prescribed.

Coal Mines Labour Housing and General Welfare Fund.

4. *(1)* The proceeds of the duty levied under section 3 shall be paid by the collecting agencies into the Reserve Bank of India at Calcutta in the prescribed manner, and shall be credited to a fund to be called the Coal Mines Labour Housing and General Welfare Fund, and apportioned under two separate accounts, to be called the housing account of the Fund, and the general welfare account of the Fund, in such manner as the Central Government from time to time may, by notification in the official Gazette, determine :

Provided that there shall at all times be credited— .

(a) to the housing account of the Fund, not less than one anna and four pies, and

(b) to the general welfare account of the Fund, not more than four annas and eight pies,

—out of the duty collected under this Act on every ton of coal or coke.

(2) There shall also be credited to the housing account of the Fund—

(a) any grants made thereto by the Central Government;

(b) rents, if any, realised from housing accommodation constructed out of such account;

(c) any other moneys received by the Housing Board.

Expenditure from the Fund.

5. *(1)* The cost of administering the Fund and the salaries and allowances, if any, of the Commissioner, Inspectors, Welfare Officers and other staff appointed to supervise or carry out measures financed from the Fund shall be defrayed out of the Fund, and shall be apportioned between and debited to the housing account and the general welfare account in such manner as may be prescribed.

(2) The Central Government may out of the general welfare account of the Fund pay annually grants-in-aid to such of the colliery owners as maintain to the satisfaction of the Commissioner dispensary services of the prescribed standard for the benefit of labour employed in their collieries, so however that the amount payable as grant-in-aid to the owner of a colliery shall not exceed—

(i) the amount of the duty at the rate of eight pies per ton recovered in respect of coal or coke despatched from the colliery less the proportionate costs of recovery, or

(ii) the amount spent by the owner of the colliery in the maintenance of the dispensary service, as determined by the Commissioner,

whichever is less:

Provided that no grant-in aid shall be payable in respect of any dispensary service maintained by the owner of the colliery if the amount expended thereon, as determined by the Commissioner, is less than eighty rupees per mensem.

(3) The balance of the moneys in the general welfare account of the Fund shall be applied by the Central Government to meet expenditure incurred in connection with measures which are in the opinion of the Central Government necessary or expedient to promote the welfare of labour employed in the coal-mining industry.

(4) Without prejudice to the generality of sub-section *(3)* the moneys in the general welfare account of the Fund may be utilised to defray—

(a) the cost of measures for the benefit of labour employed in the coal-mining industry directed towards—

(i) the improvement of public health and sanitation, the prevention of disease, the provision of medical facilities and the improvement of existing medical facilities, including the provision and maintenance of dispensary services in collieries the owners of which do not receive grants-in-aid under sub-section *(2)*,

(ii) the provision of water supplies, and facilities for washing and the improvement of existing supplies and facilities,

(iii) the provision and improvement of educational facilities,

(iv) the improvement of standards of living, including nutrition, amelioration of social conditions, and the provision of recreational facilities,

(v) the provision of transport to and from work;

(b) the grant to a Provincial Government, a local authority or the owner, agent or manager of a coal mine of money in aid of any scheme approved by the Central Government for any purpose for which moneys in the general welfare account of the Fund may be utilised;

(c) the allowances, if any, of the members of the Advisory Committee and the amounts debitable to the account under sub-section *(1)*;

(d) any other expenditure which the Central Government directs to be defrayed out of the moneys in the general welfare account of the Fund.

(5) The Central Government shall publish annually in the official Gazette an estimate of

receipts into and expenditure from the general welfare account of the Fund together with a statement of the accounts and a report of the activities financed during the previous year from the general welfare account of the Fund, and shall forward copies of such statement and report to members of the Advisory Committee.

(6) The moneys in the housing account of the Fund shall be applied by the Housing Board to defray—

(a) the cost of erecting, maintaining and repairing housing accommodation for labour employed in the coal-mining industry and of providing services and facilities connected therewith;

(b) the cost of preparing schemes, and of acquiring any land required, for the purposes referred to in clause *(a)*;

(c) the grant, subject to the previous approval of the Central Government, to a Provincial Government, a local authority or the owner, agent or manager of a coal mine of money in aid of any scheme approved by the Housing Board for the purposes referred to in clauses *(a)* and *(b)*;

(d) the allowances, if any, of members of the Housing Board and the amounts debitable to the account under sub-section *(1)*;

(e) any other expenditure which the Central Government directs to be defrayed out of the moneys in the housing account of the Fund.

(7) In February of each year the Housing Board shall submit to the Central Government a statement in the prescribed form of the estimated receipts into and expenditure from the housing account of the Fund for the ensuing financial year together with a report of the activities financed during the previous year from the housing account of the Fund, and may at any time during the ensuing financial year submit to the Central Government a supplementary statement and shall forward copies of such statements and report to members of the Advisory Committee.

(8) The Housing Board shall comply with such directions as the Central Government may from time to time think fit to give in respect of expenditure from the housing account of the Fund.

(9) The Housing Board may invest moneys in the housing account of the Fund in securities of the Government of India or, with the previous approval of the Central Government, in other securities.

(10) The Housing Board shall cause to be maintained such books of account as may be prescribed and shall prepare in the prescribed manner an annual statement of the accounts.

(11) The Housing Board shall cause the housing account of the Fund to be audited annually by a person qualified under the provisions of section 144 of the Indian Companies Act, 1913, to act as an auditor of companies, and as soon as the said account has been audited the Housing Board shall forward copies thereof together with copies of the report of the auditor thereon to the Central Government and to members of the Advisory Committee.

(12) The Central Government shall have power to decide whether any particular expenditure is or is not debitable to the housing account, or the general welfare account, of the Fund, and its decision shall be final.

(13) Before incurring any expenditure from the Fund, other than expenditure of a routine or urgent nature the Central Government or, as the case may be, the Housing Board, shall consult the Advisory Committee.

Coal Mines Labour Housing Board.

6. *(1)* The Central Government shall, by notification in the official Gazette, constitute a Coal Mines Labour Housing Board to prepare and carry out, subject to the previous approval of the Central Government, schemes, financed from the housing account of the Fund for the provision of suitable housing accommodation for labour employed in the coal mining industry, and to carry out the other functions of the Housing Board under this Act.

(2) The Commissioner shall be the chairman of the Housing Board, and the other members thereof shall be appointed by the Central Government and shall be of such number and chosen in such manner as may be prescribed.

(3) The Housing Board shall be a body corporate by the name of the Coal Mines Labour Housing Board, having perpetual succession and a common seal, with power to acquire property both movable and immovable, and shall by the said name sue and be sued.

(4) No act done by the Housing Board shall be called in question on the ground merely of the existence of any vacancy in, or defect on the constitution of, the Housing Board.

Provisions regarding housing accommodation.

7. *(1)* The occupation by any person of any housing accommodation provided out of the housing account of the Fund shall be subject to compliance by that person at all times with such conditions relating to his occupation of such accommodation as may be prescribed.

(2) Before any person occupies any such accommodation he shall be furnished with a copy of the conditions referred to in sub-section *(1)*, and if he so desires the said conditions shall be read over to him in a language which he under-

stands; and the Housing Board shall cause to be published in such manner as it thinks best adapted for informing the persons concerned any changes which may from time to time be made in the said conditions.

(3) If, in the opinion of the Housing Board, any person in occupation of any such accommodation fails or ceases to comply with any of the conditions referred to in sub-section *(1)*, it may, by notice in writing, require him to vacate the accommodation on or before such date, not being less than thirty days after the service of the notice, as may be specified in the notice; and the occupation of such accommodation by such person or any dependent of his after the date so specified shall be unlawful, and such person or dependent may be evicted accordingly by due process of law from such accommodation.

(4) There shall be payable in respect of the occupation of any such accommodation as aforesaid rent at such rate as may be prescribed :

Provided that the Housing Board may remit, subject to compliance at all times with the conditions referred to in sub-section *(1)*, either the whole or any part of the prescribed rent :

Provided further that where, in the case of any person who is by virtue of a remission under the first proviso paying either no rent or a reduced rent, the Housing Board has reason to believe that such person has contravened any of the said conditions, it may by notice in writing require such person to pay, with effect on and after the expiry of seven days from the service of the notice, rent for the accommodation occupied by him at the full prescribed rate.

(5) All rent payable in respect of the occupation of such accommodation as aforesaid, whether at the full prescribed rate or at a lesser rate shall be recoverable as an arrear of land revenue.

Advisory Committee.

8. *(1)* The Central Government shall, by notification in the official Gazette, constitute an Advisory Committee, to advise on matters on which the Central Government or the Housing Board is required by this Act to consult the Committee and on any other matters arising out of the administration of this Act which the Central Government may refer to it for advice.

(2) The members of the Advisory Committee shall be appointed by the Central Government and shall be of such number and chosen in such manner as may be prescribed :

Provided that the Advisory Committee shall include an equal number of members representing Government, the owners of coal mines and workmen employed in the coal-mining industry, and that at least one member of the Advisory Committee shall be a woman.

(3) The chairman of the Advisory Committee shall be an officer of the Central Government appointed by the Central Government.

Appointment and powers of officers.

9. *(1)* The Central Government may appoint a Coal Mines Labour Welfare Commissioner and such number of Inspectors, Welfare Officers and other staff as it thinks fit to supervise and carry out measures financed from the Fund.

(2) Any person so appointed shall be deemed to be a public servant within the meaning of section 21 of the Indian Penal Code, 1860.

(3) The Commissioner or any Inspector or Welfare Officer may, with such assistance, if any, as he thinks fit, enter at all reasonable times any place which he considers it necessary to enter for the purpose of supervising or carrying out the measures financed from the Fund, and may do therein anything necessary for the proper discharge of his duties.

Power to make rules.

10. *(1)* The Central Government may, by notification in the official Gazette, and subject to the condition of previous publication, make rules to carry into effect the purposes of this Act.

(2) Without prejudice to the generality of the foregoing power, rules made under this section may provide for—

(i) the manner in which the duty levied under sub-section *(1)* of section 3 shall be collected, the persons who shall be liable to make the payments, the making of refunds, remissions and recoveries, the deduction by collecting agencies of a percentage of the realizations to cover the cost of collection, and the procedure to be followed in remitting the proceeds to the Reserve Bank of India ;

(ii) the composition of the Housing Board, the manner in which its members shall be chosen, the term of office of its members, the allowances if any payable to them and the manner in which the Housing Board shall conduct its business, including the number of members necessary to form a quorum at a meeting thereof;

(iii) the books of account to be maintained by the Housing Board, and the form of its financial estimates and statements of account;

(iv) the composition of the Advisory Committee, the manner in which its members shall be chosen, the term of office of its members, the allowances if any payable to them and the manner in which the Advisory Committee shall conduct its business;

(v) the apportionment between the housing account and the general welfare account of the Fund of the expenditure on the administration

of the Fund and on the salaries and allowances of the Commissioner, Inspectors, Welfare Officers and other staff employed for the purposes of this Act;

(vi) the standard of dispensary service to be provided by owners of collieries for the purposes of sub-section *(2)* of section 5, and the inspection and supervision of the dispensaries and other places at which such services are provided;

(vii) the application by owners of collieries for grants-in-aid, the authority to whom and the manner in which such applications shall be made and the particulars to be specified in such applications;

(viii) the manner in which dispensary services may be provided by the Central Government;

(ix) the conditions governing the grant of money from the general welfare account of the Fund to a Provincial Government, a local authority or the owner, agent or manager of a coal mine;

(x) the rate of rent for housing accommodation provided out of the housing account of the Fund;

(xi) the conditions of service and the duties of Inspectors, Welfare Officers and other officers appointed to supervise or carry out measure financed from the Fund;

(xii) the duties and functions of the Commissioner;

(xiii) the furnishing by owners, agents or managers of coal mines of statistical or other information, and the punishment by fine not exceeding two hundred rupees of [on?] failure to comply with the requirements of any rules made under this clause;

(xiv) any other matter which under this Act is to be or may be prescribed.

Repeal of Ord. VII of 1944.

11. *(1)* The Coal Mines Labour Welfare Fund Ordinance 1944, is hereby repealed.

(2) For the avoidance of doubts it is hereby declared that the provisions of section 6 of the General Clauses Act, 1897, shall apply to the repeal effected by this section.

(3) Any balance remaining in the Fund constituted under the aforesaid Ordinance shall be credited to the Fund constituted under this Act, and shall be apportioned between the housing account and the general welfare account of such Fund in such manner as the Central Government may determine.

[THE] COAL MINES PROVIDENT FUND AND BONUS SCHEMES ACT, 1948.

(ACT XLVI OF 1948.)

STATEMENT OF OBJECTS AND REASONS.

"The Board of Conciliation appointed in 1947 in connection with certain disputes in the Bengal and Bihar coalfields recommended the payment of bonus to, and the establishment of a provident fund for, the employees in coal mines. With a view to implementing these recommendations, Government promulgated the Coal Mines Provident Fund and Bonus Schemes Ordinance, 1948, on the 23rd April 1948. A Coal Mines Bonus Scheme has since been framed under that Ordinance and the details of a Provident Fund Scheme are being worked out.

As the life of an Ordinance is six months, the Ordinance will cease to be effective on the 23rd October 1948. As the schemes which are being framed under it must be continued beyond that date, this Bill seeks to replace the Ordinance by an Act."

—Gazette of India, 1948, Part V, page 607.

THE COAL MINES PROVIDENT FUND AND BONUS SCHEMES ACT, 1948.

(ACT XLVI of 1948.)

[3rd September, 1948.]

An Act to make provision for the framing of a Provident Fund Scheme and a Bonus Scheme for persons employed in coal mines.

WHEREAS it is expedient to make provision for the framing of a Provident Fund Scheme and a Bonus Scheme for persons employed in coal mines;

It is hereby enacted as follows:—

Short title and extent.

1. *(1)* This Act may be called the Coal Mines Provident Fund and Bonus Schemes Act, 1948.

(2) It extends to all the Provinces of India and to all Acceding States which, by their Instruments of Accession, have accepted the subject-matter of this Act as a matter with respect to which the Dominion Legislature may make laws for such States.

Interpretation.

2. In this Act, unless there is anything repugnant in the subject or context,—

(a) "bonus" means any sum of money payable to an employee in a coal mine under the Coal Mines Bonus Scheme framed under this Act;

(b) "coal mine" means any excavation where any operation for the purpose of obtaining coal has been or is being carried on, and includes

all works, machinery, tramways, and sidings, whether above or below ground, in or adjacent to or belonging to a coal mine:

Provided that it shall not include any part of the coal mine on which a manufacturing process is being carried on unless such process is a process for coke-making or the dressing of minerals;

(c) "contribution" means the contribution payable in respect of a member under the Coal Mines Provident Fund Scheme framed under this Act;

(d) "employee" means any person who is employed in any kind of work, manual or otherwise, in or in connection with a coal mine and who gets his wages directly or indirectly from the employer;

(e) "employer" means the owner of a coal mine as defined in clause *(g)* of section 3 of the Indian Mines Act, 1923 (IV of 1923);

(f) "Fund" means the provident fund established under the Coal Mines Provident Fund Scheme; and

(g) "member" means a member of the Fund.

Coal Mines Provident Fund Scheme.

3. *(1)* The Central Government may, by notification in the official Gazette, frame a scheme[a] to be called the Coal Mines Provident Fund Scheme for the establishment of a provident fund for employees in coal mines and specify the coal mines to which the said scheme shall apply.

(2) Any scheme framed under the provisions of sub-section *(1)* may provide for all or any of the matters specified in the First Schedule.

[a] For Coal Mines Provident Fund Scheme, *see* Gazette of India, 1948, Extra-Ord., page 1917.

Fund to be recognised under Act XI of 1922.

4. For the purposes of the Indian Income-tax Act, 1922, the Fund shall be deemed to be a recognised provident fund within the meaning of Chapter IX-A of that Act.

Coal Mines Bonus Scheme.

5. *(1)* The Central Government may, by notification in the official Gazette, frame a scheme to be called the Coal Mines Bonus Scheme for the payment of bonus to employees in coal mines and specify the coal mines to which the said scheme shall apply.

(2) A scheme framed under the provisions of sub-section *(1)* may provide for all or any of the matters specified in the Second Schedule.

Retrospective operation of a scheme.

6. A scheme framed under this Act may provide that any of its provisions shall come into force either prospectively or retrospectively with effect from such date as may be specified in this behalf in the scheme.

Modification of a scheme.

7. The Central Government may, by notification in the official Gazette, add to, amend or vary a scheme framed under this Act.

Protection against attachment.

8. *(1)* The amount of the provident fund standing to the credit of any member in the Fund shall not in any way be capable of being assigned or charged and shall not be liable to attachment under any decree or order of any Court in respect of any debt or liability incurred by the member and neither the Official Assignee nor any Receiver appointed under the Provincial Insolvency Act, 1920, shall be entitled to, or have any claim on, any such amount.

(2) Any amount standing to the credit of any member in the Fund at the time of his death and payable to his nominee under the Coal Mines Provident Fund Scheme shall, subject to any deduction authorised by the said scheme, vest in the nominee and shall be free from any debt or other liability incurred by the deceased or incurred by the nominee before the death of the member.

Penalty.

9. *(1)* Any scheme framed under this Act may provide that any person who contravenes any of the provisions thereof shall be punishable with imprisonment for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

(2) No Court shall take cognizance of any offence punishable under any such scheme except on a report in writing of the facts constituting such offence made by an Inspector with the previous sanction of such authority as may be specified in this behalf by the Central Government.

Inspectors.

10. *(1)* The Central Government may, by notification in the official Gazette, appoint such persons as it thinks fit to be Inspectors for the purposes of the Coal Mines Provident Fund Scheme or the Coal Mines Bonus Scheme and may define their jurisdiction.

(2) An Inspector may, in respect of any coal mine within his jurisdiction,—

(a) require an employer to furnish such information as he may consider necessary for the purposes of any scheme framed under this Act;

(b) at any reasonable time enter any coal mine or its office and require any one found in charge thereof to produce before him such accounts, books, registers and other documents relating to the employment of persons in the coal mine as he may consider necessary;

(c) examine, with respect to any matter relevant to any of the purposes aforesaid, the employer, his agent or servant or any other person found in charge of the coal mine or its office or

whom the Inspector has reasonable cause to believe to be or to have been an employee in the coal mine.

(3) Every Inspector shall be deemed to be a public servant within the meaning of section 21 of the Indian Penal Code, 1860.

Priority of payment of contributions and bonus over other debts.

11. The amount due in respect of any contribution or bonus under a scheme framed under this Act, or any charges incurred in respect of the administration of any such scheme, shall, where the liability therefor has accrued before the person liable has been adjudicated insolvent or, in the case of a company ordered to be wound up, before the date of such order, be deemed to be included among the debts, which, under section 49 of the Presidency-Towns Insolvency Act, 1909, or under section 61 of the Provincial Insolvency Act, 1920, or under section 230 of the Indian Companies Act, 1913, are to be paid in priority to all other debts in the distribution of the property of the insolvent or the assets of a company being wound up, as the case may be.

Repeal of Ordinance VII of 1948.

12. *(1)* The Coal Mines Provident Fund and Bonus Schemes Ordinance, 1948 (VII of 1948), is hereby repealed.

(2) Notwithstanding any such repeal, anything done or any action taken in exercise of any power conferred by or under the said Ordinance shall be deemed to have been done or taken in exercise of the powers conferred by or under this Act, as if this Act had commenced on the 23rd day of April, 1948.

THE FIRST SCHEDULE

(*See* section 3)

Matters to be provided for in the Coal Mines Provident Fund Scheme.

1. The employees or class of employees who shall join the Fund, the contributions payable to the Fund and the conditions under which an employee may be exempted from joining the Fund or from payment of contributions.

2. The payment of contributions to the Fund by the employees, or by the employers on behalf of the employees, the rate, time and manner of payment of such contributions, and the manner in which such contributions or part thereof shall be recovered from employees.

3. The payment by the employer of such sums of money as may be considered necessary to meet the cost of administering the Fund and the rate at which and the manner in which it shall be paid.

4. The constitution of a Board of Trustees consisting of nominees of the Central Government and representatives of employers and employees nominated by the Central Government in consultation with the representative organisations concerned, subject to the condition that the number of the representatives of the employees shall not be less than the number of the representatives of the employers; the number of Trustees and the terms and conditions under which they may be nominated, and the time, place and procedure of meetings of the Board.

5. The appointment of officers and servants of the Board and the opening of regional and other offices.

6. The manner in which accounts shall be kept, the investment of moneys belonging to the Fund, the preparation of a budget, the audit of accounts and the submission of reports to the Central Government

7 The conditions under which withdrawals from the Fund may be permitted and any deduction or forfeiture may be made and the maximum amount of such deduction or forfeiture.

8. The fixation of the rate of interest payable to members by the Central Government in consultation with the Board of Trustees.

9. The form in which an employee shall furnish particulars about himself and his family when required.

10. The nomination of a person to receive the amount standing to the credit of a member after his death and the cancellation or the change of such nomination.

11. The registers and records to be maintained by the employer and the returns to be furnished by him.

12. The form or design of an identity card or a token or a disc for purposes of identifying any employee and for the issue, custody and replacement thereof.

13. The fees to be levied for any of the purposes specified in this Schedule.

14. Any other matter which may be necessary or proper for the purpose of implementing the Coal Mines Provident Fund Scheme.

THE SECOND SCHEDULE

(*See* section 5)

Matters to be provided for in the Coal Mines Bonus Scheme.

1. The payment of bonus dependent on the attendance of an employee in a coal mine during any period.

2. The employees or class of employees who shall be eligible for the bonus and the conditions of eligibility.

3. The rate at which the bonus shall be payable to an employee and the manner in which the bonus shall be calculated.

4. The conditions under which an employee may be debarred from getting the bonus in whole or in part.

5. The rate at which sums shall be set apart by the employer for payment of bonus, and the time and manner of such payment.

6. The registers and records to be maintained by the employer and the returns to be furnished by him.

7. Any other matter which may be necessary or proper for the purpose of implementing the Coal Mines Bonus Scheme.

[THE] CONTINUANCE OF LEGAL PROCEEDINGS ACT, 1948. (ACT XXXVIII OF 1948).

Statement of Objects and Reasons.

"Section 15 (2) of the Indian Independence Act, 1947, provides *inter alia* that any legal proceedings by or against the Secretary of State in respect of any right or liability of the undivided India or any part thereof which were pending in Indian Courts immediately before the 15th August, 1947, shall be continued by or against such person as may be designated by order of the Governor-General under section 9 of that or otherwise, by law of the Dominion concerned. Article 12 (3) of the Indian Independence (Rights, Pro-

perty and Liabilities) Order, 1947, makes the requisite provision for the continuance of such legal proceedings, but only in respect of any *liability* of the undivided India or part thereof. This Article does not cover proceedings in respect of any *right* of the undivided India. The Bihar Government brought to the notice of the Government of India the existence of a long pending suit which was instituted in 1933 before the passing of the Government of India Act, 1935, in the name of the Secretary of State in Council to establish the right of Government to underground minerals in an estate, and since there was the possibility of a few more cases of a similar character pending by or against the Secretary of State in some of the Courts, an Ordinance entitled the Continuance of Legal Proceedings Ordinance, 1948 (XII of 1948), was promulgated. The object of the present Bill is to convert that Ordinance into an Act of the Legislature."

—Gazette of India, 1948, Part V, page 464.

[THE] CONTINUANCE OF LEGAL PROCEEDINGS ACT, 1948

(ACT XXXVIII OF 1948)

[3rd September, 1948.]

An Act to provide for the continuance of certain legal proceedings by or against the Secretary of State.

WHEREAS it is expedient to provide for the continuance of certain legal proceedings by or against the Secretary of State in respect of any right of India or any part of India which were pending immediately before the 15th day of August 1947;

a. This Act has been applied to—
   (a) Chota Nagpur Division and Santal Parganas District—*see* Bihar Gazette, 1948, Part II, page 2515;
   (b) excluded and partially excluded areas in the Province of Madras subject to certain modifications—*see* Fort St. George Gazette, 1948, Part I, page 1047.
   (c) Jaunsar-Babar Pargana in Dehradun District and the portion of Mirzapur District which lies to the south of Kaimur Hills, *see* U. P. Gazette, 1948, Part I, page 720.

It is hereby enacted as follows:—

Short title and extent.

1. *(1)* This act may be called the Continuance of Legal Proceedings Act, 1948.

(2) It extends to all the Provinces of India.

Interpretation.

2. In this Act "the appointed day" means the 15th day of August, 1947.

Continuance of legal proceedings.

3. Any legal proceedings which immediately before the appointed day,—

(a) were pending by or against the Secretary of State in any Court within the territories which as from the appointed day became the territories of India by virtue of sub section *(1)* of section 2 of the Indian Independence Act, 1947, and

(b) were in respect of any right of India or any part of India,

shall—

(i) if the right in question was that of the Governor-General in Council, be continued by or against the Dominion of India;

(ii) if the right in question was that of the former Province of Bengal or the Punjab, be continued by or against the Province of West Bengal or East Punjab, as the case may be; and

(iii) if the right in question was that of any Governor's Province other than Bengal, the Punjab, the North-West Frontier Province or Sind, be continued by or against that Province.

Exclusion of time in computing period of limitation.

4. In computing the period of limitation prescribed for any appeal or application to a Court in respect of any such proceedings as aforesaid, the period from the appointed day up to the 28th day of May, 1948 shall be excluded.

Repeal.

5. *(1)* The Continuance of Legal Proceedings Ordinance, 1948, is hereby repealed.

(2) Anything done or any action taken in exercise of any powers conferred by or under the said Ordinance shall be deemed to have been done or taken in exercise of powers conferred by or under this Act as if this Act had commenced on the 28th day of May, 1948.

[THE] COTTON TEXTILES CESS ACT, 1948.

(ACT VII OF 1948).

STATEMENT OF OBJECTS AND REASONS.

"The Government of India have recently relaxed their controlled prices of cotton textiles, and are now leaving the fixation of prices to the industry, who have assured Government that they will fix reasonable prices. Government have decided to collect from mills or stock-holders, for the benefit of the public revenues, the difference between the old and the new prices of cloth. At present Government have no power to collect this cess, and the Bill is designed to give them this power." — Gazette of India, 1948 Part V, page 77.

(ACT VII OF 1948)

[1st March, 1948.]

An Act to impose a cess on certain cotton textiles manufactured in the Provinces of India.

WHEREAS it is expedient to impose a cess on certain cotton textile manufactured in the Provinces of India ;

It is hereby enacted as follows :—

Short title, extent and commencement.

1. *(1)* This Act may be called the Cotton Textiles Cess Act, 1948.

(2) It extends to all the Provinces of India.

(3) It shall be deemed to have come into force on the 31st day of December 1947.

Definitions.

2. In this Act, unless there is anything repugnant in the subject or context,—

(a) "cloth" and "yarn" mean respectively the cloth and yarn of which prices fixed by any order made under section 3 or continued by section 17 of the Essential Supplies (Temporary Powers) Act, 1946, were in force immediately before the commencement of this Act ;

(b) "producer" means a person engaged in the production of cloth or yarn or both by power as defined in clause (f) of section 2 of the Factories Act, 1934.

Levy of Cess.

3. The Central Government may, by notification in the official gazette, levy on any cloth or yarn held in stock by a producer or a wholesale dealer on such date as the Central Government may fix in this behalf a cess at such rate as may be specified in the notification.

Effect on Contracts.

4. Where before the date mentioned in section 3 a producer or wholesale dealer has made a contract of sale in respect of any cloth or yarn on which a cess is levied under that section, it shall be lawful for him to charge the amount of the cess to the buyer in addition to the contract price.

Payment of Cess.

5. The cess shall be paid by the producer or the wholesale dealer as the case may be to such authority within such time and in such manner as may be specified in the notification.

Penalty for non-payment.

6. If any cess payable under this Act is not paid as prescribed, it shall be deemed to be in arrears and the authority appointed in this behalf by the Central Government may, after such enquiry as he deems fit, impose on the producer or the dealer a penalty not exceeding the amount of cess in arrears.

Recovery of Cess and penalty.

7. The amount of cess in arrears and any sum imposed as penalty under section 6 shall, without prejudice to any other liability incurred under this Act, be recovered as arrears of land revenue.

Power of inspection, entry and search.

8. Any authority authorised by the Central Government in this behalf may, with a view to securing compliance with this Act,—

(a) require any producer or dealer to furnish to such authority such information relating to his business as that authority may specify;

(b) inspect or cause to be inspected any books or other documents belonging to or under the control of such producer or dealer :

(c) enter and search or authorise any person to enter and search any premises and seize or authorise any person to seize any cloth or yarn in respect of which he has reason to believe that a contravention of this Act has been or is about to be committed.

Penalty for evasion of cess or failure to comply with order under section 8.

9. *(1)* Whoever evades or attempts to evade the payment of cess payable by him under this Act or fails to comply with any order issued to him under clause (a) of section 8 or furnishes any information which is false and which he knows or has reasonable cause to believe to be false or does not believe to be true, shall be punishable with imprisonment which may extend to 6 months or with fine which may extend to two thousand rupees or with both.

(2) Any Court trying any offence under this Act may order that any cloth or yarn together with the packages or coverings thereof in respect of which the Court is satisfied that an offence under this Act has been committed shall be forfeited to the Central Government.

[THE] DAMODAR VALLEY CORPORATION ACT, 1948. (ACT XIV OF 1948).

STATEMENT OF OBJECTS AND REASONS.

"The Damodar river rises in western Bihar and flows generally in a south-easterly direction into Bengal. It it a seasonal river having a large flow of water during the rains which, apart from being generally wasted, at times causes great damage to life and property. It is now proposed to harness the water of this

river and some of its tributaries and utilise it in multiple development of the Damodar Valley and the adjoining area.

This Bill seeks to set up a Corporation, called the Damodar Valley Corporation on the lines of the Tennessee Valley Authority in the U. S. A. It will be an autonomous body within the framework of the enactment. Its objects, constitution and powers are laid down in the Bill. Briefly, its main function will be to control flood in the Damodar, generate electric power for disribution and provide water for irrigation and other purposes. In addition, the Corporation will endeavour to promote economic development of the Damodar Valley and the adjoining areas. It will consist of three members including the Chairman. These three members and the secretary and treasurer will be appointed by the Central Government. The Corporation will have power to acquire land and construct or cause to be constructed such dams, barrages, reservoirs, power houses and power structures, electrical transmission lines, irrigation and navigation works as may be necessary. The capital required by the Corporation will be provided by the Central Government and the Governments of Bihar and West Bengal. The profits and losses will be distributable between these three Governments in certain agreed proportions.

The provisions of this Bill are designed to give effect to the broad outlines of the agreement reached between the three Governments concerned."

—Gazette of India, 1948, Part V, page 595.

[THE] DAMODAR VALLEY CORPORATION ACT, 1948.
(ACT XIV OF 1948)[a]

[27th March 1948]

An Act to provide for the establishment and regulation of a Corporation for the development of the Damodar Valley in the Provinces of Bihar and West Bengal.

WHEREAS it is expedient to provide for the establishment and regulation of a Corporation for the development of the Damodar Valley in the Provinces of Bihar and West Bengal:

AND WHEREAS in pursuance of S. 103, Government of India Act, 1935 (26 Geo. V, c. 2), resolutions have been passed by all the Chambers of the Provincial Legislatures of the said Provinces to the effect that certain matters dealt with in this Act which are enumerated in the Provincial Legislative List should be regulated in those Provinces by Act of the Dominion Legislature ;

It is hereby enacted as follows :

[a] For Select Committee Report, *See* Gazette of India, 1948, Part V, page 41.

PART I

INTRODUCTORY

Short title, extent and commencement.

1. (1) This Act may be called the Damodar Valley Corporation Act, 1948.

(2) It extends to the Provinces of Bihar and West Bengal.

(3) It shall come into force on such date as the Central Government may, by notification in the official Gazette, appoint in this behalf.[a]

[a] This Act came into force on 2nd April 1948 — (*See* Gazette of India, 1948, Part I, page 391.)

Interpretation.

2. In this Act, unless there is anything repugnant in the subject or context,—

(1) "Corporation" means the Damodar Valley Corporation ;

(2) "Damodar Valley" includes the basin of the Damodar river and its tributaries ;

(3) "member" means a member of the Corporation and includes the Chairman ;

(4) "participating Governments" mean the Central Government, the Provincial Government of Bihar and the Provincial Government of West Bengal;

(5) "prescribed" means prescribed by rules made under S. 59;

(6) "Provincial Government" means the Government of Bihar or as the case may be of West Bengal, and "Provincial Governments" mean the Governments of Bihar and of West Bengal ;

(7) "regulation" means the regulations made by the Corporation under S. 60.

PART II

ESTABLISHMENT OF THE CORPORATION

Incorporation.

3. (1) With effect from such date as the Central Government may, by notification in the official Gazette, appoint in this behalf, there shall be established a Corporation by the name of the Damodar Valley Corporation.[a]

(2) The said Corporation shall be a body corporate having perpetual succession and a common seal, and shall by the said name sue and be sued.

[a] For establishment of Damodar Valley Corporation with effect from 7th July 1948 — *See* Gazette of India, 1948, Part I, page 831.

Constitution of the Corporation.

4. (1) The Corporation shall consist of a Chairman and two other members appointed by the Central Government after consultation with the Provincial Governments.

(2) A person shall be disqulified for being appointed, or for continuing as, a member of the Corporation—

(a) if he is a member of the Central or any Provincial Legislature; or

(b) if he has, directly or indirectly, any interest in a subsisting contract made with, or in any work being done for, the Corporation except

as a shereholder (other than a director) in an incorporated company provided that where he is a shareholder, he shall disclose to the Government the nature and extent of shares held by him in such Company.

(3) No act or proceeding of the Corporation shall be invalid by reason only of the existence of any vacancy amongst its members or any defect in the appointment of a member thereof.

Condition of service of members.

5. (1) Every member shall be a whole time servant of the Corporation.

(2) The remuneration and other conditions of service of the members shall be such as may be prescribed.

Appointment of officers and servants.

6. (1) The secretary and the financial adviser of the Corporation shall be appointed by the Central Government.

(2) The secretary shall be the chief executive officer of the Corporation.

(3) The Corporation may appoint such other officers and servants as it considers necessary for the efficient performance of its functions.

Conditions of service of officers and servants.

7. The pay and other conditions of service of the officers and servants of the Corporation shall—

(a) as respects the secretary and financial adviser, be such as may be prescribed ; and

(b) as respects the other officers and servants, be such as may be determined by regulations.

Functions and duties of the financial adviser.

8. The functions and duties of the financial adviser shall be such as may be prescribed.

General disqualification of all officers and servants.

9. No person who has directly or indirectly, by himself or his partner or agent, any share or interest in any contract, by or on behalf of the Corporation, or in any employment under, by or on behalf of the Corporation otherwise than as an officer or servant thereof, shall become or remain an officer or servant of the Corporation.

Appointment of Advisory Committee.

10. Subject to any rules made under S. 59 the Corporation may from time to time appoint one or more Advisory Committees for the purpose of securing the efficient discharge of the functions of the Corporation, and in particular for the purpose of securing that those functions are exercised with due regard to the circumstances and requirements of particular local areas.

PART III

FUNCTIONS AND POWERS OF THE CORPORATION

General

Limits of Damodar Valley and area of operation.

11. (1) The Central Government shall, by notification in the official Gazette, specify the limits of the Damodar Valley.

(2) The Corporation shall carry out all or any of its functions and exercise all or any of its powers within the Damodar Valley.

(3) The Central Government may, after consultation with the Provincial Governments, by notification in the official Gazette, direct that the Corporation shall carry out such function and exercise such power in such other area as may be specified therein and the area so specified shall be called the "area of operation" of the Corporation.

Functions of the Corporation.

12. The functions of the Corporation shall be —

(a) the promotion and operation of schemes for irrigation, water supply and drainage,

(b) the promotion and operation of schemes for the generation, transmission and distribution of electrical energy, both hydro-electric and thermal,

(c) the promotion and operation of schemes for flood control in the Damodar river and its tributaries and the channels, if any, excavated by the Corporation in connection with the scheme and for the improvement of flow condition in the Hooghly river,

(d) the promotion and control of navigation in the Damodar river and its tributaries and channels, if any,

(e) the promotion of afforestation and control of soil erosion in the Damodar Valley, and

(f) the promotion of public health and the agricultural, industrial, economic and general well-being in the Damodar Valley and its area of operation.

Irrigation and water-supply.

Provision for irrigation and water-supply.

13. The Corporation may, with the approval of the Provincial Government concerned which shall not be unreasonably withheld construct canals and distributaries and maintain and operate them :

Provided that the Provincial Government may, after giving notice and subject to the payment of fair compensation, take over the maintenance and operation of any such canal or distributary.

Rates for supply of water for irrigation.

14. (1) The Corporation may, after consultation with the Provincial Government concerned, determine and levy rates for the bulk

supply of water to that Government for irrigation, and fix the minimum quantity of water which shall be made available for such purpose.

(2) The rates at which such water shall be supplied by the Provincial Government to the cultivators and other consumers shall be fixed by that Government after consultation with the Corporation.

Rates for supply of water for industrial and domestic purposes.

15. The Corporation may determine and levy rates for bulk supply and retail distribution of water for industrial and domestic purposes and specify the manner of recovery of such rates.

Supply of water to those whose supply has been stopped or reduced.

16. If, with a view to operating its schemes, the Corporation has stopped or reduced the supply of water to any person for agricultural, industrial or domestic purposes which such person was, prior to such stoppage or reduction, enjoying by virtue of any prescriptive right, the Corporation shall arrange such supply of water on the same terms as before.

Construction of dam, etc., prohibited except with approval of the Corporation.

17. Save as otherwise prescribed, no person shall construct, operate or maintain in the Damodar Valley any dam or other work or any installation for the extraction of water without the consent of the Corporation.

Supply and generation of electrical energy.

Supply and generation of electrical energy.

18. Notwithstanding anything contained in the Indian Electricity Act, 1910 (IX of 1910) or any licence granted thereunder :

(i) No person shall without the permission of the Corporation—

(a) sell electrical energy to any consumer in the Damodar Valley where the energy is taken by the consumer at a pressure of 30,000 volts or more;

(b) transmit electrical energy in the Damodar Valley at a pressure of 30,000 volts or more;

(c) generate any electrical energy at an installation having an aggregate capacity of more than 10,000 kilowatts in any part of the Damodar Valley lying to the north of a straight line drawn east to west passing through a point at latitude twenty-two degrees, fourteen minutes and forty-seven seconds and longitude eighty-seven degrees, fifty one minutes and forty-two seconds except such portion of the municipal area of Burdwan as may lie to the north of such straight line :

Provided that nothing in sub clause (c) shall apply to any person who was at the commencement of this Act, generating electrical energy at an installation having an aggregate capacity of more than 10,000 kilowatts, so long as the capacity of such installation is not increased:

Provided further that nothing in sub-clause (c) shall apply to the power station installation of the fertiliser factory at Sindri having an aggregate capacity of 80,000 kilowatts so long as the capacity of such installation is not increased beyond 80,000 kilowatts.

(ii) The Corporation may sell electrical energy to any consumer in the Damodar Valley but no such sale shall except with the permission of the Provincial Government concerned be made to any consumer requiring supply at a pressure of less than 30,000 volts.

(iii) The Corporation may, with the permission of the Provincial Government concerned, extend its transmission system to any area beyound the Damodar Valley and sell electrical energy in such area.

Effect on existing licences.

19. *(1)* Where any licence granted under the Indian Electricity Act, 1910, becomes inoperative wholly or partly by virtue of the provisions of section 18, the licence shall be deemed to have been revoked or modified so as to be consistent with those provisions.

(2) Where a licence is deemed to have been revoked under sub-section *(1)*, the Corporation shall purchase the undertaking of the licensee, and where a licence is modified under that sub-section the Corporation shall, at the option of the licensee, either purchase the undertaking or pay fair compensation to the licensee.

(3) The purchase price or the amount or compensation payable by the Corporation under sub-section *(2)* shall be such as may be agreed to between the Corporation and the licensee or, in the event of disagreement, as may be determined by arbitration.

Charges for supply of electrical energy.

20. The Corporation shall fix the schedule of charges for the supply of electrical energy, including the rates for bulk supply and retail distribution, and specify the manner of recovery of such charges :

Provided that the Corporation may in any contract for bulk supply of electrical energy impose such terms and conditions including a retail rate schedule as it may deem necessary or desirable to encourage the use of electrical energy.

Other activities

Other activities of the Corporation.

21. *(1)* The Corporation may establish, maintain and operate laboratories, experimental and research stations and farms for conducting experiments and research for—

(*a*) utilising the water, electrical energy and other resources in the most economical manner for the development of the Damodar Valley,

(*b*) determining the effect of its operations on the flow conditions in the Hooghly river,

(*c*) making improvements in navigation conditions in the port of Calcutta, and

(*d*) carrying out any other function specified under section 12.

(*2*) The Corporation may set up its own planning, designing, construction and operating agencies, or make arrangements therefore with the participating Governments, local authorities, educational and research institutions or any person carrying on the business of an architect, an engineer or a contractor.

Powers.

General powers of the Corporation.

22. (*1*) The Corporation shall have the power to do anything which may be necessary or expedient for the purposes of carrying out its functions under this Act.

(*2*) Without prejudice to the generality of the foregoing provisions, such power shall include the power—

(*i*) to acquire and hold such movable and immovable property as it may deem necessary and to lease, sell or otherwise transfer any such property;

(*ii*) to construct or cause to be constructed such dams, barrages, reservoirs, power houses, power structures, electrical transmission lines and sub-stations, navigation works, irrigation, navigation and drainage canals and such other works and structures as may be required ;

(*iii*) to prevent pollution of any water under its control and to take all measures to prevent discharges into such water effluents which are harmful to water supply, irrigation, public health or fish life ;

(*iv*) to stock its reservoirs or water courses with fish and to regulate or prohibit taking out fish from the water under its control;

(*v*) to undertake resettlement of the population displaced by the dams, acquisition of land for reservoirs and protection of watersheds;

(*vi*) to aid in the establishment of co-operative societies and other organisations for the better use of facilities made available by the Corporation;

(*vii*) to undertake measures for the prevention of malaria.

Power to close roads and open spaces.

23. (*1*) The Corporation may, after giving notice to the persons concerned or to the public generally,—

(*a*) turn, divert or discontinue the public use of, or permanently close, any road or any part thereof, or

(*b*) discontinue the public use of, or permanently close, any open space or any part thereof.

(*2*) Whenever the Corporation discontinues the public use of, or permanently closes, any road or open space, the Corporation shall pay reasonable compensation to every person—

(*a*) who was entitled, otherwise than as a licensee, to use such road or open space or part thereof as a means of access, or

(*b*) whose immovable property was receiving air and light on account of such open space or part,

and who has suffered damage—

(*i*) in any case falling under clause (*a*) from such discontinuance or closure and

(*ii*) in any case falling under clause (*b*) from the use to which the Corporation has put such open space or part.

(*3*) In determining the compensation payable to any person under sub-section (*2*), the Corporation may take into consideration any benefit accruing to such person from the construction, provision or improvement of any other road, or open space at or about the same time that the road or open space or part thereof, on account of which the compensation is to be paid, is discontinued or closed.

(*4*) When any road or open space or any part thereof, is permanently closed under sub-section (*1*), the Corporation may sell or lease such part of it as is not required for its purposes.

Powers under certain other enactments.

24. (*1*) Notwithstanding anything contained in the Acts specified in column one of Part I of the Schedule, the Corporation may carry out all or any of the functions and exercise all or any of the powers of a Provincial Government in the Damodar Valley under the provisions of such Acts specified in column two thereof against each item of column one.

(*2*) Notwithstanding anything contained in the Acts specified in column one of Part II of the Schedule, any officer authorised by the Corporation may carry out all or any of the functions and exercise all or any of the powers of a Canal Officer collector, or Forest Officer, as the case may be, in the Damodar Valley under the provisions of such Acts specified in column two thereof against each item of column one.

Co-operation and avoidance of submersion

Co-operation with other authorities to minimise inconvenience caused by submersion.

25. The Corporation shall co-operate with the participating Governments, railway authorities and local authorities and bodies, with a view to minimising the

inconvenience likely to be caused by the submersion of roads and communications and shall bear the cost of any realignment thereof or resettlement of any population rendered necessary by such submersion.

Submersion of coal mines to be avoided by the Corporation.

26. The Corporation shall make every endeavour to avoid submersion of coal or mineral deposits and shall cooperate with the coal mining industry and the bodies set up by the participating Government to ensure the maintenance of supplies of sand for stowing purposes in coal mines and in other ways to minimise the inconvenience to the coal mining industry.

PART IV

FINANCE, ACCOUNTS AND AUDIT

Expenditure till the Corporation is established.

27. All expenditure incurred by the Central Government for and in connection with the establishment of the Corporation up to the date of its establishment shall be treated as the capital provided by the Central Government to the Corporation and such capital shall be adjusted between the Participating Governments in accordance with the provisions of sections 30 to 36.

Vesting of property in the Corporation.

28. All property acquired and works constructed for the purposes of the Damodar Valley scheme before the establishment of the Corporation shall vest in the Corporation and all income derived and expenses incurred in this behalf shall be brought into the books of the Corporation.

Fund of the Corporation.

29. *(1)* The Corporation shall have its own fund and all receipts of the Corporation shall be carried thereto and all payments by the Corporation shall be made therefrom.

(2) Except as otherwise directed by the Central Government, all moneys belonging to that fund shall be deposited in the Reserve Bank of India or the Agents of the Reserve Bank of India or invested in such securities as may be approved by the Central Government.

Liabilities of Participating Governments to provide capital to the Corporation.

30. The Participating Governments shall, as hereinafter specified provide the entire capital required by the Corporation for the completion of any project undertaken by it.

Payment by Participating Government on specified date.

31. Each Participating Government shall provide its share of the capital on the dates specified by the Corporation and if any Government fails to provide such share on such dates the Corporation may raise loan to make up the deficit at the costs of the Government concerned.

Expenditure on objects other than irrigation, power and flood control.

32. The Corporation shall have power to spend such sums as it thinks fit on objects authorised under this Act other than irrigation, power and flood control and such sums shall be treated as common expenditure payable out of the Fund of the Corporation before allocation under section 32.

Allocation of expenditure chargeable to project on main objects.

33. The total capital expenditure chargeable to a project shall be allocated between the three main objects, namely, irrigation, power and flood control as follows, namely :—

(1) expenditure solely attributable to any of these objects, including a proportionate share of overhead and general charges, shall be charged to that object, and

(2) expenditure common to two or more of the said objects, including a proportionate share of overhead and general charges, shall be allocated to each of such objects in proportion to the expenditure which, according to the estimate of the Corporation, would have been incurred in constructing a separate structure solely for that object, less any amount determined under clause *(1)* in respect of that object.

Capital allocated to irrigation.

34. The total amount of capital allocated to irrigation shall be shared between the Provincial Governments as follows namely :—

(1) the Government concerned shall be responsible for the capital cost of the works constructed exclusively for irrigation in its Province ; and

(2) the balance of capital cost under irrigation for both the Provinces of Bihar and West Bengal shall be shared by the Provincial Governments in the proportion to their guaranteed annual off-takes of water for agricultural purposes :

Provided that the divisible capital cost under this clause shall be provisionally shared between them in accordance with their previously declared intentions regarding their respective guaranteed off-takes and any payments made accordingly shall be adjusted after the determination of the guaranteed off-takes.

Capital allocated to power.

35. The total amount of capital allocated to power shall be shared equally between the three Participating Governments.

Capital allocated to flood control.

36. The total amount of capital up to fourteen crores of rupees allocated to flood control

shall be shared equally between the Central Government and the Government of West Bengal and any amount in excess thereof shall be the liability of the Government of West Bengal.

Disposal of profits and deficits.

37. *(1)* Subject to the provisions of sub-section (2) of section 40, the net profit, if any, attributable to each of the three main objects, namely, irrigation, power and flood control, shall be credited to the Participating Governments in proportion to their respective shares in the total capital cost attributed to that object.

(2) The net deficit, if any, in respect of any of the objects shall be made good by the Governments concerned in the proportion specified in sub-section (1) :

Provided that the net deficit in respect of flood control shall be made good entirely by the Government of West Bengal and the Central Government shall have no share in such deficit.

Payment of interest.

38. The Corporation shall pay interest on the amount of capital provided by each Participating Government at such rate as may, from time to time, be fixed by the Central Government and such interest shall be deemed to be part of the expenditure of the Corporation.

Interest, charges and other expenses to be added to and receipts taken for reduction of capital costs.

39. For a period, not exceeding fifteen years, from the establishment of the Corporation, if the Corporation runs in deficit, the interest charges and all other expenditure shall be added to the capital cost and all receipts shall be taken in reduction of such capital cost.

Provision for depreciation and reserve and other funds.

40. *(1)* The Corporation shall make provision for depreciation and for reserve and other funds at such rates and on such terms as may be specified by the Auditor General of India in consultation with the Central Government.

(2) The net profit for the purposes of section 37 shall be determined after such provision has been made.

Corporation's share in betterment levy by Provincial Governments.

41. In the event of any betterment levy being imposed by a Provincial Government, the proportionate proceeds thereof in so far as they are attributable to the operations of the Corporation shall be credited to the Corporation.

Borrowing of money.

42. The Corporation may, with the approval of the Central Government, borrow money in the open market or otherwise for the purposes of carrying out its functions under this Act.

Liability to pay Central taxes.

43. *(1)* The Corporation shall be liable to pay any taxes on income levied by the Central Government in the same manner and to the same extent as a company.

(2) The Provincial Governments shall not be entitled to any refund of any such taxes paid by the Corporation.

Budget.

44. *(1)* The Corporation, in consultation with the financial adviser, shall in October each year prepare in such form as may be prescribed a budget for the next financial year showing the estimated receipts and expenditure and the amounts which would be required from each of the three Participating Governments during that financial year.

(2) Printed copies of the budget shall be made available to each of the three Participating Governments by the 15th day of November each year.

(3) The budget shall be laid before the Central and the Provincial Legislatures concerned as soon as may be after it is prepared.

Annual Report.

45. *(1)* The Corporation shall prepare, in such form as may be prescribed, an annual report within six months after the end of each financial year giving a true and faithful account of its activities during the previous financial year, with particular reference to—

(i) irrigation ;
(ii) water supply ;
(iii) electrical energy :
(iv) flood control ;
(v) navigation ;
(vi) afforestation ;
(vii) soil erosion ;
(viii) use of lands ;
(ix) resettlement of displaced population ;
(x) sanitation and public health measures; and
(xi) economic and social welfare of the people.

(2) The annual report shall also give a true and faithful account of the income and expenditure during the previous financial year, the net amounts attributable to each of the three main objects and the distribution of the capital cost between the three Participating Governments and show the progressive totals from the inception of the Corporation and the up-to-date financial results.

(3) The payments provisionally made by each of the three Participating Governments on the basis of the budget estimates shall be adjusted as soon as possible in accordance with the allocation made in the annual report.

(4) Printed copies of the annual report shall be made available to each of the three Participating Governments by the 15th day of October each year.

(5) The annual report shall be laid before the Central and the Provincial Legislatures concerned as soon as may be after it is prepared.

Other annual financial statements.

46. (1) The Corporation shall also prepare such other annual financial statements in such form and by such dates as may be prescribed.

(2) Printed copies of each such annual financial statement shall be made available to each of the three Participating Governments by such date as may be prescribed.

Accounts and Audit.

47. The accounts of the Corporation shall be maintained and audited in such manner as may, in consultation with the Auditor General of India, be prescribed.

PART V

MISCELLANEOUS

Directions by the Central Government.

48. (1) In discharge of its functions the Corporation shall be guided by such instructions on questions of policy as may be given to it by the Central Government.

(2) If any dispute arises between the Central Government and the Corporation as to whether a question is or is not a question of policy, the decision of the Central Government shall be final.

Disputes between the Corporation and Governments.

49. (1) Save as otherwise expressly provided in this Act, any dispute between the Corporation and any Participating Government regarding any matter covered by this Act or touching or arising out of it shall be referred to an arbitrator who shall be appointed by the Chief Justice of India.

(2) The decision of the arbitrator shall be final and binding on the parties.

Compulsory acquisition of land for the Corporation.

50. Any land required by the Corporation for carrying out its functions under this Act shall be deemed to be needed for a public purpose and such land shall be acquired for the Corporation as if the provisions of Part VII of the Land Acquisition Act, 1894 were applicable to it and the Corporation were a company within the meaning of clause (e) of section 3 of the said Act.

Control of Central Government.

51. (1) The Central Government may remove from the Corporation any member who in its opinion —

(a) refuses to act,

(b) has become incapable of acting,

(c) has so abused his position as a member as to render his continuance on the Corporation detrimental to the interest of the public, or

(d) is otherwise unsuitable to continue as member.

(2) The Central Government may suspend any member pending an enquiry against him.

(3) No order of removal under this section shall be made unless the member concerned has been given an opportunity to submit his explanation to the Central Government, and when such order is passed the seat of the member removed shall be declared vacant and another member may be appointed under section 4 to fill up the vacancy.

(4) A member who has been removed shall not be eligible for reappointment as member or in any other capacity to the Corporation.

(5) The Central Government may declare void any transaction in connection with which a member has been removed under sub-section (1).

(6) If the Corporation fails to carry out its functions, or follow the directions issued by the Central Government under this Act, the Central Government shall have the power to remove the Chairman and the members of the Corporation and appoint a Chairman and members in their places.

Application of certain provisions of the Indian Forest Act, 1927, to the forests of the Corporation.

52 All acts prohibited in respect of a reserved forest under section 27 of the Indian Forest Act, 1927, shall be deemed to be prohibited in respect of any forest owned by or under the supervision or control of the Corporation and all offences in respect of such forest shall be punishable under the said Act as if they were committed in respect of a reserved forest.

Penalty.

53. Whoever contravenes the provisions of sections 17 and 18 of this Act or any rule made thereunder shall be punished with imprisonment for a term which may extend to six months or with fine or with both.

Procedure for prosecution.

54. No Court shall take cognisance of an offence under this Act except on the complaint of an officer of the Corporation authorised by it in this behalf.

Power of entry.

55 Any officer or servant of the Corporation generally or specially authorised by the Corporation may at all reasonable times enter upon any land or premises and there do such things as may be reasonably necessary for the purpose of lawfully carrying out any of its works or of making any survey, examination or investigation preliminary or

incidental to the exercise of powers or the performance of functions by the Corporation under this Act.

Members, officers and servants of the Corporation, to be public servants.

56. All members, officers and servants of the Corporation, whether appointed by the Central Government or the Corporation, shall be deemed, when acting or purporting to act in pursuance of any of the provisions of this Act, to be public servants within the meaning of section 21 of the Indian Penal Code.

Protection of action taken under the Act.

57. *(1)* No suit, prosecution, or legal proceeding shall lie against any person in the employment of the Corporation for anything which is in good faith done or purported to be done under this Act.

(2) Save as otherwise provided in the Act no suit or other legal proceeding shall lie against the Corporation for any damage caused or likely to be caused by anything in good faith done or purported to be done under this Act.

Effect of other laws.

58. The provisions of this Act or any rule made thereunder shall have effect notwithstanding anything contained in any enactment other than this Act or any instrument having effect by virtue of any enactment other than this Act.

Power to make rules.

59 The Central Government may, by notification in the official Gazette, make rules[a] to provide for all or any of the following matters, namely:—

(1) the salaries and allowances and conditions of service of members, the secretary and the financial adviser;

(2) the functions and duties of the financial adviser;

(3) the dams or other works or the installations which may be constructed without the approval of the Corporation;

(4) the forms of the budget, the annual report and the annual financial statements and the date by which copies of the annual financial statements shall be made available to the Participating Governments;

(5) the manner in which the accounts of the Corporation shall be maintained and audited;

(6) the appointment of an Advisory Committee; and

(7) the punishment for breach of any rule made under this Act.

[a] For rules made under this section, *See* Gazette of India, 1948, Part I, page 482.

Power to make regulations.

60. *(1)* The Corporation may, with the previous sanction of the Central Government, by notification in the *Gazette of India*, make regulations for carrying out its functions under this Act.

(2) In particular and without prejudice to the generality of the foregoing power, in such regulation the Corporation may make provision for—

(a) making of appointments and promotions of its officers and servants;

(b) specifying other conditions of service of its officers and servants;

(c) specifying the manner in which water rates and charges for electrical energy shall be recovered;

(d) preventing the pollution of water under its control;

(e) regulating the taking out of fish from the water under its control;

(f) regulating its proceedings and business;

(g) prescribing punishment for breach of any regulation.

(3) All regulations made under sub-sections *(1)* and *(2)* shall, as soon as possible, be published also in the official Gazettes of the Provincial Governments.

THE SCHEDULE

(*See* section 24)

PART I

Acts	Provisions of the Acts specified in column (1)
(1)	(2)
1. The Canals Act, 1864 (Ben. Act V of 1864)	Section 6 (Power of Provincial Government to fix and alter rates of tolls). Section 8 (Power of Provincial Government to appoint persons to collect tolls who may farm collection).
2. The Indian Forest Act, 1927 (XVI of 1927)	Section 35 (Protection of forests for special purposes). Section 36 (Power to assume management of forests).

PART II

Acts	Provisions of the Acts specified in column (1)
(1)	(2)
1. The Bengal Irrigation Act, 1876 (Ben. Act III of 1876).	Part III (Power of the maintenance of canals). Section 41 of Part IV (Power of Canal Officer to issue notice to person causing obstruction). Section 42 of Part IV (Power of Canal Officer to cause obstructions to be removed).
2. The Bengal Embankment Act, 1882 (Ben. Act II of 1882).	Part II (Powers of Collector and procedure thereon). Part III (Powers of Collector in cases of imminent danger to life or property).
3. Indian Forest Act, 1927 (XVI of 1927).	Section 36 (Power to assume management of forests).

[THE] DENTISTS ACT, 1948
(ACT XVI OF 1948)

STATEMENT OF OBJECTS AND REASONS.

"Except in Bengal, where there is a Provincial Dental Council eetablished under a Provincial Act, there is no legal provision for the regulation of the education and training of dental practitioners or for the registration of qualified persons. There is also no restriction on the practice of dentistry by person without scientific training. It is well known that the practice of dentistry by untrained or inadequately trained persons may constitute a danger to the patient. It is accordingly proposed to constitute an Indian Dental Council, which will be empowered to lay down minimum standards of training, and Provincial Councils, which will maintain registers of persons entitled to practice dentistry. The Indian Dental Council will also be authorised to enter into agreements with corresponding authorities in other countries for the reciprocal recognition of qualifications.

For the purposes of the preparation of the first register persons holding certain specified qualifications and persons who do not hold such qualifications but have practised dentistry for a minimum period of two years will be entitled to registration. Thereafter entry to the profession will be restricted to persons who have undergone a minimum standard of training.

As the Indian Dental Council will have the responsibility of laying down standards of education and training, only dentists who have undergone such training and possess recognised qualifications will be entitled to be elected to the Council.

In order that simple dental aid may be made available to the people on as wide a basis as possible, provision is made for the registration of dental hygienists who will be entitled to carry out simple extractions and perform minor dental work. Registered medical practitioners will be entitled to practise dentistry.

The existing Bengal Dental Council will perform the functions of a Provincial Dental Council under this Act and persons registered under the Bengal Dental Act will be entitled to registration without payment of registration fee.

In view of the provisions of section 119 of the Government of India Act, 1935, persons who are not British subjects of Indian domicile and who are residents in British India and hold specified dental qualifications, will be admitted to the first register but thereafter such persons will be entitled to registration only if their qualifications have been recognised by the Indian Dental Council in pursuance of a reciprocity agreement. The Indian Dental Council will be debarred from entering into a reciprocity agreement unless by the law and practice of the foreign country Indians are permitted to enter and practise dentistry in that country."

—Gazette of India, 1947, Part V, page 425.

THE DENTISTS ACT, 1948
(ACT XVI OF 1948)[a]

[29th March, 1948.]

An Act to regulate the profession of dentistry

WHEREAS it is expedient to make provision for the regulation of the profession of dentistry and for that purpose to constitute Dental Councils;

It is hereby enacted as follows:—

[a] For Select Committee Report, *see* Gazette of India, 1948, Part V, page 90.

This Act is made applicable to—

(a) the Chota Nagpur Division and the Sontal Parganas District — *See* Bihar Gazette, 1948, Part II, page 1005;

(b) all the partially excluded areas in C. P. and Berar subject to certain modifications—*See* C. P. & Berar Gazette, 1948, Part I, page 548.

CHAPTER I

INTRODUCTORY

Short title and extent.

1. *(1)* This Act may be called the Dentists Act 1948.

(2) It extends to all the Provinces of India.

Interpretation.

2. In this Act, unless there is anything repugnant in the subject or context,—

(a) "the Council" means the Dental Council of India constituted under section 3;

(b) "dental hygienist" means a person not being a dentist or a medical practitioner, who scales, cleans or polishes teeth, or gives instruction in dental hygiene;

(c) "dental mechanic" means a person who makes or repairs dentures and dental appliances;

(d) "dentistry" includes—

(i) the performance of any operation on, and the treatment of any disease, deficiency or lesion of, human teeth or jaws, and the performance of radiographic work in connection with human teeth or jaws or the oral cavity;

(ii) the giving of any anaesthetic in connection with any such operation or treatment ;

(iii) the mechanical construction or the renewal of artificial dentures or restorative dental appliances;

(iv) the performance of any operation on or, the giving of any treatment, advice or attendance to, any person preparatory to or for the purpose of, or in connection with, the fitting, inserting, fixing, constructing, repairing or renewing, of artificial dentures or restorative dental appliances, and the performance of any such operation and the giving of any such treatment, advice or attendance, as is usually performed or given by dentists;

(e) "dentist" means a person who practises dentistry;

(f) "medical practitioner" means a person who holds a qualification granted by an authority specified or notified under section 3 of the Indian Medical Degrees Act, 1916, or specified in the Schedules to the Indian Medical Council Act, 1933, or who practises any system of medicine and is registered or is entitled to be registered in any provincial medical register by whatever name called ;

(g) "prescribed" means prescribed by rules or regulations made under this Act;

(h) "Provincial Council" means a Provincial Dental Council constituted under section 21, and includes a Joint Provincial Council constituted in accordance with an agreement under section 22;

(i) "register" means a register maintained under this Act ;

(j) "recognised dental qualification" means any qualification for the time being included in the Schedule or recognised by the Council under section 10;

(k) "recognised dental hygiene qualification" means a qualification recognised by the Council under section 11;

(l) "registered dentist," "registered dental hygienist" and "registered dental mechanic" shall mean, respectively, a person whose name is for the time being registered in a register of dentists, a register of dental hygienists and a register of dental mechanics.

CHAPTER II

DENTAL COUNCIL OF INDIA

Constitution and composition of Council.

3. The Central Government shall as soon as may be, constitute a Council consisting of the following members, namely:—

(a) one registered dentist possessing a recognised dental qualification elected by the dentists registered in Part A of each Provincial register ;

(b) one member elected from amongst themselves by the members of the Medical Council of India ;

(c) not more than four members elected from among themselves, by the heads of dental colleges in the Provinces of India which grant recognised dental qualifications ;

(d) one member from each University in the Provinces of India which grants a dental qualification, to be elected by the members of the Senate of the University, or in case the University has no Senate, by the members of the Court, from amongst the members of the Medical Faculty of the University ;

(e) one member to represent each Governor's Province nominated by each such Provincial Government from persons registered either in a medical register or in a dental register of the Province ;

(f) six members nominated by the Central Government, of whom at least one shall be a registered dentist possessing a recognised dental qualification and practising or holding an appointment in an institution for the training of dentists in a Chief Commissioner's Province, and at least two shall be dentists registered in Part B of a Provincial register :

Provided that pending the preparation of registers the Provincial Governments may nominate to the first Council members referred to in parts *(a)* and *(e)* and the Central Government members referred to in part *(f)* out of persons who are eligible for registration in the respective registers and such persons shall hold office for such period as the Provincial or Central Government may, by notification in the official Gazette, specify.

Incorporation of Council.

4. The Council shall be a body corporate by the name of the Dental Council of India, having perpetual succession and a common seal, with

power to acquire and hold property both movable and immovable, and shall by the said name sue and be sued.

Mode of elections.

5. Elections under this Chapter shall be conducted in the prescribed manner, and where any dispute arises regarding any such election, it shall be referred to the Central Government whose decision shall be final.

Term of office and casual vacancies.

6. *(1)* Subject to the provisions of this section, an elected or nominated member shall hold office for a term of five years from the date of his election or nomination or until his successor has been duly elected or nominated, whichever is longer.

(2) An elected or nominated member may at any time resign his membership by writing under his hand addressed to the President, and the seat of such member shall thereupon become vacant.

(3) An elected or nominated member shall be deemed to have vacated his seat if he is absent without excuse, sufficient in the opinion of the Council, from three consecutive ordinary meetings of the Council or, in the case of a member whose name is required to be included in a Provincial register, if his name is removed from such register, or if he has been elected under clause *(c)* of section 3, if he ceases to hold his appointment as head of a college, or if he has been elected under clause *(b)* or *(d)* of section 3, if he ceases to be a member of the Medical Council of India or the Medical Faculty of the University, as the case may be.

(4) A casual vacancy in the Council shall be filled by fresh election or nomination, as the case may be, and the person elected or nominated to fill the vacancy shall hold office only for the remainder of the term for which the member whose place he takes was elected or nominated.

(5) Members of the Council shall be eligible for re-election or re-nomination.

(6) No act done by the Council shall be called in question on the ground merely of the existence of any vacancy in, or defect in the constitution of, the Council.

President and Vice-President of Council.

7. *(1)* The President and Vice-President of the Council shall be elected by the members thereof from among themselves:

Provided that on the first constitution of the Council and until the President is elected, a member of the Council nominated by the Central Government in this behalf shall discharge the functions of the President:

Provided further that for five years from the first constitution of the Council, the President shall, if the Central Government so decides, be a person nominated by the Central Government who shall hold office during the pleasure of the Central Government, and where he is not already a member, shall be a member of the Council in addition to the members referred to in section 3.

(2) An elected President or Vice-President shall hold office as such for a term not exceeding five years and not extending beyond the expiry of his term as member of the Council, but subject to his being a member of the Council, he shall be eligible for re-election.

Staff, remuneration and allowances.

8. *(1)* The Council shall—

(a) appoint a Secretary who may also, if so decided by the Council, act as Treasurer;

(b) appoint such other officers and servants as the Council deems necessary to enable it to carry out its functions under this Act;

(c) require and take from the Secretary or from any other officer or servant such security for the due performance of his duties as the Council considers necessary; and

(d) with the previous sanction of the Central Government, fix the fees and allowances of the President, Vice-President and other members of the Council, and the pay and allowances and other conditions of service of officers and servants of the Council.

(2) Notwithstanding anything contained in clause *(a)* of sub-section *(1)*, for the first four years from the first constitution of the Council, the Secretary of the Council shall be a person appointed by the Central Government, who shall hold office during the pleasure of the Central Government.

The Executive Committee.

9. *(1)* The Council shall constitute from among its members an Executive Committee, and may so constitute other Committees for such general or special purposes as the Council considers necessary for carrying out its functions under this Act.

(2) The Executive Committee shall consist of the President and Vice-President *ex officio*, and five other members elected by the Council.

(3) The President and Vice President of the Council shall be Chairman and Vice-Chairman, respectively, of the Executive Committee.

(4) A member of the Executive Committee shall hold office as such until the expiry of his term of office as member of the Council but, subject to his being a member of the Council, he shall be eligible for re-election.

(5) In addition to the powers and duties conferred and imposed on it by this Act, the Executive Committee shall exercise and dis-

charge such powers and duties as may be prescribed.

Recognition of qualifications.

10. *(1)* For the purposes of this Act, the qualifications included in Part I of the Schedule shall be recognised dental qualifications but shall not entitle persons other than British subjects of Indian domicile to registration unless by the law and practice of the State or country to which such persons belong, persons of Indian origin holding dental qualifications registrable in that State or country are permitted to enter and practise the profession of dentistry in such State or country.

(2) Any authority in a Province of India which grants a qualification in dentistry not included in Part I of the Schedule may apply to the Council to have such qualification recognised, and the Council may, after such inquiry, if any, as it thinks fit, and after consulting the Government and the Provincial Council of the Province in which the authority making the application is situated, declare that such qualification, or such qualification only when granted after a specified date shall be a recognised dental qualification.

(3) The qualifications included in Part II of the Schedule shall be recognised dental qualifications but shall not entitle persons other than British subjects of Indian domicile to registration unless they have been declared to be recognised dental qualifications in accordance with the provisions of sub-section *(5)*.

(4) The qualifications included in Part III of the Schedule shall be recognised dental qualifications only for the purpose of the registration of British subjects of Indian domicile when the register is first prepared under this Act.

(5) The Council may enter into negotiations with any authority in any State or country outside the Province of India which by the law of such State or country is entrusted with the maintenance of a register of dentists, for the settling of a scheme of reciprocity for the recognition of qualifications, and in pursuance of any such scheme the Council may declare that a qualification granted by any authority in any such State or country, or such qualification, only when granted after a specified date, shall be a recognized dental qualification for the purposes of this Act :

Provided that no declaration shall be made under this sub-section in respect of any qualification unless by the law and practice of the State or country in which the qualification is granted, persons of Indian origin holding dental qualifications registrable in that State or country are permitted to enter and practise the profession of dentistry in that State or country.

Qualifications of dental hygienists.

11. Any authority in a Province of India which grants a qualification for dental hygienists may apply to the Council to have such qualification recognised, and the Council may, after such inquiry, if any, as it thinks fit, and after consulting the Government and the Provincial Council of the Province in which the authority making the application is situated, declare that such qualification, or such qualification only when granted after a specified date, shall be a recognised dental hygiene qualification for the purposes of this Act.

Qualifications of dental mechanics.

12. The Council may prescribe the period and nature of an apprenticeship or training which shall be undergone and the other conditions which shall be satisfied by a person before he is entitled to be registered under this Act as a dental mechanic.

Effect of recognition.

13. Notwithstanding anything contained in any other law, but subject to the provisions of this Act,

(a) any recognised dental or dental hygiene qualification shall be a sufficient qualification for enrolment in the appropriate register of any Province ;

(b) no person shall, after the first registers are compiled under this Act, be entitled to be enrolled in any register as a dentist or dental hygienist unless he holds a recognised dental or dental hygiene qualification or as a dental mechanic unless he has undergone training which satisfies the prescribed requirements referred to in section 12.

Power to require information as to courses of study and training and examinations.

14. Every authority in a Province of India which grants any recognised dental or dental hygiene qualification shall furnish such information as the Council may from time to time require as to the courses of study and training and examinations to be undergone in order to obtain such qualification, as to the ages at which such courses of study and examinations are required to be undergone, and generally as to the requisites for obtaining such qualification.

Inspections.

15. *(1)* The Executive Committee may appoint such number of Inspectors as it deems necessary to attend at any examinations held by authorities in the Provinces of India which grant recognised dental or dental hygiene qualifications and to inspect any institution recognised as a training institution.

(2) Inspectors appointed under this section shall not interfere with the course of any examination but they shall report to the Executive

Committee on the sufficiency of every examination at which they attend and of the courses of study and training at every institution which they inspect, and on any other matters with regard to which the Executive Committee may require them to report.

(3) The Executive Committee shall forward a copy of such report to the authority or institution concerned and shall also forward copies with remarks, if any, of the authority or institution concerned thereon to the Central Government and to the Government of the Province in which the authority or institution is situated.

Withdrawal of recognition.

16. (1) When upon report by the Executive Committee it appears to the Council—

(a) that the courses of study and training or the examinations to be undergone in order to obtain a recognised dental or dental hygiene qualification from any authority in a Province of India, or the conditions for admission to such courses or the standards of proficiency required from the candidates at such examinations are not in conformity with regulations made under this Act or fall short of the standards required thereby, or

(b) that an institution does not satisfy the requirements of the Council,

the Council may send to the Government of the Province in which the authority or institution is situated a statement to such effect, and the Provincial Government shall forward it, along with such remarks as it may think fit, to the authority or institution concerned with an intimation of the period within which the authority or institution may submit its explanation to the Provincial Government.

(2) On receipt of the explanation or where no explanation is submitted within the period fixed; then on the expiry of the period the Provincial Government shall after consulting the Provincial Council forward its recommendations and those of the Provincial Council, if any, to the Council.

(3) The Council, after considering the recommendations of the Provincial Government and the Provincial Council and after such further inquiry, if any, as it may think fit to make, may declare that the qualification granted by the authority or institution shall be a recognised dental or dental hygiene qualification only when granted before a specified date.

(4) The Council may declare that any recognised dental or dental hygiene qualification granted outside the provinces of India shall be recognised as such only if granted before a specified date.

Mode of declarations.

17. All declarations under section 10, section 11, or section 16 shall be made by a resolution passed at a meeting of the Council and shall forthwith be published in the official Gazette.

The Indian Register.

18. (1) The Council shall maintain a register of dentists to be known as the Indian Dentists Register and consisting of the entries in all the Provincial registers of dentists.

(2) Each Provincial Council shall supply to the Council twenty printed copies of the Provincial register as soon as may be after the 1st day of April of each year, and each Registrar shall inform the Council without delay of all additions to and other amendments in the Provincial register.

Information to be furnished.

19. (1) The Council shall furnish copies of its minutes and of the minutes of the Executive Committee and an annual report of its activities together with an abstract of its accounts to the Central Government.

(2) The Central Government may publish in such manner as it thinks fit any report, copy or abstract furnished to it under this section.

Power to make regulations.

20. (1) The Council may, with the approval of the Central Government, make regulations not inconsistent with the provisions of this Act to carry out the purposes of this Chapter.

(2) In particular and without prejudice to the generality of the foregoing power such regulations may—

(a) provide for the managment of the property of the Council and the maintenance and audit of its accounts;

(b) prescribe the manner in which elections under this Chapter shall be conducted;

(c) provide for the summoning and holding of meetings of the Council and the Executive Committee, the times and places at which such meetings shall be held, the conduct of business thereat and the number of members necessary to constitute a quorum;

(d) prescribe the functions of the Executive Committee;

(e) prescribe the powers and duties of the President and Vice-President;

(f) prescribe the tenure of office and the powers and duties of the Secretary, Inspectors and other officers and servants of the Council.

(g) prescribe the standard curricula for the training of dentists and dental hygienists, and the conditions for admission to courses of such training:

(h) prescribe the standards of examinations and other requirements to be satisfied to secure for qualifications recognition under this Act:

(i) any other matter which is to be or may be prescribed under this Act:

Provided that regulations under clauses *(g)* and *(h)* shall be made after consultation with Provincial Governments.

(3) To enable the Council to be first constituted, the Central Government may make regulations for the conduct of the elections to the Council, and any regulation so made may be altered or rescinded by the Council in exercise of its powers under this section.

CHAPTER III

PROVINCIAL DENTAL COUNCILS

Constitution and composition of Provincial Councils.

21. Except where a Joint Provincial Council is constituted in accordance with an agreement made under section 22, the Provincial Government shall constitute a Provincial Council consisting of the following members, namely:—

(a) four members elected from among themselves by dentists registered in Part A of the Provincial register ;

(b) four members elected from among themselves by dentists registered in Part B of the Provincial register ;

(c) the heads of dental colleges in the Province which grant recognised dental qualifications, *ex officio* ;

(d) one member elected from amongst themselves by the members of the Medical Council or the Council of Medical Registration of the Province, as the case may be ; and

(e) three members nominated by the Provincial Government :

Provided that in the Province of West Bengal the Board established under the Bengal Dentists Act, 1939, shall be deemed to be the Provincial Council constituted under this Act.

Inter-Provincial agreements.

22. *(1)* Two or more Provincial Governments may enter into an agreement to be in force for such period and to be subject to renewal for such further periods, if any, as may be specified in the agreement, to provide—

(a) for the constitution of a Joint Provincial Council for all the participating Provinces, or

(b) for the Provincial Council of one Province to serve the needs of the other participating Provinces.

(2) In addition to such matters as are in this Act specified, an agreement under this section may—

(a) provide for the apportionment between the participating Provinces of the expenditure in connection with the Provincial Council or Joint Provincial Council ;

(b) determine which of the participating Provincial Governments shall exercise the several functions of the Provincial Governments under this Act, and the references in this Act to the Provincial Government shall be construed accordingly ;

(c) provide for consultation between the participating Provincial Governments either generally or with reference to particular matters arising under this Act;

(d) make such incidental and ancillary provisions, not inconsistent with this Act, as may be deemed necessary or expedient for giving effect to the agreement.

(3) An agreement under this section shall be published in the official Gazettes of the participating Provinces.

Composition of Joint Provincial Councils.

23. A Joint Provincial Council shall consist of the following members, namely :—

(a) two members elected from among themselves by dentists registered in Part A of the register of each of the participating Provinces ;

(b) two members elected from among themselves by dentists registered in Part B of the register of each of the participating Provinces ;

(c) the heads of dental colleges in all the participating Provinces which grant recognised dental qualifications, *ex officio* ;

(d) one member elected by the Medical Council or the Council of Medical Registration, of each participating Province, as the case may be ;

(e) two members nominated by each participating Provincial Government.

Incorporation of Provincial Councils.

24. Every Provincial Council shall be a body corporate by such name as may be notified by the Provincial Government in the official Gazette or in the case of a Joint Provincial Council, as may be determined in the agreement, having perpetual succession and a common seal with power to acquire and hold property, both movable and immovable, and shall by the said name sue and be sued.

President and Vice-President of Provincial Council.

25. *(1)* The President and Vice-President of the Provincial Council shall be elected by the members from among themselves:

Provided that for five years from the first constitution of the Provincial Council, the President shall, if the Provincial Government so decides, be a person nominated by the Provin-

cial Government who shall hold office during the pleasure of the Provincial Government, and where he is not already a member, shall be a member of the Provincial Council in addition to the members referred to in section 21 or 23, as the case may be.

(2) The President or Vice-President shall hold office as such for a term not exceeding five years and not extending beyond the expiry of his term as a member of the Provincial Council, but subject to his being a member of the Provincial Council, he shall be eligible for re-election.

Mode of elections.

26. Elections under this Chapter shall be conducted in the prescribed manner, and where any dispute arises regarding any such election, it shall be referred to the Provincial Government whose decision shall be final.

Term of office and casual vacancies.

27. *(1)* Subject to the provisions of this section, an elected or nominated member shall hold office for a term of five years from the date of his election or nomination or until his successor has been duly elected or nominated, whichever is longer.

(2) An elected or nominated member may at any time resign his membership by writing under his hand addressed to the President, and the seat of such member shall thereupon become vacant.

(3) An elected or nominated member shall be deemed to have vacated his seat—

(a) if he is absent without excuse, sufficient in the opinion of the Provincial Council, from three consecutive ordinary meetings of the Provincial Council, or

(b) in the case of a member whose name is required to be included in any Provincial register, if his name is removed from the register, or

(c) where he has been elected under clause *(d)* of section 21 or under clause *(d)* of section 23, if he ceases to be a member of the Medical Council or the Council of Medical Registration of the Province, as the case may be.

(4) A casual vacancy in the Provincial Council shall be filled by fresh election or nomination, as the case may be, and the person elected or nominated to fill the vacancy shall hold office only for the remainder of the term for which the member whose place he takes was elected or nominated.

(5) Members of the Provincial Council shall be eligible for re-election or re-nomination.

(6) No act done by the Provincial Council shall be called in question on the ground merely of the existence of any vacancy in or defect in the constitution of, the Provincial Council.

Staff, remuneration and allowances.

28. *(1)* The Provincial Council may, with the previous sanction of the Provincial Government,—

(a) appoint a Registrar, who shall also act as Secretary and if so decided by the Provincial Council also as its Treasurer;

(b) appoint such other officers and servants as may be required to enable the Provincial Council to carry out its functions under this Act,

(c) require and take from the Registrar or from any other officer or servant such security for the due performance of his duties as the Provincial Council considers necessary ;

(d) fix the salaries and allowances and other conditions of service of the Registrar and other officers and servants of the Provincial Council.

(e) fix the rate of allowances payable to members of the Provincial Council.

(2) Notwithstanding anything contained in clause *(a)* of sub-section *(1)*, for the first four years from the first constitution of the Provincial Council, the Registrar of the Provincial Council shall be a person appointed by the Provincial Government, who shall hold office during the pleasure of the Provincial Government.

Executive Committee.

29. *(1)* The Provincial Council shall constitute from among its members an Executive Committee consisting of the President and Vice-President *ex officio*, and such number of other members elected by the Provincial Council as may be prescribed.

(2) The President and Vice-President of the Provincial Council shall be Chairman and Vice-Chairman, respectively, of the Executive Committee.

(3) A member of the Executive Committee shall hold office as such until the expiry of his term of office as member of the Provincial Council, but subject to his being a member of the Provincial Council, he shall be eligible for re-election.

(4) The Executive Committee shall exercise and discharge such powers and duties as may be prescribed.

Information to be furnished.

30. *(1)* The Provincial Council shall furnish such reports, copies of its minutes and of the minutes of the Executive Committee, and abstracts of its accounts to the Provincial Government as the Provincial Government may from time to time require and shall forward copies of all material so furnished to the Provincial Government to the Council.

(2) The Provincial Government may publish in such manner as it thinks fit any report, copy or abstract furnished to it under this section.

CHAPTER IV
REGISTRATION

Preparation and maintenance of register.

31. *(1)* The Provincial Government shall as soon as may be cause to be prepared in the manner hereinafter provided a register of dentists for the Province.

(2) The Provincial Council shall upon its constitution assume the duty of maintaining the register in accordance with the provision of this Act.

(3) The register of dentists shall be maintained in two Parts, A and B, persons possessing recognised dental qualifications being registered in Part A and persons not possessing such qualifications being registered in Part B.

(4) The register shall include the following particulars, namely :—

(a) the full name, nationality and residential address of the registered person ;

(b) the date of his first admission to the register ;

(c) his qualification for registration, and the date on which he obtained his degree or diploma in dentistry, if any, and the authority which conferred it :

(d) his professional address ; and

(e) such further particulars as may be prescribed.

First preparation of register.

32. *(1)* For the purpose of first preparing the register of dentists, the Provincial Government shall, by notification in the official Gazette, constitute a Registration Tribunal consisting of three persons and shall also appoint a Registrar who shall act as Secretary of the Tribunal.

(2) The Provincial Government shall, by the same or a like notification, appoint a date on or before which application for registration, which shall be accompanied by the prescribed fee, shall be made to the Registration Tribunal.

(3) The Registration Tribunal shall examine every application received on or before the appointed date, and if it is satisfied that the applicant is qualified for registration under section 33, shall direct the entry of the name of the applicant on the register.

(4) The register so prepared shall thereafter be published in such manner as the Provincial Government may direct, and any person aggrieved by a decision of the Registration Tribunal expressed or implied in the register as so published may, within thirty days from the date of such publication, appeal to an authority appointed by the Provincial Government in this behalf by notification in the official Gazette.

(5) The Registrar shall amend the register in accordance with the decisions of the authority appointed under sub-section *(4)* and shall thereupon issue to every person whose name is entered on the register a certificate of registration in the prescribed form.

(6) Upon the constitution of the Provincial Council, the register shall be given into its custody, and the Provincial Government may direct that all or any specified part of the application fees for registration in the first register shall be paid to the credit of the Provincial Council.

Qualifications for entry on first preparation of register.

33. *(1)* A person shall be entitled on payment of the prescribed fee to have his name entered on the register when it is first prepared, if he resides or carries on the profession of dentistry in the Province and if he—

(a) holds a recognised dental qualification, or

(b) does not hold such a qualification but, being a British subject of Indian domicile, has been engaged in practice as a dentist as his principal means of livelihood for a period of not less than five years prior to the commencement of this Act :

Provided that no person other than a British subject of Indian domicile shall be entitled to registration by virtue of a qualification—

(a) specified in Part I of the Schedule unless by the law and practice of the State or country to which such person belongs persons of Indian origin holding dental qualifications registrable in that State or country are permitted to enter and practise the profession of dentistry in such State or country, or

(b) specified in Part II of the Schedule unless the Council has, in pursuance of a scheme or reciprocity, declared that qualification to be a recognised dental qualification :

Provided further that a person shall be entitled to registration by virtue of a qualification specified in Part III of the Schedule only if he is a British subject of Indian domicile :

Provided further that for the purposes of the first preparation of the register of dentists under this Act in the Province of West Bengal a person shall be entitled to have his name entered in the appropriate Part of the register, if he is registered on the register of dental practitioners maintained under the Bengal Dentists Act, 1939 (Bengal Act XII of 1939), and no registration fee shall be payable by such person if he had been registered on or before 31st December, 1947.

(2) A person domiciled in a Province of India shall be entitled on payment of the prescribed fee to temporary registration as a dentist for a period of five years, if he has been engaged in practice as a dentist as his principal means of

livelihood for a period of not less than two years during the five years prior to the date of the commencement of this Act, and a person so registered shall be entitled to permanent registration if within a period of five years after that date he passes an examination which satisfies the requirements of the Council.

Qualification for subsequent registration.

34. After the date appointed under sub-section *(2)* of section 32 a person shall, on payment of the prescribed fee, be entitled to have his name entered on the register of dentists, if he resides or carries on the profession of dentistry in the Province and if he—

(i) holds a recognised dental qualification, or

(ii) does not hold such a qualification but, being a British subject of Indian domicile, has been engaged in practice as a dentist as his principal means of livelihood for a period of not less than two years before the commencement of this Act and has passed, within a period of five years after the commencement of this Act, an examination recognised for this purpose by the Council:

Provided that no person other than a British subject of Indian domicile shall be entitled to registration by virtue of a qualification—

(a) specified in Part I of the Schedule unless by the law and practice of the State or country to which such person belongs persons of Indian origin holding dental qualifications registrable in that State or country are permitted to enter and practise the profession of dentistry in such State or country, or

(b) specified in Part II of the Schedule unless the Council has, in pursuance of a scheme of reciprocity, declared that qualification to be a recognized dental qualification:

Provided further that a person registered in Part B of the register shall be entitled to be registered in Part A thereof, if within a period of five years he passes an examination recognised for the purpose by the Council.

Scrutiny of applications for registration.

35. *(1)* After the date appointed for the receipt of applications for registration in the first register of denists, all applications for registration shall be addressed to the Registrar of the Provincial Council and shall be accompanied by the prescribed fee.

(2) If upon such application the Registrar is of opinion that the applicant is entitled to have his name entered on the register, he shall enter thereon the name of the applicant:

Provided that no person, whose name has under the provisions of this Act been removed from the register of any Province, shall be entitled to have his name entered on the register except with the approval of the Provincial Council from whose register his name was removed.

(3) Any person whose application for registration is rejected by the Registrar may, within three months from the date of such rejection, appeal to the Provincial Council, and the decision of the Provincial Council thereon shall be final.

(4) Upon entry in the register of a name under this section, the Registrar shall issue a certificate of registration in the prescribed form.

Register of dental hygienists and dental mechanics.

36 *(1)* The Provincial Government may by notification in the official Gazette direct that the Provincial Council shall maintain a register of dental hygienists or a register of dental mechanics.

(2) The provisions of section 35 shall, so far as they may be made applicable, apply in respect of applications for registration in a register referred to in this section.

Qualification for registration as a dental hygienist.

37. A person shall be entitled on payment of the prescribed fee to have his name registered on the register of dental hygienists, if he resides in the Province and holds a recognised dental hygiene qualification:

Provided that for the purposes of the first register of dental hygienists, a person shall be entitled to be registered, if he has been engaged as a dental hygienist as his principal means of livelihood for a period of not less than two years prior to the date of notification under sub-section *(1)* of section 36.

Qualification for registration as a dental mechanic.

38. A person shall be entitled on payment of the prescribed fee to have his name entered in the register of dental mechanics, if he satisfies the prescribed requirements referred to in section 12:

Provided that for the purposes of the preparation of the first register of dental mechanics, a person shall be entitled to be registered, if he has been engaged as a dental mechanic as his principal means of livelihood for a period of not less than two years prior to the date of notification under sub-section *(1)* of section 36.

Renewal fees.

39. *(1)* The Provincial Government may, by notification in the official Gazette, direct that for the retention of a name in a register after the 31st day of December of the year following the year in which the name is first entered in the register, there shall be paid annually to the Provincial Council such renewal fee as may be prescribed in respect of each register, and where such direction has been made, such renewal fee shall be due to be paid before

the 1st day of April of the year to which it relates.

(2) Where a renewal fee is not paid before the due date, the Registrar shall remove the name of the defaulter from the register :

Provided that a name so removed may be restored to the register on payment in such manner as may be prescribed.

(3) On payment of the renewal fee, the Registrar shall in the prescribed manner endorse the certificate of registration accordingly.

Entry of additional qualifications.

40. A registered dentist shall on payment of the prescribed fee be entitled to have entered in the register any further recognised qualification which he may obtain.

Removal from register.

41. *(1)* Subject to the provisions of this section, the Provincial Council may order that the name of any person shall be removed from any register where it is satisfied, after giving that person a reasonable opportunity of being heard and after such further inquiry, if any, as it may think fit to make,—

(i) that his name has been entered in the register by error or on account of misrepresentation or suppression of a material fact, or

(ii) that he has been convicted of any offence or has been guilty of any infamous conduct in any professional respect, which in the opinion of the Provincial Council renders him unfit to be kept in the register.

(2) An order under sub-section *(1)* may direct that any person whose name is ordered to be removed from a register shall be ineligible for registration in the Province under this Act either permanently or for such period of years as may be specified.

(3) An order under sub-section *(1)* shall not take effect until the expiry of three months from the date thereof.

(4) A person aggrieved by an order under sub-section *(1)* may, within thirty days from the date thereof, appeal to the Provincial Government, and the order of the Provincial Government upon such appeal shall be final.

(5) A person whose name has been removed from the register under this section or under sub-section *(2)* of section 39 shall forthwith surrender his certificate of registration to the Registrar, and the name so removed shall be published in the official Gazette.

Restoration to register.

42. The Provincial Council may at any time for reasons appearing to it sufficient and subject to the approval of the Provincial Government, order that upon payment of the prescribed fee the name of a person removed from a register shall be restored thereto.

Bar of jurisdiction.

43. No order refusing to enter a name in a register or removing a name from a register shall be called in question in any Court.

Issue of duplicate certificates.

44. Where it is shown to the satisfaction of the Registrar that a certificate of registration has been lost or destroyed, the Registrar may, on payment of the prescribed fee, issue a duplicate certificate in the prescribed form.

Printing of registers.

45. As soon as may be after the 1st day of April in each year, the Registrar shall cause to be printed copies of the registers as they stood on the said date and such copies shall be made available to persons applying therefor on payment of the prescribed charge and shall be evidence that on the said date the persons whose names are entered therein were registered dentists, registered dental hygienists or registered dental mechanics, as the case may be.

Effect of registration.

46. *(1)* Any reference in any other law to a person recognised by law as a dentist shall be deemed to be a reference to a dentist registered under this Act.

(2) No certificate required by or under any other law from a dentist shall be valid unless the person signing it is registered as a dentist under this Act.

(3) After the expiry of two years from the commencement of this Act, a person who is not registered in Part A of the Provincial register of dentists shall not, except with the sanction of the Provincial Government, hold any appointment as dentist in any dispensary, hospital or other institution in the Province which is supported wholly or partially from public or local funds :

Provided that the provisions of this sub-section shall not apply to any such person who is holding such an appointment at the commencement of this Act.

(4) After the expiry of two years from the publication of a register of dental hygienists in a Province no person whose name is not entered in that register shall hold appointment as dental hygienist in any dispensary, hospital or other institution in the Province which is supported wholly or partially from public or local funds:

(5) Any person who is a registered dentist, registered dental hygienist or registered dental mechanic in a Province may practise as such in any other Province.

CHAPTER V

MISCELLANEOUS

Penalty for falsely claiming to be registered.

47. If any person whose name is not for the time being entered in a register falsely represents it is so entered, or uses in connection with his name or title any words or letters reasonably calculated to suggest that his name is so entered, he shall be punishable on first conviction with fine which may extend to five hundred rupees, and on any subsequent conviction with imprisonment which may extend to six months or with fine not exceeding one thousand rupees or with both.

Misuse of titles.

48. If any person,—

(a) not being a person registered in a register of dentists, takes or uses the description of dental practitioner, dental surgeon, surgeon dentist, or dentist, or

(b) not being a person whose name is entered on a register of dental hygienists, takes or uses in a Province where such register has been published, the title of dental hygienist, or

(c) not being a person whose name is entered on register of dental mechanics, takes or uses in a Province where such register has been published, the title of dental mechanic,

he shall be punishable on first conviction with fine which may extend to five hundred rupees, and on any subsequent conviction with imprisonment which may extend to six months or with fine not exceeding one thousand rupees or with both.

Practice by unregistered persons.

49. *(1)* After the expiry of two years from the commencement of this Act in the case of dentists, and in the Provinces where a register of dental hygienists or dental mechanics has been prepared under section 26 from such date as may be specified in this behalf by the Provincial Government by notification in the official Gazette, in the case of dental hygienists or dental mechanics, no person, other than a registered dentist, registered dental hygienist or registered dental mechanic, shall practise dentistry or the art of scaling, cleaning or polishing teeth, or of making or repairing dentures and dental appliances, as the case may be, or indicate in any way that he is prepared to so practise :

Provided that the provisions of this section shall not apply to —

(a) practice of dentistry by a registered medical practitioner ;

(b) the extraction of a tooth by any person when the case is urgent and no registered dentist is available, so however that the operation is performed without the use of any general or local anaesthetic ;

(c) the performance of dental work or radiographic work in any hospital or dispensary maintained or supported from public or local funds

(2) If any person contravenes the provisions of sub-section *(1)*, he shall be punishable on first conviction with fine which may extend to five hundred rupees and on any subsequent conviction with imprisonment which may extend to six months or with fine not exceeding one thousand rupees or with both.

Failure to surrender certificate of registration.

50. If any person whose name has been removed from a register fails without sufficient cause forthwith to surrender his certificate of registration, he shall be punishable with fine which may extend to fifty rupees per month of such failure and in the case of a continuing offence with an additional fine which may extend to two rupees per day after the first day during which the offence continues.

Companies not to engage in dentistry.

51. *(1)* Except as hereinafter provided, the profession of dentistry shall not be carried on by a company or other corporate body.

(2) The provisions of sub-section *(1)* shall not apply to—

(a) a company or other corporate body which carries on no business other than the profession of dentistry or some business ancillary to the profession of dentistry and of which the majority of the directors and all the operating staff are registered dentists ;

(b) the carrying on of the profession of dentistry by employers who provide dental treatment for their employees by registered dentists otherwise than for profit ;

(c) the carrying on of the profession of dentistry by any hospital or dispensary or institution for the training of dentists or dental hygienists or by any local authority or other body authorised or required by law to provide dental treatment :

Provided that any company or other corporate body carrying on the profession of dentistry at the date of the commencement of this Act may continue so to do until the expiry of three years from such date.

(3) If any person contravenes the provisions of sub section *(1)*, he shall be punishable with fine which may extend, on first conviction to five hundred rupees or on any subsequent conviction with imprisonment which may extend to six months or with fine not exceeding one thousand rupees or with both.

52. No Court shall take cognizance of any offence punishable under this Act except upon complaint made by order of the Provincial Government or the Provincial Council.

Cognizance of offences.

53. The Provincial Council shall before the end of June in each year pay to the Council a sum equivalent to one-fourth of the total fees realised by the Provincial Council under this Act during the period of twelve months ending on the 31st day of March of that year.

Payment of part of fees to Council.

54. *(1)* Whenever it appears to the Central Government that the Council is not complying with any of the provisions of this Act, the Central Government may appoint a Commission of Enquiry consisting of three persons, two of whom shall be appointed by the Central Government, one being the Judge of a High Court, and one by the Council; and refer to it the matters on which the enquiry is to be made.

Appointment of Commission of Enquiry.

(2) The Commission shall proceed to enquire in a summary manner and report to the Central Government on the matters referred to it together with such remedies, if any, as the Commission may like to recommend.

(3) The Central Government may accept the report or remit the same to the Commission for modification or reconsideration.

(4) After the report is finally accepted, the Central Government may order the Council to adopt the remedies so recommended within such time as may be specified in the order and if the Council fails to comply within the time so specified, the Central Government may pass such order or take such action as may be necessary to give effect to the recommendations of the Commission.

(5) Whenever it appears to the Provincial Government that the Provincial Council is not complying with any of the provisions of this Act, the Provincial Government may likewise appoint a similar Commission of Enquiry in respect of the Provincial Council to make enquiry in like manner and pass such order or take such action as specified in sub-sections *(3)* and *(4)*.

55. *(1)* The Provincial Government may, by notification in the official Gazette make rules to carry out the purposes of Chapters III, IV and V.

Power to make rules.

(2) In particular and without prejudice to the generality of the foregoing power, such rules may provide for—

(a) the management of the property of the Provincial Council, and the maintenance and audit of its accounts;

(b) the manner in which elections under Chapter III shall be conducted;

(c) the summoning and holding of meetings of the Provincial Council, the times and places at which such meetings shall be held, the conduct of business thereat and the number of members necessary to form a quorum;

(d) the powers and duties of the President and Vice-President of the Provincial Council;

(e) the constitution and functions of the Executive Committee, the summoning and holding of meetings thereof, the times and places at which such meetings shall be held, the number of members necessary to constitute a quorum;

(f) the term of office and the powers and duties of the Registrar and other officers and servants of the Provincial Council, including the amount and nature of the security to be given by the Treasurer;

(g) the particulars to be stated, and the proof of qualifications to be given in applications for registration under this Act;

(h) the fees payable for registration and the charge for supplying copies of the registers;

(i) the form of certificates of registration and the manner of endorsement or renewal thereof;

(j) any other matter which is to be or may be prescribed under Chapters III, IV and V, except sub-sections *(1)*, *(2)*, *(3)* and *(4)* of section 54.

THE SCHEDULE

(See section 10)

RECOGNISED DENTAL QUALIFICATIONS

Part I

Degrees or diplomas in dentistry issued by any of the following authorities :—

(1) Board of Examiners, Calcutta Dental College and Hospital, if granted before the first day of January 1940.

(2) State Medical Faculty, Bengal, Calcutta, if granted after the 31st day of December 1939.

(3) The University of Bombay.

(4) The College of Physicians and Surgeons, Bombay.

(5) The Nair Hospital Dental Board, Bombay.

Part II

Degrees or diplomas in dentistry issued by the following authorities :—

(1) The Punjab University.

(2) The Punjab State Medical Faculty, Lahore.

(3) The Board of Examiners, College of Dentistry, Karachi, if granted before the 31st day of December 1943.

(4) The Royal College of Surgeons, England.

(5) The Royal College of Surgeons, Edinburgh.

(6) The Royal Faculty of Physicians and Surgeons of Glasgow.

(7) The Royal College of Surgeons, Ireland.

(8) The Universities of Durham, London, Manchester, Birmingham, Liverpool, Leeds, Sheffield, Bristol, St. Andrews and Belfast, and the National University of Ireland.

(9) Atlanta Southern Dental College, Atlanta, Georgia.
(10) College of Dentistry, University of Illinois, Chicago, Illinois
(11) College of Dental Surgery, Loyola University, Chicago, Illinois.
(12) North Western University Dental College, Chicago, Illinois.
(13) School of Dentistry, Indiana University, Indianapolis, Indiana.
(14) College of Dentistry, University of Iowa City, Iowa
(15) Dental School, Harvard, University of Boston, Massachusetts
(16) College of Dentistry, University of Nebraska, Omaha, Nebraska
(17) School of Dental and Oral Surgery, Columbia University, New York City.
(18) University of Pennsylvania, Thomas Evans Dental Institute, School of Dentistry, Philadelphia, Pennsylvania.
(19) Texas State Dental College, Houston Texas.
(20) University of Minnesota, Minnesota
(21) University of St Louis, Missouri.
(22) University of Michigan, Michigan.
(23) Tufts College, Boston.
(24) University of Toronto Faculty of Dentistry, Toronto Ontario
(25) Dental College of McGill University, Montreal, Quebec.
(26) Deutsche Zahnaerztliche Universitaets Institut, Bonn
(27) Deutsche Zahnaerztliche Universitaets Institut, Munich.
(28) Ecole Dentaire de Paris, Paris.
(29) Ecole Dentaire Francaise, Paris.
(30) Any other foreign qualification approved in this behalf by the Dental Council of India, or before the said Council is constituted by the Central Government, by notification in the official Gazette.

Part III

The following qualifications :—
(1) Post-graduate certificate of dentistry of the University of Vienna (Z. D. S.).
(2) Any other foreign qualification approved in this behalf by the Central Government by notification in the official Gazette.

[THE] DIPLOMATIC AND CONSULAR OFFICERS (OATHS AND FEES) ACT, 1948 (ACT XLI OF 1948).

STATEMENT OF OBJECTS AND REASONS

"Prior to the passing of the Indian Independence Act, 1947, British diplomatic and consular officers performed notarial duties in respect of Indian nationals abroad and charged fees therefor and for other consular functions for which fees were leviable. They were also authorised to administer oaths. Legal authority for the exercise of these functions existed in the Consular Salaries and Fees Act, 1891, and the Commissioners for Oaths Act, 1889, passed by the English Parliament

On the passing of the Indian Independence Act, 1947, His Majesty's Government in the United Kingdom ceased to have any responsibility in the matter. It has therefore become advisable to provide statutory authority for the fixation, levy and accounting of fees to be charged by Indian diplomatic and consular officers abroad and for the administration of oaths and the taking of affidavits by them in much the same manner as was done by British diplomatic and consular officers prior to the Indian Independence Act, 1947. Hence the present Bill."

—Gazette of India, 1948, Part V, page 461.

THE DIPLOMATIC AND CONSULAR OFFICERS (OATHS AND FEES) ACT, 1948 (ACT XLI OF 1948).

[3rd September, 1948.]

An Act to provide for the administration of oaths by diplomatic and consular officers and to prescribe the fees leviable in respect of certain of their official duties.

WHEREAS it is expedient to provide for the administration of oaths by diplomatic and consular officers and for the levy of fees in respect of certain official duties performed by them;

It is hereby enacted as follows:—

1. This Act may be called the Diplomatic and Consular Officers (Oaths and Fees) Act, 1948.

Short title.

Definitions.

2. In this Act,—

(a) "consular officer" includes consul-general consul, vice consul, consular agent, pro consul and any other person authorised to perform the duties of consul-general, consul, vice-consul or consular agent;

(b) "diplomatic officer" means any ambassador, envoy, minister, charge d'affaires, or secretary of embassy or legation; and

(c) "prescribed" means prescribed by rules made under this Act.

Powers as to oaths and notarial acts abroad.

3. (1) Every diplomatic or consular officer may, in any foreign country or place where he is exercising his functions, administer any oath and take any affidavit and also do any notarial act which any notary public may do within the Provinces of India; and every oath, affidavit and notarial act administered, sworn or done by or before any such person shall be as effectual as if duly administered, sworn or done by or before any lawful authority in any Province of India.

(2) Any document purporting to have affixed, impressed or subscribed thereon or thereto the seal and signature of any person authorised by

this Act to administer an oath in testimony of any oath, affidavit or act, being administered, taken or done by or before him, shall be admitted in evidence without proof of the seal or signature being the seal or signature of that person, or of the official character of that person.

Punishment for offences under this Act.

4. *(1)* Whoever swears falsely in any oath or affidavit taken or made in accordance with the provisions of this Act shall be punished with imprisonment for a term which may extend to three years and shall also be liable to fine.

(2) Whoever forges or fraudulently alters the seal or signature of any person authorised by or under this Act to administer an oath or tenders in evidence, or otherwise uses, any affidavit having any seal or signature so forged or counterfeited or fraudulently altered knowing the same to be forged, counterfeited or fraudulently altered, shall be punished with imprisonment for a term which may extent to three years and shall also be liable to fine.

Trial of offences.

5. Any offence under this Act may be inquired into, dealt with, tried and punished in any Province of India in which the person charged with the offence was apprehended or is in custody, in the same manner and to the same extent as if the offence had been committed within the Province where he was apprehended or is in custody.

Power to prescribe fees.

6. *(1)* The Central Government may, from time to time, prescribe the fees to be levied in respect of any matter or thing done by a diplomatic or consular officer in the execution of his office.

(2) All such fees shall be levied, accounted for and applied and may be remitted in such manner as may be prescribed.

(3) A diplomatic or consular officer shall not, save as may be provided by any rules made in this behalf, ask for or take any fee or reward for or on account of any act or thing, or service done, performed or rendered by him in the execution of his office.

Publication and issue of tables of fees.

7. *(1)* Tables of the fees which may, for the time being, be levied under the rules shall be published in such manner and copies thereof shall be issued gratuitously to such persons as may be prescribed.

(2) Every consular officer, and every diplomatic officer in any foreign country or place where there is no consular officer, shall keep exhibited in a conspicuous place in his office a copy of the table of fees to be levied under this Act and shall permit the same to be inspected by any person interested therein.

Power to make rules.

8. *(1)* The Central Government may make rules to carry out the purposes of this Act.

(2) In particular and without prejudice to the generality of the foregoing power, such rules may prescribe—

(a) the scale of fees leviable under this Act and the manner in which such fees shall be levied and collected;

(b) the remuneration, if any, payable to a diplomatic or consular officer in the execution of any of the duties vested in him by this Act:

(c) the registers to be kept and the returns to be made in pursuance of this Act; and

(d) the manner in which copies of tables of fees may be published and distributed.

[THE] DISPLACED PERSONS (INSTITUTION OF SUITS) ACT, 1948 (ACT XLVII OF 1948).

STATEMENT OF OBJECTS AND REASONS.

"Under the existing law a suit to recover the money has to be instituted in the Court within whose jurisdiction the defendant resides or the cause of action arises either wholly or in part. This hits hard displaced merchants from Pakistan now residing in India who have money claims against persons in India. These refugees are not in a position to bring suits against their debtors in the Pakistan Court within whose jurisdiction the cause of action may have arisen, nor have they sufficient means and other necessary facilities to go to the places of residence of their debtors in India and bring suits in the appropriate Courts there. This Bill accordingly seeks to make certain special provisions for the institution of suits by displaced persons with a view to giving a certain measure of relief to the refugees concerned."

— Gazette of India, 1948, Part V, page 481.

THE DISPLACED PERSONS (INSTITUTION OF SUITS) ACT, 1948. (ACT XLVII OF 1948)[a]

(4th September, 1948.)

An Act to make certain special provisions for the institution of suits by displaced persons.

WHEREAS it is expedient to make certain special provisions for the institution of suits by displaced persons;

It is hereby enacted as follows:—

a. This Act is made applicable to —

[a] Chota Nagpur Division and Santal Par-

ganas District — *See* Bihar Gazette, 1948, Part II, page 2515;

(b) the partially excluded areas in the Province of Bombay — *See* Bombay Gazette, 1948, Part IV-A, page 488;

(c) the excluded and partially excluded areas in the Province of Madras subject to certain modifications—*See* Fort St. George Gazette, 1948, Part I, page 1047;

(d) Jounsar Bawar Pargana in Dehradun District and to the portion of Mirzapur District which lies to the south of Kaimur range — *See* U. P. Gazette, 1948, Part I, page 848.

Short title and extent.

1. *(1)* This Act may be called the Displaced Persons (Institution of Suits) Act, 1948.

(2) It extends to all the Provinces of India.

Duration.

2. This Act shall remain in force for a period of three years only but upon the expiry of the said period section 6 of the General Clauses Act, 1897, shall apply as if this Act had been then repealed by a Central Act.

Definition.

3. In this Act, "displaced person" means any person who, on account of the setting up of the Dominions of India and Pakistan, or on account of civil disturbances or fear of such disturbances in any area now forming part of Pakistan, has been displaced from, or has left, his place of residence in such area after the 1st day of March, 1947, and who has subsequently been residing in India.

Institution of suits by displaced persons.

4. Notwithstanding anything contained in section 20 of the Code of Civil Procedure, 1908 (V of 1908) or in any other law relating to the local limits of the jurisdiction of Courts or in any agreement to the contrary, a displaced person may institute a suit in a Court within the local limits of whose jurisdiction he or the defendant or any of the defendants, where there are more than one at the time of the commencement of the suit, actually and voluntarily resides, or carries on business, or personally works for gain, if—

(i) the defendant, or where there are more than one, each of the defendants, actually and voluntarily resides or carries on business, or personally works for gain in India and is not a displaced person;

(ii) the cause of action, wholly or in part, arises or has arisen in a place now situate within the territories of Pakistan;

(iii) the Court in which the suit is instituted is otherwise competent to try it; and

(iv) the suit does not relate to immovable property.

Validation of certain pending suits.

5. Any suit instituted by a displaced person after the 15th day of August, 1947, which if this Act had come into force on that day would have been validly instituted in pursuance of section 4 shall, if pending at the commencement of this Act, be deemed to have been validly instituted and be disposed of accordingly.

Explanation.—For the purposes of this section a suit pending at the commencement of this Act includes a suit in respect of which an appeal lies or is pending at the commencement of this Act.

Restoration of certain dismissed suits.

6. Where any suit instituted by a displaced person after the 15th day of August, 1947, and before the commencement of this Act, which if this Act had come into force on that day would have been validly instituted in pursuance of section 4, had been dismissed solely on the ground that it had not been validly instituted, the Court shall, on application made within one month from the commencement of this Act, make an order setting aside the decree and shall proceed with the suit.

Restoration of suit where appeal dismissed.

7. Where in any appeal arising from a suit instituted by a displaced person after the 15th day of August, 1947, and before the commencement of this Act, a decree had been passed dismissing such appeal solely on the ground that the suit had not been validly instituted and the institution of such suit would have been valid if section 4 had come into force on the aforesaid day, the appellate Court shall, on application made to it within one month from the commencement of this Act, make an order setting aside its decree and remand the suit to the Court of first instance for trial.

Extension of period of limitation.

8. Notwithstanding anything contained in section 3 of the Indian Limitation Act, 1908 (IX of 1908), or any special or local law, any suit instituted in pursuance of section 4 of this Act may be admitted after the period of limitation prescribed therefor when the plaintiff satisfies the Court that he was unable to institute the suit within such period owing to causes connected with his being a displaced person.

Repeal of Ordinance XVIII of 1948.

9. *(1)* The Displaced Persons (Institution of Suits) Ordinance, 1948 is hereby repealed.

(2) Notwithstanding such repeal, any suit instituted or any action taken in exercise of any power conferred by or under the said Ordinance shall be deemed to have been instituted or taken in exercise of the powers conferred by or under this Act, as if this Act had commenced on the 21st day of July, 1948.

[THE] DOCK WORKERS (REGULATION OF EMPLOYMENT) ACT, 1948.

(ACT IX OF 1948).

STATEMENT OF OBJECTS AND REASONS.

"The demand for dock labour is intermittent depending on the arrival and departure of vessels, the size and nature of their cargo as well as seasonal and cyclical fluctuations. In the ports, therefore, there is usually labour in excess of minimum requirements and the general tendency on the part of employers is to ensure larger reserves than necessary in order to provide ample margin against emergencies. The main problem connected with dock labour is to devise measures so as to reduce the hardship due to unemployment or underemployment to the utmost extent possible. The Royal Commission on Labour recommended as far back as 1931 that a policy of decasualisation should be adopted with a view 'to regulate the numbers of dock labourers in accordance with requirements and to ensure that the distribution of employment depends not on the caprice of intermediaries, but on a system which as far as possible gives all efficient men an equal share.' Government had accepted the recommendation and efforts were made to induce Port Trusts to formulate necessary schemes of decasualisation. The voluntary attempt was not, however, a success and a scheme for compulsory registration was formulated in 1939 but was not proceeded with due to the outbreak of war.

Although the operation of certain measures introduced during the war, such as rationing and organised distribution of food supplies, facilitated the registration of labour at major ports, the problem, in the main, has remained unsolved. It is now proposed to undertake legislation giving power to the Central Government in respects of major ports and to the Provincial Governments in respect of other ports, to frame a scheme for the registration of dock workers with a view to securing greater regularity of employment and for regulating the employment of dock workers whether registered or not, in a port. In particular, the scheme may provide *inter alia* for the terms and conditions of employment of workers whether registered or not, including rates of remuneration, hours of work and conditions as to paid holidays. It may also provide for payment to registered workers of minimmu pay for days on which work may not be available to them and for their training and welfare.

Provision is also made in the Bill for the constitution of an Advisory Committee consisting of not more than 15 members representing the Government, the dock workers and the employers of dock workers in equal proportion. In the framing and administration of the schemes the appropriate Government will take the advice of the Committee."

—Gazette of India, 1947, Part V, page 432.

[THE] DOCK WORKERS (REGULATION OF EMPLOYMENT) ACT, 1948.

(ACT IX of 1948.)

[4th March, 1948.]

An Act to provide for regulating the employment of dock workers.

WHEREAS it is expedient to provide for regulating the employment of dock workers;

It is hereby enacted as follows:—

Short title and extent.

1. *(1)* This Act may be called the Dock Workers (Regulation of Employment) Act, 1948.

(2) It extends to all the Provinces of India.

Definitions.

2. In this Act, unless there is anythiug repugnant in the subject or context,—

(a) "cargo" includes anything carried or to be carried in a ship or other vessel;

(b) "Dock worker" means a person employed or to be employed in, or in the vicinity of, any port on work in connection with the loading, unloading, movement or storage of cargoes, or work in connection with the preparation of ships or other vessels for the receipt or discharge of cargoes or leaving port;

(c) "employer", in relation to a dock worker, means the person by whom he is employed or to be employed as aforesaid;

(d) "Government" means, in relation to any major port, the Central Government and, in relation to any other port, the Provincial Government;

(e) "scheme" means a scheme made under this Act.

Scheme for ensuring regular employment of workers.

3. *(1)* Provision may be made by a scheme for the registration of dock workers with a view to ensuring greater regularity of employment and for regulating the employment of dock workers, whether registered or not in a port.

(2) In particular, a scheme may provide—

(a) for the application of the scheme to such classes of dock workers and employers as may be specified therein;

(b) for defining the obligations of dock workers and employers subject to the fulfilment of which the scheme may apply to them and the circumstances in which the scheme shall cease to apply to any dock workers or employers;

(c) for regulating the recruitment and entry into the scheme of dock workers, and their registration, including the maintenance of registers, the removal, either temporarily or permanently, of names from the registers and the imposition of fees for registration;

(d) for regulating the employment of dock workers, whether registered or not, and the terms and conditions of such employment, including rates of remuneration, hours of work and conditions as to holidays and pay in respect thereof;

(e) for securing that, in respect of periods during which employment, or full employment, is not available for dock workers to whom the scheme applies and who are available for work, such workers will, subject to the conditions of the scheme, receive a minimum pay;

(f) for prohibiting, restricting or otherwise controlling the employment of dock workers to whom the scheme does not apply and the employment of dock workers by employers to whom the scheme does not apply;

(g) for the training and welfare of dock workers, in so far as satisfactory provision therefor does not exist apart from the scheme;

(h) for health and safety measures in places where dock workers are employed, in so far as satisfactory provision therefor does not exist apart from the scheme.

(i) for the manner in which, and the persons by whom, the cost of operating the scheme is to be defrayed;

(j) for constituting or prescribing the authority to be responsible for the administration of the scheme;

(k) for such incidental and supplementary matters as may be necessary or expedient for the purposes of the scheme.

(3) A scheme may further provide that a contravention of any provision thereof shall be punishable with imprisonment for such term as may be specified but in no case exceeding three months in respect of a first contravention or six months in respect of any subsequent contravention, or with fine which may extend to such amount as may be specified but in no case exceeding five hundred rupees in respect of a first contravention or one thousand rupees in respect of any subsequent contravention, or with both imprisonment and fine as aforesaid.

Making variation and revocation of schemes.

4. *(1)* The Government may, by notification in the official Gazette and subject to the condition of previous publication, make one or more schemes for a port or group of ports, and may in the like manner and subject to the like condition add to, amend, vary or revoke any scheme made by it.

(2) The provisions of section 23 of the General Clauses Act, 1897, shall apply to the exercise of a power given by sub-section *(1)* as they apply to the exercise of a power given by a Central Act to make rules subject to the condition of previous publication.

(3) The Government may direct the port authority of any port to prepare, in accordance with such instructions as may from time to time be given to it, one or more draft schemes for the port, and the port authority shall comply with such direction.

Advisory Committees.

5. *(1)* The Government may, or if it decides to make any scheme under section 4, shall, constitute an Advisory Committee, to advise upon such matters arising out of the administration of this Act or any scheme made thereunder as the Government may refer to it for advice.

(2) The members of the Advisory Committee shall be appointed by the Government, and shall be of such number (not exceeding fifteen) and chosen in such manner as may be prescribed by rules made under sub-section *(5)*:

Provided that the Advisory Committee shall include an equal number of members representing—

(i) the Government,

(ii) the dock workers,

(iii) the employers of dock workers.

(3) The Chairman of the Advisory Committee shall be one of the members appointed to represent the Government, nominated in this behalf by the Government.

(4) The Government shall publish in the official Gazette the names of all members of the Advisory Committee.

(5) The Government may, by notification in the official Gazette, make rules to provide for—

(a) the composition of the Advisory Committee;

(b) the manner in which its members shall be chosen;

(c) the term of office of its members;

(d) the allowances, if any, payable to the members of the Committee;

(e) the manner in which the Committee shall conduct its business, including the number of members to be present at a meeting thereof in order to constitute a quorum.

Inspectors.

6. *(1)* The Government may, by notification in the official Gazette, appoint such persons as it thinks fit to be Inspectors for the purposes of this Act at such ports as may be specified in the notification.

(2) Every Inspector shall be deemed to be a public servant within the meaning of the Indian Penal Code, 1860.

(3) An Inspector may, at any port for which he is appointed,—

(a) enter, with such assistance (if any) as he thinks fit, any premises or vessel where dock workers are employed;

(b) require any authority or person to produce any register, muster-roll or other document relating to the employment of dock workers, and examine such documents;

(c) take on the spot or otherwise the evidence of any person for the purpose of ascertaining whether the provisions of any scheme made for the port are, or have been, complied with.

(4) The Government may, by notification in the official Gazette, prescribe the manner in which and the persons by whom complaints regarding contravention of any provision of a scheme may be made to an Inspector and the duties of the Inspector in relation to such complaints.

Cognizance of offences.

7. *(1)* No Court shall take cognizance of any offence made punishable by a scheme or of any abetment thereof, except on a report in writing of the facts constituting such offence or abetment made by an Inspector or by a person specially authorised in this behalf by the Government.

(2) Notwithstanding anything contained in the Code of Criminal Procedure, 1898, an offence made punishable by a scheme or an abetment thereof shall be triable only by a Presidency Magistrate or a Magistrate of the first class.

[THE] ELECTRICITY (SUPPLY) ACT, 1948.
(ACT LIV OF 1948).

STATEMENT OF OBJECTS AND REASONS.

"The co-ordinated development of electricity in India on a regional basis is a matter of increasingly urgent importance for post-war reconstruction and development. The absence of co-ordinated system, in which generation is concentrated in the most efficient units and bulk supply of energy centralised under the direction and control of one authority is one of the factors that impedes the healthy and economical growth of electrical development in this country. Besides, it is becoming more and more apparent that if the benefits of electricity are to be extended to semi-urban and rural areas in the most efficient and economical manner consistent with the needs of an entire region, the area of development must transcend the geographical limits of a Municipality, a Cantonment Board or a Notified Area Committee, as the case may be. It has, therefore, become necessary that the appropriate Governments should be vested with the necessary legislative powers to link together under one control electrical development in contiguous areas by the establishment of what is generally known as the "Grid System". In the circumstances of this country such a system need not necessarily involve inter-connection throughout the length and breadth of a Province ; regional co-ordination inclusive of some measure of inter-connection may be all that is needed. An essential pre-requisite is, however, the acquisition of necessary legislative power not only to facilitate the establishment of this system in newly licensed areas but also to control the operations of existing licensees so as to secure fully co-ordinated development.

Government feel that it is not possible to legislate for this purpose within the framework of the Indian Electricity Act, 1910, which was conceived for a very different purpose. In their view what is needed is specific legislation; on the broad lines of the Electricity (Supply) Act, 1926, in force in the United Kingdom, which will enable Provincial Governments to set up suitable organizations to work out "Grid Schemes" within the territorial limits of the Provinces. Although executive power under the proposed Bill will necessarily vest in the Provinces two considerations indicate the necessity for Central legislation :

(i) the need for uniformity in the organization and development of the "Grid System", and

(ii) the necessity for the constitution of semi-autonomous bodies like Electricity Boards to administer the "Grid Systems". In the view of Government it is bodies like these which are likely to be the most suitable organizations for working the "Grid Systems" on quasi-commercial lines. Such Boards cannot, however, be set up by Provincial Governments under the existing Constitutional Act as they would be in the nature of trading corporations within the meaning of Entry 33 of the Federal Legislative List. . . ."

—Gazette of India, 1947, Part V, page 514.

THE ELECTRICITY (SUPPLY) ACT, 1948.
(ACT LIV OF 1948)[a]

[10th September, 1948.]

An Act to provide for the rationalisation of the production and supply of electricity, and generally for taking measures conducive to the electrical development of the Provinces of India.

WHEREAS it is expedient to provide for the rationalisation of the production and supply of electricity, for taking measures conducive to the electrical development of the Provinces of India and for all matters incidental thereto ;

It is hereby enacted as follows :—

[a] For Report of the Select Committee, *see* Gazette of India, Part V, page 201.

CHAPTER I
INTRODUCTORY

Short title, extent and commencement.

1. *(1)* This Act may be called the Electricity (Supply) Act, 1948.

(2) It extends to all the Provinces of India.[a]

(3) This section and sections 3, 4, 57, 58 and 77 and the Sixth Schedule and the Table appended to the Seventh Schedule of this Act shall come into force at once.

(4) The remaining provisions of this Act shall come into force in a Province on such date, not later than two years from the coming into force of the sections, Schedule and Table mentioned in sub-section (3), as the Provincial Government may, by notification in the official Gazette, appoint :

Provided that the Central Government may as respects any Province extend the said period of two years and in such event the remaining provisions of the Act shall come into force in that Province on such date, not later than the extended period, as the Provincial Government may, by notification in the official Gazette, appoint.

[a] This Act is made applicable to :
(a) Chota Nagpur Division and Santal Parganas District—*See* Bihar Gazette, 1948, Part II, page 2467 ;
(b) all the partially excluded areas in the C. P. and Berar subject to certain modifications —*See* C. P. and Berar Gazette, 1948, Part I, page 844.

Interpretation.

2. In this Act, unless there is anything repugnant in the subject or context,—

(1) "Authority" means the Central Electricity Authority constituted under section 3;

(2) "Board" means a Provincial Electricity Board constituted under section 5;

(3) "bulk-licensee" means a licensee who is authorised by his licence to supply electricity to other licensees for distribution by them ;

(4) "controlled station" means a generating station designated in a scheme sanctioned under Chapter V as a controlled station ;

(5) "generating station" or "station" means any station for generating electricity, including any building and plant used for that purpose and the site thereof, a site intended to be used for a generating station, and any buildings used for housing the operating staff of a generating station, and where electricity is generated by water-power, includes penstocks, head and tail works, main and regulating reservoirs, dams and other hydraulic works, but does not in any case include any sub-station for transforming, converting or distributing electricity ;

(6) "licensee" means a person licensed under Part II of the Indian Electricity Act, 1910, to supply energy or a person who has obtained sanction under section 28 of that Act to engage in the business of supplying energy but, the provisions of section 26 of this Act notwithstanding, does not include the Board ;

(7) "main transmission lines" means all high pressure cables and overhead lines (not being an essential part of the distribution system of a licensee) transmitting electricity from a generating station to another generating station or to a sub-station, together with any step-up and step-down transformers, switch-gear and other works necessary to and used for the control of such cables or overhead lines, and such buildings or part thereof as may be required to accommodate such transformers, switch-gear and other works and the operating staff thereof;

(8) "maximum demand" means, in respect of any period, twice the largest number of kilowatt hours supplied and taken during any consecutive thirty minutes (calculated from either the commencement or the middle of an hour) in the period;

(9) "prescribed" means prescribed by rules made under section 78;

(10) "regulations" means regulations made by the Board under section 79 ;

(11) "Reserve Bank" means the Reserve Bank of India ;

(12) "transmission lines" means all works mentioned in sub-section *(7)* used wholly or partially for the purposes of distribution;

(13) "year" means, in relation to the Board, the year commencing on the 1st day of April;

(14) "year of account" means, in relation to a licensee, his financial year ;

(15) other expressions have the meanings respectively assigned to them in the Indian Electricity Act, 1910.

CHAPTER II

THE CENTRAL ELECTRICITY AUTHORITY

Constitution of the Central Electricity Authority.

3. *(1)* The Central Government shall constitute a body called the Central Electricity Authority generally to exercise such functions and perform such duties under the Act and in such manner as the Central Government may prescribe or direct, and in particular to—

(i) develop a sound, adequate and uniform national power policy, and particularly to co-ordinate the activities of the planning agencies in relation to the control and utilisation of national power resources;

(ii) act as arbitrators in matters arising between the Provincial Government or the Board and a licensee or other person as provided in this Act;

(iii) carry out investigations and to collect and record the data concerning the generation, distribution and utilisation of power and the development of power resources; and

(iv) make public from time to time information secured under this Act and to provide for the publication of reports and investigations.

(2) The Authority shall consist of not more than six members appointed by the Central Government, of whom at least three shall be full-time members.

(3) The Central Government shall appoint one of the full-time members to be the Chairman of the Authority.

(4) All the members of the Authority shall hold office during the pleasure of the Central Government.

(5) No full-time member of the Authority shall be directly or indirectly concerned or interested in or have any share or interest in any company or other body corporate or an association of persons (whether incorporated or not), or a firm engaged in the business of supplying electrical energy or fuel, solid or liquid, for the generation of electricity.

(6) The Authority may appoint a Secretary and such other officers and servants as it considers necessary for the performance of its functions under this Act on such terms as to salary, remuneration, fee, allowance, pension, leave and gratuity, as the Authority may, in consultation with the Central Government, fix:

Provided that the appointment of the Secretary shall be subject to the approval of the Central Government.

(7) The Authority may act by two of its members in all matters.

Power to require accounts, statistics and returns.

4. It shall be the duty of each Provincial Electricity Board, Provincial Government Electricity Department or other licensee or person supplying electricity for public or private purposes, or generating electricity for its or his own use, to furnish to the Authority such accounts, statistics and returns relating to the generation, supply and use of electricity as it may require and at such times and in such form and manner as it may direct.

CHAPTER III

PROVINCIAL ELECTRICITY BOARDS

Constitution and composition of Provincial Electricity Boards.

5. *(1)* The Provincial Government shall as soon as may be after the issue of the notification under sub section *(4)* of section 1, constitute by notification in the official Gazette a Provincial Electricity Board under such name as shall be specified in the notification.

(2) The Board shall consist of not less than three and not more than seven members appointed by the Provincial Government.

(3) All members of the Board shall be full-time members.

(4) Of the members, one shall be a person of proved administrative ability and commercial experience; one shall be an electrical engineer with wide experience; and one shall be an accountant with experience of the electricity supply industry or other public utility.

(5) One of the members possessing any of the qualifications specified in sub-section *(4)* shall be appointed by the Provincial Government to be the Chairman of the Board.

(6) A person shall be disqualified from being appointed or being a member of the Board if he is, or within the twelve months last preceding was, a member of the Central or of any Provincial Legislature or any local authority.

(7) No act done by the Board shall be called in question on the ground only of the existence of any vacancy in, or any defect in the constitution of the Board.

Inter-provincial agreement to extend Board's jurisdiction to another Province.

6. *(1)* Subject to the provisions of this section, the Government of any Province may, after it has issued a notification under sub-section *(4)* of section 1, in lieu of constituting a Board under section 5 enter into an agreement with the Government of a contiguous Province to provide that the Board constituted for the latter Province shall exercise the functions of a Board under this Act in the former Province.

(2) Subject to such modifications (being of a character not affecting the general operation of the agreement) of the terms of the agreement as may from time to time be agreed upon by the Provincial Governments concerned, an agreement entered into under this section shall be for a period of not less than twenty-five years but may be determined earlier by mutual consent.

(3) An agreement under this section may—

(a) make such financial arrangements between the participating Provincial Governments as may be necessary for the purposes of the agreement;

(b) provide for consultation between the participating Provincial Governments either generally or with reference to particular matters arising under this Act;

(c) generally make such incidental, supplementary or ancillary provisions, not inconsistent with this Act, as may be deemed necessary or expedient for giving effect to the agreement.

Effect of inter-provincial agreement.

7. Where an agreement is entered into under section 6, the participating Provincial Governments shall, by notification in the official Gazettes, declare a date on which the agreement shall come into force, and on and after that date—

(a) the Board constituted for the one Province shall have all the powers and duties of a Board under this Act in respect of both Provinces as if they constituted a single Province;

(b) references in this Act to the Province shall, unless the subject or context otherwise requires, be construed as references to both Provinces, and in particular the references in section 61 to the Provincial Legislature shall be

construed as references to the Legislatures of both Provinces;

(c) the provisions of section 60 in relation to the assumption by the Board of the rights and liabilities of the Provincial Government arising before the first constitution of the Board shall apply to the assumption by the Board of the rights and liabilities of the Government of the Province to which the exercise of its functions under this Act is extended under the agreement, as if in that section for the words "before the first constitution of the Board" there were substituted the words and figure "before the date on which the agreement under section 6 came into force."

Term of office of members of the Board.

8. *(1)* Subject to the provisions of this Act, the Chairman and the members of the Board shall hold office for five years:

Provided that on the first constitution of the Board, the Chairman shall hold office for seven years and one of the members shall be appointed to hold office for three years only.

(2) Members shall be eligible for reappointment.

Members not to hold interest in certain concerns.

9. *(1)* A member of the Board shall, prior to his appointment, give to the Provincial Government intimation of, and shall before taking charge of his office, sell or divest himself of, any interest which he may have for his own benefit whether in his own name or otherwise, in any firm or company carrying on the business of supplying electricity or any fuel for the generation of electricity, or of the manufacture, sale or hire of machinery, plant, equipment apparatus or fittings for the generation, transmission, distribution or use of electricity, or any interest in the managing agency or shares or securities of any such company; and it shall not be lawful for a member of the Board, so long as he holds office, to acquire or purchase any such interest in any such firm or company and if he, under any will or by succession or gift becomes entitled for his own benefit to any such interest, he shall sell the same within three months after becoming so entitled thereto; and he shall also within three months, sever any connection he may have and cease to have any interest, direct or indirect, in any such concern.

(2) Nothing contained in sub-section *(1)* shall prevent a member from acquiring or holding any share or interest in any firm or company other than a firm or company mentioned in sub-section *(1)*:

Provided that if the Board has entered into, or is about to enter into, any contract or agreement with any such firm or company in which a member holds any share or interest, he shall disclose the fact and nature of such interest and he shall not be entitled to vote on any decision of the Board relating to such contract or agreement.

(3) A disclosure referred to in the proviso to sub-section *(2)* shall forthwith be recorded in the minutes of the Board and communicated to the Provincial Government and the Provincial Government may thereupon give such directions as it may deem proper.

Removal or suspension of members.

10. The Provincial Government may suspend from office for such period as it thinks fit or remove from office any member of the Board who—

(a) is found to be a lunatic or becomes of unsound mind; or

(b) is adjudged insolvent; or

(c) fails to comply with the provisions of section 9; or

(d) becomes or seeks to become a member of the Central or any Provincial Legislature or any local authority; or

(e) in the opinion of the Provincial Government has failed or is unable to carry out his duties so as to render his suspension or removal, as the case may be, necessary; or

(f) is convicted of an offence involving moral turpitude.

Temporary absence of members.

11. If the Chairman or any other member of the Board is by infirmity or otherwise rendered temporarily incapable of carrying out his duties or is absent on leave or otherwise in circumstances not involving the vacation of his appointment, the Provincial Government may appoint another person to officiate for him and carry out his functions under this Act or any rule or regulation made thereunder.

Incorporation of Board.

12. The Board shall be a body corporate by the name notified under sub-section *(1)* of section 5, having perpetual succession and a common seal, with power to acquire and hold property both movable and immovable, and shall by the said name sue and be sued.

Authentication of orders and other instruments of the Board.

13. All orders and decisions of the Board shall be authenticated by the singature of the Chairman or any other member authorised by the Board in this behalf, and all other instruments issued by the Board shall be authenticated by the signature of such member or officer of the Board as may in like manner be authorised in this behalf.

Meetings of the Board.

14. *(1)* The Board shall hold ordinary meetings at such intervals as may be provided in the re-

gulations; and a meeting may be convened by the Chairman at any other time for the transaction of urgent business.

(2) The number of members necessary to constitute a quorum at a meeting shall be such as may be provided in the regulations.

Appointment of staff.

15. The Board may appoint a Secretary and such other officers and servants as may be required to enable the Board to carry out its functions under this Act.

Provincial Electricity Council.

16. *(1)* The Provincial Government shall constitute a Provincial Electricity Council for the Province, and in cases to which sections 6 and 7 apply, the Provincial Governments concerned shall constitute such one or more Provincial Electricity Council or Councils and for such areas as they may by agreement determine.

(2) The Provincial Electricity Council shall consist of the members of the Board and such other persons being not less than seven and not more than fifteen as the Provincial Government or the Provincial Governments concerned may appoint after consultation with such representa tives or bodies representative of the following interests as the Provincial Government or the Provincial Governments concerned thinks or think fit, that is to say, local self-government, electricity supply industry, commerce, industry, transport, agriculture and labour employed in the electricity supply industry, but so that there shall be at least one member representing each such interest in the Council.

(3) The Chairman of the Board shall be *ex officio* Chairman of the Provincial Electricity Council.

(4) The Provincial Electricity Council shall meet at least once in every three months.

(5) The functions of the Provincial Electricity Council shall be as follows:—

(i) to advise the Board on major questions of policy and major schemes;

(ii) to review the progress and the work of the Board from time to time;

(iii) to consider such other matters as the Board may place before it; and

(iv) to consider such matters as the Provincial Government may by rules prescribe.

(6) The Board shall place before the Provincial Electricity Council the annual financial statement and supplementary statement, if any, before submitting such statement to the Provincial Government under section 61 together with copies of the report and proceedings.

Local Advisory Committee.

17. *(1)* The Provincial Government may from time to time constitute for such areas as it may determine Local Advisory Committees, consisting of such number of persons as it may think fit in each case and on such terms and conditions as may be prescribed.

(2) The Board may if it thinks fit consult the Local Advisory Committees concerned on any business coming before it, and shall so do in respect of such business as the Povincial Government may by general or special order in this behalf specify or when required by the regulations so to do.

(3) The Chairman of the Board or such other member of the Board as he may nominate in this behalf shall be *ex officio* Chairman of a Local Advisory Committee.

(4) Local Advisory Committees shall meet at such intervals as may be prescribed, and for the transaction of urgent business on such other occasions as the Chairman of the Board may require.

(5) The number of members necessary to constitute a quorum at a meeting of a Local Advisory Committee shall be such as the Provincial Government when constituting the Committee may specify.

CHAPTER IV

POWERS AND DUTIES OF PROVINCIAL ELECTRICITY BOARDS

General duties of the Board.

18. Subject to the provisions of this Act, the Board shall be charged with the general duty of promoting the co-ordinated development of the generation, supply and distribution of electricity within the Province in the most efficient and economical manner with particular reference to such development in areas not for the time being served or adequately served by any licensee, and without prejudice to the generality of the foregoing provisions it shall be the duty of the Board —

(a) to prepare and carry out schemes sanctioned under Chapter V;

(b) to supply electricity to owners of controlled stations and to licensees whose stations are closed down under this Act;

(c) to supply electricity as soon as practicable to any other licensees or persons requiring such supply and whom the Board may be competent under this Act so to supply.

Powers of the Board to supply electricity.

19. *(1)* The Board may, subject to the provisions of this Act, supply electricity to any licensee or person requiring such supply in any area in which a scheme sanctioned under Chapter V is in force:

Provided that the Board shall not—

(a) supply electricity for any purpose directly to any licensee for use in any part of the area

of supply of a bulk-licensee without the consent of the bulk-licensee unless the licensee to be supplied has an absolute right of veto on any right of the bulk-licensee to supply electricity for such purpose in the said part of such area, or unless the bulk-licensee is unable or unwilling to supply electricity for such purpose in the said part of such area on reasonable terms and conditions and within a reasonable time; or

(b) supply electricity for any purpose to any person, not being a licensee, for use in any part of the area of supply of a licensee without the consent of the licensee, unless—

(i) the actual effective capacity of the licensee's generating station computed in accordance with paragraph IX of the First Schedule at the time when such supply was required was less than twice the maximum demand asked for by any such person; or

(ii) the maximum demand of the licensee, being a distributing licensee and taking a supply of energy in bulk is, at the time of the request, less than twice the maximum demand asked for by any such person; or

(iii) the licensee is unable or unwilling to supply electricity for such purpose in the said part of such area on reasonable terms and conditions and within a reasonable time.

(2) After the Board has declared its intention to supply electricity for any purpose in any area, for which purpose and in which area it is under this section competent to supply electricity, no licensee shall, the provisions of his licence notwithstanding, at any time be entitled without the consent of the Board to supply electricity for that purpose in that area.

(3) For the purposes of sub-section *(1)* "absolute right of veto" means an unqualified right vested in a licensee by virtue of any law, licence or other instrument whereby a bulk-licensee is prevented from supplying electricity in any specified area without the consent of the licensee in whom the right of veto vests.

(4) If any question arises under sub-section (1) as to the reasonableness of the the terms or conditions or time therein mentioned, it shall be determined as provided in section 76.

Power to Board to engage in certain undertakings.

20. *(1)* The Board may, in accordance with any regulations made in this behalf, manufacture, purchase, sell or let on hire on the execution of a hire-purchase agreement or otherwise, any electric machinery, control-gear, fittings, wires or apparatus for lighting heating, cooling, or motive power or for any other purpose for which electricity can or may be used, or any industrial or agricultural machinery operated by electricity, and may install, connect, repair, maintain or remove such fittings, wires, apparatus, machinery or control-gear and in respect thereof demand and take such remuneration or rents and charges and make such terms and conditions as it deems fit.

(2) The Board may maintain shops and showrooms for the display, sale or hire of fittings, wires, apparatus and machinery as aforesaid, conduct displays, exhibitions and demonstrations thereof, and generally do all things, including advertising, incidental to the sale and hire of such fittings, wires, apparatus and machinery and to the promotion and encouragement of the use of electricity.

(3) The Board shall show separately in its accounts moneys received and expended by it in connection with any undertakings in which it engages under this section.

Powers of Board in relation to water-power.

21. The Board may, with the previous approval of the Provincial Government, take such measures as in the opinion of the Board are calculated to advance the development of water-power in the Province, and may organise and carry out power and hydrometric survey work and cause to be made such maps, plans, sections and estimates as are necessary for any of the said purposes :

Provided that where any such measures relate to a source of water power already operated upon by a licensee under a licence, the Board shall give the licensee notice of such measure and an opportunity to be heard on any representations he may desire to make in that behalf and may consider such representation.

Power to Board to conduct investigations.

22. Subject so far as the provisions of this section relate to water-power to the previous approval of the Provincial Government, the Board may at its own expense conduct such investigations, experiments and trials as it thinks fit for the improvement of the methods of transmission, distribution and supply of electricity or of the utilisation of fuel, water-power or other means of generating electricity, and may establish and maintain laboratories for the testing and standardisation of electrical instruments and equipment.

Loans by Board to licensees.

23. *(1)* Subject to any regulations made in this behalf, the Board may grant loans or advances to any licensee for the purposes of his undertaking on such terms as the Board thinks proper.

(2) The Board in the discharge of its functions may call upon a licensee to expand his undertaking and offer to advance to him a loan on such terms and conditions as it may deem proper for such expansion, and if the licensee

refuses, fails or neglects to accept the loan from the Board on the terms and conditions offered or to raise a loan from other sources or to employ his own funds on terms similar to the terms offered by the Board for purposes of such expansion and to carry out such expansion, the Board may, after giving the licensee six months' notice in writing, purchase his undertaking.

Power to Board to contribute to certain associations.

24. The Board may, subject to any regulations made in this behalf,

(1) pay such subscriptions as it thinks fit to any association for the promotion of the common interests of persons engaged in the generation, distribution and supply of electricity and the members of which consist mainly of such persons;

(2) contribute such sums as it thinks fit to the funds of any recognised society the object of which is to foster the development and use of electricity or promotion of knowledge and research in respect of electricity or electrical appliances.

Consulting engineers.

25. The Board may, subject to such conditions as may be prescribed, from time to time appoint qualified persons to be consulting engineers to the Board and pay them such remuneration as it thinks proper.

Board to have powers and obligations of licensee under Act IX of 1910.

26. Subject to the provisions of this Act, the Board shall, in respect of the whole Province, have all the powers and obligations of a licensee under the Indian Electricity Act, 1910 (IX of 1910), and this Act shall be deemed to be the licence of the Board for the purposes of that Act :

Provided that nothing in sections 3 to 11, sub-sections *(2)* and *(3)* of section 21 and sections 22, 23 and 27 of that Act or in Clauses I to XII of the Schedule to that Act relating to the duties and obligations of a licensee shall apply to the Board.

Other functions of the Board.

27. The Board shall have such further powers and duties as are provided in this Act.

CHAPTER V

THE BOARD'S WORKS AND TRADING PROCEDURE

Preparation of schemes.

28. With a view to rationalising the production and supply of electricity in any area the Board may from time to time prepare a scheme, not inconsistent with this Act, for that area, in which provision may be made for all or any of the following matters, namely :—

(a) the establishment of the Board's own generating stations;

(b) the designation of generating stations, whether existing stations or new stations, as controlled stations at which electricity shall be generated for the purposes of the Board ;

(c) the interconnection, by means of main transmission lines to be constructed or acquired by the Board, of any generating stations with any others and with any systems of licensees;

(d) where a scheme relates to a specified area, the interconnection of the system of the Board in that area with the system of the Board in any other area with respect to which a scheme is in being or may subsequently be made ;

(e) the construction or acquisition of such other main transmission lines as the scheme may require;

(f) the use by the Board of any transmission lines or main transmission lines of any licensee;

(g) such supplemental, incidental and consequential provisions as may appear necessary or expedient for any of the purposes aforesaid :

Provided that a scheme shall not, without the consent of the owner,—

(i) designate as a controlled station any generating station belonging to a person other than a licensee;

(ii) authorise the use or acquisition of a transmission line or a main transmission line belonging to a person other than a licensee.

Publication and sanctioning of schemes.

29. *(1)* The Board shall cause every scheme prepared under section 28 to be published in the official Gazette and in such local newspapers as it may consider necessary, and shall give public notice of the date, not being less than two months after the date of the notice, by which licensees and other persons interested may make representations thereon and when publishing such a scheme the Board shall show estimates of the capital expenditure involved and of the initial and ultimate revenues anticipated from the sale of energy, meter rentals and other services.

(2) The Board, after considering any such representations and after making such inquiries, if any, as it thinks fit, may sanction the scheme either without modification or subject to such modifications as it thinks fit, and either generally or in respect of any part of the area specified in the published scheme, and shall publish the scheme as sanctioned by it; and where the scheme has been sanctioned in respect of part of the said area, it may subsequently be sanctioned in respect of other parts of that area :

Provided that no sanction shall be accorded by the Board to any scheme or part of a scheme estimated to result in a capital expenditure exceeding fifty lakhs of rupees without prior con-

sultation with the Authority and until any recommendations which the Authority may, in accordance with the provisions of this Act, make upon such consultation have received due consideration by the Board :

Provided further that where the recommendations of the Authority in regard to any scheme are not accepted by the Board, the Board shall not sanction the scheme without the previous consent of the Provincial Government.

(3) In respect of any scheme to which the first proviso to sub-section *(2)* applies, the Board shall, within one month after being requested by the Authority so to do, supply the Authority with all such information incidental or supplementary to the scheme as may be specified in the request.

Matters to be considered by the Authority.

30. The Authority shall, before making any recommendations in respect of a scheme upon which it has been consulted under the first proviso to sub-section *(2)* of section 29, have particular regard to whether or not in its opinion—

(a) any river-works proposed by the Board will prejudice the prospect for the best ultimate development of the river or its tributaries for power generation, consistent with the requirements of irrigation, navigation and flood-control and for this purpose the Authority shall satisfy itself that an adequate study has been made of the optimum location of dams and other river-works;

(b) the proposed scheme will prejudice the proper combination of hydro-electric and thermo-electric power necessary to secure the greatest possible economic output of electric power ;

(c) the proposed main transmission lines will be reasonably suitable for regional requirements;

(d) the scheme provides reasonable allowances for expenditure on capital and revenue account;

(e) the estimates of prospective supplies of electricity and revenue therefrom contained in the scheme are reasonable.

Recommendations of the Authority.

31. Where the Authority has been consulted under the first proviso to sub-section *(2)* of section 29 in respect of a scheme, it shall forward its recommendations thereon to the Board, sending a copy thereof to the Provincial Government within six months from the date of the receipt by it of the scheme :

Provided that if the Board fails to supply in due time any information requested under sub-section *(3)* of section 29 the period within which the Authority shall forward its recommendation shall be correspondingly increased.

Carrying out of schemes.

32. The Board shall carry out and give effect to a scheme as soon as reasonably practicable after it has been sanctioned and published.

Power to alter or extend schemes.

33. The Board may from time to time alter or extend a scheme by a supplementary scheme made and sanctioned in the manner hereinbefore provided :

Provided that any alterations or extensions of a scheme which are in the opinion of the Board and the Authority minor in character may be made without preparing a supplementary scheme.

Controlled stations.

34. Where a generating station situate within an area for which a scheme is in force has been designated in the scheme as a controlled station, the relations between the Board and the licensee owning the station shall, subject to any arrangements agreed under section 47, be regulated by the provisions of the First Schedule.

Supply by the Board to licensees owning generating stations.

35. The Board may at any time declare to a licensee owning a generating station, other than a controlled station, situate within an area for which a scheme is in force that it is ready to make a supply of electricity available to the licensee for the purposes of his undertaking, and thereupon, but without prejudice to the provisions of section 47, the provisions of the Second Schedule shall apply in respect of the relations between the Board and the said licensee.

Power to Board to close down generating stations.

36. The Board may at any time declare to a licensee owning a generating station situate within an area for which a scheme is in force that the station shall be permanently closed down, and thereupon but without prejudice to the provisons of section 47, where the station is a controlled station the provisions of Part III of the First Schedule, or in other cases the provisions of the Third Schedule, shall apply in respect of the relations between the Board and the said licensee with reference to the station to be closed down.

Purchase of generating stations or undertakings or main transmission lines by the Board.

37. *(1)* Where under the First or Third Schedule any generating station or undertaking is to be purchased by the Board, or where a sanctioned scheme provides for the purchase by the Board of a main transmission line belonging to any licensee,—

(a) the generating station or undertaking from such date of purchase as may be fixed under

the appropriate schedule, or the main transmission line from such date of purchase as the Board shall, by notice in writing given not less than one month before the said date, intimate to the licensee, shall vest in the Board free, save as provided in sub-section *(2)*, from any debt, mortgage, lien or other similar obligation of the licensee or attaching to the station or undertaking or line, as the case may be, and any such debt, mortgage, lien or obligation shall, save as aforesaid, attach to the purchase-money in substitution of the station or undertaking or line :

Provided that notwithstanding any agreement to the contrary the licensee shall pay and the mortgagee, chargee, lien-holder or obligee shall accept the whole or part of the purchase-money as the case may be in full or part satisfaction of the debt according as the amount of the purchase-money is more or less than the amount of his debt;

(b) without prejudice to the provisions of section 47, the Board shall pay, or tender payment of, the price to be determined in accordance with the Fourth Schedule as soon as the amount thereof has been determined, together with interest on such amount from the date of purchase to the date of payment or tender of payment as aforesaid at the rate of one *per centum* over the average of the Reserve Bank rates between the said dates;

(c) the receipt of the licensee shall, notwithstanding anything in any other law, be a full and sufficient discharge to the Board for the payment due in respect of the purchase.

(2) Where a generating station or undertaking or main transmission line purchased by the Board under this Act is in course of construction, extension or repair at the date of purchase, the rights and liabilities of the former owner thereof under any contract for such construction, extension or repair shall be deemed to have been transferred to the Board, except such rights or liabilities acquired or incurred after the date of receipt of the notice of purchase without the prior sanction of the Board.

(3) Notwithstanding anything contained elsewhere in this Act —

(i) where any generating station purchased by the Board under this Act contains any plant or apparatus which, while the station was in operation, were used jointly for the purposes of generation and transmission or distribution or wholly for the purposes of transmission or distribution, then unless otherwise agreed between the Board and the licensee, such plant or apparatus shall not be purchased by the Board but shall remain the property of the licensee.

(ii) Where under the provisions of section 28 a scheme provides for the purchase of any main transmission line belonging to any licensee the Board shall not exercise the powers of acquisition thereby afforded without the prior consent of the licensee, which consent shall not be unreasonably withheld.

Provision of new generating stations.

38. The Board shall itself establish a new generating station in any area in which it is required by any sanctioned scheme to be situated, but the Board may, with the sanction of the Provincial Government, make arrangements with any licensee or other person for the establishment of a new generating station required by a sanctioned scheme, if in the opinion of the Board it is desirable so to do.

Operation of Board's generating stations.

39. Where the Board itself establishes a new generating station or acquires a generating station otherwise than for the purpose of closing it down, it shall operate the station itself, but the Board may with the sanction of the Provincial Government, make arrangements with any licensee or other person for its operation, if in the opinion of the Board it is desirable so to do.

Provision regarding connections with main transmission lines purchased by the Board.

40. Where the Board has purchased a main transmission line and by reason of the user thereof by the Board any alteration or replacement of switchgear or other apparatus of any licensee connected with the line becomes necessary, the Board may in its discretion itself carry out such alteration or replacement at its own cost or defray the reasonable expenses incurred by the licensee in effecting such alteration or replacement and any question whether such alteration or replacement is necessary or whether the expenses incurred in connection therewith are reasonable shall in default of agreement be determined as provided under section 76.

Use by Board of transmission lines.

41. *(1)* Where the Board considers it necessary to use for any of its purposes any transmission lines or main transmission lines of a licensee, the Board shall have power to use such lines to the extent to which the capacity thereof is or thereafter remains surplus to the requirements of the licensee for the transmission of electricity, on payment of charges calculated in accordance with the provisions of the Fifth Schedule.

(2) The Board may, by agreement with any licensee or other person, use any transmission line or main transmission line of that licensee or person for such time and upon such terms as may be agreed.

Powers to Board for placing wires, poles, etc.

42. Notwithstanding anything contained in sections 12 to 16 and 18 and 19 of the Indian Electricity Act, 1910, but without prejudice to the requirements of section 17 of that Act where provision in such behalf is made in a sanctioned scheme, the Board shall have, for the placing of any wires, poles, wallbrackets, stays, apparatus and appliances for the transmission and distribution of electricity, or for the transmission of telegraphic or telephonic communications necessary for the proper co ordination of the works of the Board, all the powers which the telegraph authority possesses under Part III of the Indian Telegraph Act, 1885, with regard to a telegraph established or maintained by the Government or to be so established or maintained:

Provided that where a sanctioned scheme does not make such provision as aforesaid, all the provisions of sections 12 to 19 of the first-mentioned Act shall apply to the works of the Board.

Power to Board to enter into arrangements for purchase or sale of electricity under certain conditions.

43. *(1)* The Board may enter into arrangements with any person producing electricity within the Province for the purchase by the Board, on such terms as may be agreed, of any surplus electricity which that person may be able to dispose of.

(2) Where a sanctioned scheme so provides, the Board may on such terms as may be agreed upon, enter into arrangements with any Government or person for the purchase or sale of electricity to be generated or used outside the Province:

Provided that the Board may not enter into such arrangements with any such Government or person without the consent of the Provincial Government, or into arrangements with any such person without the consent of the Government of the Province within which the electricity is to be generated or used.

Restriction on establishment of new generating stations or major additions or replacement of plant in generating stations.

44. *(1)* Notwithstanding anything contained in any other law for the time being in force or in any licence, but subject to the provisions of this Act, it shall not be lawful for a licensee, or any other person, not being the Central Government or any Corporation created by legislation enacted by the Central Legislature, except with the previous consent in writing of the Board, to establish or acquire a new generating station or to extend or replace any major unit of plant or works pertaining to the generation of electricity in a generating station:

Provided that such consent shall not, except in relation to a controlled station, be withheld unless within three months from the date of receipt of an application—

(a) for consent to the establishment or acquisition of a new generating station, the Board—

(i) gives to the applicant being a licensee an undertaking that it is competent to and will, within twenty-four months from the said date, afford to him a supply of electricity sufficient for his requirements pursuant to his application ; or

(ii) shows to the applicant that the electricity required by him pursuant to his application could be more economically obtained within a reasonable time from another appropriate source:

(b) for consent to the extension of any major unit of plant or works as aforesaid, the Board—

(i) gives to the applicant being a licensee an undertaking that within twenty-four months from the said date either the station to which the application pertains will become a controlled station in terms of section 34, or the Board will make a declaration to the applicant in terms of section 35 offering him a supply of electricity sufficient for his requirements pursuant to his application, or the Board will make a declaration to him in terms of section 36 ; or

(ii) shows to the applicant that the electricity required by him pursuant to his application could be more economically obtained within a reasonable time from another appropriate source or by other appropriate means ;

(c) for consent to the replacement of any major unit of plant or works, the Board—

(i) gives to the applicant being a licensee an undertaking that within eighteen months from the said date either the station to which the application pertains will become a controlled station in terms of section 34, or the Board will make a declaration to him in terms of section 36 ; or

(ii) shows to the applicant that the electricity required by him pursuant to his application could be more economically obtained within a reasonable time from another appropriate source or by other appropriate means.

(2) There shall be stated in every application under this section such particulars as the Board may reasonably require of the station, plant or works, as the case may be, in respect of which it is made, and where consent is given thereto, in acting in pursuance of such consent, the applicant shall not, without the further consent of the Board, make any material variation in the particulars so stated.

(3) Any difference or dispute arising out of the provisions of this section shall be referred to the arbitration of the Authority.

Power to Board to enter upon and shut down generating stations in certain circumstances.

45. *(1)* If any licensee fails to close down his generating station pursuant to a declaration of the Board under section 36, or if any person establishes or acquires a new generating station or extends or replaces any plant or works in any generating station in contravention of section 44, the Board may authorise any of its officers to enter upon the premises of such station and shut down the station or the plant or works, as the case may be, in respect of which the failure or contravention has occurred.

(2) Any expenses incurred by the Board under this section shall be recoverable by it from the licensee or person concerned as an arrear of land revenue, and for such purpose the Board shall be deemed to be a public officer within the meaning of section 5 of the Revenue Recovery Act, 1890.

(3) Any difference or dispute arising out of the provisions of this section shall be referred to the arbitration of the Authority.

The Grid Tariff.

46. *(1)* A tariff to be known as the Grid Tariff shall, in accordance with any regulations made in this behalf, be fixed from time to time by the Board in respect of each area for which a scheme is in force, and tariffs fixed under this section may, if the Board thinks fit, differ for different areas.

(2) Without prejudice to the provisions of section 47, the Grid Tariff shall apply to sales of electricity by the Board to licensees where so required under any of the First, Second and Third Schedules, and shall, subject as hereinafter provided, also be applicable to sales of electricity by the Board to licensees in other cases:

Provided that if in any such other case it appears to the Board that, having regard to the extent of the supply required, the transmission expenses involved in affording the supply are higher than those allowed in fixing the Grid Tariff, the Board may make such additional charges as it considers appropriate.

(3) The Grid Tariff shall be so framed as to include as part of the charge, and show separately a fixed kilowatt charges component and a running charges component :

Provided that if in respect of any area the electricity to be sold by the Board is wholly or substantially derived from hydro-electric sources, the running charges component may be omitted.

(4) The fixed kilowatt charges component in the Grid Tariff may be framed so as to vary with the magnitude of maximum demand.

(5) Where only a portion of a licensee's maximum demand for the purposes of his undertaking is chargeable at the Grid Tariff, the price payable for that portion shall not be greater than the average price which would have been payable had the whole of the said maximum demand of the licensee been chargeable at the Grid Tariff.

(6) The Grid Tariff may contain provisions for—

(a) adjustment of price having regard to the power factor of supply taken or the cost of fuel or both;

(b) a minimum charge related to a past or prospective demand of a licensee on the Board.

(7) The Grid Tariff may contain such other terms and conditions, not inconsistent with this Act and the regulations, as the Board thinks fit.

Power to Board to make alternative arrangements with licensees.

47. Notwithstanding anything contained in sections 34 to 37 and sub-section *(2)* of section 46 but subject to any regulations made in this behalf, the Board may make such arrangements as may be mutually agreed with any licensee whose area of supply is situate within an area for which a scheme is in force, in regard to the purchase or sale of electricity and the price thereof, or the purchase, operation or control of any generating station or main transmission line :

Provided that in making any such arrangement the Board shall not show undue preference to any licensee.

Power to licensee to carry out arrangements under this Act.

48. Where under any provision of this Act the Board is authorised or required to enter into arrangements with any licensee for any purpose, then notwithstanding anything contained in any law or in any licence, memorandum of association or other instrument regulating the constitution or powers of the licensee, it shall be lawful for the licensee to enter into and carry out any such arrangements.

Provision for the sale of electricity by the Board to persons other than licensees.

49. Subject to the provisions of this Act and of any regulations made in this behalf, the Board may supply electricity to any person not being a licensee upon such terms and conditions as the Board may from time to time fix having regard to the nature and geographical position of the supply and the purposes for which it is required :

Provided that in fixing any such terms and conditions the Board shall not show undue preference to any person.

Board not to supply electricity in certain circumstances.

50. Nothing contained in sections 34, 35 and 36 shall apply in any case where under section 19, it is not permissible for the Board to supply electricity directly to a licensee

owning a generating station; and nothing in sections 46, 47 and 49 shall empower the Board to supply electricity directly to any licensee or person to whom it is not otherwise entitled so to supply electricity.

Provisional payments.

51. Where the price to be paid for electricity by or to the Board under this Act cannot be finally ascertained until after the end of a year of account, the amount to be paid shall be ascertained as soon as practicable thereafter, but the party from whom the payment is due shall make to the other monthly payments on account of the net amounts due in accordance with estimates made for the purpose, subject to adjustment as soon after the end of the year of account as the actual liability can be ascertained.

Lower limit of power factor in supply by Board.

52. Unless otherwise agreed between the Board and the licensee, no supply of electricity taken by a licensee from the Board under this Act shall be taken at an average power factor below 0.85 during the period of maximum demand of the licensee in any month, and in the event of the average power factor as aforesaid being lower than 0.85, the licensee shall within a reasonable time take such measures, the cost of which shall not be borne by the Board, as may be necessary to raise it to a value not lower than 0.85.

Provision of accommodation and right of way.

53. *(1)* Where the Board for the purposes of any arrangements which it has made with any licensee under this Act requires accommodation on in, under or over the premises of the licensee for any works or apparatus to be provided by the Board, the licensee shall, if suitable and sufficient accommodation exists, grant such accommodation free of cost to the Board, or if such accommodation does not exist, it shall be provided upon such terms and conditions as may be agreed between the Board and the licensee.

(2) The Board and any licensee shall each have a right of access at all times to his own property on, in, over and under the property of the other.

Power to Board to connect meters, etc., to apparatus of licensees.

54. The Board shall have power to connect with the apparatus of any licensee any such correct meters, switch-gear and other equipment as may be necessary to enable it to carry out the provisions of this Act, and such meters, switch-gear and other equipment shall, unless otherwise agreed, be provided and maintained by the Board at its own costs.

Licensees to comply with Board's directions.

55. Every licensee shall comply with such directions as the Board may from time to time give him for the purpose of achieving the maximum of economy and efficiency in the operation of the station.

Leases of generating stations.

56. No licensee shall, except with the previous approval in writing of the Board and subject to any conditions which the Board may think fit to impose, enter into any arrangement whereby any generating station is to be let or held on lease by him, and any such arrangement entered into in contravention of this sub-section shall be void and of no effect.

Licensees' charges to consumers.

57. *(1)* The provisions of the Sixth Schedule and the Table appended to the Seventh Schedule shall be deemed to be incorporated in the licence of every licensee, not being a local authority, from the date of the commencement of the licensee's next succeeding year of account, and from such date the licensee shall comply therewith accordingly and any provisions of such licence or of the Indian Electricity Act, 1910, or any other law, agreement or instrument applicable to the licensee shall, in relation to the licensee, be void and of no effect in so far as they are inconsistent with the provisions of this section and the said Schedule and Table.

(2) Where the provisions of the Sixth Schedule and the Table appended to the Seventh Schedule are under sub-section *(1)* deemed to be incorporated in the licence of any licensee, the following provisions shall have effect in relation to the said licensee, namely:—

(a) The Board, or where no Board is constituted under this Act the Provincial Government, may, if it is satisfied that the licensee has failed to comply with any provision of the Sixth Schedule, and shall when requested so to do by the licensee, constitute a rating committee to examine the licensee's charges for the supply of electricity and to recommend thereon to the Provincial Government:

Provided that no rating committee shall be constituted in respect of a licensee within three years from the date on which such a committee has reported in respect of that licensee, unless the Provincial Government declares that in its opinion circumstances have arisen rendering the orders passed or the recommendations of the previous rating committee unfair to the licensee or any of his consumers.

(b) The rating committee shall, after giving the licensee a reasonable opportunity of being heard and after taking into consideration the efficiency of operation and management and the

potentialities of his undertaking, report to the Provincial Government making recommendations (and giving reasons therefor) regarding the charges for electricity which the licensee may make to any class or classes of consumers so however that the recommendations are not likely to prevent the licensee from earning clear profits sufficient when taken with the sums available in the Tariffs and Dividends Control Reserve to afford him a reasonable return during his next succeeding three years of account if the potentialities of the undertaking of the licensee, with efficient operation and management, so permit.

(c) Within one month after the receipt of the report under clause (b) the Provincial Government shall cause the report to be published in the official Gazette, and may at the same time make an order in accordance therewith fixing the licensee's charges for the supply of electricity with effect from such date, not earlier than two months or later than three months after the date of publication of the report, as may be specified in the order and the licensee shall forthwith give effect to such order:

Provided that nothing in this clause shall be deemed to prevent a licensee from reducing at any time any charges so fixed.

(3) Where a Board is constituted under this Act, the rating committee shall consist of three members, two of whom shall be members of the Board and one shall be a representative, co-opted by the two members of the Board from a licensees' association of which the licensee concerned is or is eligible to be a member or, if there is no such association, from such Chamber of Commerce or similar body as the Board may direct; one of such members of the Board shall be experienced in accounting and financial matters and one of the members of the Board shall be the Chairman of the committee.

(4) Where no Board is constituted under this Act, the rating committee shall consist of five members of whom the Chairman and two other members shall be nominated by the Provincial Government, one member shall be nominated by the licensee and one member shall be nominated by the local Electric Licensees' Association, or if there is no such association, by such Chamber of Commerce or similar body as the Provincial Government may direct.

(5) Of the three members to be nominated by the Provincial Government under sub-s. *(4)*, one shall be a person who is or has been a judicial officer not below the rank of a District Judge, one shall be a registered accountant having at least ten years' experience and one shall be a person with administrative experience.

Power to direct amortisation and tariffs policies of licensees being local authorities.

58. The Board or where no Board in constituted under this Act, the Provincial Government shall have power to direct the amortisation and tariffs policies of any licensee, being a local authority, with respect to his licensed undertaking in such manner as the Board or the Provincial Government, as the case may be, after giving the local authority a reasonable opportunity of being heard, considers expedient for the purposes of the Act; and the licensee, being a local authority, the provisions of any other law or of any rules made or directions given thereunder notwithstanding, shall give effect to any such directions of the Board or the Provincial Government, as the case may be.

CHAPTER VI

THE BOARD'S FINANCE, ACCOUNTS AND AUDIT.

General principles for Board's finance.

59. The Board shall not, as far as practicable and after taking credit for any subventions from the Provincial Government under section 63, carry on its operations under this Act at a loss, and shall adjust its charges accordingly from time to time:

Provided that where necessary any amounts due for meeting the operating, maintenance and management expenses of the Board or for the purposes of clauses (i) and (ii) of section 67 may, to such extent as may be sanctioned by the Provincial Government, be paid out of capital.

Board to assume obligations of Provincial Government in respect of matters to which this Act applies.

60. *(1)* All debts and obligations incurred, all contracts entered into and all matters and things engaged to be done by, with or for the Provincial Government for any of the purposes of this Act before the first constitution of the Board shall be deemed to have been incurred, entered into or engaged to be done by, with or for the Board; and all suits or other legal proceedings instituted or which might but for the issue of the notification under sub-section *(4)* of section 1 have been instituted by or against the Provincial Government may be continued or instituted by or against the Board.

(2) All expenditure which the Provincial Government may, not later than two months after the first constitution of the Board, declare to have been incurred before the issue of the notification under sub-section *(4)* of section 1 on capital account in connection with the purposes of this Act shall be deemed to be a loan advanced to the Board under section 64 on the date of the said declaration, and all the assets

acquired by such expenditure shall thereupon vest in the Board.

Annual financial statement.

61. *(1)* In February of each year the Board shall submit to the Provincial Government a statement in the prescribed form of the estimated capital and revenue receipts and expenditure for the ensuing year.

(2) The said statement shall include a statement of the salaries of members, officers and servants of the Board and of such other particulars as may be prescribed.

(3) The Provincial Government shall as soon as may be after the receipt of the said statement cause it to be laid on the table of the Chamber, or as the case may be, Chambers of the Provincial Legislature, and the said statement shall be open to discussion therein, but shall not be subject to vote.

(4) The Board shall take into consideration any comments made on the said statement in the Provincial Legislature.

(5) The Board may at any time during the year in respect of which a statement under sub-section *(1)* has been submitted submit to the Provincial Government a supplementary statement, and all the provisions of this section shall apply to such statement as they apply to the statement under the said sub-section.

Restriction on unbudgeted expenditure.

62. *(1)* Save where in the opinion of the Board circumstances of extreme urgency have arisen, no sum exceeding twenty-five thousand rupees on account of recurring expenditure or exceeding one lakh of rupees on account of non-recurring expenditure shall be expended by the Board in any year of account unless such sum has been included in a statement submitted under sub-section *(1)* or sub-section *(5)* of section 61.

(2) Where any such sum is expended under circumstances of extreme urgency, a report thereon indicating the source from which it is proposed to meet the expenditure shall be made as soon as practicable to the Provincial Government.

Subventions to the Board.

63. The Provincial Government may, with the approval of the Provincial Legislature, from time to time make subventions to the Board for the purposes of this Act on such terms and conditions as the Provincial Government may determine.

Loans to the Board.

64. The Provincial Government may from time to time advance loans to the Board on such terms and conditions, not inconsistent with the provisions of this Act, as the Provincial Government may determine.

Power of Board to borrow.

65. *(1)* The Board may from time to time, with the previous sanction of the Provincial Government and subject to the provisions of this Act and to such conditions as may be prescribed in this behalf, borrow any sum required for the purposes of this Act.

(2) Rules made by the Provincial Government for the purposes of this section may empower the Board to borrow by the issue of bonds or stock or otherwise and to make arrangements with bankers, and may apply to the Board with such modifications as may be necessary to be consistent with this Act, the provisions of the Local Authorities Loans Act, 1914 and the rules made thereunder as if the Board were a local authority.

(3) The maximum amount which the Board may at any time have on loan under sub-section *(1)* shall be ten crores of rupees, unless the Provincial Government, with the approval of the Provincial Legislative assembly, fixes a higher maximum amount.

(4) Stock issued by the Board under this section shall be issued, transferred, dealt with and redeemed in such manner as may be prescribed.

Guarantee of loans.

66. The Provincial Government may guarantee in such manner as it thinks fit the payment of the principal and interest of any loan proposed to be raised by the Board or of either the principal or the interest:

Provided that the Provincial Government shall, so long as any such guarantees are in force, lay before the Chamber or, as the case may be, Chambers of the Provincial Legislature in every year during the budget session a statement of the guarantees, if any, given during the current financial year of the Province, and an up-to-date account of the total sums, if any, which have been paid out of Provincial revenues by reason of any such guarantees or paid into Provincial revenues towards repayment of any money so paid out.

Priority of liabilities of the Board.

67. The revenues of the Board shall after meeting its operating, maintenance and management expenses, be distributed as far as they are available in the following order, namely:—

(i) interest on bonds not guaranteed under section 66;

(ii) interest on stock not so guaranteed;

(iii) credits to depreciation reserve under section 68;

(iv) interest on bonds guaranteed under section 66;

(v) interest on stock so guaranteed;

(vi) repayment of principal and interest on sums paid by the Provincial Government under guarantees under section 66;

(vii) the write-down of amounts paid from capital under the proviso to section 59,

(viii) contribution to general reserve of an amount not exceeding one *per centum per annum* of the original cost of fixed assets employed by the Board so however that the total standing to the credit of such reserve shall not exceed eight *per centum* of the original cost of such fixed assets;

(ix) interest on loans advanced or deemed to be advanced to the Board under section 64, including arrears of such interest;

(x) of the balance remaining, one-half in the reduction of tariffs or for such other purposes beneficial to electrical development in the Province, as the Board may think fit, and the remaining one-half as far as available in the following order, namely:—

(a) repayment of interest-free loans;

(b) to Provincial revenues.

Depreciation reserve.

68. The Board shall create a depreciation reserve and as far as compliance with the provision of section 67 makes it practicable, shall at the end of every year credit to such reserve from its revenues—

(i) sums ascertained in accordance with the Seventh Schedule, and

(ii) interest at the rate of three *per centum per annum* on all sums at credit of the depreciation reserve on the first day of the said year:

Provided that if in any year it is not practicable fully to comply with the provisions of this section, the amount by which the sums actually credited falls short of the amount required under this section in respect of that year shall be carried forward and, together with compound interest thereon at the aforesaid rate, shall be credited to the said reserve as soon as it is found possible in accordance with section 67 so to do.

Accounts and audit.

69. *(1)* The Board shall cause to be maintained such proper books of account and other books in relation to its accounts as the regulations may require, and shall prepare in accordance with the rules an annual statement of accounts.

(2) The accounts of the Board shall be audited concurrently and annually by a person who shall be qualified under the provisions of section 144 of the Indian Companies Act, 1913, to act as an auditor of companies and who shall be appointed by the Provincial Government.

(3) As soon as the accounts of the Board have been audited, the Board shall send a copy thereof together with a copy of the report of the auditor thereon to the Provincial Government, and shall cause the accounts to be published in the prescribed manner and place copies thereof on sale at a reasonable price.

(4) The Board shall comply with such orders and instructions, as the Provincial Government may, upon perusal of the report of the auditor, think fit to issue.

CHAPTER VII

MISCELLANEOUS

Effect of other laws.

70. *(1)* No provision of the Indian Electricity Act, 1910, or of any rules made thereunder or of any instrument having effect by virtue of such law or rule shall, so far as it is inconsistent with any of the provisions of this Act, have any effect:

Provided that nothing in this Act shall be deemed to prevent the Provincial Government from granting, after consultation with the Board, a licence not inconsistent with the provisions of the Indian Electricity Act, 1910, to any person in respect of such area and on such terms and conditions as the Provincial Government may think fit.

(2) Save as otherwise provided in this Act, the provisions of this Act shall be in addition to, and not in derogation of, the Indian Electricity Act, 1910.

Rights and options to purchase under Act IX of 1910 to vest in Board.

71. Where under the provisions of the Indian Electricity Act, 1910, any right or option to purchase the undertaking of a licensee vests in the Provincial Government or a local authority, such right or option shall be deemed to be transferred to the Board, and shall be exercisable by the Board in accordance with the provisions of the said Act applicable to the exercise of such right or option by the Provincial Government or a local authority, as the case may be.

Water-power concessions to be granted only to the Board.

72. The Provincial Government shall not grant any concession for the development or use of water-power for any electrical purpose to any person other than the Board, unless the Provincial Government is of opinion that it is not expedient for the Board or that the Board is unable so to develop or use the water power concerned.

Co-ordination between the Board's Schemes and Multi-purpose Schemes.

73. Where a multi-purpose scheme for the development of any river in any region is in operation, the Board shall co-ordinate its activities with

the activities of the persons responsible for such scheme in so far as they are inter-related.

Powers of entry.

74. Any officer or servant of the Board generally or specially authorised by the Board in this behalf may at any reasonable time after giving the owner or occupier reasonable notice enter upon any land or premises and there do such things as may be reasonably necessary for the purposes of lawfully using any transmission lines or main transmission lines, or of making any survey, examination or investigation preliminary or incidental to the exercise of powers or the performance of duties by the Board under this Act.

Annual reports, statistics and returns.

75. *(1)* The Board shall, before such date and in such form as may be prescribed, submit to the Provincial Government an annual report upon such matters as may be prescribed, and the Provincial Government shall cause such report to be published in the official Gazette.

(2) The Board shall furnish to the Provincial Government at such times and in such form and manner as may be prescribed or as the Provincial Government may direct, such statistics and returns and such particulars in regard to any proposed or existing scheme as the Provincial Government may from time to time require.

(3) The Board may at any time by notice in writing require any licensee or person supplying electricity for public or private purposes or generating electricity for his own use to furnish it with such information and accounts relating to such supply or generation and in such form and manner as the notice may specify.

Arbitration.

76. *(1)* All questions arising between the Provincial Government or the Board and a licensee or other person shall be determined by arbitration.

(2) Where any question or matter is, by this Act, required to be referred to arbitration, it shall be so referred—

(a) in cases where the Act so provides, to the Authority and on such reference the Authority shall be deemed to have been duly appointed as Arbitrators, and the award of the Authority shall be final and conclusive; or

(b) in other cases, to two arbitrators, one to be appointed by each party to the dispute.

(3) Subject to the provisions of this section, the provisions of the Arbitration Act, 1940 (X of 1940) shall apply to arbitrations under this Act.

(4) The arbitrators shall in making their award have regard to the provisions of this Act and any rules and regulations made thereunder relevant to the reference.

(5) The arbitrators may, if they think it expedient so to do, call in the aid of one or more qualified assessors and hear the reference wholly or partially with the aid of such assessors.

(6) The provisions of sub-sections *(4)* and *(5)* shall apply to the umpire, if he enters on the reference, as they apply to the arbitrators

Penalties and procedure.

77. *(1)* If any licensee or other person fails without reasonable excuse to comply with or give effect to any direction, order or requirement made under section 55 or under clause (c) of sub-section *(2)* of section 57 or under section 58 or under sub-section *(3)* of section 75, he shall be deemed to have committed an offence under this section and shall be punishable with fine which may extend to five hundred rupees, and in the case of continuing offence with an additional fine which may extend to fifty rupees for every day after the first during which the offence continues.

(2) Where any licensee or other person is a firm, company or other body corporate, every partner, managing director, manager, secretary or other responsible officer thereof shall, unless he proves that an offence under this section was committed without his knowledge or that he exercised all due diligence to prevent its commission, be deemed to be guilty of the offence

(3) No Court shall take cognisance of an offence under this section except on the complaint of an officer of the Board, or where no Board is constituted under this Act, on the complaint of an officer of the Provincial Government, authorised by the Board or as the case may be by the Provincial Government in this behalf.

Power to make rules.

78. *(1)* The Provincial Government may after previous publication, by notification in the official Gazette make rules to give effect to the provisions of this Act.

(2) In particular, and without prejudice to the generality of the foregoing power, such rules may provide for—

(a) the remuneration, allowances and conditions of service of members of the Board ;

(b) the terms and conditions of appointment of members of Provincial Electricity Councils and Local Advisory Committees, the convening of meetings of such councils and Committees, and the conduct of business thereat ;

(c) the form in which the annual financial statement and supplementary statements under section 61 shall be prepared by the Board, and the particulars to be included therein ;

(d) the conditions subject to which the Board may borrow under section 65 ;

(e) the manner in which stock issued by the Board shall be issued, transferred, dealt with and redeemed;

(f) the manner in which the accounts of the Board shall be published under section 69;

(g) the form in which and the date by which the annual report of the Board shall be submitted under section 75, and the form and manner of furnishing statistics and returns by the Board under that section;

(h) the business of the Board upon which the Local Advisory Committees concerned shall be consulted.

Power to make regulations.

79. The Board may make regulations not inconsistent wiih this Act and the rules made thereunder to provide for all or any of the following matters, namely:—

(a) the administration of the funds and other property of the Board, and the maintenance of its accounts;

(b) the summoning and holding of meetings of the Board, the times and places at which such meetings shall be held, the conduct of business thereat and the number of members necessary to constitute a quorum;

(c) the duties of officers and servants of the Board, and their salaries, allowances and other conditions of service;

(d) all matters necessary or expedient for regulating the operations of the Board under section 20;

(e) the making of advances to licensees by the Board under section 23 and the manner of repayment of such advances;

(f) the making of contributions by the Board under section 24;

(g) the procedure to be followed by the Board in inviting, considering and accepting tenders:

(h) principles governing the fixing of Grid Tariffs;

(i) principles governing the making of arrangements with licensees under section 47;

(j) principles governing the supply of electricity by the Board to persons other than licensees under section 49;

(k) any other matter arising out of the Board's functions under this Act for which it is necessary or expedient to make regulation:

Provided that regulations under clauses (a) and (d) shall be made only with the previous approval of the Provincial Government and regulations under clauses (h) and (i) shall be made with the concurrence of the Authority.

Provision relating to income-tax and super-tax.

80. *(1)* For the purposes of the Indian Income-tax Act, 1922 (XI of 1922), the Board shall be deemed to be a company within the meaning of that Act and shall be liable to income-tax and super-tax accordingly on its income, profits and gains.

(2) The Provincial Government shall not be entitled to any refund of any such taxes paid by the Board.

Members, officers and servants of the Board to be public servants.

81. All members, officers and servants of the Board shall be deemed, when acting or purporting to act in pursuance of any of the provisions of this Act to be public servants within the meaning of section 21 of the Indian Penal Code (XLV of 1860).

Protection to persons acting under this Act.

82. No suit, prosecution or other legal proceeding shall lie against any person for anything which is in good faith done or intended to be done under this Act.

Saving of application of Act.

83. Nothing in this Act shall be deemed to apply to a licensee on whom a notice under section 5 or section 7 of the Indian Electricity Act, 1910 (IX of 1910) has been served prior to the coming into force of the sections, Schedule and Table mentioned in sub-section *(3)* of section 1.

THE FIRST SCHEDULE.

(See sections 34 and 36)

ARRANGEMENTS IN RESPECT OF CONTROLLED STATIONS.

PART I

ASSUMPTION OF CONTROL

1. *(1)* The Board shall by notice in writing to the licensee fix a date (hereafter in this Schedule referred to as the date of control), being the first day of a year of account of the licensee, and from such date the licensee shall, except where prevented by causes beyond his control, be under obligation—

(a) subject to such directions as the Board may from time to time give him, to keep the station at all times in good and substantial repair and condition and ready for use, together with adequate staff for operating, maintaining and controlling the station, and not to make any substantial alterations or renewals in, or remove any essential or substantial part of, the station without the consent in writing of the Board;

(b) to operate the station so as to generate such quantity of electricity with such units of plant, at such rates of output and at such times, or to cease to generate electricity during such periods, as the Board may direct;

(c) to carry out as soon as may be practicable such reasonable extensions, alterations or renewals of the station or any part thereof as the Board may from time to time direct;

(d) to supply to the Board all the electricty generated at the station.

(2) To enable a licensee to comply with any direction under sub-paragraph *(1)* requiring extension of the station or any part thereof for purposes of the Board, the Board may, if it considers it expedient and practicable so to do, offer to advance to him a loan upon such terms and conditions as it may deem proper and the licenseee shall accept the loan from the Board on the terms and conditions offered unless he raises a loan

from other sources or employs his own funds for purposes of such extension on terms similar to the terms offered by the Board:

Provided that notwithstanding anything contained in any law or in any mortgage, charge or instrument executed by the licensee, the loan so advanced by the Board and the interest thereon shall be a first charge on the extension and subject to any prior encumbrance shall also be charged on the undertaking and all the revenues of the licensee and no such loan shall be amortised in any way by the licensee:

Provided further that if at the date of purchase of the station under this Act or of the licensee's undertaking under the Indian Electricity Act, 1910 (IX of 1940), the said principal or any part thereof remains unpaid though due for redemption, or is not on that date due for redemption, then any sum payable by the purchaser as a percentage on account of compulsory purchase under this Act or the said Act shall be reduced by an amount which bears the same proportion to that sum as the amount of the said principal or part thereof remaining unpaid or not being due for redemption as aforesaid bears to the total of the ordinary, preference and debenture capital of the licensee and the loans advanced by the Board under this sub-paragraph.

Explanation. — In this sub-paragraph, the expressions "ordinary capital," "preference capital" and "debenture capital" have the meanings respectively assigned to them in the Sixth Schedule.

II. From the date of the control the Board shall, except where prevented by causes beyond its control, be under obligation to supply to the licensee, and the licensee shall be under obligation to take from the Board the whole of the electricity required by the licensee for the purposes of his undertaking, except such quantity of electricity as the licensee may for the time being be entitled under paragraph III to purchase from a source other than the Board or as he may be generating in another station, not being a controlled station.

III. Unless otherwise agreed between the Board and the licensee, the licensee shall not, where he has received a notice under paragraph I, purchase after the date of control any quantity of electricity from a source other than the Board :

Provided that where on the date of the receipt of such notice the licensee is bound under any contract to purchase any quantity of electricity from some other source, he may, for a period not exceeding two years after the date of control or for such further period, if any, as the Board may allow, continue to purchase electricity under the said contract from such other source.

IV. The Board shall pay to the licensee, whether or not any electricity is generated at the station, the costs ascertained in accordance with the provisions of the Eighth Schedule.

V. The price to be paid by the licensee for electricity supplied by the Board shall be determined in the manner provided in the appropriate Part of this Schedule.

VI. The points at which electricity to be supplied under this Schedule shall be delivered by the Board and the licensee respectively shall, unless otherwise agreed between the Board and the licensee be at the generating station, and the pressure of the supplies shall be such as the Board and the licensee may agree.

VII. Where any licensee owns more than one controlled station—

(a) such of the several controlled stations as are interconnected shall, for the purposes of this Schedule, be deemed to comprise a single controlled station, and unless the subject or context otherwise requires, the provisions of this Schedule shall be construed as if the word "combined" had been inserted before the word "station" or the words "generating station" wherever they occur;

(b) the electricity supplied at the several controlled stations by the licensee to the Board, or by the Board to the licensee, shall each respectively be treated as single supplies;

(c) in the application of clause (a) of paragraph XII, the costs of production at each of the several controlled stations shall be separately ascertained, and in the application of clause (c) of the said paragraph—

(i) the sums ascertained in accordance with clause (a) of paragraph 1 of the Eighth Schedule in respect of each of the several controlled stations shall be separately allocated between fixed costs and running costs, and

(ii) the sum of the several fixed costs and the sum of the several running costs shall be the fixed costs and the running costs respectively of the combined station ;

(d) in directing the operation of the combined station under clause (b) of sub-paragraph *(1)* of paragraph I, the Board shall have regard to the nature and capacity of the licensee's transmission system interconnecting the several controlled stations and to the requirements of the licensee at each of those stations.

VIII. In the event of the licensee failing, except where prevented by causes beyond his control, to perform or continue to perform any obligation imposed upon him under this Part, the Board may give notice to him in writing that on the first day of the licensee's next succeeding year of account the generating station will be purchased by the Board, and on such day the Board shall purchase the station at a price determined in accordance with the Fourth Schedule; and thereafter—

(a) all the provisions of this Schedule except paragraph II and this paragraph shall, in relation to the licensee, cease to have effect;

(b) the Board shall supply the licensee with the electricity required by him under paragraph II at such price and on such conditions as the Board may determine.

PART II

PRICE TO BE PAID FOR ELECTRICITY SUPPLIED BY THE BOARD UNDER PART I

IX. There shall be agreed between the Board and the licensee in respect of each month of the licensee's year of account—

(a) the maximum capacity of the station, that is to say, the maximum capacity (expressed in kilowatts available for supply to feeders) of such plant and works appertaining to the generation of electricity at the station as were available for reliable and regular commercial operation on the first day of the month, including the capacity of such plant and works as were temporarily out of commission;

(b) the number and size of units of plant and works, forming part of the aforesaid plant and works, which ought properly to be deemed to be standby if the station were not a controlled station ;

(c) the standby capacity of the station, that is to say, the number of kilowatts (expressed in kilowatts available for supply to feeders) by which the maximum capacity of the station would be reduced if the standby plant and works referred to in clause (b) were to be left out of account;

(d) the actual effective capacity of the station, that is to say, the number of kilowatts by which the maximum capacity exceeds the standby capacity.

X. *(1)* The licensee shall be entitled to purchase from the station in each month at a price determined under paragraph XIII a number of kilowatts not exceeding the scheduled effective capacity of the station on the first day of that month as determined in sub-paragraph *(2)*.

(2) The scheduled effective capacity of the station shall be agreed between the Board and the licensee in respect of each month of the year of account, and shall

be computed in the same manner as the actual effective capacity under paragraph IX, except that there shall be left out of account such units of plant and works, if any, forming part of the plant and works referred to in clause (a) of the said paragraph, as the licensee declares to be surplus to his requirements for the time being :

Provided that the licensee shall not declare to be surplus to his requirements any such units of plant or works as were installed or were on order at the date of control or which were included in any previous computation of the scheduled effective capacity :

Provided further that if as a result of the licensee declaring as surplus to his requirements any units of plant or works, the scheduled effective capacity is in respect of any month computed to be less than the maximum demand of the licensee on the station for the purposes of his own undertaking, then such units of plant or works and all further additional units of plant or works shall thereafter always be deemed to be surplus to the requirements of the licensee as aforesaid unless the Board decides otherwise.

XI. Of the kilowatt-hours purchased by the licensee from the Board in each month, a number of kilowatt-hours not exceeding the number which bears the same proportion to the total number purchased as the scheduled effective capacity for the month bears to the maximum demand of the licensee on the Board in that month shall be purchased at a price determined under paragraph XIII; the balance being purchased at a price determined under paragraph XVI :

Provided that if the station is a hydro-electric station or if any unit of a combined station is a hydro-electric unit the number of kilowatt-hours which the licensee shall be entitled to purchase as aforesaid shall be reduced by such amount, if any, as may be agreed between the Board and the licensee, having regard to the number of kilowatt-hours actually supplied in the month from such hydro-electric station or unit.

XII. As soon as practicable after the end of a year of account—

(a) there shall be ascertained in respect of that year the cost of production at the station in accordance with provisions of the Eighth Schedule ;

(b) there shall be deducted from the total sum ascertained in respect of that year under clauses (b), (c), (d), (e) and (f) of paragraph I of the Eighth Schedule, such proportion of the charges referred to in the said clauses as are wholly attributable to so much of the plant and works, if, any, as has been declared by the licensee under sub-paragraph *(2)* of parapraph X to be surplus to his requirements, and the balance remaining after such deduction shall for the purposes of this Schedule be referred to as the schedule overhead charges :

Provided that in assessing the said proportion regard shall be had to the period during which any such plant or works were declared to be surplus as aforesaid ;

(c) there shall be allocated between fixed costs and running costs in accordance with the provisions of the Ninth Schedule the sum ascertained in respect of that year under clause (a) of paragraph I of the Eighth Schedule, and the amount of running costs divided by the number of kilowatt-hours supplied from the station in that year shall for the purposes of this Schedule be referred to as the running charges component ;

(d) there shall be ascertained in respect of that year an amount (in this Schedule referred to as the schedule fixed works costs) calculated from the expression, "$\frac{A}{2} + \frac{A}{2} \times \frac{B}{C}$" where—

A=the amount of fixed costs ascertained in respect of that vear under clause (c) ;

B=the sum of the scheduled effective capacities for each month of that year ;

C=the sum of the actual effective capacities for each month of that year.

XIII. The licensee shall pay to the Board in respect of each month of the year of account for the electricity purchased under paragraphs X and XI—

(a) in respect of kilowatts, an amount equal to one-twelfth of the sum of the scheduled over-head charges and the scheduled fixed works costs ;

(b) in respect of kilowatt-hours, a sum found by multiplying the number of kilowatt-hours supplied by the running charges component :

Provided that if in any year of account the station for any reason ceases to generate electricity for one thousand hours or more, then for the purposes of ascertaining the running charges component and the scheduled fixed works costs under clauses (c) and (d) respectively of paragraph XII—

(i) the said clause (c) shall be construed as if there were substituted for the words "that year" in both places where they occur, the words "the most recent year of account in which the station did not cease to generate electricity for one thousand hours or more" and as if to the said clause the following proviso were added, namely:—

"Provided that so much of the said sum as is represented by the cost of fuel shall be adjusted to take account of the cost which would have been incurred had that fuel been consumed at the average prices prevailing in the actual year of account";

(ii) in evaluating the expression contained in the said clause (d), the letter C shall be deemed to be equal to the sum of the actual effective capacities for each month of the most recent year of account in which the station did not cease to generate electricity for one thousand hours or more:

Provided further that if in any year of account there exist in the station any units of plant or works which have been declared by the licensee under sub-paragraph *(2)* of paragraph X to be surplus to his requirements in that year, there shall be added to the running charges component in respect of that year the amount, if any, by which that part of the said component attributable to the cost of fuel is less than ninety *per centum* of the corresponding part of the running charges component in respect of the year of account immediately preceding that in which the earliest installed of the said units of plant or works first came into commercial operation in the station, and in ascertaining the corresponding part as aforesaid, the fuel consumed shall be deemed to be of the same average quality and to be consumed at the same average cost per ton as the fuel consumed in the year of account:

Provided further that if in respect of any month of the year of account any units of plant or works previously declared by the licensee as aforesaid to be surplus to his requirements are for the first time taken into account in assessing the scheduled effective capacity for that month, then in addition to the payment referred to in clause (a) the licensee shall pay to the Board a sum equal to any sums previously paid by the Board to the licensee on revenue account (in respect of any period prior to the date on which the said units of plant or works came into commission) by way of interest, depreciation, testing and tuning-up expenses attributable to the said units of plant or works; and the sum to be paid as aforesaid shall become due in one or more instalments and at such time or times as the Board may direct.

XIV. The price payable by the licensee to the Board for all electricity supplied by the Board to him in

excess of the quantities referred to in paragraphs X and XI shall be the Grid Tariff.

XV. The licensee shall have the right at any time, on giving to the Board prior notice in writing expiring at the end of any year of account, to purchase from the Board at the Grid Tariff the whole of the electricity supplied to him by the Board thereafter:

Provided that the Board in those circumstances may make it a condition that the licensee shall, until the date on which the scheduled effective capacity of the station becomes nil, pay to the Board in respect of each month in addition to the Grid Tariff one twelfth of such proportion as the Board may fix of the annual charges by way of interest and depreciation which would have been payable to the Board in respect of the year of account had the said notice not been given:

Provided further that in assessing the scheduled effective capacity for the purposes of the first proviso all units of plant or works which may have been under this Schedule declared or deemed to be surplus to the requirements of the licensee at the date of the expiration of the said notice and all additional units of plant or works shall after that date always be deemed to be surplus to the requirements of the licensee:

Provided further that after the expiration of the said notice the licensee shall not be entitled any time to purchase electricity from the Board at the price ascertained under paragraph XIII.

PART III.

PERMANENT CLOSING DOWN OF A CONTROLLED STATION.

XVI. The Board may give the licensee not less than six months' notice in writing expiring at the end of any year of account that from the first day of the next succeeding year of account it will not again direct the licensee to generate any electricity in the station and upon that date (hereinafter in this Schedule referred to as the date of closing down) the station shall be permanently closed down.

XVII. From the date of closing down paragraph I, IV and VIII shall, in relation to the station cease to have effect, and on receipt of the notice under paragraph XVI the licensee shall have the option (to be exercised by a date not later than three months prior to the date of closing down) either—

(a) (i) to sell the station at any time after the date of closing down, and

(ii) to purchase the electricity supplied to him by the Board at the Grid Tariff, or

(b) (i) to require the Board to purchase the station or at the option of the licensee the undertaking of the licensee at the date of closing down at a price determined under the Fourth Schedule, and

(ii) to purchase the electricity supplied to him by the Board in accordance with the provisions of Part II as modified by paragraph XVIII:

Provided that where the station cannot be severed from the distributing system of the licensee or where the severance of the station from the distributing system of the licensee is likely to affect prejudicially the interests of the licensee, the licensee shall be entitled to demand that the Board shall purchase his entire undertaking and on such demand being made the Board shall purchase the entire undertaking of the licensee.

Any question arising under the proviso to this paragraph shall be referred to arbitration under section 76.

XVIII. Where a licensee exercises his option under paragraph XVII in terms of clause (b) thereof, the Board shall comply with the requirement to purchase the station under sub-clause (i) of that clause, and in applying the provisions of Part II to the purchase by the licensee of electricity supplied to him by the Board,

(a) the station shall, notwithstanding that it has been permanently closed down, be deemed to remain a controlled station in operation but to be such a station which has ceased to generate electricity for one thousand hours or more during each year of account:

(b) clause (a) of paragraph IX shall be construed as if the following were substituted therefor, namely:—

"(a) the maximum capacity of the station, that is to say, the maximum capacity (expressed in kilowatts available for supply to feeders) of such plant and works appertaining to the generation of electricity at the date of closing down as would have been available for reliable and regular commercial operation on the first day of each month, had the station not been closed down under Part III and had no replacement of any major item of such plant or works been carried out:"

(c) clause (a) of paragraph XII shall be construed as if the following were substituted therefor, namely:—

"(a) there shall be ascertained in respect of the year of account such annual charges by way of interest and depreciation attributable to the assets purchased by the Board under Part III as would have resulted from the application of clauses (e) and (f) of paragraph I of the Eighth Schedule had those assets remained in the ownership of the licensee:"

(d) clause (b) of paragraph XII shall be construed as if the reference therein to clauses (b), (c) and (d) of paragraph I of the Eighth Schedule were omitted;

(e) there shall be added to the sum payable by the licensee to the Board under clause (a) of paragraph XIII, in each month of the year of a sum equal to one twelfth of the amount calculated from the expression, "$\frac{A \times B}{C}$" where—

A= that part of the scheduled overhead charges payable by the licensee to the Board in respect of the most recent year of account during which the station did not cease to generate electricity for one thousand hours or more, which relates to the items referred to in clauses (b), (c) and (d) of paragraph I of the Eighth Schedule;

B= the sum of the scheduled effective capacities for each month of the year of account;

C= the sum of the scheduled effective capacities for each month of the most recent year of account as aforesaid.

PART IV

PURCHASE BY BOARD OF CONTROLLED STATION NOT TO BE CLOSED DOWN.

XIX. Where in respect of any month notified by the Board (and hereinafter in this Schedule referred to as the relevant month), the scheduled effective capacity of the station is computed under paragraph X to be less than one-half of the actual effective capacity of the station, the Board may give to the licensee six months' notice in writing that on the first day of the year of account next following the date of expiration of such notice the station will be purchased by the Board.

XX. Notwithstanding anything contained in paragraph X in computing the scheduled effective capacity for purposes of paragraph XIX there shall be left out of account all such units of plant and works as would not reasonably have been required by the licensee for purposes other than supply to the Board had the station not been a controlled station.

XXI. Where a notice under paragraph XIX has been served by the Board on the licensee, the Board shall purchase the station or where a severance of the station from the distributing system of the licensee is not possible or is likely to affect prejudicially the interest of

the licensee and the licensee so requires the entire undertaking of the licensee at the date specified in the notice and at a price determined under the Fourth Schedule.

XXII. From the date of purchase of the station or at the option of the licensee the undertaking of the licensee under paragraph XXI the provisions of paragraphs I, IV and VIII shall, in relation to the station, cease to have effect, and the licensee shall be required to purchase the electricity supplied to him by the Board in accordance with the provisions of Part II as modified by paragraph XXIII.

XXIII. In applying the provisions of Part II to the purchase by a licensee whose station has been purchased under this Part of electricity supplied to him by the Board,—

(a) the station shall, notwithstanding that it has been purchased by the Board, be deemed to remain a controlled station;

(b) clause (a) of paragraph XII shall be construed as if the reference therein to the provisions of the Eighth Schedule excluded a reference to clauses (b), (c) and (d) of paragraph I of that Schedule, and as if the following proviso were added to the said clause (a), namely :

"Provided that the annual charges to be included in accordance with clauses (e) and (f) of paragraph I of the said Schedule shall be such as would have resulted had the assets purchased by the Board under Part IV remained in the ownership of the licensee;"

(c) clause (b) of paragraph XII shall be construed as if the reference therein to clauses (b), (c) and (d) of paragraph I of the Eighth Schedule were omitted;

(d) there shall be added to the sum payable by the licensee to the Board under clause (a) of paragraph XIII in each month of the year of account a sum equal to one-twelfth of the amount calculated from the expression, "$\frac{A \times B}{C}$" where —

A = that part of the scheduled overhead charges payable by the licensee to the Board in respect of the last year of account in which the station was in the ownership of the licensee, which relates to the items referred to in clauses (b), (c) and (d) of paragraph I of the Eighth Schedule;

B=the sum of the scheduled effective capacities for each month of the year of account;

C=the sum of the scheduled effective capacities for each month of the said last year of account.

THE SECOND SCHEDULE

(See section 35)

SUPPLY BY BOARD TO LICENSEES OWNING STATIONS OTHER THAN CONTROLLED STATIONS

I. Before the end of each year the Board shall declare to the licensee in respect of each of the two next succeeding years the maximum number of kilowatts which it will make available for the purpose of the licensee's undertaking.

II. Where the Board and the licensee agree that the number of kilowatts declared under paragraph I will be inadequate to meet the requirements of the licensee having regard to the capacity of the licensee's generating plant, the Board shall not refuse its consent under section 44, the provisions of that section not withstanding, to the installation by the licensee of such generating plant as he may reasonably require for the purposes of his undertaking, unless the Board is able appropriately to amend its declaration within a reasonable time.

III. The licensee shall be entitled to demand from the Board, and the Board shall, except where prevented by causes beyond its control, be under obligation to supply to the licensee, a maximum number of kilowatts in each year not exceeding, without the consent of the Board, the maximum number of kilowatts declared under this Schedule in respect of that year.

IV. The point at which the electricity to be supplied under this Schedule shall be delivered to the licensee shall, unless otherwise agreed between the Board and the licensee, be at the licensee's generating station, and the pressure of supply shall be such as may be agreed between the Board and the licensee.

V. The Board shall bear the whole of the cost of the service apparatus required for making the supply under this Schedule available to the licensee.

VI. The price to be paid by the licensee to the Board in respect of each year for electricity supplied under this Schedule shall be the Grid Tariff.

THE THIRD SCHEDULE

(See section 36)

CLOSING DOWN OF GENERATING STATIONS OTHER THAN CONTROLLED STATIONS

I. Where the Board proposes under section 36 permanently to close down a generating station other than a controlled station, it shall give the licensee owning the station not less than six months' notice in writing expiring at the end of any year of account that from the first day of the next succeeding year of account (hereafter in this Schedule referred to as the date of closing down) the station shall be permanently closed down.

II. From the date of closing down the Board shall be under obligation to supply to the licensee, except where prevented by causes beyond its control, and the licensee shall be under obligation to take from the Board, the whole of the electricity required by the licensee for the purposes of his undertaking, except such quantity of electricity as the licensee may for the time being be entitled under paragraph III to purchase from a source other than the Board or as he may be generating in another station, not being a controlled station.

III. Unless otherwise agreed between the Board and the licensee, the licensee shall not, where he has received a notice under paragraph I, purchase after the date of closing down any quantity of electricity from a source other than the Board:

Provided that where on the date of the receipt of such notice the licensee is bound under any contract to purchase any quantity of electricity from some other source, he may, for a period not exceeding two years after the date of closing down or for such further period, if any, as the Board may allow, continue to purchase electricity under the said contract from such other source.

IV. *(1)* The point at which electricity to be supplied by the Board shall be delivered to the licensee shall unless otherwise agreed between the Board and the licensee, be at the licensee's generating station, and the pressure of supply shall be such as may be agreed between the Board and the licensee.

(2) The Board shall bear the whole of the cost of the service apparatus required for making the supply available to the licensee.

V. The licensee shall have the option, to be exercised by the date not later than three months prior to the date of closing down, either—

(a) (i) to sell the station at any time after the date of closing down, and

(ii) to purchase the whole of the electricity supplied to him by the Board at the Grid Tariff, or

(b) (i) to require the Board to purchase the station at the date of closing down at a price determined under the Fourth Schedule, and

(ii) to purchase the whole of the electricity supplied to him by the Board on the terms hereafter set out in this Schedule.

VI. Where a licensee exercises his option under paragraph v in terms of clause (b) thereof, the Board shall comply with the requirement to purchase under sub-clause (i) of that clause, and the following provisions of this Schedule shall apply.

VII. As soon as practicable after the licensee has exercised his option as aforesaid, there shall be ascertained and agreed between him and the Board the following quantities in respect of each year of account subsequent to the date of closing down, namely:—

(a) The maximum capacity of the station, that is to say, the maximum capacity (expressed in kilowatts available for supply to feeders) of such plant and works appertaining to the generation of electricity at the date of closing down as would have been available for reliable and regular commercial operation on the first day of the year of account, had the station not been closed down under this Schedule and had no replacement of any major item of such plant or works been carried out subsequent to the date of closing down.

(b) The number and size of units of plant and works, forming part of the aforesaid plant and works, which would have represented reasonable standby in the station.

(c) The standby capacity of the station, that is to say, the number of kilowatts (expressed in killowatts available for supply to feeders) by which the maximum capacity of the station would be reduced if the standby plant and works referred to in clause (b) were to be left out of account.

(d) The agreed effective capacity of the station, that is to say, the number of kilowatts by which the maximum capacity exceeds the standby capacity.

VIII. As soon as practicable after the date of closing down there shall be ascertained in agreement between the Board and the licensee in respect of each of the three consecutive years of account immediately preceding the date of closing down (hereafter in this Schedule referred to as the basic years)—

(a) the sums expended by the licensee and wholly attributable to the generation of electricity under the following heads, namely:—

(i) fuel;

(ii) Oil, water and stores consumed;

(iii) salaries and wages and any contribution by the licensee for pensions, provident fund, superannuation and insurance of officers and servants;

(iv) repairs and maintenance, and renewals not chargeable to capital account:

(v) management, rents, rates and taxes (including super-tax payable by the licensee as a company, but excluding other taxes on profits), insurance of plant and general establishment charges;

(vi) any other expense on revenue account;

(b) the actual effective capacity of the station on the first day of each such year agreed in accordance with the principles set out in paragraph IX of the First Schedule.

IX. As soon as practicable after the beginning of each year of account there shall be ascertained in respect of that year such annual charges by way of interest and depreciation attributable to the assets purchased by the Board under this Schedule as would have resulted from the application of clauses (e) and (f) of paragraph I of the Eighth Schedule, had those assets remained in the ownership of the licensee.

X. The licensee shall be entitled to purchase from the Board in each year of account at a price determined under paragraph XI—

(a) a number of kilowatts not exceeding the agreed effective capacity ascertained in respect of that year under paragraph VII, and

(b) a number of kilowatt-hours not exceeding the number of kilowatt-hours which bears the same proportion to the total number of kilowatt-hours required by the licensee in that year for the purposes of his undertaking as the agreed effective capacity ascertained in respect of that year bears to the total maximum demand of the licensee in that year for the said purposes.

XI. The price payable by the licensee in respect of each year of account for the quantity of electricity specified in paragraph X shall be—

(a) in respect of kilowatts, a fixed charge equal to the sum of—

(i) an amount calculated from the expression $\text{"}\frac{A}{2}+\frac{A}{2}\times\frac{B}{C}\text{"}$

(ii) an amount calculated from the expression $\frac{\text{"}B\times D}{C\text{"}}$

(iii) the annual charges by way of interest and depreciation ascertained in respect of the year of account under paragraph IX, where—

A=one-third of the total costs during the basic years under heads (ii), (iii), (iv) and (vi) set out in clause (a) of paragraph VIII;

B=the agreed effective capacity for the year of account;

C=one-third of the sum of the actual effective capacities [ascertained under clause (b) of paragraph VIII] for each of the basic years;

D=one-third of the total costs during the basic years under head (v) set out in clause (a) of paragraph VIII;

(b) in respect of kilowatt-hours, a running charge per kilowatt-hour ascertained —

(i) by multiplying the total number of tons of fuel consumed in the station in the basic years by the estimate agreed between the Board and the licensee of the cost per ton which would have been incurred in delivering and handling the same quantity of fuel of equivalent calorific value to the furnaces in the station during the year of account, had the station remained in the ownership of the licensee, and

(ii) by dividing the total cost so found by the total number of units sent out from the station in the basic years.

XII. The price payable by the licensee for all electricity supplied to him by the Board in excess of the quantity specified in paragraph X shall be the Grid Tariff.

XIII. The licensee shall have the right at any time on giving the Board prior notice in writing expiring at the end of a year of account of purchase at the Grid Tariff the whole of the electricity supplied to him by the Board:

Provided that the Board in those circumstances may make it a condition that the licensee shall, until the date on which the agreed effective capacity of the station becomes nil, pay to the Board in each year of account in addition to the Grid Tariff a sum equal to such proportion as the Board may fix of the annual charges by way of interest and depreciation ascertained in respect of the year under paragraph IX:

Provided further that after the expiration of the said notice, the licensee shall not be entitled at any time to purchase electricity from the Board at the price ascertained under paragraph XI.

THE FOURTH SCHEDULE

(See sections 23 and 37 and First and Third Schedules)

PRICE FOR UNDERTAKINGS, GENERATING STATIONS AND MAIN TRANSMISSION LINES PURCHASED BY THE BOARD.

I. For the purposes of this Schedule—

(a) "date of vesting" means the date on which the undertaking, generating station, main transmission line or asset forming part of such station or line, as the case may be, vests in the Board ;

(b) "original cost" of an asset means the amount of expenses certified or determined under paragraph II to have been properly incurred on and incidental to the provision of the asset for the purposes of the undertaking, generating station or main transmission line, as the case may be;

(c) "prescribed period" shall have the meaning assigned to it in the Sixth Schedule.

II. The price to be paid for any undertaking, generating station or main transmission line, as the case may be, purchased by the Board under this Act shall be such sum as may be certified by an auditor appointed by the Provincial Government in this behalf to have been the amount properly incurred on and incidental to the establishment of the undertaking, station or main transmission line, as the case may be, less depreciation thereon on the scale set out in paragraph III :

Provided that there shall be added to such sum as aforesaid on account of such purchase of the generating station or main transmission line such reasonable compensation as may be determined by the Board having due regard to the fact that a portion of the undertaking is to be acquired :

Provided further that if the Board or the licensee is dissatisfied with the sum so certified, the matter shall, in default of agreement between them, be determined as provided in section 76

III. The scale of depreciation referred to in paragraph II shall be in respect of the portion of the prescribed period prior to the date of vesting,—

(a) for land owned under full title, including the costs of clearing the site, nil ;

(b) for other assets specified in the Table appended to the Seventh Schedule, the amount which would be produced by the end of the said portion of the prescribed period if during that portion an allowance were made annually on account of depreciation in accordance with the provisions of paragraph VI of the Sixth Schedule.

IV. The auditor appointed under paragraph II shall be a person qualified under the provisions of section 144 of the Indian Companies Act, 1913 (VII of 1913) to act as an auditor of companies.

V. The auditor's costs under this Schedule shall be shared equally by the Board and the licensee concerned.

THE FIFTH SCHEDULE

(See section 41)

CHARGES FOR USE BY BOARD OF TRANSMISSION LINES AND MAIN TRANSMISSION LINES

I. The following charges and allowances shall be made in respect of a year of account for the use by the Board of main transmission lines or transmission lines (hereafter in this Schedule referred to as lines), namely:—

(a) the actual cost of maintenance of the lines, including renewals thereof not chargeable to capital account ;

(b) sums paid in respect of the lines for insurance and as rents, rates and taxes (including super-tax payable by the licensee as a company but excluding other taxes on profits);

(c) the proportion of management and general establishment charges properly attributable to the lines ;

(d) any other expenses on revenue account properly attributable to the lines ;

(e) interest on money properly expended for capital purposes (whether defrayed out of capital or revenue) and attributable to the lines, and interest on such working capital as is properly attributable to the lines :

Provided that for the purpose of ascertaining the principal on which interest is payable within the meaning of this clause, there shall be left out of account any part of principal interest on which is charged to capital;

(f) an allowance for depreciation of an amount determined in respect of the lines in accordance with the provisions of paragraph VI of the Sixth Schedule.

II. If the lines are used partly by the Board and partly by the licensee owning them, or if the arrangement for their use comes into force or determines otherwise than at the beginning or end of a year of account, the charges and allowances referred to in paragraph I shall be the proper proportion thereof having regard to the use made of the lines by the Board and the period of such use during the year and with the addition of the cost of such additional transmission losses as may have been incurred by the licensee as a result of the Board's user of the lines.

III. For the purposes of clause (e) of paragraph I the rate of interest shall be—

(a) where the licensee owning the lines is a local authority, the average rate payable on the money raised by that authority for the purpose of constructing the lines ;

(b) in any other case, 5 *per centum per annum*.

THE SIXTH SCHEDULE

(See section 57)

FINANCIAL PRINCIPLES AND THEIR APPLICATIONS

I. The licensee shall so adjust his rates for the sale of electricity by periodical revision that his clear profit in any year shall not as far as possible exceed the amount of reasonable return :

Provided that the licensee shall not be considered to have failed so to adjust his rates if the clear profit in any year of account has not exceeded the amount of the reasonable return by more than thirty *per centum* of the amount of the reasonable return.

II. *(1)* If the clear profit of a licensee in any year of account is in excess of the amount of reasonable return, one-third of such excess, not exceeding 7½ per cent. of the amount of reasonable return, shall be at the disposal of the undertaking. Of the balance of the excess, one-half shall be appropriated to a reserve which shall be called the Tariffs and Dividends Control Reserve and the remaining half shall either be distributed in the form of a proportional rebate on the amounts collected from the sale of electricity and meter rentals or carried forward in the accounts of the licensee for distribution to the consumers in future, in such manner as the Provincial Government may direct.

(2) The Tariffs and Dividends Control Reserve shall be available for disposal by the licensee only to the extent by which the clear profit is less than the reasonable return in any year of account.

(3) On the purchase of the undertaking under the terms of its licence any balance remaining in the Tariffs and Dividends Control Reserve shall be handed over to the purchaser and maintained as such Tariffs and Dividends Control Reserve.

III. There shall be created from existing reserves or from the revenues of the undertaking a reserve to be called "Contingencies Reserve."

IV. *(1)* The licensee shall appropriate to contingencies Reserve from the revenues of each year of account a sum not less than one quarter of one *per centum* and

not more than one-half of one *per centum* of the original cost of fixed assets; provided that if the said reserve exceeds, or would by such appropriation be caused to exceed, five *per centum* of the original cost of fixed assets, no appropriation shall be made which would have the effect of increasing the reserve beyond the said maximum.

(2) The amount of the Contingencies Reserve shall be invested in securities authorised under the Indian Trusts Act, 1882 (II of 1882).

V. The Contingencies Reserve shall not be drawn upon during the currency of the licence except to meet such charges as the Provincial Government may approve as being—

(a) expenses or loss of profits arising out of accident, strikes or circumstances which the management could not have prevented;

(b) expenses on replacement or removal of plant or works other than expenses requisite for normal maintenance or renewal;

(c) compensation payable under any law for the time being in force and for which no other provision is made.

VI. *(1)* There shall be allowed in each year in respect of depreciation of fixed assets employed in the business of electricity supply such an amount as would if set aside annually throughout the prescribed period and accumulated at compound interest at 4 *per centum per annum*, produced by the end of the prescribed period an amount equal to 90 per cent. of the original cost of the asset after taking into account the sums already written off or set aside in the books of the undertaking. Annual interest on the accumulated balance will be allowed as an expense from revenue as well as the annual incremental deposit :

Provided that, within 3 months from the date upon which these principles are enacted, a licensee may elect to adopt the straight-line method of depreciation accounting in lieu of the compound interest method above prescribed. Straight-line method of depreciation accounting means the method whereby an allowance is made in each year in respect of depreciation of fixed assets employed in the business of such an amount as is arrived at by dividing ninety per cent. of the original cost of the asset by the prescribed period in respect of such asset.

(2) The year in which any asset becomes available for use in the business and the relative cost thereof shall, in the absence of satisfactory record, be determined by the Provincial Government. All sums credited to depreciation account shall be invested only in the business of electricity supply of the undertaking or in investments, approved by the Provincial Government.

VII. *(1)* Where any fixed asset ceases to be available for use through obsolescence, inadequacy, superfluity or for any other reason, it shall be described in the books of the licensee as no longer in use and no further depreciation in respect thereof shall be allowed as a charge against revenue.

(2) The written down cost of such fixed asset shall be carried to a special account in the books of the licensee and the amount for which the asset is sold or the amount of its scrap value when actually realised shall be set off against the amount so carried.

(3) The written down cost which still remains to be written off in respect of such fixed asset shall be charged against the Contingencies Reserve by equal annual instalments from the year of account in which the asset ceases to be available for use as aforesaid up to the date of the next option of purchase of the undertaking under the licence or up to the expiration of the prescribed period, whichever is earlier.

VIII. When any asset has been written down in the books of the undertaking to 10 per cent. or less of its original cost, no further depreciation shall be allowed in respect of that asset.

IX. When any fixed asset is sold for an amount exceeding its written down cost the excess shall be credited to the Contingencies Reserve.

X. Except with the consent of the Provincial Government no sums shall be carried to a reserve, and no dividends in excess of 3 per cent. on share capital and no other distribution of profits shall be made to shareholders while any sum allowed in respect of depreciation for the year of account or any instalments due in respect of any arrears of depreciation as provided in paragraph XI remains to be written off in the books of the undertaking.

XI. Arrears of depreciation calculated in accordance with paragraph VI may be written off by equated payments over the remainder of the prescribed period and the amount so set aside in the books of the undertaking may be taken into account in any year as a special appropriation for purposes of assessing the clear profit.

XII. Where contributions are made by consumers towards the costs of construction of service lines constructed after the date on which this Act comes into force only the net cost of such service lines after deducting such contributions shall be included in the cost of fixed assets for the purposes of arriving at the capital base.

Provided that for the purposes of depreciation under paragraph VI, the total original cost of construction of the service lines shall be taken into account.

XIII. *(1)* Subject to the provisions of sub-paragraph *(2)* the ordinary remuneration of a managing agent excluding the office allowance mentioned in sub-paragraph *(3)* but including purchasing commission, if any, shall be based on a percentage of net profits as defined in section 87 (C) (3) of the Indian Companies Act, 1913 (VII of 1913), and shall not exceed—

(a) in respect of the first Rs. 5 lakhs of such net profits—10 per cent; and

(b) in respect of all net profits in excess of Rs. 5 lakhs —7 per cent.

(2) The amount paid to a managing agent shall be subject to a minimum payment on account of ordinary remuneration not exceeding two rupees per annum for each complete thousand rupees of paid up share and debenture capital, provided that for purposes of computing the minimum payment should the share and debenture capital be less than rupees five lakhs it shall be taken as rupees five lakhs and should the said capital be greater than rupees one crore it shall be taken as rupees one crore.

(3) An office allowance drawn by a managing agent which shall include the salaries and wages of all persons employed in the office of the managing agent, but not the salaries of the engineering staff employed for purposes of the undertaking, shall be a percentage of the operating expenditure and the expenditure during the year of account on capital works. The office allowance so drawn shall not exceed—

(a) In respect of the first Rs. 1 lakh of operating expenditure—8 per cent.

In respect of the next Rs. 2 lakhs of operating expenditure—5 per cent.

In respect of the next Rs. 7 lakhs of operating expenditure—2½ per cent.

In respect of all operating expenditure in excess of Rs. 10 lakhs—1½ per cent.; and

(b) In respect of the first Rs. 1 lakh of capital expenditure incurred during the year of account—4 per cent.

In respect of the next Rs. 2 lakhs of capital expenditure incurred during the year of account—3 per cent.

In respect of the next Rs. 7 lakhs of capital expenditure incurred during the year of account—1½ per cent.

In respect of all capital expenditure in excess of Rs. 10 lakhs incurred during the year of account—1 per cent.

Operating expenditure for the purposes of sub-paragraph *(3)* (a) above shall mean the sum of the items of expenditure as defined in sub-paragraph (2) (b) of paragraph XVII with the omission of those under clauses (i), (iv), (ix) and (x) thereof.

XIV. The Board of Directors of an undertaking shall not contain more than ten directors.

XV. *(1)* Where at any time within three years before the next option of purchase under the licence arises, the licensee proposes to make any capital expenditure which exceeds twentyfive thousand rupees or two *per centum* of the capital base, whichever is more, in respect of which any amount would in the event of purchase under the option be payable by the purchaser to the licensee, the licensee shall, before giving effect to such proposal, apply to the Board or where no Board is constituted, the Provincial Government for its concurrence.

(2) If the Board or the Provincial Government, as the case may be, does not within one month from the receipt of such application, consent to such expenditure, the licensee may refer the matter to the arbitration of the Authority.

XVI. Any dispute or difference as to the interpretation or any matter arising out of the provisions of this Schedule shall be referred to the arbitration of the Authority.

DEFINITIONS

XVII. For the purposes of this Schedule—

(1) "capital base" means the sum of —

(a) the original costs of fixed assets, subject to the provision of para. XII in respect of service lines;

(b) the cost of intangible assets;

(c) the original cost of works in progress;

(d) the amount of investments compulsorily made under paragraph IV of this schedule, together with such investments made before or after the commencement of this Act from contributions towards depreciation as may be shown to the reasonable satisfaction of the Authority as being amounts which could not be or could not have been utilised by the undertaking under clauses (a) and (b) of this sub-paragraph;

(e) an amount on account of working capital equal to the sum of—

(i) one-twelfth of the sum of the book cost of stores, materials and supplies including fuel on hand at the end of each month of the year of account;

(ii) one-twelfth of the sum of cash and bank balances and call and short term deposits at the end of each month of the year of account, not exceeding in the aggregate an amount equal to one quarter of the expenditure under sub-paragraph 2 (b) of this paragraph excluding clauses (i), (iv) and (x);

less—

(i) the amounts written off or set aside on account of depreciation of fixed assets and amounts written off in respect of intangible assets in the books of the undertaking before or after the commencement of this Act, and

(ii) the amount of any loans advanced by the Board under the provisions of sub-paragraph *(2)* of paragraph 1 of the First Schedule.

(2) "Clear profit" means—

the difference between the amount of income and the sum of expenditure plus specific appropriations, made up in each case as follows :—

(a) income derived from—

(i) gross receipts from sale of energy, less discounts applicable therto;

(ii) rental of meters and other apparatus hired to consumers;

(iii) sale and repair of lamps and apparatus;

(iv) rents, less outgoings not otherwise provided for ;

(v) transfer fees;

(vi) investments, fixed and call deposits, and bank balances;

(vii) other general receipts accountable in the assessment of Indian Income-tax and arising from and ancillary or incidental to the business of electricity supply.

(b) expenditure incurred on—

(i) generation and purchase of energy;

(ii) distribution and sale of energy;

(iii) rents, rates and taxes, other than all taxes on income and profits;

(iv) interest on loans advanced by the Board under sub-paragraph *(2)* of paragraph 1 of the First Schedule;

(v) interest on security deposits;

(vi) legal charges;

(vii) bad debts;

(viii) auditors' fees;

(ix) management including managing agents' remuneration as provided for in para XIII;

(x) depreciation, computed as hereinafter set out;

(xi) other expenses admissible under the law for the time being in force in the assessment of Indian Income-tax and arising from and ancillary or incidental to the business of electricity supply;

(xii) contributions to Provident Fund, staff pension, gratuity and apprentice and other training schemes.

(c) special appropriations sufficient to cover—

(i) previous losses (that is to say excess of expenditure over income) which have arisen from the business of electricity supply to the extent in any year actually appropriated for the purpose in the books of the undertaking.

(ii) all taxes on income and profits;

(iii) instalments of written down amounts in respect of intangible assets and new capital issue expenses to the extent in any year actually appropriated for the purpose in the books of the undertaking; provided that the amounts so appropriated shall not exceed the amount found by dividing the written down cost of such assets by the number of complete years remaining before the next option of purchase under the licence arises;

(iv) contributions to the contingency reserve, computed as hereinafter set out;

(v) contributions towards arrears of depreciation:

(vi) other special appropriations permitted by the Provincial Government.

(3) "debenture capital" means—

capital raised against debentures or other instruments creating a charge or lien on the assets of the undertaking.

(4) "intangible assets" means—

underwriter's commission and such preliminary and promotional expenditure shown as a debit in the capital account of the undertaking, as has fairly arisen in promoting the business of electricity supply excluding any amount paid on account of goodwill.

(5) "ordinary capital" means—

in the case of a company, the amount of ordinary capital paid up and attributable to the undertaking of the license ;

in other cases the net amount standing to the credit of the proprietor or proprietors' account or accounts whether in capital, personal or any other account howsoever called and properly attributable to the business of electricity supply.

(6) "original cost" means in respect of any asset the sum of—

(a) the cost of the asset to the licensee, including the cost of delivery and all charges properly incurred in erecting and bringing the asset into beneficial use,

(b) interest charges on capital expenditure incurred from borrowed money and properly attributable to the asset up to the date of bringing it into use at a rate not exceeding average Reserve Bank rate ruling at that time plus one per cent.

(c) a proper addition on account of supervision not exceeding fifteen *per centum* of the cost referred to in sub-paragraph (a),

so however that the original cost of any asset shall not in any case exceed the original cost attributed thereto in the books of the undertaking.

(7) "Preference Capital" means—

the amount of paid up capital attributable to the undertaking of the licensee, issued on such preferred terms as are sufficient to qualify it for such description.

(8) "prescribed period" means—

in respect of each of the assets specified in the table appended to the Seventh Schedule, the number of years or period specified therein, in relation to such asset, running in each case from the beginning of the year of account next following that in which the particular asset became available for use in the business :

Provided that, on the application of the licensee, the Provincial Government may vary the prescribed period in respect of any assets in use on the date when this Schedule comes into force if, having regard to the physical condition of such assets the application of the table to such assets would be unreasonable. Any question arising out of the decision of the Provincial Government on any such application shall be referred to the Authority for arbitration.

(9) "reasonable return" means—

in respect of any year of account, the sum of the following :

(a) the amount found by applying the standard rate to the capital base at the end of that year ;

(b) the income derived from investments other than those made under paragraph IV of this Schedule.

(c) an amount equal to one half of one *per centum* on any loans advanced by the Board under sub-para. *(2)* of paragraph I of the First Schedule.

(10) "standard rate" means—

5 *per centum*.

(11) "written down cost" means—

original cost less the amounts set aside or written off on account of depreciation in the books of the undertaking.

THE SEVENTH SCHEDULE

(*See* section 68 and the Fifth and Eighth Schedules)

DEPRECIATION OF ASSETS

I. For the purposes of this Schedule—

(a) "financial year" means the financial year of the owner of the asset concerned.

(b) "original cost" and "prescribed period" shall have the meanings respectively assigned to them in the Sixth Schedule.

II. *(1)* Save as provided in the Fourth and Sixth Schedules, the scale of depreciation applicable to the assets specified in the table appended to this Schedule in any financial year, and proportionately for any portion of a financial year, shall be an allowance of such amount as would if made annually throughout the prescribed period and accumulated at compound interest at the rate of 4 *per centum per annum* produce by the end of the prescribed period an amount equal to 90 *per centum* of the original cost of the asset.

(2) Such allowance shall cease at the end of the prescribed period or when the asset ceases to be used for the purposes of the undertaking, whichever is earlier :

TABLE

(See also section 57 and the Fourth and Sixth Schedules)

Description of asset	Number of years or period
A. Land owned under full title	Infinite.
B. Land held under lease —	
(a) for investment in the land	The period of the lease, or the period remaining unexpired on the assignment of the lease.
(b) for costs of clearing site	The period of the lease remaining unexpired at the date of clearing the site.
C. Assets purchased new —	
(a) Plant and machinery in generating stations, including plant foundations —	
(i) hydro-electric	Thirty-five.
(ii) steam-electric	Twenty five.
(iii) diesel-electric	Fifteen.
(b) Cooling towers and circulating water systems	Thirty.
(c) Hydraulic works forming part of a hydro-electric system including —	
(i) dams, spillways, weirs, canals, reinforced concrete flumes and syphones	One hundred.

Description of asset	Number of years of period.
(ii) reinforced concrete pipe-lines and surge tanks, steel pipelines, sluice gates, steel surge tanks, hydraulic control valves and other hydraulic works	Forty.
(d) Buildings and civil engineering works of a permanent character, not mentioned above,—	
(i) offices and show-rooms	Fifty.
(ii) containing thermo-electric generating plant	Thirty.
(iii) containing hydro-electric generating plant	Thirty-five.
(iv) temporary erections such as wooden structures	Five.
(v) others	Fifty.
(e) Transformers, transformer kiosks, sub-station equipment and other fixed apparatus (including plant foundations) —	
(i) transformes (including foundations) having a rating of 100 kilovolt amperes and over	Thirty five.
(ii) others	Twenty-five.
(f) Switchgear, including cable connections	Twenty.
(g) Batteries	Ten.
(h) (1) Underground cables, including joint boxes and disconnecting boxes	Forty.
(2) Cable duct system	Sixty.
(i) Overhead lines, including supports —	
(i) lines on steel or reinforced concrete supports, operating at nominal voltages higher than 13. 2 kilovolts	Thirty.
(ii) other lines on steel or reinforced concrete support	Twenty-five.
(iii) lines on wood supports	Twenty.
(j) Meters	Fifteen.
(k) Self-propelled vehicles	Seven.
(l) Static machine tools	Twenty.
(m) Air-conditioning plant —	
(i) static	Fifteen.
(ii) portable	Seven.
(n) (i) Office furniture and fittings	Twenty.
(ii) office equipment	Ten.
(o) Apparatus let on hire,—	
(i) other than motors	Seven.
(ii) motors	Twenty.
D. Assets purchased second hand and assets not otherwise provided for in this Table	Such reasonable period as the Provincial Government determines in each case, having regard to the nature, age and condition of the asset at the time of its acquisition by the owner.

THE EIGHTH SCHEDULE

(*See* the First and Third Schedules)

DETERMINATION OF COSTS OF PRODUCTION OF ELECTRICITY AT GENERATING STATIONS.

I. For the purposes of the First and Third Schedules, the cost of production of electricity at a generating station shall be ascertained by calculating and taking into account the following costs, charges and allowances in respect of the year of account, namely:—

(a) sums expended for fuel, oil, water and stores consumed, for salaries and wages, and any contribution by the licensee for pensions, provident fund, super annuation and insurance of officers and servants, for repairs and maintenance and for renewals not chargeable to capital account;

(b) sums paid in respect of the station for insurance and as rents, rates and taxes (including super-tax payable by the licensee as a company but excluding other taxes on profits);

(c) the proportion of management and general establishment charges properly attributable to the station;

(d) any other expenses on revenue account properly attributable to the station;

(e) interest on money properly expended for capital purposes (whether defrayed out of capital or revenue) and attributable to the station, and interest on working capital properly attributable to the station and the production of electricity therein :

Provided that for the purpose of ascertaining the principal on which interest is payable within the meaning of this clause, there shall be left out of account any

part of principal on which interest is payable out of capital;

(f) an allowance for depreciation of an amount determined in respect of the station in accordance with the provisions of paragraph VI of the Sixth Schedule.

II. For the purposes of clause (e) of paragraph I, the rate of interest shall be—

(a) on such part of the principal on which interest is payable within the meaning of the said clause as has been advanced on loan by the Board under paragraph I of the First Schedule, the actual rate charged by the Board *plus* one-half of one *per centum* per annum on the loan in the year of account;

(b) on the balance of the said principal,—

(i) where the licensee owning the station is a local authority, the average rate payable in the year of account on the money raised by that authority for the purposes of the station:

(ii) in any other case, 5 *per centum per annum*;

THE NINTH SCHEDULE

(*See* the First Schedule)

ALLOCATION OF COSTS OF PRODUCTION AT GENERATING STATIONS

I. For the purposes of this Schedule—

(a) the average load Factor of a station shall be expressed as a percentage, and shall be ascertained by multiplying the number of kilowatthours supplied from the station during the year of account by 100, and dividing the product so obtained by the product of the average monthly maximum demand multiplied by the number of hours during which the station was in commission in the year of account,

(b) the averge monthly maximum demand shall be the arithmetical average of the monthly maximum demands on the station in those calendar months during which the station was in commission in the year of account;

(c) a station shall be deemed to be in commission when the whole or any portion of the plant in the station is generating electricity or is in readiness to generate electricity upon demand;

(d) "cost of fuel" means the sums expended for fuel consumed *plus* the cost of any transport, handling, preparation or treatment incurred in connection with the delivery of fuel to the boiler hoppers, furnaces or engines and in connection with the disposal of the products or residues of combustion, *plus* the proportion of salaries and wages and any contributions made by the owner of the station for pensions, provident fund, superannuation and insurance of officers and servants properly attributable to such delivery or disposal, *less* any sums received from the sale of any products or residues of combustion;

(e) "cost of oil, water and stores" means the sums expended for oil, water and stores consumed;

(f) "cost of repairs, maintenance and renewals" means the sums expended for repairs and maintenance and for renewals not chargeable to capital account, together with the proportion of salaries and wages and any contributions made by the owner of the station for pensions, provident fund, superannuation and insurance of officers and servants properly attributable to repairs, maintenance and renewals;

(g) "salaries and wages" means the sums expended for salaries and wages and any contributions made by the owner of the station for pensions, provident fund, superannuation and insurance of officers and servants, less the proportion of such sums properly attributable to the cost of fuel under clause (d) and to the cost of repairs, maintenance and renewals under clause (f).

II. Of the costs of production of electricity at a generating station ascertained in accordance with the Eighth Schedule, the following costs, charges and allowances in respect of the year of account shall be allocated as "fixed costs," namely:—

(a) of the costs, charges and allowances set out in clause (a) of paragraph I of the said Schedule, portions calculated from the appropriate formulæ set out in paragraph III;

(b) the whole of the costs, charges and allowances set out in the remaining clauses of paragraph I of the said Schedule.

III. The portion of the following costs, charges, and allowances to be allocated as fixed costs shall be ascertained from the formula hereinafter set out against each, namely:—

(*a*) cost of fuel . . . . . $\frac{100}{100 + 12{\cdot}8\,L}$;

(*b*) cost of oil, water and stores . . . $\frac{100}{100 + 9{\cdot}66\,L}$;

(*c*) salaries and wages . . . $\frac{100}{100 + 0{\cdot}38\,L}$;

(*d*) cost of repairs, maintenance and renewals . . . . $\frac{100}{100 + 0{\cdot}0001\,NL}$

where—

L=the average load factor of the station;

N=the number of hours during which the station was in commission in the year of account.

IV. The amount of the difference between the costs of production at a generating station ascertained in accordance with the Eighth Schedule and the fixed costs in respect of the year of account determined in accordance with this Schedule shall be allocated as "running costs".

V. The foregoing provisions of this Schedule shall not apply in any case where it is agreed between the Board and the owner of the station that the circumstances or conditions of operation in the station, whether temporary or continuing, are such that the said provisions ought not reasonably to be applied; and in such case the allocation between fixed costs and running costs shall be made in such manner as the Board and the said owner may agree.

[THE] EMPLOYEES' STATE INSURANCE ACT, 1948
(ACT XXXIV of 1948.)

STATEMENT OF OBJECTS AND REASONS.

"The introduction of a scheme of Health Insurance for Industrial Workers has been under the consideration of the Government of India for a long time. The necessity for such a scheme has become more urgent in view of the conditions brought about by war. The scheme envisaged is one of compulsory state insurance providing for certain benefits in the event of sickness, maternity and employment injury to workmen employed in or in connection with work in factories other than seasonal factories.

A scheme of this nature has to be planned on an all-India basis and administered uniformly throughout

the country. With this object, the administration of the scheme is proposed to be entrusted to a Corporation constituted by central legislation.

The functions of the Corporation will be performed by a Central Board constituted of representatives of Central and Provincial Governments, and of employers, workers and the medical profession. The Board will also include certain members elected by the Central Legislative Assembly. A Standing Committee of the Board will act as the Executive of the Board, and a Medical Benefit Council will also be set up to advise on matters relating to the administration of medical benefit.

The insurance fund will be mainly derived from contributions from employers and workmen. The contributions payable in respect of each workman will be based on his average wages and will be payable in the first instance by the employer. The employer will be entitled to recover the workman's share from the wages of the workmen concerned. Workmen whose earnings do not exceed 10 annas a day will be totally exempt from payment of any share of the contribution, the entire contribution on account of such workmen being met by employer. Provision has been made for the preparation of proper budgets and the audit of accounts.

The insured workman will be entitled to the following benefits:—

Sickness Benefit. (a) A workman, if certified sick and incapable of working, will receive for a period not exceeding 8 weeks in any *Cash* continuous 12 monthly period a cash allowance equal approximately to half his average daily wages during previous six months. He will also be entitled to receive medical care and treatment at such hospitals, dispensaries or other institutions to which the factory in which he is employed may be allotted.

Maternity Benefit. (b) Women workers will be entitled to receive a maternity benefit at 12 annas a day for 12 weeks. They will also be entitled to medical aid at the aforesaid medical institutions.

Disablement and Dependents' Benefits. (c) A workman disabled by employment injury will receive for the period of disablement or life depending on whether the disablement is temporary or full and permanent, as the case may be, a monthly pension equivalent to half his average wages during the previous twelve months, subject to a maximum and minimum. Where disablement is partial, the pension will be proportionately reduced. In case of death resulting from employment injury, the pension will be payable to the widow or widows, minor sons and minor and unmarried daughters or in case there are no widow and legitimate children, to other dependants of the deceased workman. The workman will also be entitled to medical care and treatment.

Medical care and treatment to insured workman will be provided by Provincial Governments at such hospitals, dispensaries and other institutions as may be prescribed for the purpose. The cost of the medical benefit will be shared between the Provincial Government and the Corporation in such proportions as may be agreed upon between them. In case the average incidence of sickness cash benefit in any Province is in excess of the all-India average, Provincial Government will also bear such share of the cost of the excess incidence as may be agreed upon between it and the Corporation.

Workmen's State Insurance Courts will be set up to decide disputes and adjudicate on claims. The cost of the tribunal will be paid by the insurance fund.

Central Government will make rules on matters relating to the administration of the Corporation, such as nomination and election of members of the Board, Standing Committee, Medical Benefit Council, powers and duties of the principal officers, raising of loans, investment of funds, accounts to be maintained by the Corporation, their audit and publication. Provincial Government will make rules on matters relating to the Workmen's Insurance Courts to be set up under the Act, establishment of hospitals, dispensaries, medical institutions, etc., and the scale of medical benefit to be provided to insured persons. The Board will make regulations on matters relating to the working of the scheme, e. g. collection of contributions, payment of benefits, returns and other particulars to be submitted by employers in respect of workmen employed by them, the conditions to be observed by insured persons in receipt of benefits, etc.

The Bill makes detailed provisions in regard to the above matters. . . . . ."

—Gazette of India, 1946, Part V, page 462.

[THE] EMPLOYEES' STATE INSURANCE ACT, 1948.

(ACT XXXIV OF 1948)[a]

[19th April, 1948.]

An Act to provide for certain benefits to employees in case of sickness, maternity and 'employment injury' and to make provision for certain other matters in relation thereto.

WHEREAS it is expedient to provide for certain benefits to employees in case of sickness, maternity and employment injury and to make provision for certain other matters in relation thereto.

It is hereby enacted as follows:—

[a] For Report of the Select Committee, *see* Gazette of India, 1948, Part V, page 124.

This Act is made applicable to—

(a) the Chota Nagpur Division and the Santal Parganas District — *See* Bihar Gazette, 1948, Part I, page 1199;

(b) all the partially excluded areas of C. P. and Berar subject to certain modifications — *See* C. P. & Berar Gazette, 1948, Part I, page 518.

CHAPTER I

PRELIMINARY

Short title, extent, commencement and application.

1. *(1)* This Act may be called the Employees' State Insurance Act, 1948.

(2) It extends to all the Provinces of India.

(3) It shall come into force on such date or dates as the Central Government may, by notification in the official Gazette, appoint[a], and different dates may be appointed for different provisions of this Act and for different Provinces.

(4) It shall apply, in the first instance, to all factories (including factories belonging to the Crown) other than seasonal factories.

(5) The appropriate Government may, in consultation with the Corporation and with the approval of the Central Government, after giving six months' notice of its intention of so doing by notification in the official Gazette, extend the provisions of this Act or any of them, to any other establishment or class of establishments, industrial, commercial, agricultural or otherwise.

[a] Chapters 1, 2, 3 and 8 came into force on 1st September 1948 in all the Provinces of India—*See* Gazette of India, 1948, Extraord., page 1417.

Definitions.

2. In this Act, unless there is anything repugnant in the subject or context,—

(1) "appropriate Government" means, in respect of establishments under the control of the Central Government or a federal railway or a major port or a mine or oilfield, the Central Government, and in all other cases, the Provincial Government;

(2) "benefit period" means such period of twenty-six consecutive weeks or six consecutive months corresponding to the contribution period, or in the case of the first benefit period, such longer or shorter period, as may be specified in the regulations;

(3) "confinement" means labour resulting in the issue of a living child, or labour after twenty-six weeks of pregnancy resulting in the issue of a child whether alive or dead;

(4) "contribution" means the sum of money payable to the Corporation by the principal employer in respect of an employee and includes any amount payable by or on behalf of the employee in accordance with the provisions of this Act;

(5) "contribution period" means such period of twenty six consecutive weeks or six consecutive months, or in the case of the first contribution period, such longer or shorter period, as may be specified in the regulations;

(6) "Corporation" means the Employees' State Insurance Corporation set up under this Act;

(7) "duly appointed" means appointed in accordance with the provisions of this Act or with the rules or regulations made thereunder ;

(8) "employment injury" means a personal injury to an employee caused by accident or an occupational disease arising out of and in the course of his employment in a factory or establishment to which this Act applies, which injury or occupational disease would entitle such employee to compensation under the Workmen's Compensation Act, 1923, if he were a workman within the meaning of the said Act;

(9) "employee" means any person employed for wages in or in connection with the work of a factory or establishment to which this Act applies and—

(i) who is directly employed by the principal employer on any work of, or incidental or preliminary to, or connected with the work of, the factory or establishment, whether such work is done by the employee in the factory or establishment or elsewhere; or

(ii) who is employed by or through an immediate employer on the premises of the factory or establishment or under the suprevision of the principal employer or his agent on work which is ordinarily part of the work of the factory or establishment or which is preliminary to the work carried on in or incidental to the purpose of the factory or establishment; or

(iii) whose services are temporarily lent or let on hire to the principal employer by the person with whom the person whose services are so lent or let on hire has entered into a contract of service;

but does not include—

(a) any member of His Majesty's naval, military or air forces; or

(b) any person employed on a remuneration which in the aggregate exceeds four hundred rupees a month;

(10) "exempted employee" means an employee who is not liable under this Act to pay the employee's contribution :

(11) "family" means the spouse and minor legitimate and adopted children dependent upon the insured person and where the insured person is a male, his dependent parents;

(12) "factory" means any permises including the precincts thereof whereon twenty or more persons are working or were working on any day of the preceding twelve months, and in any part of which a manufacturing process is being carried on with the aid of power or is ordinarily so carried on but does not include a mine subject to the operation of the Indian Mines Act, 1923 (IV of 1923),

"seasonal factory" means a factory which is exclusively engaged in one or more of the following manufacturing processes, namely, cotton ginning, cotton or jute pressing, decortication of groundnuts, the manufacture of coffee, indigo, lac, rubber, sugar (including *gur*) or tea or any manufacturing process which is incidental to or connected with any of the aforesaid processes;

The expressions "manufacturing process" and "power" shall have the meanings respectively assigned to them in the Factories Act, 1934 (XXV of 1934);

(13) "immediate employer" in relation to employees employed by or through him, means a person who has undertaken the execution, on the premises of a factory or an establishment to which this Act applies or under the supervision

of the principal employer or his agent, of the whole or any part of any work which is ordinarily part of the work of the factory or establishment of the principal employer or is preliminary to the work carried on in, or incidental to the purpose of, any such factory or establishment, and includes a person by whom the services of an employee who has entered into a contract of service with him are temporarily lent or let on hire to the principal employer;

(14) "insured person" means a person who is or was an employee in respect of whom contributions are or were payable under this Act and who is, by reason thereof, entitled to any of the benefits provided by this Act;

(15) "occupier" of the factory shall have the meaning assigned to it in the Factories Act, 1934 (XXV of 1934);

(16) "prescribed" means prescribed by rules made under this Act;

(17) "principal employer" means—

(i) in a factory, the owner or occupier of the factory and includes the managing agent of such owner or occupier, the legal representative of a deceased owner or occupier, and where a person has been named as the manager of the factory under clause *(e)* of sub section *(1)* of section 9 of the Factories Act, 1934, the person so named;

(ii) in any establishment under the control of any department of any Government in India, the authority appointed by such Government in this behalf or where no authority is so appointed, the head of the Department;

(iii) in any other establishment, any person responsible for the supervision and control of the establishment;

(18) "regulation" means a regulation made by the Corporation;

(19) "Schedule" means a Schedule to this Act;

(20) "sickness" means a condition which requires medical treatment and attendance and necessitates abstention from work on medical grounds;

(21) "temporary disablement" means a condition resulting from an employment injury which requires medical treatment and renders an employee, as a result of such injury, temporarily incapable of work;

(22) "wages" means all remuneration paid or payable in cash to an employee, if the terms of the contract of employment, express or implied, were fulfilled and includes other additional remuneration, if any, paid at regular intervals after the last day of the wage period, but does not include—

(a) any contribution paid by the employer to any pension fund or provident fund, or under this Act;

(b) any travelling allowance or the value of any travelling concession;

(c) any sum paid to the person employed to defray special expenses entailed on him by the nature of his employment; or

(d) any gratuity payable on discharge;

(23) "week" means a period of seven days commencing at midnight on saturday night;

(24) the expressions "dependant," "managing agent," "occupational disease," "partial disablement" where the disablement is of a permanent nature and "total disablement" shall have respectively the meanings assigned to them in the Workmen's Compensation Act, 1923.

CHAPTER II.[a]

CORPORATION, STANDING COMMITTEE AND MEDICAL BENEFIT COUNCIL.

Establishment of Employees' State Insurance Corporation.

3. *(1)* With effect from such date as the Central Government may, by notification in the official Gazette, appoint in this behalf, there shall be established[b] for the administration of the scheme of Employees' State Insurance in accordance with the provisions of this Act a Corporation to be known as the Employees' State Insurance Corporation,

(2) The Corporation shall be a body corporate by the name of Employees' State Insurance Corporation having perpetual succession and a common seal and shall by the said name sue and be sued.

[a] As to coming into force of this chapter *see* note under S. 1.

[b] For establishment, with effect from 1st October, 1948, of the Employees' State Insurance Corporation, *see* Gaz. of India, 1948, Extra, page 1417.

Constitution of Corporation.

4. The Corporation shall consist of the following members, namely:—

(a) the Minister for Labour in the Central Government, *ex-officio*, as Chairman ;

(b) the Minister for Health in the Central Government, *ex-officio*, as Vice-Chairman ;

(c) not more than five persons to be nominated by the Central Government of whom at least three shall be officials of the Central Government ;

(d) one person each representing each of the Governor's Provinces to be nominated by the Provincial Government concerned ;

(e) one person to be nominated by the Central Government to represent the Chief Commissioners' Provinces ;

(f) five persons representing employers to be nominated by the Central Government in consultation with such organisations of employers as may be recognised for the purpose by the Central Government;

(g) five persons representing employees to be nominated by the Central Government in consultation with such organisations of employees as may be recognised for the purpose by the Central Government;

(h) two persons representing the medical profession to be nominated by the Central Government in consultation with such organisations of medical practitioners as may be recognised for the purpose by the Central Government; and

(i) two persons to be elected by the Central Legislature.

Term of office of members of the Corporation.

5. *(1)* Save as otherwise expressly provided in this Act, the term of office of members of the Corporation, other than the *ex-officio* members and members referred to in clauses *(c)*, *(d)* and *(e)* of section 4, shall be four years commencing from the date on which their nomination or election is notified:

Provided that a member of the Corporation shall, notwithstanding the expiry of the said period of four years, continue to hold office until the nomination or election of his successor is notified.

(2) The members of the Corporation referred to in clauses *(c)*, *(d)* and *(e)* of section 4 shall hold office during the pleasure of the Government nominating them.

Eligibility for re-nomination or re-election.

6. An outgoing member of the Corporation, the Standing Committee, or the Medical Benefit Council shall be eligible for re-nomination or re-election as the case may be.

Authentication of orders, decisions, etc.

7. All orders and decisions of the Corporation shall be authenticated by the signature of the Chairman or some other member authorised by the Corporation in this behalf and all other instruments issued by the Corporation shall be authenticated by the signature of such member or officer of the Corporation as may be authorised by it.

Constitution of Standing Committee.

8 A Standing Committee of the Corporation shall be constituted from among its members, consisting of—

(a) a chairman, nominated by the Central Government;

(b) three members of the Corporation, being officials of the Central Government, nominated by that Government;

(c) nine members elected by the Corporation as follows :—

(i) three members from among the members of the Corporation nominated by the Provincial Governments;

(ii) two members from among the members of the Corporation representing employers;

(iii) two members from among the members of the Corporation representing employees;

(iv) one member from among the members of the Corporation representing the medical profession; and

(v) one member from among the members of the Corporation elected by the Central Legislature.

Term of office of members of Standing Committee.

9. *(1)* Save as otherwise expressly provided in this Act, the term of office of a member of the Standing Committee other than a member referred to in clause *(a)* or clause *(b)* of section 8, shall be two years from the date on which his election is notified:

Provided that a member of the Standing Committee shall notwithstanding the expiry of the said period of two years, continue to hold office until the election of his successor is notified:

Provided further that a member of the Standing Committee shall cease to hold office when he ceases to be a member of the Corporation.

(2) A member of the Standing Committee referred to in clause *(a)* or clause *(b)* of section 8 shall hold office during the pleasure of the Central Government.

Medical Benefit Council.

10. *(1)* The Central Government shall constitute a Medical Benefit Council consisting of—

(a) the Director General, Health Services, *ex-officio*, as Chairman;

(b) a Deputy Director General, Health Services, to be nominated by the Central Government;

(c) the Medical Commissioner of the Corporation, *ex-officio*;

(d) one member each representing each of the Governor's Provinces to be nominated by the Provincial Government concerned;

(e) three members representing employers to be nominated by the Central Government in consultation with such organisations of employers as may be recognised for the purpose by the Central Government;

(f) three members representing employees to be nominated by the Central Government in consultation with such organisations of employees as may be recognised for the purpose by the Central Government; and

(g) three members, of whom not less than one shall be a woman, representing the medical profession, to be nominated by the Central Government in consultation with such organisations of medical practitioners as may be recognised for the purpose by the Central Government.

(2) Save as otherwise expressly provided in this Act, the term of office of a member of the Medical Benefit Council, other than a member referred to in any of the clauses (a) to (d) of sub-section (1), shall be four years from the date on which his nomination is notified.

(3) A member of the Medical Benefit Council referred to in clauses (b) and (d) of sub-section (1) shall hold office during the pleasure of the Government nominating him.

Resignation of membership.

11. A member of the Corporation, the Standing Committee or the Medical Benefit Council may resign his office by notice in writing to the Central Government and his seat shall fall vacant on the acceptance of the resignation by that Government.

Cessation of membership.

12. A member of the Corporation, the Standing Committee, or the Medical Benefit Council shall cease to be a member of that body if he fails to attend three consecutive meetings thereof:

Provided that the Corporation, the Standing Committee or the Medical Benefit Council, as the case may be, may, subject to rules made by the Central Government in this behalf, restore him to membership.

Disqualification.

13. A person shall be disqualified for being chosen as or for being a member of the Corporation, the Standing Committee or the Medical Benefit Council—

(a) if he is declared to be of unsound mind by a competent Court; or

(b) if he is an undischarged insolvent; or

(c) if he has directly or indirectly by himself or by his partner any interest in a subsisting contract with, or any work being done for, the Corporation except as a medical practitioner or as a shareholder (not being a Director) of a company; or

(d) if before or after the commencement of this Act, he has been convicted of an offence involving moral turpitude.

Filling of vacancies.

14. (1) Vacancies in the office of nominated or elected members of the Corporation, the Standing Committee and the Medical Benefit Council shall be filled by nomination or election, as the case may be.

(2) A member of the Corporation, the Standing Committee or the Medical Benefit Council nominated or elected to fill a casual vacancy shall hold office only so long as the member in whose place he is nominated or elected would have been entitled to hold office if the vacancy had not occurred.

Fees and allowances.

15. Members of the Corporation, the Standing Committee and the Medical Benefit Council shall receive such fees and allowances as may from time to time be prescribed by the Central Government.

Principal Officers.

16. (1) The Central Government may, in the case of the first appointment itself and in the case of subsequent appointments, in consultation with the Corporation, appoint the following officers (hereinafter referred to as Principal Officers) of the Corporation, namely :—

(a) a Director General of Employees' State Insurance;

(b) an Insurance Commissioner;

(c) a Medical Commissioner;

(d) a Chief Accounts Officer; and

(e) an Actuary.

(2) The Director General shall be the Chief Executive Officer of the Corporation.

(3) The Principal Officers shall be whole-time officers of the Corporation and shall not undertake any work unconnected with their office without the sanction of the Central Government.

(4) A Principal Officer shall hold office for such period, not exceeding five years, as may be specified in the order appointing him. An outgoing Principal Officer shall be eligible for reappointment if he is otherwise qualified.

(5) A Principal Officer shall receive such salary and allowances as may be prescribed by the Central Government.

(6) A person shall be disqualified from being appointed as or for being a Principal Officer if he is subject to any of the disqualifications specified in section 13.

(7) The Central Government may at any time remove a Principal Officer from office and shall do so if such removal is recommended by a resolution of the Corporation passed at a special meeting called for the purpose and supported by the votes of not less than two-thirds of the total strength of the Corporation.

Staff.

17. (1) The Corporation may employ such other staff of officers and servants as may be necessary for the efficient transaction of its business provided that the sanction of the Central Government shall be obtained for the creation of any post with a maximum monthly salary of five hundred rupees and above

(2) The Corporation shall, with the approval of the Central Government, make regulations regarding the method of recruitment, pay and allowances, discipline, superannuation benefits and other conditions of service of the members of its staff.

(3) Every appointment to posts carrying a maximum monthly pay of five hundred rupees and above shall be made in consultation with the Federal Public Service Commission :

Provided that this sub-section shall not apply to an officiating or temporary appointment for an aggregate period not exceeding one year.

Powers of the Standing Committee.

18. *(1)* Subject to the general superintendence and control of the Corporation, the Standing Committee shall administer the affairs of the Corporation and may exercise any of the powers and perform any of the functions of the Corporation.

(2) The Standing Committee shall submit for the consideration and decision of the Corporation all such cases and matters as may be specified in the regulations made in this behalf.

(3) The Standing Committee may, in its discretion, submit any other case or matter for the decision of the Corporation.

Corporation's power to promote measures for health, etc., of insured persons.

19. The Corporation may, in addition to the scheme of benefits specified in this Act, promote measures for the improvement of the health and welfare of insured persons and for the rehabilitation and re-employment of insured persons who have been disabled or injured and may incur in respect of such measures expenditure from the funds of the Corporation within such limits as may be prescribed by the Central Government.

Meetings of Corporation, Standing Committee and Medical Benefit Council.

20. Subject to any rules made under this Act, the Corporation, the Standing Committee and the Medical Benefit Council shall meet at such times and places and shall observe such rules or procedure in regard to transaction of business at their meetings as may be specified in the regulations made in this behalf.

Supersession of the Corporation and Standing Committee.

21. *(1)* If in the opinion of the Central Government, the Corporation or the Standing Committee persistently makes default in performing the duties imposed on it by or under this Act or abuses its powers, that Government may, by notification in the official Gazette, supersede the Corporation, or in the case of the Standing Committee, supersede in consultation with the Corporation, the Standing Committee :

Provided that before issuing a notification under this sub-section the Central Government shall give a reasonable opportunity to the Corporation or the Standing Committee, as the case may be, to show cause why it should not be superseded and shall consider the explanations and objections, if any, of the Corporation or the Standing Committee, as the case may be.

(2) Upon the publication of a notification under sub-section *(1)* superseding the Corporation or the Standing Committee, all the members of the Corporation or the Standing Committee, as the case may be, shall, as from the date of such publication, be deemed to have vacated their offices.

(3) When the Standing Committee has been superseded, a new Standing Committee shall be immediately constituted in accordance with section 8.

(4) When the Corporation has been superseded the Central Government may—

(a) immediately nominate or cause to be nominated or elected new members to the Corporation in accordance with section 4 and may constitute a new Standing Committee under section 8.

(b) in its discretion, appoint such agency, for such period as it may think fit, to exercise the powers and perform the functions of the Corporation and such agency shall be competent to exercise all the powers and perform all the functions of the Corporation.

(5) The Central Government shall cause a full report of any action taken under this section and the circumstances leading to such action to be laid before the Central Legislature at the earliest opportunity and in any case not later than three months from the date of the notification superseding the Corporation or the Standing Committee, as the case may be.

Duties of Medical Benefit Council.

22. The Medical Benefit Council shall—

(a) advise the Corporation, the Standing Committee and the Medical Commissioner on matters relating to the administration of medical benefit, the certification for purposes of the grant of benefits and other connected matters;

(b) have such powers and duties of investigation as may be prescribed in relation to complaints against medical practitioners in connection with medical treatment and attendance; and

(c) perform such other duties in connection with medical treatment and attendance as may be specified in the regulations.

Duties of Principal Officers.

23. The Principal Officers shall exercise such powers and discharge such duties as may be prescribed. They shall also perform such other functions as may be specified in the regulations.

Acts of Corporation, etc, not invalid by reason of defect in constitution, etc.

24. No act of the Corporation, the Standing Committee or the Medical Benefit Council shall be deemed to be invalid by reason of any defect in the

constitution of the Corporation, the Standing Committee or the Medical Benefit Council, or on the ground that any member thereof was not entitled to hold or continue in office by reason of any disqualification or of any irregularity in his nomination or election, or by reason of such act having been done during the period of any vacancy in the office of any member of the Corporation, the Standing Committee or the Medical Benefit Council.

Regional Boards, Local Committees, Regional and Local Medical Benefit Councils.

25. The Corporation may appoint Regional Boards, Local Committees and Regional and Local Medical Benefit Councils in such areas and in such manner, and delegate to them such powers and functions, as may be provided by the regulations.

CHAPTER III[a]

FINANCE AND AUDIT

Employees' State Insurance Fund.

26. *(1)* All contributions paid under this Act and all other moneys received on behalf of the Corporation shall be paid into a fund called the Employees' State Insurance Fund which shall be held and administered by the Corporation for the purposes of this Act.

(2) The Corporation may accept grants, donations and gifts from the Central or any Provincial Government, Indian State, local authority, or any individual or body whether incorporated or not, for all or any of the purposes of this Act.

(3) All moneys accruing or payable to the said Fund shall be received by such officers of the Corporation as may be authorised by it in this behalf and shall forthwith be paid by them into the Reserve Bank of India or such other bank as may be approved by the Central Government to an account styled the account of the Employees' State Insurance Fund.

(4) Such account shall be operated on by such officers as may be authorised by the Standing Committee with the approval of the Corporation.

[a] As to coming into force of this Chapter, *see* note under S. 1.

Grant by the Central Government.

27. The Central Government shall, every year during the first five years, make a grant to the Corporation of a sum equivalent to two-thirds of the administrative expenses of the Corporation not including therein the cost of any benefits provided by or under this Act.

Purposes for which the Fund may be expended.

28. Subject to the provisions of this Act and of any rules made by the Central Government in that behalf, the Employees' State Insurance Fund shall be expended only for the following purposes, namely:—

(i) payment of benefits and provision of medical treatment and attendance to insured persons and, where the medical benefit is extended to their families, the provision of such medical benefit to their families, in accordance with the provisions of this Act and defraying the charges and costs in connection therewith;

(ii) payment of fees and allowances to members of the Corporation, the Standing Committee and the Medical Benefit Council, the Regional Boards, Local Committees and Regional and Local Medical Benefit Councils ;

(iii) payment of salaries, leave and joining time allowances, travelling and compensatory allowances, gratuities and compassionate allowances, pensions, contributions to provident or other benefit fund of officers and servants of the Corporation and meeting the expenditure in respect of offices and other services set up for the purpose of giving effect to the provisions of this Act;

(iv) establishment and maintenance of hospitals, dispensaries and other institutions and the provision of medical and other ancillary services for the benefit of insured persons and, where the medical benefit is extended to their families, their families;

(v) payment of contributions to any Provincial Government, Indian State, local authority or any private body or individual, towards the cost of medical treatment and attendance provided to insured persons and, where the medical benefit is extended to their families, their families including the cost of any building and equipment, in accordance with any agreement entered into by the Corporation;

(vi) defraying the cost (including all expenses) of auditing the accounts of the Corporation and of the valuation of its assets and liabilities;

(vii) defraying the cost (including all expenses) of the Employees' Insurance Courts set up under this Act;

(viii) payment of any sums under any contract entered into for the purposes of this Act by the Corporation or the Standing Committee or by any officer duly authorised by the Corporation or the Standing Committee in that behalf;

(ix) payment of sums under any decree, order or award of any Court or Tribunal against the Corporation or any of its officers or servants for any act done in the execution of his duty or under a compromise or settlement of any suit or other legal proceeding or claim instituted or made against the Corporation;

(x) defraying the cost and other charges of instituting or defending any civil or criminal proceedings arising out of any action taken under this Act;

(xi) defraying expenditure, within the limits prescribed, on measures for the improvement of the health and welfare of insured persons and for the rehabilitation and re-employment of insured persons who have been disabled or injured; and

(xii) such other purposes as may be authorised by the Corporation with the previous approval of the Central Government.

Holding of property, etc.

29. *(1)* The Corporation may, subject to such conditions as may be prescribed by the Central Government, acquire and hold property both movable and immovable, sell or otherwise transfer any movable or immovable property which may have become vested in or have been acquired by it and do all things necessary for the purposes for which the Corporation is established.

(2) Subject to such conditions as may be prescribed by the Central Government, the Corporation may from time to time invest any moneys which are not immediately required for expenses properly defrayable under this Act and may, subject as aforesaid, from time to time reinvest or realise such investments.

(3) The Corporation may, with the previous sanction of the Central Government and on such terms as may be prescribed by it, raise loans and take measures for discharging such loans.

(4) The Corporation may, constitute for the benefit of its staff or any class of them, such provident or other benefit fund as it may think fit.

Vesting of the property in the Corporation.

30. All property acquired before the establishment of the Corporation shall vest in the Corporation and all income derived and expenditure incurred in this behalf shall be brought into the books of the Corporation.

Expenditure by Central Government to be treated as a loan.

31. All expenditure incurred by the Central Government for and in connection with the establishment of the Corporation up to the date of its establishment shall be treated as a loan advanced by the Central Government to the Corporation and such loan shall be adjusted against grants from the Central Government to the Corporation.

Budget estimates.

32. The Corporation shall in each year frame a budget showing the probable receipts and the expenditure which it proposes to incur during the following year and shall submit a copy of the budget for the approval of the Central Government before such date as may be fixed by it in that behalf. The budget shall contain provisions adequate in the opinion of the Central Government for the discharge of the liabilities incurred by the Corporation and for the maintenance of a working balance.

Accounts.

33. The Corporation shall maintain correct accounts of its income and expenditure in such form and in such manner as may be prescribed by the Central Government.

Audit.

34. *(1)* The accounts of the Corporation shall be audited, at such times and in such manner as may be prescribed, by auditors appointed by the Central Government.

(2) The auditors shall at all reasonable times have access to the books, accounts and other documents of the Corporation and may, for the purposes of the audit, call for such explanation and information as they may require or examine any principal or other officer of the Corporation.

(3) The auditors shall forward to the Central Government a copy of their report together with an audited copy of the accounts of the Corporation.

(4) The cost of the audit as determined by the Central Government shall be paid out of the funds of the Corporation.

Annual report.

35. The Corporation shall submit to the Central Government an annual report of its work and activities.

Budget, audited accounts and the annual report to be placed before the Central Legislature.

36. The annual report, the audited accounts of the Corporation, and the budget as finally adopted by the Corporation shall be placed before the Central Legislature and published in the official Gazette.

Valuation of assets and liabilities.

37. The Corporation shall, at intervals of five years, have a valuation of its assets and liabilities made by a valuer appointed with the approval of the Central Government:

Provided that it shall be open to the Central Government to direct a valuation to be made at such other times as it may consider necessary.

CHAPTER IV

CONTRIBUTIONS

All employees to be insured.

38. Subject to the provisions of this Act, all employees in factories or establishments to which this Act applies shall be insured in the manner provided by this Act.

Contributions.

39. *(1)* The contribution payable under this Act in respect of an employee shall comprise contribution payable by the employer (hereinafter referred to as the employer's contribution) and contribution payable by the employee (hereinafter referred to as

the employee's contribution) and shall be paid to the Corporation.

(2) The contributions shall be paid at the rates specified in the First Schedule, and in case where the provisions of this Act are made applicable to any employee or class of employees in any factory or establishment or class of factories or establishments in such manner that they are excluded from some of the benefits under this Act, at such rates as the Corporation may fix in this behalf.

(3) A week shall be the unit in respect of which all contributions shall be payable under this Act.

(4) The contributions payable in respect of each week shall ordinarily fall due on the last day of the week, and where an employee is employed for part of the week, or is employed under two or more employers during the same week, the contributions shall fall due on such days as may be specified in the regulations.

Principal employer to pay contributions in the first instance.

40. *(1)* The principal employer shall pay in respect of every employee, whether directly employed by him or by or through an immediate employer, both the employer's contribution and the employee's contribution.

(2) Notwithstanding anything contained in any other enactment but subject to the provisions of this Act and the regulations, if any, made thereunder, the principal employer shall, in the case of an employee directly employed by him (not being an exempted employee), be entitled to recover from the employee the employee's contribution by deduction from his wages and not otherwise :

Provided that no such deduction shall be made from any wages other than such as relate to the period or part of the period in respect of which the contribution is payable, or in excess of the sum representing the employee's contribution for the period.

(3) Notwithstanding any contract to the contrary, neither the principal employer nor the immediate employer shall be entitled to deduct the employer's contribution from any wages payable to an employee or otherwise to recover it from him.

(4) Any sum deducted by the principal employer from wages under this Act shall be deemed to have been entrusted to him by the employee for the purpose of paying the contribution in respect of which it was deducted.

(5) The principal employer shall bear the expenses of remitting the contributions to the Corporation.

Recovery of contribution from immediate employer.

41. *(1)* A principal employer, who has paid contribution in respect of an employee employed by or through an immediate employer, shall be entitled to recover the amount of the contribution so paid (that is to say, the employer's contribution as well as the employee's contribution, if any) from the immediate employer, either by deduction from any amount payable to him by the principal employer under any contract, or as a debt payable by the immediate employer.

(2) In the case referred to in sub-section *(1)*, the immediate employer shall be entitled to recover the employee's contribution from the employee employed by or through him by deduction from wages and not otherwise, subject to the conditions specified in the proviso to sub-section *(2)* of section 40.

Explanation. — For the purposes of sections 40 and 41, wages shall be deemed to include payment to an employee in respect of any period of authorised leave, lock-out or legal strike.

General provisions as to payment of contributions.

42. *(1)* No employee's contribution shall be payable by or on behalf of an employee whose average daily wages are below one rupee.

Explanation. — The average daily wages of an employee shall be calculated in the manner specified in the First Schedule.

(2) Contribution (both the employer's contribution and the employee's contribution) shall be payable by the principal employer for each week during the whole or part of which an employee is employed.

(3) Where wages are payable to an employee for a portion of the week the employer shall be liable to pay both the employer's contribution and the employee's contribution for the week in full but shall be entitled to recover from the employee the employee's contribution.

(4) No contribution shall be payable in respect of an employee for any week during the whole of which no services are rendered by an employee and in respect of which no wages are payable to him.

(5) Notwithstanding the provisions of sub-section *(4)*, contribution shall be payable, in respect of any week during which no services are rendered by and no wages are paid to an employee, at the rate at which contribution was last paid, where the failure to render such services is due to the employee being on authorised leave, or is due to a lock-out or a legal strike, if in respect of the period covered by such legal strike the employee receives wages in full or in part.

43. Subject to the provisions of this Act, the Corporation may make regulations for any matter relating or incidental to the payment and collection of contributions payable under this Act and without prejudice to the generality of the foregoing power such regulations may provide for—

Method of payment of contribution.

(*a*) the manner and time of payment of contributions ;

(*b*) the payment of contributions by means of adhesive or other stamps affixed to or impressed upon books, cards or otherwise and regulating the manner, times and conditions in, at and under which, such stamps are to be affixed or impressed ;

(*c*) the entry in or upon books or cards of particulars of contributions paid and benefits distributed in the case of the insured persons to whom such books or cards relate ; and

(*d*) the issue, safe custody, production, inspection and delivery of books or cards and the replacement of books or cards which have been lost, destroyed or defaced.

44. Every principal and immediate employer shall submit to the Corporation or to such officer of the Corporation as it may direct such returns in such form and containing such particulars relating to persons employed by him, as may be specified in regulations made in this behalf.

Returns by employers.

45. (*1*) The Corporation may appoint such persons as Inspectors, as it thinks fit, for the purposes of this Act, within such local limits as it may assign to them.

Inspectors, their functions and duties.

(*2*) Any Inspector appointed by the Corporation under sub-section (*1*) (thereinafter referred to as Inspector), or other official of the Corporation authorised in this behalf by it may, for the purposes of enquiring into the correctness of any of the particulars stated in any return referred to in section 44 or for the purpose of ascertaining whether any of the provisions of this Act has been complied with—

(*a*) require any principal or immediate employer to furnish to him such information as he may consider necessary for the purposes of this Act ; or

(*b*) at any reasonable time enter any office, establishment, factory or other premises occupied by such principal or immediate employer and require any person found in charge thereof to produce to such Inspector or other official and allow him to examine such accounts, books and other documents relating to the employment of persons and payment of wages or to furnish to him such information as he may consider necessary ; or

(*c*) examine, with respect to any matter relevant to the purposes aforesaid, the principal or immediate employer, his agent or servant, or any person found in such factory, establishment, office or other premises, or any person whom the said Inspector or other official has reasonable cause to believe to be or to have been an employee.

(*3*) An Inspector shall exercise such functions and perform such duties as may be authorised by the Corporation or as may be specified in the regulations.

CHAPTER V

BENEFITS

46. (*1*) Subject to the provisions of this Act the insured persons or, as the case may be, their dependants shall be entitled to the following benefits, namely:—

Benefits.

(*a*) periodical payments to any insured person in case of his sickness certified by a duly appointed medical practitioner (hereinafter referred to as sickness benefit);

(*b*) periodical payments in case of confinement to an insured woman, certified to be eligible for such payments by an authority specified in this behalf by the regulations (hereinafter referred to as maternity benefit);

(*c*) periodical payments to an insured person suffering from disablement as a result of an employment injury sustained as an employee under this Act and certified to be eligible for such payments by an authority specified in this behalf by the regulations (hereinafter referred to as disablement benefit);

(*d*) periodical payments to such dependants of an insured person who dies as a result of an employment injury sustained as an employee under this Act, as are entitled to compensation under this Act (hereinafter referred to as dependants' benefit); and

(*e*) medical treatment for and attendance on insured persons (hereinafter referred to as medical benefit).

(*2*) The Corporation may, at the request of the appropriate Government and subject to such conditions as may be laid down in the regulations, extend the medical benefits to the family of an insured person.

47. A person shall be qualified to claim sickness benefit during any benefit period, if during the corresponding contribution period, weekly contributions in respect of him were payable for not less than two-thirds of the number of weeks during which he shall be

When person eligible for sickness benefit.

deemed to have been available for employment within the meaning of section 48, subject to a minimum of twelve contributions:

Provided that the Corporation may waive the minimum number of contributions during the first contribution period.

When person deemed available for employment.

48. A person shall always be deemed to have been available for employment in any week, except when during the whole of such week,—

(a) he was unable to work on account of sickness which had been duly certified, whether entitling him to receive sickness benefit or not, or

(b) he was qualified to receive disablement benefit for temporary disablement, or

(c) in the case of an insured woman, she was entitled to the maternity benefit provided in section 50 or she would have been entitled to such benefit if she had fulfilled all other conditions entitling her thereto.

Sickness benefit.

49. Subject to the provisions of this Act and the regulations, if any, a person qualified to claim sickness benefit in accordance with section 47 shall be entitled to receive such benefit at the rates specified in the Second Schedule for the period of his sickness:

Provided that he shall not be entitled to the benefit for an initial waiting period of two days except in the case of a spell of sickness following, at an interval of not more than fifteen days, the spell of sickness for which sickness benefit was last paid:

Provided further that sickness benefit shall not be paid to any person for a number of days in excess of the number which taken together with the number of days for which he has already received the benefit makes up a total of fifty-six days during any continuous period of three hundred and sixty-five days.

Maternity benefit.

50. *(1)* An insured woman shall be qualified to claim maternity benefit for a confinement occurring in a benefit period if during the corresponding contribution period, weekly contributions in respect of her were payable for not less than two-thirds of the number of weeks during which she shall be deemed to have been available for employment within the meaning of section 48, subject to a minimum of twelve contributions:

Provided that at least one contribution has been paid between thirty-five and forty weeks before the week in which the confinement takes place or in which notice of pregnancy is given before confinement whichever is more advantageous to the insured person.

(2) Subject to the provisions of this Act, and the regulations, if any, an insured woman who is qualified to claim maternity benefit in accordance with sub-section *(1)* shall be entitled to receive it at the rate of twelve annas a day for all days on which she does not work for remuneration during a period of twelve weeks of which not more than six shall precede the expected date of confinement.

Disablement benefit.

51. *(1)* Subject to the provisions of this Act, and the regulations, if any, disablement benefit shall be payable—

(a) to a person who sustains temporary disablement, during the period of such disablement;

(b) to a person who sustains permanent partial disablement, during his life;

(c) to a person who sustains permanent total disablement, during his life; and

(d) to a person, in all cases of disablement not falling under sub-clauses *(a)*, *(b)* or *(c)* of this sub-section, as may be provided in the regulations.

(2) Disablement benefit shall be paid on the scale and subject to the conditions specified in this behalf in the Second Schedule.

Dependants' benefit.

52. Where an insured person dies as a result of an employment injury sustained as an employee under this Act, dependants' benefit shall be payable subject to the provisions of this Act and the regulations, if any, to his dependants at such rates and for such period as is specified in the Second Schedule.

Disablement and dependants' benefit.

53. Where an insured person is or his dependants are entitled to receive or recover, whether from the employer of the insured person or from any other person any compensation or damages under the Workmen's Compensation Act, 1923, or otherwise, in respect of an employment injury sustained by the insured person as an employee under this Act, then the following provisions shall apply, namely :—

(i) The insured person shall, in lieu of such compensation or damages, receive the disablement benefit provided by this Act [but subject otherwise to the conditions specified in the Workmen's Compensation Act, 1923,] from the Corporation and not from the employer or other person.

(ii) If the insured person dies as a result of the employment injury sustained as an employee under this Act (whether or not he was in receipt of any periodical payment for temporary disablement in respect of the injury), dependants' benefit shall be payable at the rates and in the proportion specified in the Second Schedule to his widow or widows during her or their widowhood, and to minor legitimate or adopted sons and minor legitimate unmarried daughters.

(iii) In case the insured person does not leave him surviving any widow or children as mentioned in clause *(ii)* or in the case of an insured woman if she does not leave her surviving any children as mentioned in clause *(ii)*, dependant's benefit shall be paid to the other dependants of the deceased at such rates as may be determined by the Commissioner appointed under the Workmen's Compensation Act, 1923.

(iv) The amount of dependants' benefit payable under clause *(iii)* shall not exceed one half of the amount which would have been payable to the insured person as benefit on permanent total disablement.

(v) Save as modified by his Act, the obligations and liabilities imposed on an employer by the Workmen's Compensation Act, 1923, shall continue to apply to him.

Medical examination.

54. All medical examinations and treatment referred to in the Workmen's Compensation Act, 1923, shall for the purposes of this Act, be carried out by duly appointed medical practitioners.

Review of benefits.

55. *(1)* Any payment of disablement benefit may be reviewed by the Commissioner appointed under the Workmen's Compensation Act, 1923, on the application of—

(a) an Insurance Officer of the Corporation, or

(b) the person receiving the benefit,

and such application shall be accompanied by a certificate of a duly appointed medical officer:

Provided that such application may be made without such certificate in such circumstances as may be specified in the regulations made in this behalf.

(2) Subject to the provisions of this Act, the Commissioner may, on such review as aforesaid, direct that the disablement benefit be continued, increased, reduced or discontinued.

Medical benefit.

56. *(1)* An insured person or (where such medical benefit is extended to his family) a member of his family whose condition requires medical treatment and attendance shall be entitled to receive medical benefit

(2) Such medical benefit may be given either in the form of out-patient treatment and attendance in a hospital or dispensary, clinic or other institution or by visits to the home of the insured person or treatment as in-patient in a hospital or other institution.

(3) A person shall be entitled to medical benefit during any week for which contributions are payable in respect of him or in which he is qualified to claim sickness benefit or maternity benefit or, as provided under the regulations, is in receipt of disablement benefit :

Provided that a person in respect of whom contribution ceases to be payable under this Act may be allowed medical benefit for such period and of such nature as may be provided under the regulations.

Scale of medical benefit.

57. *(1)* An insured person and (where such medical benefit is extended to his family) his family shall be entitled to receive medical benefit only of such kind and on such scale as may be provided by the Provincial Government or by the Corporation, and an insured person or, where such medical benefit is extended to his family, his family shall not have a right to claim any medical treatment except such as is provided by the dispensary, hospital, clinic or other institution to which he or his family is allotted, or as may be provided by the regulations.

(2) Nothing in this Act shall entitle an insured person and (where such medical benefit is extended to his family) his family to claim reimbursement from the Corporation of any expenses incurred in respect of any medical treatment, except as may be provided by the regulations.

Provision of medical treatment by Provincial Government.

58. *(1)* The Provincial Government shall provide for insured persons and (where such benefit is extended to their families) their families in the Province, reasonable medical, surgical and obstetric treatment:

Provided that the Provincial Government may, with the approval of the Corporation, arrange for medical treatement at clinics of medical practitioners on such scale and subject to such terms and conditions as may be agreed upon.

(2) Where the incidence of sickness benefit payment to insured persons in any Province is found to exceed the all-India average, the amount of such excess shall be shared between the Corporation and the Provincial Government in such proportion as may be fixed by agreement between them:

Provided that the Corporation may in any case waive the recovery of the whole or any part of the share which is to be borne by the Provincial Government.

(3) The Corporation may enter into an agreement with a Provincial Government in regard to the nature and scale of the medical treatment that should be provided to insured persons and (where such medical benefit is extended to the families) their families (including provision of buildings, equipment, medicines, and staff) and for the sharing of the cost thereof and of any excess in the incidence of sickness benefit

to insured persons between the Corporation and the Provincial Government.

(4) In default of agreement between the Corporation and any Provincial Government as aforesaid, the nature and extent of the medical treatment to be provided by the Provincial Government and the proportion in which the cost thereof and of the excess in the incidence of sickness benefit shall be shared between the Corporation and that Government, shall be determined by an arbitrator (who shall be or shall have been a Judge of the High Court of a Province) appointed by the Chief Justice of India and the award of the arbitrator shall be binding on the Corporation and the Provincial Government.

Establishment and maintenance of hospitals, etc, by Corporation.

59. *(1)* The Corporation may, with the approval of the Provincial Government, establish and maintain in a Province such hospitals, dispensaries and other medical and surgical services as it may think fit for the benefit of insured persons and (where such medical benefit is extended to their families) their families.

(2) The Corporation may enter into agreement with any Indian State, local authority, private body or individual in regard to the provision of medical treatment and attendance for insured persons and (where such medical benefit is extended to their families) their families, in any area and sharing the cost thereof.

GENERAL.

Benefit not assignable or attachable.

60. *(1)* The right to receive any payment of any benefit under this Act shall not be transferable or assignable.

(2) No cash benefit payable under this Act shall be liable to attachment or sale in execution of any decree or order of any Court.

Bar of benefits under other enactments.

61. When a person is entitled to any of the benefits provided by this Act, he shall not be entitled to receive any similar benefit admissible under the provisions of any other enactment.

Persons not to commute cash benefits.

62. Save as may be provided in the regulations, no person shall be entitled to commute for a lump sum any periodical payment admissible under this Act.

Persons not entitled to receive benefits in certain cases.

63. No person shall be entitled to sickness benefit or maternity benefit, or disablement benefit for temporary disablement in respect of any day on which he works and receives wages.

Recipients of sickness or disablement benefit to observe conditions.

64. A person who is in receipt of sickness benefit or disablement benefit (other than benefit granted on permanent disablement)—

(a) shall remain under medical treatement at a dispensary, hospital, clinic or other institution provided under this Act and shall carry out the instructions given by the medical officer or medical attendant in charge thereof;

(b) shall not while under treatment do anything which might retard or prejudice his chances of recovery;

(c) shall not leave the area in which medical treatment provided by this Act is being given without the permission of the medical officer, medical attendant or such other authority as may be specified in this behalf by the regulations; and

(d) shall allow himself to be examined by any duly appointed medical officer or sick visitor or other person authorised by the Corporation in this behalf.

Benefits not to be combined.

65. *(1)* An insured person shall not be entitled to receive for the same period —

(a) both sickness benefit and maternity benefit: or

(b) both sickness benefit and disablement benefit for temporary disablement; or

(c) both maternity benefit and disablement benefit for temporary disablement.

(2) Where a person is entitled to more than one of the benefits mentioned in sub-section *(1)*, he shall be entitled to choose which benefit he shall receive.

Corporation's right to recover damages from employer in certain cases.

66. *(1)* Where any employment injury is sustained by an insured person as an employee under this Act by reason of the negligence of the employer to observe any of the safety rules laid down by or under any enactment applicable to a factory or establishment or by reason of any wrongful act of the employer or his agent, the Corporation shall notwithstanding the fact that the employer has paid the weekly contributions due under this Act in respect of such insured person be entitled to be reimbursed by the employer or the principal who is liable to pay compensation under section 12 of the Workmen's Compensation Act, 1923, the actuarial present value of the periodical payments which the Corporation is liable to make under this Act.

(2) For the purposes of this Act, the actuarial present value of the periodical payments shall be determined in such manner as may be specified in the regulations.

Corporation's right to be indemnified in certain cases.

67. Where an insured person is entitled to receive or to recover (but has not received or recovered), whether from his employer or any other person, compensation or damages under any law for the time being in force in respect of any employment injury caused under circumstances creating a legal liability in some person other than the employer or his agent, the Corporation shall be entitled to be indemnified by the person so liable :

Provided that the Corporation shall not be entitled to be indemnified by an employer who has paid contributions in respect of the employee sustaining the employment injury as an employee under this Act, except in cases covered by section 66.

Corporation's rights where a principal employer fails or neglects to pay any contribution.

68. *(1)* If any principal employer fails or neglects to pay any contribution which under this Act he is liable to pay in respect of any employee and by reason thereof such person becomes disentitled to any benefit or entitled to a benefit on a lower scale, the Corporation may, on being satisfied that the contribution should have been paid by the principal employer, pay to the person the benefit at the rate to which he would have been entitled if the failure or neglect had not occurred and the Corporation shall be entitled to recover from the principal employer either —

(i) the difference between the amount of benefit which is paid to the said person and the amount of the benefit which would be payable on the basis of the contributions which should have been paid by the employer, or

(ii) twice the amount of the contribution which the employer failed or neglected to pay, whichever is greater.

(2) The amount recoverable under this section may be recovered as if it were an arrear of land-revenue.

Liability of owner or occupier of factories, etc., for excessive sickness benefit.

69. *(1)* Where the Corporation considers that the incidence of sickness among insured persons is excessive by reason of —

(i) insanitary working conditions in a factory or establishment or the neglect of the owner or occupier of the factory or establishment to observe any health regulations enjoined on him by or under any enactment, or

(ii) insanitary conditions of any tenements or lodgings occupied by insured persons and such insanitary conditions are attributable to the neglect of the owner of the tenements or lodgings to observe any health regulations enjoined on him by or under any enactment,

the Corporation may send to the owner or occupier of the factory or establishment or to the owner of the tenements or lodgings, as the case may be, a claim for the payment of the amount of the extra expenditure incurred by the Corporation as sickness benefit; and if the claim is not settled by agreement, the Corporation may refer the matter, with a statement in support of its claim, to the appropriate Government.

(2) If the appropriate Government is of opinion that a *prima facie* case for inquiry is disclosed, it may appoint a competent person or persons to hold an inquiry into the matter.

(3) If upon such inquiry it is proved to the satisfaction of the person or persons holding the inquiry that the excess in incidence of sickness among the insured persons is due to the default or neglect of the owner or occupier of the factory or establishment or the owner of the tenements or lodgings, as the case may be, the said person or persons shall determine the amount of the extra expenditure incurred as sickness benefit, and the person or persons by whom the whole or any part of such amount shall be paid to the Corporation.

(4) A determination under sub-section *(3)* may be enforced as if it were a decree for payment of money passed in a suit by a Civil Court.

(5) For the purposes of this section, "owner" of tenements or lodgings shall include any agent of the owner and any person who is entitled to collect the rent of the tenements or lodgings as a lessee of the owner.

Repayment of benefit improperly received.

70. *(1)* Where any person has received any benefit or payment under this Act when he is not lawfully entitled thereto, he shall be liable to repay to the Corporation the value of the benefit or the amount of such payment, or in the case of his death his representative shall be liable to repay the same from the assets of the deceased, if any, in his hands.

(2) The value of any benefits received other than cash payments shall be determined by such authority as may be specified in the regulations made in this behalf and the decision of such authority shall be final.

(3) The amont recoverable under this section may be recovered as if it were an arrear of land-revenue.

Benefit payable up to and including day of death.

71. If a person dies during any period for which he is entitled to a cash benefit under this Act, the amount of such benefits up to and including the day of his death shall be paid to any person nominated by the deceased

person in writing in such form as may be specified in the regulations or, if there is no such nomination, to the heir or legal representative of the deceased person.

Employer not to reduce wages, etc.

72. No employer by reason only of his liability for any contributions payable under this Act shall, directly or indirecly reduce the wages of any employee, or except as provided by the regulations, discontinue or reduce benefits payable to him under the conditions of his service which are similar to the benefits conferred by this Act.

Employer not to dismiss or punish employee during period of sickness, etc.

73. *(1)* No employer shall dismiss, discharge, or reduce or otherwise punish an employee during the period the employee is in receipt of sickness benefit or maternity benefit, nor shall he, except as provided under the regulations, dismiss, discharge or reduce or otherwise punish an employee during the period he is in receipt of disablement benefit for temporary disablement or is under medical treatment for sickness or is absent from work as a result of illness duly certified in accordance with the regulations to arise out of the pregnancy or confinement rendering the employee unfit for work.

(2) No notice of dismissal or discharge or reduction given to an employee during the period specified in sub-section *(1)* shall be valid or operative.

CHAPTER VI.

ADJUDICATION OF DISPUTES AND CLAIMS.

Constitution of Employees' Insurance Court.

74. *(1)* The Provincial Government shall, by notification in the official Gazette, constitute an Employees' Insurance Court for such local area as may be specified in the notification.

(2) The Court shall consist of such number of Judges as the Provincial Government may think fit.

(3) Any person who is or has been a judicial officer or is a legal practitioner of five years' standing shall be qualified to be a Judge of the Employees' Insurance Court.

(4) The Provincial Government may appoint the same Court for two or more local areas or two or more Courts for the same local area.

(5) Where more than one Court has been appointed for the same local area, the Provincial Government may by general or special order regulate the distribution of business between them.

Matters to be decided by Employees' Insurance Court.

75. *(1)* If any question of dipute arises as to —

(a) whether any person is an employee within the meaning of this Act or whether he is liable to pay the employee's contribution, or

(b) the rate of wages or average daily wages of an employee for the purposes of this Act, or

(c) the rate of contribution payable by a principal employer in respect of any employee, or

(d) the person who is or was the principal employer in respect of any employee, or

(e) the right of any person to any benefit and as to the amount and duration thereof, or

(f) the actuarial present value of the periodical payments referred to in section 66, or

(g) any other matter which is in dispute between a principal employer and the Corporation, or between a principal employer and an immediate employer, or between a person and the Corporation or between an employee and a principal or immediate employer, in respect of any contribution or benefit or other dues payable or recoverable under this Act,

such question or dispute shall be decided by the Employees' Insurance Court in accordance with the provisions of this Act.

(2) The following claims shall be decided by the Employees' Insurance Court, namely :—

(a) claim for the recovery of contributions from the principal employer ;

(b) claim by a principal employer to recover contributions from any immediate employer;

(c) claim under sections 66 or 67 made by the Corporation against the employer or other person liable thereunder ;

(d) claim against a principal employer under section 68 ;

(e) claim under section 70 for the recovery of the value or amount of the benefits received by a person when he is not lawfully entitled thereto ; and

(f) any claim for the recovery of any benefit admissible under this Act.

(3) No Civil Court shall have jurisdiction to decide or deal with any question or dispute as aforesaid or to adjudicate on any liability which by or under this Act is to be decided by the Employees' Insurance Court.

Institution of proceedings, etc.

76. *(1)* Subject to the provisions of this Act and any rules made by the Provincial Government, all proceedings before the Employees' Insurance Court shall be instituted in the Court appointed for the local area in which the insured person was working at the time the question or dispute arose.

(2) If the Court is satisfied that any matter arising out of any proceeding pending before it can be more conveniently dealt with by any other Employees' Insurance Court in the same Province, it may, subject to any rules made by

the Provincial Government in this behalf, order such matter to be transferred to such other Court for disposal and shall forthwith transmit to such other Court the records connected with the matter.

(3) The Provincial Government may transfer any matter pending before any Employees' Insurance Court in the Province to any such Court in any other Province with the consent of the Provincial Government of that Province.

(4) The Court to which any matter is transferred in section (2) or sub-section (3) shall dispose of the proceedings as if they had originally instituted in it.

77. (1) Proceedings before an Employees' Insurance Court shall be commenced by application.

(2) Every such application shall be in such form and shall contain such particulars and shall be accompanied by such fee, if any, as may be prescribed by rules made by the Provincial Government in consultation with the Corporation.

Powers of Employees' Insurance Court.

78. (1) The Employees' Insurance Court shall have all the powers of a Civil Court for the purpose of summoning and enforcing the attendance of witnesses, compelling the discovery and production of documents and material objects, recording evidence and it shall be deemed to be a Civil Court within the meaning of section 195 and Chapter XXXV of the Code of Criminal Procedure, 1898.

(2) The Employees' Insurance Court shall follow such procedure as may be prescribed by rules made by the Provincial Government.

(3) All costs incidental to any proceeding before an Employees' Insurance Court shall, subject to such rules as may be made in this behalf by the Provincial Government, be in the discretion of the Court.

(4) An order of the Employees' Insurance Court shall be enforceable as if it were a decree passed in a suit by a Civil Court.

Appearance by legal practitioner, etc.

79. Any application, appearance or act required to be made or done by any person to or before an Employees' Insurance Court (other than appearance of a person required for the purpose of his examination as a witness) may be made or done by a legal practitioner or by an officer of a registered trade union authorised in writing by such person or with the permission of the Court, by any other person so authorised.

Benefit not admissible unless claimed in time.

80. An Employees' Insurance Court shall not direct the payment of any benefit to a person unless he has made a claim for such benefit in accordance with the regulations made in that behalf within twelve months after the claim became due :

Provided that if the Court is satisfied that there was reasonable excuse for not making a claim for the benefit within twelve months after it became due, it may direct the payment of the benefit as if the claim had been made in time.

Reference to High Court

81. An Employees' Insurance Court may submit any question of law for the decision of the High Court and if it does so shall decide the question pending before it in accordance with such decision.

Appeal.

82. (1) Save as expressly provided in this section, no appeal shall lie from an order of an Employees' Insurance Court.

(2) An appeal shall lie to the High Court from an order of an Employees' Insurance Court if it involves a substantial question of law.

(3) The period of limitation for an appeal under this section shall be sixty days.

(4) The provisions of sections 5 and 12 of the Indian Limitation Act, 1908, shall apply to appeals under this section.

Stay of payment pending appeal.

83. Where the Corporation has presented an appeal against an order of the Employees' Insurance Court, that Court may, and if so directed by the High Court shall, pending the decision of the appeal, withhold the payment of any sum directed to be paid by the order appealed against.

CHAPTER VII.

PENALTIES.

Punishment for false statement.

84. Whoever, for the purpose of causing any increase in payment or benefit under this Act, or for the purpose of causing any payment or benefit to be made where no payment or benefit is authorized by or under this Act, or for the purpose of avoiding any payment to be made by himself under this Act or enabling any other person to avoid any such payment, knowingly makes or causes to be made any false statement or false representation, shall be punishable with imprisonment for a term which may extend to three months, or with fine not exceeding five hundred rupees, or with both.

Punishment for failure to pay contributions, etc.

85. If any person—

(a) fails to pay any contribution which under this Act he is liable to pay, or

(b) deducts or attempts to deduct from the wages of an employee the whole or any part of the employer's contribution, or

(c) in contravention of section 72 reduces the wages or any privileges or benefits admissible to an employee, or

(d) in contravention of section 73 or any regulation dismisses, discharges, reduces or otherwise punishes an employee, or

(e) fails or refuses to submit any return required by the regulations or makes a false return, or

(f) obstructs any Inspector or other official of the Corporation in the discharge of his duties, or

(g) is guilty of any contravention of or non-compliance with any of the requirements of this Act or the rules or the regulations in respect of which no special penalty is provided,

he shall be punishable with imprisonment which may extend to three months or with fine which may extend to five hundred rupees, or with both.

Prosecutions.

86. *(1)* No prosecution under this Act shall be instituted except by or with the previous sanction of the Insurance Commissioner.

(2) No Court inferior to that of a Presidency Magistrate or a Magistrate of the first class shall try any offence under this Act.

(3) No Court shall take cognizance of any offence under this Act except on a complaint made in writing in respect thereof, within six months of the date on which the offence is alleged to have been committed.

CHAPTER VIII.[a]

MISCELLANEOUS.

Exemption of a factory or establishment or class of factories or establishments.

87. The appropriate Government, may, by notification in the official Gazette and subject to such conditions as may be specified in the notification, exempt any factory or establishment or class of factories or establishments in any specified area from the operation of this Act for a period not exceeding one year and may from time to time by like notification renew any such exemption for periods not exceeding one year at a time.

[a] As to coming into force of this Chapter see note under S. 1.

Exemption of persons or class of persons.

88. The appropriate Government, may, by notification in the official Gazette and subject to such conditions as it may deem fit to impose, exempt any persons or class of persons employed in any factory or establishment or class of factories or establishments to which this Act applies from the operation of the Act.

Corporation to make representation.

89. No exemption shall be granted or renewed under section 87 or section 88, unless a reasonable opportunity has been given to the Corporation to make any representation it may wish to make in regard to the proposal and such representation has been considered by the appropriate Government.

Exemption of factories or establishments belonging to Government or any local authority.

90. The appropriate Government may, by notification in the official Gazette and subject to such conditions as may be specified in the notification, exempt any factory or establishment belonging to the Crown or any local authority, if the employees in any such factory or establishment are otherwise in receipt of benefit substantially similar or superior to the benefits provided under this Act.

Exemption from one or more provisions of the Act.

91. The appropriate Government may, with the consent of the Corporation, by notification in the official Gazette, exempt any employees or class of employees in any factory or establishment or class of factories or establishments from one or more of the provisions relating to the benefits provided under this Act.

Power of Central Government to give directions.

92. The Central Government may give directions to a Provincial Government as to the carrying into execution of this Act in the Province.

Corporation officers and servants to be public servants

93. All officers and servants of the Corporation shall be deemed to be public servants within the meaning of section 21 of the Indian Penal Code.

Contributions, etc., due to Corporation to have priority over other debts.

94. There shall be deemed to be included among the debts which, under section 49 of the Presidency-towns Insolvency Act, 1909, or under section 61 of the Provincial Insolvency Act, 1920, or under section 230 of the Indian Companies Act, 1913, are in the distribution of the property of the insolvent or in the distribution of the assets of a company being wound up, to be paid in priority to all other debts, the amount due in respect of any contribution or any other amount payable under this Act the liability wherefor accrued before the date of the order of adjudication of the insolvent or the date of the winding up, as the case may be.

Power of Central Government to make rules.

95. *(1)* The Central Government may, subject to the condition of previous publication, make rules not inconsistent with this Act for the purpose of giving effect to the provisions thereof.

(2) In particular and without prejudice to the generality of the foregoing power, such rules

may provide for all or any of the following matters, namely:—

(a) the manner in which nominations and elections of members of the Corporation, the Standing Committee and the Medical Benefit Council shall be made;

(b) the quorum at meetings of the Corporation, the Standing Committee and the Medical Benefit Council and the minimum number of meetings of those bodies to be held in a year;

(c) the records to be kept of the transaction of business by the Corporation, the Standing Committee and the Medical Benefit Council;

(d) the powers and duties of the principal Officers and the conditions of their service;

(e) the powers and duties of the Medical Benefit Council;

(f) the procedure to be adopted in the execution of contracts;

(g) the acquisition, holding and disposal of property by the Corporation:

(h) the raising and repayment of loans;

(i) the investment of the funds of the Corporation and of any provident or other benefit fund and their transfer or realisation;

(j) the basis on which the periodical valuation of the assets and liabilities of the Corporation shall be made;

(k) the bank or banks in which the funds of the Corporation may be deposited, the procedure to be followed in regard to the crediting of moneys accruing or payable to the Corporation and the manner in which any sums may be paid out of the Corporation funds and the officers by whom such payment may be authorised;

(l) the accounts to be maintained by the Corporation and the forms in which such accounts shall be kept and the times at which such accounts shall be audited;

(m) the publication of the accounts of the Corporation and the report of auditors, the action to be taken on the audit report, the powers of auditors to disallow and surcharge items of expenditure and the recovery of sums so disallowed or surcharged;

(n) the preparation of budget estimates and of supplementary estimates and the manner in which such estimates shall be sanctioned and published:

(o) establishment and maintenance of provident or other benefit fund for officers and servants of the Corporation; and

(p) any matter which is required or allowed by this Act to be prescribed by the Central Government.

(3) Rules made under this section shall be published in the official Gazette and thereupon shall have effect as if enacted in this Act.

Power of Provincial Government to make rules.

96. (1) The Provincial Government may, subject to the condition of previous publication, make rules not inconsistent with this Act in regard to all or any of the following matters, namely:—

(a) the constitution of Employees' Insurance Courts, the qualifications of persons who may be appointed Judges thereof, and the conditions of service of such Judges;

(b) the procedure to be followed in proceedings before such Courts and the execution of orders made by such Courts;

(c) the fee payable in respect of applications made to the Employees' Insurance Court, the costs incidental to the proceedings in such Court, the form in which applications should be made to it and the particulars to be specified in such applications;

(d) the establishments of hospitals, dispensaries and other institutions, the allotment of insured persons of their families to any such hospital, dispensary or other institution ;

(e) the scale of medical benefit which shall be provided at any hospital, clinic, dispensary or institution, the keeping of medical records and the furnishing of statistical returns ;

(f) the nature and extent of the staff, equipment and medicines that shall be provided at such hospital, dispensaries and institutions ;

(g) the conditions of service of the staff employed at such hospitals, dispensaries and institutions ; and

(h) any other matter which is required or allowed by this Act to be prescribed by the Provincial Government.

(2) Rules made under this section shall be published in the official Gazette and thereupon shall have effect as if enacted in this Act.

Power of Corporation to make regulations.

97. (1) The Corporation may, subject to the condition of previous publication, make regulations, not inconsistent with this Act and the rules made thereunder, for the administration of the affairs of the Corporation and for carrying into effect the provisions of this Act.

(2) In particular and without prejudice to the generality of the foregoing power, such regulations may provide for all or any of the following matters, namely :—

(i) the time and place of meetings of the Corporation, the Standing Committee and the Medical Benefit Council and the procedure to be followed at such meetings.

(ii) the matters which shall be referred by the Standing Committee to the Corporation for decision ;

(iii) the manner in which any contribution payable under this Act shall be assessed and collected ;

(iv) reckoning of wages for the purpose of fixing the contribution payable under this Act ;

(v) the certification of sickness and eligibility for any cash benefit ;

(vi) the method of determining the actuarial present value of periodical payments ;

(vii) the assessing of the money value of any benefit which is not a cash benefit ;

(viii) the time within which and the form in which any claim for a benefit may be made and the particulars to be specified in such claim ;

(ix) the circumstances in which an employee in receipt of disablement benefit may be dismissed, discharged, reduced or otherwise punished ;

(x) the manner in which and the place and time at which any benefit shall be paid ;

(xi) the method of calculating the amount of cash benefit payable and the circumstances in which and the extent to which commutation of disablement and dependant's benefits may be allowed and the method of calculating the commutation value ;

(xii) the notice of pregnancy or of confinement and notice and proof of sickness ;

(xiii) the conditions under which any benefit may be suspended ;

(xiv) the conditions to be observed by a person when in receipt of any benefit and the periodical medical examination of such persons ;

(xv) the visiting of sick persons ;

(xvi) the appointment of medical practitioners for the purposes of this Act, the duties of such practitioners and the form of medical certificates;

(xvii) the penalties for breach of regulations by fine (not exceeding two days' wages for a first breach and not exceeding three days' wages for any subsequent breach) which may be imposed on employees ;

(xviii) the circumstances in which and the conditions subject to which any regulation may be relaxed, the extent of such relaxation, and the authority by whom such relaxation may be granted ;

(xix) the returns to be submitted by the principal and immediate employers, the form in which and the time at which such returns should be submitted and the particulars to be given in such returns ;

(xx) the duties and powers of Inspectors and other officers and servants of the Corporation;

(xxi) the conditions of service of the officers and servants of the Corporation other than the principal Officers ;

(xxii) the procedure to be followed in remitting contributions to the Corporation ; and

(xxiii) any matter in respect of which regulations are required or permitted to be made by this Act.

(3) Regulations made by the Corporation shall be published in the Gazette of India and thereupon shall have effect as if enacted in this Act.

Corporation may undertake duties in the Indian States.

98. The Corporation may, at the request of the Government of an Indian State and with the previous permission of the Central Government and subject to such conditions as may be imposed by it, undertake to discharge in the Indian State any duty which may be specified in a State law corresponding to this Act.

Enhancement of benefits.

99. At any time when its funds so permit, the Corporation may enhance the scale of any benefit admissible under this Act and the period for which such benefit may be given, and provide or contribute towards the cost of medical care for the families of insured persons.

SCHEDULE I

(*See* section 39)

1. The amount of weekly contribution payable in respect of an employee shall be calculated with reference to his average daily wages.

2. The average daily wages shall be:—

(a) in respect of an employee employed on daily wages, the amount of wages earned during the week divided by the number of days worked (reckoned in terms of full working days);

(b) in respect of an employee employed on weekly wages, the amount earned in the week divided by the number of days worked (reckoned in terms of full working days);

(c) in respect of an employee employed on monthly wages, the amount earned in the month in which the contribution falls due, divided by the number of days worked (reckoned in terms of full working days);

(d) in respect of an employee employed on the basis of any other wage period the wages for the period, in which the contribution falls due, divided (by the number of days worked) reckoned in terms of full working days, during the period ;

(e) in respect of an employee paid at piecework rate, the amount earned during the week divided by the number of days worked (reckoned in terms of full working days);

(f) in respect of an employee employed on hourly wages, the amount of wages earned during the week, divided by the number of hours worked and multiplied by eight;

(g) in respect of an employee who does not fall under clauses *(a)* to *(f)*, the amount calculated on the basis of wages earned for the day on which the contribution falls due.

Explanation.—Except as provided by regulations, pay, salaries or allowances paid in respect of any period of leave or holidays with pay shall not be taken into account in reckoning wages.

3. *(a)* For the purposes of fixing the amount of

weekly contribution payable, employees shall be divided into eight groups on the basis of their average daily wages ascertained in the manner specified in paragraph 2.

(b) The employees' contribution and employer's contribution payable in respect of the group of employees specified in the first column of the table below shall be at the rates respectively specified in the corresponding entries in the second and third columns thereof.

TABLE

Group of employees	Employees' contribution (recovereble from employees)			Employer's contribution			Total contribution (employees' and employer's contribution)		
1	2			3			4		
	Rs.	A.	P.	Rs.	A.	P.	Rs.	A.	P.
1. Employees whose average daily wages are below Re. 1.	Nil			0	7	0	0	7	0
2. Employees whose average daily wages are Re. 1 and above but below Rs. 1-8-0.	0	2	0	0	7	0	0	9	0
3. Employees whose average daily wages are Rs. 1-8-0 and above but below Rs. 2.	0	4	0	0	8	0	0	12	0
4. Employees whose average daily wages are Rs. 2 and above but below Rs. 3.	0	6	0	0	12	0	1	2	0
5. Employees whose average daily wages are Rs. 3 and above but below Rs. 4.	0	8	0	1	0	0	1	8	0
6. Employees whose average daily wages are Rs. 4 and above but below Rs. 6.	0	11	0	1	6	0	2	1	0
7. Employees whose average daily wages are Rs. 6 and above but below Rs. 8.	0	15	0	1	14	0	2	13	0
8. Employees whose average daily wages are Rs. 8 and above.	1	4	0	2	8	0	3	12	0

SCHEDULE II

(*See* sections 49, 51, 52 and 53)

Sickness Benefit and Disablement and Dependants' benefits.

1. The average daily wages of an employee in each of the groups specified in the first column of the table below shall, for the purpose of calculating the sickness benefit and disablement and dependants' benefits be assumed to be the rate specified in the corresponding entry in the second column thereof.

TABLE

Group of employees	Average assumed daily wages		
1	2		
	Rs.	A.	P.
1. Employees whose average daily wages are below Re. 1.	0	14	0
2. Employees whose average daily wages are Re. 1 and above, but below Rs. 1—8—0	1	4	0
3. Employees whose average daily wages are Rs. 1—8—0 and above, but below Rs. 2.	1	12	0
4. Employees whose average daily wages are Rs. 2 and above, but below Rs. 3.	2	8	0
5. Employees whose average daily wages are Rs. 3 and above, but below Rs. 4.	3	8	0
6. Employees whose average daily wages are Rs. 4 and above, but below Rs. 6.	5	0	0
7. Employees whose average daily wages are Rs. 6 and above, but below Rs. 8.	7	0	0
8. Employees whose average daily wages are Rs. 8 and above.	10	0	0

2. The daily rate of sickness benefit during any benefit period shall be an amount equivalent to one-half of the sum of the assumed average daily wages as aforesaid for each of the weeks for which contributions were paid in respect of the person during the corresponding contribution period, divided by the number of weeks in that contribution period in which he was deemed to have been available for employment within the meaning of section 48; provided that where the amount of the benefit so calculated includes a fraction of an anna, it shall be rounded to the next higher anna. The calculation indicated above is illustrated by the following examples:—

Example 1.—If the assumed average daily wages of the person as an employee were Rs. 1/4 a day for 10 weeks, Rs. 1/12 a day for 10 weeks and Rs. 2/8 a day for 6 weeks, the average of the assumed daily wages for the purpose of the rate of sickness benefit will be—

$$\frac{10\times 20 + 10\times 28 + 6\times 40}{26} = 27\frac{18}{26}$$

The daily rate of sickness benefit payable in the benefit period will then be $13\frac{22}{26}$ annas, rounded to the next higher anna, namely, 14 annas.

Example 2.—If the person was deemed to have been not available for employment for 14 weeks in any contribution period and was employed as an employee for only 12 weeks in that contribution period, his assumed average daily wages being Rs. 1/4 for the 12 weeks, the average of the assumed daily wages for the purpose of the rate of sickness benefit will be:—

$$\frac{12\times 20}{(26-14)} = 20 \text{ annas.}$$

The daily rate of sickness benefit payable in the benefit period will then be 10 annas.

Example 3.—If the person was deemed to have been not available for employment for 4 weeks in any contribution period and was employed as an employee for only 20 weeks (he having been without any employment for 2 weeks) in that contribution period, his assumed average daily wages being Rs. 1/12 for 20 weeks, the average of the daily wages for the purpose of the rate of sickness benefit will be:—

$$\frac{20 \times 28}{(26-4)} = 25\frac{5}{11} \text{ annas.}$$

The daily rate of sickness benefit payable in the benefit year will then be $12\frac{8}{11}$ annas, rounded to the next higher anna, namely, 13 annas.

3. Disablement and dependants' benefit shall be an amount equivalent to one-half of the sum of the assumed average daily wages for each of the weeks for which contributions were paid in respect of the employee during the period of fifty-two weeks immediately preceding the week in which the employment injury occurs, divided by the number of weeks for which contributions were so paid provided that where the amount of the benefit so calculated includes a fraction of an anna, it shall be rounded to the next higher anna. The calculation indicated above is illustrated by the following examples :

Example 1.—If the assumed average daily wages of an employee were 14 annas a day for 20 weeks, Rs. 1/4 a day for 20 weeks and Rs. 1/12 a day for 12 weeks, the average of the assumed daily wages for the purpose of disablement and dependants' benefit will be :—

$$\frac{20\times 14 + 20\times 20 + 12\times 28}{52} = 19\frac{28}{52} \text{ annas.}$$

The disablement or dependants' benefit will then be $9\frac{20}{26}$ annas, rounded to the next higher anna, namely 10 annas a day.

Example 2. — If the employee worked only for 34 weeks in the period of 52 weeks preceding the week in which the employment injury occurs and his assumed average daily wages were 14 annas a day for 20 weeks and Rs. 1/4 for 14 weeks, the average of the assumed daily wages for the purpose of disablement and dependants' benefit will be : —

$$\frac{20\times 14 + 14\times 20}{34} = 16\frac{16}{34} \text{ annas.}$$

The disablement or dependants' benefit will be $8\frac{8}{34}$ annas, rounded to the next higher anna, namely, 9 annas a day.

The disablement or dependants' benefits calculated as aforesaid shall be called the full rate.

4. The disablement or dependants' benefit shall be payable to a person suffering from disablement as a result of an employment injury sustained as an employee in a factory or establishment to which this Act applies, or if he dies as a result of such injury, to his dependants as follows :—

(i) to the insured person—

(a) for temporary disablement, during the period of such disablement at the full rate ;

(b) for permanent partial disablement, at a percentage of the full rate, as provided in section 4 of the Workmen's Compensation Act,1923 (VIII of 1923),for life;

(c) for permanent total disablement, at the full rate for life ;

(d) in cases of disablement not covered by clauses *(a)*, *(b)* and *(c)* above, as may be provided in the regulations.

(ii) in the case of the death of the person, to his widow and children as follows :—

(a) to the widow during life or until remarriage an amount equivalent to three-fifths of the full rate and, if there are two or more widows, the amount payable to the widow as aforesaid shall be divided equally between the widows ;

(b) to each legitimate or adopted son, an amount equivalent to two-fifths of the full rate until he attains fifteen years of age ;

(c) to each legitimate unmarried daughter, an amount equivalent to two-fifths of the full rate until she attains fifteen years of age or until marriage, whichever is earlier :

Provided, that the Corporation may continue such benefit to any legitimate or adopted son or any legitimate unmarried daughter until he or she attains the age of eighteen years if such son or daughter continues education to the satisfaction of the Corporation :

Provided further that if the total of the dependant's benefits distributed among the widow or widows and legitimate children of the deceased person as aforesaid exceeds the full rate, the share of the each of the dependants shall be proportionately reduced, so that the total amount payable to them does not exceed the amount of disablement benefit at the full rate.

5. In case the deceased person does not leave a widow or legitimate child, dependants' benefit at such rates as may be determined by the Commissioner appointed under the Workmen's Compensation Act, 1923 (VIII of 1923), shall be payable as follows :—

(a) to a parent or grand parent, for life ;

(b) to any other male dependant, until he attains fifteen years of age ;

(c) to any other female dependant, until she attains fifteen years of age or until marriage, whichever is earlier, or if widowed until she attains fifteen years of age.

(ACT LVIII OF 1948.)

STATEMENT OF OBJECTS AND REASONS.

"On account of the wholesale exodus of non-Muslim from West Punjab, North-West Frontier Province, and certain other areas of West Pakistan, it became necessary to arrange for an exchange of prisoners from these areas. Negotiations were started with Pakistan and a general agreement was arrived at. The agreement worked for sometime and a large number of non-Muslim prisoners were received from West Punjab and all Muslim prisoners except about 300 were returned to Pakistan from East Punjab.

To impliment and validate this exchange of prisoners the Governor-General passed an Ordinance (Exchange of Prisoners Ordinance, No. VI of 1948) which was promulgated on 20th April 1948.

The exchange of prisoners has not been completed yet and some of the provisions of the Ordinance will have to be kept in force even after such exchange is completed, for example, sections 5 and 8. It is, therefore, considered desirable to re-enact all the provisions of the Ordinance in the form of an Act of the Legislature. The present Bill, therefore, seeks to replace the Ordinance which expires on the 20th October 1948, by an Act."

—Gazette of India, 1948, Part V, page 631.

[THE] EXCHANGE OF PRISONERS ACT, 1948.
(ACT LVIII OF 1948)

[10th September, 1948.]

An Act to provide, in pursuance of an agreement with Pakistan for the exchange of prisoners, for the transfer of certain prisoners from India to Pakistan and the reception in India of certain prisoners from Pakistan.

WHEREAS an agreement has been reached between the Government of India and the Government of Pakistan for the exchange of certain classes of prisoners between the two countries :

AND WHEREAS it is necessary to provide in pursuance of the said agreement for the transfer of certain prisoners from India to Pakistan and for the reception in India of certain prisoners from Pakistan;

It is hereby enacted as follows :—

Short title, extent and commencement.

1. *(1)* This Act may be called the Exchange of Prisoners Act, 1948.

(2) It extends to the whole of India.

Definitions.

2. In this Act, unless there is anything repugnant in the subject or context,—

(a) "prison" includes any subsidiary jail, judicial lock-up or police lock-up, and any place used for the custody of persons who are ordered to be detained under any law for the time being in force;

(b) "prisoner" means any person committed to custody in a prison on or before the 1st day of August, 1948 under the writ, warrant or order of any Court or authority other than a civil Court or Court-martial;

(c) "the Provincial Government", in relation to any Acceding State, means the Government of that State;

(d) "transferable prisoner" means—

(i) in the Province of East Punjab, any prisoner who, being a Muslim, is willing to be transferred to Pakistan under the provisions of this Act, and

(ii) in any other part of India, any prisoner of such category as the Central Government may specify by notification in the official Gazette who, being a Muslim, is willing to be transferred to Pakistan under the provisions of this Act.

Issue of warrants for transfer of prisoners.

3. The Provincial Government may issue a warrant addressed to the officer in charge of a prison to deliver to the person presenting the warrant any transferable prisoner confined or detained in the prison, together with all the records relating to such prisoner and the personal effects taken from him at the time of his admission into the prison.

Removal and delivery of prisoners.

4. Upon the presentation of a warrant issued under section 3, the officer in charge of the prison shall forthwith comply with the warrant and obtain thereon the signature of the person to whom delivery of the prisoner, records and articles is made in pursuance of the warrant; and that person shall cause the prisoner, records and articles to be removed from the prison and delivered at such place, and to such authorised officer of Pakistan, as the Provincial Government may, by general or special order, specify in this behalf.

Cesser of jurisdiction of Indian Courts and authorities over prisoners.

5. Upon the delivery of custody of a prisoner to an officer of Pakistan in accordance with the provisions of section 4, all Courts and authorities in India shall, save as otherwise provided in section 8 or for the purposes of that section, cease to have or exercise, in relation to the prisoner, any jurisdiction in respect of the offence or other matter which was the cause of his confinement or detention in the prison.

Lawfulness of custody and retaking upon escape.

6. It shall be lawful for any officer of Pakistan to whom the custody of a prisoner is delivered under the provisions of section 4 to receive and hold in custody such prisoner and to convey him out of India, and if the prisoner escapes from such custody within India he may be retaken as a person accused of an offence may be retaken upon an escape.

Transfer of records relating to transferable prisoners.

7. Where a prisoner is or is to be transferred to Pakistan under the provisions of this Act, the Provincial Government may requisition the record of any proceedings, including judicial proceedings, relating to that prisoner from any Court or office, and may direct that such record shall be sent to the Government of Pakistan or the Government of any Province in Pakistan.

Prohibition of return to India of transferred prisoners.

8. *(1)* No person who has been transferred to Pakistan under the provisions of this Act shall return to India except with the permission in writing of the Central Government.

(2) If any person contravenes the provisions of sub-section *(1)*, he shall be punishable with imprisonment for a term which may extend to three years and if, at the time of his transfer to Pakistan, he was undergoing a sentence of imprisonment in India, he shall further be sentenced to undergo the unexpired portion of such sentence without taking into account any period for which he may have been detained or confined in Pakistan after the transfer.

(3) If at the time of his transfer to Pakistan, the person contravening the provisions of sub-section *(1)* was undergoing trial in any Court in India for any offence, he shall, without prejudice to the provisions of sub-section *(2)*, be liable to be tried for such offence by the same or any other Court having jurisdiction :

Provided that if such person has, before his return to India, been tried for the offence by a Court of competent jurisdiction in Pakistan and convicted or acquitted of the offence, he shall not be liable to be tried again for the same offence by any Court in India.

Reception in India of prisoners transferred from Pakistan.

9. *(1)* The Central Government may, by general or special order, specify the place or places at which, and the officer or officers to whom, the custody of prisoners confined or detained in Pakistan is to be delivered in pursuance of the agreement reached in this behalf between the Government of India and the Government of Pakistan.

(2) It shall be lawful for any such officer as aforesaid to receive and hold in custody any prisoner so delivered and to convey such prisoner to any prison in a Province of India for being dealt with in accordance with law; and if the prisoner escapes from such custody he may be retaken as a person accused of an offence against an Indian law may be retaken upon an escape.

Repeal of Ordinance VI of 1948.

10. *(1)* The Exchange of Prisoners Ordinance 1948 is hereby repealed.

(2) The repeal by this Act of the said Ordinance shall not affect the previous operation thereof, and any order made, action taken, or thing done, in the exercise of any powers conferred by or under the said Ordinance shall for all purposes be deemed to have been made, taken or done in the exercise of powers conferred by this Act as if this Act had commenced on the 20th day of April, 1948.

[THE] EXTRA-PROVINCIAL JURISDICTION ACT, 1947
(ACT XLVII OF 1947)

STATEMENT OF OBJECTS AND REASONS.

"The Central Government have acquired by agreement, treaty, usage, etc, certain powers and jurisdiction in the non-jurisdictional and semi-jurisdictional States and Talukas of Western India and Gujrat, Manipur, etc. The Central Government have in consequence assumed certain functions in relation to the administration of these areas. In order to provide legal machinery for the exercise of these functions, the Extra-Provincial Jurisdiction Ordinance was promulgated. It is now proposed to replace the Ordinance by an Act of the Dominion Legislature. The present Bill empowers the Central Government to exercise in the areas outside the Provinces jurisdiction and powers acquired, or that may be acquired, by the Central Government, by treaties, agreements, etc., and validates action already taken by the Central Government and its Officers."

—Gazette of India, 1947, Part V, page 471.

[THE] EXTRA PROVINCIAL JURISDICTION ACT, 1947
(ACT XLVII OF 1947)

[24th December 1947.]

An Act to provide for the exercise of certain extra-provincial jurisdiction of the Central Government.

WHEREAS by treaty, agreement, grant, usage, sufferance and other lawful means, the Central Government has, and may hereafter acquire, jurisdiction in and in relation to areas outside the Provinces of India;

It is hereby enacted as follows :—

Short title 1. This Act may be called the Extra Provincial Jurisdiction Act, 1947.

Definitions. 2. In this Act,—

(a) "extra-provincial jurisdiction" means any jurisdiction which by treaty, agreement, grant, usage, sufferance or other lawful means the Central Government has for the time being in or in relation to any area outside the Provinces;

(b) "jurisdiction" includes rights, power and authority.

Exercise of jurisdiction. 3. *(1)* It shall be lawful for the Central Government to exercise extra-provincial jurisdiction in such manner as it thinks fit.

(2) The Central Government may delegate any such jurisdiction as aforesaid to any officer or authority in such manner and to such extent as it thinks fit.

Power to make orders. 4. *(1)* The Central Government may, by notification in the official Gazette, make such orders as may seem to it expedient for the effective exercise of any extra-provincial jurisdiction of the Central Government.

(2) Without prejudice to the generality of the powers conferred by sub-section *(1)*, any order made under that sub-section may provide—

(a) for determining the law and procedure to be observed, whether by applying with or without modifications all or any of the provisions of any enactment in force in any Province or otherwise;

(b) for determining the persons who are to exercise jurisdiction, either generally or in particular cases or classes of cases, and the powers to be exercised by them;

(c) for determining the Courts, judges, magistrates and authorities by whom and for regulating the manner in which, any jurisdiction auxiliary or incidental to or consequential on the jurisdiction exercised under this Act is to be exercised within any Province; and

(d) for regulating the amount, collection and application of fees.

Validity of acts done in pursuance of jurisdiction. 5. Every act and thing done, whether before or after the commencement of this Act, in pursuance of any extra-provincial jurisdiction of the Central Government in an area outside the Provinces shall be as valid as if it had been done according to the local law then in force in that area.

Evidence as to existence or extent of jurisdiction. 6. *(1)* If in any proceeding, civil or criminal, in a Court established in the Provinces or by the authority of the Central Government outside the Provinces, any question arises as to the existence or extent of any extra-provincial jurisdiction of the Central Government, the Secretary to the Government of India in the appropriate department shall, on the application of the Court, send to the Court the decision of the Central Government on the question, and that decision shall for the purposes of the proceeding be final.

(2) The Court shall send to the said Secretary, in a document under the seal of the Court or signed by a judge of the Court, questions framed so as properly to raise the question, and sufficient answers to those questions shall be returned to the Court by the Secretary and those answers shall on production thereof be conclusive evidence of the matters therein contained.

Repeal and saving. 7. *(1)* The Extra-Provincial Jurisdiction Ordinance, 1947, is hereby repealed.

(2) Any order made, anything done or any action taken in exercise of any power conferred by or under the said Ordinance shall be deemed to have been made, done or taken in exercise of powers conferred by or under this Act as if this Act had commenced on the 27th day of August, 1947.

[THE] FACTORIES ACT, 1948
(ACT LXIII OF 1948)

STATEMENT OF OBJECTS AND REASONS.

"The existing law relating to the regulation of labour employed in factories in India is embodied in the Factories Act, 1934. Experience of the working of the Act has revealed a number of defects and weaknesses which hamper effective administration. Although the Act has been amended in certain respects in a piecemeal fashion whenever some particular aspect of labour safety or welfare assumed urgent importance, the general framework has remained unchanged. The provisions for the safety, health and welfare of workers are generally found to be inadequate and unsatisfactory, and even such protection as is provided does not extend to the large mass of workers employed in work-places not covered by the Act. In view of the large and growing industrial activities in the country, a radical overhauling of the Factories law is essentially called for and cannot be delayed.

The proposed legislation differs materially from the existing law in several respects. Some of the important features are herein mentioned. Under the definition of "Factory" in the Act of 1934, several undertakings are excluded from its scope but it is essental that important basic provisions relating to health, working hours, holidays, lighting and ventilation, should be extended to all workplaces in view of the unsatisfactory state of affairs now prevailing in unregulated factories. Further

the present distinction between seasonal and perennial factories which has little justification has been done away with. The minimum age of employment for children has been raised from 12 to 13 and their working hours reduced from 5 to 4½, with powers to Provincial Governments to prescribe even a higher minimum age for employment in hazardous undertakings.

The present Act is very general in character and leaves too much to the rule-making powers of the Provincial Governments. While some of them do have rules of varying stringency, the position on the whole is not quite satisfactory. This defect is sought to be remedied by laying down clearly in the Bill itself the minimum requirements regarding health (cleanliness, ventilation and temperature, dangerous dusts and fumes, lighting and control of glare, etc.) safety (eye-protection, control of explosive and inflammable dusts, etc.), and general welfare of workers (washing facilities, first aid, canteens, shelter rooms, creches, etc.) amplified, where necessary, by rules and regulations to be prescribed by Provincial Governments.

Further the present Act leaves important and complex points to the discretion of inspectors placing heavy responsibility on them. In view of the specialised and hazardous nature of the processes employed in the factories, it is too much to expect Inspectors to possess an expert knowledge of all these matters. The detailed provisions contained in the Bill will go a long way in lightening their burden.

Some difficulties experienced in the administration of the Act, especially relating to hours of employment, holidays with pay, etc., have been met by making the provisions more definite and clearer. The penalty clauses have also been simplified. An important provision has also been made in the Bill empowering Provincial Governments to require that every factory should be registered and should take a license for working to be renewed at periodical intervals. Provincial Governments are further being empowered to require that before a new factory is constructed or any extensions are made to an existing one the plans, designs and specifications of the proposed construction should receive their prior approval.

It is expected that the Bill when enacted into law will considerably advance the condition of workers in factories.

The substantial changes made in the existing law are also indicated in the Notes on Clauses [*omitted.*] Opportunity has also been taken to arrange the existing law and to revise expressions, where necessary."

— Gazette of India, 1947, Part V, p. 580.

THE FACTORIES ACT, 1948
(ACT LXIII OF 1948)[a]

[23rd September, 1948.]

An Act to consolidate and amend the law regulating labour in factories.

WHEREAS it is expedient to consolidate and amend the law regulating labour in factories;

It is hereby enacted as follows :—

a. For Report of Select Committee, *see* Gazette of India, 1948, Part V, page 551.

CHAPTER I
PRELIMINARY

Short title, extent and commencement.

1. *(1)* This Act may be called the Factories Act, 1948.

(2) It extends to all the Provinces of India and shall extend to such Acceding States as, by their Instruments of Accession, have accepted the subject-matter of this Act as a matter with respect to which the Dominion Legislature may make laws for such States.

(3) It shall come into force on the 1st day of April 1949.

Interpretation.

2. In this Act, unless there is anything repugnant in the subject or context,—

(a) "adult" means a person who has completed his eighteenth year of age;

(b) "adolescent" means a person who has completed his fifteenth year of age but has not completed his eighteenth year;

(c) "child" means a person who has not completed his fifteenth year of age ;

(d) "young person" means a person who is either a child or an adolescent;

(e) "day" means a period of twenty-four hours beginning at midnight;

(f) "week" means a period of seven days beginning at midnight on Saturday night or such other night as may be approved in writing for a particular area by the Chief Inspector of Factories;

(g) "power" means electrial energy, or any other form of energy which is mechanically transmitted and is not generated by human or animal agency;

(h) "prime mover" means any engine, motor or other appliance which generates or otherwise provides power;

(i) "transmission machinery" means any shaft, wheel, drum, pulley, system of pulleys, coupling, clutch, driving belt or other appliance or device by which the motion of a prime mover is transmitted to or received by any machinery or appliance:

(j) "machinery" includes prime movers, transmission machinery and all other appliances whereby power is generated, transformed, transmitted or applied;

(k) "manufacturing process" means any process for—

(i) making, altering, repairing, ornamenting, finishing, packing, oiling, washing, cleaning, breaking up, demolishing, or otherwise treating or adapting any article or substance with a view to its use, sale, transport, delivery or disposal, or

(ii) pumping oil, water or sewage, or

(iii) generating, transforming or transmitting power; or

(iv) printing by letterpress, lithography, photogravure or other similar work or book binding, which is carried on by way of trade or for purposes of gain, or incidentally to another business so carried on; or

(v) constructing, reconstructing, repairing, refitting, finishing or breaking up ships or vessels,

(l) "worker" means a person employed, directly or through any agency, whether for wages or not, in any manufacturing process, or in cleaning any part of the machinery or premises used for a manufacturing process, or in any other kind of work incidental to, or connected with, the manufacturing process, or the subject of the manufacturing process;

(m) "factory" means any premises including the precincts thereof—

(i) whereon ten or more workers are working, or were working on any day of the preceding twelve months, and in any part of which a manufacturing process is being carried on with the aid of power, or is ordinarily so carried on, or

(ii) whereon twenty or more workers are working, or were working on any day of the preceding twelve months, and in any part of which a manufacturing process is being carried on without the aid of power, or is ordinarily so carried on,—

but does not include a mine subject to the operation of the Indian Mines Act, 1923, or a railway running shed;

(n) "occupier" of a factory means the person who has ultimate control over the affairs of the factory, and where the said affairs are entrusted to a managing agent such agent shall be deemed to be the occupier of the factory;

(o) "managing agent" has the meaning assigned to it in the Indian Companies Act, 1913;

(p) "prescribed" means prescribed by rules made by the Provincial Government under this Act;

(q) "Provincial Government" includes the Government of an Acceding State to which this Act applies and all references to a province shall be construed as references also to an Acceding State;

(r) where work of the same kind is carried out by two or more sets of workers working during different periods of the day, each of such sets is called a "relay" and each of such periods is called a "shift".

References to time of day.

3. In this Act references to time of day are references to Indian Standard Time, being five and a half hours ahead of Greenwich Mean Time:

Provided that for any area in which Indian Standard Time is not ordinarily observed the Provincial Government may make rules—

(a) specifying the area,

(b) defining the local mean time ordinarily observed therein, and

(c) permitting such time to be observed in all or any of the factories situated in the area.

Power to declare departments to be separate factories.

4. The Provincial Government may, by order in writing, direct that different departments or branches of a specified factory shall be treated as separate factories for all or any of the purposes of this Act.

Power to exempt during public emergency.

5. In any case of public emergency the Provincial Government may, by notification in the official Gazette, exempt any factory or class or description of factories from all or any of the provisions of this Act for such period and subject to such conditions as it may think fit:

Provided that no such notification shall be made for a period exceeding three months at a time.

Approval, licensing and registration of factories.

6. *(1)* The Provincial Government may make rules—

(a) requiring the previous permission in writing of the Provincial Government or the Chief Inspector to be obtained for the site on which the factory is to be situated and for the construction or extension of any factory or class or description of factories;

(b) requiring for the purpose of considering applications for such permission the submission of plans and specifications;

(c) prescribing the nature of such plans and specifications and by whom they shall be certified;

(d) requiring the registration and licencing of factories or any class or description of factories, and prescribing the fees payable for such registration and licensing and for the renewal of licences;

(e) requiring that no licence shall be granted or renewed unless the notice specified in section 7 has been given.

(2) If on an application for permission referred to in clause *(a)* of sub-section *(1)* accompanied by the plans and specifications required by the rules made under clause *(b)* of that sub-section, sent to the Provincial Government or Chief Inspector by registered post, no order is communicated to the applicant within three months from the date on which it is so sent, the permission applied for in the said application shall be deemed to have been granted.

(3) Where a Provincial Government or a Chief Inspector refuses to grant permission to the site, construction or extension of a factory or to the registration and licensing of a factory, the applicant may within thirty days of the date of such refusal appeal to the Central Govern-

ment if the decision appealed from was of the Provincial Government and to the Provincial Government in any other case.

Explanation.—A factory shall not be deemed to be extended within the meaning of this section by reason only of the replacement of any plant or machinery, or within such limits as may be prescribed of the addition of any plant or machinery.

Notice by occupier.

7. *(1)* The occupier shall, at least fifteen days before he begins to occupy or use any premises as a factory, send to the Chief Inspector a written notice containing—

(a) the name and situation of the factory,

(b) the name and address of the occupier;

(c) the address to which communications relating to the factory may be sent;

(d) the nature of the manufacturing process—

(i) carried on in the factory during the last twelve months in the case of factories in existence on the date of the commencement of this Act, and

(ii) to be carried on in the factory during the next twelve months in the case of all factories;

(e) the nature and quantity of power to be used;

(f) the name of the manager of the factory for the purposes of this Act;

(g) the number of workers likely to be employed in the factory;

(h) the average number of workers per day employed during the last twelve months in the case of a factory in existence on the date of the commencement of this Act;

(i) such other particulars as may be prescribed.

(2) In respect of all establishments which come within the scope of the Act for the first time, the occupier shall send a written notice to the Chief Inspector containing the particulars specified in sub-section *(1)* within thirty days from the date of the commencement of this Act.

(3) Before a factory engaged in a manufacturing process which is ordinarily carried on for less than one hundred and eighty working days in the year resumes working, the occupier shall send a written notice to the Chief Inspector containing the particulars specified in sub-section *(1)* within thirty days before the date of the commencement of work.

(4) Whenever a new manager is appointed, the occupier shall send to the Chief Inspector a written notice within seven days from the date on which such person takes over charge.

(5) During any period for which no person has been designated as manager of a factory or during which the person designated does not manage the factory, any person found acting as manager, or if no such person is found, the occupier himself, shall be deemed to be the manager of the factory for the purposes of this Act

CHAPTER II

THE INSPECTING STAFF

Inspectors.

8. *(1)* The Provincial Government may, by notification in the Official Gazette, appoint such persons as possess the prescribed qualification to be Inspectors for the purposes of this Act and may assign to them such local limits as it may think fit.

(2) The Provincial Government may, by notification in the Official Gazette, appoint any person to be a Chief Inspector who shall, in addition to the powers conferred on a Chief Inspector under this Act, exercise the powers of an Inspector throughout the Province.

(3) No person shall be appointed under sub-section *(1)*, sub section *(2)* or sub-section *(5)* or, having been so appointed, shall continue to hold office, who is or becomes directly or indirectly interested in a factory or in any process or business carried on therein or in any patent or machinery connected therewith.

(4) Every District Magistrate shall be an Inspector for his district.

(5) The Provincial Government may also by notification as aforesaid, appoint such public officers as it thinks fit to be additional Inspectors for all or any of the purposes of this Act, within such local limits as it may assign to them respectively.

(6) In any area where there are more Inspectors than one, the Provincial Government may, by notification as aforesaid, declare the powers which such Inspectors shall respectively exercise and the Inspector to whom the prescribed notices are to be sent.

(7) Every Chief Inspector and Inspector shall be deemed to be a public servant within the meaning of the Indian Penal Code, and shall be officially subordinate to such authority as the Provincial Government may specify in this behalf.

Powers of Inspectors.

9. Subject to any rule made in this behalf, an Inspector may, within the local limits for which he is appointed,—

(a) enter, with such assistants, being persons in the service of the Government, or any local or other public authority, as he thinks fit, any place which is used, or which he has reason to believe is used, as a factory;

(b) make examination of the premises, plant and machinery, require the production of any

prescribed register and any other document relating to the factory, and take on the spot or otherwise statements of any persons which he may consider necessary for carrying out the purposes of this Act.

(c) exercise such other powers as may be prescribed for carrying out the purposes of this Act:

Provided that no person shall be compelled under this section to answer any question or give any evidence tending to incrimate himself.

Certifying surgeons.

10. *(1)* The Provincial Government may appoint qualified medical practitioners to be certifying surgeons for the purposes of this Act within such local limits or for such factory or class or description of factories as it may assign to them respectively.

(2) A certifying surgeon may, with the approval of the Provincial Government, authorise any qualified medical practitioner to exercise any of his powers under this Act for such period as the certifying surgeon may specify and subject to such conditions as the Provincial Government may think fit to impose, and references in this Act to a certifying surgeon shall be deemed to include reference to any qualified medical practitioner when so authorised.

(3) No person shall be appointed to be, or authorised to exercise the powers of a certifying surgeon, or having been so appointed or authorised, continue to exercise such powers, who is or becomes the occupier of a factory or is or becomes directly or indirectly interested therein or in any process or business carried on therein or in any patent or machinery connected therewith or is otherwise in the employ of the factory.

(4) The certifying surgeon shall carry out such duties as may be prescribed in connection with—

(a) the examination and certification of young persons under this Act;

(b) the examination of persons engaged in factories in such dangerous occupations or processes as may be prescribed;

(c) the exercising of such medical supervision as may be prescribed for any factory or class or description of factories where—

(i) cases of illness have occurred which it is reasonable to believe are due to the nature of the manufacturing process carried on, or other conditions of work prevailing, therein;

(ii) by reason of any change in the manufacturing process carried on or in the substances used therein or by reason of the adoption of any new manufacturing process or of any new substance for use in a manufacturing process, there is a likelihood of injury to the health of workers employed in that manufacturing process;

(iii) young persons are, or are about to be, employed in any work which is likely to cause injury to their health.

Explanation. — In this section "qualified medical practitioner" means a person holding a qualification granted by an authority specified in the Schedule to the Indian Medical Degrees Act, 1916, or in the Schedules to the Indian Medical Council Act, 1933.

CHAPTER III

HEALTH

Cleanliness.

11. *(1)* Every factory shall be kept clean and free from effluvia arising from any drain, privy or other nuisance, and in particular—

(a) accumulations of dirt and refuse shall be removed daily by sweeping or by any other effective method from the floors and benches of workrooms and from staircases and passages, and disposed of in a suitable manner;

(b) the floor of every workroom shall be cleaned at least once in every week by washing, using disinfectant, where necessary, or by some other effective method;

(c) where a floor is liable to become wet in the course of any manufacturing process to such extent as is capable of being drained, effective means of drainage shall be provided and maintained;

(d) all inside walls and partitions, all ceilings or tops of rooms and all walls, sides and tops of passages and staircases shall—

(i) where they are painted or varnished, be repainted or revarnished at least once in every period of five years;

(ii) where they are painted or varnished or where they have smooth impervious surfaces, be cleaned at least once in every period of fourteen months by such method as may be prescribed;

(iii) in any other case, be kept whitewashed or colourwashed, and the whitewashing or colourwashing shall be carried out at least once in every period of fourteen months;

(e) the dates on which the processes required by clause *(d)* are carried out shall be entered in the prescribed register.

(2) If, in view of the nature of the operations carried on in a factory, it is not possible for the occupier to comply with all or any of the provisions of sub-section *(1)*, the Provincial Government may by order exempt such factory or class or description of factories from any of the provisions of that sub-section and specify alter-

native methods for keeping the factory in a clean state.

Disposal of wastes and effluents.

12. *(1)* Effective arrangements shall be made in every factory for the disposal of wastes and effluents due to the manufacturing process carried on therein.

(2) The Provincial Government may make rules prescribing the arrangements to be made under sub-section *(1)* or requiring that the arrangements made in accordance with sub-section *(1)* shall be approved by such authority as may be prescribed.

Ventilation and temperature.

13. *(1)* Effective and suitable provision shall be made in every factory for securing and maintaining in every workroom—

(a) adequate ventilation by the circulation of fresh air, and

(b) such a temperature as will secure to workers therein reasonable conditions of comfort and prevent injury to health;—

and in particular,—

(i) walls and roofs shall be of such material and so designed that such temperature shall not be exceeded but kept as low as practicable;

(ii) where the nature of the work carried on in the factory involves, or is likely to involve, the production of excessively high temperatures, such adequate measures as are practicable shall be taken to protect the workers therefrom, by separating the process which produces such temperatures from the workroom, by insulating the hot parts or by other effective means.

(2) The Provincial Government may prescribe a standard of adequate ventilation and reasonable temperature for any factory or class or description of factories or parts thereof and direct that a thermometer shall be provided and maintained in such place and position as may be specified.

(3) If it appears to the Provincial Government that in any factory or class or description of factories excessively high temperatures can be reduced by such methods as whitewashing, spraying or insulating and screening outside walls or roofs or windows, or by raising the level of the roof, or by insulating the roof either by an air-space and double roof or by the use of insulating roof materials, or by other methods, it may prescribe such of these or other methods as shall be adopted in the factory.

Dust and fume.

14. *(1)* In every factory in which, by reason of the manufacturing process carried on, there is given off any dust or fume or other impurity of such a nature and to such an extent as is likely to be injurious or offensive to the workers employed therein, or any dust in substantial quantities, effective measures shall be taken to prevent its inhalation and accumulation in any workroom, and if any exhaust appliance is necessary for this purpose, it shall be applied as near as possible to the point of origin of the dust, fume or other impurity, and such point shall be enclosed so far as possible.

(2) In any factory no stationary internal combustion engine shall be operated unless the exhaust is conducted into the open air, and no other internal combustion engine shall be operated in any room unless effective measures have been taken to prevent such accumulation of fumes therefrom as are likely to be injurious to workers employed in the room.

Artificial humidification.

15. *(1)* In respect of all factories in which the humidity of the air is artificially increased, the Provincial Government may make rules,—

(a) prescribing standards of humidification

(b) regulating the methods used for artificially increasing the humidity of the air;

(c) directing prescribed tests for determining the humidity of the air to be correctly carried out and recorded;

(d) prescribing methods to be adopted for securing adequate ventilation and cooling of the air in the workrooms.

(2) In any factory in which the humidity of the air is artificially increased, the water used for the purpose shall be taken from a public supply, or other source of drinking water, or shall be effectively purified before it is so used.

(3) If it appears to an Inspector that the water used in a factory for increasing humidity which is required to be effectively purified under sub-section *(2)* is not effectively purified he may serve on the manager of the factory an order in writing, specifying the measures which in his opinion should be adopted, and requiring them to be carried out before specified date.

Overcrowding.

16. *(1)* No room in any factory shall be overcrowded to an extent injurious to the health of the workers employed therein.

(2) Without prejudice to the generality of sub-section *(1)*, there shall be in every workroom of a factory in existence on the date of the commencement of this Act at least three hundred and fifty cubic feet and of a factory built after the commencement of this Act at least five hundred cubic feet of space for every worker employed therein, and for the purposes of this sub-section no account shall be taken of any space which is more than fourteen feet above the level of the floor of the room.

(3) If the Chief Inspector by order in writing so requires, there shall be posted in each workroom of a factory a notice specifying the maximum number of workers who may, in compliance with the provisions of this section, be employed in the room

(4) The Chief Inspector may by order in writing exempt subject to such conditions, if any, as he may think fit to impose, any workroom from the provisions of this section, if he is satisfied that compliance therewith in respect of the room is unnecessary in the interest of the health of the workers employed therein.

Lighting.

17. *(1)* In every part of a factory where workers are working or passing there shall be provided and maintained sufficient and suitable lighting; natural or artificial, or both.

(2) In every factory all glazed windows and skylights used for the lighting of the workrooms shall be kept clean on both the inner and outer surfaces and, so far as compliance with the provisions of any rules made under sub-section *(3)* of section 13 will allow, free from obstruction.

(3) In every factory effective provision shall, so far as is practicable, be made for the prevention of —

(a) glare, either directly from a source of light or by reflection from a smooth or polished surface;

(b) the formation of shadows to such an extent as to cause eyestrain or the risk of accident to any worker.

(4) The Provincial Government may prescribe standards of sufficient and suitable lighting for factories or for any class or description of factories or for any manufacturing process.

Drinking water.

18. *(1)* In every factory effective arrangements shall be made to provide and maintain at suitable points conveniently situated for all workers employed therein a sufficient supply of wholesome drinking water.

(2) All such points shall be legibly marked "drinking water" in a language understood by a majority of the workers employed in the factory, and no such point shall be situated within twenty feet of any washing place, urinal or latrine unless a shorter distance is approved in writing by the Chief Inspector.

(3) In every factory wherein more than two hundred and fifty workers are ordinarily employed, provision shall be made for cooling drinking water during hot weather by effective means and for distribution thereof.

(4) In respect of all factories or any class or description of factories the Provincial Government may make rules for securing compliance with the provisions of sub-sections *(1)*, *(2)* and *(3)* and for the examination by prescribed authorities of the supply and distribution of drinking water in factories.

Latrines and urinals.

19. *(1)* In every factory —

(a) sufficient latrine and urinal accomodation of prescribed types shall be provided conveniently situated and accessible to workers at all times while they are at the factory:

(b) separate enclosed accommodation shall be provided for male and female workers;

(c) such accommodation shall be adequately lighted and ventilated, and no latrine or urinal shall, unless specially exempted in writing by the Chief Inspector, communicate with any workroom except through an intervening open space or ventilated passage;

(d) all such accommodation shall be maintained in a clean and santitary condition at all times;

(e) sweepers shall be employed whose primary duty it would be to keep clean latrines, urinals and washing places.

(2) In every factory wherein more than two hundred and fifty workers are ordinarily employed —

(a) all latrine and urinal accommodation shall be of prescribed sanitary types;

(b) the floors and internal walls, up to a height of three feet, of the latrines and urinals and the sanitary blocks shall be lain in glazed tiles or otherwise finished to provide a smooth polished impervious surface;

(c) without prejudice to the provisions of clauses *(d)* and *(e)* of sub-section *(1)*, the floors, portions of the walls and blocks so laid or finished and the sanitary pans of latrines and urinals shall be thoroughly washed and cleaned at least once in every seven days with suitable detergents or disinfectants or with both.

(3) The Provincial Government may prescribe the number of latrines and urinals to be provided in any factory in proportion to the numbers of male and female workers ordinarily employed therein, and provide for such further matters in respect of sanitation in factories, including the obligation of workers in this regard, as it considers necessary in the interest of the health of the workers employed therein.

Spittoons.

20. *(1)* In every factory there shall be provided a sufficient number of spittoons in convenient places and they shall be maintained in a clean and hygienic condition.

(2) The Provincial Government may make rules prescribing the type and the number of spittoons to be provided and their location in any factory and provide for such further matters relating to their maintenance in a clean and hygienic condition.

(3) No person shall spit within the premises of a factory except in the spittoons provided for the purpose and a notice containing this provision and the penalty for its violation shall be prominently displayed at suitable places in the premises.

(4) Whoever spits in contravention of sub-section *(3)* shall be punishable with fine not exceeding five rupees.

CHAPTER IV

SAFETY

Fencing of machinery.

21. *(1)* In every factory the following, namely,—

(i) every moving part of a prime mover and every flywheel connected to a prime mover, whether the prime mover or flywheel is in the engine house or not;

(ii) the headrace and tailrace of every water-wheel and water-turbine;

(iii) any part of a stock-bar which projects beyond the head stock of a lathe; and

(iv) unless they are in such position or of such construction as to be safe to every person employed in the factory as they would be if they were securely fenced, the following, namely,—

(a) every part of an electric generator, a motor or rotary convertor;

(b) every part of transmission machinery; and

(c) every dangerous part of any other machinery,

shall be securely fenced by safeguards of substantial construction which shall be kept in position while the parts of machinery they are fencing are in motion or in use :

Provided that for the purpose of determining whether any part of machinery is in such position or is of such construction as to be safe as aforesaid, account shall not be taken of any occasion when, it being necessary to make an examination of the machinery while it is in motion or, as a result of such examination, to carry out any mounting or shipping of belts, lubrication or other adjusting operation while the machinery is in motion, such examination or operation is made or carried out in accordance with the provisions of section 22.

(2) The Provincial Government may by rules prescribe such further precautions as it may consider necessary in respect of any particular machinery or part thereof, or exempt, subject to such condition as may be prescribed, for securing the safety of the workers, any particular machinery or part thereof from the provisions of this section.

Work on or near machinery in motion.

22. *(1)* Where in any factory it becomes necessary to examine any part of machiney referred to in section 21 while the machinery is in motion, or as a result of such examination, to carry out any mounting or shipping of belts, lubrication or other adjusting operation while the machinery is in motion, such examination or operation shall be made or carried out only by a specially trained adult male worker wearing tight fitting clothing whose name has been recorded in the register prescribed in this behalf and while he is so engaged,—

(a) such worker shall not handle a belt at a moving pulley unless the belt is less than six inches in width and unless the belt-joint is either laced or flush with the belt;

(b) without prejudice to any other provision of this Act relating to the fencing of machinery, every set screw, bolt and key on any revolving shaft, spindle, wheel or pinion and all spur, worm and other toothed or friction gearing in motion with which such worker would otherwise be liable to come into contact, shall be securely fenced to prevent such contact.

(2) No woman or child shall be allowed in any factory to clean, lubricate or adjust any part of the machinery while that part is in motion, or to work between moving parts, or between fixed and moving parts, of any machinery which is in motion.

(3) The Provincial Government may, by notification in the Official Gazette, prohibit, in any specified factory or class or description of factories, the cleaning, lubricating or adjusting by any person of specified parts of machinery when those parts are in motion.

Employment of young persons on dangerous machines.

23. *(1)* No young person shall work at any machine to which this section applies, unless he has been fully instructed as to dangers arising in connection with the machine and the precautions to be observed and—

(a) has received sufficient training in work at the machine, or

(b) is under adequate supervision by a person who has a thorough knowledge and experience of the machine.

(2) Sub section *(1)* shall apply to such machines as may be prescribed by the Provincial Government, being machines which in its opinion are of such a dangerous character that young persons ought not to work at them unless the foregoing requirements are complied with

Striking gear and devices for cutting off power.

24. *(1)* In every factory—

(a) suitable striking gear or other efficient mechancial appliance shall be provided and

maintained and used to move driving belts to and from fast and loose pulleys which form part of the transmission machinery, and such gear or appliances shall be so constructed, placed and maintained as to prevent the belt from creeping back on to the fast pulley,

(b) driving belts when not in use shall not be allowed to rest or ride upon shafting in motion.

(2) In every factory suitable devices for cutting off power in emergencies from running machinery shall be provided and maintained in every workroom :

Provided that in respect of factories in operation before the commencement of this Act, the provisions of this sub section shall apply only to work-rooms in which electricity is used as power.

Self-acting machines.

25. No traversing part of a self-acting machine in any factory and no material carried thereon shall, if the space over which it runs is a space over which any person is liable to pass, whether in the course of his employment or otherwise, be allowed to run on its outward or inward traverse within a distance of eighteen inches from any fixed structure which is not part of the machine :

Provided that the Chief Inspector may permit the continued use of a machine installed before the commencement of this Act which does not comply with the requirements of this section on such conditions for ensuring safety as he may think fit to impose.

Casing of new machinery.

26. *(1)* In all machinery driven by power and installed in any factory after the commencement of this Act,—

(a) every set screw, bolt or key on any revolving shaft, spindle, wheel or pinion shall be so sunk, encased or otherwise effectively guarded as to prevent danger ;

(b) all spur, worm and other toothed or friction gearing which does not require frequent adjustment while in motion shall be completely encased, unless it is so situated as to be as safe as it would be if it were completely encased.

(2) Whoever sells or lets on hire or, as agent of a seller or hirer, causes or procures to be sold or let on hire, for use in a factory any machinery driven by power which does not comply with the provisions of sub-section *(1)*, shall be punishable with imprisonment for a term which may extend to three months or with fine which may extend to five hundred rupees or with both.

(3) The Provincial Government may make rules applying the provisions of this section to any particular machine or class or description of machines and specifying the types of safeguards to be provided thereon.

Prohibition of employment of woman and children near cotton-openers.

27. No woman or child shall be employed in any part of a factory for pressing cotton in which a cotton-opener is at work:

Provided that if the feed-end of a cotton-opener is in a room separated from the delivery end by a partition extending to the roof or to such height as the Inspector may in any particular case specify in writing, women and children may be employed on the side of the partition where the feed-end is situated.

Hoists and lifts.

28. *(1)* In every factory—

(a) every hoist and lift shall be—

(i) of good mechanical construction, sound material and adequate strength ;

(ii) properly maintained, and shall be thoroughly examined by a competent person at least once in every period of six months, and a register shall be kept containing the prescribed particulars of every such examination ;

(b) every hoistway and liftway shall be sufficiently protected by an enclosure fitted with gates, and the hoist or lift and every such enclosure shall be so constructed as to prevent any person or thing from being trapped between any part of the hoist or lift and any fixed structure or moving part ;

(c) the maximum safe working load shall be plainly marked on every hoist or lift, and no load greater than such load shall be carried thereon;

(d) the cage of every hoist or lift used for carrying persons shall be fitted with a gate on each side from which access is afforded to a landing;

(e) every gate referred to in clause *(b)* or clause *(d)* shall be fitted with interlocking or other efficient device to secure that the gate cannot be opened except when the cage is at the landing and that the cage cannot be moved unless the gate is closed.

(2) The following additional requirements shall apply to hoists and lifts used for carrying persons and installed or reconstructed in a factory after the commencement of this Act, namely:—

(a) where the cage is supported by rope or chain, there shall be at least two ropes or chains separately connected with the cage and balance weight, and each rope or chain with its attachments shall be capable of carrying the whole weight of the cage together with its maximum load ;

(b) efficient devices shall be provided and maintained capable of supporting the cage together with its maximum load in the event of breakage of the ropes, chains or attachments;

(c) an efficient automatic device shall be provided and maintained to prevent the cage from over-running.

(3) The Chief Inspector may permit the continued use of a hoist or lift installed in a factory before the commencement of this Act which does not fully comply with the provisions of sub-section *(1)* upon such conditions for ensuring safety as he may think fit to impose.

(4) The Provincial Government may, if in respect of any class or description of hoist or lift, it is of opinion that it would be unreasonable to enforce any requirement of sub-sections *(1)* and *(2)*, by order direct that such requirement shall not apply to such class or description of hoist or lift.

Cranes and other lifting machinery.

29. *(1)* The following provisions shall apply in respect of cranes and all other lifting machinery (other than hoists and lifts) in any factory, namely :—

(a) every part thereof, including the working gear, whether fixed or movable, ropes and chains and anchoring and fixing appliances shall be—

(i) of good construction, sound material and adequate strength ;

(ii) properly maintained, and shall be thoroughly examined by a competent person at least once in every period of twelve months, and a register shall be kept containing the prescribed particulars of every such examination ;

(b) no such machinery shall be loaded beyond the safe working load which shall be plainly inscribed thereon ;

(c) While any person is employed or working on or near the wheel track of a travelling crane in any place where he would be liable to be struck by the crane, effective measures shall be taken to ensure that the crane does not approach within twenty feet of that place.

(2) The Provincial Government may make rules in respect of any lifting machinery or class or description of lifting machinery in factories—

(a) prescribing requirements to be complied with in addition to those set out in this section ;

(b) exempting from compliance with all or any of the requirements of this section, where in its opinion such compliance is unnecessary or impracticable.

Revolving machinery.

30. *(1)* In every room in a factory in which the process of grinding is carried on there shall be permanently affixed to or placed near each machine in use a notice indicating the maximum safe working peripheral speed of every grindstone or abrasive wheel, the speed of the shaft or spindle upon which the wheel is mounted, and the diameter of the pulley upon such shaft or spindle necessary to secure such safe working peripheral speed.

(2) The speeds indicated in notices under sub-section *(1)* shall not be exceeded.

(3) Effective measures shall be taken in every factory to ensure that the safe working peripheral speed of every revolving vessel, cage, basket, flywheel, pulley, disc or similar appliance driven by power is not exceeded.

Pressure plant.

31. *(1)* If in any factory any part of the plant or machinery used in a manufacturing process is operated at a pressure above atmospheric pressure effective measures shall be taken to ensure that the safe working pressure of such part is not exceeded.

(2) The Provincial Government may make rules providing for the examination and testing of any plant or machinery such as is referred to in sub-section *(1)* and prescribing such other safety measures in relation thereto as may in its opinion be necessary in any factory or class or description of factories.

Floors, stairs, and means of access.

32. In every factory—

(a) all floors, steps, stairs, passages and gangways shall be of sound construction and properly maintained, and where it is necessary to ensure safety, steps, stairs passages and gangways shall be provided with substantial handrails ;

(b) there shall, so far as is reasonably practicable, be provided and maintained safe means of access to every place at which any person is at any time required to work.

Pits, sumps, openings in floors, etc.

33. *(1)* In every factory every fixed vessel, sump, tank, pit or opening in the ground or in a floor which, by reason of its depth, situation, construction or contents, is or may be a source of danger, shall be either securely covered or securely fenced.

(2) The Provincial Government may, by order in writing, exempt, subject to such conditions as may be prescribed, any factory or class or description of factories in respect of any vessel, sump, tank, pit or opening from compliance with the provisions of this section.

Excessive weights.

34. *(1)* No person shall be employed in any factory to lift, carry or move any load so heavy as to be likely to cause him injury.

(2) The Provincial Government may make rules prescribing the maximum weights which may be lifted, carried or moved by adult men, adult women, adolescents and children employed in factories or in any class or description of factories or in carrying on any specified process.

Protection of eyes.

35. In respect of any such manufacturing process carried on in any factory as may be prescribed being a process which involves—

(a) risk of injury to the eyes from particles or fragments thrown off in the course of the process, or

(b) risk to the eyes by reason of exposure to excessive light,—

the Provincial Government may by rules require that effective screens or suitable goggles shall be provided for the protection of persons employed on or in the immediate vicinity of, the process.

Precautions against dangerous fumes.

36. *(1)* In any factory no person shall enter or be permitted to enter any chamber, tank, vat, pit, pipe, flue or other confined space in which dangerous fumes are likely to be present to such an extent as to involve risk of persons being overcome thereby, unless it is provided with a manhole of adequate size or other effective means of egress.

(2) No portable electric light of voltage exceeding twenty-four volts shall be permitted in any factory for use inside any confined space such as is referred to in sub-section *(1)*, and where the fumes present are likely to be inflammable, no lamp or light other than of flame-proof construction shall be permitted to be used in such confined space.

(3) No person in any factory shall enter or be permitted to enter any confined space such as is referred to in sub-section *(1)* until all practicable measures have been taken to remove any fumes which may be present and to prevent any ingress of fumes and unless either—

(a) a certificate in writing has been given by a competent person, based on a test carried out by himself, that the space is free from dangerous fumes and fit for persons to enter, or

(b) the worker is wearing suitable breathing apparatus and a belt securely attached to a rope, the free end of which is held by a person standing outside the confined space.

(4) Suitable breathing apparatus, reviving apparatus and belts and ropes shall in every factory be kept ready for instant use beside any such confined space as aforesaid which any person has entered, and all such apparatus shall be periodically examined and certified by a competent person to be fit for use ; and a sufficient number of persons employed in every factory shall be trained and practised in the use of all such apparatus and in the method of restoring respiration.

(5) No person shall be permitted to enter in any factory any boiler, furnace, boiler flue, chambar tank, vat, pipe or other confined space for the purpose of working or making any examination therein until it has been sufficiently cooled by ventilation or otherwise to be safe for persons to enter.

(6) The Provincial Government may make rules prescribing the minimum dimensions of the manholes referred to in sub-section *(1)*, and may by order in writing exempt, subject to such conditions as it may think fit to impose, any factory or class or description of factories from compliance with any of the provisions of this section.

Explosive or inflammable dust, gas etc.

37. *(1)* Where in any factory any manufacturing process produces dust, gas, fume or vapour of such character and to such extent as to be likely to explode on ignition, all practicable measures shall be taken to prevent any such explosion by—

(a) effective enclosure of the plant or machinery used in the process,

(b) removal or prevention of the accumulation of such dust, gas, fume or vapour ;

(c) exclusion or effective enclosure of all possible sources of ignition.

(2) Where in any factory the plant or machinery used in a process such as is referred to in sub-section *(1)* is not so constructed as to withstand the probable pressure which such an explosion as aforesaid would produce, all practicable measures shall be taken to restrict the spread and effects of the explosion by the provision in the plant or machinery of chokes, baffles, vents or other effective appliances.

(3) Where any part of the plant or machinery in a factory contains any explosive or inflammable gas or vapour under pressure greater than atmospheric pressure, that part shall not be opened except in accordance with the following provisions, namely :—

(a) before the fastening of any joint of any pipe connected with the part or the fastening of the cover of any opening into the part is loosened, any flow of the gas or vapour into the part or any such pipe shall be effectively stopped by a stop-valve or other means ;

(b) before any such fastening as aforesaid is removed, all practicable measures shall be taken to reduce the pressure of the gas or vapour in the part or pipe to atmospheric pressure ;

(c) where any such fastening as aforesaid has been loosened or removed effective measures shall be taken to prevent any explosive or inflammable gas or vapour from entering the part or pipe until the fastening has been secured, or, as the case may be, securely replaced :

Provided that the provisions of this sub-section shall not apply in the case of plant or machinery installed in open air.

(4) No plant, tank or vessel which contains or has contained any explosive or inflammable substance shall be subjected in any factory to any welding, brazing, soldering or cutting operation which involves the application of heat unless adequate measures have first been taken to remove such substance and any fumes arising therefrom or to render such substance and fumes non-explosive or non-inflammable ; and no such substance shall be allowed to enter such plant, tank or vessel after any such operation until the metal has cooled sufficiently to prevent any risk of igniting the substance.

(5) The Provincial Government may by rules exempt, subject to such conditions as may be prescribed, any factory or class or description of factories from compliance with all or any of the provisions of this section.

Precautions in case of fire.

38. *(1)* Every factory shall be provided with such means of escape in case of fire as may be prescribed, and if it appears to the Inspector that any factory is not so provided, he may serve on the manager of the factory an order in writing specifying the measures which, in his opinion, should be adopted to bring the factory into conformity with the provisions of this section and any rules made thereunder, and requiring them to be carried out before a date specified in the order.

(2) In every factory the doors affording exit from any room shall not be locked or fastened so that they cannot be easily and immediately opened from the inside while any person is within the room, and all such doors, unless they are of the sliding type, shall be constructed to open outwards.

(3) In every factory, every window, door or other exit affording a means of escape in case of fire, other than the means of exit in ordinary use, shall be distinctively marked in a language understood by the majority of the workers and in red letters of adequate size or by some other effective and clearly understood sign.

(4) There shall be provided in every factory effective and clearly audible means of giving warning in case of fire to every person employed in the factory.

(5) A free passage-way giving access to each means of escape in case of fire shall be maintained for the use of all workers in every room of a factory.

(6) Effective measures shall be taken to ensure that in every factory—

(a) wherein more than twenty workers are ordinarily employed in any place above the ground floor, or

(b) wherein explosive or highly inflammable materials are used or stored,

all the workers are familiar with the means of escape in case of fire and have been adequately trained in the routine to be followed in such case.

(7) The Provincial Government may make rules prescribing in respect of any factory or class or description of factories, the means of escape to be provided in case of fire and the nature and amount of fire-fighting apparatus to be provided and maintained.

Power to require specifications of defective parts or tests of stability.

39. If it appears to the Inspector that any building or part of a building or any part of the ways, machinery or plant in a factory is in such a condition that it may be dangerous to human life or safety, he may serve on the manager of the factory an order in writing requiring him before a specified date —

(a) to furnish such drawings, specifications and other particulars as may be necessary to determine whether such building, ways, machinery or plant can be used with safety, or

(b) to carry out such tests in such manner as may be specified in the order, and to inform the Inspector of the results thereof.

Safety of buildings and machinery.

40. *(1)* If it appears to the Inspector that any building or part of a building or any part of the ways, machinery or plant in a factory is in such a condition that it is dangerous to human life or safety, he may serve on the manager of the factory an order in writing specifying the measures which in his opinion should be adopted, and requiring them to be carried out before a specified date.

(2) If it appears to the Inspector that the use of any building or part of a building or any part of the ways, machinery or plant in a factory involves imminent danger to human life or safety, he may serve on the manager of the factory an order in writing prohibiting its use until it has been properly repaired or altered.

Power to make rules to supplement this Chapter.

41. The Provincial Government may make rules requiring the provision in any factory or in any class or description of factories of such further devices for securing the safety of persons employed therein as it may deem necessary.

CHAPTER V

WELFARE

Washing facilities.

42. *(1)* In every factory—

(a) adequate and suitable facilities for wash-

ing shall be provided and maintained for the use of the workers therein;

(b) separate and adequately screened facilities shall be provided for the use of male and female workers;

(c) such facilities shall be conveniently accessible and shall be kept clean.

(2) The Provincial Government may, in respect of any factory or class or description of factories or of any manufacturing process, prescribe standards of adequate and suitable facilities for washing.

Facilities for storing and drying clothing.

43. The Provincial Government may, in respect of any factory or class or description of factories, make rules requiring the provision therein of suitable places for keeping clothing not worn during working hours and for the drying of wet clothing.

Facilities for sitting.

44. *(1)* In every factory suitable arrangements for sitting shall be provided and maintained for all workers obliged to work in a standing position, in order that they may take advantage of any opportunities for rest which may occur in the course of their work.

(2) If, in the opinion of the Chief Inspector, the workers in any factory engaged in a particular manufacturing process or working in a particular room are able to do their work efficiently in a sitting position, he may, by order in writing, require the occupier of the factory to provide before a specified date such seating arrangements as may be practicable for all workers so engaged or working.

(3) The Provincial Government may, by notification in the official Gazette, declare that the provisions of sub-section *(1)* shall not apply to any specified factory or class or description of factories or to any specified manufacturing process.

First-aid appliances.

45. *(1)* There shall in every factory be provided and maintained so as to be readily accessible during all working hours first-aid boxes or cupboards equipped with the prescribed contents, and the number of such boxes or cupboards to be provided and maintained shall not be less than one for every one hundred and fifty workers ordinarily employed in the factory.

(2) Nothing except the prescribed contents shall be kept in the boxes and cupboards referred to in sub-section *(1)*, and all such boxes and cupboards shall be kept in the charge of a responsible person who is trained in first-aid treatment and who shall always be available during the working hours of the factory.

(3) In every factory wherein more than five hundred workers are employed there shall be provided and maintained an ambulance room of the prescribed size, containing the prescribed equipment and in the charge of such medical and nursing staff as may be prescribed.

Canteens.

46. *(1)* The Provincial Government may make rules requiring that in any specified factory wherein more than two hundred and fifty workers are ordinarily employed, a canteen or canteens shall be provided and maintained by the occupier for the use of the workers.

(2) Without prejudice to the generality of the foregoing power, such rules may provide for—

(a) the date by which such canteen shall be provided;

(b) the standards in respect of construction, accommodation, furniture and other equipment of the canteen;

(c) the foodstuffs to be served therein and the charges which may be made therefor;

(d) the constitution of a managing committee for the canteen and representation of the workers in the management of the canteen;

(e) the delegation to the Chief Inspector, subject to such conditions as may be prescribed, of the power to make rules under clause *(c)*.

Shelters, rest rooms and lunch rooms.

47. *(1)* In every factory wherein more than one hundred and fifty workers are ordinarily employed, adequate and suitable shelters or rest rooms and a suitable lunch room, with provision for drinking water, where workers can eat meals brought by them, shall be provided and maintained for the use of the workers:

Provided that any canteen maintained in accordance with the provisions of section 46 shall be regarded as part of the requirements of this sub section :

Provided further that where a lunch room exists no worker shall eat any food in the work room.

(2) The shelters or rest rooms or lunch rooms to be provided under sub section *(1)* shall be sufficiently lighted and ventilated and shall be maintained in a cool and clean condition.

(3) The Provincial Government may—

(a) prescribe the standards in respect of construction, accommodation, furniture and other equipment of shelters, rest rooms and lunch rooms to be provided under this section;

(b) by notification in the official Gazette, exempt any factory or class or description of factories from the requirements of this section.

Creches.

48. *(1)* In every factory wherein more than fifty women workers are ordinarily employed there shall be provided and

maintained a suitable room or rooms for the use of children under the age of six years of such women.

(2) Such rooms shall provide adequate accommodation, shall be adequately lighted and ventilated, shall be maintained in a clean and sanitary condition and shall be under the charge of women trained in the care of children and infants.

(3) The Provincial Government may make rules—

(a) prescribing the location and the standards in respect of construction, accommodation, furniture and other equipment of rooms to be provided under this section;

(b) requiring the provision in factories to which this section applies of additional facilities for the care of children belonging to women workers, including suitable provision of facilities for washing and changing their clothing;

(c) requiring the provision in any factory of free milk or refreshment or both for such children;

(d) requiring that facilities shall be given in any factory for the mothers of such children to feed them at the necessary intervals.

Welfare officers.

49. *(1)* In every factory wherein five hundred or more workers are ordinarily employed the occupier shall employ in the factory such number of welfare officers as may be prescribed.

(2) The Provincial Government may prescribe the duties, qualifications and conditions of service of officers employed under sub-section *(1)*.

Power to make rules to supplement this Chapter.

50. The Provincial Government may make rules—

(a) exempting, subject to compliance with such alternative arrangements for the welfare of workers as may be prescribed, any factory or class or description of factories from compliance with any of the provisions of this Chapter;

(b) requiring in any factory or class or description of factories that representatives of the workers employed in the factory shall be associated with the management of the welfare arrangements of the workers.

CHAPTER VI

WORKING HOURS OF ADULTS.

Weekly hours.

51. No adult worker shall be required or allowed to work in a factory for more than forty-eight hours in any week.

Weekly holidays.

52. *(1)* No adult worker shall be required or allowed to work in a factory on the first day of the week (hereinafter referred to as the said day), unless—

(a) he has or will have a holiday for a whole day on one of the three days immediately before or after the said day, and

(b) the manager of the factory has, before the said day or the substituted day under clause *(a)*, whichever is earlier,—

(i) delivered a notice at the office of the Inspector of his intention to require the worker to work on the said day and of the day which is to be substituted, and

(ii) displayed a notice to that effect in the factory :

Provided that no substitution shall be made which will result in any worker working for more than ten days consecutively without a holiday for a whole day.

(2) Notices given under sub section *(1)* may be cancelled by a notice delivered at the office of the Inspector and a notice displayed in the factory not later than the day before the said day or the holiday to be cancelled, whichever is earlier.

(3) Where, in accordance with the provisions of sub-section *(1)*, any worker works on the said day and has had a holiday on one of the three days immediately before it, that said day shall, for the purpose of calculating his weekly hours of work, be included in the preceding week.

Compensatory holidays.

53 *(1)* Where, as a result of the passing of an order or the making of a rule under the provisions of this Act exempting a factory or the workers therein from the provisions of section 52, a worker is deprived of any of the weekly holidays for which provision is made in sub section *(1)* of that section, he shall be allowed, within the month in which the holidays were due to him or within the two months immediately following that month, compensatory holidays of equal number to the holidays so lost.

(2) The Provincial Government may prescribe the manner in which the holidays for which provision is made in sub-section *(1)* shall be allowed.

Daily hours.

54. Subject to the provisions of section 51, no adult worker shall be required or allowed to work in a factory for more than nine hours in any day.

Intervals for rest.

55. The period of adult workers in a factory each day shall be so fixed that no period shall exceed five hours and that no worker shall work for more than five hours before he has had an interval for rest of at least half an hour.

Spread-over.

56. The periods of work of an adult worker in a factory shall be so

arranged that inclusive of his intervals for rest under section 55, they shall not spread over more than ten and a half hours in any day:

Provided that the Chief Inspector may, for reasons to be specified in writing, increase the spread-over to twelve hours.

Night shifts.

57. Where a worker in a factory works on a shift which extends beyond midnight,—

(a) for the purposes of sections 52 and 53, a holiday for a whole day shall mean in his case a period of twenty-four consecutive hours beginning when his shift ends;

(b) the following day for him shall be deemed to be the period of twenty-four hours beginning when such shift ends, and the hours he has worked after midnight shall be counted in the previous day.

Prohibition of overlapping shifts.

58. *(1)* Work shall not be carried on in any factory by means of a system of shifts so arranged that more than one relay of workers is engaged in work of the same kind at the same time.

(2) The Provincial Government may, subject to such conditions as may be prescribed, make rules exempting any factory or class or description of factories from the provisions of sub-section *(1)*.

Extra wages for overtime.

59. *(1)* Where a worker works in a factory for more than nine hours in any day or for more than forty-eight hours in any week, he shall, in respect of overtime work, be entitled to wages at the rate of twice his ordinary rate of wages.

(2) Where any workers in a factory are paid on a piece rate basis, the Provincial Government, in consultation with the employer concerned, and the representatives of the workers shall, for the purposes of this section, fix time rates as nearly as possible equivalent to the average rate of earnings of those workers, and the rates so fixed shall be deemed to be the ordinary rates of wages of those workers.

(3) For the purposes of this section, "ordinary rate of wages" means the basic wages plus such allowances, including the cash equivalent of the advantage accruing through the concessional sale to workers of foodgrains and other articles, as the worker is for the time being entitled to, but does not include a bonus.

(4) The Provincial Government may prescribe the registers that shall be maintained in a factory for the purpose of securing compliance with the provisions of this section.

Restriction on double employment.

60. No adult worker shall be required or allowed to work in any factory on any day on which he has already been working in any other factory, save in such circumstances as may be prescribed.

Notice of periods of work for adults.

61. *(1)* There shall be displayed and correctly maintained in every factory in accordance with the provisions of sub-section *(2)* of section 108, a notice of periods of work for adults, showing clearly for every day the periods during which adult workers may be required to work.

(2) The periods shown in the notice required by sub-section *(1)* shall be fixed beforehand in accordance with the following provisions of this section, and shall be such that workers working for those periods would not be working in contravention of any of the provisions of sections 51, 52, 54, 55 and 56.

(3) Where all the adult workers in a factory are required to work during the same periods, the manager of the factory shall fix those periods for such workers generally.

(4) Where all the adult workers in a factory are not required to work during the same periods, the manager of the factory shall classify them into groups according to the nature of their work indicating the number of workers in each group.

(5) For each group which is not required to work on a system of shifts, the manager of the factory shall fix the periods during which the group may be required to work.

(6) Where any group is required to work on a system of shifts and the relays are not to be subject to predetermined periodical changes of shifts, the manager of the factory shall fix the periods during which each relay of the group may be required to work.

(7) Where any group is to work on a system of shifts and the relays are to be subject to pre-determined periodical changes of shifts, the manager of the factory shall draw up a scheme of shifts whereunder the periods during which any relay of the group may be required to work and the relay which will be working at any time of the day shall be known for any day.

(8) The Provincial Government may prescribe forms of the notice required by sub-section *(1)* and the manner in which it shall be maintained.

(9) In the case of a factory beginning work after the commencement of this Act, a copy of the notice referred to in sub-section *(1)* shall be sent in duplicate to the Inspector before the day on which work is begun in the factory.

(10) Any proposed change in the system of work in any factory which will necessitate a change in the notice referred to in sub-section *(1)* shall be notified to the Inspector in duplicate before the change is made, and except with the

previous sanction of the Inspector, no such change shall be made until one week has elapsed since the last change.

Register of adult workers.

62. *(1)* The Manager of every factory shall maintain a register of adult workers, to be available to the Inspector at all times during working hours, or when any work is being carried on in the factory, showing—

(a) the name of each adult worker in the factory;

(b) the nature of his work;

(c) the group, if any, in which he is included;

(d) where his group works on shifts, the relay to which he is allotted;

(e) such other particulars as may be prescribed:

Provided that, if the Inspector is of opinion that any muster roll or register maintained as part of the routine of a factory gives in respect of any or all the workers in the factory the particulars required under this section, he may, by order in writing, direct that such muster roll or register shall to the corresponding extent be maintained in place of, and be treated as, the register of adult workers in that factory.

(2) The Provincial Government may prescribe the form of the register of adult workers, the manner in which it shall be maintained and the period for which it shall be preserved.

Hours of work to correspond with notice under section 61 and register under section 62.

63. No adult worker shall be required or allowed to work in any factory otherwise than in accordance with the notice of periods of work for adults displayed in the factory and the entries made beforehand against his name in the register of adult workers of the factory.

Power to make exempting rules.

64. *(1)* The Provincial Government may make rules defining the persons who hold positions of supervision or management or are employed in a confidential position in a factory, and the provisions of this Chapter, other than the provisions of clause *(b)* of sub-section *(1)* of section 66 and of the proviso to that sub-section, shall not apply to any person so defined.

(2) The Provincial Government may make rules in respect of adult workers in factories providing for the exemption, to such extent and subject to such conditions as may be prescribed—

(a) of workers engaged on urgent repairs from the provisions of sections 51, 52, 54, 55 and 56;

(b) of workers engaged in work in the nature of preparatory or complementary work which must necessarily be carried on outside the limits laid down for the general working of the factory, from the provisions of sections 51, 54, 55 and 56;

(c) of workers engaged in work which is necessarily so intermittent that the intervals during which they do not work while on duty ordinarily amount to more than the intervals for rest required by or under section 55, from the provisions of sections 51, 54, 55 and 56;

(d) of workers engaged in any work which for technical reasons must be carried on continuously throughout the day, from the provisions of sections 51, 52, 54, 55 and 56;

(e) of workers engaged in making or supplying articles of prime necessity which must be made or supplied every day, from the provisions of section 52;

(f) of workers engaged in manufacturing process which cannot be carried on except during fixed seasons from the provisions of section 52;

(g) of workers engaged in a manufacturing process which cannot be carried on except at times dependent on the irregular action of natural forces, from the provisions of sections 52 and 55;

(h) of workers engaged in engine-rooms or boiler-houses or in attending to power-plant or transmission machinery, from the provisions of section 52.

(3) Rules made under sub-section *(2)* providing for any exemption may also provide for any consequential exemption from the provisions of section 61 which the Provincial Government may deem to be expedient, subject to such conditions as it may prescribe.

(4) In making rules under this section, the Provincial Government shall not exceed, except in respect of exemption under clause *(a)* of sub-section *(2)*, the following limits of work inclusive of overtime :—

(i) the total number of hours of work in any day shall not exceed ten;

(ii) the total number of hours of overtime work shall not exceed fifty for any one quarter;

Explanation.—"Quarter" means a period of three consecutive months beginning on the 1st of January, the 1st of April, the 1st of July or the 1st of October;

(iii) the spreadover inclusive of intervals for rest shall not exceed twelve hours in any one day:

Provided that, subject to the previous approval of the Chief Inspector, the daily maximum specified in section 54 may be exceeded in order to facilitate the change of shifts.

(5) Rules made under this section shall remain in force for not more than three years.

Power to make exempting orders.

65. *(1)* Where the Provincial Government is satisfied that, owing to the nature of the work carried

on or to other circumstances, it is unreasonable to require that the periods of work of any adult workers in any factory or class or description of factories should be fixed beforehand, it may, by written order, relax or modify the provisions of section 61 in respect of such workers therein, to such extent and in such manner as it may think fit, and subject to such conditions as it may deem expedient to ensure control over periods of work.

(2) The Provincial Government or, subject to the control of the Provincial Government, the Chief Inspector, may by written order exempt, on such conditions as it or he may deem expedient, any or all of the adult workers in any factory or group or class or description of factories from any or all of the provisions of sections 51, 52, 54 and 56 on the ground that the exemption is required to enable the factory or factories to deal with an exceptional press of work.

(3) Any exemption given under sub section *(2)* in respect of weekly hours of work shall be subject to the maximum limits prescribed under sub section *(4)* of section 64.

(4) No factory shall be exempted under subsection *(2)* for a period or periods exceeding in the aggregate three months in any year.

Further restrictions on employment of women.

66. *(1)* The provisions of this Chapter shall, in their application to women in factories, be supplemented by the following further restrictions, namely :—

(a) no exemption from the provisions of section 54 may be granted in respect of any woman;

(b) no woman shall be employed in any factory except between the hours of 6 A. M. and 7 P. M. :

Provided that the Provincial Government may, by notification in the official Gazette, in respect of any class or description of factories, vary the limits laid down in clause *(b)*, but so that no such variation shall authorise the employment of any woman between the hours of 10 P. M. and 5 A. M.

(2) The Provincial Government may make rules providing for the exemption from the restrictions set out in sub section *(1)*, to such extent and subject to such conditions as it may prescribe, of women working in fish curing or fish-canning factories, where the employment of women beyond the hours specified in the said restrictions is necessary to prevent damage to, or deterioration in, any raw material.

(3) The rules made under sub-section *(2)* shall remain in force for not more than three years at a time.

CHAPTER VII

EMPLOYMENT OF YOUNG PERSONS

Prohibition of employment of young children.

67. No child who has not completed his fourteenth year shall be required or allowed to work in any factory.

Non-adult workers to carry tokens.

68. A child who has completed his fourteenth year or an adolescent shall not be required or allowed to work in any factory unless :—

(a) a certificate of fitness granted with reference to him under section 69 is in the custody of the manager of the factory, and

(b) such child or adolescent carries while he is at work a token giving a reference to such certificate.

Certificates of fitness.

69. *(1)* A certifying surgeon shall, on the application of any young person or his parent or guardian accompanied by a document signed by the manager of a factory that such person will be employed therein if certified to be fit for work in a factory, or on the application of the manager of the factory in which any young person wishes to work, examine such person and ascertain his fitness for work in a factory.

(2) The certifying surgeon, after examination, may grant to such young person, in the prescribed form, or may renew —

(a) a certificate of fitness to work in a factory as a child, if he is satisfied that the young person has completed his fourteenth year, that he has attained the prescribed physical standards and that he is fit for such work;

(b) a certificate of fitness to work in a factory as an adult, if he is satisfied that the young person has completed his fifteenth year and is fit for a full day's work in a factory :

Provided that unless the certifying surgeon has personal knowledge of the place where the young person proposes to work and of the manufacturing process in which he will be employed, he shall not grant or renew a certificate under this sub section until he has examined such place.

(3) A certificate of fitness granted or renewed under sub section *(2)* —

(a) shall be valid only for a period of twelve months from the date thereof ;

(b) may be made subject to conditions in regard to the nature of the work in which the young person may be employed, or requiring re examination of the young person before the expiry of the period of twelve months.

(4) A certifying surgeon shall revoke any certificate granted or renewed under sub-section *(2)* if in his opinion the holder of it is no longer fit to work in the capacity stated therein in a factory.

(5) Where a certifying surgeon refuses to grant or renew a certificate or a certificate of the kind requested or revokes a certificate, he shall, if so requested by any person who could have applied for the certificate or the renewal thereof, state his reasons in writing for so doing.

(6) Where a certificate under this section with reference to any young person is granted or renewed subject to such conditions as are referred to in clause *(b)* of sub section *(3)*, the young person shall not be required or allowed to work in any factory except in accordance with those conditions.

(7) Any fee payable for a certificate under this section shall be paid by the occupier and shall not be recoverable from the young person, his parents or guardian.

Effect of certificate of fitness granted to adolescent.

70. *(1)* An adolescent who has been granted a certificate of fitness to work in a factory as an adult under clause *(b)* of sub-section *(2)* of section 69, and who while at work in a factory carries a token giving reference to the certificate, shall be deemed to be an adult for all the purposes of Chapters VI and VIII.

(2) An adolescent who has not been granted a certificate of fitness to work in a factory as an adult under the aforesaid clause *(b)* shall, notwithstanding his age, be deemed to be a child for all the purposes of this Act.

Working hours for children.

71. *(1)* No child shall be employed or permitted to work, in any factory —

(a) for more than four and a half hours in any day ;

(b) between the hours of 7 P. M. and 6 A. M.

(2) The period of work of all children employed in a factory shall be limited to two shifts which shall not overlap or spread over more than five hours each ; and each child shall be employed in only one of the relays which shall not, except with the previous permission in writing of the Chief Inspector, be changed more frequently than once in a period of thirty days.

(3) The provisions of section 52 shall apply also to child workers, and no exemption from the provisions of that section may be granted in respect of any child.

(4) No child shall be required or allowed to work in any factory on any day on which he has already been working in another factory.

Notice of periods of work for children.

72. *(1)* There shall be displayed and correctly maintained in every factory in which children are employed, in accordance with the provisions of sub section *(2)* of section 108 a notice of periods of work for children showing clearly for every day the periods during which children may be required or allowed to work.

(2) The periods shown in the notice required by sub section *(1)* shall be fixed beforehand in accordance with the method laid down for adult workers in section 61, and shall be such that children working for those periods would not be working in contravention of any of the provisions of section 71.

(3) The provisions of sub-sections *(8)*, *(9)* and *(10)* of section 61 shall apply also to the notice required by sub-section *(1)* of this section.

Register of child workers.

73. *(1)* The manager of every factory in which children are employed shall maintain a register of child workers, to be available to the Inspector at all times during working hours or when any work is being carried on in a factory, showing—

(a) the name of each child worker in the factory,

(b) the nature of his work,

(c) the group, if any, in which he is included,

(d) where his group works on shifts, the relay to which he is allotted, and

(e) the number of his certificate of fitness granted under section 69.

(2) The Provincial Government may prescribe the form of the register of child workers, the manner in which it shall be maintained and the period for which it shall be preserved.

Hours of work to correspond with notice under section 72 and register under section 73.

74. No child shall be employed in any factory otherwise than in accordance with the notice of periods of work for children displayed in the factory and the entries made beforehand against his name in the register of child workers of the factory.

Power to require medical examination.

75. Where an Inspector is of opinion—

(a) that any person working in a factory without a certificate of fitness is a young person, or

(b) that a young person working in a factory with a certificate of fitness is no longer fit to work in the capacity stated therein,—

he may serve on the manager of the factory a notice requiring that such person or young person as the case may be shall be examined by a certifying surgeon, and such person or young person shall not, if the Inspector so directs, be employed, or permitted to work, in any factory until he has been so examined and has been granted a certificate of fitness or a fresh certificate of fitness, as the case may be, under section 69, or has been certified by the certifying

surgeon examining him not to be a young person.

Power to make rules.

76. The Provincial Government may make rules—

(a) prescribing the forms of certificates of fitness to be granted under section 69, providing for the grant of duplicates in the event of loss of the original certificates and fixing the fees which may be charged for such certificates and renewals thereof and such duplicates ;

(b) prescribing the physical standards to be attained by children and adolescents working in factories ;

(c) regulating the procedure of certifying surgeons under this Chapter ;

(d) specifying other duties which certifying surgeons may be required to perform in connection with the employment of young persons in factories, and fixing the fees which may be charged for such duties and the persons by whom they shall be payable.

Certain other provisions of law not barred.

77. The provisions of this Chapter shall be in addition to, and not in derogation of, the provisions of the Employment of Children Act, 1938 (XXVI of 1938).

CHAPTER VIII

LEAVE WITH WAGES

Application of chapter.

78. *(1)* The provisions of this Chapter shall not operate to the prejudice of any rights to which a worker may be entitled under any other law or under the terms of any award, agreement or contract of service:

Provided that where such award, agreement or contract of service provides for a longer leave with wages than provided in this Chapter the worker shall be entitled only to such longer leave.

Explanation.—For the purpose of this Chapter leave shall not, except as provided in section 79, include weekly holidays or holidays for festivals or other similar occasions.

(2) The provisions of this Chapter shall not apply to any workshop of a Federal Railway.

Annual leave with wages.

79. *(1)* Every worker who has completed a period of twelve months, continuous service in a factory shall be allowed during the subsequent period of twelve months, leave with wages for a number of days calculated at the rate of—

(i) if an adult, one day for every twenty days of work performed by him during the previous period of twelve months subject to a minimum of ten days, and

(ii) if a child, one day for every fifteen days of work performed by him during the previous period of twelve months, subject to a minimum of fourteen days :

Provided that a period of leave shall be inclusive of any holiday which may occur during such period :

Provided further that where the employment of a worker who has completed a period of four months' continuous service in a factory is terminated before he has completed a period of twelve months' continuous service, he shall be deemed to have become entitled to leave for the number of days which bears to the number of days specified in this sub-section the same proportion as the period of his continuous service bears to the continuous service of twelve months and the occupier of the factory shall pay to him the amount payable under section 80 in respect of the leave to which he is deemed to have become entitled.

(2) If a worker does not in any one such period of twelve months take the whole of the leave allowed to him under sub-section *(1)*, any leave not taken by him shall be added to the leave to be allowed to him under that sub-section in the succeeding period of twelve months :

Provided that the total number of days of leave which may be carried forward to a succeeding period shall not exceed fifteen in the case of an adult or twenty in the case of a child :

Provided further that a worker who has applied for leave with wages but has not been given such leave in accordance with any scheme drawn up under sub-sections *(4)* and *(5)*, shall be entitled to carry forward the unavailed leave without any limit.

(3) A worker may in any such period of twelve months apply in writing to the manager of the factory, not less than fifteen full working days before the date on which he wishes his leave to begin, to take all the leave or any portion thereof, allowable to him during that period under sub-sections *(1)* and *(2)* :

Provided that the number of instalments in which the leave is proposed to be taken shall not exceed three :

Provided further that the application shall be made not less than thirty full working days before the date on which the worker wishes his leave to begin, if he is employed in a public utility service as defined in clause *(n)* of section 2 of the Industrial Disputes Act, 1947 (XIV of 1947).

(4) If, for the purpose of ensuring the continuity of work in a factory, the occupier or manager of the factory, in agreement with the Works Committee of the factory constituted under section 3 of the Industrial Disputes Act, 1947 (XIV of 1947) or a similar committee con-

stituted under any other Act, or if there is no such Works Committee or a similar committee in the factory the occupier or the manager of the factory in agreement with the representatives of the workers therein chosen in the prescribed manner, may lodge with the Chief Inspector a scheme in writing whereby the leave allowable under this section may be regulated.

(5) A scheme lodged under sub-section *(4)* shall be posted in convenient places in the factory and shall be in force for a period of twelve months from the date on which it is lodged with the Chief Inspector, and may thereafter be renewed, with or without modification, for a further period of twelve months at a time, by the manager in agreement with the Works Committee or a similar committee or, as the case may be, by the manager of the factory in agreement with the representatives of the workers as specified in sub-section *(4)*.

(6) An application for leave which does not contravene the provisions of sub-section *(3)* shall not be refused unless the refusal is in accordance with a scheme for the time being in operation under sub-sections *(4)* and *(5)*.

(7) If a worker entitled to leave under sub-sections *(1)* and *(2)* is discharged from the factory before he has taken the entire leave to which he is entitled or if having applied for and having not been granted such leave, he quits his employment before he has taken the leave the occupier of the factory shall pay him the amount payable under section 80 in respect of the leave not taken and such payment shall be made before the expiry of the second working day after the day on which his employment is terminated.

Explanation 1. — For the purposes of this section a worker shall be deemed to have completed a period of continuous service in a factory notwithstanding any interruption in service during that period brought about by—

(i) sickness, accident or authorised leave not exceeding in the aggregate one-sixth of the period, or

(ii) a strike which is not an illegal strike or a lock out, or

(iii) one or more periods of involuntary unemployment not exceeding in the aggregate one-twelfth of the period, or

(iv) leave admissible or granted under any other law.

Explanation 2. — "Authorised leave" shall include any casual absence due to any reasonable cause :

Provided that the worker within a week from the commencement of the absence gives the reasons for the absence in writing to the manager of the factory, and may include periods of unauthorised leave, not exceeding in the aggregate one-thirty sixth of the period of continuous service, but shall not include any weekly holiday allowed under section 52 which occurs at the beginning or end of an interruption brought about by the leave.

Explanation 3. — "Illegal strike" means a strike which is illegal within the meaning of section 24 of the Industrial Disputes Act, 1947 or of any other law for the time being in force relating to industrial disputes.

Wages during leave period.

80. For the leave allowed to him under section 79 a worker shall be paid at a rate equal to the daily average of his total full-time earnings exclusive of any overtime earnings and bonus, but inclusive of dearness allowance and the cash equivalent of any advantage accruing by the sale, by the employer, of foodgrains and other articles at concessional rates, for the days on which he worked during the month immediately preceding his leave.

Payment in advance in certain cases.

81. A worker who has been allowed leave for not less than four days in the case of an adult and five days in the case of a child under section 79 shall, before his leave begins, be paid the wages due for the period of the leave allowed.

Power of Inspector to act for worker.

82. Any Inspector may institute proceedings on behalf of any workers to recover any sum required to be paid by an employer under this Chapter which the employer has not paid.

Power to make rules.

83. The Provincial Government may prescribe the keeping by managers of factories of registers showing such particulars as may be prescribed and requiring such registers to be made available for examination by Inspectors.

Power to exempt factories.

84. Where the Provincial Government is satisfied that the leave rules applicable to workers in a factory provide benefits which in its opinion are not less favourable than those for which this Chapter makes provision, it may, by written order, exempt the factory from all or any of the provisions of this Chapter, subject to such conditions as may be specified in the order.

CHAPTER IX

SPECIAL PROVISIONS

Power to apply the Act to certain premises.

85. *(1)* The Provincial Government may, by notification in the official Gazette, declare that all or any of the provisions of this Act shall apply to any place wherein a manu-

facturing process is carried on with or without the aid of power or is so ordinarily carried on notwithstanding that—

(i) the number of persons employed therein is less than ten, if working with the aid of power and less than twenty if working without the aid of power, or

(ii) the persons working therein are not employed by the owner thereof but are working with the permission of, or under agreement with, such owner :

Provided that the manufacturing process is not being carried on by the owner only with the aid of his family.

(2) After a place is so declared, it shall be deemed to be a factory for the purposes of this Act, and the owner shall be deemed to be the occupier, and any person working therein a worker.

Explanation. — For the purposes of this section, "owner" shall include a lessee or mortgagee with possession of the premises.

Power to exempt public institutions.

86. The Provincial Government may exempt, subject to such conditions as it may consider necessary, any workshop or workplace where a manufacturing process is carried on and which is attached to public institution maintained for the purposes of education, training or reformation, from all or any of the provisions of this Act:

Provided that no exemption shall be granted from the provisions relating to hours of work and holidays, unless the persons having the control of the institution submit, for the approval of the Provincial Government, a scheme for the regulation of the hours of employment, intervals for meals, and holidays of the persons employed in or attending the institution or who are inmates of the institution, and the Provincial Government is satisfied that the provisions of the scheme are not less favourable than the corresponding provisions of this Act.

Dangerous operations.

87. Where the Provincial Government is of opinion that any operation carried on in a factory exposes any persons employed in it to a serious risk of bodily injury, poisoning or disease, it may make rules applicable to any factory or class or description of factories in which the operation is carried on —

(a) specifying the operation and declaring it to be dangerous;

(b) prohibiting or restricting the employment of women, adolescents or children in the operation ;

(c) providing for the periodical medical examination of persons employed, or seeking to be employed, in the operation, and prohibiting the employment of persons not certified as fit for such employment ;

(d) providing for the protection of all persons employed in the operation or in the vicinity of the places where it is carried on;

(e) prohibiting, restricting or controlling the use of any specified materials or processes in connection with the operation.

Notice of certain accidents.

88. Where in any factory an accident occurs which causes death, or which causes any bodily injury by reason of which the person injured is prevented from working for a period of forty eight hours or more immediately following the accident, or which is of such nature as may be prescribed in this behalf, the manager of the factory shall send notice thereof to such authorities, and in such form and within such time, as may be prescribed.

Notice of certain diseases.

89. *(1)* Where any worker in a factory contracts any disease specified in the Schedule, the manager of the factory shall send notice thereof to such authorities, and in such form and within such time, as may be prescribed.

(2) If any medical practitioner attends on a person who is or has been employed in a factory, and who is, or is believed, by the medical practitioner to be, suffering from any disease specified in the Schedule, the medical practitioner shall without delay send a report in writing to the office of the Chief Inspector stating —

(a) the name and full postal address of the patient,

(b) the disease from which he believes the patient to be suffering, and

(c) the name and address of the factory in which the patient is, or was last, employed.

(3) Where the report under sub-section *(2)* is confirmed to the satisfaction of the Chief Inspector, by the certificate of a certifying surgeon or otherwise, that the person is suffering from a disease specified in the Schedule, he shall pay to the medical practitioner such fee as may be prescribed, and the fee so paid shall be recoverable as an arrear of land-revenue from the occupier of the factory in which the person contacted the disease.

(4) If any medical practitioner fails to comply with the provisions of sub-section *(2)*, he shall be punishable with fine which may extend to fifty rupees.

Power to direct enquiry into cases of accident or disease.

90. *(1)* The Provincial Government may, if it considers it expedient so to do, appoint a competent person to inquire into the causes of any accident occurring in a factory or into any case where a disease specified in the

Schedule has been, or is suspected to have been, contacted in a factory, and may also appoint one or more persons possessing legal or special knowledge to act as assessors in such inquiry.

(2) The person appointed to hold an inquiry under this section shall have all the powers of a Civil Court under the Code of Civil Procedure, 1908, for the purposes of enforcing the attendance of witnesses and compelling the production of documents and material objects, and may also, so far as may be necessary for the purposes of the inquiry, exercise any of the powers of an Inspector under this Act; and every person required by the person making the inquiry to furnish any information shall be deemed to be legally bound so to do within the meaning of section 176 of the Indian Penal Code.

(3) The person holding an inquiry under this section shall make a report to the Provincial Government stating the causes of the accident, or as the case may be, disease and any attendant circumstances, and adding any observations which he or any of the assessors may think fit to make.

(4) The Provincial Government may, if it thinks fit, cause to be published any report made under this section or any extracts therefrom.

(5) The Provincial Government may make rules for regulating the procedure at inquiries under this section.

Power to take samples.

91. *(1)* An Inspector may at any time during the normal working hours of a factory, after informing the occupier or manager of the factory or other person for the time being purporting to be in charge of the factory, take in the manner hereinafter provided a sufficient sample of any substance used or intended to be used in the factory, such use being—

(a) in the belief of the Inspector in contravention of any of the provisions of this Act or the rules made thereunder, or

(b) in the opinion of the Inspector likely to cause bodily injury to, or injury to the health of, workers in the factory.

(2) Where the Inspector takes a sample under sub-section *(1)*, he shall, in the presence of the person informed under that sub-section unless such person wilfully absents himself, divide the sample into three portions and effectively seal and suitably mark them, and shall permit such person to add his own seal and mark thereto.

(3) The person informed as aforsaid shall, if the Inspector so requires, provide the appliances for dividing, sealing and marking the sample taken under this section.

(4) The Inspector shall—

(a) forthwith give one portion of the sample to the person informed under sub-section *(1)*;

(b) forthwith send the second portion to a Government Analyst for analysis and report thereon;

(c) retain the third portion for production to the Court before which proceedings, if any, are instituted in respect of the substance.

(5) Any document purporting to be a report under the hand of any Government Analyst upon any substance submitted to him for analysis and report under this section, may be used as evidence in any proceedings instituted in respect of the substance.

CHAPTER X

PENALTIES AND PROCEDURE

General penalty for offences.

92. Save as is otherwise expressly provided in this Act and subject to the provisions of section 93, if in, or in respect of, any factory there is any contravention of any of the provisions of this Act or of any rule made thereunder or of any order in writing given thereunder, the occupier and manager of the factory shall each be guilty of an offence and punishable with imprisonment for a term which may extend to three months or with fine which may extend to five hundred rupees or with both, and if the contravention is continued after conviction, with a further fine which may extend to seventy-five rupees for each day on which the contravention is so continued.

Liability of owner of premises in certain circumstances.

93. Where in any premises separate buildings, or in any building separate parts of the building or separate parts of any room therein are leased or occupied by different persons in such a manner as to constitute separate factories, the owner of the premises or building, as the case may be, shall be liable, in the stead of the occupier of the factory for any contravention in, or in respect of, any part of the premises or building which is used as a factory, of—

(a) the provisions of Chapter III or of any rules made thereunder;

(b) the provisions of Chapter IV or of any rules made thereunder, except in so far as they relate to plant or machinery belonging to or supplied by the occupier of the factory;

(c) the provisions of Chapter V or of any rules made thereunder, and in computing for the purposes of any of the provisions mentioned in this clause the number of workers employed, the whole of the premises or building, as the case may be, shall be deemed to be a single factory:

Provided that—

(i) the provisions of this section shall not apply to, or in respect of, any building or room in the sole occupation of the occupier of a factory;

(ii) the aforesaid owner shall be liable for any contravention of any of the provisions of this Act or of the rules made thereunder relating to cleanliness of sanitary conveniences only when those conveniences are used by workers of more than one occupier ;

(iii) the aforesaid owner shall be liable for any contravention of any of the provisions of this Act or of the rules made thereunder relating to hoists and lifts, and means of escape and safety precautions in case of fire, only in so far as the said provisions relate to things under his control.

Enhanced penalty after previous conviction.

94. If any person who has been convicted of any offence punishable under section 92 is again guilty of an offence involving a contravention of the same provision, he shall be punishable on a subsequent conviction with imprisonment for a term which may extend to six months or with fine which may extend to one thousand rupees or with both:

Provided that for the purposes of this section no cognizance shall be taken of any conviction made more than two years before the commission of the offence which is being punished.

Penalty for obstructing Inspector.

95. Whoever wilfully obstructs an Inspector in the exercise of any power conferred on him by or under this Act, or fails to produce on demand by an Inspector any registers or other documents in his custody kept in pursuance of this Act or of any rules made thereunder, or conceals or prevents any worker in a factory from appearing before, or being examined by, an Inspector, shall be punishable with imprisonment for a term which may extend to three months or with fine which may extend to five hundred rupees or with both.

Penalty for wrongfully disclosing results of analysis under section 91.

96. Whoever, except in so far as it may be necessary for the purposes of a prosecution for any offence punishable under this Act, publishes or discloses to any person the results of an analysis made under section 91, shall be punishable with imprisonment for a term which may extend to three months or with fine which may extend to five hundred rupees or with both.

Offences by workers.

97. *(1)* Subject to the provisions of section 111, if any worker employed in a factory contravenes any provision of this Act, or any rules or orders made thereunder, imposing any duty or liability on workers, he shall be punishable with fine which may extend to twenty rupees.

(2) Where a worker is convicted of an offence punishable under sub-section *(1)*, the occupier or manager of the factory shall not be deemed to be guilty of an offence in respect of that contravention, unless it is proved that he failed to take all reasonable measures for its prevention.

Penalty for using false certificate of fitness.

98. Whoever knowingly uses or attempts to use, as a certificate of fitness granted to himself under section 70, a certificate granted to another person under that section, or who, having procured such a certificate, knowingly allows it to be used, or an attempt to use it to be made, by another person, shall be punishable with imprisonment for a term which may extend to one month or with fine which may extend to fifty rupees or with both.

Penalty for permitting double employment of child.

99. If a child works in a factory on any day on which he has already been working in another factory, the parent or guardian of the child or the person having custody of or control over him or obtaining any direct benefit from his wages, shall be punishable with fine which may extend to fifty rupees, unless it appears to the Court that the child so worked without the consent or connivance of such parent, guardian or person.

Determination of occupier in certain cases.

100. *(1)* Where the occupier of a factory is a firm or other association of individuals, any one of the individual partners or members thereof may be prosecuted and punished under this Chapter for any offence for which the occupier of the factory is punishable :

Provided that the firm or association may give notice to the Inspector that it has nominated one of its members, residing within the Provinces of India to be the occupier of the factory for the purposes of this Chapter, and such individual shall, so long as he is so resident, be deemed to be the occupier of the factory for the purposes of this Chapter, until further notice cancelling his nomination is received by the Inspector or until he ceases to be a partner or member of the firm or association.

(2) Where the occupier of a factory is a company, any one of the directors thereof, or in the case of a private company, anyone of the shareholders thereof, may be prosecuted and punished under this Chapter for any offence for which the occupier of the factory is punishable:

Provided that the company may give notice to the Inspector that it has nominated a director, or in the case of a private company, a shareholder, who is resident in either case within the Provinces of India, to be the occupier of the factory for the purposes of this Chapter, and such director or shareholder, as the case may

be, shall, so long as he is so resident, be deemed to be the occupier of the factory for the purposes of this Chapter, until further notice cancelling his nomination is received by the Inspector or until he ceases to be a director or shareholder.

(3) Where the owner of any premises or building referred to in section 93 is not an individual, the provisions of this section shall apply to such owner as they apply to occupiers of factories who are not individuals.

Exemption of occupier or manager from liability in certain cases.

101. Where the occupier or manager of a factory is charged with an offence punishable under this Act, he shall be entitled, upon complaint duly made by him and on giving to the prosecutor not less than three clear days' notice in writing of his intention so to do, to have any other person whom he charges as the actual offender brought before the Court at the time appointed for hearing the charge; and if, after the commission of the offence has been proved, the occupier or manager of the factory, as the case may be, proves to the satisfaction of the Court :—

(a) that he has used due diligence to enforce the execution of this Act, and

(b) that the said other person committed the offence in question without his knowledge, consent or connivance—

that other person shall be convicted of the offence and shall be liable to the like punishment as if he were the occupier or manager of the factory, and the occupier or manager, as the case may be, shall be discharged from any liability under this Act in respect of such offence :

Provided that in seeking to prove as aforesaid, the occupier or manager of the factory, as the case may be, may be examined on oath, and his evidence and that of any witness whom he calls in his support shall be subject to cross-examination on behalf of the person he charges as the actual offender and by the prosecutor :

Provided further that, if the person charged as the actual offender by the occupier or manager cannot be brought before the Court at the time appointed for hearing the charge, the Court shall adjourn the hearing from time to time for a period not exceeding three months and if by the end of the said period the person charged as the actual offender cannot still be brought before the Court, the Court shall proceed to hear the charge against the occupier or manager and shall, if the offence be proved, convict the occupier or manager.

Power of Court to make orders.

102. *(1)* Where the occupier or manager of a factory is convicted of an offence punishable under this Act the Court may, in addition to awarding any punishment, by order in writing require him, within a period specified in the order (which the Court may, if it thinks fit and on application in such behalf, from time to time extend) to take such measures as may be so specified for remedying the matters in respect of which the offence was committed.

(2) Where an order is made under sub-section *(1)*, the occupier or manager of the factory, as the case may be, shall not be liable under this Act in respect of the continuation of the offence during the period or extended period, if any, allowed by the Court, but if on the expiry of such period or extended period, as the case may be, the order of the Court has not been fully complied with, the occupier or manager, as the case may be, shall be deemed to have committed a further offence, and may be sentenced therefor by the Court to undergo imprisonment for a term which may extend to six months or to pay a fine which may extend to one hundred rupees for every day after such expiry on which the order has not been complied with, or both to undergo such imprisonment and to pay such fine, as aforesaid.

Presumption as to employment.

103. If a person is found in a factory at any time, except during intervals for meals or rest, when work is going on or the machinery is in motion, he shall, until the contrary is proved, be deemed for the purposes of this Act and the rules made thereunder to have been at that time employed in the factory.

Onus as to age.

104. *(1)* When any act or omission would, if a person were under a certain age, be an offence punishable under this Act and such person is in the opinion of the Court *prima facie* under such age, the burden shall be on the accused to prove that such person is not under such age.

(2) A declaration in writing by a certifying surgeon relating to a worker that he has personally examined him and believes him to be under the age stated in such declaration shall, for the purposes of this Act and the rules made thereunder, be admissible as evidence of the age of that worker.

Cognizance of offences.

105. *(1)* No Court shall take cognizance of any offence under this Act except on complaint by, or with the previous sanction in writing, of an Inspector.

(2) No Court below that of a Presidency Magistrate or of a Magistrate of the first class shall try any offence punishable under this Act.

Limitation of prosecutions.

106. No Court shall take cognizance of any offence punishable under this Act unless complaint

thereof is made within three months of the date on which the alleged commission of the offence came to the knowledge of an Inspector:

Provided that where the offence consists of disobeying a written order made by an Inspector, complaint thereof may be made within six months of the date on which the offence is alleged to have been committed.

CHAPTER XI

SUPPLEMENTAL

Appeals.

107. *(1)* The manager of a factory on whom an order in writing by an Inspector has been served under the provisions of this Act or the occupier of the factory may, within thirty days of the service of the order, appeal against it to the prescribed authority, and such authority may, subject to rules made in this behalf by the Provincial Government, confirm, modify or reverse the order.

(2) Subject to rules made in this behalf by the Provincial Government (which may prescribe classes of appeals which shall not be heard with the aid of assessors), the appellate authority may, or if so required in the petition of appeal shall, hear the appeal with the aid of assessors, one of whom shall be appointed by the appellate authority and the other by such body representing the industry concerned as may be prescribed:

Provided that if no assessor is appointed by such body before the time fixed for hearing the appeal, or if the assessor so appointed fails to attend the hearing at such time, the appellate authority may, unless satisfied that the failure to attend is due to sufficient cause proceed to hear the appeal without the aid of such assessor or, if it thinks fit, without the aid of any assessor.

(3) Subject to such rules as the Provincial Government may make in this behalf and subject to such conditions as to partial compliance or the adoption of temporary measures as the appellate authority may in any case think fit to impose, the appellate authority may, if it thinks fit, suspend the order appealed against pending the decision of the appeal.

Display of notices.

108. *(1)* In addition to the notices required to be displayed in any factory by or under this Act, there shall be displayed in every factory a notice containing such abstracts of this Act and of the rules made thereunder as may be prescribed and also the name and address of the Inspector and the certifying surgeon.

(2) All notices required by or under this Act to be displayed in a factory shall be in English and in a language understood by the majority of the workers in the factory, and shall be displayed at some conspicuous and convenient place at or near the main entrance to the factory, and shall be maintained in a clean and legible condition.

(3) The Chief Inspector may, by order in writing served on the manager of any factory, require that there shall be displayed in the factory any other notice or poster relating to the health, safety or welfare of the workers in the factory.

Service of notices.

109. The Provincal Government may make rules prescribing the manner of the service of orders under this Act on owners, occupiers or managers of factories.

Returns.

110. The Provincial Government may make rules requiring owners, occupiers, or managers of factories to submit such returns, occasional or periodical, as may in its opinion be required for the purposes of this Act.

Obligations of workers.

111. *(1)* No worker in a factory—

(a) shall wilfully interfere with or misuse any appliance, convenience or other thing provided in a factory for the purposes of securing the health, safety or welfare of the workers therein;

(b) shall wilfully and without reasonable cause do anything likely to endanger himself or others; and

(c) shall wilfully neglect to make use of any appliance or other thing provided in the factory for the purposes of securing the health or safety of the workers therein.

(2) If any worker employed in a factory contravenes any of the provisions of this section or of any rule or order made thereunder, he shall be punishable with imprisonment for a term which may extend to three months or with fine which may extend to one hundred rupees, or with both.

General power to make rules.

112. The Provincial Government may make rules providing for any matter which, under any of the provisions of this Act, is to be or may be prescribed or which may be considered expedient in order to give effect to the purposes of this Act.

Powers of Centre to give directions.

113. The Central Government may give directions to a Provincial Government as to the carrying into execution of the provisions of this Act.

No charge for facilities and conveniences.

114. Subject to the provisions of section 46 no fee or charge shall be realised from any

worker in respect of any arrangements or facilities to be provided, or any equipments or appliances to be supplied by the occupier under the provisions of this Act.

Publication of rules.

115. All rules made under this Act shall be published in the official Gazette, and shall be subject to the condition of previous publication; and the date to be specified under clause *(3)* of section 23 of the General Clauses Act, 1897, shall be not less than three months from the date on which the draft of the proposed rules was published.

Application of Act to Government factories.

116. Unless otherwise provided this Act shall apply to factories belonging to the Central or any Provincial Government.

Protection to persons acting under this Act.

117. No suit, prosecution or other legal proceeding shall lie against any person for anything which is in good faith done or intended to be done under this Act.

Restriction on disclosure of information.

118. *(1)* No Inspector shall, while in service or after leaving the service, disclose otherwise than in connection with the execution, or for the purposes of, this Act any information relating to any manufacturing or commercial business or any working process which may come to his knowledge in the course of his official duties.

(2) Nothing in sub-section *(1)* shall apply to any disclosure of information made with the previous consent in writing of the owner of such business or process or for the purposes of any legal proceeding (including arbitration) pursuant to this Act or of any criminal proceeding which may be taken, whether pursuant to this Act or otherwise, or for the purposes of any report of such proceedings as aforesaid.

(3) If any Inspector contravenes the provisions of sub-section *(1)* he shall be punishable with imprisonment for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

Amendment of section 3, Act XXVI of 1938.

119. In sub-section *(3)* of section 3 of the Employment of Children Act, 1938, for the word "twelfth" the word "fourteenth" shall be substituted.

Repeal and savings.

120. The enactments set out in the Table appended to this section are hereby repealed:

Provided that anything done under the said enactments which could have been done under this Act if it had then been in force shall be deemed to have been done under this Act.

TABLE

Enactments repealed.

Year.	No.	Short title.
1934.	XXV ...	The Factories Act, 1934.
1944.	XIV ...	The Factories (Amendment) Act, 1944.
1945.	III ...	The Factories (Amendment) Act, 1945.
1946.	X ...	The Factories (Amendment) Act, 1946.
1947.	V ...	The Factories (Amendment) Act, 1947.

THE SCHEDULE

(*See* sections 89 and 90)

List of Notifiable Diseases.

1. Lead poisoning, including poisoning by any preparation or compound of lead or their sequelæ.
2. Lead tetra-ethyl poisoning.
3. Phosphorus poisoning or its sequelæ.
4. Mercury poisoning or its sequelæ.
5. Manganese poisoning or its sequelæ.
6. Arsenic poisoning or its sequelæ.
7. Poisoning by nitrous fumes.
8. Carbon bisulphide poisoning.
9. Benzene poisoning including poisoning by any of its homologues, their nitro or amido derivatives or its sequelæ.
10. Chrome ulceration or its sequelæ.
11. Anthrax.
12. Silicosis.
13. Poisoning by halogens or halogen derivatives of the hydrocarbons of the aliphatic series.
14. Pathological manifestations due to—
    (a) radium or other radio-active substances;
    (b) X-rays.
15. Primary epitheliomatous cancer of the skin.
16. Toxic anæmia
17. Toxic jaundice due to poisonous substances.

[THE] FEDERAL COURT (ENLARGEMENT OF JURISDICTION) ACT, 1947 (ACT I OF 1948)

STATEMENT OF OBJECTS AND REASONS.

"The Bill provides for the enlargement of the appellate jurisdiction of the Federal Court in civil cases to the fullest extent permissible under section 206 of the Government of India Act, 1935, as now in force and for the abolition *pro tanto* of all direct appeals in such cases from High Courts to His Majesty in Council either with or without special leave. Although owing to the limitations imposed by the existing constitution appeals to the Privy Council cannot altogether be excluded by means of this Bill, it will when enacted have the effect of stopping the further flow of direct appeals to the Privy Council in civil cases and prepare the way for the abolition in due course of all appeals to that body. The Bill, however, does not interfere with appeals which are pending before the Privy Council and the records of which have been transmitted to England by the High Court concerned, nor with appeals to the bringing of which special leave may have been granted by the Privy Council before the coming into force of this law. These appeals are left to be disposed of by the Privy Council under the existing law."

—Gazette of India, 1947, Part V, page 609.

[THE] FEDERAL COURT (ENLARGEMENT OF JURISDICTION) ACT, 1947. (ACT I OF 1948)[a]

[5th January, 1948.]

An Act to provide for the enlargement of the appellate jurisdiction of the Federal Court in civil cases.

WHEREAS it is expedient to provide for the enlargement of the appellate jurisdiction of the Federal Court in civil cases ;

It is hereby enacted as follows :—

[a] This Act is applied to—

(i) the Chota Nagpur Division and the Santal Parganas District — *see* Bihar Gazette, 1948, Part II page 247

(ii) the Darjeeling District on and from 15-7-1948 subject to certain modifications — *see* Calcutta Gazette, 1948, Part I, page 914 ;

(iii) all the partially excluded areas in C. P. & Berar subject to certain modifications — *see* C. P. & Berar Gazette, 1948, Part I, page 161 ;

(iv) all the partially excluded areas in the Province of Orissa subject to certain modifications — *see* Orissa Gazette, 1948, Part III, page 641 ;

(v) excluded and partially excluded areas in the Province of Madras subject to certain modifications — *see* Fort St. George Gazette, 1948, Part I, page 1106.

Short title and commencement.

1. *(1)* This Act may be called the Federal Court (Enlargement of Jurisdiction) Act, 1947.

(2) It shall come into force on the first day of February, 1948, which day is hereinafter referred to as "the appointed day."

Definitions.

2. In this Act,—

(a) "High Court', means any High Court to which the provisions of Chapter II of Part IX of the Government of India Act, 1935, apply ;

(b) "judgment to which this Act applies" means any judgment, decree or final order of a High Court in a civil case from which a direct appeal could have been brought to His Majesty in Council, either with or without special leave, if this Act had not been passed.

Enlargement of the Federal Court's jurisdiction.

3. As from the appointed day,—

(a) an appeal shall lie to the Federal Court from any judgment to which this Act applies—

(i) without the special leave of the Federal Court, if an appeal could have been brought to His Majesty in Council without special leave under the provisions of the Code of Civil Procedure, 1908, or of any other law in force immediately before the appointed day, and

(ii) with the special leave of the Federal Court in any other case ;

(b) in any such appeal as aforesaid it shall be competent for the Federal Court to consider any question of the nature mentioned in sub-section *(1)* of section 205 of the Government of India Act, 1935, and

(c) no direct appeal shall lie to His Majesty in Council, either with or without special leave, from any such judgment.

Continuance of certain proceedings in High Courts.

4. All proceedings and steps taken in, and orders made and certificates granted by, a High Court in connection with an appeal to His Majesty in Council from a judgment to which this Act applies shall, unless the records pertaining to such appeal have before the appointed day been transmitted by the High Court concerned to His Majesty in Council, be deemed to be proceedings and steps taken, orders made, and certificates granted, in connection with an appeal from that judgment to the Federal Court under this Act, and shall be concluded, or as the case may be, have effect, accordingly.

Pending applications for special leave to appeal.

5. Every application to His Majesty in Council for special leave to appeal from a judgment to which this Act applies remaining undisposed of immediately before the appointed day shall on that day stand transferred to the Federal Court by virtue of this Act, and shall be disposed of by that Court as if it had been an application duly made to that Court for special leave to appeal from the said judgment.

Modification of existing laws.

6. The provisions of the Code of Civil Procedure, 1908, and of any other law in force immediately before the appointed day relating to direct appeals in civil cases to His Majesty in Council shall, as from that day, have effect in relation to any appeal from a judgment to which this Act applies as if in the said provisions, for all references to His Majesty in Council, there has been substituted references to the Federal Court.

Savings.

7. The preceding provisions of this Act shall not apply to any appeal —

(a) which immediately before the appointed day is pending before His Majesty in Council, if the records pertaining to such appeal have before that day been transmitted by the High Court concerned to His Majesty in Council, or

(b) to the bringing of which to His Majesty in Council special leave has been granted before the appointed day ;

and any such appeal may be disposed of by His Majesty in Council as if this Act had not been passed.

Registrar's certificate to be conclusive as to fact of transmission of records.

8. If any question arises under S. 4 or S. 7 whether the records pertaining to an appeal have before the ap-

pointed day been transmitted by the High Court concerned to His Majesty in Council a certificate of the Registrar of the High Court that they have been transmitted or not transmitted before the appointed day shall be conclusive evidence on the question.

[THE INDIAN] FINANCE ACT, 1948 (ACT XX OF 1948.)[a]

[30th March, 1948.]

An Act to give effect to the financial proposals of the Central Government for the year beginning on the first day of April, 1948.

WHEREAS it is expedient to discontinue the duty on salt manufacture in, or imported into, the Provinces of India, to fix maximum rates of postage under the Indian Post Office Act, 1898, to alter certain duties of customs and excise, to levy certain additional duties of customs and excise, to fix rates of, and make certain provisions relating to, income-tax and super-tax, and to continue, subject to certain modifications, for a period of one year the tax imposed by the Business Profits Tax Act, 1947 ;

It is hereby enacted as follows:—

[a] For the Report of the Select Committee, *see* Gazette of India, 1948, Part V, page 266.

The Act is applied to—

(a) the Chota Nagpur Division and the Santal Parganas District with effect from 1-4-1948 — *see* Bihar Gazette, 1948, Extra-ord., dated 1-4-1948;

(b) the partially excluded areas in the Province of Bombay from 1-4-1948— *see* Bombay Gazette, 1948, Part IV-A, page 147 ;

(c) the Darjeeling District on and from 1-4-1948 —*see* Calcutta Gazette, 1948, Part I, Extra., page 375 ;

(d) all the partially excluded areas in the C. P. and Berar subject to certain modifications — *see* C. P. and Berar Gazette, 1948, Part 1, page 183 ;

(e) the provisions of sections 1, 2, 7, 8 and 9 of the Act shall apply to the excluded area of Lahaul (East Punjab) and sections 1 and 7 shall apply to the excluded area of Spiti (East Punjab) with effect from 24-4-1948 —*see* East Punjab Gazette, 1948, Part I, page 421;

(f) all partially excluded areas in the Province of Madras subject to certain modifications — *see* Fort St. Geo. Gazette, 1948, Part I, page 281.

Short title and extent.

1. *(1)* This Act may be called the Indian Finance Act, 1948.

(2) It extends to all the Provinces of India.

Discontinuance of salt duty.

2. For the year beginning on the 1st day of April, 1948, no duty shall be levied on salt manufactured in, or imported by sea or by land into, the Provinces of India.

Inland postage rates.

3. For the year beginning on the 1st day of April, 1948, the Schedule contained in the First Schedule to the Indian Finance Act, 1945, shall again be inserted in the Indian Post Office Act, 1898, as the First Schedule to that Act.

Alteration of certain duties of customs.

4. In the First Schedule to the Indian Tariff Act, 1934,—

(a) in Item No. 24, for the entry in the fourth column the entry "Rs. 13 per lb." shall be substituted;

(b) in Item No. 24 (1), in the entry in the fourth column, for the letters and figures "Rs. 7-8", the letters and figures "Rs. 12-8" shall be substituted;

(c) in Item No. 24 (2), in the entry in the fourth column, for the words, letters and figures "Rs. 18-12 per thousand or Rs. 7-8 per lb." the words, letters and figures "Rs. 31-4 per thousand or Rs. 12-8 per lb." shall be substituted; and

(d) in Item No. 75 (1), for the figures "37½" in the fourth column, the figures "50" shall be substituted, and for the figures "30" in the fifth column, the figures "42½" shall be substituted.

Additional duties of customs.

5. Where any goods chargeable with a duty of customs under the First Schedule to the Indian Tariff Act, 1934, or under the said Schedule read with any notification of the Central Government for the time being in force, are assessed to duty, there shall, up to the 31st day of March, 1949, be levied and collected as an addition to[a], and in the same manner as, the total amount so chargeable—

(a) a sum equal to one-half of such amount, in the case of goods comprised in Items Nos. 22 (3) and 22 (4) and sub-items (a), (c) and (d) of Item No. 22 (5) of the said Schedule, and

(b) a sum equal to one-fifth of such amount, in any other case :

Provided that such additional duty of customs shall not be levied and collected on the goods specified in the First Schedule to this Act.

Imposition and alteration of certain export duties.

6. In the Second Schedule to the Indian Tariff Act, 1934, Items Nos. 6 and 7 shall be omitted, and in lieu thereof, the following Items shall be inserted, namely:—

"6. Cloth of any description manufactured either wholly from cotton, or partly from cotton and partly from any other substance and containing not less than ten per cent. of cotton

by weight, but excluding cloth of handloom manufacture.	25 per cent. *ad valorem.*
7. Manganese ore . . .	25 per cent. *ad valorem.*
8. Oil seeds	Rs. 80 per ton.
9. Vegetable oils . . .	Rs. 160 per ton."

Imposition and alternation of certain duties of excise.

7. *(1)* In the First Schedule to the Central Excises and Salt Act, 1944,—

(a) in each of the sub-items (1) and (2) of Item No. 2,—

(i) clause *(i)* shall be omitted,

(ii) clauses *(ii)*, *(iii)* and *(iv)* shall be renumbered as clauses *(i)*, *(ii)* and *(iii)* respectively, and

(iii) in clause *(i)* as so renumbered, the words "more than forty, but" shall be omitted ;

(b) in Item No. 9,—

(i) for the entry in the third column against sub-item I (2) *(b)*, the entry "Twelve annas" shall be substituted :

(ii) In the entries in the third column against sub-item I (3), for the words "Nine annas" at both places where they occur, the words "Twelve annas" shall be substituted, and for the words "Three annas", at all the three places where they occur, the words "Four annas" shall be substituted ; and

(iii) in sub-item II, before the words "Cigars", the brackets and figure "(1)" shall be inserted, and to that sub-item, the following shall be added, namely:—

"(2) Cigarettes of which the value—

	Per thousand
(i) exceeds Rs. 50 a thousand	Twelve rupees and eight annas.
(ii) exceeds Rs. 40 a thousand but does not exceed Rs. 50 a thousand.	Ten rupees.
(iii) exceeds Rs. 30 a thousand but does not exceed Rs. 40 a thousand.	Seven rupees and eight annas.
(iv) exceeds Rs. 25 a thousand but does not exceed Rs. 30 a thousand.	Six rupees and four annas.
(v) exceeds Rs. 20 a thousand but does not exceed Rs. 25 a thousand.	Five rupees.
(vi) exceeds Rs. 15 a thousand but does not exceed Rs. 20 a thousand.	Three rupees and twelve annas.
(vii) exceeds Rs. 10 a thousand but does not exceed Rs. 15 a thousand.	Two rupees and eight annas.
(viii) does not exceed Rs. 10 a thousand.	One rupee and four annas.";

(c) in Item No. 10, for the words "Ten per cent" the words "Fifteen per cent." shall be substituted ;

(d) in item No. 11, for the words "Five rupees" the words "Seven rupees" shall be substituted ;

(e) Item No. 12 shall be omitted ;

(f) in Item No. 13, for the words "Two annas" the words "Three annas" shall be substituted ; and

(g) in Item No. 14, for the words "Two annas" the words "Three annas" shall be substituted.

(2) In Part A of the Second Schedule to the Central Excises and Salt Act, 1944, the figure and word "2. Betel nuts" shall be omitted, and for the figure "3", the figure "2" shall be substituted.

Amendment of Act XI of 1922.

8. The following amendments shall be made in the Indian Income-tax Act, 1922 :—

(1) In section 2, after clause *(7)*, the following clause shall be inserted, namely:—

"*(7A)* 'Indian Company' means a company as defined in the Indian Companies Act, 1913, the registered office of which is situate in British India;".

(2) In *Explanation* 3 to sub-section *(1)* of section 4, after the words "dividend paid", the words "by an Indian company" shall be inserted.

(3) In clause *(xii)* of sub-section *(3)* of section 4, for the figures "1948" the figures "1950" shall be substituted.

(4) In sub-clause *(a)* of clause *(vi)* of sub-section *(2)* of section 10, for the figures "1948" the figures "1950" shall be substituted.

(5) After section 15A, the following section shall be inserted, namely:—

"15B. *Exemption on account of donations for charitable purposes.*—*(1)* The tax shall not be payable by an assessee in respect of any sums paid by him as donations to any institution or fund which is established in British India for a charitable purpose and is approved by the Central Government for the purposes of this section:

Provided that the total of the sums so paid is not less than two hundred and fifty rupees :

Provided further that in the case of a company this exemption shall apply only in respect of the income-tax, and not in respect of any super-tax, payable by it.

Explanation. — In this section, 'charitable purpose' includes relief of the poor, education, medical relief and the advancement of any other object of general public utility.

(2) The aggregate of any sums exempted under this section shall not exceed—

(a) one-twentieth in the case of a company, and one-tenth in any other case, of the assessee's total income as reduced by any portion thereof exempt from tax under any other provision of this Act, or

(b) two hundred and fifty thousand rupees whichever is less.

(3) The amount by which the tax payable by an assessee is reduced on account of an exemp-

tion under this section shall not in any case exceed half the amount in respect of which the exemption is allowed under this section."

(6) In section 16, in clause *(a)* of sub-section *(1)*, for the words and figures "section 14 and section 15", the words, figures and letter "section 14, section 15 and section 15B" shall be substituted; and in sub-section *(2)*, for the words "of a company" the words and brackets "of the company (without taking into account any rebate allowed or additional income-tax charged)" shall be substituted.

(7) In sub-section *(3)* of section 17, after the words and figures "of section 14" the words figures and letter "or under section 15D" shall be inserted.

(8) In sub-section *(3E)* of section 18, for the words "by a company" the words 'by an Indian company or by a company which has made such effective arrangements as may be prescribed for the deduction of super-tax from such dividends" shall be substituted.

(9) In section 19A, after the words "every company", the words "which is an Indian company or a company which has made such effective arrangements as may be prescribed for the declaration and payment of dividends in British India" shall be inserted.

(10) In section 49B, for the words "such person shall be deemed" the words "such person shall, if the dividend is included in his total income, be deemed" shall be substituted, and for the words "total income of a company" the words "total income of the company" shall be substituted.

Income-tax and super-tax.

9. *(1)* Subject to the provisions of sub sections *(3)*, *(4)*, *(5)* and *(6)*, for the year beginning on the 1st day of April, 1948,—

(a) income-tax shall be charged at the rates specified in Part I of the Second Schedule to this Act, and

(b) rates of super-tax shall, for the purposes of section 55 of the Indian Income-tax Act, 1922 (hereafter in this section referred to as "the Income-tax Act"), be those specified in Part II of the Second Schedule to this Act.

(2) In making any assessment for the year ending on the 31st day of March, 1949, there shall be deducted from the total income of an assessee, in accordance with the provisions of section 15A of the Income-tax Act, an amount equal to one-fifth of the earned income, if any, included in his total income, but not exceeding in any case four thousand rupees.

(3) In making any assessment for the year ending on the 31st day of March, 1949,—

(a) where the total income of an assessee, not being a company, includes any income chargeable under the head "Salaries" as reduced by the deduction for earned income appropriate thereto or any income chargeable under the head 'Interest on securities" or any income from dividends in respect of which he is deemed under section 49B of the Income-tax Act to have paid income-tax imposed in British India, the income-tax payable by the assessee on that part of his total income which consists of such inclusions shall be an amount bearing to the total amount of income-tax payable according to the rates applicable under the operation of the Indian Finance Act, 1947, on his total income the same proportion as the amount of such inclusions bears to his total income ;

(b) where the total income of an assessee, not being a company, includes any income chargeable under the head "Salaries" on which super-tax has been or might have been deducted under the provisions of sub-section *(2)* of section 18 of the Income-tax Act, the super-tax payable by the assessee on that portion of his total income which consist of such inclusion shall be an amount bearing to the total amount of super-tax payable, according to the rates applicable under the operation of the Indian Finance Act, 1947, on his total income the same proportion as the amount of such inclusion bears to his total income.

(4) In making any assessment for the year ending on the 31st day of March, 1949, where the total income of an assessee consists partly of earned income and partly of unearned income, the super-tax payable by him shall be—

(i) on that part of the earned income chargeable under the head "Salaries" to which clause *(b)* of sub-section *(3)* applies, the amount of super-tax computed in accordance with the provisions of that sub-section, *plus*

(ii) on the remainder of the earned income, the amount which bears to the total amount of super-tax which would have been payable on his total income had it consisted wholly of earned income the same proportion as such remainder bears to his total income, *plus*

(iii) on the unearned income, the amount which bears to the total amount of super-tax which would have been payable on his total income had it consisted wholly of unearned income the same proportion as the unearned income bears to his total income.

(5) In making any assessment for the year ending on the 31st day of March, 1949,—

(a) where the total income of a company includes any profits and gains from life insurance business, the super-tax payable by the company shall be reduced by an amount computed at the rate of two annas in the rupee on that part of its total income which consists of such inclusion;

(b) where the total income of an assessee, not being a company, includes any profits and gains from life insurance business, the income-tax and super-tax payable by the assessee on that part of his total income which consists of such inclusion shall be an amount bearing to the total amount of such taxes payable according to the rates applicable under the operation of the Indian Finance Act, 1942, on his total income the same proportion as the amount of such inclusion bears to his total income, so however that the aggregate of the taxes so computed in respect of such inclusion shall not in any case exceed the amount of tax payable on such inclusion at the rate of five annas in the rupee.

(6) In cases to which section 17 of the Income-tax Act applies, the tax chargeable shall be determined as provided in that section, but with reference to the rates imposed by sub-section *(1)*, and in accordance, where applicable, with the provisions of sub-sections *(3)*, *(4)* and *(5)* of this section.

(7) For the purposes of making any deduction of income-tax in the year beginning on the 1st day of April, 1948, under sub-section *(2)* or sub-section *(2B)*, of section 18 of the Income-tax Act from any earned income chargeable under the head "Salaries," the estimated total income of the assessee under this head shall, in computing the income-tax to be deducted, be reduced by an amount equal to one-fifth of such earned income, but not exceeding in any case four thousand rupees, but no abatement shall be allowed by the person responsible for paying the salary in respect of any donations made by the assessee to which section 15B of the Income-tax Act is or may be applicable.

(8) For the purposes of this section and of the rates of tax imposed thereby, the expression "total income" means total income as determined for the purposes of income-tax or super-tax, as the case may be, in accordance with the provisions of the Income-tax Act, and the expression "earned income" has the meaning assigned to it in clause *(6AA)* of section 2 of that Act.

10. The following amendments shall be made in the Business Profits Tax Act, 1947:—

Amendment of Act XXI of 1947.

(1) In clause *(1)* of section 2, after the words "chargeable accounting period" the words and figures "ending on or before the 31st day of March, 1947," shall be inserted, and after the words "the period of one year" the following shall be inserted, namely:—

"and, in respect of any chargeable accounting period beginning after the 31st day of March, 1947, such sum as may be fixed by the Annual Finance Act."

(2) In sub-clause *(a)* of clause *(4)* of section 2, for the figures "1947" the figures "1948" shall be substituted, and to the said clause *(4)*, the following proviso shall be added, namely:—

"Provided that where an accounting period falls partly before, and partly after, the end of March 1947, so much of that accounting period as falls before, and so much of that accounting period as falls after, the end of March 1947, shall be deemed each to be a separate chargeable accounting period."

(3) In section 4, for the words "which shall be equal to sixteen and two-thirds per cent. of the taxable profits," the following shall be substituted, namely:—

"which shall, in respect of any chargeable accounting period ending on or before the 31st day of March 1947, be equal to sixteen and two-thirds per cent. of the taxable profits, and in respect of any chargeable accounting period beginning after that date, be equal to such percentage of the taxable profits as may be fixed by the Annual Finance Act."

11. *(1)* The tax imposed by section 4 of the Business Profits Tax Act, 1947, shall, in respect of any chargeable accounting period beginning after the 31st day of March, 1947, be an amount equal to ten per cent. of the taxable profits.

Business Profits Tax.

(2) For the purposes of the said Act, "abatement" shall mean, in respect of any chargeable accounting period beginning after the 31st day of March, 1947, a sum which bears —

(a) in the case of a company not being a company deemed for the purposes of section 9 of the said Act to be a firm, to a sum equal to six per cent. of the capital of the company on the first day of the said period, computed in accordance with Schedule II to the said Act, or two lakhs of rupees, whichever is greater, or

(b) in any other case, to two lakhs of rupees, the same proportion as the said period bears to the period of one year.

THE FIRST SCHEDULE

(See *section 5*)

Goods on which additional duty of customs is not leviable.

A. Goods comprised in the following Items of the First Schedule to the Indian Tariff Act, 1934, namely:—

Nos. 8 (2), 8 (3), 9 (5), 20 (1), 20 (3), 20 (4), 24, 24 (1), 24 (2), 24 (3), 25 (1), 27 (4), 27 (5), 27 (6), 28 (15), 28 (16), 28 (17), 28 (18), 29, 29 (1), 30 (9) 30 (10), 43, 44, 46 (3), 61 (2), 61 (3), 62 (1), 62 (2), 63 (30), 63 (31), 63 (32), 63 (33), 70 (2), 70 (3), 71 (7), 71 (8), 72, 72 (1), 72 (2), 72 (3), 72 (11), 75 (1), 75 (5), 75 (6), 75 (7), 75 (8).

B. Goods comprised in the following items of the First Schedule to the Indian Tariff Act, 1934, when the Customs Collector is satisfied that such goods are the produce or manufacture of Burma, namely:—

No. 7 (potatoes and onions only) and Nos. 9, 9 (3), 13 (2), 17 and 34 (4) *(a)*.

THE SECOND SCHEDULE

(See *section 9*)

PART I

Rates of Income-tax

A. In the case of every individual, Hindu undivided family, unregistered firm and other association of persons, not being a case to which paragraph B, C or D of this Part applies—

	Rate
1. On the first Rs. 1500 of total income	... Nil
2. On the next Rs. 3,500 of total income	... One anna in the rupee.
3. On the next Rs. 5,000 of total income	... Two annas in the rupee.
4. On the next Rs. 5,000 of total income	... Three and a half annas in the rupee.
5. On the balance of total income	... Five annas in the rupee:

Provided that—

(i) no income-tax shall be payable on a total income which, before deduction of the allowance, if any, for earned income, does not exceed Rs. 3000 ;

(ii) the income-tax payable shall in no case exceed half the amount by which the total income (before deduction of the said allowance, if any, for earned income) exceeds Rs. 3,000;

(iii) the income-tax payable on the total income as reduced by the allowance for earned income shall not exceed either—

(a) a sum bearing to half the amount by which the total income (before deduction of the allowance for earned income) exceeds Rs. 3,000 the same proportion as such reduced total income bears to the unreduced total income, or

(b) the income-tax payable on the income so reduced at the rates herein specified,—

whichever is less.

B. In the case of every company, not being a company to which paragraph C of this Part applies—

	Rate.
On the whole of total income . .	Five annas in the rupee :

Provided that in the case of an Indian company—

(a) where the total income, as reduced by seven annas in the rupee and by the amount, if any, exempt from income-tax, exceeds the amount of any dividends (including dividends payable at a fixed rate) declared in respect of the whole or part of the previous year for the assessment for the year ending on the 31st day of March, 1949, and no order has been made under sub-section *(1)* of section 23A of the Indian Income-tax Act, 1922, a rebate shall be allowed at the rate of one anna per rupee on the amount of such excess ;

(b) where the amount of dividends referred to in clause *(a)* above exceeds the total income as reduced by seven annas in the rupee and by the amount, if any, exempt from income-tax, there shall be charged on the total income an additional income-tax equal to the sum, if any, by which the aggregate amount of income-tax actually borne by such excess (hereinafter referred to as "the excess dividend") falls short of the amount calculated at the rate of five annas per rupee on the excess dividend; and

(c) the income-tax payable, after deducting any rebate permissible under clause *(a)*, but without including any additional income-tax chargeable under clause *(b)*, shall not exceed the aggregate of—

(i) the income tax which would have been payable under the provisions of paragraph C of this Part if the total income had been Rs. 25,000, and

(ii) half the amount by which the total income exceeds Rs. 25,000.

For the purposes of clause *(b)* of the above proviso, the aggregate amount of income-tax actually borne by the excess dividend shall be determined as follows :—

(i) the excess dividend shall be deemed to be out of the whole or such portion of the undistributed profits of one or more years immediately preceding the previous year as would be just sufficient to cover the amount of the excess dividend and as have not likewise been taken into account to cover an excess dividend of a preceding year ;

(ii) such portion of the excess dividend as is deemed to be out of the undistributed profits of each of the said years shall be deemed to have borne tax,—

(a) if an order has been made under sub-section *(1)* of section 23A of the Indian Income-tax Act, 1922, in respect of the undistributed profits of that year, at the rate of five annas in the rupee, and

(b) in respect of any other year, at the rate applicable to the total income of the company for that year reduced by the rate at which rebate, if any, was allowed on the undistributed profits.

C. In the case of every Indian company the total income of which does not exceed Rs. 25,000—

	Rate.
On the whole of total income . .	Two and a half annas in the rupee ;

Provided that where the total income, as reduced by four and a half annas in the rupee and by the amount, if any, exempt from income-tax, exceeds the amount of any dividends (including dividends payable at a fixed rate) declared in respect of the whole or part of the previous year for the assessment for the year ending on the 31st day of March, 1949, and no order has been made under sub-section *(1)* of section 23A of the Indian Income-tax Act, 1922, a rebate shall be allowed at the rate of half anna per rupee on the amount of such excess.

D. In the case of every local authority and in every case in which, under the provisions of the Indian Income-tax Act, 1922, income-tax is to be charged at the maximum rate—

	Rate.
On the whole of total income . .	Five annas in the rupee.

Explanation.—For the purposes of this Part,—

(a) the expression "dividend" shall be deemed to include any distribution included in that expression as defined in clause *(6A)* of section 2 of the Indian Income-tax Act, 1922, and any such distribution made during the year ending on the 31st day of March, 1949, shall be deemed to have been made in respect of the whole or part of the previous year;

(b) the expression "Indian company" shall have the meaning assigned to it in clause *(7A)* of section 2 of the Indian Income-tax Act, 1922.

PART II

Rates of Super-tax

A. In the case of every individual, Hindu undivided family, unregistered firm and other association of persons, not being a case to which any other paragraph of this Part applies—

	Rate, if income wholly earned	Rate if income wholly unearned.
1. On the first Rs. 25,000 of total income.	Nil	Nil
2. On the next Rs. 15,000 of total income.	Two annas in the rupee.	Three annas in the rupee.
3. On the next Rs. 15,000 of total income.	Three annas in the rupee.	Four and a half annas in the rupee.
4. On the next Rs. 15,000 of total income.	Five annas in the rupee.	Six annas in the rupee.
5. On the next Rs. 15,000 of total income.	Six annas in the rupee.	Seven annas in the rupee.
6. On the next Rs. 15,000 of total income.	Six and half annas in the rupee.	Eight annas in the rupee.
7. On the next Rs. 50,000 of total income.	Seven annas in the rupee.	Nine annas in the rupee.
8. On the next Rs. 1,00 000 of total income	Nine and a half annas in the rupee	Nine and a half annas in the rupee.
9. On the next Rs. 1,00,000 of total income.	Ten annas in the rupee.	Ten annas in the rupee.
10. On the balance of total income.	Ten and half annas in the rupee.	Ten and a half annas in the rupee.

B. In the case of every local authority—

	Rate
On the whole of total income . . .	Two annas in the rupee.

C. In the case of an association of persons being a co-operative society, other than the Sanikatta Saltowners' Society in the Bombay Presidency, for the time being registered under the Co-operative Societies Act, 1912, or under an Act of a Provincial Legislature governing the registration of co-operative societies—

	Rate
(1) On the first Rs. 25,000 of total income . . .	*Nil*
(2) On the balance of total income	Two annas in the rupee.

D. In the case of every company—

	Rate
On the whole of total income	Three annas in the rupee.

Provided that a rebate at the rate of one anna per rupee of the total income shall be allowed in the case of any company which, in respect of its profits liable to tax under the Indian Income-tax Act, 1922, for the year ending on the 31st day of March, 1949, has made the prescribed arrangements—

(a) for the declaration and payment in the Provinces of India of the dividend payable out of such profits, and

(b) for the deduction of super-tax from dividends in accordance with the provisions of sub-sections *(3D)* or *(3E)* of section 18 of the said Act.

[THE INDIAN] FINANCE (SUPPLEMENTARY) ACT, 1947.

(ACT XLII OF 1947).

[18th December, 1947.]

An Act to give effect to the supplementary financial proposals of the Central Government for the year ending on the 31st day of March, 1948.

WHEREAS it is expedient to impose an export duty on cotton cloth and yarn, and to amend the Cotton Textiles Fund Ordinance, 1944 (XXXIV of 1944);

It is hereby enacted as follows :—

Short title and extent.

1. *(1)* This Act may be called the Indian Finance (Supplementary) Act, 1947.

(2) It extends to all the Provinces of India.

Addition to Second Schedule, Act XXXII of 1934.

2. In the Second Schedule to the Indian Tariff Act, 1934 (XXXII of 1934), after Item No. 5, the following items shall be inserted :—

"6.	Cloth of any description manufactured either wholly from cotton or partly from cotton and partly from any other substance and containing not less than ten *per centum* of cotton by weight.	Annas four per square yd.
7.	Yarn of any description manufactured either wholly from cotton or partly from cotton and partly from any other substance and containing not less than ten *per centum* of cotton by weight.	Annas six per lb."

Amendment of Ordinance No. XXXIV of 1944.

3. For section 4 of the Cotton Textiles Fund Ordinance, 1944, the following section shall be substituted, namely :—

"4. *Government's contribution to the Fund.*—The Central Government may from time to time make such contributions to the Fund as it thinks fit."

[THE] GANDHI NATIONAL MEMORIAL FUND DONATIONS (COMPANIES) ACT, 1948 (ACT XXXV OF 1948).

STATEMENT OF OBJECTS AND REASONS.

"It has been represented that the absence of enabling provisions in the Memoranda of Association of certain companies precludes them from making donations to charitable or public funds such as the Gandhi National Memorial Fund, not closely connected with or incidental to the objects for which the companies may have been formed. The amendment of such Memoranda with a view to incorporating such provisions will, in the ordinary course, be a long process and in some cases involve considerable expense. It is desirable that such companies as are anxious to contribute to the Gandhi National Memorial Fund but are unable to do so in terms of their Memoranda or Articles of Association should be enabled by law to make such donations. The scope of the Bill is strictly restricted to cover such donations to the Gandhi National Memorial Fund only."

—Gazette of India, 1948, Part V, page 488.

[THE] GANDHI NATIONAL MEMORIAL FUND DONATIONS (COMPANIES) ACT, 1948, (ACT XXV OF 1948)[a]

[31st August, 1948.]

An Act to enable companies to make donations to the Gandhi National Memorial Fund.

WHEREAS it is expedient to make provision for enabling companies to make donations to the Gandhi National Memorial Fund;

[a] The Act is applied to the district of Darjeeling on and from 4-11-1948—*See* Calcutta Gazette, 1948, Part I, page 1450.

It is hereby enacted as follows :—

Short title and extent.

1. *(1)* This Act may be called the Gandhi National Memorial Fund Donations (Companies) Act, 1948.

(2) It extends to all the Provinces of India.

Power of companies to make donations to the Fund.

2. Any company, as defined in clause *(2)* of sub-section *(1)* of section 2 of the Indian Companies Act, 1913 (VII of 1913), may, notwithstanding anything contained in that Act, and notwithstanding that the Memorandum of Association or the Articles of Association of the Company do not enable it so to do, by special resolution authorise the making of a donation from the company's assets to the Fund known as the Gandhi National Memorial Fund and administered by the President of the Indian National Congress.

[THE] INDUSTRIAL FINANCE CORPORATION ACT, 1948 (ACT XV OF 1948).

STATEMENT OF OBJECTS AND REASONS.

"The provision of credit for medium and long-term capital requirements of industry falls outside the normal activities of commercial banks and, in certain cases the usual methods of capital issue are not wholly practicable or suitable. In order to fill this lacuna, Industrial Finance Corporations, to provide medium and long-term credit for facilitating post-war rehabilitation and development, have been established in several countries. This Bill seeks to establish a similar Corporation in India for the same purpose, ..."

—Gazette of India, 1946, Part V, page 394.

[THE] INDUSTRIAL FINANCE CORPORATION ACT, 1948 (ACT XV OF 1948)[a]

[27th March, 1948.]

An Act to establish the Industrial Finance Corporation of India.

WHEREAS it is expedient to establish an Industrial Finance Corporation for the purpose of making medium and long-term credits more readily available to industrial concerns in India, particularly in circumstances where normal banking accommodation is inappropriate or recourse to capital issue methods is impracticable;

It is hereby enacted as follows :—

[a] For Select Committee Report, *see* Gazette of India, 1948, Part V, page 23.

The Act is made applicable to :—

(a) the Chota Nagpur Division and the Santal Parganas District—*See* Bihar Gazette, 1948, Part II, page 1121;

(b) partially excluded areas in the Province of Bombay subject to certain modifications—*See* Bombay Gazette, 1948, Part IV-A, page 262;

(c) all the partially excluded areas in C. P. and Berar subject to certain modifications—*See* C. P. and Berar Gazette, 1948, Part I, page 439;

(d) all partially excluded areas of the Province of Orissa subject to certain modifications — *See* Orissa Gazette, 1948, Part III, page 399;

(e) excluded and partially excluded areas in the Province of Madras — *See* Fort St. George Gazette, 1948, Part I, page 990;

(f) partially excluded areas in the Jounsar-Bewar Pargana in Dehradun district and to the portion of Mirzapur district which lies to

the South of Kaimur ranges from the date on which the Act comes into force in the Provinces in India—*See* U. P. Gazette, 1948, Part I, page 831.

Short title, extent and commencement.

1. *(1)* This Act may be called the Industrial Finance Corporation Act, 1948.

(2) It extends to all the Provinces of India and shall extend to such acceding States as shall by their Instrument of Accession accept the subject-matter of this Act as a matter with respect to which the Dominion Legislature may make laws for such States.

(3) It shall come into force on such date as the Central Government may, by notification in the official Gazette, appoint.[a]

[a] This sub-section read with S. 22 of the General Clauses Act, 1897—The Act came into force on 1st July 1948—*See* Gazette of India, 1948, Extraord, page 853.

Interpretation.

2. In this Act, unless there is anything repugnant in the subject or context,—

(a) "Board" means the Board of Directors of the Corporation;

(b) "Corporation" means the Industrial Finance Corporation of India established by this Act;

(c) "industrial concern" means any public limited company or co-operative society incorporated by an Act of the Legislature or under any law for the time being in force and registered in India and engaged in the manufacture or processing of goods or in mining or in the generation or distribution of electricity or any other form of power;

(d) "prescribed" means prescribed by rules or regulations made under this Act;

(e) "Reserve Bank" means the Reserve Bank of India;

(f) "scheduled bank" means a bank for the time being included in the Second Schedule to the Reserve Bank of India Act, 1934 (II of 1934);

(g) "underwriting" means contracting, with or without conditions, to subscribe for stocks, shares, bonds or debentures of an industrial concern with a view to the resale of the whole or any part thereof.

Establishment and incorporation of Corporation.

3. *(1)* A Corporation to be called the Industrial Finance Corporation of India shall be established for the purposes of this Act.

(2) The Corporation shall be a body corporate by the name of the Industrial Finance Corporation of India, having perpetual succession and a common seal, with power, subject to the provisions of the Act, to acquire and hold property, both movable and immovable, and shall by the said name sue and be sued.

Share capital and share-holders.

4. *(1)* The authorised capital of the Corporation shall be ten crores of rupees divided into twenty thousand fully paid up shares of five thousand rupees each of which ten thousand shares of the total value of five crores of rupees shall be issued in the first instance, and the remaining shares may be issued with the sanction of the Central Government from time to time as and when the Corporation may deem fit.

(2) Of the capital issued in the first instance, the Central Government and the Reserve Bank shall each subscribe for two thousand shares.

(3) On application made before such date[a] as may be notified by the Central Government in the official Gazette in this behalf, scheduled banks may subscribe for two thousand five hundred shares, and insurance companies, investment trusts and other like financial institutions for two thousand five hundred shares, and co-operative banks for one thousand shares of the Corporation :

Provided that no institution shall be allotted more than ten per cent. of the shares reserved for the class of institutions to which it belongs.

[a] That is, 11th August 1948 — *See* Gazette of India, 1948, Part I, page 825.

(4) The allotment of shares to the applicants mentioned in sub-section *(3)* shall be made by the Board in accordance with the regulations made in this behalf.

(5) If any shares referred to in sub-section *(3)* remain unallotted, they shall be subscribed for by the Central Government and the Reserve Bank in such proportion as may be agreed on between them :

Provided that the Central Government and the Reserve Bank may dispose of the shares subscribed for by them in pursuance of this sub-section to any scheduled bank, insurance company, investment trust or other like financial institution or any co-operative bank to which shares of the Corporation may be transferred under sub-section *(7)*.

(6) If and when the remaining shares or any part thereof are issued, the Central Government and the Reserve Bank shall, and the institutions referred to in sub-section *(3)* of this section may, subscribe for such shares in the same proportion as far the first issue, and the provisions of sub-sections *(4)* and *(5)* of this section shall also apply to such shares.

(7) Shares of the Corporation shall not be transferable except to the Central Government, the Reserve Bank, any scheduled bank, any insurance company, any investment trust or any other like financial institution or any co-

operative bank in accordance with the regulations made in this behalf.

Guarantee by Central Government.

5. The shares of the Corporation shall be guaranteed by the Central Government as to the repayment of the principal and the payment of the annual dividend at such minimum rate as may be fixed by the Central Government by notification published in the official Gazette at the time of issuing the shares.

Management.

6. *(1)* The general superintendence and direction of the affairs and business of the Corporation shall be entrusted to a Board of Directors which, with the assistance of an Executive Committee and a Managing Director, may exercise all powers and do all acts and things which may be exercised or done by the Corporation.

(2) The Board in discharging its functions shall act on business principles due regard being had by it to the interests of industry, commerce and the general public.

(3) In the discharge of its said functions, the Board shall be guided by such instructions on questions of policy as may be given to it by the Central Government.

(4) If any dispute arises between the Central Government and the Board as to whether a question is or is not a question of policy, the decision of the Central Government shall be final.

(5) If the Board fails to carry out the instructions on the question of policy laid down by the Central Government, the Central Government shall have the power to supersede the Board and appoint a new Board in its place to function until a properly constituted Board is set up. The decision of the Central Government as to the grounds for superseding the Board shall not be questioned in any Court of law.

Powers of Executive Committee.

7. *(1)* Subject to such general or special directions as the Board may from time to time give, the Executive Committee shall be competent to deal with any matter within the competence of the Board.

(2) The minutes of every meeting of the Executive Committee shall be laid before the Board at its next following meeting.

Advisory committee.

8. The Corporation may from time to time appoint one or more Advisory Committee or Committees for the purpose of assisting the Corporation in the efficient discharge of its functions and in paticular for the purpose of securing that those functions are exercised with due regard to the circumstances, conditions prevailing in and requirements of particular areas.

Managing Director.

9. The managing Director shall—

(a) be a whole time officer of the Corporation;

(b) perform such duties as the Board may, by regulations, entrust or delegate to him ;

(c) hold office for four years and be eligible for re-appointment ;

(d) receive such salary and allowances as the Board, with the approval of the Central Government, may determine.

Board of Directors.

10. The Board of Directors shall consist of the following, namely:—

(a) three Directors nominated by the Central Government;

(b) two Directors nominated by the Central Board of the Reserve Bank;

(c) two Directors elected in the prescribed manner by the scheduled banks who are share-holders of the Corporation;

(d) two Directors elected in the prescribed manner by the share-holders of the Corporation, other than the Central Government, the Reserve Bank, the scheduled banks and co-operative banks;

(e) two Directors elected in the prescribed manner by the co-operative banks who are share-holders of the Corporation;

(f) one Managing Director appointed by the Central Government after consideration of the recommendation—

(i) in the case of the first appointment, of the Central Board of the Reserve Bank;

(ii) in the case of subsequent appointments, of the Board :

Provided that on the first constitution of the Board the Directors referred to in clauses *(c)*, *(d)* and *(e)* shall be nominated by the Central Government to represent the classes of share-holders respectively specified in the said clauses and Directors nominated under this proviso shall for the purposes of this Act be deemed to be elected Directors :

Provided further that all Directors of the Board first constituted other than the Managing Director shall retire at the end of the first year.

Term of office and retirement of Directors.

11. *(1)* A nominated Director shall hold office during the pleasure of the Central Government.

(2) An elected Director shall hold office for four years :

Provided that one out of the two Directors elected to represent the share-holders referred to in each of the clauses *(c)*, *(d)* and *(e)* of section 10 shall retire at the end of two years after the first election; the Directors so to retire shall be determined by lot :

Provided further that an elected Director shall be required to continue in his office until his successor has been elected :

Provided further that a Director shall be eligible for re-election for not more than two full consecutive terms after the rotation of elected Directors has begun.

(3) A casual vacancy in the office of an elected Director shall be filled by election and a Director so elected shall hold office for the unexpired portion of the term of his predecessor :

Provided that no casual vacancy occurring within three months of the date of expiry of the normal term of office of an elected Director need be filled under this sub-section.

(4) Directors other than the Managing Director and not being servants of the Government shall be paid such fees for attending meetings of the Board and if they are members thereof, of the Executive Committee, as may be prescribed.

(5) No act or proceeding of the Board shall be questioned on the ground merely of the existence of any vacancy in, or any defect in the constitution of, the Board.

Disqualification.

12. No person shall be a Director who—

(a) is a salaried official of the Corporation other than a Managing Director; or

(b) is, or at any time has been, adjudicated insolvent or has suspended payment or has compounded with his creditors; or

(c) is found to be a lunatic or becomes of unsound mind; or

(d) is or has been convicted of any offence involving moral turpitude.

Director's absence from three consecutive meetings.

13. A person shall cease to be a Director if he absents himself from three consecutive meetings of the Board without leave of absence.

Appointment of officers, advisers, etc.

14. The Corporation may appoint such officers, advisers and employees as it considers necessary for the efficient performance of its functions.

Chairman of the Board.

15. *(1)* The Chairman of the Board shall be one of the Directors (not being the Managing Director) nominated in this behalf by the Central Government after considering, except in the case of the nomination of the first Chairman, the recommendation of the Board ;

Provided that the nomination of the Chairman for any period (other than the first period) shall be made only after the vacancies in the office of Directors occurring by efflux of time in that period have been filled by nomination or election, as the case may be.

(2) The Chairman shall hold office for two years or until his successor is nominated :

Provided that a Chairman shall, so long as he remains a Director, be eligible for renomination as Chairman.

Executive Committee.

16. *(1)* The Executive Committee shall consist of the Managing Director (who shall be Chairman of the Committee), two Directors elected by the nominated Directors and two Directors elected by the elected Directors.

(2) A Director elected to be a member of the Executive Committee shall hold office as such for the rest of his term of office as Director for which he is so elected.

Meetings of Board and Committee.

17. *(1)* Meetings of the Board and of the Executive Committee shall be held at such times and at such places as may be prescribed :

Provided that until regulations have been made in this behalf such meetings shall be convened by the Managing Director.

(2) To constitute a quorum at a meeting of —

(a) the Board, not less than five Directors shall be present, of whom not less than two shall be nominated Directors and at least one an elected Director ;

(b) the Executive Committee, not less than three members shall be present, of whom at least one shall be a nominated Director and one an elected Director.

(3) At a meeting of the Board or of the Executive Committee, each Director or member of the Committee, as the case may be, shall have one vote, and in the event of an equality of votes, the Chairman shall have a second or casting vote.

(4) No Director shall vote on any matter concerning an industrial concern in which he is directly or indirectly interested.

(5) If for any reason the Chairman is unable to be present at a meeting —

(a) of the Board, a Director (other than the Managing Director) authorised by the Chairman in writing in this behalf shall preside at that meeting and in default of such authorisation the Board may elect a Chairman to preside at that meeting ;

(b) of the Executive Committee, a member authorised in writing by the Managing Director shall preside at that meeting and in default of such authorisation the Executive Committee may elect a Chairman to preside at that meeting.

Offices and agencies.

18. The Corporation shall establish its head office in Delhi and offices in Bombay, Calcutta, Kanpur and Madras, and may, with the previous sanc-

tion of the Central Government, establish offices or agencies in other places in India.

Deposit Accounts.

19. The Corporation may open Deposit Accounts with the Reserve Bank or with any agency of the Reserve Bank other than a Government treasury.

Investment of funds.

20. The Corporation may invest its funds in the securities of the Central Government or of any Provincial Government.

Borrowing powers.

21. *(1)* The Corporation may issue and sell bonds and debentures carrying interest for the purpose of raising its working capital:

Provided that the total amount of bonds and debentures issued and outstanding and of the contingent liabilities of the Corporation in the form of guarantees given by it or underwriting agreements entered into by it shall not at any time exceed five times the amount of the paid up share capital and the reserve fund of the Corporation.

(2) Bonds and debentures of the Corporation shall be guaranteed by the Central Government as to the repayment of principal and the payment of interest at such rate as may be fixed by the Central Government on the recommendation of the Board at the time the bonds and debentures are issued.

Deposits with the Corporation.

22. The Corporation may accept deposits from the public repayable after the expiry of a period which shall not be less than five years from the date of the making of the deposit, and on such other terms as it thinks fit:

Provided that the total amount of such deposits shall not at any time exceed ten crores of rupees.

Business which the Corporation may transact.

23. *(1)* The Corporation shall, subject to the provisions of this Act, be authorised to carry on and transact the following kinds of business, namely —

(a) guaranteeing, on such terms and conditions as may be agreed upon, loans raised by industrial concerns which —

(i) are repayable within a period not exceeding twenty-five years, and

(ii) are floated in the public market;

(b) underwriting the issue of stock, shares, bonds or debentures by industrial concerns;

(c) receiving in consideration of the services mentioned in clauses *(a)* and *(b)* such commission as may be agreed upon;

(d) retaining as part of its assets any stock, shares, bonds or debentures which it may have to take up in fulfilment of its underwriting liabilities, so however that it disposes of the stock, shares, bonds or debentures so acquired as early as practicable and in any case within a period of seven years from the date of such acquisition;

(e) granting loans or advances to, or subscribing to debentures of, industrial concerns, repayable within a period not exceeding twenty five years from the date on which they are granted or subscribed to, as the case may be; and

(f) generally, the doing of all such matters and things as may be incidental to or consequential upon the exercise of its powers or the discharge of its duties under this Act.

(2) No accommodation shall be given under sub-clauses *(a)* and *(e)*, unless it is secured by a sufficient pledge, mortgage, hypothecation or assignment of Government or other securities, stocks, shares or secured debentures, bullion, movable or immovable property or other tangible assets in the manner prescribed by regulations.

Limit of accommodation.

24. The Corporation shall not enter into any arrangement under clauses *(a)* and *(e)* of sub-section *(1)* of section 23 with a single industrial concern for an amount equivalent in the aggregate to more than ten per cent. of the paid up share capital of the Corporation but in no case exceeding fifty lakhs of rupees.

Power to impose conditions for accommodation.

25. *(1)* In entering into any arrangement under section 23 with an industrial concern, the Corporation may impose such conditions as it may think necessary or expedient for protecting the interests of the Corporation, and securing that the accommodation granted by it is put to the best use by the industrial concern.

(2) Where one of the conditions imposed is that a Director shall be appointed by the Corporation on the Board of Directors of the industrial concern to protect the interests of the Corporation, such condition shall be valid notwithstanding anything contained in the Indian Companies Act, 1913, or any other law for the time being in force.

Prohibited business.

26. The Corporation shall not—

(a) accept deposits except as provided by this Act;

(b) subscribe directly to the shares or stock of any company having limited liability:

Provided that nothing in clause *(b)* shall affect the right of the Corporation to acquire any shares, bonds or debentures of a company having limited liability in fulfilment of any underwriting agreement entered into by the Corporation.

Loans in foreign currency.

27. *(1)* The Corporation may, for the purpose of making loans or advances to industrial concerns requiring to be financed in foreign currency, borrow, with the previous consent of the Central Government, such currency through the International Bank for Reconstruction and Development or otherwise, and may pledge, mortgage, hypothecate or assign to the said Bank or other foreign lender all or any part of the security taken by the Corporation from the industrial concerns for the loans or advances granted in foreign currency.

(2) All loans and advances made to industrial concerns in foreign currency shall be repaid in the currency in which they are made or its equivalent in Indian currency at the rate of exchange prevailing at the time of repayment.

Rights of Corporation in case of default.

28. *(1)* Where any industrial concern which is under a liability to the Corporation under an agreement makes any default in repayment or otherwise fails to comply with the terms of its agreement with the Corporation, the Corporation shall have the right to take over the management of the concern, as well as the right to sell and realise the property pledged, mortgaged, hypothecated or assigned to the Corporation.

(2) Any transfer of property made by the Corporation in exercise of its powers of sale and realization under sub-section *(1)* shall vest in the transferee all rights in or to the property transferred as if the sale had been made by the owner of the property.

(3) The Corporation shall have the same rights and powers with respect to goods manufactured or produced wholly or partly from goods forming part of security held by it, as it had with respect to the original goods.

(4) Where the Corporation takes over the management of a concern under the provisions of sub-section *(1)*, it shall be deemed to be the owner of such concern for purposes of suits by or against such concern and shall sue and be sued in the name of the owner of the concern.

Power to call for repayment before agreed period.

29. Notwithstanding any agreement to the contrary, the Corporation may by notice require any industrial concern, to which it has granted any loan or advance, forthwith to discharge in full its liabilities to the Corporation—

(a) if it appears to the Board that false or misleading information in any material particular was given in the application for the loan or advance; or

(b) if the industrial concern has failed to comply with the terms of its contract with the Corporation in the matter of the loan or advance; or

(c) if there is a reasonable apprehension that the industrial concern is unable to pay its debts or that proceedings for liquidation may be commenced in respect thereof; or

(d) if the property pledged, mortgaged, hypothecated or assigned to the Corporation as security for the loan or advance is not insured and kept insured by the industrial concern to the satisfaction of the Corporation; or depreciates in value, in the opinion of the Board, by more than twenty per cent., and further security to the satisfaction of the Board is not given; or

(e) if, without the permission of the Board, machinery or other equipment, whether forming part of the security or otherwise, is removed from the premises of the industrial concern without being replaced; or

(f) if for any reason it is necessary in the opinion of the Board to protect the interests of the Corporation.

Special provisions for enforcement of claims by the Corporation.

30. *(1)* Where by reason of the breach of any condition of an agreement between the Corporation and an industrial concern the Corporation becomes entitled to call for the immediate payment of any loan or advance granted by it, before the due date or where the due date has expired, and the industrial concern fails to repay such loan or advance, any officer of the Corporation generally or especially authorised by the Board in this behalf may apply to the District Judge within the local limits of whose jurisdiction the industrial concern carries on the whole or a substantial part of its business for one or more of the following reliefs, namely :—

(a) for an order for the sale of the property pledged, mortgaged, hypothecated or assigned to the Corporation as security for the loan or advance, or

(b) for transferring the management of the industrial concern to the Corporation, or

(c) for an *ad interim* injunction where there is apprehension of the machinery or the equipment being removed from the premises of the industrial concern without the permission of the Board.

(2) An application under sub-section *(1)* shall state the nature and extent of the liability of the industrial concern to the Corporation, the ground on which it is made and such other particulars as may be prescribed.

(3) When the application is for the reliefs mentioned in sub-clauses *(a)* and *(c)* of sub-

section *(1)* the District Judge shall pass an *ad interim* order attaching the security or so much of the property of the industrial concern as would on being sold realise in his estimation an amount equivalent in value to the outstanding liability of the industrial concern to the Corporation together with the costs of the proceedings taken under this section with or without an *ad interim* injunction restraining the industrial concern from transferring or removing its machinery or equipment.

(4) Where the application is for the relief mentioned in sub-clause *(b)* of sub-section *(1)*, the District Judge shall grant an *ad interim* injunction restraining the industrial concern from transferring or removing its machinery or equipment and issue a notice calling upon the industrial concern to show cause on a date to be specified in the notice why the management of the industrial concern should not be transferred to the Corporation.

(5) Before passing any order under sub-section *(3)* or sub-section *(4)*, the District Judge may, if he thinks fit, examine the officer making the application.

(6) At the same time as he passes an order under sub-section *(3)*, the District Judge shall issue to the industrial concern a notice accompanied by copies of the order, the application and the evidence, if any, recorded by him, calling upon it to show cause on a date to be specified in the notice why the *ad interim* order of attachment should not be made absolute or the injunction confirmed.

(7) If no cause is shown on or before the date specified in the notice under sub-sections *(4)* and *(6)*, the District Judge shall forthwith make the *ad interim* order absolute and direct the sale of the attached property or transfer the management of the industrial concern to the Corporation or confirm the injunction.

(8) If cause is shown the District Judge shall proceed to investigate the claim of the Corporation and the provisions of the Code of Civil Procedure shall as far as practicable apply to such proceedings.

(9) On an investigation made under sub-section *(8)* the District Judge shall pass an order—

(a) confirming the order of attachment and directing the sale of the attached property, or

(b) varying the order of attachment so as to release a portion of the property from attachment and directing the sale of the remainder of the attached property, or

(c) releasing the property from attachment, if he is satisfied that it is not necessary in the interests of the Corporation, or

(d) confirming or dissolving the injunction, or

(e) transferring the management of the industrial concern to the Corporation or rejecting the claim made in this behalf :

Provided that when making any order under clause *(c)*, the District Judge may make such further orders as he thinks necessary to protect the interests of the Corporation, and may apportion the costs of the proceedings in such manner as he thinks fit :

Provided further that unless the Corporation intimates to the District Judge that it will not appeal against any order releasing any property from attachment, such order shall not be given effect to until the expiry of the period fixed under sub-section *(11)* within which an appeal may be preferred, or if an appeal is preferred unless the High Court otherwise directs, until the appeal is disposed of.

(10) An order of attachment or sale of property under this section shall be carried into effect as far as may be practicable in the manner provided in the Code of Civil Procedure for the attachment or sale of property in execution of a decree, as if the Corporation were the decree-holder.

(11) Any party aggrieved by an order under sub-section *(7)* or sub-section *(9)* may, within thirty days from the date of the order, appeal to the High Court, and upon such appeal, the High Court may after hearing the parties pass such orders as it thinks proper.

(12) Nothing in this section shall be construed, where proceedings for liquidation in respect of the industrial concern have commenced before an application is made under sub-section *(1)* as giving to the Corporation any preference over the other creditors of the industrial concern not conferred on it by any other law.

(13) The functions of a District Judge under this section shall, in a Presidency-town, be exercised by the Chief Judge of the Small Cause Court.

Act XVIII of 1891 to apply to the books of the Corporation.

31. The Corporation shall be deemed to be a bank for the purposes of the Banker's Books Evidence Act, 1891.

Disposal of profits.

32. *(1)* The Corporation shall establish a reserve fund.

(2) After making provision for bad and doubtful debts, depreciation of assets and all other matters which are usually provided for by bankers, the Corporation may out of its net annual profits declare a dividend :

Provided that for so long as the reserve fund is less than the paid up share capital of the Corporation and until there has been repaid to the Central Government such sums, if any, as

that Government may have paid under the guarantee given in pursuance of section 5 or under any guarantee given in pursuance of sub-section *(2)* of section 21, the rate of such dividend shall not exceed the rate guaranteed by the Central Government under section 5 :

Provided further that under no circumstances shall any such dividend exceed the rate of five per cent. per annum and if in respect of any financial year after the reserve fund becomes equal to the share capital of the Corporation there is after declaring a dividend at that rate any surplus in the net profits, such surplus shall be paid to the Central Government.

General meetings.

33. *(1)* A general meeting (hereinafter referred to as the annual general meeting) shall be held annually at a place in India where there is an office of the Corporation within two months from the date on which the annual accounts of the Corporation are closed; and a general meeting may be convened by the Board at any other time.

(2) The shareholders present at the annual general meeting shall be entitled to discuss the annual accounts, the report of the Board on the working of the Corporation throughout the year and the auditors' report on the annual balance-sheet and accounts.

Audit.

34. *(1)* The affiairs of the Corporation shall be audited by not less than two auditors qualified under section 144 of the Indian Companies Act, 1913, to act as auditors of companies who shall be appointed by the Central Government on such remuneration as the Central Government may fix, and such remuneration shall be paid by the Corporation.

(2) Every auditor shall be supplied with a copy of the annual balance-sheet of the Corporation, and it shall be his duty to examine it together with the accounts and vouchers relating thereto; and every auditor shall have a list delivered to him of all books kept by the Corporation, and shall at all reasonable times have access to the books, accounts and other documents of the Corporation, and may in relation to such accounts examine any Director or officer of the Corporation.

(3) The auditors shall make a report to the shareholders upon the annual balance-sheet and accounts, and in every such report they shall state whether in their opinion the balance-sheet is a full and fair balance-sheet containing all necessary particulars and properly drawn up so as to exhibit a true and correct view of the state of the affairs of the Corporation, and in case they have called for any explanation or information from the Board whether it has been given and whether it is satisfactory.

(4) The Central Government may at any time issue directions to the auditors requiring them to report to it upon the adequacy of measures taken by the Corporation for the protection of its shareholders and creditors or upon the sufficiency of their procedure in auditing the affairs of the Corporation, and may at any time enlarge or extend the scope of the audit or direct that a different procedure in audit be adopted or direct that any other examination be made by the auditors if in its opinion the public interest so requires.

Returns.

35. *(1)* The Corporation shall furnish a statement in the prescribed form of its assets and liabilities as at the close of business on the last Friday of each month, or if that day is a public holiday under the Negotiable Instruments Act, 1881 (XXVI of 1881), as at the close of business on the preceding working day, to all shareholders within ten days from the date to which the statement relates.

(2) The Corporation shall furnish in the prescribed form to the Central Government and to the Reserve Bank at least once in every year or as frequently as the Central Government or the Reserve Bank may require a classification of its loans and investments of loans guaranteed by it and underwriting agreements entered into by it.

(3) The Corporation shall furnish to the Central Government and the Reserve Bank within two months of the close of the financial year a statement in the prescribed form of its assets and liabilities as at the close of that year together with a profit and loss account for the year and a report of the working of the Corporation during the year, and copies of the said statement, account and report shall be published in the official Gazette and shall be laid before the Central Legislature.

Acquisition of shares by the Central Government.

36. In the event of the Central Government at any time deciding to acquire the shares held by share-holders other than the Central Government and the Reserve Bank the share-holders shall be paid for the shares so acquired an amount equal to the paid up value of the shares together with a premium calculated at the rate of one per cent. of the paid up value for every year from the date of issue to the date of acquisition, subject to a maximum of ten per cent.

Liquidation of Corporation.

37. No provision of law relating to the winding up of companies or corporations shall apply to the Corporation, and the Corporation shall not be placed in liquidation save by order of the Central Government and in such manner as it may direct.

Indemnity of Directors.

38. *(1)* Every Director shall be indemnified by the Corporation against all losses and expenses incurred by him in or about the discharge of his duties, except such as are caused by his own wilful act or default.

(2) A Director shall not be responsible for any other Director or for any officer or servant of the Corporation or for any loss or expense resulting to the Corporation by the insufficiency or deficiency of value of, or title to, any property or security acquired or taken on behalf of the Corporation, or by the wrongful act of any person under obligation to the Corporation or by anything done in good faith in the execution of the duties of his office or in relation thereto.

Declaration of fidelity and secrecy.

39. Every Director, auditor, officer or servant of the Corporation shall, before entering upon his duties, make a declaration of fidelity and secrecy in the form set out in the Schedule.

Provision relating to income-tax and super-tax.

40. For the purposes of the Indian Income-tax Act, 1922, the Corporation shall be deemed to be a company within the meaning of that Act and shall be liable to income-tax and super-tax accordingly on its income, profits and gains :

Provided that any sum paid by the Central Government under the guarantee given in pursuance of section 5 or under any guarantee given in pursuance of sub-section *(2)* of section 21 shall not be treated as the income, profits and gains of the Corporation, and any interest on debentures or bonds paid by the Corporation out of such sum shall not be treated as expenditure incurred by it :

Provided further that in the case of any share-holder, such portion of a dividend as has been paid out of any such sum advanced by the Central Government, shall be deemed to be his income from "interest on securities", declared to be income-tax free within the meaning of section 8 of the said Act.

Offences.

41. *(1)* Whoever in any bill of lading, warehouse receipt or other instrument given to the Corporation whereby security is given or is purported to be given to the Corporation for any accommodation granted by it under this Act wilfully makes any false statement, or knowingly permits any false statement to be made, shall be punishable with imprisonment for a term which may extend to two years or with fine which may extend to two thousand rupees or with both.

(2) Whoever without the consent in writing of the Corporation uses the name of the Corporation in any prospectus or advertisement shall be punishable with imprisonment for a term which may extend to six months or with fine which may extend to one thousand rupees or with both.

(3) No Court shall take cognizance of any offence punishable under this Act otherwise than on a complaint in writing signed by an officer of the Corporation authorised by the Board in this behalf.

Power of Central Government to make rules.

42. The Central Government may make rules not inconsistent with the provisions of this Act, to give effect to the provisions of this Act, and where there is any inconsistency between the rules and the regulations made under this Act the rules shall prevail.

Power of Board to make regulations.

43. *(1)* The Board may, after consultation with the Reserve Bank and with the previous sanction of the Central Government, make regulations[a] not inconsistent with this Act to provide for all matters for which provision is necessary or expedient for the purpose of giving effect to the provisions of this Act.

(2) In particular and without prejudice to the generality of the foregoing power, such regulations may provide for—

(a) the holding and conduct of elections under this Act, including the final decision of doubts or disputes regarding the validity of elections ;

(b) the manner in which and the conditions subject to which the first allotment of shares of the Corporation shall be made ;

(c) the manner in which and the conditions subject to which the shares of the Corporation may be held and transferred, and generally all matters relating to the rights and duties of share-holders ;

(d) the manner in which general meetings shall be convened, the procedure to be followed thereat and the manner in which voting rights may be exercised ;

(e) the calling of meeting of the Board and of the Executive Committee, fees for attending meetings thereof and the conduct of business thereat ;

(f) the manner and terms of issue and redemption of bonds and debentures by the Corporation ;

(g) the conditions which the Corporation may impose in granting loans or advances ;

(h) the manner of determining the sufficiency of the security taken under sub-section *(2)* of section 23 ;

(i) the manner and conditions subject to which the Corporation may borrow in foreign currency from foreign lenders ;

(j) the forms of returns and statements required under this Act;

(k) the duties and conduct of officers and servants and agents of the Corporation;

(l) the disclosure of interest, direct or indirect, of a Director in any industrial concern;

(m) taking over the management of and managing an industrial concern committing a breach of its agreement with the Corporation;

(n) appointment of *ad hoc* committees for technical and other advice for purposes of this Act; and

(o) generally, the efficient conduct of the affairs of the Corporation.

(3) All regulations made under this section shall be published in the official Gazette and shall come into force on such publication and shall also be laid on the table of the Legislature.

[a.] For Regulations, *see* Gazette of India, 1948, Extraord., page 1220.

THE SCHEDULE

(*See* section 39)

Declaration of Fidelity and Secrecy.

I,....., do declare that I will faithfully, truly and to the best of my judgment, skill and ability, execute and perform the duties required of me as a Director, officer, employee or auditor (as the case may be) of the Industrial Finance Corporation of India and which properly relate to any office or position in the said Corporation held by me.

I further declare that I will not communicate or allow to be communicated to any person not legally entitled thereto any information relating to the affairs of the Corporation nor will I allow any such person to inspect or have access to any books or documents belonging to or in the possession of the Corporation and relating to the business of the Corporation.

Signature.....

Signed before me.

Signature.....

Designation.....

Date.....

[THE INDIAN] MATRIMONIAL CAUSES (WAR MARRIAGES) ACT, 1948 (ACT XL OF 1948)

STATEMENT OF OBJECTS AND REASONS.

"In the course of the judgment delivered in the case of *Mrs. Margaret Pierce* v. *Mr. George Albert Pierce*, the Additional District Judge, 24-Parganas, Calcutta, observed as follows:

'The position of a woman domiciled in India who marries a foreigner not domiciled in India appears to be extremely anomalous in regard to the law of divorce. She can apparently obtain no relief under the Indian Divorce Act, 1869, and, inasmuch as the Indian and Colonial Divorce Jurisdiction Act, 1926, is applicable only to parties who are British subjects domiciled in England and Scotland, she can obtain no relief under that Act either .... The anomaly of this position is intensified in regard to a war-time marriage contracted by a woman domiciled in India with a foreigner serving temporarily in India on military duty; and inasmuch as not a few war-time marriages of this character must presumably have been contracted between women domiciled in this country and foreigners temporarily resident here during the war, it would seem that there is a lacuna in the present law of divorce which ought to be filled.'

Under the existing law, no Court in India has jurisdiction to grant a decree of divorce, unless the parties are domiciled in India or in England or Scotland. In other cases the woman has no remedy unless she is in a position to institute proceedings in the country of her husband's domicile. A clear case, therefore, exists on the merits for the enactment in India of a counterpart of the Act in the United Kingdom called the Matrimonial Causes (War-Marriages) Act, 1944, whereby in the case of a marriage celebrated during the war period, where the husband was at the time of the marriage domiciled outside India, and the wife was, immediately before the marriage, domiciled in India, the Indian Courts exercising jurisdiction under the Indian Divorce Act should be vested with jurisdiction in relation to proceedings for divorce as if both parties were at all material times domiciled in India. Such a law would obviously apply only in cases where the petitioner or the respondent professes the Christian religion. Hence the present Bill.

Provision is also included in the Bill for limiting the time within which proceedings for divorce or for nullity of marriage may be commenced under the Act."

—Gazette of India, 1948, Part V, page 476.

[THE INDIAN] MATRIMONIAL CAUSES (WAR MARRIAGES) ACT, 1948 (ACT XL OF 1948)[a]

[3rd September, 1948.]

An Act to confer upon Courts temporary jurisdiction in certain matrimonial causes.

WHEREAS it is expedient to confer upon Courts in the Provinces of India temporary jurisdiction in certain matrimonial causes;

It is hereby enacted as follows:—

[a] The Act is applied to—

(a) Chota Nagpur Division and Santal Parganas District—*See* Bihar Gazette, 1948, Part II, page 2515;

(b) all partially excluded areas in the Province of Madras subject to certain modifications—*See* Fort St. George Gazette, 1948, Part I, page 1047;

(c) Jounsar-Bawar in Dehradun District and to the portion of Mirzapur District which lies to the south of Kaimur range — *See* U. P. Gazette, 1948, Part I, page 848.

Short title and extent.

1. *(1)* This Act may be called the Indian Matrimonial Causes (War Marriages) Act, 1948.

(2) It extends to all the Provinces of India.

Definitions.

2. In this Act, unless there is anything repugnant in the subject or context,—

(a) "High Court" shall have the same meaning as in the Indian Divorce Act, 1869;

(b) "marriage" includes a purported marriage which was void *ab initio*, and "husband" and "wife" shall be construed accordingly;

(c) "war period" means the period commencing on the 3rd day of September, 1939, and ending on the 31st day of March, 1946.

Application of Act.

3. The marriages to which this Act applies are marriages solemnized during the war period, where the husband was, at the time of the marriage, domiciled outside India, and the wife was, immediately before the marriage, domiciled in India:

Provided that this Act shall not apply to any marriage if since the solemnization thereof, the parties thereto have resided together in the country in which the husband was domiciled at the time of the residence.

Explanation.—For the purposes of the above proviso, the whole of the United States of America, the whole of the United Kingdom and the whole of any British possession outside India shall each be treated as one country.

Temporary extension of jurisdiction of High Courts.

4. In the case of any marriage to which this Act applies, the High Court shall have jurisdiction in and in relation to any proceedings for divorce or for nullity of marriage as if both parties were at all material times domiciled in India; and subject to the provisions of this Act, the provisions of the Indian Divorce Act, 1869, shall apply, so far as may be, in relation to any such proceedings instituted under this Act as if they were proceedings instituted under that Act:

Provided that this section shall not apply in relation to any proceedings for divorce or for nullity of marriage unless—

(a) the petitioner or the respondent professes the Christian religion, and

(b) the proceedings for divorce or for nullity of marriage are commenced not later than three years from the commencement of this Act.

Saving.

5. Nothing in this Act shall be deemed to extend or alter the jurisdiction of the High Court in, or in relation to, any proceedings for divorce or for nullity of marriage, where at the commencement of those proceedings the parties are domiciled anywhere in India.

Certain decrees and orders to be recognised.

6. The validity of any decree or order made in the United Kingdom by virtue of the Matrimonial Causes (War Marriages) Act, 1944 (7 and 8 Geo. VI, c. 43) shall, by virtue of this Act, be recognised in all Courts in the Provinces of India.

Power to make rules.

7. The High Court may make such rules as may be necessary for the purpose of carrying out the objects of this Act.

[THE] MINES AND MINERALS (REGULATION AND DEVELOPMENT) ACT, 1948.

(ACT LIII OF 1948)

STATEMENT OF OBJECTS AND REASONS.

"The question of Central regulation of mines and oilfields and mineral development has been engaging the attention of Government for some time. The need for Central regulation was amply illustrated in the last war when certain key minerals had to be controlled under the Defence of India Act. It is now well recognised that a planned and uniform policy of mineral development is essential to economic and industrial progress. The Industrial Policy Resolution of the 6th April 1948 included minerals amongst the industries whose location must be governed by economic factors of all-India import or which require considerable investment or a high degree of technical skill and must consequently be the subject of Central regulation and control.

This Bill has accordingly been drafted under Item 36 of the Federal Legislative List of the Seventh Schedule to the Government of India Act, 1935, to regulate mines and oilfields and mineral development on the lines contemplated in the Industrial Policy Resolution of the 6th April 1948. It seeks to give powers to the Central Government to frame rules for the regulation of the terms and conditions of mining leases, as also for the conservation and development of minerals. It also provides for modification of existing leases on payment of compensation. Clause 8 provides for delegation of powers to Provincial Governments or any officers or authority as may be specified in this behalf, e.g., a Coal Commission. Clause 11 confers powers of entry and inspection on any officers authorised by the Central Government in this behalf. Finally, there is a clause prescribing penalties for contravention of any of the provisions of the Act or the rules made thereunder. The rules made under the Act will be laid before the Legislature as soon as may be after they are made, while rules relating to compensation to be paid for modification of existing leases will not be operative unless and until they are approved by the Legislature."

—Gazette of India, 1948, Part V, page 601.

[THE] MINES AND MINERALS (REGULATION AND DEVELOPMENT) ACT, 1948. (ACT LIII OF 1948)[a]

[8th September, 1948.]

An Act to provide for the regulation of mines and oilfields and for the development of minerals.

WHEREAS it is expedient in the public interest to provide for the regulation of mines and oilfields and for the development of minerals to the extent hereinafter specified;

It is hereby enacted as follows:—

[a] For Report of Select Committee, *see* Gazette of India, 1948, Part V, page 641.

The Act is applied to all the partially excluded areas in the C. P. and Berar subject to certain modifications— *See* C. P. & Berar Gazette, 1948, Part I, page 809.

Short title, extent and commencement.

1. *(1)* This Act may be called the Mines and Minerals (Regulation and Development) Act, 1948.

(2) It extends to all the Provinces of India and also to any Acceding State for which the Central Legislature has for the time being the power to make laws as respects mines and oilfields and the development of minerals.

(3) It shall come into force on such date as the Central Government may, by notification in the official Gazette, appoint in this behalf.

Declaration as to expediency of control by Central Government.

2. It is hereby declared that it is expedient in the public interest that the Central Government should take under its control the regulation of mines and oilfields and the development of minerals to the extent hereinafter provided.

Definitions.

3. In this Act, unless there is anything repugnant in the subject or context,—

(a) the expressions "lessor" and "lessee" respectively include a licensor and licensee;

(b) "mine" means any excavation for the purpose of searching for or obtaining minerals and includes an oil-well;

(c) "minerals" include natural gas and petroleum;

(d) "mining lease" means a lease granted for the purpose of searching for, winning, working, getting, making merchantable, carrying away or disposing of minerals or for the purposes connected therewith, and includes an exploring or a prospecting license;

(e) "oilfield" means any area where any operation for the purpose of obtaining natural gas and petroleum, crude oil, refined oil, partially refined oil and any of the products of petroleum in a liquid or solid state, is to be or is being carried on.

No mining lease to be valid unless it is in accordance with this Act.

4. *(1)* No mining lease shall be granted after the commencement of this Act otherwise than in accordance with the rules made under this Act.

(2) Any mining lease granted contrary to the provisions of sub-section *(1)* shall be void and of no effect.

Power to make rules as respects mining leases.

5. *(1)* The Central Government may, by notification in the official Gazette, make rules for regulating the grant of mining leases or for prohibiting the grant of such leases in respect of any mineral or in any area.

(2) In particular, and without prejudice to the generality of the foregoing power, such rules may provide for all or any of the following matters, namely:—

(a) the manner in which, the minerals or areas in respect of which and the persons by whom, applications for mining leases may be made and the fees to be paid on any such applications;

(b) the authority by which, the terms on which, and the conditions subject to which, mining leases may be granted;

(c) the maximum or minimum area and the period for which any mining lease may be granted, and the terms on which leases in respect of contiguous areas may be amalgamated;

(d) the fixing of the maximum and minimum rent payable by a lessee, whether the mine is worked or not.

Power to make rules as respects mineral development.

6. *(1)* The Central Government may, by notification in the official Gazette, make rules for the conservation and development of minerals.

(2) In particular, and without prejudice to the generality of the foregoing power, such rules may provide for all or any of the following matters, namely:—

(a) the regulation or prohibition of the mining, quarrying or digging for or the excavating or collecting of minerals from any mine or in any area;

(b) the manner in which and the persons by whom any minerals or any area as respects which the grant of mining leases is prohibited may be developed or worked;

(c) the development of any mineral resources in any area by prescribing or regulating the use of any engines, machinery or other equipment;

(d) the regulation of the drilling, redrilling, deepening, shutting down, plugging and aban-

doning of oilwells in an oilfield and for the limitation or prohibition of such operations and for the taking of remedial measures to prevent waste of or damage to oil;

(e) the regulation of the methods of producing oil in any oilfield, and the limitation or prohibition of such methods;

(f) the compulsory notification of all new borings and shaft sinkings, and the preservation of boring records and specimens of cores of all new bore-holes;

(g) the taking of samples from mines and new bore holes;

(h) the regulation of the arrangements for the storage of minerals and the stocks thereof that may be kept by any person;

(i) the levy and collection of royalties, fees or taxes in respect of minerals mined, quarried, excavated or collected;

(j) the submission by the owners or lessees of mines of special or periodical returns and reports, and the forms in which and the authorities to whom such returns and reports shall be submitted.

Power to make rules for modification of existing leases.

7. *(1)* The Central Government may, by notification in the official Gazette, make rules for the purpose of modifying or altering the terms and conditions of any mining lease granted prior to the commencement of this Act so as to bring such lease into conformity with the rules made under sections 5 and 6:

Provided that any rules so made which provide for the matters mentioned in clause *(c)* of sub-section *(2)* shall not come into force until they have been approved, either with or without modifications, by the Central Legislature.

(2) The rules made under sub-section *(1)* shall provide:—

(a) for giving previous notice of the modification or alteration proposed to be made thereunder to the lessee, and where the lessor is not the Central Government, also to the lessor, and for affording them an opportunity of showing cause against the proposal;

(b) for the payment of compensation by the party who would be benefited by the proposed modification or alteration to the party whose rights under the existing lease would thereby be adversely affected; and

(c) for the principles on which, the manner in which and the authority by which the said compensation shall be determined.

Delegation.

8. The Central Government may, by notification in the official Gazette, direct that any power exercisable under this Act shall be exercised, subject to such conditions, if any, as may be specified therein by such officer or authority as may be specified in the direction.

Penalties.

9. *(1)* Any rule made under any of the provisions of this Act may provide that any contravention thereof shall be punishable with imprisonment which may extend to six months or with fine which may extend to one thousand rupees or with both.

(2) Whoever, after having been convicted of any offence referred to in sub-section *(1)*, continues to commit such offence shall be punishable for each day after the date of the first conviction during which he continues so to offend, with fine which may extend to one hundred rupees.

Rules to be laid before the Legislature.

10. All rules made under any of the provisions of this Act shall be laid before the Central Legislature as soon as may be after they are made.

Power of inspection.

11. *(1)* For the purpose of ascertaining the position of the working, actual or prospective, of any mine or abandoned mine or for any other purpose mentioned in this Act or the rules made thereunder, any officer authorised by the Central Government in this behalf shall have the right to—

(a) enter and inspect any mine;

(b) order the production of any document, book, register or record in the possession or power of any person having the control of, or connected with, any mine;

(c) examine any person having the control of, or connected with, any mine.

(2) Any officer authorised by the Central Government under sub-section *(1)* shall be deemed to be a public servant within the meaning of section 21 of the Indian Penal Code, 1860.

Relaxation of rules in special cases.

12. The Central Government may, if satisfied that it is in the public interest so to do, authorise in any case the granting of any mining lease or the working of any mine on terms and conditions different from those laid down in the rules made under sections 5 and 6.

Act to be binding on the Crown.

13. The provisions of this Act shall be binding on the Crown, whether in the right of the Dominion or of a Province.

Protection of action taken in good faith.

14. No suit, prosecution or other legal proceeding whatever shall lie against any person for anything which is in good faith done or intended to be done under this Act.

(ACT XI OF 1948.)

STATEMENT OF OBJECTS AND REASONS.

"The justification for statutory fixation of minimum wages is obvious. Such provisions which exist in more advanced countries are even more necessary in India, where workers' organizations are yet poorly developed and the workers' bargaining power is consequently poor.

The Bill provides for fixation, by the Provincial Governments, of minimum wages for employments covered by the Schedule to the Bill. The items in the Schedule are those where sweated labour is most prevalent or where there is a big chance of exploitation of labour. After a time, when some experience is gained, more categories of employments can be added and the Bill provides for additions to the Schedule. A higher period is allowed for fixation of minimum wages for Agricultural labour as administrative difficulties in this case will be more than in the other employments covered by the Schedule. The Bill also provides for periodical revision of the wages fixed.

Provision has been made for appointment of Advisory Committees and Advisory Boards, the latter for coordination of work of the Advisory Committees. The Committees and the Boards will have equal representation of employers and workmen. Except on initial fixation of minimum wages, consultation with the Adisory Committees will be obligatory on all occasions of revision.

In cases where an employer pays less than the minimum wages fixed by Provincial Governments, a summary procedure has been provided for recovery of the balance with penalty and for subsequent prosecution of the offending party.

It is not ordinarily proposed to make any exemptions in regard to employees of undertakings belonging to the Central Government except that difficulties might arise where the sphere of duty of such an employee covers more than one Province and when the rates of minimum wages fixed by the different Provinces may be different. For this purpose, a provision has been included that the minimum wages fixed by a Provincial Government will not apply to employees in any undertaking owned by the Central Government or employees of a Federal railway, except with the consent of the Central Government."

—Gazette of India, 1946, Part V, page 331.

[THE] MINIMUM WAGES ACT, 1948.

(ACT XI OF 1948)[a]

[15th March, 1948.]

An Act to provide for fixing minimum rates of wages in certain employments.

WHEREAS it is expedient to provide for fixing minimum rates of wages in certain employments;

It is hereby enacted as follows:—

[a.] For Select Committee Report, *see* Gazette of India, 1948, Part V, page 55.

This Act is applied to—

(a) Chota Nagpur Division and Santal Parganas District, *see* Bihar Gazette, 1948, Part II, page 878;

(b) partially excluded areas in the Bombay Presidency—*see* Bombay Gazette, 1948, Part IV-A, page 399;

(c) Darjeeling District—*see* Calcutta Gazette, 1948, Part I, page 722;

(d) partially excluded areas in C. P. and Berar subject to certain modifications—*see* C. P. and Berar Gazette, 1948, Part I, page 675.

Short title and extent.

1. *(1)* This Act may be called the Minimum Wages Act, 1948.

(2) It extends to all the Provinces of India.

Interpretation.

2. In this Act, unless there is anything repugnant in the subject or context,—

(a) "adult", "adolescent" and "child" have the meanings respectively assigned to them in section 2 of the Factories Act, 1934;

(b) "appropriate Government" means—

(i) in relation to any scheduled employment carried on by or under the authority of the Central Government by the Federal railway authority, or a railway company operating a Federal railway or in relation to a mine, oilfield or major port, or any corporation established by an Act of the Central Legislature, the Central Government; and

(ii) in relation to any other scheduled employment, the Provincial Government;

(c) "competent authority" means the authority appointed by the appropriate Government by notification in its official Gazette to ascertain from time to time the cost of living index number applicable to the employees employed in the scheduled employments specified in such notification;

(d) "cost of living index number" in relation to employees in any scheduled employment in respect of which minimum rates of wages have been fixed, means the index number ascertained and declared by the competent authority by notification in the official Gazette to be the cost of living index number applicable to employees in such employment;

(e) "employer" means any person who employs, whether directly or through another person, or whether on behalf of himself or any other person, one or more employees in any scheduled employment in respect of which minimum rates of wages have been fixed under this Act, and includes, except in sub-section *(3)* of section 26,—

(i) in a factory where there is carried on any scheduled employment in respect of which minimum rates of wages have been fixed under this

Act, any person named under clause *(e)* of sub-section *(1)* of section 9 of the Factories Act, 1934, as manager of the factory;

(ii) in any scheduled employment under the control of any Government in India in respect of which minimum rates of wages have been fixed under this Act, the person or authority appointed by such Government for the supervision and control of employees or where no person or authority is so appointed, the head of the Department;

(iii) in any scheduled employment under any local authority in respect of which minimum rates of wages have been fixed under this Act, the person appointed by such authority for the supervision and control of employees or where no person is so appointed, the chief executive officer of the local authority;

(iv) in any other case where there is carried on any scheduled employment in respect of which minimum rates of wages have been fixed under this Act, any person responsible to the owner for the supervision and control of the employees or for the payment of wages;

(f) "prescribed" means prescribed by rules made under this Act;

(g) "scheduled employment" means an employment specified in the Schedule, or any process or branch of work forming part of such employment;

(h) "wages" means all remuneration, capable of being expressed in terms of money, which would, if the terms of the contract of employment, express or implied, were fulfilled, be payable to a person employed in respect of his employment or of work done in such employment, but does not include—

(i) the value of—

(a) any house accommodation, supply of light, water, medical attendance, or

(b) any other amenity or any service excluded by general or special order of the appropriate Government;

(ii) any contribution paid by the employer to any Pension Fund or Provident Fund or under any Scheme of social insurance;

(iii) any travelling allowance or the value of any travelling concession;

(iv) any sum paid to the person employed to defray special expenses entailed on him by the nature of his employment; or

(v) any gratuity payable on discharge;

(i) "employee" means any person who is employed for hire or reward to do any work, skilled, or unskilled, manual or clerical, in a scheduled employment in respect of which minimum rates of wages have been fixed; and includes an out-worker to whom any articles or materials are given out by another person to be made up, cleaned, washed, altered, ornamented, finished, repaired, adapted or otherwise processed for sale for the purposes of the trade or business of that other person where the process is to be carried out either in the home of the out-worker or in some other premises not being premises under the control and management of that other person; and also includes an employee declared to be an employee by the appropriate Government; but does not include any member of the armed forces of the Crown.

Fixing of minimum rates of wages.

3. *(1)* The appropriate Government shall, in the manner hereinafter provided,—

(a) fix, before the expiry of three years in the case of an employment specified in Part II of the Schedule, or two years in any other case, from the commencement of this Act or, as the case may be, from the date of the notification under section 27 including the employment in the Schedule, the minimum rates of wages payable to employees employed in all scheduled employments;

(b) review at such intervals as it may think fit, such intervals not to exceed five years, the minimum rates of wages so fixed and revise the minimum rates, if necessary:

Provided that the appropriate Government shall not be required to fix minimum rates of wages in respect of any scheduled employment in which there are in the whole Province less than one thousand employees engaged in such employment.

(2) The appropriate Government may fix—

(a) a minimum rate of wages for time work (hereinafter referred to as "a minimum time rate");

(b) a minimum rate of wages for piece work (hereinafter referred to as "a minimum piece rate"),

(c) a minimum rate of remuneration to apply in the case of employees employed on piece work for the purpose of securing to such employees a minimum rate of wages on a time work basis (hereinafter referred to as "a guaranteed time rate");

(d) a minimum rate (whether a time rate or a piece rate) to apply in substitution for the minimum rate which would otherwise be applicable, in respect of overtime work done by employees (hereinafter referred to as "overtime rate").

(3) In fixing or revising minimum rates of wages under this section,—

(a) different minimum rates of wages may be fixed for—

(i) different scheduled employments;

(ii) different classes of work in the same scheduled employment;

(iii) adults, adolescents, children and apprentices;

(iv) different localities;

(b) minimum rates of wages may be fixed by the hour, by the day or by any larger wage period as may be prescribed:

Provided that where any wage periods have been fixed under section 4 of the Payment of Wages Act, 1936, minimum wages shall be fixed in accordance therewith.

Minimum rate of wages.

4. *(1)* Any minimum rate of wages fixed or revised by the appropriate Government in respect of scheduled employments under section 3 may consist of—

(i) a basic rate of wages and a special allowance at a rate to be adjusted, at such intervals and in such manner as the appropriate Government may direct, to accord as nearly as practicable with the variation in the cost of living index number applicable to such workers (hereinafter referred to as the "cost of living allowance"); or

(ii) a basic rate of wages with or without the cost of living allowance, and the cash value of the concessions in respect of supplies of essential commodities at concession rates, where so authorised; or

(iii) an all-inclusive rate allowing for the basic rate, the cost of living allowance and the cash value of the concessions, if any.

(2) The cost of living allowance and the cash value of the concessions in respect of supplies of essential commodities at concession rates shall be computed by the competent authority at such intervals and in accordance with such directions as may be specified or given by the appropriate Government.

Procedure for fixing minimum wages.

5. *(1)* In fixing minimum rates of wages in respect of any scheduled employment for the first time under this Act, the appropriate Government shall either—

(a) appoint a committee to hold enquiries and advise it in this behalf with such sub-committees for different localities as it may deem expedient to assist such committee, or

(b) by notification in the official Gazette, publish its proposals for the information of persons likely to be affected thereby and specify a date, not less than two months from the date of the notification, on which the proposals will be taken into consideration.

(2) After considering the advice of the committee appointed under clause *(a)* of sub-section *(1)*, or as the case may be, all representations received by it before the date specified in the notification under clause *(b)* of that sub-section, the appropriate Government shall, by notification in the official Gazette, fix the minimum rates of wages in respect of each scheduled employment, and unless such notification otherwise provides, it shall come into force on the expiry of three months from the date of its issue.

Advisory Committees and sub-committees.

6. For the purpose of revising minimum rates of wages fixed under this Act, the appropriate Government shall appoint as many advisory committees and sub-committees as it considers necessary to inquire into the conditions prevailing in any scheduled employment and to advise the appropriate Government in making such revision in respect of that employment.

Advisory Board.

7. For the purpose of co ordinating the work of committees, sub-committees, advisory committees and advisory sub-committees appointed under sections 5 and 6 and advising the appropriate Government generally in the matter of fixing and revising minimum rates of wages, the appropriate Government shall appoint an Advisory Board.

Central Advisory Board.

8. *(1)* For the purpose of advising the Central and Provincial Governments in the matters of the fixation and revision of minimum rates of wages and other matters under this Act and for co-ordinating the work of the Advisory Boards, the Central Government shall appoint a Central Advisory Board.

(2) The Central Advisory Board shall consist of persons to be nominated by the Central Government representing empolyers and employees in the scheduled employments, who shall be equal in number, and independent persons not exceeding one-third of its total number of members; one of such independent persons shall be appointed the Chairman of the Board by the Central Government.

Composition of Committees, etc.

9. Each of the committees, sub-committees, advisory committees, advisory sub-committees and the Advisory Board shall consist of persons to be nominated by the appropriate Government representing employers and employees in the scheduled employments, who shall be equal in number, and independent persons not exceeding one-third of its total number of members; one of such independent persons shall be appointed the Chairman by the appropriate Government.

Procedure for revision of minimum rates of wages.

10. *(1)* Before revising any minimum wages fixed under this Act, the appropriate Government shall consult all advisory com-

mittees appointed under section 6 to inquire into the conditions prevailing in the scheduled employment concerned, and the Advisory Board also.

(2) Revisions of minimum wages shall be notified by the appropriate Government in the official Gazette, and unless the notification otherwise provides, it shall come into force on the expiry of three months from the date of its issue.

Wages in kind.

11. *(1)* Minimum wages payable under this Act shall be paid in cash.

(2) Where it has been the custom to pay wages wholly or partly in kind, the appropriate Government being of the opinion that it is necessary in the circumstances of the case may, by notification in the official Gazette, authorise the payment of minimum wages either wholly or partly in kind.

(3) If the appropriate Government is of the opinion that provision should be made for the supply of essential commodities at concession rates, the appropriate Government may, by notification in the official Gazette, authorise the provision of such supplies at concession rates.

(4) The cash value of wages in kind and of concessions in respect of supplies of essential commodities at concession rates authorised under sub-sections *(2)* and *(3)* shall be estimated in the prescribed manner.

Payment of minimum rates of wages.

12. *(1)* Where in respect of any scheduled employment a notification under section 5 or section 10 is in force, the empolyer shall pay to every employee engaged in a scheduled employment under him wages at a rate not less than the minimum rate of wages fixed by such notification for that class of empolyees in that employment without any deductions except as may be authorised within such time and subject to such conditions as may be prescribed.

(2) Nothing contained in this section shall affect the provisions of the Payment of Wages Act, 1936.

Fixing hours for a normal working day, etc.

13. In regard to any scheduled employment minimum rates of wages in respect of which have been fixed under this Act, the appropriate Government may—

(a) fix the number of hours of work which shall constitute a normal working day, inclusive of one or more specified intervals;

(b) provide for a day of rest in every period of seven days which shall be allowed to all employees or to any specified class of employees and for the payment of remuneration in respect of such days of rest;

(c) provide for payment for work on a day of rest at a rate not less than the overtime rate.

Overtime.

14. *(1)* Where an employee, whose minimum rate of wages is fixed under this Act by the hour, by the day or by such a longer wage-period as may be prescribed, works on any day in excess of the number of hours constituting a normal working day, the employer shall pay him for every hour or for part of an hour so worked in excess at the overtime rate fixed under this Act or under any law of the appropriate Government for the time being in force, whichever is higher.

(2) Nothing in this Act shall prejudice the operation of the provisions of section 47 of the Factories Act, 1934 in any case where those provisions are applicable.

Wages of worker who works for less than normal working day.

15. If an employee whose minimum rate of wages has been fixed under this Act by the day works on any day on which he was employed for a period less than the requisite number of hours constituting a normal working day, he shall, save as otherwise hereinafter provided, be entitled to receive wages in respect of work done by him on that day as if he had worked for a full normal working day:

Provided, however, that he shall not be entitled to receive wages for a full normal working day—

(i) in any case where his failure to work is caused by his unwillingness to work and not by the omission of the employer to provide him with work, and

(ii) in such other cases and circumstances as may be prescribed.

Wages for two or more classes of work.

16. Where an employee does two or more classes of work to each of which a different minimum rate of wages is applicable, the employer shall pay to such employee in respect of the time respectively occupied in each such class of work, wages at not less than the minimum rate in force in respect of each such class.

Minimum time rate wages for piece work.

17. Where an employee is employed on piece work for which minimum time rate and not a minimum piece rate has been fixed under this Act, the employer shall pay to such employee wages at not less than the minimum time rate.

Maintenance of registers and records.

18. *(1)* Every employer shall maintain such registers and records giving such particulars of employees employed by him, the work performed by them, the wages paid to them, the receipts given by them and such other particulars and in such form as may be prescribed.

(2) Every employer shall keep exhibited, in such manner as may be prescribed, in the factory, workshop or place where the employees in the scheduled employment may be employed, or in the case of out workers, in such factory, workshop or place as may be used for giving out-work to them, notices in the prescribed form containing prescribed particulars.

(3) The appropriate Government may, by rules made under this Act, provide for the issue of wage books or wage slips to employees employed in any scheduled employment in respect of which minimum rates of wages have been fixed and prescribe the manner in which entries shall be made and authenticated in such wage books or wage slips by the employer or his agent.

Inspectors.

19. *(1)* The appropriate Government may, by notification in the official Gazette, appoint such persons as it thinks fit to be Inspectors for the purposes of this Act, and define the local limits within which they shall exercise their functions.

(2) Subject to any rules made in this behalf, an Inspector may, within the local limits for which he is appointed—

(a) enter, at all reasonable hours, with such assistants (if any), being persons in the service of the Crown or any local or other public authority, as he thinks fit, any premises or place where employees are employed or work is given out to out-workers in any scheduled employment in respect of which minimum rates of wages have been fixed under this Act, for the purpose of examining any register, record of wages or notices required to be kept or exhibited by or under this Act or rules made thereunder, and require the production thereof for inspection;

(b) examine any person whom he finds in any such premises or place and who, he has reasonable cause to believe, is an employee employed therein or an employee to whom work is given out therein;

(c) require any person giving out-work and any out-workers, to give any information, which is in his power to give, with respect to the names and addresses of the persons to, for and from whom the work is given out or received, and with respect to the payments to be made for the work;

(d) take copies of any register, record of wages or notices or of any portions thereof; and

(e) exercise such other powers as may be prescribed.

(3) Every Inspector shall be deemed to be a public servant within the meaning of the Indian Penal Code (XLV of 1860).

Claims.

20. *(1)* The appropriate Government may, by notification in the official Gazette, appoint any Commissioner for Workmen's Compensation or other officers with experience as a Judge of a Civil Court or as a stipendiary Magistrate to be the Authority to hear and decide for any specified area all claims arising out of payment of less than the minimum rates of wages to employees employed or paid in that area.

(2) Where an employee is paid less than the minimum rates of wages fixed for his class of work under this Act, the employee himself, or any legal practitioner or any official of a registered trade union authorised in writing to act on his behalf, or any Inspector, or any person acting with the permission of the Authority appointed under sub-section *(1)*, may apply to such Authority for a direction under sub-section *(3)*:

Provided that every such application shall be presented within six months from the date on which the minimum wages became payable:

Provided further that any application may be admitted after the said period of six months when the applicant satisfies the Authority that he had sufficient cause for not making the application within such period.

(3) When any application under sub-section *(2)* is entertained, the Authority shall hear the applicant and the employer or give them an opportunity of being heard, and after such further inquiry, if any, as it may consider necessary, may, without prejudice to any other penalty to which the employer may be liable under this Act, direct the payment to the employee of the amount by which the minimum wages payable to him exceed the amount actually paid, together with the payment of such compensation as the Authority may think fit, not exceeding ten times the amount of such excess and the Authority may direct payment of such compensation in cases where the excess is paid by the employer to the employee before the disposal of the application.

(4) If the Authority hearing any application under this section is satisfied that it was either malicious or vexatious, it may direct that a penalty not exceeding fifty rupees be paid to the employer by the person presenting the application.

(5) Any amount directed to be paid under this section may be recovered—

(a) if the Authority is a Magistrate, by the Authority as if it were a fine imposed by the Authority as a Magistrate, or

(b) if the Authority is not a Magistrate, by any Magistrate to whom the Authority makes application in this behalf, as if it were a fine imposed by such Magistrate.

(6) Every direction of the Authority under this section shall be final.

(7) Every Authority appointed under sub-section *(1)* shall have all the powers of a Civil Court under the Code of Civil Procedure, 1908, for the purpose of taking evidence and of enforcing the attendance of witnesses and compelling the production of documents, and every such authority shall be deemed to be a Civil Court for all the purposes of section 195 and Chapter XXXV of the Code of Criminal Procedure, 1898.

Single application in respect of a number of employees.

21. *(1)* A single application may be presented under section 20 on behalf or in respect of any number of employees employed in the scheduled employment in respect of which minimum rates of wages have been fixed and in such cases the maximum compensation which may be awarded under sub-section *(3)* of section 20 shall not exceed ten times the aggregate amount of such excess.

(2) The Authority may deal with any number of separate pending applications presented under section 20 in respect of employees in the scheduled employments in respect of which minimum rates of wages have been fixed, as a single application presented under sub-section *(1)* of this section and the provisions of that sub section shall apply accordingly.

Penalties and procedure.

22. *(1)* Any employer who pays to any employee less than the minimum rates of wages fixed for that employee's class of work, or less than the amount due to him under the provisions of this Act, or infringes any order or rules made under section 13, shall be punishable with imprisonment of either description for a term which may extend to six months, or with fine which may extend to five hundred rupees, or with both.

Provided that in imposing any fine for an offence under this sub-section, the Court shall take into consideration the amount of any compensation already awarded against the accused in any proceedings taken under section 20.

(2) Any employer who fails to maintain a register or record required to be maintained under section 18 shall be punishable with fine which may extend to five hundred rupees.

(3) No Court shall take cognizance of a complaint against any person for an offence under sub-section *(1)*, unless an application in respect of the facts constituting the offence has been presented under section 20 and has been granted wholly or in part, and the Authority granting such application has sanctioned the making of the complaint.

(4) No Court shall take cognizance of an offence under sub-section *(2)* except on a complaint made by, or with the sanction of, an Inspector.

(5) No Court shall take cognizance of an offence—

(a) under sub-section *(1)*, unless complaint thereof is made within one month of the grant of sanction under sub-section *(3)*;

(b) under sub-section *(2)*, unless complaint thereof is made within six months of the date on which the offence is alleged to have been committed.

Exemption of employer from liability in certain cases.

23. Where an employer is charged with an offence against this Act, he shall be entitled, upon complaint duly made by him, to have any other person whom he charges as the actual offender, brought before the Court at the time appointed for hearing the charge; and if, after the commission of the offence has been proved, the employer proves to the satisfaction of the Court—

(a) that he has used due diligence to enforce the execution of this Act, and

(b) that the said other person committed the offence in question without his knowledge, consent or connivance,

that other person shall be convicted of the offence and shall be liable to the like punishment as if he were the employer and the employer shall be discharged :

Provided that in seeking to prove, as aforesaid, the employer may be examined on oath, and the evidence of the employer or his witness, if any, shall be subject to cross-examination by or on behalf of the person whom the employer charges as the actual offender and by the prosecution.

Bar of suits.

24. No Court shall entertain any suit for the recovery of wages in so far as the sum so claimed—

(a) forms the subject of an application under section 20 which has been presented by or on behalf of the plaintiff, or

(b) has formed the subject of a direction under that section in favour of the plaintiff, or

(c) has been adjudged in any proceeding under that section not to be due to the plaintiff, or

(d) could have been recovered by an application under that section.

Contracting out.

25. Any contract or agreement, whether made before or after the commencement of this Act, whereby an employee either relinquishes or reduces his right to a minimum rate of wages or any privilege or concession accruing to him

under this Act shall be null and void in so far as it purports to reduce the minimum rate of wages fixed under this Act.

Exemptions and exceptions.

26. *(1)* The appropriate Government may, subject to such conditions, if any, as it may think fit to impose, direct that the provisions of this Act shall not apply in relation to the wages payable to disabled employees.

(2) The appropriate Government may, if for special reasons it thinks so fit, by notification in the official Gazette direct that for such period as it may specify the provisions of this Act or any of them shall not apply to all or any class of employees employed in any scheduled employment or to any locality where there is carried on a scheduled employment.

(3) Nothing in this Act shall apply, to the wages payable by an employer to a member of his family who is living with him and is dependant on him.

Explanation.—In this sub-section a member of the employer's family shall be deemed to include his or her spouse or child or parent or brother or sister.

Power of Provincial Government to add to Schedule.

27. The appropriate Government, after giving by notification in the official Gazette not less than three months' notice of its intention so to do, may by like notification, add to either Part of the Schedule any employment in respect of which it is of opinion that minimum rates of wages should be fixed under this Act, and thereupon the Schedule shall in its application to the Province be deemed to be amended accordingly.

Power of Central Government to give directions.

28. The Central Government may give directions to a Provincial Government as to the carrying into execution of this Act in the Province.

Power of the Central Government to make rules.

29. The Central Government may, subject to the condition of previous publication by notification in the official Gazette, make rules prescribing the term of office of the members, the procedure to be followed in the conduct of business, the method of voting, the manner of filling up casual vacancies in membership and the quorum necessary for the transaction of business of the Central Advisory Board.

Power of appropriate Government to make rules.

30. *(1)* The appropriate Government may, subject to the condition of previous publication, by notification in the official Gazette, make rules for carrying out the purposes of this Act.

(2) without prejudice to the generality of the foregoing power, such rules may—

(a) prescribe the term of office of the members, the procedure to be followed in the conduct of business, the method of voting, the manner of filling up casual vacancies in membership and the quorum necessary for the transaction of business of the committees, sub-committees, advisory committees, advisory sub-committees and the Advisory Board;

(b) prescribe the method of summoning witnesses, production of documents relevant to the subject-matter of the enquiry before the committees, sub committees, advisory committees advisory sub-committees and the Advisory Board;

(c) prescribe the mode of computation of the cash value of wages in kind and of concessions in respect of supplies of essential commodities at concession rates ;

(d) prescribe the time and conditions of pay ment of, and the deductions permissible from, wages ;

(e) provide for giving adequate publicity to the minimum rates of wages fixed under this Act;

(f) provide for a day of rest in every period of seven days and for the payment of remuneration in respect of such day;

(g) prescribe the number of hours of work which shall constitute a normal working day ;

(h) prescribe the cases and circumstances in which an employee employed for a period of less than the requisite number of hours constituting a normal working day shall not be entitled to receive wages for a full normal working day ;

(i) prescribe the form of registers and records to be maintained and the particulars to be entered in such registers and records;

(j) provide for the issue of wage books and wage slips and prescribe the manner of making and authenticating entries in wage books and wage slips;

(k) prescribe the powers of Inspectors for purposes of this Act ;

(l) regulate the scale of costs that may be allowed in proceedings under section 20;

(m) prescribe the amount of court-fees payable in respect of proceedings under section 20 ; and

(n) provide for any other matter which is to be or may be prescribed.

THE SCHEDULE

[See sections 2 (g) and 27]

PART I

1. Employment in any woollen carpet making or shawl weaving establishment.

2. Employment in any rice mill, flour mill or dal mill.
3. Employment in any tobacco (including bidi making) manufactory.
4. Employment in any plantation, that is to say, any estate which is maintained for the purpose of growing cinchona, rubber, tea or coffee.
5. Employment in any oil mill.
6. Employment under any local authority.
7. Employment on road construction or in building operations.
8. Employment in stone breaking or stone crushing.
9. Employment in any lac manufactory.
10. Employment in any mica works.
11. Employment in public motor transport.
12. Employment in tanneries and leather manufactory.

PART II

1. Employment in agriculture, that is to say, in any form of farming, including the cultivation and tillage of the soil, dairy farming, the production, cultivation, growing and harvesting of any agricultural or horticultural commodity, the raising of live stock, bees, or poultry, and any practice performed by a farmer or on a farm as incidental to or in conjunction with farm operations (including any forestry or timbering operations and the preparation for market and delivery to storage or to market or to carriage for transportation to market of farm produce).

[THE] NATIONAL CADET CORPS ACT, 1948.
(ACT XXXI OF 1948)

STATEMENT OF OBJECTS AND REASONS.

"It is considered that the present University Officers Training Corps should be overhauled, but at the same time it is felt that full development of character and the capacity for leadership will be possible only when the requisite training is given to boys and girls while they are young and impressionable.

The problem is essentially educational which can be solved adequately only if the Educational Authorities take an active interest in this aspect of training and make it an integral part of school education. A good beginning to achieve this end can be made by the introduction of cadet training in schools and universities. With that object in view the present Bill has been drafted.

These units will be officered by members of the teaching staff, but regular training will be imparted wherever necessary by trained regular officers.

Provision is also included in the Bill for the raising of additional units as the exigencies of circumstances may require. The National Cadet Corps Committee recommended that open units should be constituted to which recruitment will be made from amongst boys earning a livelihood and the object of cl. 7 is to provide for such units."

—Gazette of India, 1948, Part V, page 368.

[THE] NATIONAL CADET CORPS ACT, 1948).
(ACT XXXI OF 1948)[a]

[16th April, 1948.]

An Act to provide for the constitution of a National Cadet Corps.

WHEREAS it is expedient to provide for the constitution of a National Cadet Corps;

It is hereby enacted as follows :—

[a] This Act is made applicable to : —
(a) the Chota Nagpur Division and the Santal Parganas District—*See* Bihar Gazette, 1948, Part I, page 1317 ;
(b) Darjeeling District on and from 15-7 1948—*See* Calcutta Gazette, 1948, Part I, page 912:
(c) all the partially excluded areas in C. P. and Berar with certain modifications— *See* C. P. and Berar Gazette, 1948, Part I, page 518.

Short title extent and application.

1. *(1)* This Act may be called the National Cadet Corps Act, 1948.

(2) It extends to the whole of India and applies to all persons enrolled or appointed under this Act, wherever they may be.

Definitions.

2. In this Act, unless there is anything repugnant in the subject or context,—

"corps" means the National Cadet Corps constituted under this Act ;

"enrolled" means enrolled in the Corps under this Act ;

"prescribed" means prescribed by rules made under this Act;

"school" includes any institution recognised in this behalf by the Central Government or the Provincial Government;

"university" means any university established by law in India and includes colleges affiliated to universities, intermediate colleges and such technical institutions of collegiate status, as are recognised in this behalf by the Central Government or the Provincial Government.

Constitution of the National Cadet Corps.

3. There shall be raised and maintained in the manner hereinafter provided a Corps to be designated the National Cadet Corps :

Provided that the Central Government may establish all or any of the units of the Corps as and when necessary.

Constitution and disbandment of units.

4. The Central Government may constitute in any Province or Acceding State one or more units of the Corps, members of which shall be recruited from amongst the students of any university or school, and may disband or reconstitute any unit so constituted.

Division of the Corps into Divisions.

5. There shall be three Divisions of the Corps, namely :—

(i) the Senior Division, recruitment to which shall be from amongst the students of the male sex of any university ;

(ii) the Junior Division, recruitment to which shall be from amongst the students of the male sex of any school; and

(iii) the Girls Division, recruitment to which shall be from amongst the students of the female sex of any university or school.

Enrolment.

6. *(1)* Any student of the male sex of any university may offer himself for enrolment as a cadet in the Senior Division, and any student of the male sex of any school may offer himself for enrolment as a cadet in the Junior Division if he is of the prescribed age or over.

(2) Any student of the female sex of any university or school may offer herself for enrolment as a cadet in the Girls Division :

Provided that in the latter case she is of the prescribed age or over.

Central Government may raise other units.

7. Notwithstanding anything contained in this Act, the Central Government may, by notification, provide for the constitution of any other units of the Corps in any place and prescribe the persons or class of persons who may be eligible for enrolment therein.

Discharge.

8. Every person enrolled under this Act shall be entitled to receive his or her discharge from the Corps on the expiration of the period for which he or she was enrolled or on his or her ceasing to be borne on the roll of the university or school to which he or she may belong :

Provided that any person enrolled may be discharged at any time by such authority and subject to such conditions as may be prescribed.

Appointment of officers.

9. The Central Government may provide for the appointment of officers in or for any unit of the Corps either from amongst members of the staff of any university or school or otherwise and may prescribe the duties, powers and functions of such officers.

Duties of persons subject to this Act.

10. No person subject to this Act shall by virtue of being a member of the Corps be liable for active military service, but subject thereto any such person shall be liable to perform such duties and discharge such obligations as may be prescribed.

Punishment for offences under this Act.

11. Any person enrolled under this Act may be punished for the contravention of any rule made under this Act with fine which may extend to fifty rupees to be recovered in such manner and by such authority as may be prescribed.

Power to appoint Advisory Committees.

12. *(1)* The Central Government may for the purpose of advising it on all matters of policy connected with the constitution and administration of the Corps appoint a Central Advisory Committee consisting of the following persons, namely,—

(a) the Minister for Defence, who shall be the Chairman of the Committee;

(b) the Secretary to the Government of India, Ministry of Defence, *ex-officio*;

(c) the Secretary to the Government of India, Ministry of Education, *ex officio*;

(d) the Financial Adviser, Defence, *ex-officio;*

(e) the Chief of the Army Staff and Commander-in-Chief, Indian Army, *ex-officio;*

(f) the Chief of the Air Staff and Air Marshal Commanding, Royal Indian Air Force, *ex-officio* ;

(g) the Chief of the Naval Staff and Flag Officer Commanding, Royal Indian Navy, *ex-officio*:

(h) five non-official members to be nominated by the Central Government; and

(i) two members elected by the Central Legislature.

(2) The Central Government may also appoint, for the same purpose as is specified in sub-section *(1)*, such Provincial or State Advisory Committees as it may consider desirable from time to time and may prescribe their duties and functions.

Power to make rules.

13. *(1)* The Central Government may make rules to carry out the objects of this Act.

(2) In particular and without prejudice to the generality of the foregoing power such rules may —

(a) prescribe the conditions subject to which universities or schools shall be allowed to raise units under this Act ;

(b) prescribe the persons or class of persons who may be eligible for enrolment under section 7.

(c) prescribe the manner in which, the period for which and the conditions subject to which any person or class of persons may be enrolled under this Act ;

(d) provide for the medical examination of persons offering themselves for enrolment under this Act;

(e) prescribe preliminary and periodical military training for any person or class for persons subject to this Act;

(f) prescribe the military or other obligations to which members of the Corps shall be liable when undergoing military training and provide generally for the maintenance of discipline amongst members of the Corps ;

(g) prescribe the duties, powers and functions of officers appointed under this Act ;

(h) prescribe the allowances or other remuneration payable to persons subject to this Act;

(i) provide for the removal or discharge of any person subject to this Act;

(j) prescribe the offences for which any person subject to this Act may be tried and provide for the trial thereof;

(k) prescribe the manner in which fines levied under this Act may be recovered ;

(l) prescribe the duties, powers and functions of Central, Provincial or State Advisory Committees; and

(m) provide for any other matter which under this Act is to be or may be prescribed

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[THE] PHARMACY ACT, 1948
(ACT VIII OF 1948)

STATEMENT OF OBJECTS AND REASONS

"It is desirable that, as in most other countries, only persons who have attained a minimum standard of professional education should be permitted to practise the Profession of Pharmacy. It is accordingly proposed to establish a Central Council of Pharmacy, which will prescribe the minimum standards of education and approve courses of study and examinations for Pharmacists, and Provincial Pharmacy Councils, which will be responsible for the maintenance of provincial registers of qualified pharmacists. It is further proposed to empower Provincial Governments to prohibit the dispensing of medicine on the prescription of a Medical Practitioner otherwise than by, or under the direct and personal supervision of, a registered pharmacist."

—Gazette of India, 1947, Part V, page 469.

[THE] PHARMACY ACT, 1948
(ACT VIII OF 1948)[a]

[4th March, 1948.]

An Act to regulate the profession of pharmacy

WHEREAS it is expedient to make better provision for the regulation of the profession and practice of pharmacy and for that purpose to constitute Pharmacy Councils;

It is hereby enacted as follows :

[a] For Select Committee Report, *see* Gazette of India, 1948, Part V, page 8.

For application of this Act to all the partially excluded areas in C. P. and Berar, *see* C. P. and Berar Gazette, 1948, Part I, page 548.

CHAPTER I

INTRODUCTORY

Short title, extent and commencement.

1. *(1)* This Act may be called the Pharmacy Act, 1948.

(2) It extends to all the Provinces of India.

(3) It shall come into force at once, but Chapters III, IV and V shall take effect in a particular Province from such date, not later than three years from the commencement of this Act, as the Provincial Government may, by notification in the official Gazette, appoint in this behalf.

Interpretation.

2. In this Act, unless there is anything repugnant in the subject or context,

(a) "agreement" means an agreement entered into under section 20 ;

(b) "approved" means approved by the Central Council under section 12 or section 14;

(c) "Indian University" means a university in any Province of India established by an Indian law;

(d) "Central Council" means the Pharmacy Council of India constituted under section 3 ;

(e) "Executive Committee" means the Executive Committee of the Central Council or of the Provincial Council, as the context may require;

(f) "Medical practitioner" means a person holding a qualification granted by an authority specified or notified under section 3 of the Indian Medical Degrees Act, 1916 or specified in the Schedules to the Indian Medical Council Act, 1933 or a person registered or eligible for registration in a medical register of a Provinc meant for the registration of persons practising allopathic system of medicine;

(g) "prescirbed" means in Chapter II prescribed by regulations made under section 18, and elsewhere prescribed by rules made under section 46 ;

(h) "Provincial Council" means a Provincial Council of Pharmacy constituted under section 19, and includes a Joint Provincial Council of Pharmacy constituted in accordance with an agreement under section 20;

(i) "register" means a register of pharmacists prepared and maintained under Chapter IV;

(j) "registered pharmacist" means a person whose name is for the time being entered on the register of the Province in which he is for the time being residing or carrying on his profession or business of pharmacy.

CHAPTER II

THE PHARMACY COUNCIL OF INDIA

Constitution and Composition of Central Council.

3. The Central Government shall as soon as may be, constitute a Central Council consisting of the following members, namely:

(a) six members, among whom there shall be at least one teacher of each of the subjects, pharmaceutical chemistry, pharmacy, pharmacology and pharmacognosy elected by the authority known as the Inter-University Board from among persons on the teaching staff of an Indian University or a College affiliated thereto which grants a degree or diploma in pharmacy;

(b) six members, of whom at least three shall be persons possessing a degree or diploma in, and practising pharmacy or pharmaceutical chemistry, nominated by the Central Government;

(c) one member elected from amongst themselves by the members of the Medical Council of India;

(d) the Director General, Health Services, *ex-officio* or if he is unable to attend any meeting, a person authorised by him in writing to do so;

(e) the Director of the Central Drugs Laboratory, *ex-officio*;

(f) the Chief Chemist, Central Revenues, *ex-officio*:

(g) one member to represent each Governor's Province elected by the members of each Provincial Council, who shall be a registered pharmacist;

(h) one member to represent each Governor's Province nominated by each such Provincial Government, who shall be either a registered medical practitioner or a registered pharmacist:

Provided that for five years from the first constitution of the Central Council, instead of members elected under clause (g), each Government of the Governors' Provinces shall nominate one member, being a person eligible for registration as a pharmacist under section 31.

Incorporation of Central Council.

4. The Council constituted under section 3 shall be a body corporate by the name of the Pharmacy Council of India, having perpetual succession and a common seal, with power to acquire and hold property both movable and immovable, and shall by the said name sue and be sued.

President and Vice-President of Central Council.

5. *(1)* The President and Vice-President of the Central Council shall be elected, by the members of the said Council from among themselves:

Provided that for five years from the first constitution of the Central Council the President shall be a person nominated by the Central Government who shall hold office at the pleasure of the Central Government and where he is not already a member, shall be a member of the Central Council in addition to the members referred to in section 3.

(2) An elected President or Vice-President shall hold office as such for a term not exceeding five years and not extending beyond the expiry of his term as member of the Central Council, but subject to his being a member of the Central Council, he shall be eligible for re-election.

Mode of election.

6. Elections under this Chapter shall be conducted in the prescribed manner, and where any dispute arises regarding any such election it shall be referred to the Central Government whose decision shall be final.

Term of office and casual vacancies.

7. *(1)* Subject to the provisions of this section, a nominated or elected member; other than a nominated President, shall hold office for a term of five years from the date of his nomination or election or until his successor has been duly nominated or elected, whichever is longer.

(2) A nominated or elected member may at any time resign his membership by writing under his hand addressed to the President, and the seat of such member shall thereupon become vacant.

(3) A nominated or elected member shall be deemed to have vacated his seat if he is absent without excuse, sufficient in the opinion of the Central Council, from three consecutive meetings of the Central Council or if he is elected under clause (a), (c) or (g) of section 3, if he ceases to be a member of the teaching staff, Medical Council of India or a registered pharmacist, as the case may be.

(4) A casual vacancy in the Central Council shall be filled by fresh nomination or election, as the case may be, and the person nominated or elected to fill the vacancy shall hold office only for the remainder of the term for which the member whose place he takes was nominated or elected.

(5) No act done by the Central Council shall be called in question on the ground merely of the existence of any vacancy in, or any defect in the constitution of, the Central Council.

(6) Members of the Central Council shall be eligible for re-nomination or re election.

Staff, remuneration and allowances.

8. (1) The Central Council may appoint a Secretary who may also, if so decided by the Central Council, act as Treasurer :

Provided that for the first four years from the first constitution of the Central Council, the Secretary shall be a person appointed by the Central Government, who shall hold office during the pleasure of the Central Government.

(2) The Central Council may, with the previous sanction of the Central Government,—

(a) appoint such other officers and servants as may be required to enable the Central Council to carry out its functions under this Act;

(b) fix the salaries and allowances and other conditions of service of the Secretary and other officers and servants;

(c) fix the rates of allowances payable to members of the Central Council.

The Executive Committee.

9. (1) The Central Council shall, as soon as may be, constitute an Executive Committee consisting of the President (who shall be chairman of the Executive Committee) and Vice-President, *ex-officio*, and five other members elected by the Central Council from amongst its members.

(2) A member of the Executive Committee shall hold office as such until the expiry of his term of office as member of the Central Council, but, subject to his being a member of the Central Council, he shall be eligible for re-election.

(3) In addition to the powers and duties conferred and imposed upon it by this Act the Executive Committee shall exercise and discharge such powers and duties as may be prescribed.

Education Regulations.

10. (1) Subject to the provisions of this section, the Central Council may, subject to the approval of the Central Government, make regulations, to be called the Education Regulations, prescribing the minimum standard of education required for qualification as a pharmacist.

(2) In particular and without prejudice to the generality of the foregoing power, the Education Regulations may prescribe—

(a) the nature and period of study and of practical training to be undertaken before admission to an examination;

(b) the equipment and facilities to be provided for students undergoing approved courses of study;

(c) the subjects of examination and the standards therein to be attained;

(d) any other conditions of admission to examinations.

(3) Copies of the draft of the Education Regulations and of all subsequent amendments thereof shall be furnished by the Central Council to all Provincial Governments, and the Central Council shall before submitting the Education Regulations or any amendment thereof, as the case may be, to the Central Government for approval under sub section (1) take into consideration the comments of any Provincial Government received within three months from the furnishing of the copies as aforesaid.

(4) The Education Regulations shall be published in the official Gazette and in such other manner as the Central Council may direct.

(5) The Executive Committee shall from time to time report to the Central Council on the efficacy of the Education Regulations and may recommend to the Central Council such amendments thereof as it may think fit.

Application of Education Regulations to Provinces.

11. At any time after the constitution of the Provincial Council under Chapter III and after consultation with the Provincial Council, the Provincial Government may, by notification in the official Gazette, declare that the Education Regulations shall take effect in the Province :

Provided that where no such declaration has been made, the Education Regulations shall take effect in the Province on the expiry of three years from the date of the constitution of the Provincial Council.

Approved courses of study and examinations.

12. (1) Any authority in a Province of India which conducts a course of study for pharmacists may apply to the Central Council for approval of the course, and the Central Council, if satisfied, after such enquiry as it thinks fit to make, that the said course of study is in conformity with the Education Regulations, shall declare the said course of study to be an approved course of study for the purpose of admission to an approved examination for pharmacists.

(2) Any authority in a Province of India which holds an examination in pharmacy may apply to the Central Council for approval of the examination, and the Central Council, if satisfied after such enquiry as it thinks fit to make, that the said examination is in conformity with the Education Regulations, shall declare the said examination to be an approved examination for the purpose of qualifying for registration as a pharmacist under this Act.

(3) Every authority in the Provinces of India which conducts an approved course of study or holds an approved examination shall furnish such information as the Central Council may, from time to time, require as to the courses of

study and training and examination to be undergone, as to the ages at which such courses of study and examination are required to be undergone and generally as to the requisites for such courses of study and examination.

Withdrawal of approval.

13. (1) Where the Executive Committee reports to the Central Council that an approved course of study or an approved examination does not continue to be in conformity with the Education Regulations, the Central Council shall give notice to the authority concerned of its intention to take into consideration the question of withdrawing the declaration of approval accorded to the course of study or examination, as the case may be, and the said authority shall within three months from the receipt of such notice forward to the Central Council through the Provincial Government such representation in the matter as it may wish to make.

(2) After considering any representation which may be received from the authority concerned and any observations thereon which the Provincial Government may think fit to make, the Council may declare that the course of study or the examination shall be deemed to be approved only when completed or passed, as the case may be, before a specified date.

Qualifications granted outside the Provinces of India.

14. The Central Council, if it is satisfied that any qualification in pharmacy granted by an authority outside the Provinces of India affords a sufficient guarantee of the requisite skill and knowledge, may declare such qualification to be an approved qualification for the purpose of qualifying for registration under this Act, and may for reasons appearing to it sufficient at any time declare that such qualification shall be deemed to be approved only when granted before or after a specified date:

Provided that no person other than a British subject of Indian domicile possessing such qualification shall be deemed to be qualified for registration unless by the law and practice of the State or country in which the qualification is granted, persons of Indian origin holding such qualification are permitted to enter and practice the profession of pharmacy.

Mode of declarations.

15. All declarations under section 12, section 13 or section 14 shall be made by resolution passed at a meeting of the Central Council, and shall have effect as soon as they are published in the official Gazette.

Inspection.

16. (1) The Executive Committee may appoint such number of Inspectors as it may deem requisite for the purposes of this Chapter.

(2) An Inspector may—

(a) inspect any institution which provides an approved course of study;

(b) attend at any approved examination;

(c) inspect any institution whose authorities have applied for the approval of its course of study or examination under this Chapter, and attend at any examination of such institution.

(3) An Inspector attending at any examination under sub-section (2) shall not interfere with the conduct of the examination, but he shall report to the Executive Committee on the sufficiency of every examination he attends and on any other matter in regard to which the Executive Committee may require him to report.

(4) The Executive Committee shall forward a copy of every such report to the authority or institution concerned, and shall also forward a copy together with any comments thereon which the said authority or institution may have made, to the Central Government and to the Government of the Province in which the authority or institution is situated.

Information to be furnished.

17. (1) The Central Council shall furnish copies of its minutes and of the minutes of the Executive Committee and an annual report of its activities together with an abstract of its accounts to the Central Government.

(2) The Central Government may publish in such manner as it may think fit, any report, copy or abstract, furnished to it under this section or under section 16.

Power to make regulations.

18. (1) The Central Council may, with the approval of the Central Government, make regulations consistent with this Act to carry out the purposes of this Chapter.

(2) In particular and without prejudice to the generality of the foregoing power, such regulations may provide for—

(a) the management of the property of the Central Council and the maintenance and audit of its accounts;

(b) the manner in which elections under this Chapter shall be conducted;

(c) the summoning and holding of meetings of the Central Council, the times and places at which such meetings shall be held, the conduct of business thereat and the number of members necessary to constitute a quorum;

(d) the functions of the Executive Committee, the summoning and holding meetings thereof, the times and places at which such meetings shall be held and the number of members necessary to constitute a quorum;

(e) the powers and duties of the President and Vice-President;

(f) the qualifications, the term of office and the powers and duties of the Secretary, Inspectors and other officers and servants of the Central Council, including the amount and nature of the security to be furnished by the Treasurer.

(3) Until regulations are made by the Central Council under this section, the President may, with the previous sanction of the Central Government, make such regulations under this section, including those to provide for the manner in which the first elections to the Central Council shall be conducted, as may be necessary for carrying into effect the provisions of this Chapter, and any regulations so made may be altered or rescinded by the Central Council in exercise of its powers under this section.

CHAPTER III

PROVINCIAL PHARMACY COUNCILS

Constitution and composition of Provincial Councils.

19. Except where a Joint Provincial Council is constituted in accordance with an agreement made under section 20, the Provincial Government shall constitute a Provincial Council consisting of the following members, namely:

(a) six members, elected from amongst themselves by registered pharmacists of the Province;

(b) five members of whom at least two shall be persons possessing a prescribed degree or diploma in pharmacy or pharmaceutical chemistry or members of the pharmaceutical profession, nominated by the Provincial Government:

(c) one member elected from amongst themselves by the members of each Medical Council or the Council of Medical Registration of the Province, as the case may be;

(d) the chief administrative medical officer of the Province *ex-officio* or if he is unable to attend any meeting, a person authorized by him in writing to do so;

(e) the Government Analyst under the Drugs Act 1940, *ex officio*, or where there is more than one, such one as the Provincial Government may appoint in this behalf:

Provided that where an agreement is made under clause *(b)* of sub section *(1)* of section 20, the agreement may provide that the Provincial Council to serve the needs of the other participating Provinces also shall be augmented by not more than two members, of whom at least one shall at all times be a person possessing a prescribed degree or diploma in pharmacy or pharmaceutical chemistry or a member of the pharmaceutical profession, nominated by the Government of each of the said other participating Provinces, and where the agreement so provides, the composition of the Provincial Council shall be deemed to be augmented accordingly.

Inter-provincial agreements.

20. *(1)* Two or more Provincial Governments may enter into an agreement to be in force for such period and to be subject to renewal for such further periods, if any, as may be specified in the agreement, to provide—

(a) for the constitution of a Joint Provincial Council for all the participating Provinces, or

(b) that the Provincial Council of one Province shall serve the needs of the other participating Provinces.

(2) In addition to such matters as are in this Act specified, an agreement under this section may—

(a) provide for the apportionment between the participating Provinces of the expenditure in connection with the Provincial Council or Joint Provincial Council;

(b) determine which of the participating Provincial Governments shall exercise the several functions of the Provincial Government under this Act, and the references in this Act to the Provincial Government shall be construed accordingly;

(c) provide for consultation between the participating Provincial Governments either generally or with reference to particular matters arising under this Act;

(d) make such incidental and ancillary provisions, not inconsistent with this Act, as may be deemed necessary or expedient for giving effect to the agreement.

(3) An agreement under this section shall be published in the official Gazettes of the participating Provinces.

Composition of Joint Provincial Councils.

21. A Joint Provincial Council shall consist of the following members, namely:

(a) such number of members, being not less than three and not more than five as the agreement shall provide elected from amongst themselves by the registered pharmacists of each of the participating Provinces;

(b) such number of members, being not less than two and not more than four as the agreement shall provide nominated by each participating Provincial Government;

(c) one member elected from amongst themselves by the members of each Medical Council or the Council of Medical Registration of each participating Province, as the case may be;

(d) the chief administrative medical officer of each participating Province, *ex-officio* or if he is unable to attend any meeting, a person authorized by him in writing to do so;

(e) the Government Analyst under the Drugs Act, 1940 of each participating Province, *ex officio*, or where there is more than one in any such Province, such one as the Provincial Government may appoint in this behalf.

(2) The agreement may provide that within the limits specified in clauses *(a)* and *(b)* of subsection *(1)*, the number of members to be elected or nominated under those clauses may or may not be the same in respect of each participating Province.

(3) Of the members nominated by each Provincial Government under clause *(b)* of subsection *(1)*, at least half shall be persons possessing a prescribed degree or diploma in pharmacy or pharmaceutical chemistry or members of the pharmaceutical profession.

Incorporation of Provincial Councils.

22. Every Provincial Council shall be a body corporate by such name as may be notified by the Provincial Government in the official Gazette or, in the case of a Joint Provincial Council, as may be determined in the agreement, having perpetual succession and a common seal, with power to acquire or hold property both movable and immovable and shall by the said name sue and be sued.

President and Vice-President of Provincial Council.

23. *(1)* The President and Vice-President of the Provincial Council shall be elected by the members from amongst themselves :

Provided that for five years from the first constitution of the Provincial Council the President shall be a person nominated by the Provincial Government who shall hold office at the pleasure of the Provincial Government and where he is not already a member, shall be a member of the Provincial Council in addition to the members referred to in section 19 or section 21, as the case may be.

(2) An elected President or Vice-President shall hold office as such for a term not exceeding five years and not extending beyond the expiry of his term as a member of the Provincial Council, but subject to his being a member of the Provincial Council, he shall be eligible for re-election.

Mode of elections.

24. Elections under this Chapter shall be conducted in the prescribed manner, and where any dispute arises regarding any such election it shall be referred to the Provincial Government whose decision shall be final.

Term of office and casual vacancies.

25. *(1)* Subject to the provisions of this section, a nominated or elected member, other than a nominated President, shall hold office for a term of five years from the date of his nomination or election or until his successor has been duly nominated or elected, whichever is longer.

(2) A nominated or elected member may at any time resign his membership by writing under his hand addressed to the President, and the seat of such member shall thereupon become vacant.

(3) A nominated or elected member shall be deemed to have vacated his seat if he is absent without excuse sufficient in the opinion of the Provincial Council from three consecutive meetings of the Provincial Council, or if he is elected under clause *(a)* or *(c)* of section 19 or 21, if he ceases to be a registered pharmacist or ceases to be a member of the Medical Council or Council of Medical Registration of the Province, as the case may be.

(4) A casual vacancy in the Provincial Council shall be filled by fresh nomination or election, as the case may be, and the person nominated or elected to fill the vacancy shall hold office only for the remainder of the term for which the member whose place he takes was nominated or elected.

(5) No act done by the Provincial Council shall be called in question on the ground merely of the existence of any vacancy in, or any defect in the constitution of, the Provincial Council.

(6) Members of the Provincial Council shall be eligible for re-nomination or re-election.

Staff, remuneration and allowances.

26. The Provincial Council may, with the previous sanction of the Provincial Government,—

(a) appoint a Registrar who shall also act as Secretary and, if so decided by the Provincial Council, Treasurer, of the Provincial Council ;

(b) appoint such other officers and servants as may be required to enable the Provincial Council to carry out its functions under this Act;

(c) fix the salaries and allowances and other conditions of service of the Secretary and other officers and servants of the Provincial Council;

(d) fix the rates of allowances payable to members of the Provincial Council :

Provided that for the first four years from the first constitution of the Provincial Council the Registrar shall be a person appointed by the Provincial Government who shall hold office during the pleasure of the Provincial Government.

The Executive Committee.

27. *(1)* The Provincial Council shall, as soon as may be, constitute an Executive Committee consisting of the President (who shall be Chairman of the Executive Committee) and Vice-President, *ex officio*, and such number of other members elected by the Provincial Council from amongst themselves as may be prescribed.

(2) A member of the Executive Committee shall hold office as such until the expiry of his

term of office as member of the Provincial Council, but, subject to his being a member of the Provincial Council, he shall be eligible for re-election.

(3) In addition to the powers and duties conferred and imposed upon it by this Act, the Executive Committee shall exercise and discharge such powers and duties as may be prescribed.

Information to be furnished.

28. *(1)* The Provincial Council shall furnish such reports, copies of its minutes and of the minutes of the Executive Committee, and abstracts of its accounts to the Provincial Government as the Provincial Government may from time to time require and copies thereof shall be sent to the Central Council.

(2) The Provincial Government may publish, in such manner as it may think fit, any report, copy, abstract or other information furnished to it under this section.

CHAPTER IV

REGISTRATION OF PHARMACISTS

Preparation and maintenance of register.

29. *(1)* As soon as may be after this Chapter has taken effect in any Province, the Provincial Government shall cause to be prepared in the manner hereinafter provided a register of pharmacists for the Province.

(2) The Provincial Council shall as soon as possible after it is constituted assume the duty of maintaining the register in accordance with the provisions of this Act.

(3) The register shall include the following particulars, namely:—

(a) the full name and residential address of the registered person;

(b) the date of his first admission to the register;

(c) his qualifications for registration;

(d) his professional address, and if he is employed by any person, the name of such person;

(e) such further particulars as may be prescribed.

Preparation of first register.

30. *(1)* For the purpose of preparing the first register, the Provincial Government shall, by notification in the official Gazette, constitute a Registration Tribunal consisting of three persons, and shall also appoint a Registrar who shall act as Secretary of the Registration Tribunal.

(2) The Provincial Government shall, by the same or a like notification, appoint a date on or before which applications for registration, which shall be accompanied by the prescribed fee, shall be made to the Registration Tribunal.

(3) The Registration Tribunal shall examine every application received on or before the appointed date, and if it is satisfied that the applicant is qualified for registration under section 31, shall direct the entry of the name of the applicant on the register.

(4) The first register so prepared shall thereafter be published in such manner as the Provincial Government may direct, and any person aggrieved by a decision of the Registration Tribunal expressed or implied in the register as so published may, within sixty days from the date of such publication, appeal to an authority appointed by the Provincial Government in this behalf by notification in the official Gazette.

(5) The Registrar shall amend the register in accordance with the decisions of the authority appointed under sub-section *(4)* and shall thereupon issue to every person whose name is entered in the register a certificate of registration in the prescribed form.

(6) Upon the constitution of the Provincial Council, the register shall be given into its custody, and the Provincial Government may direct that all or any specified part of the application fees for registration in the first register shall be paid to the credit of the Provincial Council.

Qualifications for entry on first register.

31. A person shall be entitled on payment of the prescribed fee to have his name entered in the first register if he resides, or carries on the business or profession of pharmacy, in the Province and if he—

(a) holds a degree or diploma in pharmacy or pharmaceutical chemistry or a chemist and druggist diploma of an Indian University or a Provincial Government, as the case may be, or a prescribed qualification granted by an authority outside the Provinces of India, or

(b) holds a degree of an Indian University other than a degree in pharmacy or pharmaceutical chemistry, and has been engaged in the compounding of drugs in a hospital or dispensary or other place in which drugs are regularly dispensed on prescriptions of medical practitioners for a total period of not less than three years, or

(c) has passed an examination recognised as adequate by the Provincial Government for compounders or dispensers, or

(d) has been engaged in the compounding of drugs in a hospital or dispensary or other place in which drugs are regularly dispensed on prescriptions of medical practitioners for a total period of not less than five years prior to the date notified under sub-section *(2)* of section 30.

Qualifications for subsequent registration.

32. *(1)* After the date appointed under sub-section *(2)* of section 30 and before the Education Regulations have, by or under

section 11, taken effect in the Province, a person shall on payment of the prescribed fee be entitled to have his name entered in the register if he resides or carries on the business or profession of pharmacy in the Province and if he—

(a) satisfies the conditions prescribed with the prior approval of the Central Council, or where no conditions have been prescribed, the conditions entitling a person to have his name entered on the first register as set out in section 31, or

(b) is a registered pharmacist in another Province, or

(c) possesses a qualification approved under section 14:

Provided that no person shall be entitled under this sub-section to have his name entered on the register unless he has passed a matriculation examination or an examination prescribed as being equivalent to a matriculation examination.

(2) After the Education Regulations have by or under section 11 taken effect in the Province, a person shall on payment of the prescribed fee be entitled to have his name entered on the register if he has attained the age of twenty-one years, if he resides, or carries on the business or profession of pharmacy, in the Province and if he has passed an approved examination or possesses a qualification approved under section 14.

Scrutiny of applications for registration.

33. *(1)* After the date appointed under sub-section *(2)* of section 30, applications for registration shall be addressed to the Registrar of the Provincial Council and shall be accompanied by the prescribed fee.

(2) If upon such application the Registrar is of opinion that the applicant is entitled to have his name entered in the register under the provisions of this Act for the time being applicable, he shall enter the name of the applicant in the register:

Provided that no person whose name has under the provisions of this Act been removed from the register of any Province shall be entitled to have his name entered in the register except with the approval of the Provincial Council recorded at a meeting.

(3) Any person whose application for registration is rejected by the Registrar, may within three months from the date of such rejection appeal to the Provincial Council, and the decision of the Provincial Council thereon shall be final.

(4) Upon entry in the register of a name under this section, the Registrar shall issue a certificate of registration in the prescribed form.

Renewal fees.

34. *(1)* The Provincial Government may, by notification in the official Gazette, direct that for the retention of a name on the register after the 31st day of December of the year following the year in which the name is first entered on the register, there shall be paid annually to the Provincial Council such renewal fee as may be prescribed, and where such direction has been made, such renewal fee shall be due to be paid before the first day of April of the year to which it relates.

(2) Where a renewal fee is not paid by the due date, the Registrar shall remove the name of the defaulter from the register:

Provided that a name so removed may be restored to the register on such conditions as may be prescribed.

(3) On payment of the renewal fee, the Registrar shall in the prescribed manner endorse the certificate of registration accordingly.

Entry of additional qualifications.

35. A registered pharmacist shall on payment of the prescribed fee be entitled to have entered in the register any further degrees or diplomas in pharmacy or pharmaceutical chemistry which he may obtain.

Removal from register.

36. *(1)* Subject to the provisions of this section, the Executive Committee may order that the name of a registered pharmacist shall be removed from the register, where it is satisfied, after giving him a reasonable opportunity of being heard and after such further inquiry, if any, as it may think fit to make,—

(i) that his name has been entered in the register by error or on account of misrepresentation or suppression of a material fact, or

(ii) that he has been convicted of any offence or has been guilty of any infamous conduct in any professional respect, which in the opinion of the Executive Committee, renders him unfit to be kept in the Register, or

(iii) that a person employed by him for the purposes of his business of pharmacy has been convicted of any such offence or has been guilty of any such infamous conduct as would, if such person were a registered pharmacist, render him liable to have his name removed from the register under clause *(ii)*:

Provided that no such order shall be made under clause *(iii)* unless the Executive Committee is satisfied—

(a) that the offence or infamous conduct was instigated or connived at by the registered pharmacist, or

(b) that the registered pharmacist has at any time during the period of twelve months immediately preceding the date on which the offence

or infamous conduct took place committed a similar offence or been guilty of similar infamous conduct, or

(c) that any person employed by the registered pharmacist for the purposes of his business of pharmacy has at any time during the period of twelve months immediately preceding the date on which the offence or infamous conduct took place, committed a similar offence or been guilty of similar infamous conduct, and that the registered pharmacist had, or reasonably ought to have had, knowledge of such previous offence or infamous conduct, or

(d) that where the offence or infamous conduct continued over a period, the registered pharmacist had, or reasonably ought to have had, knowledge of the continuing offence or infamous conduct, or

(e) that where the offence is an offence under the Drugs Act, 1940, the registered pharmacist has not used due diligence in enforcing compliance with the provisions of that Act in his place of business and by persons employed by him.

(2) An order under sub-section *(1)* may direct that the person whose name is ordered to be removed from the register shall be ineligible for registration in the Province under this Act either permanently or for such period as may be specified.

(3) An order under sub-section *(1)* shall be subject to confirmation by the Provincial Council and shall not take effect until the expiry of three months from the date of such confirmation.

(4) A person aggrieved by an order under sub-section *(1)* which has been confirmed by the Provincial Council may, within thirty days from the communication to him of such confirmation, appeal to the Provincial Government, and the order of the Provincial Government upon such appeal shall be final.

(5) A person whose name has been removed from the register under this section or under sub-section *(2)* of section 34 shall forthwith surrender his certificate of registration to the Registrar, and the name so removed shall be published in the official Gazette.

Restoration to register.

37. The Provincial Council may at any time for reasons appearing to it sufficient order that upon payment of the prescribed fee the name of a person removed from the register shall be restored thereto:

Provided that where an appeal against such removal has been rejected by the Provincial Government, an order under this section shall not take effect until it has been confirmed by the Provincial Government.

Bar of other jurisdiction.

38. No order refusing to enter a name on the register or removing a name from the register shall be called in question in any Court.

Issue of duplicate certificates of registration.

39. Where it is shown to the satisfaction of the Registrar that a certificate of registration has been lost or destroyed, the Registrar may, on payment of the prescribed fee, issue a duplicate certificate in the prescribed form.

Printing of register.

40. As soon as may be after the first day of April in each year, the Registrar shall cause to be printed copies of the register as it stood on the said date, and such copies shall be made available to persons applying therefor on payment of the prescribed charge, and shall be evidence that on the said date the persons whose names are entered therein were registered pharmacists.

CHAPTER V

MISCELLANEOUS

Penalty for falsely claiming to be registered.

41. *(1)* If any person whose name is not for the time being entered in the register of the Province falsely pretends that it is so entered or uses in connection with his name or title any words or letters reasonably calculated to suggest that his name is so entered, he shall be punishable on first conviction with fine which may extend to five hundred rupees and on any subsequent conviction with imprisonment extending to six months or with fine not exceeding one thousand rupees or with both:

Provided that it shall be a defence to show that the name of the accused is entered in the register of another Province and that at the time of the alleged offence under this section an application for registration in the Province had been made.

(2) For the purposes of this section —

(a) it shall be immaterial whether or not any person is deceived by such pretence or use as aforesaid;

(b) the use of the description "pharmacist," "chemist," "druggist," "pharmaceutist," "dispenser," "dispensing chemist," or any combination of such words shall be deemed to be reasonably calculated to suggest that the person using such description is a person whose name is for the time being entered in the register of the Province;

(c) the onus of proving that the name of a person is for the time being entered in the register of a Province shall be on him who asserts it.

(3) Cognizance of an offence punishable under this section shall not be taken except upon com-

plaint made by order of the Provincial Government or the Executive Committee of the Provincial Council.

Dispensing by unregistered persons.

42. *(1)* On or after such date as the Provincial Government may by notification in the official Gazette appoint in this behalf, no person other than a registered pharmacist shall compound, prepare, mix, or dispense any medicine on the prescription of a medical practitioner except under the direct and personal supervision of a registered pharmacist :

Provided that this sub-section shall not apply to the dispensing by a medical practitioner of medicine for his own patients, or with the general or special sanction of the Provincial Government, for the patients of another medical practitioner.

(2) Whoever contravenes the provisions of sub-section *(1)* shall be punishable with imprisonment for a term which may extend to six months, or with fine not exceeding one thousand rupees or with both.

(3) Cognizance of an offence punishable under this section shall not be taken except upon complaint made by an order of the Provincial Government.

Failure to surrender certificate of registration.

43. *(1)* If any person whose name has been removed from the register fails without sufficient cause forthwith to surrender his certificate of registration, he shall be punishable with fine which may extend to fifty rupees.

(2) Cognizance of an offence punishable under this section shall not be taken except upon complaint made by an order of the Executive Committee.

Payment of part of fees to Central Council.

44. The Provincial Council shall before the end of June in each year pay to the Central Council a sum equivalent to one-fourth of the total fees realised by the Provincial Council under this Act during the period of twelve months ending on the 31st day of March of that year.

Appointment of Commission of Enquiry.

45. *(1)* Whenever it appears to the Central Government that the Central Council is not complying with any of the provisions of this Act, the Central Government may appoint a Commission of Enquiry consisting of three persons, two of whom shall be appointed by the Central Government, one being the Judge of a High Court, and one by the Council; and refer to it the matters on which the enquiry is to be made.

(2) The Commission shall proceed to enquire in such manner as it may deem fit and report to the Central Government on the matters referred to it together with such remedies, if any, as the Commission may like to recommend.

(3) The Central Government may accept the report or remit the same to the Commission for modification or reconsideration.

(4) After the report is finally accepted, the Central Government may order the Central Council to adopt the remedies so recommended within such time as may be specified in the order and if the Council fails to comply within the time so specified, the Central Government may pass such order or take such action as may be necessary to give effect to the recommendations of the Commission.

(5) Whenever it appears to the Provincial Government that the Provincial Council is not complying with any of the provisions of this Act, the Provincial Government may likewise appoint a similar Commission of Enquiry and pass such order or take such action as specified in sub-sections *(3)* and *(4)*.

Power to make rules.

46. *(1)* The Provincial Government may, by notification in the official Gazette, make rules to carry out the purposes of Chapters III, IV and V.

(2) In particular and without prejudice to the generality of the foregoing power such rules may provide for—

(a) the management of the property of the Provincial Council, and the maintenance and audit of its accounts;

(b) the manner in which elections under Chapter III shall be conducted;

(c) the summoning and holding of meetings of the Provincial Council, the times and places at which such meetings shall be held, the conduct of business thereat and the number of members necessary to form a quorum;

(d) the powers and the duties of the President and Vice-President of the Provincial Council;

(e) the constitution and functions of the Executive Committee, the summoning and holding of meetings thereof, the times and places at which such meetings shall be held, and the number of members necessary to constitute a quorum;

(f) the qualifications, the term of office and the powers and duties of the Registrar and other officers and servants of the Provincial Council, including the amount and nature of the security to be given by the Treasurer;

(g) the particulars to be stated, and the proof of qualifications to be given in applications for registration under Chapter IV;

(h) the conditions for registration under sub-section *(1)* of section 32;

(i) fees payable under Chapter IV and the charge for supplying copies of the register;

(j) the form of certificates of registration and the manner of endorsement of renewals thereof;

(k) the maintenance of a register;

(l) any other matter which is to be or may be prescribed under Chapters III, IV and V except sub sections *(1)*, *(2)*, *(3)* and *(4)* of section 45.

[THE INDIAN] POWER ALCOHOL ACT, 1948.

(ACT XXII OF 1948.)

STATEMENT OF OBJECTS AND REASONS.

"The development of the Power Alcohol Industry is of national importance both from the point of view of using the molasses which would otherwise be wasted, and of creating in the country the nucleus of an industry which would be of importance in times of emergency. The utilisation of Power Alcohol would also reduce the price of sugar and reduce our dependence on petrol. It would, however, not be possible for most of the Provinces producing molasses to absorb their total production of Power Alcohol within their own limits. It is, therefore, necessary to adopt measures to utilise their surpluses in other Provinces in which production will not be sufficient to meet their requirements.

The Panel for the development of Sugar, Power Alcohol and Food Yeast industries which was set up by the Government of India recommended that admixture of Power Alcohol with petrol should be made compulsory for the whole country and enforced in such areas as are notified from time to time. The Industries Conference held in December, 1947, in which representatives of Provincial and State Governments participated, also unanimously passed a resolution in support of the proposed legislation."

— Gazette of India, 1948, Part V, page 200.

[THE INDIAN] POWER ALCOHOL ACT, 1948.

(ACT XXII OF 1948)[a]

[3rd April, 1948.]

An Act to provide for the development of the power alcohol industry.

WHEREAS it is expedient in the public interest that the power alcohol industry should be developed under the control of the Central Government;

It is hereby enacted as follows:—

[a] This Act is made applicable to all the partially excluded areas in the C. P. and Berar subject to certain modifications—*see* C. P. and Berar Gazette, 1948, Part I, page 518.

Short title, extent and duration.

1. *(1)* This Act may be called the Indian Power Alcohol Act, 1948.

(2) It extends to all the Provinces of India.

(3) This Act or such portion thereof shall come into force in such area, and on such date as the Central Government may, by notification in the official Gazette, specify in this behalf.

Declaration as to expediency of Central Government's control.

2. It is hereby declared that it is expedient in the public interest that the Central Government should take under its control the development of the power alcohol industry.

Definitions.

3. In this Act, unless there is anything repugnant in the subject or context,—

(a) "molasses" means the heavy, dark-coloured residual syrup drained away in the final stage of the manufacture of sugar by vacuum pans in sugar factories either from sugarcane or by refining *gur*, when such a syrup has fermentable sugars (expressed as reducing sugars), but does not include the final residual syrup left in the manufacture of sugar by the open pan process;

(b) "petrol" means dangerous petroleum as defined in clause *(b)* of section 2 of the Petroleum Act, 1934;

(c) "power alcohol" means ethyl alcohol containing not less than 99.5 per cent. by volume of ethanol measured at sixty degrees Fahrenheit corresponding to 74.4 over proof strength.

Production of power alcohol.

4. *(1)* No person shall manufacture power alcohol from any substance other than molasses or such other substance as may be specified by the Central Government.

(2) If any dispute arises as to whether any substance is or is not molasses, the decision of an officer, authorised by the Central Government in this behalf, regarding such dispute shall be final and shall not be called in question in any Court.

Power to regulate production and disposal of power alcohol.

5. The Central Government may regulate the production and disposol of power alcohol by any distillery situated in any area in which this section is for the time being in force.

Power to direct use of power alcohol as motive power.

6. *(1)* The Central Government may, by notification in the official Gazette, direct that in such area as may be specified

therein no petrol shall be sold or kept for sale except with an admixture of power alcohol.

(2) The proportion of petrol and power alcohol in such mixture shall, in any area and for any purpose, be such as may from time to time be specified by the Central Government but such proportion of power alcohol in the case of mixture with petrol meant for use as motive power for any motor vehicle shall not be more than twenty five per cent. or less than five per cent. by volume.

(3) The power alcohol to be employed for such mixture shall be obtained from such distilleries as may, from time to time, be specified by the Central Government.

Penalty.

7. Whoever contravenes any of the provisions of sections 4 and 6 or any order of the Central Government issued thereunder shall be punishable with imprisonment which may extend to six months or with fine not exceeding one thousand rupees or with both, and in the case of a continued contravention with a further fine which may extend to one hundred rupees for every day during which the contravention is continued after conviction therefor.

Delegation of powers.

8. The Central Government may, by notification in the official Gazette, direct that any power conferred by this Act shall, subject to such conditions, if any, as may be specified in the direction, be exercisable also by—

(a) such officer or authority subordinate to the Central Government, or

(b) such Provincial Government or such other officer or authority subordinate to a Provincial Government

as may be specified in the direction.

Offences to be bailable.

9. All offences punishable under this Act or any rule made thereunder shall be bailable within the meaning of the Code of Criminal Procedure, 1898.

Power to make rules.

10. *(1)* The Central Government may, by notification in the official Gazette, make rules for the purpose of carrying into effect the provisions of this Act.

(2) In particular and without prejudice to the generality of the foregoing powers, such rules may—

(a) provide for the licensing of the manufacture of power alcohol;

(b) prescribe the specifications and tests in respect of the purity of power alcohol intended for admixture with petrol in order to ensure its suitability for use in motor vehicles;

(c) fix the price at which power alcohol may be sold for the purpose of admixture with petrol;

(d) provide for imposing and collecting a duty of excise on power alcohol intended for admixture with petrol;

(e) prescribe conditions in respect to the transport and storage of power alcohol intended for admixture with petrol and for the manner in which the admixture is to be effected;

(f) prescribe the submission by a manufacturer of power alcohol or importer or distributor of petrol of returns regarding the power alcohol and petrol manufactured, purchased, stored or sold, as the case may be;

(g) provide for denaturing of power alcohol at the distilleries;

(h) provide for any other matter which is to be or may be prescribed under this Act.

(3) Rules made under this Act may provide that any contravention of such rules shall render the offender liable on conviction to a fine not exceeding one thousand rupees.

Power of exemption.

11. Notwithstanding anything contained in this Act, the Central Government may, by notification in the official Gazette, declare that any of the provisions of this Act shall not apply to any case or class of cases.

[THE] PRESS (SPECIAL POWERS) ACT, 1947

(ACT XXXIX OF 1947)

STATEMENT OF OBJECTS AND REASONS

"Experience of recent communal riots has shown that inflammatory writings and speeches and their dissemination by the Press have contributed to the creation and maintenance of tension between the communities and have hampered the return of normal conditions in riot-stricken areas. Publication of false or exaggerated reports about riots and ill-informed or violent comments thereon have spread this tension to or resulted in the out-break of rioting even in distant areas.

The permanent law as it stands has been found inadequate to deal with this probelm. Its processes are too dilatory and afford undue publicity to objectionable matter. To remedy these defects in the existing law it has been found necessary to promulgate the Press (Special Powers) Ordinance, 1947. The present Bill seeks to repeal that Ordinance and re-enacts its provisions."

—Gazette of India, 1947, Part V, Page 32.

THE PRESS (SPECIAL POWERS) ACT, 1947

(ACT XXXIX OF 1947)

[18th December, 1947.]

An Act to continue certain special powers conferred on the administration in Chief Commissioners' Provinces for the better control of the dissemination of undesirable matter.

WHEREAS it is expedient to continue certain powers conferred on the administration in Chief Commissioners' Provinces for the better control of the dissemination of undesirable matter;

It is hereby enacted as follows:—

Short title and extent.

1. *(1)* This Act may be called the Press (Special Powers) Act, 1947.

(2) It extends to all Chief Commissioners' Provinces.

(3) This Act shall cease to have effect after the 31st December, 1949.

Interpretation.

2. In this Act unless there is anything repugnant in the subject or context, "document" includes gramophone records, sound tracks and any other articles on which sounds have been recorded with a view to their subsequent reproduction.

Delegation of powers.

3. *(1)* The Provincial Government may by order direct that any power which is conferred on it by this Act shall in such circumstances and under such conditions, if any, as may be specified in the direction, be exercised by a District Magistrate or Additional District Magistrate.

(2) The powers of the Provincial Government under this Act shall be exercised also by the Chief Commissioner.

Power to control publications.

4. The Provincial Government may by order in writing addressed to a printer, publisher or editor or generally to all printers, publishers or editors or to such class of printers, publishers or editors as may be specified therein—

(a) prohibit or regulate the printing or publication in any document or class of documents either absolutely or for a specified period, or in a particular issue or issues of a newspaper or periodical, of any matter which tends directly or indirectly to promote feelings of enmity or hatred between different classes of His Majesty's subjects;

(b) require that any document, or class of documents, or any matter relating to a particular subject or class of subjects, shall before publication be submitted for scrutiny, to a specified officer, who may after such scrutiny, if he is satisfied that such document, class of documents or matter or any portion thereof is or contains matter of the nature described in clause *(a)*, either prohibit its publication or pass it for publication with such modifications as he may deem necessary.

Control of documents printed outside the Province.

5. The Provincial Government may, by general or special order, prohibit or regulate the entry into, or sale or distribution or circulation or publication or possession within the Province of any document or class of documents or of any matter of the nature described in clause *(a)* of section 4, printed or made outside the Province.

Forfeiture of books, newspapers or other documents.

6. Where in its opinion any newspaper, book or other document, wherever made, contains any matter of the nature described in clause *(a)* of section 4, the Provincial Government may, by notification in the official Gazette, declare every copy of the issue of such newspaper, or of such book or other document to be forfeited to His Majesty, and thereupon any police officer may seize such copies wherever found, and any Magistrate may by warrant authorise any police officer not below the rank of Sub-Inspector to enter upon and search for such copies in any premises where any such copy may be or may be reasonably expected to be.

Prevention of publication of unauthorised matter.

7. Where the Provincial Government has reason to believe that a newspaper, book or other document is likely to be published, printed or made, containing matter of the nature described in clause *(a)* of section 4, it may, by order in writing, prohibit the printing or publication of such newspaper, book or document, or allow the publication, printing or making of the newspaper, book or document, subject to the publisher, printer or editor, as the case may be, giving an undertaking in writing that he will not publish any such matter.

Dissemination of prohibited documents or matter.

8. *(1)* Whoever circulates or distributes in any manner any document or thing advocating or calculated to further any activity which tends directly or indirectly to promote feelings of enmity or hatred among different classes of His Majesty's subjects, or in respect of which an order of forfeiture under section 6 is in force shall, unless he proves that he was unaware of the nature of the document or thing, be punishable with imprisonment for a

term which may extend to one year or with fine, or with both.

(2) Whoever allows his name or address to be used to facilitate transmission through the post or otherwise to any person other than the person for whom it purports to be intended of any document or thing of the nature referred to in sub-section *(1)* shall be punishable with imprisonment for a term which may extend to one year, or with fine, or with both.

(3) Whoever publishes, circulates or repeats in public any matter contained in any newspaper, book or other document in respect of which any order of forfeiture or prohibition has been made under this Act shall be punishable with imprisonment for a term which may extend to three years, or with fine, or with both.

Powers in respect of contravention of orders.

9. Where in the opinion of the Provincial Government any person has contravened an order under section 4, section 5 or section 7 or an undertaking given by him under section 7, the Provincial Government may, without prejudice to any other penalty to which such person may be liable, by order prohibit, either absolutely or for a specified period, the publication by him or on his behalf of any newspaper, periodical, leaflet or other document, and may order the seizure of all copies of the publication in respect of which the contravention has occurred and of any printing-press or other instrument or apparatus used in the production of the publication; and the Provincial Government may by order declare forfeited to His Majesty any article so seized.

Penalties.

10. Whoever—

(a) contravenes any provision of this Act or of any order made thereunder or any direction or undertaking given or condition imposed under this Act, or

(b) interferes with or obstructs the compliance with such provision, order, direction, undertaking or condition by the person concerned, or

(c) obstructs the lawful exercise of any power conferred by or under this Act,

shall, if no express provison is made by this Act for the punishment of such contravention or interference or obstruction, be punishable with imprisonment for a term which may extend to three years, or with fine, or with both.

Attempt and abetment.

11. Whoever attempts to commit, or abets, or attempts to abet, or does any act preparatory to the commission of, any offence punishable under this Act shall be deemed to have committed that offence.

Search.

12. *(1)* The power to issue search warrants conferred by section 98 of the Code of Criminal Procedure, 1898, shall be deemed to include a power to issue warrants authorising—

(a) the search of any place in which any Magistrate mentioned in that section has reason to believe that any offence punishable under this Act has been, is being or is about to be committed or that preparation for the commission of any such offence is being made;

(b) the seizure in or on any place searched under clause *(a)* of anything which the officer executing the warrant has reason to believe is being or has been or is intended to be used for any purpose mentioned in that clause.

(2) Any police officer authorised by general or special order in writing of the District Magistrate or of the Superintendent of Police may search or cause to be searched any person whom he has reason to believe or suspects to be in possession of or carrying any document or other thing the possession, circulation or distribution of which is punishable under this Act and may seize and detain any such document or thing found on such person.

(3) The provisions of the said Code shall, so far as may be, apply to searches made, and to the disposal of any property seized, under this section.

Offences to be cognizable.

13. Notwithstanding anything contained in the Code of Criminal Procedure, 1898, any offence punishable under this Act shall be cognizable.

Jurisdiction barred.

14. Every declaration of forfeiture purporting to be made under this Act shall, as against all persons, be conclusive evidence that the forfeiture therein referred to has taken place, and no proceeding or order purporting to be taken or made under this Act shall be called in question by any Court, and no civil or criminal proceeding shall be instituted against any person for anything done or in good faith intended to be done under this Act or against any person for any loss or damage caused to or in respect of any property whereof possession has been taken under this Act.

Effect of orders, etc., inconsistent with other laws.

15. Any order made, and any other action taken, under this Act shall have effect notwithstanding anything inconsistent therewith contained in any other law or in any instrument having effect by virtue of any other law.

Amendment of Act XXIII of 1931.

16. In its application to the Chief Commissioners' Provinces, the Indian Press (Emergency Powers) Act, 1931, shall have effect as if in sub-section *(1)* of section 4 thereof, after clause *(b)*

the following word and clause had been inserted, namely:—

"or

(bb) are calculated to instigate the commission of, or the publication of which constitutes, an offence punishable under the Press (Special Powers) Act, 1947."

17. The Press (Special Powers) (No. 2) Ordinance 1947. is hereby repealed.

Repeal of Ordinance X of 1947.

[THE] REHABILITATION FINANCE ADMINISTRATION ACT, 1948 (ACT XII OF 1948)

STATEMENT OF OBJECTS AND REASONS.

"Credit facilities for the settlement of refugees in business and industry cannot adequately be granted by commercial Banks and other financing agencies nor can they appropriately be provided by a commercial organization like the proposed Industrial Finance Corporation. It is also impracticable for the State to give such accommodation direct as in the case of agriculturists, small shopkeepers, artisans and persons engaged in professions. This Bill therefore seeks to establish for this purpose a Rehabilitation Finance Administration which will be financed and controlled by the Central Government but will work as a semi-autonomous body in close collaboration with the Central and Provincial Governments and Banks. Provision has also been made which will facilitate the granting of such financial assistance by normal banking channels."

—Gazette of India, 1948, Part V, page 73.

[THE] REHABILITATION FINANCE ADMINISTRATION ACT, 1948 (ACT XII OF 1948)[a]

[23rd March, 1948.]

An Act to establish the Rehabilitation Finance Administration.

WHEREAS it is expedient to establish a Rehabilitation Finance Administration for the purpose of giving financial assistance on reasonable terms to displaced persons to enable them to settle in business or industry;

It is hereby enacted as follows:—

[a] For Select Committee Report, *see* Gazette of India, 1948, Part V, page 117.

The Act is made applicable to —

(a) the Chota Nagpur Division and the Santal Parganas District — *see* Bihar Gazette, Extraord., dated 15-4-1948.

(b) the partially excluded areas in the Province of Bombay subject to certain modifications— *see* Bombay Gazette, 1948, Part IV A, Extraord., page 262;

(c) all the partially excluded areas in C. P. and Berar subject to certain modifications—*see* C. P. & Berar Gazette, 1948, Part I, page 439;

(d) all the partially excluded areas in the Province of Orissa subject to certain modifications — *see* Orissa Gazette, 1948, Part III, page 399;

(e) the partially excluded areas of Jounsar-Bawar Pargana in Dehra Dun District and to the portion of the Mirzapur district which lies to the south of Kaimur ranges from the date on which the Act comes into force in the Provinces of India — *see* U. P. Gazette 1948, Part I, page 831.

Short title, extent and commencement.

1. *(1)* This Act may be called the Rehabilitation Finance Administration Act, 1948.

(2) It extends to all the Provinces of India.

(3) It shall come into force on such date as the Central Government may, by notification in the official Gazette, appoint in this behalf.[a]

[a] The Act came into force on 1st June 1948 — *see* Gazette of India, 1948, Extraord., page 735.

Definitions.

2. In this Act, unless there is anything repugnant in the subject or context,

(a) 'Act' means the Rehabilitation Finance Administration Act, 1948;

(b) 'Administration' means the Rehabilitation Finance Administration constituted under this Act;

(c) 'borrower' means an individual, company, association or body of individuals, whether incorporated or not, to whom a loan has been advanced under this Act;

(d) 'displaced person' means—

(i) a person who, being displaced from any area outside India on account of civil disturbances or fear of such disturbances, has settled and is engaged or intends to engage in any business or industry in India, or

(ii) a person in India who, having had his business, industry or property, wholly or partially outside India, has lost, wholly or partially, such business, industry, or property on account of civil disturbances or the fear of such disturbances, and who is engaged, or intends to engage in any business or industry in India;

(e) 'loan' means a sum of money advanced by the Administration to a displaced person for business or industry; and

(f) 'prescribed' means prescribed by rules made under section 23 or regulations made under section 24.

Establishment and incorporation.

3. *(1)* The Central Government shall constitute a Corporation called the Rehabilitation Finance

Administration for giving financial assistance on reasonable terms to displaced persons to enable them to settle in business and industry.

(2) The Corporation shall be a body corporate by the name of the Rehabilitation Finance Adminstration having perpetual succession and a common seal, with power, subject to the provisions of this Act, to acquire, hold and transfer property, both movable and immovable, and shall by the said name sue and be sued.

(3) The Administration shall have its head office at Delhi and may with the previous approval of the Central Government, open branches at such places in India as it may consider necessary to discharge effectively its functions under this Act.

Constitution of the Administration.

4. *(1)* The Administration shall consist of the following members, namely:—

(a) a Chairman to be appointed by the Central Government who shall be called the Chief Administrator;

(b) three officials appointed by the Central Government; and

(c) three non-officials nominated by the Central Government.

(2) No act done by the Administration shall be called in question on the ground merely of the existence of any vacancy or any defect in the constitution of the Administration.

Advisory Board.

5. *(1)* The Central Government shall constitute an Advisory Board to advise the Administration on matters of policy and may where necessary constitute a Regional Committee to advise each branch of the Administration.

(2) The Advisory Board shall consist of such members, not exceeding fifteen in number, as may be nominated by the Central Government.

Terms of office of the members of the Administration and the Advisory Board.

6. *(1)* A member appointed under clauses *(a)* and *(b)* of sub section *(1)* of section 4 shall hold office during the pleasure of the Central Government.

(2) A member nominated under clause *(c)* of sub-section *(1)* of section 4 or sub-section *(2)* of section 5 shall hold office for a term of two years from the date of his nomination and shall be eligible for re-nomination.

(3) A nominated member may resign his membership by writing under his hand addressed to the Central Government and he shall thereupon cease to be a member.

(4) A casual vacancy created by resignation under sub-section *(3)* or by any other reason shall be filled by fresh nomination and the person nominated to fill the vacancy shall hold office only for the remainder of the term for which the member whose place he takes was nominated.

Disclosure of interest.

7. *(1)* No member of the Administration shall have any interest, direct or indirect, in any business, industry or concern to which any assistance under section 12 has been given or is to be given and if any such member acquires such interest at any time during the continuance of such assistance, he shall immediately disclose it to the Administration and shall either resign his membership or dispose of his interest in such manner and within such time as he may be directed by it.

(2) Any member of the Advisory Board who has any interest, direct or indirect, in any business, industry or concern to which any assistance under section 12 has been given or is to be given or acquires such interest at any time during the continuance of such assistance shall immediately disclose it to the Administration and shall not participate in the proceedings of the Advisory Board relating to such assistance.

Removal from membership.

8. Notwithstanding anything contained in section 6, the Central Government may, for any reason which may appear to it to be sufficient, remove any member at any time from the Administration or the Advisory Board.

The Chief Administrator.

9. The Chief Administrator shall be a whole time servant of the Administration and shall receive such salaries and allowances and shall be subject to such terms and conditions as may be determined by the Central Government.

Staff.

10. The Administration may, in the manner prescribed and with the prior sanction of the Central Government,—

(a) appoint a Deputy Chief Administrator and such other officers and servants as may be required to enable it to carry out the functions under this Act;

(b) fix the salary and allowances or other conditions of service of the Deputy Chief Administrator, other officers and servants;

(c) fix the remuneration and allowances payable to the members of the Administration and of the Advisory Board.

Funds of the Administration.

11. *(1)* The Central Government may from time to time advance money for the business of the Administration, the aggregate amount of which shall not exceed ten crores of rupees.

(2) All monies belonging to the Administration shall be deposited in the Reserve Bank of India or any agents thereof or invested in such securities as may be approved by the Central Government.

(3) The Administration shall pay interest on the money so advanced at the rate of 3 per cent. per annum to the Central Government.

Business of the Administration.

12. The Administration may —

(a) subject to the provisions of section 13 advance loans not exceeding an aggregate amount of seven crores of rupees ;

(b) re-discount bills of exchange and promissory notes in respect of loans advanced to a displaced person by a scheduled bank or a syndicate of banks up to an aggregate amount of one crore of rupees; and

(c) guarantee part of the losses, not exceeding 50 per cent. of the loss in any case, which a scheduled bank or a syndicate of banks may suffer in respect of any loan advanced to a displaced person with the approval of the Administration : provided that the maximum liability incurred under such guarantees shall not at any time in the aggregate exceed two crores of rupees.

Loans.

13. *(1)* The Central Government may prescribe the limits as to amounts within which loans may be advanced by the Administration.

(2) For the purpose of advancing any loan under sub-section *(1)*, the Administration may call for any report either through its own staff, or through the District Officer of the district in which the borrower resides or carries on business, or through any Provincial or a State Government, or through any Bank or any other appropriate agency.

(3) The Administration shall charge interest from the borrower at such rate not exceeding 6 per cent. per annum as may be specified by it.

(4) The period of the loan shall not exceed ten years.

(5) The loan may be advanced either for fixed capital or working capital or for both.

The assets created from the loan shall, notwithstanding any law or usage to the contrary, be deemed to be mortgaged to the Administration for the repayment of the loan together with the interest thereon and the amount of the loan and the interest thereon shall be first charge on such assets.

(6) The Administration may also take such further security for any loan as it may consider necessary.

Power to call for repayment before agreed period.

14. Notwithstanding any agreement to the contrary, the Administration may, by notice, require any borrower forthwith to repay in full with interest thereon any loan borrowed from it, —

(a) if it appears to the Administration that false or misleading information in any material particular was given by the borrower for obtaining the loan or while furnishing any information under section 17 ; or

(b) if the borrower has failed to comply with the terms of the contract with the Administration in the matter of the loan ; or

(c) if there is a reasonable apprehension that the borrower is unable to pay his debts or that insolvency proceedings or proceedings for liquidation may be commenced against him ; or

(d) if for any other reason it is necessary in the opinion of the Administration to protect the interests of the Administration.

Mode of recovery.

15. *(1)* If the amount of loan or any instalment thereof or interest thereon which is due, in accordance with the terms of the contract or under the provisions of section 14, has not been repaid the Administration may,—

(a) without prejudice to any other remedy provided by law, recover such loan, instalment or interests as arrears of land revenue, or

(b) take charge of the business or industry of the borrower on such terms and conditions as it may deem fit.

Audit.

16. *(1)* The affairs of the Administration shall be audited by one or more auditors qualified under section 144 of the Indian Companies Act, 1913, to act as auditors of companies, who shall be appointed by the Central Government on such remuneration as may be specified by it.

(2) An auditor so appointed shall hold office for a period of one year and shall be eligible for reappointment :

Provided that any casual vacancy in the office of an auditor shall be filled by the Central Government.

(3) Every auditor shall be supplied with a copy of the annual balance-sheet of the Administration, and it shall be his duty to examine it together with the accounts and vouchers relating thereto, and every auditor shall have a list delivered to him of all books kept by the Administration, and shall at all reasonable times have access to the books, accounts and other documents of the Administration, and may in relation to such accounts examine any officer of Administration.

(4) The auditors shall make a report to the Central Government upon the annual balance-sheet and accounts, and in every such report they shall state whether in their opinion the balance-sheet is a full and true balance-sheet containing all necessary particulars and properly drawn up so as to exhibit a true and correct view of the state of affairs of the Administration, and in case they have called for

any explanation or information from the Administration whether it has been given and whether it is satisfactory.

Power of inspection.

17. *(1)* The Chief Administrator or any other officer authorised by him in writing in this behalf may, by order require any borrower to furnish such information or to produce such books of accounts and other documents for inspection at such time and place as may be specified in the order and the borrower shall comply with such order.

(2) The Chief Administrator or such officer may inspect such books of accounts or documents produced and take extracts therefrom.

(3) The Chief Administrator or the officer making the inspection or any person working under his order shall not communicate or allow to be communicated to any person not legally entitled thereto any information relating to the affairs of the borrower.

(4) If any person contravenes the provisions of sub section *(1)* or sub section *(3)* he shall be punishable with imprisonment which may extend to six months or with fine which may extend to five thousand rupees or with both.

Returns.

18. *(1)* The Administration shall furnish to the Central Government a half yearly report together with accounts and such other information within such time and in such manner as may be specified by the Central Government.

(2) The report shall be laid before the Central Legislature as soon as may be after it is prepared.

Power of Central Government to give direction.

19. For the purposes of this Act, the Central Government may, from time to time, give to the Administration such general or special directions as it thinks fit, and the Administration shall, in the exercise of its functions under this Act, comply with any such directions.

Exemption from taxes.

20. Notwithstanding anything contained in the Indian Income-tax Act, 1922, or in any other enactment for the time being in force relating to income-tax, super-tax, or business profits tax, the Administration shall not be liable to pay any income tax, super-tax or business profits tax on any incomes, profits or gains.

Liquidation of the Administration.

21. *(1)* No provision of law relating to insolvency or to the winding up of companies or corporation shall apply to the Administration and the Administration shall not be placed in liquidation save by the order of the Central Government and in such manner as it may direct.

(2) In the event of the Administration being placed in liquidation, the assets of the Administration, after meeting the liabilities, if any, shall vest in the Central Government and the Central Government shall thereupon have all the powers of the Administration in recovering the loans remaining unpaid.

Delegation.

22. The Administration may, by notification in the official Gazette, direct that any power or duty which under any of the provisions of this Act is conferred or imposed upon the Administration shall, in such circumstances and under such conditions, if any, as may be specified in the direction, be exercised or discharged by the Chief Administrator, Deputy Chief Administrator or any other person subordinate to the Administration.

Power to make rules.

23. The Central Government may, by notification in the official Gazette, make rules[a] for the purpose of giving effect to the provisions of this Act.

[a] For Rehabilitation Finance Administration Rules, 1948, *see* Gazette of India, 1948, Extraord., page 955.

Power to make regulations.

24. *(1)* The Administration may, with the previous sanction of the Central Government, make regulations, not inconsistent with this Act or the rules made thereunder, to provide for all matters for which provision is necessary or expedient for the purpose of giving effect to the provisions of this Act.

(2) In particular and without prejudice to the generality of the foregoing power such regulations may provide for —

(a) the conditions on which a person may be recognised as a displaced person,

(b) the manner and the time of the general meetings of the Administration, or Advisory Board or Regional Committee and the procedure to be followed thereat and the manner in which right of voting may be exercised,

(c) the terms on which the Administration may grant loans,

(d) forms of returns and statements required under this Act,

(e) the duties and conduct, salaries, allowances and conditions of service of officers, servants and agents of the Administration,

(f) manner and form of application for loans and contracts,

(g) manner in which accounts of the Administration shall be kept and audited,

(h) the manner in which and the conditions under which the business or industry of a person to whom a loan has been advanced may be

taken charge of and administered under section 15.

(i) any other matter which has to be or may be specified under this Act.

(3) All regulations made under this section shall be published in the official Gazette and shall come into force on such date as may be specified therein.

[THE] REPEALING AND AMENDING ACT, 1947. (ACT II OF 1948.)

[5th January, 1948.]

An Act to repeal or amend certain enactments.

WHEREAS it is expedient that the enactments specified in the Schedule which are spent or have otherwise become unnecessary, or have ceased to be in force otherwise than by expressed specific repeal, should be expressly and specifically repealed :

AND WHEREAS it is expedient that certain formal amendments should be made in the Indian Income-tax Act, 1922 (XI of 1922) ;

It is hereby enacted as follows :—

Short title. 1. This Act may be called the Repealing and Amending Act, 1947.

Repeal of certain enactments. 2. The enactments specified in the Schedule are hereby repealed to the extent mentioned in the fourth column thereof.

Savings. 3. The repeal by this Act of any enactment shall not affect any other enactment in which such enactment has been applied, incorporated or referred to ;

and this Act shall not affect the validity, invalidity, effect or consequences of anything already done or suffered or any right, title, obligation or liability acquired, accrued or incurred, or any remedy or proceeding in respect thereof or any release or discharge of or from any debt, penalty, obligation, liability, claim or demand or any indemnity already granted, or the proof of any past act or thing :

nor shall this Act affect any principle or rule of law, or established jurisdiction, form or course of pleading, practice or procedure, or existing usage, custom, privilege, restriction, exemption, office or appointment, notwithstanding that they respectively may have been in any manner affirmed, recognised or derived by, in or from any enactment hereby repealed ;

nor shall the repeal by this Act of any enactment revive or restore any jurisdiction, office, custom, liability, right, title, privilege, restriction, exemption, usage, practice, procedure or other matter or thing not now existing or in force, or any provision of the Letters Patent of any High Court which under any such enactment ceased to have effect.

Amendment of section 10 of Act XI of 1922. 4. In section 10 of the Indian Income-tax Act, 1922,—

(a) in clause *(b)* of the proviso to clause *(vi)* of sub-section *(2)* for the words, brackets and letter "clause *(a)* of" the words, brackets and letter "clause *(b)* of" shall be substituted ; and

(b) in sub-section *(4)* for the word, brackets and figure "clause *(xii)*," wherever they occur, the word, brackets and figure "clause *(xv)*" shall be substituted.

THE SCHEDULE

(*See* section 2.)

Acts of the Indian Legislature.

1920	XL	The Aligarh Muslim University Act, 1920	The proviso to sub-section (3) of section 30.
1924	II	The Cantonments Act, 1924	The second proviso to sub-section *(1)* of section 15.
1927	XVI	The Indian Forest Act, 1927	Section 86 and the Schedule.
1934	II	The Reserve Bank of India Act, 1934	Clause *(7)* of section 17.
1939	XXXV	The Defence of India Act, 1939	The whole
1940	III	The Royal Indian Navy (Extension of Service) Act, 1940	The whole
1940	VII	The Reserve Bank of India (Closing of Annual Accounts) Act, 1940	The whole
1940	XXXVII	The War Donations and Investments (Companies) Act, 1940	The whole
1942	I	The Workmen's Compensation (Amendment) Act, 1942	The whole
1942	II	The Indian Merchant Shipping (Amendment) Act, 1942	The whole
1942	III	The Indus Vessels (Amendment) Act, 1942	The whole

Acts of the Indian Legislature — contd.

1942	IV	The Indian Medical Council (Amendment) Act, 1942	The whole
1942	V	The Indian Boilers (Amendment) Act, 1942	The whole
1942	VII	The Coffee Market Expansion Act, 1942	Section 50.
1942	VIII	The Indian Penal Code (Amendment) Act, 1942	The whole
1942	IX	The Cotton Ginning and Pressing Factories (Amendment) Act, 1942	The whole
1942	XI	The Protective Duties Continuation Act, 1942	The whole
1942	XV	The Cantonments (Amendment) Act, 1942	The whole
1942	XVI	The Indian Limitation (Amendment) Act, 1942	The whole
1942	XVII	The Indian Companies (Amendment) Act, 1942	The whole
1942	XX	The Motor Vehicles (Amendment) Act, 1942	The whole
1942	XXI	The Indian Companies (Second Amendment) Act, 1942	The whole
1942	XXII	The Indian Rubber Control (Temporary Amendment) Act, 1942	The whole
1942	XXIII	The Code of Civil Procedure (Amendment) Act, 1942	The whole
1942	XXIV	The Code of Civil Procedure (Second Amendment) Act, 1942	The whole
1942	XXV	The Repealing and Amending Act, 1942	The whole
1943	I	The Motor Vehicles (Amendment) Act, 1943	The whole
1943	II	The Government Savings Banks (Amendment) Act, 1943	The whole
1943	III	The Indian Railways (Amendment) Act, 1943	The whole
1943	IV	The Aligarh Muslim University (Amendment) Act, 1943	The whole
1943	V	The Code of Civil Procedure (Amendment) Act, 1943	The whole
1943	VI	The Indian Penal Code (Amendment) Act, 1943	The whole
1943	VII	The Coffee Market Expansion (Amendment) Act, 1943	The whole
1943	XII	The Indian Tea Control (Amendment) Act, 1943	The whole
1943	XIV	The Indian Army and Air Force (Military Prisons and Detention Barracks) Act, 1943	The whole
1943	XV	The Trade Marks (Amendment) Act, 1943	The whole
1943	XVI	The Muslim Personal Law (*Shariat*) Application (Amendment) Act, 1943	The whole
1943	XVII	The Indian Boilers (Amendment) Act, 1943	The whole
1943	XVIII	The Mines Maternity Benefit (Amendment) Act, 1943	The whole
1943	XIX	The Motor Vehicles (Drivers) (Amendment) Act, 1943	The whole
1943	XX	The Agricultural Produce (Grading and Marking) Amendment Act, 1943	The whole
1943	XXI	The Indian Army and Indian Air Force (Amendment) Act, 1943	The whole
1943	XXII	The Reciprocity (Amendment) Act, 1943	The whole
1943	XXIV	The Delhi University (Amendment) Act, 1943	The whole
1943	XXV	The Victoria Memorial (Amendment) Act, 1943	The whole
1943	XXVI	The Criminal Procedure Amendment Act, 1943	The whole
1943	XXVII	The Code of Criminal Procedure (Amendment) Act, 1943	The whole
1943	XXVIII	The Code of Criminal Procedure (Second Amendment) Act, 1943	The whole
1943	XXIX	The Indian Tea Control (Second Amendment) Act, 1943	The whole
1943	XXX	The Indian Companies (Amendment) Act, 1943	The whole
1944	I	The Central Excises and Salt Act, 1944	Section 38 and the third Schedule.
1944	II	The Coffee Market Expansion (Amendment) Act, 1944	The whole
1944	III	The Coal Mines Safety (Stowing) Amendment Act, 1944	The whole
1944	IV	The Indian Companies (Amendment) Act, 1944	The whole
1944	V	The Indian Aircraft (Amendment) Act, 1944	The whole
1944	VI	The Transfer of Property (Amendment) Act, 1944	The whole
1944	VII	The Insurance (Amendment) Act, 1944	The whole
1944	VIII	The Cantonments (Amendment) Act, 1944	The whole
1944	IX	The Indian Merchant Shipping (Amendment) Act, 1944	The whole
1944	XI	The Indian Income-tax (Amendment) Act, 1944	The whole
1944	XII	The Delhi Muslim Wakfs (Amendment) Act, 1944	The whole
1944	XIII	The Protective Duties Continuation Act, 1944	The whole
1944	XV	The Indian Patents and Designs (Temporary Amendment) Act, 1944	The whole
1944	XVI	The Coffee Market Expansion (Second Amendment) Act, 1944	The whole
1944	XVII	The Delhi Joint Water and Sewage Board (Amendment) Act, 1944	The whole
1945	I	The Indian Tea Control (Amendment) Act, 1945	The whole
1945	II	The Code of Criminal Procedure (Amendment) Act, 1945	The whole
1945	IV	The Indian Companies (Amendment) Act, 1945	The whole
1945	V	The Indian Merchandise Marks (Amendment) Supplementary Act, 1945	The whole
1945	VI	The Repealing and Amending Act, 1945	The whole
1945	VII	The Indian Army (Amendment) Act, 1945	The whole
1945	VIII	The Indian Air Force (Amendment) Act, 1945	The whole
1945	IX	The Indian Patents and Designs (Amendment) Act, 1945	The whole
1945	X	The Mines Maternity Benefit (Amendment) Act, 1945	The whole
1945	XI	The Aligarh Muslim University (Amendment) Act, 1945	The whole

Ordinances made by the Governor-General

1940	II	The National Service (Technical Personnel) Ordinance, 1940	The whole
1940	VIII	The Civic Guards Ordinance, 1940	The whole

Ordinances made by the Governor General—contd.

1942	X	The Civil Pioneer Force Ordinance, 1942	The whole
1942	XIII	The Women's Auxiliary Corps Ordinance, 1942	The whole
1942	XV	The Prisoners (Amendment) Ordinance, 1942	The whole
1942	XXII	The Deputy Commander-in-Chief (Powers) Ordinance, 1942	The whole
1942	XXXIII	The Civil Services (Conditions of Service) Ordinance, 1942	The whole
1942	LIII	The Railways (Employment of Military Personnel) Ordinance, 1942	The whole
1942	LVI	The Allied Forces Ordinance, 1942	The whole
1942	LVII	The Allied Forces (United States of America) Ordinance, 1942	The whole
1942	LXII	The Indian Legislature (Prevention of Disqualification) Ordinance, 1942	The whole
1943	I	The Enemy Agents Ordinance, 1943	The whole
1943	VI	The Indian Standard Time (Interpretation of References) Ordinance, 1943	The whole
1943	XIII	The Essential Services (Telephone Employees) Ordinance, 1943	The whole
1943	XVII	The Royal Indian Navy (Powers of Command) Ordinance, 1943	The whole
1943	XXI	The Parole Centres Ordinance, 1943	The whole
1943	XXII	The Special Police Establishment (War Department) Ordinance, 1943	The whole
1943	XXIV	The Discipline of Seamen Ordinance, 1943	The whole
1943	XXVIII	The Allied Forces (Exemption from Local Taxation) Ordinance, 1943	The whole
1943	XXXI	The Factories (Control of Dismantling) Ordinance, 1943	The whole
1943	XXXIII	The Military Stores (Unlawful Possession) Ordinance, 1943	The whole
1943	XXXV	The Hoarding and Profiteering Prevention Ordinance, 1943	The whole
1943	XLI	The Sugar (Temporary Excise Duty) Ordinance, 1943	The whole
1944	IV	The Military Safety (Powers of Detention) Ordinance, 1944	The whole
1944	XX	The Service in Ships (Requisition) Ordinance, 1944	The whole
1944	XXXI	The Indian Army (Second Amendment) Ordinance, 1944	So much as is not repealed
1944	XXXV	The Defence of India (Second Amendment) Ordinance, 1944	The whole
1944	L	The Sugar (Temporary Excise Duty) Ordinance, 1944	The whole
1945	I	The Factories (Control of Dismantling) Amendment Ordinance, 1945	The whole
1945	II	The National Service (European British Subjects) Amendment Ordinance, 1945	The whole
1945	III	The Delhi Rent Control (Amendment) Ordinance, 1945	The whole
1945	IV	The Military Safety (Powers of Detention) Amendment Ordinance, 1945	The whole
1945	VIII	The Essential Services (Dibru Sadiya and Colliery Branch Railway) Ordinance, 1945	The whole
1945	IX	The Indian Income-tax (Amendment) Ordinance, 1945	The whole
1945	XI	The Provincial Debt Laws (Temporary Validation) Ordinance, 1945	The whole
1945	XII	The Criminal Law (1943 Amendment) Amending Ordinance, 1945	The whole
1945	XIV	The Criminal Law (1944 Amendment) Amending Ordinance, 1945	The whole
1945	XVI	The Income-tax and Excess Profits Tax (Validity of Notices) Amendment Ordinance, 1945	The whole
1945	XVII	The Mines (Amendment) Ordinance, 1945	The whole
1945	XVIII	The Explosives (Amendment) Ordinance, 1945	The whole
1945	XX	The Excess Profits Tax (Amendment) Ordinance, 1945	The whole
1945	XXI	The Refugee Camps Ordinance, 1945	The whole
1945	XXII	The Criminal Law (1943 Amendment) Second Amending Ordinance, 1945	The whole
1945	XXV	The Defence of India (Amendment) Ordinance, 1945	The whole
1945	XXVII	The Civil Pioneer Force (Amendment) Ordinance, 1945	The whole
1945	XXXI	The Defence of India (Second Amendment) Ordinance, 1945	The whole
1945	XXXV	The Defence of India (Third Amendment) Ordinance, 1945	The whole
1945	XXXVI	The Armed Forces (Special Powers) Amendment Ordinance, 1945	The whole
1945	XXXVII	The Indian Army (Amendment) Ordinance, 1945	The whole
1945	XXXVIII	The National Service (European British Subjects) Amendment Ordinance, 1945	The whole
1945	XXXIX	The Bills of Exchange Ordinance, 1945	The whole
1945	XLI	The War Injuries (Compensation Insurance) Amendment Ordinance, 1945	The whole
1945	XLII	The Indian Army and Indian Air Force (Amendment) Ordinance, 1945	The whole
1945	XLIII	The Hoarding and Profiteering Prevention (Amendment) Ordinance, 1945	The whole
1945	XLIV	The Defence of India Reserve (Disbandment) Ordinance, 1945	The whole
1945	XLV	The Defence of India (Fourth Amendment) Ordinance, 1945	The whole
1945	XLVIII	The Indian Army (Second Amendment) Ordinance, 1945	The whole
1946	XI	The Defence of India (Amendment) Ordinance, 1946	The whole
1946	XII	The Defence of India (Second Amendment) Ordinance, 1946	The whole

[THE] RESERVE BANK (TRANSFER TO PUBLIC OWNERSHIP) ACT, 1948

(ACT LXII OF 1948)

STATEMENT OF OBJECTS AND REASONS.

"The Reserve Bank of India, as at present constituted, is a privately owned institution incorporated by a special Act. With a view to implement the Government policy that the Bank should function as a State-owned institution and to meet the general desire that the control of Government over the Bank's activities should be extended to ensure a greater co-ordination of the monetary, economic and financial policies, this Bill has been framed to provide—

(1) for the acquisition of all shares of the Bank held

by members of the public against payment of compensation ;

(2) for enabling Government, after consultation with the Bank's Governor, to give directions to the Bank in matters of policy ;

(3) for amending the constitution of the Central and Local Boards which at present mainly represent the shareholders ;

(4) for effecting certain amendments including consequential amendments in the Reserve Bank of India Act, 1934."

— Gazette of India, 1948, Part V, page 487.

THE RESERVE BANK (TRANSFER TO PUBLIC OWNERSHIP) ACT, 1948 (ACT LXII OF 1948)

[23rd September, 1948.]

An Act to bring the share capital of the Reserve Bank of India into public ownership and to make consequential amendments in the Reserve Bank of India Act, 1934.

WHEREAS it is expedient to bring the share capital of the Reserve Bank of India into public ownership, to make provisions with respect to the relations between the Central Government and the Bank and to make consequential amendments in the Reserve Bank of India Act, 1934 ;

It is hereby enacted as follows :

Short title.

1. This Act may be called the Reserve Bank (Transfer to Public Ownership) Act, 1948.

Definitions.

2. In this Act,—

(a) "appointed day" means such day as the Central Government may, by notification in the official Gazette, appoint[a];

(b) "Bank" means the Reserve Bank of India as constituted by the principal Act ; and

(c) "principal Act" means the Reserve Bank of India Act, 1934.

[a] 1st January 1949 appointed as 'appointed day' for the purposes of this Act—*see* Gazette of India, 1948, Extraord., page 1657.

Transfer of bank shares.

3. *(1)* On the appointed day—

(a) all shares in the capital of the Bank shall by virtue of this Act be deemed to be transferred free of all trusts, liabilities and encumbrances to the Central Government ; and

(b) as full compensation therefor, the Central Government shall issue to every person who, immediately before the appointed day, is registered as the holder of any such shares, an amount calculated at the rate of one hundred and eighteen rupees and ten annas per share, in promissory notes of the Central Government bearing interest at the rate of three *per centum per annum* repayable at par on such date as may be specified in this behalf by the Central Government :

Provided that where the amount so calculated is not an exact multiple of one hundred rupees the amount in excess of the nearest lower multiple of one hundred rupees shall be paid by cheque drawn on the Bank :

Provided further that in respect of any share obtained at par from the Central Government by any Director of the Bank in pursuance of sub-section *(8)* of section 4 of the principal Act as in force immediately before the appointed day, the said amount shall be calculated at the rate of one hundred rupees per share.

(2) Notwithstanding the transfer of shares effected by this section any shareholder who, immediately before the appointed day, is entitled to payment of dividend on the shares held by him shall be entitled to receive from the Bank—

(a) all dividends accruing due on his shares in respect of the year ending on the 30th day of June, 1948, or any preceding year remaining unpaid on the appointed day ;

(b) dividends calculated at the rate of four rupees *per annum* per share in respect of the period from the 1st day of July, 1948, to the appointed day.

Vacation of office by existing office bearers.

4. On the appointed day any person who immediately before that day was holding office of a Director of the Central Board otherwise than as Governor or Deputy Governor or as a member of a Local Board of the Bank shall vacate his office, and the Central Board and the Local Boards of the Bank shall thereafter be constituted in the manner prescibed by sections 8 and 9 of the principal Act as amended by this Act.

Interim arrangements.

5. Pending the constitution of the Central Board under section 8 of the principal Act as amended by this Act, the Governor of the Bank, or in his absence a Deputy Governor of the Bank duly nominated by him in this behalf, may, subject to such restrictions and conditions as may from time to time be imposed by the Central Government, exercise all powers, and do all acts and things which may be exercised or done by the Bank.

Rule making power.

6. *(1)* The Central Government may, by notification in the official Gazette, make rules[a] for the purpose of giving effect to the objects of this Act.

(2) In particular and without prejudice to the generality of the foregoing power, such rules may provide—

(a) for the manner in which and the authority by which compensation shall be paid under section 3 ; and

(b) for the determination of persons to whom compensation is so payable.

[a] For such rules, *see* Gazette of India, 1948, Extraord., page 1657.

Amendments to Act II of 1934.

7. As from the appointed day, the Reserve Bank of India Act, 1934, shall be amended in the manner directed in the Schedule to this Act.

THE SCHEDULE

(See section 7*)*

Amendments to the Reserve Bank of India Act, 1934.

Section 2.—In clause *(d)*, omit "silver".

Chapter II. — In the heading for 'SHARE CAPITAL" substitute "CAPITAL".

Capital of the Bank.

For section 4 substitute the following, namely :—

"4. The capital of the Bank shall be five crores of rupees".

Omit section 5.

Management.

For section 7 substitute the following, namely :—

"7. *(1)* The Central Government may from time to time give such directions to the Bank as it may, after consultation with the Governor of the Bank, consider necessary in the public interest.

(2) Subject to any such directions, the general superintendence and direction of the affairs and business of the Bank shall be entrusted to a Central Board of Directors which may exercise all powers and do all acts and things which may be exercised or done by the Bank.

(3) Save as otherwise provided in regulations made by the Central Board, the Governor shall have full powers to transact all the business of the Bank which may be transacted by the Central Board."

Section 8.—

(i) for sub-section *(1)* substitute the following, namely :—

"*(1)* The Central Board shall consist of the following directors, namely :—

(a) a Governor and two Deputy Governors to be appointed by the Central Government;

(b) four Directors to be nominated by the Central Government, one from each of the four Local Boards as constituted by section 9;

(c) six Directors to be nominated by the Central Government; and

(d) one Government official to be nominated by the Central Government.";

(ii) for the second paragraph of sub-section *(4)* substitute the following, namely :—

"A Director nominated under clause *(c)* of sub-section *(1)* shall, subject to the provisions of sub-section *(6)*, hold office for a period of four years.";

(iii) after sub-section *(5)*, the following sub-sections shall be added, namely :—

"*(6)* Out of the six Directors first nominated under clause *(c)* of sub-section *(1)*, two shall retire at the end of one year, two at the end of two years and the last two at the end of three years, the Directors so to retire being determined by lot.

(7) A retiring Director shall be eligible for re-nomination".

Local Boards, their constitution and functions.

For section 9 substitute the following, namely :—

"9. *(1)* A Local Board shall be constituted for each of the four areas specified in the First Schedule and shall consist of five members to be appointed by the Central Government to represent, as far as possible, territorial and economic interests and the interests of co-operative and indigenous banks.

(2) The members of the Local Board shall elect from amongst themselves one person to be the chairman of the Board.

(3) The members of the Local Board shall hold office for a term of four years and shall be eligible for re-appointment.

(4) A Local Board shall advise the Central Board on such matters as may be generally or specifically referred to it and shall perform such duties as the Central Board may delegate to it".

Section 11—

(i) in sub-section *(1)* for "nominated or elected", substitute "other" and omit the proviso;

(ii) for sub-section *(2)* substitute the following, namely :—

"*(2)* A Director nominated under clause *(b)* or clause *(c)* of sub-section *(1)* of section 8 shall cease to hold office if without leave from the Central Board he absents himself from three consecutive meetings of the Board convened under sub-section *(1)* of section 13.";

(iii) in sub-section *(5)* the words "appointment" and "or election" in two places shall be omitted.

Section 12 —

(i) omit sub-section *(2)*;

(ii) in sub-section *(3)*, omit the words "otherwise than by the occurrence of a vacancy in the office of a Director elected by the Local Board", and the word "qualified", and for the word "elected" substitute the word "other";

(iii) in sub-section *(4)*, for the words commencing with "in the case of a nominated Director" and ending with the words "for the

election of members of a Local Board" substitute the words "by the Central Government";

(iv) in sub-section *(5)*, omit "or elected" and "subject to the proviso contained in sub-section *(4)*".

Omit sections 14, 15 and 16.

In clause *(3)* of section 17,—

(i) in sub-clause *(a)*, for the word "sterling" substitute the words "foreign exchange";

(ii) in sub-clause *(b)*, for the words "the United Kingdom" substitute the words "any country outside India which is a member of the International Monetary Fund";

(iii) omit sub-clause *(c)*.

Section 18 —

(i) in the first paragraph, omit the words "or, where the powers and functions of the Central Board under this section have been delegated to a committee of the Central Board or to the Governor, in the opinion of such Committee or of the Governor, as the case may be,";

(ii) in clause *(2)* for the word "sterling" substitute the words "foreign exchange"; and

(iii) omit the proviso.

Section 24 — After the words "denominational values of' insert the words "two rupees,".

Section 33 —

(i) In sub sections *(1)* and *(2)*, for the word "sterling securities" substitute the words "foreign securities;"

(ii) for sub-section *(6)*, substitute the following, namely:—

"*(6)* For the purposes of this section, the foreign securities which may be held as part of the assets shall be securities of the following kinds payable in the currency of any foreign country which is a member of the International Monetary Fund, namely:—

(a) balances at the credit of the Issue Department with the bank which is the principal currency authority of that foreign country, or, if there is no such bank, with any bank incorporated in that foreign country;

(b) bills of exchange bearing two or more good signatures and drawn on and payable at any place in that foreign country and having a maturity not exceeding ninety days; and

(c) Government securities of that foreign country maturing within five years."

Omit section 35.

Section 39.— In sub-section *(2)* for the word "five" substitute the word "two."

For section 47, substitute the following, namely:—

Allocation of surplus profits.

"47. After making provision for bad and doubtful debts, depreciation in assets, contributions to staff and superannuation funds and such other contingencies as are usually provided for by bankers, the balance of the profits shall be paid to the Central Government."

Section 48.—Omit the proviso to sub-section *(1)* and omit sub-section *(2)*.

For section 50 substitute the following, namely:—

Auditors.

"50. *(1)* Not less than two auditors shall be appointed, and their remuneration fixed, by the Central Government.

(2) The auditors shall hold office for such term not exceeding one year as the Central Government may fix while appointing them, and shall be eligible for re-appointment."

Section 51.—Omit the words "or such auditors as it thinks fit."

Section 52. — In sub section *(2)*, omit the words "to the share holders or," "as the case may be" and "Any such report made to the shareholders shall be read, together with the report of the Central Board, at the annual general meeting."

Section 53 —Omit sub section *(3)*.

Omit sections 55 and 56.

Section 57.—Omit sub-section *(2)*.

Section 58.—In sub-section *(2)*, omit clauses *(a)* to *(e)* inclusive.

For the First Schedule substitute the following, namely:—

"THE FIRST SCHEDULE.

(*See* section 9)

1. THE WESTERN AREA shall consist of the Province of Bombay, the Central Provinces and Berar, Hyderabad, Baroda, Kutch, the United State of Kathiawar (Saurashtra), Kolhapur, the United State of Gwalior, Indore and Malwa (Madhya Bharat), Bhopal, the Acceding States administered by the Government of Bombay and the Acceding States administered by the Government of the Central Provinces and Berar.

2. THE EASTERN AREA shall consist of West Bengal, Bihar, Orissa, Assam, the Andaman and Nicobar Islands, Manipur, Cooch Behar, Tripura, Mayurbhanj, the United State of Vindhya Pradesh, the Khashi States, the Acceding States administered by the Government of Bihar and the Acceding States administered by the Government of Orissa.

3. THE NORTHERN AREA shall consist of the United Provinces, East Punjab, Delhi, Ajmer-Merwara, Panth Piploda, Khashmir, Himachal Pradesh, Patiala and the East Punjab States Union, Bilaspur, Tehri-Garhwal, Rampur, Banaras, the United State of Rajasthan, the United State of Matsya, Jaisalmer, Jodhpur, Bikaner, Jaipur, and the Acceding States administered by the Government of East Punjab.

4. THE SOUTHERN AREA shall consist of the Province of Madras, Coorg, Mysore, Cochin, Travancore, Sandur and the Acceding States administered by the Government of Madras."

Omit the Fourth Schedule.

[THE] ROAD TRANSPORT CORPORATIONS ACT, 1948
(ACT XXXII OF 1948)

STATEMENT OF OBJECTS AND REASONS.

"Provincial Governments are formulating scheme to ensure the development of a rationalised system of road transport in co-ordination with Railways. Some of them have decided to set up statutory transport boards in preference to tripartite companies contemplated in the White Paper laid on the table of the Central Legislature in the Budget Session, 1946. Under the Government of India Act, 1935, the power to legislate in respect of trade and commerce is given to the Provincial Legislature, while the power to legislate for the incorporation, regulation and winding up of trading corporations is given to the Central Legislature. The Boards contemplated by Provincial Governments have been held to fall within the definition of trading corporations. This Bill is intended to give the necessary power to such Provincial Governments as may desire to set up the Corporations. While delegating this power it is necessary to guard against wasteful competition between road transport services and the Railways, and provision has, therefore, been made for the Corporations being set up with the consent of the Central Government. All other details relating to the constitution of the Corporations, which are likely to vary from Province to Province, are being left to be provided for in Provincial Legislation."

—Gazette of India, 1948, Part V, page 370.

[THE] ROAD TRANSPORT CORPORATIONS ACT, 1948
(ACT XXXII OF 1948)[a]

[16th April, 1948]

An Act to provide for the incorporation of Road Transport Corporations and for purposes connected therewith.

WHEREAS for the promotion of a co-ordinated system of road transport in India it is expedient to provide for the incorporation of Road Transport Corporations in which the Central and Provincial Governments shall be properly represented, and to make certain provisions incidental thereto;—

It is hereby enacted as follows:

[a] This Act is made applicable to all the partially excluded areas in C. P. and Berar subject to certain modifications— *See* C. P. and Berar Gazette, 1948, Part I, page 548.

Short title, extent and commencement.

1. *(1)* This Act may be called the Road Transport Corporations Act, 1948.

(2) It extends to all the Provinces, but shall not come into force in any Province unless the Central Government, by notification, so directs.

Definitions.

2. In this Act, unless there is anything repugnant in the subject or context,—

"Corporation" means the Road Transport Corporation appointed by the Provincial Government in pursuance of this Act.

Power of Provincial Governments to appoint Corporations.

3. *(1)* Notwithstanding anything contained in the Motor Vehicles Act, 1939, the Indian Companies Act, 1913, or any other law a Provincial Government, having regard to

(a) the advantages offered to the public, trade and industry by the development of road transport;

(b) the desirability of co-ordinating any form of road transport with any other form of transport;

(c) the desirability of extending and improving the facilities for road transport in any area in such manner as to provide most efficiently and as cheaply as possible for the needs thereof and of preventing uneconomic competition among any forms of road transport;

may appoint, by notification issued in this behalf, a Road Transport Corporation for the whole or any part of the Province.

(2) In such Corporation—

(a) provision shall be made and continue to be made by or under the relevant provincial law for the reservation and allotment to the Central Government, as represented by its Railways, of such percentage of the share capital of the Corporation, if any, as may be agreed to by the Central and the Provincial Governments;

(b) provision shall be made and continue to be made for adequate representation of the Central Government and of the Provincial Government concerned on the Corporation; and

(c) provision shall be made for the payment of due compensation in accordance with rules made under section 7 to the owners of any road transport services whose services are taken over by the Corporation:

Provided that where no agreement is arrived at or a dispute arises in respect of any matter referred to in this sub-section between the Central Government and a Provincial Government

such dispute will be referred to an arbitral tribunal consisting of one nominee of the Central Government, one nominee of the Provincial Government and one nominee of the Chief Justice of the Federal Court who shall be Chairman of the tribunal and the findings of the tribunal shall be final and binding.

Incorporation and dissolution of Corporation.

4. Any Corporation appointed by a Provincial Government in pursuance of this Act shall be a body corporate having perpetual succession and a common seal and may sue and be sued by the name given to it by or under the relevant Provincial law.

Composition of Corporation.

5. Subject to the other provisions of this Act any Corporation appointed by a Provincial Government shall consist of such number of persons as the Provincial Government may think fit to appoint and shall have such rights and privileges and shall exercise such duties and functions as may be specified by or under any Provincial law.

Winding up of Corporation.

6. Nothing in the Indian Companies Act, 1913, shall apply to the Corporation, and no Corporation shall be wound up save by order of the Provincial Government, and save in such manner as the Provincial Government may direct:

Provided that no order for winding up shall be passed by any Provincial Government under this section unless it has first obtained the approval of the Central Government thereto.

Power to make rules.

7. The Central Government may make rules to carry out the purposes of clause *(c)* of sub-section *(2)* of section 3 of this Act.

[THE] TERRITORIAL ARMY ACT, 1948. (ACT LVI OF 1948)

STATEMENT OF OBJECTS AND REASONS

"This Bill seeks to provide the legal basis for raising the Territorial Army, the proposals regarding which were announced in Parliament on the 8th April 1948. Owing to the constitutional changes, the old Territorial Force Act, 1920, is no longer suitable for this purpose. For example, the Act of 1920 makes members of the Force subject to the British Army Act. The present Bill merely lays down the broad principles on which the Territorial Army is to be raised leaving all administrative details, etc., to be provided for in rules and regulations. The role of the force will be—

(a) to provide a second line to, and a source of reinforcement for, the regular army;
(b) to assist in internal defence duties in a national emergency;
(c) to be responsible for anti-aircraft and coastal defence; and
(d) to give the youth of India an opportunity of training themselves to defend their country.

With the passage of this Bill, the Indian Territorial Force Act, 1920, will lapse."

—Gazette of India, 1948, Part V, page 619.

[THE] TERRITORIAL ARMY ACT, 1948 (ACT LVI OF 1948)

[10th September, 1948.]

An Act to provide for the constitution of a Territorial Army.

WHEREAS it is expedient to provide for the constitution of a Territorial Army;

It is hereby enacted as follows:—

Short title, extent and application.

1. *(1)* This Act may be called the Territorial Army Act, 1948.

(2) It extends to the whole of India[a] and applies to all classes of persons in the Territorial Army, wherever they may be.

[a.] This Act is made applicable to —

(a) all the partially excluded areas in Assam specified in Schedule to the Government of India (Excluded and Partially Excluded Areas) Order, 1936—*See* Assam Gazette, 1948, Part II, page 1571;
(b) The Chota Nagpur Division and to Santhal Parganas District—*See* Bihar Gazette, 1948, Part II, page 2736;
(c) Darjeeling district on and from 16-12-1948—*See* Calcutta Gazette, 1948, Part I, page 1650;
(d) all partially excluded areas in C. P. and Berar subject to certain modifications—*See* C. P. and Berar Gazette, 1948, Part I, page 725;
(e) all partially excluded areas and to all excluded areas other than Laccadive Islands and Minicoy in the Province of Madras and the Act except S. 13 thereof shall apply to the Laccadive Islands and Minicoy — *See* Fort St. George Gazette, 1948, Part I, page 1079.

Definitions.

2. In this Act, unless there is anything repugnant in the subject or context,—

(a) "enrolled" means enrolled in the Territorial Army under the provisions of this Act;

(b) "officer" means an officer of any of the two classes specified in section 5;

(c) "non-commissioned officer" means a person holding a non-commissioned rank in the Territorial Army, and includes an acting non-commissioned officer;

(d) "prescribed" means prescribed by rules made under this Act;

(e) the expression "regular forces" means officers and other ranks who, by their commission, terms of enrolment or otherwise, are liable

to render continuously for a term military service under the Indian Army Act, 1911; and

(f) all words and expressions used herein and defined in the Indian Army Act, 1911, and not hereinbefore defined, shall be deemed to have the meanings respectively attributed to them by that Act.

Constitution of the Territorial Army.

3. *(1)* There shall be raised and maintained in the manner hereinafter provided an army to be designated the Territorial Army.

(2) The Central Government may constitute such number of units of the Territorial Army as it thinks fit and may disband or reconstitute any units so constituted.

Personnel of the Territorial Army.

4. There shall be the following classes of persons in the Territorial Army, namely,—

(a) officers; and

(b) enrolled persons.

Officers.

5. Officers in the Territorial Army shall be of the two following classes, namely,—

(a) officers holding commissions in the Territorial Army granted by the Governor General with designations of rank corresponding to those of Indian commissioned officers; and

(b) junior commissioned officers holding commissions in the Territorial Army granted by the Governor-General with designations of rank corresponding to those of Viceroy's commissioned officers.

Persons eligible for enrolment.

6. Any person domiciled in India may offer himself for enrolment in the Territorial Army, and may, if he satisfies the prescribed conditions, be enrolled for such period and subject to such conditions as may be prescribed.

Liability for military service.

7. *(1)* No officer or enrolled person shall be required to perform military service beyond the limits of India save under a general or special order of the Central Government.

(2) Subject to the provisions of sub-section *(1)*, every officer or enrolled person shall, subject to such conditions as may be prescribed, be bound to serve in any unit of the Territorial Army to which he is for the time being attached and shall be subject to all the rules made under this Act in relation to such unit.

(3) Every officer or enrolled person shall be liable to perform military service,—

(a) when called out in the prescribed manner to act in support of the civil power or to provide essential guards;

(b) when embodied in the prescribed manner for training or for supporting or supplementing the regular forces; and

(c) when attached to any regular forces either at his own request or under the prescribed conditions.

Discharge.

8. Every person enrolled under this Act shall be entitled to receive his discharge from the Territorial Army on the expiration of the period for which he was enrolled and any such person may, prior to the expiration of that period, be discharged from the said army by such authority and subject to such conditions as may be prescribed :

Provided that no enrolled person who is for the time being engaged in military service under the provisions of this Act, shall be entitled to receive his discharge before the termination of such service.

Application of the Indian Army Act, 1911.

9. *(1)* Every officer when doing duty as such officer, and every enrolled person when called out or attached to embodied or attached to any regular forces, shall, subject to such adaptations and modifications as may be made therein by the Central Government by notification in the official Gazette, be subject to the provisions of the Indian Army Act, 1911, and the rules or regulations made thereunder in the same manner and to the same extent as if such officer or enrolled person held the same rank in the regular forces as he holds for the time being in the Territorial Army.

(2) When an offence punishable under the Indian Army Act, 1911, has been committed by any person whilst subject to that Act under the provisions of sub-section *(1)* such person may be taken into and kept in military custody and tried and punished for such offence as aforesaid in like manner as he might have been taken into and kept in military custody, tried and punished if he had continued to be so subject.

Summary trial and punishment.

10. In addition to, or in substitution for, any punishment or punishments to which he may be liable under the Indian Army Act, 1911, any enrolled person may be punished either by a criminal Court or summarily by order of the prescribed authority for any offence under that Act or for the contravention of any of the provisions of this Act or of any rules made thereunder with fine which may extend to one hundred rupees to be recovered in such manner and by such authority as may be prescribed:

Provided that no fine shall be summarily inflicted by order of the prescribed authority in any case in which the accused claims to be tried by a criminal Court.

Jurisdiction to try offences.

11. No Court inferior to that of a Presidency Magistrate or a Magistrate of the first class shall try any offence made punishable by or under this Act.

Presumption as to certain documents.

12. Where an enrolled person is required by or in pursuance of any rule made under this Act to attend at any place, a certificate purporting to be signed by the prescribed officer stating that the person so required to attend failed to do so in accordance with such requirement shall, without proof of the signature or appointment of such officer, be evidence of the matters stated therein.

Persons subject to this Act to be deemed part of regular forces for certain purposes.

13. For the purposes of sections 128, 130 and 131 of the Code of Criminal Procedure, 1898, all officers, non-commissioned officers and other enrolled persons who have been attached to a unit shall be deemed to be officers, non-commissioned officers and soldiers respectively of the regular forces.

Power to make rules.

14. *(1)* The Central Government may make rules to carry out the purposes of this Act.

(2) In particular, and without prejudice to the generality of the foregoing power, such rules may —

(a) prescribe the manner in which, the period for which and the conditions subject to which any person may be enrolled under this Act;

(b) prescribe the manner in which and the conditions subject to which officers and enrolled persons may be called out for service, or embodied for training or for supporting or for supplementing the regular forces or attached to any regular forces;

(c) prescribe preliminary and periodical military training, compulsory and voluntary, for any enrolled person and provide for the embodiment of any unit for that purpose;

(d) define the manner in which and the conditions under which any enrolled person may be excused from training;

(e) prescribe the authorities by which and the conditions subject to which enrolled persons may be discharged under section 8;

(f) prescribe the authorities by which offences under this Act may be punished and the fine inflicted may be recovered;

(g) prescribe the officers by whom certificates may be signed under section 12;

(h) generally provide for any other matter which under this Act is to be or may be prescribed.

Repeal of Act XLVIII of 1920.

15. The Indian Territorial Force Act, 1920, is hereby repealed.

II. AMENDING ACTS, 1947 — 1948

[THE INDIAN] AIRCRAFT (AMENDMENT) ACT, 1948.
(ACT XXIV OF 1948)

[12th April, 1948.]

An Act further to amend the Indian Aircraft Act, 1934.

WHEREAS it is expedient further to amend the Indian Aircraft Act, 1934, for the purposes hereinafter appearing;

It is hereby enacted as follows : —

Short title.

1. This Act may be called the Indian Aircraft (Amendment) Act, 1948.

Amendment of section 1 of Act XXII of 1934.

2. For sub-section *(2)* of section 1 of the Indian Aircraft Act, 1934 (hereinafter called the said Act), the following shall be substituted :—

"*(2)* It extends to the whole of India, and applies also—

(a) to British subjects and servants of the Crown in any part of India ;

(b) to British subjects who are domiciled in any part of India wherever they may be ; and

(c) to, and to the persons on, aircraft registered in India wherever they may be."

Amendment of certain sections of Act XXII of 1934

3. In sections other than section 1 of the said Act, for the words "the Provinces" wherever they occur, the word "India" shall be substituted.

[THE INDIAN] ARMY (AMENDMENT) ACT, 1948.
(ACT XLIII OF 1948)

[3rd September, 1948.]

An Act further to amend the Indian Army Act, 1911.

WHEREAS it is expedient further to amend the Indian Army Act, 1911 (VIII of 1911), for the purposes hereinafter appearing;

It is hereby enacted as follows :

Short title.

1. This Act may be called the Indian Army (Amendment) Act, 1948.

Substitution of section 6A, Act VIII of 1911.

2. For section 6A of the Indian Army Act, 1911 (hereinafter referred to as the said Act), the following section shall be substituted, namely :—

Relations between forces of Acceding States and Indian Land Forces when acting together.

"6A. When any of the forces of an Acceding State are

acting with, or are attached to, any body of His Majesty's Indian Land Forces, whether within or outside the State, then—

(a) all the provisions of this Act shall apply to such forces and the members thereof as if they formed part of that body of His Majesty's Indian Land Forces;

(b) for the purposes of command and discipline and for the purposes of the provisions of this Act relating to superior officers, any officer, sub-commissioned officer, warrant officer or non-commissioned officer of such forces shall, in relation to that body of His Majesty's Indian Land Forces, have all such powers and be treated as if he were an Indian commissioned officer, Viceroy's commissioned officer, warrant officer or non-commissioned officer, as the case may be, of His Majesty's Indian Land Forces; and

(c) the relative rank of officers, sub-commissioned officers, warrant officers and non-commissioned officers of such forces and of His Majesty's Indian Land Forces shall be such as may be determined by the Central Government or by such other authority as may be prescribed."

Omission of section 6B, Act VIII of 1911.

3. Section 6B of the said Act shall be omitted.

Amendment of section 7, Act VIII of 1911.

4. *(1)* In clause *(2)* of section 7 of the said Act, after the word "means," the words "a person of Indian nationality holding His Majesty's commission in His Majesty's Land Forces or" shall be inserted.

(2) The amendment made by sub-section *(1)* of this section shall be deemed to have been made with effect from the 15th day of August, 1947.

Repeal.

5. The Indian Army (Amendment) Ordinance, 1948, is here by repealed.

[THE INDIAN] ARMY AND THE INDIAN AIR FORCE (AMENDMENT) ACT, 1948.

(ACT XVII OF 1948)

[29th March, 1948]

An Act further to amend the Indian Army Act, 1911, and the Indian Air Force Act, 1932, for certain purposes and to make certain consequential amendments to the Administrator General's Act, 1913

WHEREAS it is expedient further to amend the Indian Army Act, 1911 (VIII of 1911) and the Indian Air Force Act, 1932 (XIV of 1932) for the purposes hereinafter appearing and to make certain consequential amendments to the Administrator General's Act, 1913 (III of 1913);

It is hereby enacted as follows:—

Short title.

1. This Act may be called the Indian Army and the Indian Air Force (Amendment) Act, 1948.

Amendment of section 114, Act VIII of 1911.

2. In section 114 of the Indian Army Act, 1911,—

(i) in the opening paragraph for the word "rules" the word "provisions" shall be substituted and after the words "this Act" the words "not being an Indian commissioned officer," shall be inserted;

(ii) for clause *(2)* the following clause shall be substituted, namely:—

"*(2)* In the case of a deceased person who has left in a bank (including any post office savings bank, co-operative bank or society or any other institution receiving deposits in money, however named) a deposit not exceeding one thousand rupees, the commanding officer may, if he thinks fit, require the agent, manager or other proper officer of such bank, society or other institution to pay the deposit to him forthwith, notwithstanding anything in any rules of the bank, society or other institution and when any money has been paid by such bank, society or other institution in compliance with such requisition, no person shall have any claim against the bank, society or other institution in respect of such money";

(iii) in clause *(4)* after the words "cause the moveable property to be sold by public auction" the words "and may convert into money any cash certificates (including post office cash certificates, defence savings certificates and national savings certificates)" and after the words "proceeds of the sale" the words "or conversion" shall be inserted;

(iv) clause *(7)* and the *Explanations* shall be omitted and clause *(8)* shall be renumbered *(7)*;

(v) in clause *(7)* as so renumbered the words "or the Standing Committee of Adjustment as the case may be" shall be omitted and after the words "a deceased person" the words "or deserter" shall be inserted.

Substitution of new sections for section 116, Act VIII of 1911.

3. For section 116 of the Indian Army Act, 1911, the following sections shall be substituted, namely:—

Application of sections 114 and 115 to lunatics, etc.

"116. The provisions of sections 114 and 115 shall, so far as they can be made applicable, apply in the case of a person subject to this Act, not being an Indian commissioned officer, who, notwithstanding anything contained in the Indian Lunacy Act, 1912 (IV of 1912), is ascertained in the prescribed manner to be insane, or, who, being on active service, is officially reported missing, as if he had died on the day on which his insanity is so ascertained, or, as the case may be, on the day on which he is officially reported missing:

Provided that in the case of a person so reported missing no action shall be taken under clauses *(2)* to *(5)*, inclusive of section 114 until such time as such person is officially presumed to be dead.

Property of Indian commissioned officers who die or desert.

116A. The provisions of sections 116B to 116I, inclusive, shall apply to the disposal of the property of Indian commissioned officers subject to this Act, who die or desert.

Powers of Committee of Adjustment.

116B. *(1)* On the death or desertion of an Indian commissioned officer, a Committee of Adjustment appointed in this behalf in the manner prescribed (hereinafter referred to as the Committee) shall, as soon as may be, subject to the rules made in this behalf under this Act,—

(a) secure all the moveable property belonging to the deceased or deserter, that is in camp or quarters, and cause an inventory thereof to be made, and ascertain and draw the pay and allowances, if any, due to him: and

(b) ascertain the amount, and provide for the payment, of the regimental and other debts in camp or quarters (if any) of the deceased or deserter.

(2) In the case of a deceased Indian commissioned officer whose representative, widow (if any) or next of kin has given security to the satisfaction of the Committee for the payment of the regimental and other debts in camp or quarters (if any) of the deceased, the Committee shall deliver any property received by it

under sub-section *(1)* to that representative, widow or next of kin, as the case may be, and shall not further interfere in relation to the property of the deceased.

(3) In the case of a deceased Indian commissioned officer, the committee, save as may be prescribed, shall, if it appears to it necessary for the payment of regimental and other debts in camp or quarters and the expenses, if any, incurred by the Committee, and may, in any other case, collect all moneys left by the deceased in any bank (including any post office savings bank, co-operative bank or society or any other institution receiving deposits in money, however named) and for that purpose may require the agent, manager or other proper officer of such bank, society or other institution to pay the moneys to the Committee forthwith, and such agent, manager or other officer shall be bound to comply with the requisition notwithstanding anything in any rules of the bank, society or other institution, and when any money has been paid by a bank, society or other institution in compliance with the requisition under this sub-section, no person shall have a claim against the bank, society or other institution in respect of such money.

(4) In the case of a deceased Indian commissioned officer whose estate has not been dealt with under sub-section *(2)* and in the case of a deserter, the Committee, subject to any rules made in this behalf under this Act, shall, for the purpose of paying the regimental and other debts in camp or quarters, and may in any other case, sell or convert into money the moveable property of the deceased or deserter.

(5) The Committee shall, out of the moneys referred to in sub-sections *(3)* and *(4)* pay the regimental and other debts in camp or quarters (if any) of the deceased or deserter.

(6) In the case of a deceased Indian commissioned officer the surplus (if any) shall be remitted to the prescribed person.

(7) In the case of an Indian commissioned officer who is a deserter the surplus (if any) shall be forthwith remitted to the prescribed person and shall, on the expiry of three years from the date of his desertion, be forfeited to the Central Government unless the deserter shall in the meantime have surrendered or been apprehended:

Provided that the prescribed person may pay the whole or such part of the surplus as he may deem proper to the wife or children or other dependents of the commissioned officer.

(8) If in any case a doubt or difference arises as to what are the regimental and other debts in camp or quarters of a deceased officer or deserter or as to the amount payable therefor, the decision of the prescribed person shall be final and shall be binding on all persons for all purposes.

(9) For the purpose of the exercise of its duties under this section the Committee shall, to the exclusion of all authorities and persons whomsoever, have the same rights and powers as if it had taken out representation to the deceased, and any receipt given by the Committee shall have effect accordingly.

116C. *(1)* Notwithstanding anything contained in the Administrator General's Act, 1913 (III of 1913), an Administrator General shall not interpose in any manner in relation to any property of a deceased Indian commissioned officer which has been dealt with under the provisions of section 116B except in so far as he is expressly required or permitted to do so by or under the provisions contained in this Chapter.

Power of Central Government to hand over the estate of a deceased officer to Administrator General.

(2) The Central Government may at any time and in such circumstances as it thinks fit direct that the estate of a deceased Indian commissioned officer shall be handed over by the Committee to the Administrator General of a Province for administration and thereupon the Committee shall make over the estate to such Administrator General.

(3) Where under this section any estate is handed over to the Administrator General he shall administer the estate in accordance with the provisions of the Administrator General's Act, 1913 (III of 1913):

Provided that the regimental and other debts in camp or quarters of the deceased officer (if any) shall be paid in priority to any other debt due by him.

(4) The Administrator General shall pay the surplus, if any, remaining in his hands after discharging all debts and charges, to the heirs of the deceased and, if no heir is traceable, shall remit such surplus to the prescribed person in the prescribed manner.

(5) The Administrator General shall not charge in respect of his duties any fee exceeding three per cent. of the gross amount coming to or remaining in his hands after payment of the regimental and other debts in camp or quarters.

116D. On receipt of the surplus referred to in sub-section *(6)* of section 116B or sub-section *(4)* of section 116C, the prescribed person shall proceed as follows:—

Disposal of surplus by the prescribed person.

(1) If he knows of a representative of the deceased, he shall pay the surplus to that representative.

(2) If he does not know of any such representative, he shall publish every year a notice in the prescribed form and manner for six consecutive years. If no claim to the surplus is made by a representative of the deceased within six months after the publication of the last of such notices, the prescribed person shall deposit the surplus together with any income or accumulation of income accrued therefrom to the credit of the Central Government:

Provided that such deposit shall not bar the claim of any person to such surplus or any part thereof.

116E. Where any part of the estate of a deceased Indian commissioned officer consists of effects, securities or other property not converted into money, the provisions of section 116B and section 116D with respect to paying the surplus shall, save as may be prescribed, extend to the delivery, transmission or transfer of such effects, securities or property, and the prescribed person shall have the same power of converting the same into money as a representative of the deceased.

Disposal of effects not money.

116F. Property deliverable and money payable to the representative of a deceased Indian commissioned officer under section 116B or section 116D may, if the total amount or value thereof does not exceed five thousand rupees, and, if the prescribed person thinks fit, be delivered or paid to any person appearing to him to be entitled to receive it or to administer the estate of the deceased, without requiring the production of any probate, letters of administration, succession certificate or other such conclusive evidence of title.

Disposal of certain property without production of probate, etc.

116G. Any payment of money or delivery, application, sale or other disposition of any property or money made, or purported to be made, by the Committee or the prescribed person in good faith in pursuance of section 116B, section 116D, section 116E or section 116F shall be valid and shall be a full discharge to the Committee or the prescribed person, as the case may be, and to the Crown from all further

Discharge of committee, prescribed person and the Crown.

liability in respect of that money or property; but nothing herein contained shall affect the right of any executor or administrator or other representative, or of any creditor of the deceased officer against any person to whom such payment or delivery has been made.

Property in the hands of the Committee or the prescribed person not to be assets at the place where the Committee or the prescribed person is stationed.

116H. Any property coming under section 116B or under sub-section *(4)* of section 116C into the hands of the Committee or the prescribed person shall not, by reason of so coming, be deemed to be assets or effects at the place in which that Committee or the prescribed person is stationed and it shall not be necessary by reason thereof that representation be taken out in respect of that property for that place.

Saving of rights of representative.

116I. After the Committee has deposited with the prescribed person the surplus of the property of any deceased officer under sub-section *(6)* of section 116B. any representative of the deceased or any Administrator General, shall, as regards any property of the deceased not collected by the Committee and not forming part of the aforesaid surplus, have the same rights and duties as if section 116B had not been enacted.

Application of sections 116B to 116I to lunatics, etc.

116J. The provisions of sections 116B to 116I shall so far as they can be made applicable apply in the case of an Indian commissioned officer who, notwithstanding anything contained in the Indian Lunacy Act, 1912 (IV of 1912), is ascertained in the prescribed manner to be insane, or who, being on active service, is officially reported missing, as if he had died on the day on which his insanity is so ascertained or, as the case may be, on the day on which he is officially reported missing:

Provided that in the case of an officer so reported missing no action shall be taken under sub-sections *(2)* to *(5)* of section 116B or under section 116C until such time as he is officially presumed to be dead.

Appointment of Standing Committee of Adjustment when officers die or desert while on active service.

116K. When an Indian commissioned officer dies or deserts while on active service, the references in the foregoing provisions of this Chapter to the Committee shall be construed as references to the Standing Committee of Adjustment, if any, appointed in this behalf in the manner prescribed.

Interpretation.

116L. For the purposes of this Chapter—

(1) the expression 'regimental and other debts in camp or quarters' includes money due as military debts, namely, sums due in respect of, or of any advance in respect of—

(a) quarters;

(b) mess, band, and other regimental accounts;

(c) military clothing, appointments and equipments, not exceeding a sum equal to three months' pay of the deceased, and having become due within eighteen months before his death;

(2) 'representation' includes probate and letters of administration with or without the will annexed, and a succession certificate, constituting a person the executor or administrator of the estate of a deceased person or authorising him to receive or realize the assets of a deceased person;

(3) 'representative' means any person who has taken out representation but does not include an Administrator-General."

Amendment of section 126, Act XIV of 1932

4. In section 126 of the Indian Air Force Act, 1932,—

(i) in the opening paragraph for the word "rules" the word "provisions" shall be substituted and after the words "this Act" the words, "not being an officer or warrant officer of the Indian Air Force," shall be inserted;

(ii) for clause *(2)* the following clause shall be substituted, namely:—

"*(2)* In the case of a deceased person who has left in a bank (including any post office savings bank, co-operative bank or society or any other institution receiving deposits in money, however named) a deposit not exceeding one thousand rupees, the commanding officer may, if he thinks fit, require the agent, manager or other proper officer of such bank or other institution to pay the deposit to him forthwith, notwithstanding anything in any rules of the bank or the other institution and when any money has been paid by such bank or other institution in compliance with such requisition, no person shall have any claim against the bank or the other institution in respect of such money";

(iii) in clause *(4)* after the words "cause the move able property to be sold by public auction" the words "and may convert into money any cash certificates (including post office cash certificates, defence savings certificates and national savings certificates)" and after the words "proceeds of the sale" the words "or conversion", shall be inserted;

(iv) clause *(7)* and the *Explanations* shall be omitted and clause *(8)* shall be renumbered *(7)*;

(v) in clause *(7)* as so renumbered the words "or the Standing Committee of Adjustment, as the case may be" shall be omitted and after the words "a deceased person" the words "or deserter" shall be inserted.

Substitution of new sections for section 128, Act XIV of 1932.

5. For section 128 of the Indian Air Force Act, 1932, the following sections shall be substituted, namely:—

Application of sections 126 and 127 to lunatics, etc.

"128. The provisions of sections 126 and 127 shall, so far as they can be made applicable, apply in the case of a person subject to this Act (not being an officer or warrant officer of the Indian Air Force) who notwithstanding anything contained in the Indian Lunacy Act, 1912 (IV of 1912) is ascertained in the prescribed manner to be insane, or, who, being on active service, is officially reported missing, as if he had died on the day on which his insanity is so ascertained, or, as the case may be, on the day on which he is officially reported missing;

Provided that in the case of a person so reported missing, no action shall be taken under clauses *(2)* to *(5)* inclusive of section 126 until such time as such person is officially presumed to be dead.

Property of officers of the Indian Air Force who die or desert.

128A. The provisions of sections 128B to 128I shall apply to the disposal of the property of the officers and warrant officers of the Indian Air Force who die or desert.

Powers of Committee of Adjustment.

128B. *(1)* On the death or desertion of an officer or warrant officer of the Indian Air Force, a Committee of Adjustment appointed in this behalf in the manner prescribed (hereinafter referred to as the Committee) shall, as soon as may be, subject to the rules made in this behalf under this Act,—

(a) secure all the moveable property belonging to the deceased or deserter, that is in camp or quarters, and cause an inventory thereof to be made, and ascertain and draw the pay and allowances, if any, due to him ; and

(b) ascertain the amount, and provide for the payment, of the service and other debts in camp or quarters (if any) of the deceased or deserter.

(2) In the case of a deceased officer or warrant officer whose representative, widow (if any) or next of kin has given security to the satisfaction of the Committee for the payment of the service and other debts in camp or quarters (if any) of the deceased, the Committee shall deliver any property received by it under sub-section *(1)* to that representative, widow or next of kin, as the case may be, and shall not further interfere in relation to the property of the deceased.

(3) In the case of a deceased officer or warrant officer, the Committee, save as may be prescribed shall, if it appears to it necessary for the payment of service and other debts in camp or quarters and the expenses, if any, incurred by the Committee, and may, in any other case, collect all moneys left by the deceased in any bank (including any post office savings bank, co-operative bank or society or any other institution receiving deposits in money, however named) and for that purpose may require the agent, manager or other proper officer of such bank, society or other institution to pay the moneys to the Committee forthwith, and such agent, manager or other officer shall be bound to comply with the requisition notwithstanding anything in any rules of the bank or other institution; and when any money has been paid by a bank or other institution in compliance with the requisition under this sub-section, no person shall have a claim against the bank or other institution in respect of such money.

(4) In the case of a deceased officer or warrant officer whose estate has not been dealt with under sub-section *(2)* and in the case of a deserter the Committee, subject to any rules made in this behalf under this Act, shall, for the purpose of paying the service and other debts in camp or quarters, and may, in any other case, sell or convert into money the moveable property of the deceased or deserter.

(5) The Committee shall, out of the moneys referred to in sub-sections *(3)* and *(4)*, pay the service and other debts in camp or quarters (if any) of the deceased or deserter.

(6) In the case of a deceased officer or warrant officer, the surplus (if any) shall be remitted to the prescribed person.

(7) In the case of an officer or warrant officer who is a deserter, the surplus (if any) shall be forthwith remitted to the prescribed person and shall, on the expiry of three years from the date of his desertion, be forfeited to the Central Government unless the deserter shall in the meantime have surrendered or been apprehended:

Provided that the prescribed person may pay the whole or such part of the surplus as he may deem proper to the wife or children or other dependents of the officer or warrant officer.

(8) If in any case a doubt or difference arises as to what are the service and other debts in camp or quarters of a deceased officer or deserter or as to the amount payable therefor, the decision of the prescribed person shall be final and shall be binding on all persons for all purposes.

(9) For the purpose of the exercise of its duties under this section, the Committee shall, to the exclusion of all authorities and persons whomsoever have the same rights and powers as if it had taken out representation to the deceased, and any receipt given by the Committee shall have effect accordingly.

Powers of Central Government to hand over the estate of a deceased officer to Administrator General.

128C. *(1)* Notwithstanding anything contained in the Administrator Generals Act, 1913 (III of 1913), an Administrator General shall not interpose in any manner in relation to any property of a deceased officer or warrant officer which has been dealt with under the provisions of section 128B except in so far as he is expressly required or permitted to do so by or under the provisions contained in this Chapter.

(2) The Central Government may at any time and in such circumstances as it thinks fit direct that the estate of a deceased officer or warrant officer shall be handed over by the Committee to the Administrator General of a Province for administration and thereupon the Committee shall make over the estate to such Administrator General.

(3) Where under this section any estate is handed over to the Administrator General, he shall administer the estate in accordance with the provisions of the Administrator General's Act, 1913 (III of 1913):

Provided that the service and other debts in camp or quarters of the deceased officer (if any) shall be paid in priority to any other debt due by him.

(4) The Administrator General shall pay the surplus, if any, remaining in his hands after discharge of all debts and charges, to the heirs of the deceased and, if no heir is traceable, shall remit such surplus to the prescribed person in the prescribed manner.

(5) The Administrator General shall not charge in respect of his duties any fee exceeding three per cent. of the gross amount coming to or remaining in his hands after payment of the service and other debts in camp or quarters.

Disposal of surplus by the prescribed person.

128D. On receipt of the surplus referred to in sub-section *(6)* of section 128B or sub-section *(4)* of section 128C, the prescribed person shall proceed as follows :—

(1) If he knows of a representative of the deceased, he shall pay the surplus to that representative.

(2) If he does not know of any such representative, he shall publish every year a notice in the prescribed form and manner for six consecutive years If no claim to the surplus is made by a representative of the deceased within six months after the publication of the last of such notices, the prescribed person shall deposit the surplus together with any income or accumulation of income accrued therefrom to the credit of the Central Government:

Provided that such deposit shall not bar the claim of any person to such surplus or any part thereof.

Disposal of effects not money.

128E. Where any part of the estate of a deceased officer or warrant officer consists of effects, securities or other property not converted into money, the provisions of section 128B and section 128D with respect to paying the surplus shall, save as may be prescribed, extend to the delivery, transmission or transfer of such effects, securities or property, and the prescribed person shall have the same power of converting the same into money as a representative of the deceased.

Disposal of certain property without production of probate, etc.

128F. Property deliverable and money payable to the representative of a deceased officer or warrant officer under section 128B or section 128D may, if the total amount or value thereof does not exceed five thousand rupees, and, if the prescribed person thinks fit, be delivered or paid to any person appearing to him to be entitled to receive it or to administer the estate of the deceased, without requiring the production of any probate, letters of ad-

ministration, succession certificate or other such conclusive evidence of title.

Discharge of Committee, prescribed person and the Crown.

128G. Any payment of money or delivery, application, sale or other disposition of any property or money made, or purported to be made by the Committee or the prescribed person in good faith in pursuance of section 128B, section 128D, section 128E or section 128F shall be valid and shall be a full discharge to the Committee or the prescribed person, as the case may be, and to the Crown from all further liability in respect of that money or property ; but nothing herein contained shall affect the right of any executor or administrator or other representative or of any creditor of the deceased officer or warrant officer against any person to whom such payment or delivery has been made.

Property in the hands of the Committee or the prescribed person not to be assets at the place where the Committee or the prescribed person is stationed.

128H. Any property coming under section 128B or under sub-section *(4)* of section 128C into the hands of the Committee or the prescribed person shall not, by reason of so coming, be deemed to be assets or effects at the place in which that Committee or the prescribed person is stationed and it shall not be necessary by reason thereof that representation be taken out in respect of that property for that place.

Saving of rights of representative.

128I. After the Committee has deposited with the prescribed person the surplus of the property of any deceased officer or warrant officer under sub-section *(6)* of section 128B any representative of the deceased or any Administrator General, shall, as regards any property of the deceased not collected by the Committee and not forming part of the aforesaid surplus, have the same rights and duties as if section 128B had not been enacted.

Application of sections 128B to 128I to lunatics, etc.

128J. The provisions of sections 128B to 128I shall, so far as they can be made applicable, apply in the case of an officer or warrant officer of the Indian Air Force, who notwithstanding anything contained in the Indian Lunacy Act, 1912 (IV of 1912), is ascertained in the prescribed manner to be, insane, or who, being on active service, is officially reported missing, as if he had died on the day on which his insanity is so ascertained or, as the case may be, on the day on which he is officially reported missing :

Provided that in the case of an officer or warrant officer so reported missing no action shall be taken under sub-sections *(2)* to *(5)* of section 128B or under section 128C until such time as he is officially presumed to be dead.

Appointment of Standing Committee of Adjustment when officers die or desert while on active service.

128K. When an officer or warrant officer dies or deserts while on active service, the references in the foregoing provisions of this Chapter to the Committee shall be construed as references to the Standing Committee of Adjustment, if any appointed in this behalf in the manner prescribed.

Interpretation.

128L. For the purposes of this Chapter :—

(1) the expression 'service and other debts in camp or quarters' includes money due as air force debts namely, sums due in respect of, or of any advance in respect of —

(a) quarters ;

(b) mess, band, and other service accounts ;

(c) air force clothing, appointments and equipments, not exceeding a sum equal to three months' pay of the deceased, and having become due within eighteen months before his death.

(2) 'representation' includes probate and letters of administration with or without the will annexed, and a succession certificate, constituting a person the executor or administrator of the estate of a deceased person or authorising him to receive or realize the assets of a deceased person ;

(3) 'representative' means any person who has taken out representation but does not include an Administrator General."

Amendment of sections 15, 16 and 17, Act III of 1913.

6. In the Administrator General's Act, 1913,—

(i) to section 15, after the words and figures "Regimental Debts Act, 1893" the words and figures "the Indian Army Act, 1911, or the Indian Air Force Act, 1932 shall be added ;

(ii) in section 16, after the words and figures "the Regimental Debts Act, 1893" the words and figures "the Indian Army Act, 1911, or the Indian Air Force Act, 1932 shall be inserted ; and

(iii) in section 17,—

(a) after the words and figures "the Regimental Debts Act, 1893", at both places where they occur, the words and figures "the Indian Army Act, 1911 or the Indian Air Force Act, 1932" shall be inserted, and

(b) after the words "subject to the Army Act or the Air Force Act" the words and figures "or of an Indian commissioned officer subject to the Indian Army Act, 1911 or of an officer or warrant officer of the Indian Air Force subject to the Indian Air Force Act, 1932 shall be inserted.

[THE INDIAN] BOILERS (AMENDMENT) ACT, 1947
(ACT XXXIV OF 1947)

[18th April, 1947.]

An Act further to amend the Indian Boilers Act, 1923.

WHEREAS it is expedient further to amend the Indian Boilers Act, 1923, for the purpose hereinafter appearing;

It is hereby enacted as follows :—

Short title.

1. This Act may be called the Indian Boilers (Amendment) Act, 1947.

Amendment of section 2, Act V of 1923.

2. In section 2 of the Indian Boilers Act, 1923 (hereinafter referred to as the said Act), for clause *(cc)* the following clauses shall be substituted, namely :—

'*(cc)* "economiser" means any part of a feed-pipe that is wholly or partially exposed to the action of flue gases for the purpose of recovery of wasteheat;

(ccc) "feed-pipe" means any pipe or connected fitting wholly or partly under pressure through which feed water passes directly to a boiler and does not form an integral part thereof;'

Insertion of new section 2B in Act V of 1923.

3. After section 2A of the said Act, the following section shall be inserted, namely :—

Application of Act to economisers.

"2B. Every reference in this Act to a boiler or boilers [except in clause *(ccc)* of section 2, clause *(e)* of section 6, clauses *(c)* and *(d)* of section 11, clause *(d)* of section 29 and section 34] shall be deemed to include also a reference to an economiser, or economisers respectively."

Amendment of section 7, Act V of 1923.

4. To sub-section *(5)* of section 7 of the said Act the following proviso shall be added, namely :—

"Provided that a certificate issued under this sub-section in respect of an economiser may authorise its use for a period not exceeding twenty-four months."

Amendment of section 8, Act V of 1923.

5. In section 8 of the said Act—

(a) to sub section *(3)* the following proviso shall be added, namely :—

"Provided that where the certificate relates to an economiser, the application for its renewal may be for a period not exceeding twenty-four months.";

(ii) to sub-section *(4)* the following further proviso shall be added, namely :—

"Provided further that in the case of an economiser, the owner shall be given not less than thirty days' notice of the date fixed for its examination.";

(iii) in sub-section *(5)* in the proviso, after the word "Provided" the word "further" shall be inserted and before the said proviso the following proviso shall be inserted, namely :—

'Provided that a renewed certificate issued under this sub-section in respect of an economiser may authorise its use for a period not exceeding twenty-four months."

[THE] CANTONMENTS (AMENDMENT) ACT, 1948.
(ACT L OF 1948)

[8th September, 1948]

An Act further to amend the Cantonments Act, 1924.

WHEREAS it is expedient further to amend the Cantonments Act, 1924, for the purposes hereinafter appearing ;

It is hereby enacted as follows :—

Short title.

1. This Act may be called the Cantonments (Amendment) Act, 1948.

Amendment of sections 12 and 280, Act II of 1924.

2. In section 12 and in clause *(cc)* of sub-section *(2)* of section 280 of the Cantonments Act 1924 (hereinafter referred to as the said Act), for the words "Service of Executive Officers", the words "Military Lands and Cantonments Service" shall be substituted.

Amendment of section 276, Act II of 1924.

3. In section 276 of the said Act, the words, letter, brackets and figures "clause *(a)* of section 137" shall be omitted.

[THE] CODE OF CIVIL PROCEDURE (AMENDMENT) ACT, 1948.
(ACT VI OF 1948)

[21st February, 1948.]

An Act further to amend the Code of Civil Procedure, 1908.

WHEREAS it is expedient further to amend the Code of Civil Procedure, 1908, for the purpose hereinafter appearing ;

It is hereby enacted as follows :—

Short title.

1. This Act may be called the Code of Civil Procedure (Amendment) Act, 1948.

Amendment of section 80, Act V of 1908.

2. In section 80 of the Code of Civil Procedure, 1908,—

(i) in clause (a), after the words 'Central Government the following words shall be inserted, namely :—

'except where it relates to a railway';

(ii) after clause (a), the following new clause (aa) shall be inserted, namely :—

'(aa) in the case of a suit against the Central Government where it relates to a railway, the General Manager of that railway'.

[THE] CONTROL OF SHIPPING (AMENDMENT) ACT, 1948.
(ACT XXVII OF 1948)

[13th April, 1948.]

An Act to amend the Control of Shipping Act, 1947.

WHEREAS it is expedient to amend the Control of Shipping Act, 1947, for the purposes hereinafter appearing;

It is hereby enacted as follows:—

Short title.

1. This Act may be called the Control of Shipping (Amendment) Act, 1948.

Substitution of "India" for "the Provinces" in Act XXVI of 1947.

2. In the Control of Shipping Act, 1947 (hereinafter referred to as "the said Act"), except in section 1, for the words "the Provinces," wherever they occur, the word "India" shall be substituted.

Amendment of section 1, Act XXVI of 1947.

3. In section 1 of the said Act,—

(a) in sub-section *(2)*, for the words "all the Provinces of India" the words "the whole of India" shall be substituted, and for the words "in the provinces" the words "in India" shall be substituted; and

(b) in sub-section *(3)*, for the figures "1948" the figures "1950" shall be substituted.

Amendment of section 2, Act XXVI of 1947.

4. In section 2 of the said Act, clauses *(a)*, *(b)*, *(c)*, *(d)* and *(e)* shall be re-lettered *(b)*, *(c)*, *(d)*, *(e)* and *(f)* respectively, and before clause *(b)*, as so re-lettered, the following clause shall be inserted, namely:—

'*(a)* "Coasting trade of India" means the carriage by water of passengers or goods from any port or place in India to any other port or place in the continent of India;'

Insertion of new section 3A in Act XXVI of 1947.

5. After section 3 of the said Act, the following new section shall be inserted, namely:—

Licences for Coasting trade of India.

"*3A. (1)* No ship shall engage in the coasting trade of India except under a valid licence granted by a Shipping Authority under this section.

(2) A licence granted under this section may be either a general licence or a specified voyage licence or licence for a specific period and shall be subject to such conditions as may be specified by the Shipping Authority granting the licence.

(3) The Shipping Authority may in its discretion at any time, revoke, cancel or modify a licence granted under this section."

[THE INDIAN] COTTON CESS (AMENDMENT) ACT, 1947
(ACT LI OF 1947)

[31st December, 1947.]

An Act further to amend the Indian Cotton Cess Act, 1923.

WHEREAS it is expedient further to amend the Indian Cotton Cess Act, 1923 (XIV of 1923), for the purposes hereinafter appearing;

It is hereby enacted as follows:—

Short title 1. This Act may be called the Indian Cotton Cess (Amendment) Act, 1947.

Amendment of section 3, Act XIV of 1923. 2. In sub-section *(1)* of section 3 of the Indian Cotton Cess Act, 1923, the words "produced in India and either" and the proviso shall be omitted.

Amendment to have restrospective effect. 3. The amendment made by section 2 shall have effect as if this Act had come into force on the fifteenth day of August, 1947.

[THE INDIAN] COTTON CESS (AMENDMENT) ACT, 1948
(ACT LIX OF 1948)

[10th September, 1948.]

An Act further to amend the Indian Cotton Cess Act, 1923.

WHEREAS it is expedient further to amend the Indian Cotton Cess Act, 1923 (XIV of 1923), for the purposes hereinafter appearing;

It is hereby enacted as follows:—

Short title. 1. This Act may be called the Indian Cotton Cess (Amendment) Act, 1948.

Amendment of section 3, Act XIV of 1923. 2. In sub section *(1)* of section 3 of the Indian Cotton Cess Act 1923 (hereinafter referred to as the said Act), for the words "two annas" and "six pies" the words "four annas" and "one anna" shall be substituted respectively.

Amendment of section 4, Act XIV of 1923. 3. In section 4 of the said Act,—

(a) for items *(viii)*, *(ix)* and *(x)* the following items shall be substituted, namely :—

"*(viii)* nine persons nominated by the Central Government to represent the cotton growing industry, of whom two shall be nominated to represent the industry in Madras, two to represent the industry in Bombay, two to represent the industry in the United Provinces, two to represent the industry in the Central Provinces and Berar, and one to represent the industry in East Punjab;

(ix) seven persons nominated respectively by the Governments of the following Acceding States, namely, Mysore, the United State of Gwalior, Indore and Malwa (Madhya-Bharat), the United State of Rajasthan, the United State of Vindhya Pradesh, the Patiala and East Punjab States Union, the United State of Kathiawar (Saurashtra) and Baroda; and;" and

(b) item *(xi)* shall be renumbered as item *(x)*.

Amendment of section 12, Act XIV of 1923. 4. In sub section *(2)* of section 12 of the said Act, after the words "in India" the words "or for the improvement and development of the methods of growing, manufacturing and marketing of Indian cotton" shall be inserted.

Repeal of section 12A, Act XIV of 1923. 5. Section 12A of the said Act shall be omitted.

[THE] ESSENTIAL SUPPLIES (TEMPORARY POWERS) (AMENDMENT) ACT, 1948
(ACT LXIV OF 1948)

[23rd September 1948]

An Act to amend the Essential Supplies (Temporary Powers) Act 1946.

WHEREAS it is expedient to amend the Essential Supplies (Temporary Powers) Act, 1946, for the purposes hereinafter appearing;

It is hereby enacted as follows:—

Short title. 1. This Act may be called the Essential Supplies (Temporary Powers Amendment) Act, 1948.

Amendment of section 7, Act XXIV of 1946. 2. For the proviso to sub-section *(1)* of section 7 of the Essential Supplies (Temporary Powers) Act, 1946, the following shall be substitued, namely :—

"Provided that—

(a) where the contravention is of an Order relating to cotton textiles, the Court shall—

(i) sentence any person convicted of such contravention to imprisonment for a term which may extend to three years and may, in addition, impose a sentence of fine, and

(ii) direct that any property in respect of which the Order has been contravened or such part of it as the Court may deem fit shall be forfeited to His Majesty ; and

(b) where the contravention is of an Order relating to foodstuffs, which contains an express provision in this behalf, the Court shall direct that any property in respect of which the Order has been contravened shall be forfeited to His Majesty, unless for reasons to be recorded in writing it is of opinion that the direction should not be made in respect of the whole, or as the case may be, a part, of the property."

Amendment of section 4, Act XXVI of 1947. 6. In section 4 of the said Act after the word "India" the words "or to a ship engaged in the coasting trade of India" shall be inserted.

Amendment of section 7, Act XXVI of 1947. 7. In clause *(a)* of section 7, the following words shall be added at the end, namely:—

"or has carried during any specified period".

(ACT XL OF 1947)

[*18th December, 1947*]

An Act to amend the Foreign Exchange Regulation Act, 1947.

WHEREAS it is expedient to amend the Foreign Exchange Regulation Act, 1947 (VII of 1947), for the purpose hereinafter appearing ;

It is hereby enacted as follows:—

Short title. 1. This Act may be called the Foreign Exchange Regulation (Amendment) Act, 1947.

Amendment of section 8, Act VII of 1947. 2. To sub-section *(1)* of section 8 of the Foreign Exchange Regulation Act, 1947, the following *Explanation* shall be added, and shall be deemed always to have been added, namely:—

"*Explanation.*—The bringing or sending into any port or place in British India of any such article as aforesaid intended to be taken out of British India without being removed from the ship or conveyance in which it is being carried shall nonetheless be deemed to be a bringing, or as the case may be sending into British India of that article for the purposes of this section."

[THE] FOREIGNERS (AMENDMENT) ACT, 1947.

(ACT XXXVIII OF 1947)

[*15th December, 1947.*]

An Act to amend the Foreigners Act, 1946.

WHEREAS it is expedient to amend the Foreigners Act, 1946, for the purposes hereinafter appearing ;

It is hereby enacted as follows:—

Short title. 1. This Act may be called the Foreigners (Amendment) Act, 1947.

Substitution of "India" for "British India" in Act XXXI of 1946. 2. In the Foreigners Act, 1946 (hereinafter referred to as the said Act), for the word "British India" wherever they occur, the word "India" shall be substituted.

Amendment of section 2, Act XXXI of 1946. 3. In clause *(a)* of section 2 of the said Act—

(a) for the words "Indian State" the words "acceding State" shall be substituted ;

(b) for the words "Tribal areas" the words Assam" tribal areas" shall be substitued.

Amendment of section 3, Act XXXI of 1946. 4. *(1)* In sub-section *(2)* of section 3 of the said Act,—

(a) after clause *(c)* the following clause shall be inserted, namely:—

"(cc) shall, if he has been required by order under this section not to remain in India, meet from any resources at his disposal the cost of his removal from India and of his maintenance therein pending such removal;";

(b) after the words "and may make provision" the words "for any matter which is to be or may be prescribed and" shall be inserted.

(2) To the said section 3 the following sub-section shall be added namely:—

"*(3)* Any authority prescribed in this behalf may with respect to any particular foreigner make orders under clause *(c)*, clause *(f)* or clause *(g)* of sub-section *(2)*".

Amendment of section 6, Act XXXI of 1946. 5. In section 6 of the said Act, sub-section *(4)* shall be renumbered as sub-section *(6)*, and after sub-section *(3)* the following subsection shall be inserted, namely:—

"*(4)* If any foreigner enters India in contravention of any provision of this Act or any order made thereunder, the prescribed authority may, within two months from the date of such entry, direct the master of the vessel or the pilot of the aircraft on which such entry was effected or the owner or the agent of the owner of such vessel or aircraft, to provide, to the satisfaction of the said authority and otherwise than at the expense of Government, accommodation on a vessel or aircraft for the purpose of removing the said foreigner from India,

(5) The master of any vessel or the pilot of any aircraft which is about to carry passengers from a port or place in India to any destination outside India, or the owner or the agent of the owner of any such vesse or aircraft shall, if so directed by the Central Government and on tender of payment therefor at the current rates provide on the vessel or aircraft accommodation to such port or place outside India being a port or place at which the vessel or aircraft is due to call, as the Central Government may specify, for any foreigner ordered under section 3 not to remain in India and for his dependents, if any travelling with him."

Amendment of section 7, Act XXXI of 1946. 6. To section 7 of the said Act the following sub-section shall be added namely:—

"*(4)* if in any area prescribed in this behalf the prescribed authority by notice published in such manner as may in the opinion of the authority be best adapted for informing the persons concerned so directs, it shall be the duty of every person occupying or having under his control any residential premises to submit to such person and in such manner such information in respect of foreigners accommodated in such premises as may be specified; and the provisions of sub-section *(2)* shall be apply to every person accommodated in any such premises."

Insertion of new section 7A in Act XXXI of 1946. 7. After section 7 of the said Act, the following section shall be inserted namely:—

"*7 A. (1)* The prescribed authority may, subject to such conditions as may be prescribed, direct the owner or person having control of any premises used as a restaurant or as a place of public resorted entertainment or as a club and frequented by foreigners—

Power to control places frequented by foreigners

(a) to close such premises either entirely or during specified periods, or

(b) to use or permit the use of such premises only under such conditions as may be specified, or

(c) to refuse admission to such premises either to all foreigners or to any specified foreigner or class of foreigner.

(2) A person to whom any direction has been given under sub-section *(1)* shall not, while such direction remains in force, use or permit to be used any other premises for any of the aforesaid purposes, except with the previous permission in writing of the prescribed authority and in accordance with any conditions which that authority may think fit to impose.

(3) Any person to whom any direction has been given under sub-section *(1)* and who is aggrieved thereby may, within thirty days from the date of such direction, appeal to the Central Government; and the decision of the Central Government in the matter shall be final."

(ACT LV OF 1948)

[10th September, 1948].

An Act further to amend the Indian, Income-tax Act, 1922.

WHEREAS it is expedient further to amend the Indian Income-tax Act, 1922 (XI of 1922), for the purposes hereinafter appearing ;

It is hereby enacted as follows:—

Short title. 1. This Act may be called the Indian Income-tax (Amendment) Act, 1948.

Amendment of section 15B, Act XI of 1922. 2. In sub-section *(1)* of section 15B of the Indian Income-tax Act, 1922 (hereinafter referred to as the said Act), the words "in respect of any sums paid by him" the words and figures "on or after the 1st day of April, 1948" shall be inserted.

Amendment of section 54, Act XI of 1922. 3. In sub-section *(3)* of section 54 of the said Act, at the end of clause *(m)* the word "or" shall be inserted, and after clause *(m)* the following clauses shall be inserted, namely : —

"*(n)* of such particulars to the Reserve Bank of India as are required by that Bank to enable it to compile financial statitics of international investments and balance of payments ; or

(o) of such information as may be required by any officer or department of the Central Government or of a Provincial Government for the purpose of investigation into the conduct and affairs of any public servant."

Repeal of Ordinance XIII of 1948. 4. The Indian Income-tax (Amendment) Ordinance 1948, is hereby repealed.

[THE] INCOME-TAX AND BUSINESS PROFITS TAX (AMENDMENT) ACT, 1947.

(ACT XLIV OF 1947).

[28th December, 1947]

An Act further to amend the Indian Income-tax Act, 1922, and the Business Profits Tax Act, 1947.

WHEREAS it is expedient further to amend the Indian Income-tax Act, 1922 (XI of 1922) and the Business Profits Tax Act, 1947 (XXI of 1947) for the purposes hereinafter appearing ;

It is hereby enacted as follows : —

Short title. 1. This Act may be called the Income-tax and Business Profits Tax (Amendment) Act, 1947.

Amendment of Act XI of 1922. 2. *(1)* In the Indian Income-tax Act, 1922,—

(a) in clause *(4A)* of section 2, the words and brackets "(other than agricultural land)" shall be omitted and to that clause the following shall be added, namely:—

"*(iii)* any land from which the income derived is agricultural income;";

(b) for the last proviso to clause *(6A)* of section 2, the following proviso shall be substituted, namely:—

"Provided further that the expression 'accumulated profits' wherever it occurs in this clause, shall not include capital gains arising before the 1st day of April, 1946;";

(c) in sub-section *(3)* of section 12B after the words "property of the assessee" the words "by succession, inheritance or devolution or" shall be inserted.

(2) The amendments made by sub-section *(1)* shall have effect in relation to all assessments to income-tax or super-tax for the year ending on the 31st day of March 1948 and subsequent years.

Amendment of Act XXI of 1947. 3. *(1)* [Sub-section *(1)* is omitted as the Business Profits Tax Act, 1947 (XXI of 1947) is printed as amended by this Act.]

(2) The amendments made by sub-section *(1)* shall be deemed to have effect from the date on which the Business Profits Tax Act, 1947, came into force.

[THE] INCOME-TAX AND BUSINESS PROFITS TAX (AMENDMENT) ACT, 1948.

(ACT XLVIII OF 1948).

[8th September 1948.]

An Act further to amend the Indian Income-tax Act, 1922, and the Business Profits Tax Act, 1947.

WHEREAS it is expedient further to amend the Indian Income-tax Act, 1922 and the Business Profits Tax Act, 1947, for the purposes hereinafter appearing ;

It is hereby enacted as follows:—

CHAPTER I

PRELIMINARY

Short title. 1. *(1)* This Act may be called the Income-tax and Business Profits Tax (Amendment) Act, 1948.

(2) Sections 3 to 12 shall be deemed to have come into force on the 30th day of March, 1948, and the amendment made in the Indian Income-tax Act, 1922 by section 2 shall be deemed to be operative so as to apply in relation to all assessments subsequent to the assessment for the year ending on the 31st day of March, 1948.

Sections 13 to 15 shall be deemed to have come into force on the day on which the Business Profits Tax Act, 1947 came into force.

CHAPTER II

AMENDMENT OF ACT XI OF 1922

Amendment of section 2, Act XI of 1922. 2. For clause *(6)* of section 2 of the Indian Income-tax Act, 1922 (hereinafter in this Chapter referred to as the said Act), the following shall be substituted, namely:—

"*(6)* "company" means an Indian company as defined in clause *(7A)* or any Indian or non-Indian Association, whether incorporated or not, which the Central Board of Revenue may, by general or special order, declare to be a company for the purposes of this Act."

Amendment of section 4, Act XI of 1922. 3. In *Explanation* 2 to sub-section *(1)* of section 4 of the said Act, the words "and not being pension payable without India" shall be omitted.

Amendment of section 9, Act XI of 1922. 4. In section 9 of the said Act, after sub-section *(3)*, the following sub-section shall be added, namely:—

"*(4)* For the purposes of this section, the holder of an impartible estate shall be deemed to be the individual owner of all the properties comprised in the estate."

Amendment of section 12B, Act XI of 1922. 5. In section 12B of the said Act,—

(a) in the third proviso to sub-section *(2)*, after the words "property of the assessee" the words brackets

and figure "or of the previous owner where the cost of the capital asset to the previous owner is to be taken in accordance with sub-section *(3)*" shall be inserted;

(b) to sub-section *(3)* the following proviso shall be added, namely : —

"Provided that where the capital asset became the property of the assessee—

(i) before the 1st day of April 1947, under a deed of gift or on the partition of a Hindu undivided family, the actual cost allowable to him shall be the fair market value of the capital asset on the date of the gift or the date of the partition, as the case may be, if such value is greater than the actual cost to the previous owner or the fair market value thereof on the 1st day of January 1939, where the third proviso to sub-section *(2)* applies;

(ii) on or after the 1st day of April, 1947, on the partition of a Hindu undivided family, the cost allowable to him shall be the fair market value on the date of the partition."

Amendment of section 14, Act XI of 1922.

6. To sub-section *(1)* of section 14 of the said Act, after the words "income of the family" the words "or in the case of an impartible estate where such sum has been paid out of the income of the holder of the estate belonging to the family" shall be added.

Insertion of new section in Act XI of 1922.

7. After section 33A of the said Act, the following section shall be inserted, namely: —

Power of Commissioner to revise Income-tax Officer's orders.

"33B. *(1)* The Commissioner may call for and examine the record of any proceeding under this Act and if he considers that any order passed therein by the Income-tax Officer is erroneous in so far as it is prejudicial to the interests of the revenue, he may, after giving the assessee an opportunity of being heard and after making or causing to be made such enquiry as he deems snecesary, pass such order thereon as the circumstances of the case justify, including an order enhancing or modifying the assessment, or cancelling the assessment and directing a fresh assessment.

(2) No order shall be made under sub-section *(1)* —

(a) to revise an order of re-assessment made under the provisions of section 34; or

(b) after the expiry of two years from the date of the order sought to be revised.

(3) Any assessee objecting to an order passed by the Commissioner under the sub-section *(1)* may appeal to the Appellate Tribunal within 60 days of the date on which the order is communicated to him.

(4) An appeal to the Appellate Tribunal under sub-section *(3)* shall be in the prescribed form and shall be verified in the prescribed manner and shall be accompanied by a treasury receipt in support of having paid the fee of Rs. 100, and such appeal shall be dealt with in the same manner as if it were an appeal under sub-section *(1)* of section 33 "

Amendment of section 34, XI of 1922.

8. For section 34 of the said Act, the following section shall be substituted, namely:—

Income escaping assessment.

"34. *(1)* If—

(a) the Income-tax Officer has reason to believe that by reason of the omission or failure on the part of an assessee to make a return of his income under section 22 for any year or to disclose fully and truly all material facts necessary for his assessment for that year, income, profits or gains chargeable to income-tax have escaped assessment for that year, or have been under-assessed, or assessed at too low a rate, or have been made the subject of excessive relief under the Act, or excessive loss or depreciation allowance has been computed, or

(b) notwithstanding that there has been no omission or failure as mentioned in clause *(a)* on the part of the assessee, the Income-tax Officer has in consequence of information in his possession reason to believe that income, profits or gains chargeable to income-tax have escaped assessment for any year, or have been under-assessed, or assessed at too low a rate, or have been made the subject of excessive relief under this Act, or that excessive loss or depreciation allowance has been computed,

he may in cases falling under clause *(a)* at any time within eight years and in cases falling under clause *(b)* at any time within four years of the end of that year, serve on the assessee, or, if the assessee is a company, on the principal officer thereof, a notice containing all or any of the requirements which may be included in a notice under sub-section *(2)* of section 22 and may proceed to assess or reassess such income, profits or gains or recompute the loss or depreciation allowance; and the provisions of this Act shall, so far as may be, apply accordingly as if the notice were a notice issued under that sub-section:

Provided that—

(i) the Income-tax Officer shall not issue a notice under this sub-section, unless he has recorded his reasons for doing so and the Commissioner is satisfied on such reasons recorded that it is a fit case for the issue of such notice;

(ii) the tax shall be chargeable at the rate at which it would have been charged had the income, profits or gains not escaped assessment or full assessment, as the case may be; and,

(iii) where the assessment made or to be made is an assessment made or to be made on a person deemed to be the agent of a non-resident person under section 43, this sub-section shall have effect as if for the periods of eight years and four years a period of one year was substituted.

Explanation. — Production before the Income-tax Officer of account books or other evidence from which material facts could with due diligence have been discovered by the Income-tax Officer will not necessarily amount to disclosure within the meaning of this section.

(2) Where an assessment is reopened in circumstances falling under clause *(b)* of sub-section *(1)*, the assessee may, if he has not impugned any part of the original assessment order for that year either under section 30 or under section 33A, claim that the proceedings under sub-section *(1)* of this section shall be dropped on his showing that he had been assessed on an amount or to a sum not lower than what he would be rightly liable for even if the items alleged to have escaped assessment had been taken into account, or the assessment or computation had been properly made:

Provided that in so doing he shall not be entitled to reopen matters concluded by an order under section 33B or section 35, or by a decision of the High Court or of the Privy Council under section 66 and section 66A.

(3) No order of assessment under section 23 to which clause *(c)* of sub-section *(1)* of section 28 applies or of assessment or re-assessment in cases falling within clause *(a)* of sub-section *(1)* of this section shall be made after the expiry of eight years, and no order of assessment or re assessment in any other case shall be made after the expiry of four years, from the end of the year in which the income, profits or gains were first assessable :

Provided that where a notice under sub section *(1)* has been issued within the time therein limited, the assessment or re-assessment to be made in pursuance of such notice may be made before the expiry of one year from the date of the service of the notice even if such

period exceeds the period of eight years or four years, as the case may be:

Provided further that nothing contained in this sub-section shall apply to a re-assessment made under section 27 or in pursuance of an order under section 31, section 33, section 33A, section 33B, section 66 or section 66A."

Amendment of section 46, Act XI of 1922.

9. After sub-section *(5)* of section 46 of the said Act, the following sub-section shall be inserted, namely:—

"*(5A)* The Income-tax Officer may at any time or from time to time, by notice in writing (a copy of which shall be forwarded to the assessee at this last address known to the Income-tax Officer) require any person from whom money is due or may become due to the assessee or any person who holds or may subsequently hold money for or on account of the assessee to pay to the Income-tax Officer, either forthwith upon the money becoming due or being held or at or within the time specified in the notice (not being before the money becomes due or is held) so much of the money as is sufficient to pay the amount due by the tax payer in respect of arrears of income-tax and penalty or the whole of the money when it is equal to or less than that amount.

The Income-tax Officer may at any time or from time to time amend or revoke any such notice or extend the time for making any payment in pursuance of the notice.

Any person making any payment in compliance with a notice under this sub-section shall be deemed to have made the payment under the authority of the assessee and the receipt of the Income-tax Officer shall constitute a good and sufficient discharge of the liability of such person to the assessee to the extent of the amount referred to in the receipt.

Any person discharging and liability to the assessee after receipt of the notice referred to in this sub-section shall be personally liable to the Income-tax Officer to the extent of the liability discharged or to the extent of the liability of the assessee for tax and penalties, whichever is less.

If the person to whom a notice under this sub-section is sent fails to make payment in pursuance thereof to the Income-tax Officer, further proceedings may be taken by and before the Collector on the footing that the Income-tax Officer's notice has the same effect as an attachment by the Collector in exercise of his powers under the proviso to sub-section *(2)* of section 46.

Where a person to whom a notice under this sub-section is sent objects to it on the ground that the sum demanded or any part thereof is not due to the assessee or that he does not hold any money for or on account of the assessee, then, nothing contained in this section shall be deemed to require such person to pay any such sum or part thereof, as the case may be, to the Income-tax Officer."

Omission of section 49, Act XI of 1922.

10. Section 49 of the said Act shall be omitted.

Amendment of Section 49A, Act XI of 1922.

11. In section 49A of the said Act,—

(a) in sub-section *(1)*,—

(i) for the words "on which has been paid" the words "on which have been paid" shall be substituted:

(ii) between the words, "under this Act and" and "Dominion income-tax" the word "either" shall be inserted;

(iii) after the words "Dominion income-tax in one or more countries" at the end, the words "or Burma income-tax" shall be added;

(b) after sub-section *(2)*, the following sub-section shall be added, namely :—

"*(3)* For the purposes of this section 'Burma income-tax' means any income tax or super-tax charged under any law in force in Burma where the laws of Burma provide for relief in respect of tax charged on income both in Burma and in British India which appears to the Central Board of Revenue to correspond to the relief which may be granted by the section."

Amendment of section 49AA, Act XI of 1922.

12. In section 49AA of the said Act, after the word "Pakistan", wherever it occurs, the words "or the United Kingdom" shall be inserted.

CHAPTER III

AMENDMENT OF ACT XXI OF 1947

Note. — Sections 13, 14 and 15 are omitted as the amendments made thereby in sections 2 and 9 and Rule 2 of Sch. II of the Business Profits Tax Act, 1947 (XXI of 1947) have already been incorporated.

[THE] INSURANCE (AMENDMENT) ACT, 1948.
(ACT X OF 1948)

[8th March, 1948]

An Act further to amend the Insurance Act, 1938.

WHEREAS it is expedient further to amend the Insurance Act, 1938 (IV of 1938) for the purpose hereinafter appearing;

It is hereby enacted as follows :—

Short title.

1. This Act may be called the Insurance (Amendment) Act, 1948.

Amendment of section 4, Act IV of 1938.

2. In sub- section *(1)* of section 4 for the words beginning with the words "No Insurer" and ending with the words "shall pay" the words and figures "No Insurer, not being a Co-operative Life Insurance Society to which Part IV of the Insurance Act, 1938, applies, shall pay" shall be substituted.

[INDIAN] LAC CESS (AMENDMENT) ACT, 1948
(ACT XXX OF 1948)

[15th April, 1948.]

An Act further to amend the Indian Lac Cess Act, 1930.

WHEREAS it is expedient further to amend the Indian Lac Cess Act, 1930 (XXIV of 1930) for the purposes hereinafter appearing;

It is hereby enacted as follows : —

Short title.

1. This Act may be called the Indian Lac Cess (Amendment) Act, 1948.

Amendment of section 3, Act XXIV of 1930.

2. In section 3 of the Indian Lac Cess Act, 1930,—

(a) for the words "seven annas" the words "fourteen annas" shall be substituted;

(b) for the words "five annas" the words "ten annas" shall be substituted.

(ACT XLI OF 1947)

[18th December, 1947.]

An Act further to amend the Indian Merchant Shipping Act, 1923.

WHEREAS it is expedient further to amend the Indian Merchant Shipping Act, 1923 (XXI of 1923), for the purposes hereinafter appearing;

It is hereby enacted as follows : —

Short title.

1. This Act may be called the Indian Merchant Shipping (Amendment) Act, 1947.

Insertion of new sections in Act XXI of 1923.

2. After section 289 of the Indian Merchant Shipping Act, 1923, the following sections shall be inserted, namely : —

Power to restrict transfer of ships.

"289A. *(1)* No person shall transfer or acquire any ship registered in any port of registry in India, or any share or interest therein, without the previous approval of the Central Government.

(2) If any person contravenes any of the provisions of sub-section *(1)*, he shall be punishable with imprisonment for a term which may extend to three years or with fine or with both.

(3) Any transaction effected in contravention of the provisions of sub-section *(1)* shall be void and unenforceable.

Power to restrict transfer of registry of ships.

289B. Notwithstanding anything contained in section 53 of the Merchant Shipping Act, 1894 (57 & 58 vict., c. 60), no application made, whether before or after the coming into operation of this section, for the transfer of the registry of a ship from a port of registry in India to a port of registry outside India shall be granted except with the previous approval of the Central Government and the Central Government may, if it considers necessary or expedient so to do for the purpose of conserving the strength of Indian registered merchant shipping, refuse to give its approval to any such transfer.

Power to exempt ships from provisions of this Act and the Merchant Shipping Acts.

289C. Notwithstanding anything contained in this Act or the Merchant Shipping Acts, the Central Government may, upon such conditions, if any, as it may think fit to impose, exempt any ship from any specified requirement contained in, or prescribed in pursuance of, this Act or the Merchant Shipping Acts, or dispense with the observance of any such requirement, in the case of any ship if it is satisfied that that requirement has been substantially complied with or that compliance with the requirement is unnecessary in the circumstances of the case."

Repeal and saving.

3. *(1)* The Indian Merchant Shipping (Restriction of Registry) Ordinance, 1947, is hereby repealed.

(2) Anything done or any action taken in exercise of any power conferred by or under the said Ordinance shall be deemed to have been done or taken in exercise of the powers conferred by or under this Act as if this Act had commenced on the 31st day of October, 1947.

[THE INDIAN] MERCHANT SHIPPING (AMENDMENT) ACT, 1948.

(ACT XLII OF 1948)

[3rd September, 1948.]

An Act further to amend the Indian Merchant Shipping Act, 1923.

WHEREAS it is expedient further to amend the Indian Merchant Shipping Act, 1923 for the purpose hereinafter appearing;

It is hereby enacted as follows : —

Short title.

1. This Act may be called the Indian Merchant Shipping (Amendment) Act, 1948.

Amendment of section 206, Act XXI of 1923.

2. In clause *(b)* of sub-section *(IA)* of section 206 of the Indian Merchant Shipping Act, 1923 (XXI of 1923), for the words "five years" the words "three years" shall be substituted.

[THE INDIAN] NAVY (DISCIPLINE) AMENDMENT ACT, 1948

(ACT LVII OF 1948)

[10th September, 1948.]

An Act to amend the Indian Navy (Discipline) Act, 1934.

WHEREAS it is necessary to amend the Indian Navy (Discipline) Act, 1934, for the purpose hereinafter appearing;

It is hereby enacted as follows : —

Short title.

1. This Act may be called the Indian Navy (Discipline) Amendment Act, 1948.

Amendment of section 58, Naval Discipline Act (29 and 30 Vict., c. 109) as set forth in the First Schedule to the Indian Navy (Discipline) Act, 1934.

2. In regulation 7 of section 58 of the Naval Discipline Act, as set forth in the First Schedule to the Indian Navy (Discipline) Act, 1934, for the words "the president is a captain," the words "the president is a substantive or acting commander" shall be substituted.

Repeal of Ordinance V of 1948.

3. The Indian Navy (Discipline) Amendment Ordinance, 1948 is hereby repealed.

[THE] PROTECTIVE DUTIES CONTINUATION ACT, 1948.

(ACT XVIII OF 1948.)

[31st March, 1948.]

An Act to extend the date up to which certain duties characterised as protective in the First Schedule to the Indian Tariff Act, 1934, shall have effect and further to amend the Sugar Industry (Protection) Act, 1932.

WHEREAS it is expedient to extend the date up to which certain duties characterised as protective in the First Schedule to the Indian Tariff Act, 1934, shall have effect, and further to amend the Sugar Industry

(Protection) Act, 1932, for the purpose hereinafter appearing;

It is hereby enacted as follows :—

Short title. 1. This Act may be called the Protective Duties Continuation Act, 1948.

Amendment of First Schedule to Act XXXII of 1934. 2. [Omitted as the amendments have already been incorporated in the Indian Tariff Act, 1934 (XXXII of 1934),]

Amendment of Preamble and section 3 of Act XIII of 1932. 3. In the preamble and section 3 of the Sugar Industry (Protection) Act, 1932, for the figures "1948" wherever they occur, the figures "1949" shall be substituted.

[THE] PROVINCIAL INSOLVENCY (AMENDMENT) ACT, 1948.
(ACT XXV OF 1948.)

[12th April, 1948]

An Act further to amend the Provincial Insolvency Act, 1920.

WHEREAS it is expedient further to amend the Provincial Insolvency Act, 1920 (V of 1920), for the purpose hereinafter appearing;

It is hereby enacted as follows:—

Short title. 1. This Act may be called the Provincial Insolvency (Amendment) Act, 1948.

Insertion of new section 28A in Act V of 1920. 2. In the Provincial Insolvency Act, 1920, after section 28 the following section shall be inserted, namely :—

Insolvent's property to comprise certain capacity. "28A. The property of the insolvent shall comprise and shall always be deemed to have comprised also the capacity to exercise and to take proceedings for exercising all such powers in or over or in respect of property as might have been exercised by the insolvent for his own benefit at the commencement of his insolvency or before his discharge :

Provided that nothing in this section shall affect any sale, mortgage or other transfer of the property of the insolvent by a Court or receiver or the Collector acting under section 60 made before the commencement of the Provincial Insolvency (Amendment) Act, 1948 which has been the subject of a final decision by a competent Court :

Provided further that the property of the insolvent shall not be deemed by reason of anything contained in this section to comprise his capacity referred to in this section in respect of any such sale, mortgage or other transfer of property made in the Province of Madras after the 28th day of July, 1942, and before the commencement of the Provincial Insolvency (Amendment) Act, 1948."

Notes :—The Act was passed, as suggested by the Madras High Court in its decision reported in I. L. R. 1943 Mad. 83 (F. B.), to bring into line the Provincial Insolvency Act, with the Presidency Towns Insolvency Act in certain respects. This was necessitated by the rulings of the Privy Council reported in I. L. R. 6 Lah. 1 and I. L. R. 17 Lah. 644.

[THE INDIAN] RAILWAYS (AMENDMENT) ACT, 1948.
(ACT XXI OF 1948.)

[3rd April, 1948.]

An Act further to amend the Indian Railways Act, 1890.

WHEREAS it is expedient further to amend the Indian Railways Act, 1890, for the purposes hereinafter appearing;

It is hereby, enacted as follows :—

Short title. 1. This Act may be called the Indian Railways (Amendment) Act, 1948.

Amendment of section 1, Act IX of 1890. 2. For sub-section *(2)* of section 1 of the Indian Railways Act, 1890 (hereinafter referred to as "the said Act"), the following sub-section shall be substituted, namely:—

"(2) It extends to the whole of India."

Amendment of section 3, Act IX of 1890. 3. In clause *(22)* of section 3 of the said Act, after the words "Provincial Government" the words " in relation to a minor railway wholly situate in an Acceding State, the Government of that State" shall be inserted.

Amendment of section 8A, Act IX of 1890. 4. To section 8A of the said Act, the following words shall be added, namely :—

"or the doing of anything on or to any works, lands or buildings vested in, or in the possession of the Government of an Acceding State without the consent of that Government."

Amendment of section 79, Act IX of 1890. 5. In section 79 of the said Act, after words "the Government," the words "or an Acceding State" shall be inserted.

Insertion of new section 144 in Act IX of 1890. 6. After section 143 of the said Act, the following section shall be inserted, namely :—

Application of Act to Acceding States. " 144. In the application of this Act to any Acceding State, references to the Provincial Government in clause *(18)* of section 3 and in sections 11, 12, 51 and 83 shall be construed as references to the Government of the Acceding State, and references to an enactment in force in the provinces of India but not in force in the Acceding State shall be construed as references to the corresponding law, if any, of that State."

[THE INDIAN] RAILWAYS (SECOND AMENDMENT) ACT, 1948.
(ACT LXV OF 1948.)

[23rd September, 1948.]

An Act further to amend the Indian Railways Act, 1890.

WHEREAS it is expedient further to amend the Indian Railways Act, 1890 (IX of 1890), for the purposes hereinafter appearing ;

It is hereby enacted as follows :—

Short title and commencement. 1. *(1)* This Act may be called the Indian Railways (Second Amendment) Act, 1948.

(2) It shall come into force on such date as the

Central Government may, by notification in the official Gazette, appoint.

Amendment of Chapter V, Act IX of 1890.

2. In Chapter V of the Indian Railways Act, 1890 (hereinafter referred to as the said Act), section 46 shall be omitted, and sections 41, 42, 42A, 42B, 43, 44, 45 and 46A shall be renumbered respectively as sections 26, 27, 28, 29, 30, 31, 32 and 33.

(2) In sub-section *(3)* of section 27, as so renumbered for the figures and letter "42A" the figures "28" shall be substituted.

(3) In section 28, as so renumbered, sub-section *(2)* and the figure and brackets *"(1)"* in sub-section *(1)* shall be omitted.

Insertion of new heading and new sections 34 to 46C in Act IX of 1890.

3. After section 33, as renumbered by section 2, the following heading and sections shall be inserted, namely:—

"RAILWAY RATES TRIBUNAL

Constitution of the Tribunal.

34. *(1)* There shall be a Tribunal, called the Railway Rates Tribunal, for the purpose of discharging the functions hereinafter specified in this Chapter.

(2) The Tribunal shall consist of a President, and two other members, appointed by the Central Government; and they shall hold office for such periods and on such terms and conditions as the Central Government may, by general order, prescribe.

(3) A person shall not be qualified for appointment as a member of the Tribunal unless he is or has been, or is qualified for appointment as, a Judge of a High Court.

Constitution of panels of assessors.

35. *(1)* The Central Government shall constitute two panels of assessors namely, *(a)* the trade, industry and agriculture panel; and *(b)* the railway panel.

(2) The trade industry and agriculture panel shall consist of not more than sixty persons chosen by the Central Government; one-third of the number chosen shall represent trade, one third industry, and one-third agriculture, the representatives in each group being chosen after consulting such associations representing trade, industry or agriculture (as the case may be), as the Central Government may consider necessary.

(3) The railway panel shall consist of not more than thirty persons with railway experience, chosen by the Central Government.

(4) Any appointment to either panel shall be notified in the official Gazette; and the notification shall specify the term for which the appointment is made. The term shall not exceed two years, but the member shall be eligible for re-appointment after the expiry of his term.

Staff.

36. The Tribunal may, with the sanction of the Central Government, appoint such staff, and on such terms and conditions, as the Central Government may determine.

Headquarters.

37. The head-quarters of the Tribunal shall be at such place as the Central Government may fix.

Sittings of the Tribunal.

38. The Tribunal may sit at such place or places as it may find convenient for the transaction of business.

Jurisdiction.

39. For the purpose of exercising the jurisdiction conferred on it by this Chapter, the Tribunal may pass such interim and final orders as the circumstances may require, including orders for the payment, subject to the provisions of this Chapter, of costs; and it shall be the duty of the Central Government, the Provincial Government or the Government of an Acceding State (as the case may be) on whom any obligation is imposed by any such order, to carry it out.

Powers of the Tribunal.

40. The Tribunal shall have the powers of a Civil Court under the Code of Civil Procedure, 1908 (V of 1908), for the purposes of taking evidence on oath, enforcing the attendance of witnesses compelling the discovery and production of documents and issuing commissions for the examination of witnesses and shall be deemed to be a Civil Court for all the purposes of section 195 and Chapter XXXV of the Code of Criminal Procedure, 1898 (V of 1898), and any reference to the presiding officer of a Court shall be deemed to include a reference to the President of the Tribunal.

Complaints against a railway administration.

41. *(1)* Any complaint against a railway administration, or jointly against two or more railway administrations, that such administration or administrations —

(a) is or are contravening the provisions of section 28; or

(b) is or are charging —

(i) unreasonable rates; or

(ii) rates which are unreasonable by reason of any condition attached to them regarding minimum weight, packing assumption of risk or any other matter; or

(c) is or are levying unreasonable charges excluding terminal charges which are, or may hereafter be, standardised; or

(d) is or are unreasonably refusing to quote a new station to station rate; or

(e) has or have unreasonably placed a commodity in a higher class

shall be heard and decided by the Tribunal in accordance with the provisions of this Chapter.

(2) In the case of a complaint under clause *(d)* of sub-section *(1)*, the Tribunal may fix a new station to station rate.

Power to alter rates or reclassify commodities.

42. *(1)* The Tribunal alone shall have power to reclassify any commodity in a higher class, but such power shall not be exercised except on the application of the Central Government.

(2) The Central Government alone shall have power —

(a) to increase or reduce the level of class rates, schedule rates and terminal and other charges;

(b) to classify any commodity which has not been classified before.

(3) The Tribunal as well as the Central Government shall have power to reclassify any commodity in a lower class.

Tribunal to decide matters with aid of assessors.

43. *(1)* All matters shall be decided by the Tribunal with the aid of assessors.

(2) Where, in the opinion of the President of the Tribunal, any matter *prima facie* appears to involve a question of principle, it shall be decided by a Full Bench consisting of the President and the other two members, with the aid of not less than four assessors, selected by the President in equal numbers from the trade, industry and agriculture panel and from the railway panel.

(3) All other matters may be decided by a single member of the Tribunal with the aid of not more than four assessors selected by the President of the Tribunal in equal numbers from the trade, industry and agriculture panel and from the railway panel:

Provided that the President may, in his discretion direct that any such matter shall be decided by the Full Bench:

Provided further that where a single member of the Tribunal hearing any matter considers that it involves

a question of principle, he shall refer the matter to the President who shall direct that it shall be decided by the Full Bench in the manner referred to in sub-section *(2)*.

(4) It shall be the duty of each assessor to advice the Tribunal and state his opinion on all questions arising in the matters before the Tribunal, but the Tribunal shall not be bound to act on the advice, or to conform to the opinion, of all or any of the assessors.

Procedure.

44. *(1)* With the approval of the Central Government, the Tribunal may make rules regarding its practice and procedure and generally for the effective discharge of its functions under this Chapter.

(2) In particular and without prejudice to the generality of the foregoing power, such rules may provide for—

(a) the preparation of panels of assessors :

(b) the terms and conditions of the appointment of assessors ;

(c) the award of costs by the Tribunal ;

(d) the reference of any question to a member or officer of the Tribunal or any other person appointed by the Tribunal, for report after holding a local inquiry ;

(e) the right of audience before the Tribunal, provided that any party shall be entitled to be heard in person, or by a representative duly authorised in writing, or by a legal practitioner ;

(f) the disposal by the Tribunal of any proceedings before it, notwithstanding that in the course thereof there has been a change in the persons sitting as members of the Tribunal or as assessors ;

(g) a scale of fees for and in connection with the proceedings before the Tribunal.

(3) The Central Government shall give to the Tribunal such assistance as it may require, and shall also place at its disposal any information in the possession of the Central Government which that Government may think relevant to the matter before the Tribunal.

(4) Any person duly authorised in this behalf by the Central Government shall be entitled to appear and be heard in any proceedings before the Tribunal.

(5) The Tribunal shall make annually a report to the Central Government of its proceedings under this Chapter.

Bar of jurisdiction of the Tribunal.

45. Nothing in this Chapter shall confer jurisdiction on the Tribunal in respect of scales of charges levied by a railway administration for the carriage of passengers and their luggage, parcels, military traffic and traffic in railway materials and stores, and demurrage charges, except on a reference made to the Tribunal by the Central Government.

Alteration and cancellation of certain station to station rates.

46. Notwithstanding anything contained in this Chapter, a railway administration may, in respect of the carriage of any merchandise by goods train, —

(i) quote a new station to station rate ; or

(ii) increase or reduce an existing station to station rate, not being a station to station rate introduced in compliance with an order made by the Tribunal ; or

(iii) after due notice in the manner prescribed by the Central Government, cancel any station to station rate which has not been introduced in compliance with an order made by the Tribunal, unless the Tribunal has, after notice has been given as aforesaid, granted an injunction against such cancellation ; or

(iv) withdraw, alter or amend the conditions attached to a station to station rate other than conditions introduced in compliance with an order made by the Tribunal.

Decision of the Tribunal.

46A. The decision of the Tribunal shall be by a majority of the members sitting and shall be final :

Provided that where a single member of the Tribunal has heard and decided any matter, he may, in his discretion, give leave to any party to appeal to the Full Bench; and if an appeal is filed in pursuance of such leave, the decision of the Full Bench or of a majority of the members thereof, as the case may be, shall be final.

Execution of orders of the Tribunal.

46B. The Tribunal may transmit any order made by it to a Civil Court having local jurisdiction ; and such Civil Court shall execute the order as if it were a decree.

Definitions.

46C. In this Chapter, unless there is anything repugnant in the subject or context,—

(a) "classification" means the grouping of commodities into classes as notified in the Indian Railway Conference Association's Goods Tariff and as in force at the commencement of the Indian Railways (Second Amendment) Act, 1948, for the purpose of determining the rate to be charged ;

(b) "class rate" means a rate fixed according to the class given to a commodity in the classification of goods;

(c) "commodity" includes livestock ;

(d) "demurrage" means the charge levied after the expiry of the free time allowed for loading or unloading a wagon ;

(e) "parcel" means any package or merchandise or other goods entrusted for carriage by passenger or parcels train ;

(f) "schedule rate" means a rate lower than the maximum or class rate applied on a commodity basis ;

(g) "station to station rate" means a special reduced rate applicable to a specific commodity booked between two specified stations."

[THE] RAILWAYS (TRANSPORT OF GOODS) (AMENDMENT) ACT, 1948.

(ACT XIII OF 1948.)

[25th March, 1948.]

An Act to amend the Railways (Transport of Goods) Act, 1947.

WHEREAS it is expedient to amend the Railways (Transport of Goods) Act 1947, (XII of 1947), for the purposes hereinafter appearing ;

It is hereby enacted as follows :

Short title.

1. This Act may be called the Railways (Transport of Goods) (Amendment) Act, 1948.

Amendment of section 1, Act XII of 1947.

2. In sub-section *(3)* of section 1 of the Railways (Transport of Goods) Act, 1947 (hereinafter referred to as the said Act), for the words "for one year only" the words "up to the 26th day of March 1949" shall be substituted.

Amendment of section 2, Act XII of 1947.

3. In sub-section *(2)* of section 2 of the said Act, for the words beginning with "the Central Government" and ending with "a Chief Commissioner" the following words shall be substituted, namely :—

"the Central Government or any person authorised in writing in this behalf by that Government or with respect to items 10 and 17 of the Schedule by a Provincial Government or by a Chief Commissioner or by the Government of an Indian State."

Amendment of Section 3, Act XII of 1947.

4. In clause *(a)* of section 3 of the said Act,—

(a) after the word "preference," the following words shall be inserted, namely :

"subject to such wagon quotas as the Central Government or the person so authorised may fix,"

(b) after the word "or", occurring at the end, the following words shall be added, namely :

"if the Central Government or the officer so authorised deems it necessary for reasons of urgent public interest so to do of any goods or category of goods not so specified, or."

Substitution of new Schedule for the Schedule to Act XII of 1947.

5. For the Schedule to the said Act the following Schedule shall be substituted namely :

"THE SCHEDULE.

(See *section 3.*)

Serial No.	Description of goods	Conditions for special transport facilities or preference
1.	Cattle food and cattle fodder	Nil.
2.	Coal and coke (other than Railway) when despatched from collieries	Nil.
3.	Cotton, silk and woolen piecegoods, blankets, twist yarn and cotton waste when consigned from mills or by mill agents	Nil.
4.	Empty containers for food, petroleum and other industrial products	Nil.
5.	Firewood and charcoal	Nil.
6.	Foodstuffs including fish and other perishables [tinned, canned, bottled, processed or packed including all grains and pulses, wheat products and flour of other grains and pulses, ghee, butter, cooking fats and edible vegetable oils, salt (other than hide salt), sugar, gur and jaggery]	Nil.
7.	Livestock	Nil.
8.	Materials and stores of the Posts and Telegraphs Department	Nil.
9.	Medical stores, hospital equipment and pharmaceutical goods	Nil.
10.	Military or police stores and equipment	When transport is sponsored.
11.	Petroleum and all petroleum products	When consigned by oil companies and importers of petroleum products.
12.	Plant, materials and stores for maintenance and construction of buildings and roads, and for industrial and agricultural development projects, including the "Grow-More-Food" campaign, waterworks, irrigation, hydro-electric and sewage disposal schemes	Nil.
13.	Plants, stores, raw materials for and finished products of the following major industries :—	Nil.
	Cement. Chemicals. Collieries. Distilleries. Fertiliser factories. Iron and steel. Jute. Match factories. Non-ferrous and alloy factories. Paper. Rice and flour mills. Sugar. Textile ginning and pressing mills. Vegetable ghee (Vanaspati) and vegetable oil.	
14.	Plant, stores and raw materials for and finished products of the following important industries :—	Nil.
	Bobbin factories. Bone mills. Cigaratte, cigar and tobacco factories. Electrical industries and electricity supply undertakings. Glass and ceramic factories. Mining industry. Oil companies. Ordnance factories. Paint and varnish factories. Printing, stationery and newsprint. Refractory brick factories.	

Serial No.	Description of goods	Conditions for special transport facilities or preference
	Rubber factories. Soap factories. Starch factories. Tanneries and leather, boot and shoe factories. Tea gardens.	
15.	Railway coal, material, stores and equipment.	Nil.
16.	Raw cotton, wool and silk	Nil.
17.	Stores including medical stores for relief in times of famine or other emergency	When transport is sponsored.
18.	Wagons required for the direct loading and unloading of ships in the port area	Nil."

Notes.—The original schedule to the principal Act comprised 99 items. The present schedule is restricted to only 18 really essential items but power has been taken to render assistance to items not included in the schedule, so as to meet all eventualities—*Authors.*

[THE INDIAN] REGISTRATION (AMENDMENT) ACT, 1948.

(ACT XXXIX OF 1948)

[3rd September, 1948.]

An Act further to amend the Indian Registration Act, 1908.

WHEREAS it is expedient to amend the Indian Registration Act, 1908, for the purposes hereinafter appearing ;

It is hereby enacted as follows :—

Short title.

1. This Act may be called the Indian Registration (Amendment) Act, 1948.

Amendment of section 17, Act XVI of 1908.

2. In sub-section *(2)* of section 17 of the Indian Registration Act, 1908 (hereinafter referred to as the said Act), after clause *(x)*, the following clause shall be inserted,

"*(xa)* any order made under the Charitable Endowments Act, 1890, vesting any property in a Treasurer of Charitable Endowments or divesting any such Treasurer of any property or ; ".

Amendment of section 32, Act XVI of 1908.

3. In section 32 of the said Act, for the words and figures "section 31 and section 89" the words and figures "sections 31, 88 and 89" shall be substituted.

Amendment of section 69, Act XVI of 1908.

4. In sub-section *(1)* of section 69 of the said Act, after clause *(g)* the following clause shall be inserted, namely :—

"*(gg)* regulating the manner in which the instruments referred to in sub-section *(2)* of section 88 may be presented for registration;".

Substitution of section 88, Act XVI of 1908.

5. For section 88 of the said Act, the following section shall be substituted namely :

Registration of documents executed by Government officers or certain public functionaries.

"*88. (1)* Notwithstanding anything contained in this Act, it shall not be necessary for—

(a) any officer of Government, or

(b) any Administrator General, Official Trustee or Official Assignee, or

(c) the Sheriff, Receiver or Registrar of a High Court, or

(d) the holder for the time being of such other public office as may be specified in a notification in the official Gazette issued in that behalf by the Provincial Government,

to appear in person or by agent at any registration office in any proceeding connected with the registration of any instrument executed by him or in his favour in his official capacity, or to sign as provided in section 58.

(2) Any instrument executed by or in favour of an officer of Government or any other person referred to in sub section *(1)* may be presented for registration in such manner as may be prescribed by rules made under section 69.

(3) The registering officer to whom any instrument is presented for registration under this section may, if he thinks fit, refer to any Secretary to Government or to such officer of Government or other person referred to in sub-section *(1)* for information respecting the same and, on being satisfied of the execution thereof, shall register the instrument."

[THE INDIAN] TARIFF (AMENDMENT) ACT, 1948.

(ACT LXVII OF 1948)

[24th September, 1948]

An Act further to amend the Indian Tariff Act, 1934.

WHEREAS it is expedient further to amend the Indian Tariff Act, 1934 for the purposes hereinafter appearing ; It is hereby enacted as follows :—

Short title and commencement.

1. *(1)* This Act may be called the Indian Tariff (Amendment) Act, 1948.

(2) The provisions of section 2 in so far as they relate to the two items 63 (34) *(a)* and 63 (34) *(b)* [inserted by clause (i) of that section] shall come into force on such date or dates as the Central

Government may, by notification in the official Gazette, appoint; the rest of this Act shall come into force at once.

Amendment of First Schedule, Act XXXII of 1934.

2. In the First Schedule to the Indian Tariff Act 1934,—

(a) for Item No. 11 (4) the following Items shall be substituted, namely :—

"11 (4)	Starch . .	Protective.	18 per cent. *ad valorem.*	March 31st, 1950.
11 (5)	Farina . .	Revenue.	18 per cent. *ad valorem.*"	

(b) after Item No. 21 (2) the following Item shall be inserted, namely :—

"21 (3)	Glucose other than glucose prepared for medicinal purposes.	Protective.	30 per cent. *ad valorem.*	March 31st, 1950."

(c) after Item No. 28 (18) the following Items shall be inserted, namely :—

"28 (19)	Potassium permanganate.	Protective.	30 per cent *ad valorem.*	March 31st, 1949.
28 (20)	Acid oleic and acid stearic, or any product containing 60 per cent. or more of these free fatty acids.	Protective.	30 per cent. *ad valorem.*	March 31st, 1949."

(d) in Item No. 28 (8) for the words "and other potassium compounds" the words "and potassium compounds not otherwise specified" shall be substituted ;

(e) after Item No. 40 (3) the following Items shall be inserted, namely :—

"40 (4)	Plywood including plywood panels for tea chests.	Protective.	30 per cent. *ad valorem.*	March 31st, 1950.
40 (5)	Battens for tea chests.	Protective.	30 per cent. *ad valorem.*	March 31st, 1950."

(f) in Item No. 50 (3)—

(i) in the third column, for the word "Revenue" the word "Protective" shall be substituted ;

(ii) in the last column, the date "March 31st, 1950" shall be inserted ;

(g) in Item No. 63 (1), in the second column, the word "ferro-silicon" shall be omitted ;

(h) for Item No. 63 (14), the following Item shall be substituted, namely :—

"63 (14)	Iron or steel hoops and strips not otherwise specified.	Preferential revenue.	24 per cent. *ad valorem.*	12 per cent. *ad valorem.*"

(i) after Item No. 63 (33) the following Items shall be inserted, namely :—

"63 (34)	Iron or steel hoops—			
	(a) Jute baling hoops—			
	(i) of British manufacture.	Protective.	30 per cent. *ad valorem.*	March 31st, 1949.
	(ii) not of British manufacture.	Protective.	40 per cent. *ad valorem.*	March 31st, 1949.
	(b) Cotton baling hoops—			
	(i) of British manufacture.	Protective.	30 per cent. *ad valorem.*	March 31st, 1949.
	(ii) not of British manufacture.	Protective.	40 per cent. *ad valorem.*	March 31st, 1949
63 (35)	Ferro-silicon . .	Protective.	$18\frac{3}{4}$ per cent. *ad valorem.*	March 31st, 1950."

(j) for Item No. 64 the following Item shall be substituted, namely :—

"64	Copper, wrought and manufactures of copper, all sorts not otherwise specified—			
	(a) of British manufacture.	Protective.	24 per cent. *ad valorem.*	March 31st, 1950
	(b) not of British manufacture.	Protective.	36 per cent. *ad valorem.*	March 31st, 1950."

(k) for Item No. 64 (1) the following Item shall be substituted, namely :—

"64 (1)	Copper, scrap	....	Free."

(l) after Item No. 64 (1) the following Item shall be inserted, namely :—

"64 (2)	Copper unwrought, ingots, blooms, slabs, cakes, tiles, blocks, bricks billets, cathodes, blister, bars, (electrolytic wire bars).	....	Free.

64 (3)	Copper rods, other than electrolytic copper rods—			
	(a) of British manufacture.	Protective.	35 per cent. *ad valorem.*	March 31st, 1950.
	(b) not of British manufacture.	Protective.	45 per cent. *ad valorem.*	March 31st, 1950.
64 (4)	Electrolytic copper rods, or black copper rods (in coils) —			
	(a) of British manufacture.	Protective.	20 per cent. *ad valorem.*	March 31st, 1950.
	(b) not of British manufacture.	Protective.	30 per cent. *ad valorem.*	March 31st. 1950."

(m) for Item No. 65 the following Item shall be substituted, namely :—

"65	All non-ferrous neckel alloys including German silver, nickel siiver and cupro nickel.	Protective.	30 per cent. *ad valorem.*	March 31st, 1950."

(n) after Item No. 65 the following Item shall be inserted, namely :—

"65 (1)	Nickel, pellets, cakes, slabs, anodes, shorts, blocks, granules and scraps.	..	Free "

(o) for Item No. 67 the following Item shall be substituted, namely :—

"67	Lead, wrought — the following articles, namely, pipes, tubes and sections.	Protective.	30 per cent. *ad valorem.*	March 31st, 1950."

(p) for Item No. 67 (1) the following Item shall be substituted, namely :—

"67 (1)	Lead sheets for tea chests.	Protective.	30 per cent. *ad valorem.*	March 31st, 1950."

(q) after Item No. 67 (1) the following Items shall be inserted, namely :—

"67 (2)	Lead sheets other than sheets for tea chests.	Protective.	20 per cent. *ad valorem.*	March 31st, 1950.
67 (3)	Lead ingots, pigs and lead scrap.	..	Free."	

(r) for Item No. 68 the following Item shall be substituted, namely :—

"68	Zinc or spelter, wrought or manufactured not otherwise specified.	Protective.	30 per cent. *ad valorem.*	March 31st, 1950."

(s) in Item No. 68 (1), in the second column, the words "bars, blocks" shall be added after the word "cakes" ;

(t) after Item No. 68 (1) the following Items shall be inserted, namely :—

"68 (2)	Zinc sheets not otherwise specified.	Protective.	20 per cent. *ad valorem.*	March 31st, 1950.
68 (3)	Mazak or alloys of zinc and aluminium containing not less than 94 per cent. zinc	..	Free."	

(u) for Item No. 69 the following Items shall be substituted, namely :—

"69	Tin, Block ..	..	Free.	
69 (1)	Tin scrap and tin plate scrap.	..	Free.	
69 (2)	Tin solders, white metal and antifriction alloys.	Protective.	30 per cent. *ad valorem.*	March 31st, 1950."

(v) for Item No. 70 the following Item shall be substituted, namely :—

"70	Brass, wrought and manufactures thereof not otherwise specified.	Protective.	30 per cent. *ad valorem.*	March 31st, 1950."

(w) for Item No. 71 the following Item shall be substituted, namely :—

"70 (1)	All non-ferrous alloys and manufacture of metals and alloys not otherwise specified.	Protective.	30 per cent. *ad valorem.*	March 31st, 1950."

(x) after Items No. 70 (3) the following Items shall be inserted, namely :—

"70 (4)	Brass unwrought, ingots, billets, cakes, slabs, blooms (excluding scrap), that is to say, ingots, etc., containing (1) copper 55 to 74 per cent. (2) zinc 26 to 42 per cent, and (3) components other than copper and zinc including impurities not exceeding 3 per cent. of which not more than one half should be tin.	Protective.	10 per cent. *ad valorem.*	March 31st, 1950.
70 (5).	Brass wires and rods.	Protective.	35 per cent. *ad valorem.*	March 31st, 1950.
70 (6)	Yellow metal alloys other than brass, such as gun-metal, bronze, boll-metal and phosphor-bronze and manufactures thereof not otherwise specified.	Protective.	30 per cent. *ad valorem.*	March 31st, 1950.
70 (7)	Cobalt, Chromium, tungsten, magnesium and all other non-ferrous virgin metals not otherwise specified.	...	Free.	
70 (8)	All non-ferrous metal scraps and scraps of alloys of non-ferrous metals not otherwise specified.	...	Free.	
70 (9)	Type metal.	Protective.	30 per cent. *ad valorem.*	March 31st, 1950."

(y) for paragraph *(e)* in the second column of Item No. 72, the following paragraph shall be substituted, namely:—

"*(e)* Electrical wires and cables, insulated or not and poles, troughs, conduits and insulators designed as parts of a transmission system, and the fittings thereof;"

(z) after Item No. 72 (11) the following Items shall be inserted, namely:—

"72 (12)	Bare hard drawn or annealed electrolytic copper wires and cables of all sizes solid or stranded and A.C S.R. (aluminium conductor steel reinforced.)	Protective.	30 per cent. *ad valorem.*	March 31st 1950.
72 (13)	Steel belt lacings . . .	Protective.	10 per. cent *ad valorem.*	March 31st, 1950.

72 (14)	Electric motors— *(i)* Squirrel cage induction motors 1 to 30 brake horsepower; *(ii)* slip ring motors 15 to 50 brake horsepower; *(iii)* fractional brake horsepower motors; and *(iv)* all other electric motors not covered by the above.	Protective.	10 per cent *ad valorem.*	March 31st, 1950."

(aa) in Item No. 73 (1), in the second column the words "bare or" shall be deleted;

(bb) in Item No. 73 (2), the words "not otherwise specified" shall be inserted after the word "batteries;"

(cc) after Item No. 73 (6) the following Item shall be inserted, namely:—

"73 (7)	Dry batteries.	Protective.	30 per cent. *ad valorem.*	March 31st, 1949."

(dd) In Items Nos. 8 (3), 20 (1), 20 (3) and 20 (4), in the last column headed "Duration of protective rates of duty" for the date "December 31st, 1948" the date "March 31st, 1949" shall be substituted.

[THE INDIAN] TELEGRAPH (AMENDMENT) ACT, 1948.
(ACT XLV OF 1948)

[3rd September, 1948.]

An Act to amend the Indian Telegraph Act, 1885.

WHEREAS it is expedient to amend the Indian Telegraph Act, 1885 for the purposes hereinafter appearing;

It is hereby enacted as follows:—

Short title. **1.** This Act may be called the Indian Telegraph (Amendment) Act, 1948.

Amendment of section 1, Act XIII of 1885. **2.** For sub-section *(2)* of section 1 of the Indian Telegragh Act, 1885 (hereinafter referred to as the said Act), the following sub-section shall be substituted, namely:—

"*(2)* It extends to the whole of India."

Amendment of sections 4 and 20, Act XIII of 1885. **3.** In sections 4 and 20 of the said Act, for the words "the Provinces" wherever they occur, the word "India" shall be substituted.

Insertion of new section in Act XIII of 1885. **4.** After section 34 of the said Act, the following section shall be inserted, namely:—

'Provincial Government' to include Government of an Acceding State.

"35. In the application of this Act to any Acceding State,—

(a) all references to a Provincial Government shall be construed as references to the Government of that Acceding State, and

(b) references to the Code of Criminal Procedure, 1898, in section 20 and to the Indian Penal Code in section 31 shall be construed as references to the corresponding law for the time being in force in that Acceding State."

III.—UNREPEALED ORDINANCES.

(Ordinances made and promulgated during the period beginning with 27th June 1940 and ending with 31st March, 1946.)

Ordinances made by the Governor-General.— Under section 72, Schedule IX of the Government of India Act, 1935, the Governor-General may, in cases of emergency, make and promulgate ordinances. But any such ordinance shall only have force for not more than six months from its promulgation. But subject to this time limit, such an ordinance will have the same effect as an Act of the Indian Legislature. Although thus, there is a time limit for the legal life of an ordinance of the Governor-General issued under s. 72, as that section is to-day and was originally, yet, by virtue of the India and Burma (Emergency Provisions) Act, 1940 (3 and 4 Geo. VI, Ch. 33) the words in S. 72 limiting the duration of life of such ordinances ceased to have effect with regard to the ordinances made during the period beginning from the passing of the Act and expiring with the date which was notified as the end of the emergency which was the occasion for the passing of the Act. The date of the passing of the Act was 27-6-1940 and the date from which the emergency was notified to have ceased was 1-4-1946. So with regard to the ordinances made during this period, there was no time limit for their duration.

But under s. 72, Schedule IX, such ordinances cannot have a greater force or validity than an Act of the Central Legislature. Hence, under s. 102 (4) of the Government of India Act, 1935, with regard to subjects in the Provincial list in Schedule VII, the ordinances can have effect only if a Proclamation of Emergency by the Governor-General has been made and even then, the ordinances will cease to have effect on the expiration of 6 months after such Proclamation has ceased to operate. During the last War, such a Proclamation of Emergency was issued on 3-9-1939 and was revoked by a Proclamation of 1-4-1946. Hence, ordinances made by the Governor-General during this period, although dealing with subjects in the Provincial list, were valid for the duration of the period and thereafter up to the end of 6 months from 1-4-1946, i. e., up to the end of September 1946. After September 30, 1946, such ordinances, in so

far as they dealt with subjects in the Provincial list, ceased to have any effect. A prominent instance of such an ordinance is the Hoarding and Profiteering Prevention Ordinance of 1943.

Ordinances not dealing with subjects in the Provincial list and made during the period between 27-6-1940 and 1-4-1946 are subject to no time limit as regards their existence and validity unless imposed by the ordinances themselves or other amending or repealing legislation whether by ordinance or otherwise.

There was felt some doubt about the effect of the amendment, above referred to, of S. 72, Schedule IX, Government of India Act. It was thought in some quarters that the effect of the amendment would only be to give life to the ordinances during the emergency which occasioned the amendment and the ordinances would cease to have effect on the declaration of the end of the emergency on 1-4-1946. But this view does not accord with actual words employed in the amending statute and, further, has been authoritatively repudiated by the Federal Court (*see* A. I. R. (34) 1947 F. C. 38).

Hence, we are giving such of the ordinances passed during the above period as do not deal with subjects in the Provincial list and as have not otherwise expired or been repealed .

[THE] ACTIVE SERVICE ORDINANCE, 1941.

(Ordinance No. X of 1941)[a]

[6th December, 1941]

An Ordinance to declare that certain persons shall be deemed to be on active service for the purposes of the Army Act, the Air Force Act, the Indian Army Act, 1911 and the Indian Air Force Act, 1932.

WHEREAS an emergency has arisen which makes it necessary to declare that certain persons shall be deemed to be on active service for the purposes of the Army Act, the Air Force Act, the Indian Army Act, 1911, and the Indian Air Force Act, 1932;

Now, therefore, in exercise of the powers conferred by section 72 of the Government of India Act, as set out in the Ninth Schedule to the Government of India Act, 1935, the Governor General is pleased to make and promulgate the following Ordinance:—

[a.] Published in the Gazette of India, Extraordinary, dated 6th December 1941.

The Ordinance is amended by—
Ordinance No. 31 of 1942, and
Ordinance No. 14 of 1946.

Short title, extent and commencement.

1. *(1)* This Ordinance may be called the Active Service Ordinance, 1941.

(2) It extends to the whole of British India and applies also to British subjects and servants of the Crown in any part of India and to all members of and persons attached to, employed with or following, any military or air force raised in British India wherever they may be.

(3) It shall come into force at once.

Certain persons to be deemed to be on active service for the purposes of the Army and Air Force Acts.

2. Notwithstanding anything contained in sub-section (1) of section 189 of the Army Act,[a] sub-section (1) of section 189 of the Air Force Act, clause *(13)* of section 7 of the Indian Army Act, 1911, or clause *(11)* of section 6 of the Indian Air Force Act, 1932, all persons forming part of and all persons who are employed by, or are in the service of, or are followers of, or accompany any portion of, His Majesty's Forces [b][or any force to which clause *(13)* of section 7 of the Indian Army Act, 1911, for the time being applies by virtue of a notification under sub-section (1) of section 5 of that Act] shall, until such date as the Central Government may, by notification in the official Gazette, [c][appoint in this behalf] be deemed for the purposes of each of the said Acts [d][and of regulations prescribed under the Regimental Debts Act, 1893[e]] to be on active service.

[f][Provided that the Central Government may from time to time, by notification in the official Gazette, declare that the provisions of this section—

(a) shall apply only, or shall cease to apply, in respect of specified classes of such persons, or

(b) shall apply to such persons, or to any specified classes of such persons, only when they are serving within or outside a specified area, or

(c) shall apply to such persons, or to any specified classes of such persons, only for the purposes of specified provisions of each of the said Acts or of the said regulations.]

[a] (1881) 44 & 45 Vict., c. 58. [b] *Inserted* by the Indian Army Act (Application) Ordinance, 1942 (31 [XXXI] of 1942), S. 3 [20-6-1942]. [c] *Substituted* for the words "declare to be the date on which the present hostilities terminated", by the Active Service (Amendment) Ordinance, 1946 (14 [XIV] of 1946), S. 2 [30-3-1946]. [d] *Inserted, ibid.* [e] (1893) 56 & 57 Vict., c. 5. [f] Proviso was *added, ibid.*

Saving as to past proceedings.

3. No punishment inflicted, and no order passed or other action taken in any proceedings held, under any of the Acts specified in section 2 shall, after the commencement of this Ordinance, be called in question in any Court on the ground only that the person on whom the punishment was inflicted or to whose prejudice the order was passed or the action was taken was not on active service, if—

(a) the act for which the punishment was inflicted, or in respect of which the proceedings were commenced, occurred on or after the 3rd day of September, 1939, and

(b) such person at the time the act was committed, formed part of, or was employed by, or was in the service of, or was a follower of, or accompanied any portion of, His Majesty's Forces.

Section 1 — Note 1

[1] By virtue of S. 1 (2) read with S. 2 of this Ordinance military store-keepers engaged by the Army authorities during the continuation of the hostilities must be regarded as on active service and can be tried by the Court-martial. (Vol 33) 1946 Lah 103 (109) : I L R (1945) Lah 419 : 47 Cr. L Jour 1022 (FB).

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SCHEDULE.

[THE] ALLIED FORCES (CHINA) ORDINANCE, 1946.

(ORDINANCE NO. VIII OF 1946)[a]

[19th January, 1946.]

An Ordinance to make certain provisions respecting the forces of the Republic of China in British India.

WHEREAS an emergency has arisen which renders it necessary, in order to give effect in British India to an agreement (hereinafter referred to as the said Agreement) entered into between His Majesty's Government in the United Kingdom and the Government of India and the Government of the Republic of China, relating to jurisdiction over members of the forces of those Governments, to make certain provisions respecting the forces of the Republic of China in British India;

NOW, THEREFORE, in exercise of the powers conferred by section 72 of the Government of India Act, as set out in the Ninth Schedule to the Government of India Act, 1935, the Governor-General is pleased to make and promulgate the following Ordinance:—

[a] Published in the Gazette of India, Extraordinary, dated 19th January, 1946.

Short title, extent and commencement.

1. *(1)* This Ordinance may be called the Allied Forces (China) Ordinance, 1946.

(2) It extends to the whole of British India.

(3) It shall come into force at once.

Interpretation.

2. In this Ordinance the expression "members of the Chinese forces" has the meaning assigned to it in clause (b) of paragraph (1) of Article 1 of the said Agreement, and set out in the Schedule to this Ordinance.

Bar of criminal proceedings in British Indian Courts.

3. *(1)* Notwithstanding anything in section 12 of the Allied Forces Ordinance, 1942, or elsewhere in any law in force in British India, no criminal proceedings shall, subject as hereinafter provided, be prosecuted or continued in British India before any Court of British India against members of the Chinese forces and any such proceedings pending at the commencement of this Ordinance shall be discharged, unless representation to a contrary effect is made under the proviso to this sub-section in respect of any such pending proceedings:

Provided that this sub-section shall not apply to any particular case in respect of which representation to such effect is made in writing on behalf of the Government of the Republic of China to the Commissioner of Police in a Presidency-town, or to the District Magistrate elsewhere.

(2) Nothing in sub-section (1) shall affect any powers of arrest, search, entry or custody exercisable under the law in force in British India with respect to offences committed or believed to have been committed against that law, but where a person against whom proceedings cannot, by virtue of that sub-section, be prosecuted or continued before a Court of British India is in the custody of any authority of British India, he shall be delivered into the custody of the appropriate authorities of the forces of which he is a member:

Provided that the powers of arrest, search and entry saved by this sub-section shall not be exercised on or in respect of any premises or ship for the time being occupied exclusively by members of the Chinese forces, except with the permission of the officer commanding or person in charge of the forces occupying such premises or ship.

Arrest of persons charged with offences against Chinese law.

4. On application made by or under the authority of the officer commanding or other person in charge of any members of the Chinese forces to a magistrate in British India for the arrest of any such member alleged to have been guilty of an offence against the law of the Republic of China, the magistrate may issue a warrant for the arrest of such member, and such warrant may direct his delivery when so arrested into the custody of the appropriate authorities of the forces of which he is a member.

Proof of identity as member of Chinese forces.

5. For the purposes of any proceedings in any Court of British India, a certificate issued by an officer of the Chinese military forces of rank not below that of Major or an officer of the Chinese naval or air forces of rank not below that corresponding to Major stating that a person of the name and description specified therein is, or was at the time so specified, a member of the Chinese forces, shall be conclusive evidence of that fact, and any document purporting to be a certificate issued for the purposes of this section and to be signed by an officer as aforesaid shall, unless the contrary is proved, be deemed to be a certificate issued by such officer.

Bar of legal proceedings.

6. Nothing contained in this Ordinance shall render any person subject to any liability whether civil or criminal in respect of anything done by him to a member of the Chinese forces in good faith and without knowledge that he was a member of the Chinese forces.

Termination of Ordinance.

7. On the termination of the said Agreement in pursuance of any notice given under paragraph (2) of Article 9 thereof, the Central Government may, by notification in the official Gazette, declare that with effect from such date as may be specified in the notification this Ordinance shall cease to be in operation, and upon the issue of such notification this Ordinance shall be deemed to be repealed on the date so specified.

THE SCHEDULE.

(See section 2.)

'*Article 1.*—(1) In this Agreement the expression . . .

(b) "members of the Chineses forces" means every uniformed person, holding a rank in the naval, military or air forces, maintained by the Government of the Republic of China, who is, in respect of the duties

which he performs in India or Burma, under the orders of the commander or any Chinese naval, military or air force in India or Burma. It includes uniformed members (i) of political and civil staffs attached to the Chinese forces, (ii) of the women's forces auxiliary to the said forces, (iii) of the nursing staffs, male and female, (iv) of the staff of the Navy, Army and Air Force Institutes, (v) of guerilla units auxiliary to the Chinese forces which operate under the command of a commander of the Chinese forces and which are subject to Chinese military law. It does not include British nationals employed by or accompanying the Chinese forces but not enlisted or commissioned in the Chinese forces; nor does it include nationals of third powers or persons without nationality who may be recruited in India or Burma for employment with the Chinese forces. The expression also includes members of the crews (other than British subjects or British protected persons) of merchant ships belonging to or chartered or requisitioned by or on behalf of the Government of the Republic of China, which are operating in conjunction with the Chinese naval authorities."

[THE] ARMED FORCES (SPECIAL POWERS) ORDINANCE, 1942.

(Ordinance No. XLI of 1942.)[a]

[15th August, 1942.]

An Ordinance to confer certain special powers upon certain officers of the armed forces.

WHEREAS an emergency has arisen which makes it necessary to confer certain special powers upon certain officers of the armed forces;

Now, THEREFORE, in exercise of the powers conferred by section 72 of the Government of India Act, as set out in the Ninth Schedule to the Government of India Act, 1935, the Governor General is pleased to make and promulgate the following Ordinance :—

[a] Published in the Gazette of India, Extraordinary, dated 15th August, 1942.

Applied to British Baluchistan, *see* Notification No. 80-W, dated 20-8-1942, Gazette of India, 1942, Part I, page 1385 ; to the Darjeeling District and the partially excluded areas of the Mymensingh District with effect from 15-10-1942, *see* Bengal Government Notification No. 20215-P dated 8-10-1942 ; sections 2-4 applied to members of the Armed Reserves, Special Emergency Forces, Vizianagram and Pallavaram and the Malabar Special Police, *see* Madras Government Notification No. 226—Home, dated 29-1-1943. Applied to the Chittagong Hill Tracts, with effect from 28-1-1943, *see* Bengal Government Notification No. 273-S, dated 22-1-1943.

This Ordinance is amended by Ordinance No. 36 of 1945. *See also* Ordinance No. 66 of 1942.

Short title, extent and commencement.

1. *(1)* This Ordinance may be called the Armed Forces (Special Powers) Ordinance, 1942.

(2) It extends to the whole of British India.

(3) It shall come into force at once.

Power to certain officers of armed forces to order use of force in certain circumstances.

[a]2. *(1)* Any officer not below the rank of Captain in His Majesty's Military Forces and any officer holding equivalent rank either in His Majesty's Naval or Air Forces or in the forces of a foreign power allied with His Majesty or in the forces of a foreign authority recognised by His Majesty as competent to maintain armed forces for service in association with His Majesty's forces or in the military forces of an Indian State serving in association with any such forces as aforesaid may, if in his opinion it is necessary for the proper performance of his duty so to do, by general or special order in writing, require any personnel under his command to use such force as may be necessary, even to the causing of death, against any person who —

(a) fails to halt when challenged by a sentry, or

(b) does, attempts to do, or appears to be about to do or attempt to do, any such act as would endanger or damage any property of any description whatsoever which it is the duty of such officer to protect ;

and it shall be lawful for such personnel, when so ordered, to use such force against such person.

(2) The use of force against any person in obedience to an order under sub-section *(1)* shall include the power to arrest and take into custody such person, and the use of such force as may be necessary, even to the causing of death, in order to effect such arrest.

[a] *See* the Armed Forces (Special Powers) Extension Ordinance, 1942 (66 [LXVI] of 1942), S. 2. [24-12-1942.]

Arrested persons to be made over to appropriate authority.

[a][3. Any person arrested and taken into custody under this Ordinance shall, as soon as practicable, be made over, together with a report of the circumstances occasioning the arrest, to the officer in charge of the nearest police station, or where the said person is a person subject to military law, to the appropriate military officer.]

[a] Section 3 was *substituted* for the original section 3, by the Armed Forces (Special Powers) Amendment Ordinance, 1945 (36 [XXXVI] of 1945), S. 2. [18-9-1945.]

Protection to persons acting under this Ordinance.

[a]4. No prosecution, suit or other legal proceedings for any order purporting to be made under this ordinance or for any act purporting to be done in obedience to any such order shall be instituted in any court except with the previous sanction of the Central Government, and notwithstanding anything contained in any other law for the time being in force, no person purporting in good faith to make such an order or to do any act in obedience thereto shall, whatever consequences ensue, be liable therefor.

[a] *See* the Armed Forces (Special Powers) Extension Ordinance, 1942 (66 [LXVI] of 1942), S. 2. [24-12-1942].

[THE] ARMED FORCES (SPECIAL POWERS) EXTENSION ORDINANCE, 1942.

(Ordinance No. LXVI of 1942.)[a]

[24th December, 1942]

An Ordinance to provide for the extension of the Armed Forces (Special Powers) Ordinance 1942, to officers and members of police forces employed on certain duties.

WHEREAS an emergency has arisen which makes it necessary to provide for the extension of the Armed Forces (Special Powers) Ordinance, 1942 (XLI of 1942), to officers and members of police forces employed on certain duties;

Now, therefore, in exercise of the powers conferred

by section 72 of the Government of India Act, as set out in the Ninth Schedule to the Government of India Act, 1935, the Governor General is pleased to make and promulgate the following Ordinance:—

[a] Published in the Gazette of India, Extraordinary, dated 24th December 1942.

This Ordinance is applied to the Chittagong Hill tracts, with effect from 28th January 1943, *see* Bengal Government Notification No. 273-S, dated the 22nd January 1943.

Short title, extent and commencement.

1. *(1)* This Ordinance may be called the Armed Forces (Special Powers) Extension Ordinance, 1942.

(2) It extends to the whole of British India.

(3) It shall come into force at once.

Power to extend Ord. XLI of 1942 to police forces.

2. The Central Government or a Provincial Government may, by notification in the official Gazette, direct that the provisions of section 2 and section 4 of the Armed Forces (Special Powers) Ordinance, 1942[a], shall apply to the officers and members of any police force or any portion of a police force specified in the notification, when employed on any duty specified in the notification, as they apply to officers and members of His Majesty's Military Forces; and on such direction being made the powers exercisable by an officer not below the rank of Captain in His Majesty's Military Forces shall be exercisable by any officer of a police force so specified who holds a gazetted appointment in such force.

[a] For the text of this Ordinance, *see ante*.

[THE] ARMY (FORFEITURE OF EMOLUMENTS) ORDINANCE, 1945.

(Ordinance No. XL of 1945.)[a]

[*27th October, 1945*]

An Ordinance to provide for the forfeiture in certain cases not provided for by the Army Act of pay and allowances of certain persons subject to that Act.

WHEREAS an emergency has arisen which makes it necessary to provide for the forfeiture in certain cases not provided for by the Army Act[b] of pay and allowances of certain persons subject to that Act;

NOW, THEREFORE, in exercise of the powers conferred by section 72 of the Government of India Act, as set out in the Ninth Schedule to the Government of India Act, 1935 the Governor General is pleased to make and promulgate the following Ordinance:—

[a] Published in the Gazette of India, Extraordinary, dated 27th October 1945. The Ordinance is amended by Ordinance No. 13 of 1946. [b] (1881) 44 & 45 Vict., C. 58.

Short title and commencement.

1. *(1)* This Ordinance may be called the Army (Forfeiture of Emoluments) Ordinance, 1945.

(2) It shall come into force at once.

Forfeiture of emoluments in certain cases.

2. *(1)* The whole or any part of the pay and allowances of a person subject to the Army Act,[a] [b] ✠ ✠ ✠ may be forfeited by order of the Central Government if the said person is found by a military Court of Enquiry constituted under this Ordinance.

(a) to have deserted to the enemy, or

(b) while in enemy hands, to have served with, or under the orders of the enemy, or in any manner to have aided the enemy, or

(c) to have allowed himself to be taken prisoner by the enemy through want of due precaution, or through disobedience of orders or wilful neglect of duty, or,

(d) having been taken prisoner by the enemy, to have failed to rejoin His Majesty's service when it was possible to do so.

(2) The Central Government may at any time cancel in whole or in part any order made under sub-section *(1)*, and any such cancellation may be with retrospective effect.

[a] (1881) 44 & 45 Vict., C. 58. [b] The words "as an officer" were *omitted* by the Army (Forfeiture of Emoluments) Amendment Ordinance, 1946 (15 [XIII] of 1946), S. 2. [30-3-1946].

Courts of Enquiry.

3. The Commander-in-Chief of His Majesty's Forces in India or any officer authorised by him in this behalf may constitute a military Court of such composition as the constituting authority thinks fit to enquire into and report to the Central Government on any case of the nature referred to in sub-section *(1)* of section 2.

Power to withhold emoluments pending enquiry.

4. Where the conduct of any person is to be enquired into under this Ordinance, the Commander-in-Chief of His Majesty's Forces in India or any officer authorised by him in this behalf may order that the whole or any part of the pay and allowances of such person shall be withheld pending the orders of the Central Government on the report made on the case under section 3.

[THE] ARMY (PROVISION FOR DEPENDANTS) ORDINANCE, 1944.

(ORDINANCE NO. XXX OF 1944)[a]

[*1st July, 1944.*]

An Ordinance to enable provision to be made for the dependants of certain persons subject to the Army Act or the Indian Army Act, 1911.

WHEREAS an emergency has arisen which makes it necessary to enable provision to be made in certain cases for dependants of certain persons subject to the Army Act[b] and of persons subject to the Indian Army Act, 1911.

NOW, THEREFORE, in exercise of the powers conferred by section 72 of the Government of India Act, as set out in the Ninth Schedule to the Government of India Act, 1935, the Governor-General is pleased to make and promulgate the following Ordinance —

[a] Published in the Gazette of India, Extraordinary, dated 1st July 1944. The Ordinance has been partly repealed by Ordinance No. 1 of 1946. [b] (1881) 44 and 45 Vict., C. 58.

Short title and commencement.

1. *(1)* This Ordinance may be called the Army (Provision for Dependants) Ordinance, 1944.

(2) It shall come into force at once.

Power to make provision for dependants of certain persons subject to the Army Act.

2. *(1)* In the case of all persons subject to the Army Act[a] whose pay and allowances are paid by and on the authority of the Central Government, it shall be lawful, notwithstanding any provision in any other enactment or any rule of law to the contrary, for proper provision to be made by such authorities as the Central Government may authorise in this behalf for any dependants of any such person

as aforesaid who is a prisoner of war or missing, out if his pay and allowances.

(2) Any payments made before the commencement of this Ordinance to dependants which, if this section had been in force could have been validly made are hereby validated.

[a] (1881) 44 & 45 Vict., C. 58.

Insertion of new section 52B in Act VIII of 1911. 3. [Repealed by the Repealing Ordinance, 1946 (1 [I] of 1946), S. 2 and Schedule (5-1-1946).]

[THE] BANK NOTES (DECLARATION OF HOLDINGS) ORDINANCE, 1946. (ORDINANCE No. II of 1946)[a]

[12th January, 1946.]

An Ordinance to require banks and Government treasuries to furnish information concerning certain bank notes held by them.

WHEREAS an emergency has arisen which makes it necessary to provide for obtaining from banks and Government treasuries information concerning bank notes of certain denominational values held by them:

NOW, THEREFORE, in exercise of the powers conferred by section 72 of the Government of India Act, as set out in the Ninth Schedule to the Government of India Act, 1935, the Governor General is pleased to make and promulgate the following Ordinance;—

[a] Published in the Gazette of India, Extraordinary, dated 12th January 1946.

Short title, extent and commencement. 1. *(1)* This Ordinance may be called the Bank Notes (Declaration of Holdings) Ordinance, 1946.

(2) It extends to the whole of British India.

(3) It shall come into force at once.

Interpretation. 2. In this Ordinance,—

(*a*) "bank" means a banking company as defined in section 277F of the Indian Companies Act, 1913, and includes any branch of a bank;

(*b*) "bank note" includes all currency notes of the Government of India issued either by the Central Government or by the Reserve Bank;

(*c*) "Reserve Bank" means the Reserve Bank of India.

Closing of banks and Government treasuries. 3. All banks and Government treasuries shall be closed on the 12th day of January 1946 for the transaction of all business except the preparation and presentation of the first return referred to in section 4, and that day shall for the purposes of the Negotiable Instruments Act, 1881 be deemed to be a public holiday notified under that Act.

Declaration of holding of certain bank notes. 4. *(1)* Every bank and every Government treasury shall prepare and send to the Reserve Bank in the manner provided in this section—

(i) a first return showing separately under each denominational value the total value of bank notes of the denominational values of one hundred rupees, five hundred rupees, one thousand rupees and ten thousand rupees held by it at the close of business on the 11th day of January 1946, and

(ii) a second return giving details of such bank notes, if any, received by it by post in the ordinary course of business on or after the 12th day of January 1946 which appear to have been posted on or before the 11th day of January 1946, together with in each case the name and address of the sender, the post office of despatch and the registration number affixed by that post office to the cover containing the notes, and if no such bank notes are received as aforesaid, it shall be stated accordingly in the second return.

(2) Every such return shall be presented for forwarding to the reserve Bank to the manager of a branch of the Reserve Bank, or to the District Magistrate or Subdivisional Magistrate, or if such Manager or Magistrate is not available, to the seniormost revenue or police officer available, in the case of the first return not later than 3 p. m., on the 12th day of January 1946, and in the case of the second return not later than the 16th day of January 1946;

Provided that if it is not convenient to present the first return to any such person as aforesaid, it may be presented by handing two copies thereof not later than 3 p.m. on the 12th day of January 1946 to a telegraph office, one copy for despatch by express telegram to the Reserve Bank at Bombay at the expense of the bank or Government treasury, as the case may be, and the other copy for return to the person presenting it in the manner provided in sub-section *(4)*, and by despatching the third copy required by sub-section (3) by registered post on the same date to the Reserve Bank at Bombay.

(3) Every such return shall be prepared and presented in triplicate, and shall be signed by the manager of the Bank or the officer in charge of the Government treasury, as the case may be.

(4) The officer to whom a return is presented shall give back to the person presenting it one copy thereof in acknowledgment of receipt on which shall be recorded the time and date of receipt, and such officer shall without delay forward one copy of the return to the Reserve Bank at Bombay.

Powers of inspection. 5. *(1)* In order to verify any return made under section 4 or where any bank fails to present any such return in the manner provided by that section, the Central Government may, by general or special order, authorise any person to inspect the books, accounts and other documents of any bank, and it shall be the duty of the manager or other officer of the bank to produce to any person so authorised all such books, accounts and other documents in his custody or power relating to the bank's holdings of bank notes at all times between the 11th and 16th days, both inclusive, of January 1946, as the person so authorised may require of him.

(2) Any person making an inspection under sub-section *(1)* may examine on oath any manager or other officer of the bank in relation to the bank's holdings of bank notes as aforesaid, and may administer an oath accordingly.

Penalties. [a]6. *(1)* If any bank fails to prepare and present in the manner provided by section 4 any return referred to in that section, or presents any such return which is false in any material particular, the manager of the bank shall, unless he proves that the failure took place or the false return was presented without his knowledge or that he exercised all due diligence to prevent the same, be punishable with imprisonment for a term which may extend to three years or with fine or with both.

(2) If any person refuses to produce any book, account or other document which under section 5 it is his duty to produce or to answer any question relating to the matters referred to in that section, he shall be

punishable with a fine which may extend to one thousand rupees in respect of each offence.

(3) No prosecution for an offence punishable under this section shall be instituted except with the previous sanction of tha Central Government.

[a] *See* the High Denomination Bank Notes (Demonetisation) Ordinance, 1946 (3 [III] of 1946), S. 10. [12-1-1946.]

[THE] BANKING COMPANIES (INSPECTION) ORDINANCE, 1946
(ORDINANCE NO. IV OF 1946)[a]

[15th January, 1946.]

An Ordinance to enable inspection of the affairs of banking companies to be made in certain circumstances.

WHEREAS an emergency has arisen which renders it necessary to make provision to enable inspection of the affairs of banking companies to be made in certain circumstances ;

NOW, THEREFORE, in exercise of the powers conferred by section 72 of the Government of India Act, as set out in the Ninth Schedule to the Government of India Act, 1935, the Governor General is pleased to make and promulgate the following Ordinance:—

[a] Published in the Gazette of India, Extraordinary, dated 15th January, 1946.

Short title, extent and commencement.

1. *(1)* This Ordinance may be called the Banking Companies (Inspection) Ordinance, 1946.

(2) It extends to the whole of British India.

(3) It shall come into force at once.

Definitions.

2. In this Ordinance,—

(a) "banking company" means a banking company as defined in section 277F of the Indian Companies Act, 1913 ;

(b) "Reserve Bank" means the Reserve Bank of India.

Power to order inspection.

3. Notwithstanding anything to the contrary contained in section 138 of the Indian Companies Act, 1913, the Central Government may at any time direct the Reserve Bank to cause an inspection to be made of any banking company and its books and accounts, and to make a report thereon to the Central Government.

Inspection of books and examination of officers.

4. *(1)* On receipt of a direction under section 3, the Reserve Bank may authorise one or more competent persons to make the inspection as aforesaid, and it shall be the duty of every director or other officer of the banking company to produce to any person so authorised all such books, accounts and other documents in his custody or power relating to the affairs of the banking company as the person so authorised may require of him.

(2) Any person making an inspection under sub-section *(1)* may examine on oath any director or other officer of the banking company in relation to its business, and may administer an oath accordingly.

(3) If any person refuses to produce any book, account or other document which under this section it is his duty to produce, or to answer any question relating to the business of the banking company, he shall be liable to a fine which may extend to five hundred rupees in respect of each offence, and if he persists in such refusal, to a further fine which may extend to fifty rupees for every day during which the offence continues.

Powers of Central Government on receipt of report.

5. *(1)* If after consideration of the report of the Reserve Bank under section 3, the Central Government is of opinion that the affairs of a banking company are being conducted to the detriment of the interest of its depositors, the Central Government may—

(a) by order in writing prohibit the banking company from receiving fresh deposits, or

(b) notwithstanding anything contained in sub section (6) of section 42 of the Reserve Bank of India Act, 1934, refuse to direct the inclusion of the banking company in the Second Schedule to that Act, or if the banking company is included therein, by notification in the official Gazette direct its exclusion from that Schedule:

Provided that the Central Government may cancel or modify any order passed under this sub-section upon such terms and conditions as it may think fit to impose.

(2) If any deposits are received by a banking company in contravention of an order under clause *(a)* of sub-section (1), every director or other officer of the banking company, unless he proves that the contravention took place without his knowledge or that he exercised all due diligence to prevent it, shall be deemed to be guilty of such contravention and shall be punishable with a fine which may extend to twice the amount of the deposits so received.

Publication of reports.

6. The Central Government may, after giving reasonable notice to the banking company concerned, publish any report of the Reserve Bank under section 3 or such portion thereof as may appear necessary to the Central Government.

[THE] BOMBAY EXPLOSION (COMPENSATION) ORDINANCE, 1944.
(ORDINANCE No. XXXII OF 1944).

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[THE] BOMBAY EXPLOSION (COMPENSATION) ORDINANCE, 1944.

(ORDINANCE NO. XXXII OF 1944.)[a]

[1st July, 1944]

An Ordinance to provide for and regulate the payment of compensation in respect of the explosions and fires in Bombay on the 14th April 1944.

WHEREAS an emergency has arisen which makes it necessary to provide for and regulate the payment of compensation for death and permanent personal disablement and damage to property due to or arising out of the explosions and fires which occurred in the Bombay Docks on the 14th April 1944, to restrict litigation in connection with the said explosions and fires, and to make certain other provision in connection therewith;

NOW THEREFORE, in exercise of the powers conferred by S. 72 of the Government of India Act as set out in the Ninth Schedule to the Government of India Act, 1935, the Governor-General is pleased to make and promulgate the following Ordinance :—

[a] Published in the Gazette of India, Extraordinary, dated 1st July 1944.

The Ordinance has been amended by Ordinance No. 51 of 1944.

Short title and commencement.

1. *(1)* This Ordinance may be called the Bomay Explosion (Compensation) Ordinance, 1944.

(2) It shall come into force at once.

Definitions.

2. In this Ordinance, unless there is anything repugnant in the subject or context,—

(a) "the explosion" means the explosions which occurred in the Bombay Docks on the 14th April 1944 and and the fires which ensued therefrom ;

(b) "explosion damage" and "explosion injury" mean respectively damage which occurred, whether accidentally or not, and personal injury sustained, as the direct result of the explosion or as the direct result of measures taken under proper authority to avoid the spreading of, or otherwise to mitigate the consequences of such damage as aforesaid ;

(c) "scheduled explosion injury" means an explosion injury resulting in any such measure of permanent disablement as is described in the First Schedule;

(d) "total disablement" means such disablement as permanently incapacitates a person for all work which he was capable of performing at the time when he sustained the injury resulting in such disablement, and includes the permanent loss of the sight of both eyes or the combination of any two or more of the disablements described in Part II of the First Schedule where the aggregate of the percentages specified in that Part against the disablements involved amounts to or exceeds one hundred;

(e) "dependant" has the same meaning in relation to a person whose death resulted from the explosion or an explosion injury as it has in relation to a deceased workman under the Workmen's Compensation Act, 1923 (VIII of 1923);

(f) "uninsured property" means property which was not covered whether wholly or partially by any policy of fire, marine or miscellaneous insurance at the time of the explosion :

Explanation.—A policy of insurance issued under the War Risks (Goods) Insurance Ordinance, 1940, or under the War Risks (Factories) Insurance Ordinance, 1942 is not a policy of insurance within the meaning of this clause.

(g) "proved loss" in relation to any uninsured property means the difference as assessed by the enquiring Claims Commissioner in accordance with the provisions of this Ordinance and the rules made thereunder, between the value of the property immediately before the explosion and its value immediately after the explosion;

(h) "miscellaneous insurance" means any kind of insurance which is not in the opinion of the Central Government life, fire or marine insurance;

(i) "prescribed" means prescribed by the rules made under this Ordinance;

(j) "Schedule" means a Schedule to this Ordinance;

(k) "Chairman" means the Chairman of the Claims Committee.

Claims Committee.

3. For the purposes of enquiring into and determining applications for compensation under section 14, the Central Government shall appoint a Claims Committee consisting of not more than twenty persons, of whom one shall be nominated by the Central Government to be Chairman.

Claims Commissioners.

4. For the purposes of enquiring into and determining applications for compensation under section 11 or section 16, the Central Government shall appoint such number of Claims Commissioners as it may from time to time think fit to have jurisdiction in regard to such class of applications as the Central Government may specify.

Applications for compensation.

5. *(1)* Any person claiming compensation under this Ordinance shall make an application in such one of Forms A, B, C, D and E set out in the Second Schedule as may be applicable to his case not later than the [a][30th day of November] 1944.

(a) to the Chairman of the Claims Committee, where the compensation is payable under section 14, or

(b) to an appropriate Claims Commissioner, in all other cases.

[b][Provided that the Central Government may, if it is satisfied that there was reasonable excuse for the delay, direct that an application made after the said date but not later than the 31st day of October, 1945, shall be enquired into and determined under this Ordinance.]

(2) Save as hereinafter provided, an application for compensation under this Ordinance shall be made, in respect of compensation payable—

(i) under section 11, by the person sustaining the scheduled explosion injury ;

(ii) under section 14, by the holder of the policy of insurance ;

(iii) under section 16, by the owner of the damaged property :

Provided that—

(a) where death has resulted from the explosion or an explosion injury, the application may be made by any dependant of the deceased, or with the permission of the Claims Commissioner by any other near relative of the deceased, and where in such a case applications

are received from more than one person, they shall be enquired into and determined together ;

(b) where a scheduled explosion injury has been sustained by a minor, the application shall be made by his guardian ;

(c) in respect of claims for compensation payable under section 16 for explosion damage to household and personal effects, only one application shall be entertained in respect of the effects of one household and the personal effects of all persons of that household, and that application shall be made by the householder.

(3) Where under sub-section (2) a person may make an application for compensation under this Ordinance, such application may be made on his behalf by his duly accredited representative.

(4) If any person makes in an application for compensation under this Ordinance any statement which is false, and which he either knows or believes to be false or does not believe to be true, he shall be punishable on conviction with imprisonment for a term which may extend to three years or with fine or with both.

[a] *Substituted* for "31st day of October" by the Bombay Explosion (Compensation) Amendment Ordinance, 1944 (51 [LI] of 1944), S. 2. [25-10-1944].

[b] Proviso to sub-section (1) was *added*, *ibid.*

Procedure and powers of Claims Committee.

6. *(1)* Applications for compensation payable under section 14 shall be determined by the Claims Committee after summary enquiry by panels nominated from among members of the Claims Committee by the Chairman in such manner as the Chairman may think fit.

(2) In carrying out their functions under this Ordinance the Claims Committee and panels thereof shall, subject to the provisions of any rules made by the Central Government in this behalf, follow such procedure as the Chairman may by general or special order direct ; and in particular and without prejudice to the generality of the foregoing power of the Chairman, such orders may determine the number of members to form a panel for the purposes of sub-section (1) and the quorum of the Claims Committee.

(3) Notwithstanding anything contained in any other law, the Claims Committee or any panel thereof shall not be bound to hear any applicant under this Ordinance or to receive any evidence which he may wish to adduce, nor shall it be bound to divulge to any applicant any reasons for any determination or recommendation, as the case may be, made by it.

Procedure and powers of Claims Commissioners.

7. *(1)* In enquiring into and determining applications for compensation payable under section 11 or section 16, Claims Commissioners shall, subject to the provisions of any rules made by the Central Government in this behalf follow such summary procedure as they may think fit.

(2) Claims Commissioners shall have all the powers of Civil Courts for the purposes of receiving evidence, administering oaths, enforcing the attendance of witnesses, and compelling the discovery and production of documents, and shall be deemed to be Civil Courts within the meaning of sections 480 and 482 of the Code of Criminal Procedure, 1898.

(3) In order to ascertain in any case whether—

(a) any person in respect of whom an application for compensation payable under section 11 has been made was at the time of the explosion insured against personal injury, or

(b) any property in respect of which an application for compensation payable under section 16 has been made was at the time of the explosion covered whether wholly or partially by any policy of fire, marine or miscellaneous insurance —

the Claims Commissioner, may by order in writing require any insurer to disclose to him particulars of any such insurance as aforesaid within such time as may be specified in the order : and if any person fails to comply with such order or in complying therewith gives any false information, he shall be punishable on conviction with imprisonment for a term which may extend to six months or with fine or with both.

Decisions.

8 *(1)* Subject to the provisions of section 10, every decision of the Claims Committee shall be final and shall not be called in question in any Court.

(2) Subject to the provisions of section 10, every decision of a Claims Commissioner—

(a) as to whether compensation is payable under section 11 or section 16, and if so, as to its amount,

(b) as to the apportionment of compensation payable under section 11 in respect of death resulting from the explosion or an explosion injury,

(c) where the title to receive compensation under section 16 is in dispute, and the amount of compensation determined does not exceed 5,000 rupees as to whom the compensation shall be paid,—

shall be final and shall not be called in question in any Court.

(3) Where the title to receive compensation under section 16 is in dispute and the amount of compensation determined exceeds five thousand rupees, the Claims Commissioner shall record the amount of compensation determined and shall refer the disputing parties to the Civil Court : and no interest shall be payable by the Central Government on any amount the title to which is in dispute as aforesaid.

Payment of Compensation.

9. *(1)* Upon determining an application for compensation under this Ordinance the Claims Committee or the Claims Commissioner, as the case may be, shall, except where the Claims Commissioner refers disputing parties to the Civil Court under sub-section (3) of section 8, issue a payment order in the prescribed form :

Provided that where in the opinion of the Claims Commissioner any other compensation in respect of a schedule explosion injury or in respect of death resulting from the explosion or an explosion injury is recoverable from any source such as is referred to in the first proviso to sub-section (1) of section 11, and where at the time of making his determination under this Ordinance, the amount of such other compensation has not been determined and cannot be predicted by the Claims Commissioner, he may, if he thinks fit, issue a provisional payment order for an amount not exceeding the amount which he estimates to be payable under section 11 after the reduction referred to in the said proviso has been made.

(2) No person shall be entitled to receive any compensation under this Ordinance until he has duly completed and signed a document in the form set out in the Third Schedule.

(3) Where any compensation has been paid under this Ordinance for any death resulting from the explosion or an explosion injury or for any schedule explosion injury or for any explosion damage to property, no other application for compensation shall except as provided in the second proviso to sub-section (1) of section 11, be entertained under this Ordinance in respect of the death, injury or damage for which compensation has been so paid :

Provided that nothing in this Ordinance shall affect the rights of any person against the person to whom the payment as aforesaid has been made.

Appeal and review.

10. *(1)* The Claims Committee may refer for the decision of the Central Government any application for compensation payable under section 14 which involves any point of special difficulty.

(2) Any person aggrieved by any decision of the Claims Committee or of a Claims Commissioner, other than a decision referred to in clause *(b)* of sub-section (2) of section 8 or referring disputing parties to the Civil Court under sub section (3) of that section, may within ninety days from the date of the decision (or within such further period as the Central Government may in any case think fit to allow) appeal to the Central Government against such decision.

(3) The Central Government may of its own motion at any time within six months after the date of any decision of the Claims Committee or a Claims Commissioner call for the record relating to any application for compensation under this Ordinance, and may upon an appeal under sub-section (2) or on calling for the record under this sub-section modify any such decision, other than a decision excepted in sub-section (2), in such manner as it thinks fit :

Provided that no such modification prejudicial to the applicant shall be made unless he has been given a reasonable opportunity of being heard.

(4) Every decision of the Central Government under this section shall be final and shall not be called in question in any Court, nor shall the Central Government be bound to record any reasons for any such decision.

Amount of compensation for death or injury.

11. *(1)* Subject to the provisions of this Ordinance, there shall be paid by the Central Government compensation for any schedule explosion injury or for death resulting from the explosion or an explosion injury at the rates set out in the First Schedule :

Provided that where any compensation (by whatever name called) for such injury or death is otherwise recoverable under the Workmen's Compensation Act, 1923, or under any policy against personal accident or under any other contract or scheme providing for the payment of compensation for death or accident, the amount of compensation determined in accordance with the said rates shall be reduced by the amount of compensation otherwise recoverable as aforesaid or where such other compensation is payable wholly or in part by instalments over an unspecified period, by the value of such other compensation commuted in such manner as may be prescribed :

Provided further that where there has been paid as compensation for a schedule explosion injury under this section an amount which is less than the amount which would have been payable as compensation for the injured person's death due to the explosion or an explosion injury and that person subsequently dies as a result of his explosion injuries, there shall be payable by the Central Government upon application being made under section 5 in this behalf and in accordance with the provisions of sub section (1) of section 12 as further compensation in respect of such person an amount equal to the difference between the amount payable under this section as compensation for his death and the amount already paid in respect of a schedule explosion injury sustained by him.

(2) Nothing in this section shall apply to any servant of the Crown or of the Trustees of the Port of Bombay or of the Municipal Corporation of the City of Bombay.

Compensation for death or injury to whom payable.

12. *(1)* Payment of compensation under this Ordinance for death resulting from the explosion or an explosion injury shall be apportioned in such manner among the dependants of the deceased or any one or more of them as the Claims Commissioner thinks fit, or if there are no dependants of the deceased among such of his relatives and in such proportions as the Claims Commissioner thinks fit.

(2) Save that payment of compensation for a scheduled explosion injury sustained by a minor shall be paid to the guardian of the minor, payment of compensation for a scheduled explosion injury shall be paid to the person by whom it is sustained.

Bases of determination of proved loss.

13. *(1)* In determining the amount of proved loss of any property for the purposes of an application for compensation payable under section 14, the practice and principles normally prevailing in the insurance business shall, so far as may be, be followed, and in particular the proved loss shall in no case be taken to exceed the value of the damaged property declared for the purposes of the policy of insurance.

(2) In determining the amount of the proved loss of uninsured property for the purposes of this Ordinance, the Claims Commissioner shall assess the value immediately before and immediately after the explosion —

(a) of immovable property, on the basis of prices prevailing on the 31st day of March, 1939;

(b) of motor vehicles, on the basis of the prices and principles set out in the Used Motor Vehicles Control Order, 1944;

(c) of other movable property, on the basis of prices prevailing on the 14th day of April 1944.

Compensation for explosion damage to insured property.

14. Subject to the provisions of this Ordinance, there shall be paid by the Central Government compensation for explosion damage to property, being—

(a) damage caused by fire to property insured whether wholly or partially at the time of the explosion against fire under a policy (other than a policy of marine insurance) covering fire risk, or damage caused by blast without fire intervening to property insured whether wholly or partially at the time of the explosion under a policy (other than a policy of marine insurance) covering fire and explosion risks, of an amount equal to the proved loss, or

(b) damage caused by blast without fire intervening to property insured whether wholly or partially at the time of the explosion against fire under a policy (other than a policy of marine insurance) covering fire risk but not explosion risk, of an amount equal to 87½ *per centum* of the proved loss,

to the holder of the policy of insurance covering the damaged property, or if he is deceased, to his legal representatives.

Contribution by insurers.

15. Notwithstanding anything contained in the Indian Companies Act, 1913, or in the memorandum of association or articles of association of any company or in any other instrument, the insurer of any property, for explosion damage to which compensation is paid under S. 14, may pay from his assets in such manner and at such times as may be prescribed to and for the purposes of the Central Government a contribution of such an amount as may be agreed.

Compensation for explosion damage to uninsured property.

16. *(1)* Subject to the provisions of this Ordinance there shall be paid by the Central Government compensation for explosion damage to uninsured property at the following rates, namely —

(a) In the case of immovable property, an amount equal to 75 *per centum* of the proved loss.

(b) In the case of motor vehicles, an amount equal to 75 *per centum* of the proved loss.

(c) In the case of household and personal effects, an amount (subject to a maximum of five thousand rupees in all for the effects of one household and the personal effects of all persons of that household) payable to the householder, equal to:—

(i) the proved loss where the proved loss in respect of all the effects of the household and the personal effects of all persons of the household does not exceed two thousand rupees, or

(ii) two thousand rupees *plus* 75 *per centum* of the amount by which such proved loss exceeds two thousand rupees, in other cases.

(d) In the case of stock-in-trade and merchandise, an amount (subject to a maximum of fifteen thousand rupees in all for the stock-in-trade and merchandise of any one business) equal to —

(i) the proved loss, where the proved loss in respect of the business does not exceed five thousand rupees, or

(ii) five thousand rupees *plus* 75 *per centum* of the amount by which such proved loss exceeds five thousand rupees, in other cases.

(2) Save as provided in clause (c) of sub-section (1), compensation under this section shall be paid to the owner of the damaged property, or if the said owner (or the householder in respect of damage to household and personal effects) is deceased, to his legel representatives.

No compensation payable in certain cases.

17. Notwithstanding anything contained elsewhere in this Ordinance, no compensation shall be payable on explosion damage to any property being—

(a) Property—

(i) the possession of which required to be declared, or

(ii) in respect of stocks of which returns are required to be made, or

(iii) for the possession, use or sale of which any licence is required to be obtained,

by the Hoarding and Profiteering Prevention Ordinance, 1943[a] or by the Defence of India Rules or by any order made under the said Ordinance or Rules or by any other law for the time being in force, where, as the case may be, such declaration or returns have not been duly made or such licence has not been duly obtained or was not valid at the time of the explosion ;

(b) bullion, all articles made of precious metals or precious or semi-precious stones (including jewellery and watches), curios and antiques ;

(c) currency notes, bank notes and coins ;

(d) negotiable instruments, securities, stamps, title-deeds, manuscripts business books, patterns, models, plans, designs and all other documents of whatever description ;

nor shall compensation be payable under this Ordinance for any loss of profits estimated to result from the explosion or for any other such consequential losses as may appear to be directly or otherwise attributable to the explosion.

[a] Ordinance No. 35 of 1943 is now repealed by Act II of 1948.

Certain legal proceedings barred.

18. *(1)* Nothing in this Ordinance shall prevent the recovery of compensation for death or personal injury under the Workmen's Compensation Act, 1923, or under any policy of life insurance or against personal accident or under any other contract or scheme providing for the payment of compensation for death or personal injury, or for damages to property under any policy of marine or miscellaneous insurance.

(2) Save as provided in sub-section (1), no person shall have, or be deemed ever to have had, otherwise than under this Ordinance, any right whether in contract or in tort or otherwise to any compensation or damages for any death, personal injury or damage to or loss of any property, rights or interests, due to or in any way arising out of the explosion ; and no suit or other legal proceedings for any such compensation or damages shall, save as aforesaid, be maintainable in any Court against the Crown or the Trustees of the Port of Bombay or the Municipal Corporation of the City of Bombay or against any servants or agents of the Crown or of the said Trustees or Municipal Corporation or against any other person whomsoever ; and no act or omission which caused or contributed to the explosion shall be deemed to have been done or omitted to be done otherwise than lawfully.

(3) No suit, prosecution or other legal proceeding whatsoever shall lie against any person for anything in good faith done or ordered to be done in combating or mitigating the effects of the explosion, or for anything in good faith done or intended to be done in pursuance of this Ordinance or any rules or order made thereunder.

Recovery in certain cases.

19. *(1)* Where under section 10, the Central Government reduces the amount of compensation determined as payable under this Ordinance and such amount has already been paid to any person, the Claims Committee where the compensation has been paid under section 14, or the Claims Commissioner who made the original determination in other cases, shall by notice in the prescribed form require the person to whom payment has been made to refund to the Central Government within such time as the notice shall specify an amount representing the difference between the amount paid to that person and the reduced amount as determined by the Central Government.

(2) Where a refund required to be made by notice under sub-section (1) is not made in due time, the Chairman of the Claims Committee or the Claims Commissioner, as the case may be, issuing the notice shall prepare a certificate signed by him specifying the amount due from the person liable to pay it and shall send it to the Collector of the district in which such person resides or conducts his business, and the said Collector, on receipt of such certificate, shall proceed to recover from the said person the amounts specified therein as if it were an arrear of land revenue.

Disclosure of certain information.

20. Notwithstanding anything to the contrary contained in section 54 of the Indian Income-tax Act, 1922, it shall be lawful—

(a) for any public servant to disclose to any person being a public servant appointed under this section by the Central Government to assist it in the exercise of its functions under section 10 any information relating to the assessment to income-tax of any applicant for compensation under this Ordinance for explosion damage to property, and

(b) for any person so appointed to convey any such information disclosed to him to the Central Government.

Offences by corporations.

21. If the person committing an offence described in sub-section (4) of section 5 or in sub-section (3) of section 7, is a company or other body corporate, every director, manager, secretary or other officer or agent thereof shall, unless he proves that the offence was committed without his knowledge or that he exercissd all due diligence to prevent its commission, be deemed to be guilty of the offence.

Power to make rules.

22. The Central Government may make rules to carry into effect the purposes of this Ordinance.

THE FIRST SCHEDULE

(*See* Section 11)

PART I

Compensation for death or total disablement.

Where the monthly salary, or in the absence of a monthly salary, the average monthly income at the time of the explosion of the person killed or injured was—	Amount of compensation—	
	(a) for death	(b) for total disablement
(1)	(2)	(3)
	Rs.	Rs
nil or not exceeding Rs. 20	900	1,300
exceeding Rs. 20 but not exceeding Rs. 30	1,300	1,900
exceeding Rs. 30 but not exceeding Rs. 40	1,800	2 500
exceeding Rs. 40 but not exceeding Rs. 50	2,200	3,200
exceeding Rs. 50 but not exceeding Rs. 60	2 600	3,800
exceeding Rs. 60 but not exceeding Rs. 70	3,200	4,400
exceeding Rs. 70 but not exceeding Rs. 80	3,600	5,000
exceeding Rs. 80 but not exceeding Rs. 100	4,500	6,300
exceeding Rs. 100 but not exceeding Rs. 200	5,200	7,400
exceeding Rs. 200 but not exceeding Rs. 500	7,000	9,500
exceeding Rs. 500 but not exceeding Rs. 1,000	8,000	10,000
exceeding Rs. 1,000 but not exceeding Rs. 1,500	10,000	12,500
exceeding Rs. 1,500 but not exceeding Rs. 2,000	12,000	15,000
exceeding Rs. 2,000	14,000	17,000

PART II

Compensation for partial disablement.

Where the nature of the disablement is—	Amount of compensation expressed as a percentage of the amount payable under Part I for total disablement
loss of right arm above or at the elbow	70
loss of left arm above or at the elbow	60
loss of right arm below the elbow	60
loss of leg at or above the knee	60
loss of left arm below the elbow	50
loss of leg below the knee	50
permanent total loss of hearing	50
loss of one eye	30
loss of thumb	25
loss of all toes of one foot	20
loss of one phalanx of thumb	10
loss of index finger	10
loss of great toe	10
loss of any finger other than index finger	5

Explanation.—Complete and permanent loss of the use of any limb or member referred to in this Part shall be deemed to be equivalent to the loss of that limb or member.

THE SECOND SCHEDULE

(*See* section 5)

FORM A

GOVERNMENT OF INDIA

Bombay Explosion (Compensation) Ordinance, 1944.

Application for Compensation by Injured Person.

Applicant's full name (in capitals)—

Name of father (in the case of married woman, of husband)—

Age—

Date of birth—

Caste—

Profession—

Residence—

Nationality—

Monthly rate of wages or monthly income on the 14th April 1944, and the source of the income—

What amount of compensation is claimed and justification for the claim—

Name of employer and his full address—

Ticket number, if any, and department in which employed—

Whether insured under an "Accident" policy, and, if so, the amount of compensation to which the applicant is entitled under such policy and the name of the Insurance Company and policy number —

Whether entitled to any compensation under the Workmen's Compensation Act, 1923, or under any contract (other than a policy of insurance) or scheme for the payment of compensation, and, if so, the amount of compensation to which the applicant is so entitled—

Place where injury was sustained –
Date of injury—
Cause of injury in detail—
Details of injury—
If taken to dispensary or hospital, which and when—
If discharged from dispensary or hospital, when—
If attended to at residence by a medical practitioner, details of place where treated and name of medical practitioner—
If any temporary allowance or pension is being or has been drawn by the injured person, details thereof—
The compensation, if awarded, may be made payable at Post Office/Government Treasury—
*I certify that I am not entitled to any compensation under an "Accident" insurance policy or under the Workmen's Compensation Act, 1923, or under any other contract or scheme for the payment of compensation.
*I certify that I am entitled to compensation amounting to Rs; under an "Accident" insurance policy issued by and to compensation amounting to Rs. under the Workmen's Compensation Act, 1923, (and) to compensation amounting to under—
I certify that the information furnished above is true to the best of my knowledge and belief.
Date 1944.

(Signature of applicant or thumb impression, if illiterate).

*Strike off whichever is unnecessary.

FORM B

GOVERNMENT OF INDIA

Bombay Explosion (Compensation) Ordinance, 1944.
Application for compensation by dependant.
Applicant's full name (in capitals)—
Name of father (in the case of married woman, of husband)—
Age—
Caste—
Residence—
Date of birth—
Profession—
Nationality—
Relationship with deceased—
Full name of the deceased (in capitals)—
Place of death—
Cause of death—
Name of the employer of the deceased—
Ticket number, if any, and department in which employed—
Place of employment—
Monthly rate of wages or monthly income of the deceased on the 14th April 1944, and the source of the income—
Was deceased attended to by A. R. P. volunteer, civic guard, police or other organisation?
If deceased received any medical treatment, details thereof including place where received—
If deceased died in any hospital or dispensary, state details—
If not, give any other proof of death, e. g., affidavits, or any certificate by a Justice of the Pease, Gazetted Officer, Magistrate or Inspector of police,
If deceased has any of the following relatives living at the time of his death, give details* in respect of each—

(i) widow, minor legitimate son, unmarried legitimate daughter, widowed mother—
(ii) if wholly or in part dependant on the earnings of the deceased at the time of his death, a widower, a parent other than a widowed mother, a minor illegitimate son, an unmarried illegitimate daughter, a daughter legitimate or illegitimate if married and a minor or if widowed, a minor brother, an unmarried or widowed sister, a widowed daughter-in-law, a minor child of a deceased son, a minor child of a deceased daughter where no parent of the child is alive, or where no parent of the deceased is alive, a paternal grandparent—

State also if any has since died, or whether any female relative has since married or remarried —
Date of birth and age in the case of all eligible relatives—
Residence of such relatives—
If staying elsewhere than with applicant, state details—
In the case of daughter, whether married—
In the case of children, guardian, if any, other than applicant—
If any of the said relatives or the applicant—

(i) draws any other pension or allowance from public funds, state detail as to source and amount—
(ii) holds any appointment under Government or a local authority, state details and rate of emoluments—

Amount and particulars of compensation applied for—
The compensation, if awarded, may be made payable at Post Office/Government Treasury.
**I certify that I am not entitled to any compensation under an "Accident" insurance policy or under the Workmen's Compensation Act, 1923, or under any other contract or scheme for the payment of compensation.
**I certify that I am entitled to compensation amounting to Rs. under an "Accident" insurance policy issued by (and) to compensation amounting to Rs. under the Workmen's Compensation Act, 1923, (and) to compensation amounting to under
I certify that the information furnished above is true to the best of my knowledge and belief.
Date 1944.

(Signature of applicant or thumb impression, if illiterate).

*If necessary, this may be done on a sheet to be attached and signed.
**Strike off whichever is unnecessary.

FORM C

GOVERNMENT OF INDIA.

Bombay Explosion (Compensation) Ordinance, 1944.
Application for compensation in respect of*

(i) damage by fire to property insured under policies covering fire risk ;
(ii) damage by blast without fire intervening to property insured under fire policies extended to cover explosions;
(iii) damage by blast without fire intervening to property insured against fire under policies covering fire risk but not explosions risk.

I/We of (address) do hereby solemnly declare that on or about o'clock a. m. Indian Standard Time on the day of April 1944, goods/building owned by me/us, which were/was insured under Fire Policy or Policies detailed below, were/was destroyed or damaged by fire/blast/fire and blast** and or water.

I/We further solemnly declare that at the time of the said loss or damage the actual value of all goods/building owned by me/us as described in the said Policy or Policies amounted to Rs. as detailed below and

that apart from myself/ourselves no person other than has any interest in the said goods/building.

I/We therefore apply for compensation from the Governor-General in Council amounting to Rs. as detailed below and I/we solemnly declare that this application contains a true and accurate statement of the loss or damage sustained by me/us, without inclusion of profit of any kind.

Situation of goods/building at the time of loss or damage —

Details of Fire Insurances in force at the time of the loss or damage.

Name of company	Policy No.	Insured amount	Property insured as described in the policy

Statement of the actual value of all goods/buildings owned as described in Fire Insurance Policy or Policies :—

Description of goods/building	Situation of goods/building	Actual value of goods/building

If the property at risk immediately before the loss or damage occurred comprised property subject to compulsory insurance under the War Risks (Goods) Insurance Ordinance, 1940, or the War Risks (Factories) Insurance Ordinance, 1942, give details of all insurances effected under the former Ordinance since 31st December 1943 and details of the policy or policies in force at the time of the loss or damage in the case of the latter Ordinance :—

Policy No.	Government agent	Term of policy	Sum insured	Description of property insured

Details of damage or loss—

Description of goods/building damaged or destroyed	Actual value at time of loss or damage	Value of salvage	Actual loss

Are the goods or any of them, required to be declared or held under a licence by an Order under the Defence of India Rules or any other law for the time being in force ?—

If so, has a declaration been made or a licence obtained ?—

Give the name of the Officer to whom the declaration has been made or from whom the licence has been obtained and the date when it was made or the licence obtained—

Give name of Assessor who examined the damaged goods/building of (address)—

I certify that the information furnished above is true to the best of my knowledge and belief.

Date 1944.

[Signature of applicant (s) or thumb impression (s), if illiterate.]

Full name (s) of applicant (s) (in block letters).

Signed

Declared before me this day of 1944.

Magistrate or Justice of the peace.

*Strike out the clause which is not applicable.

**Delete words which do not apply.

FORM D

GOVERNMENT OF INDIA

Bombay Explosion (Compensation) Ordinance, 1944

Application for compensation in respect of explosion damage to uninsured immovable property.

I/We of (address) do hereby solemnly declare that on or about o'clock a. m./p. m. Indian Standard Time on the day of April 1944, building (s) owned by me/us which were/was not insured under any policy of insurance were/was destroyed or damaged by fire/blast/fire and blast* and/or water.

I/We further solemnly declare that the actual value of the said building (s) owned by me/us, as on the 31st March 1939 amounted to Rs. as detailed below and that apart from myself/ourselves no person other than has any interest in the said building (s).

I/We therefore apply for compensation from the Governor-General in Council amounting to Rs. as detailed below and I/we solemnly declare that this application contains a true and accurate statement of the loss or damage sustained by me/us without inclusion of profit of any kind.

Situation of building (s) at the time of loss or damage—

If the property at risk immediately before the loss or damage occurred comprised property subject to compulsory insurance under the War Risks (Factories) Insurance Ordinance, 1942, give details of the policy or policies taken out under the said Ordinance in force at the time of the loss or damage.

Policy No.	Government agent	Term of policy	Sum insured	Description of property insured

Details of damage or loss—

Description of building damaged or destroyed	Actual value as on 31-3 39	Value of salvage	Loss

Give name of Assessor who examined the damaged building of address—

I certify that the information furnished above is true to the best of my knowledge and belief.

Date 1944.

[Signature of applicant (s) or thumb impression (s), if illiterate]

Full name (s) of applicant (s) (in block letters) —

Signed

Declared before me this day of 1944.

Magistrate or Justice of the Peace.

*Delete words which do not apply.

FORM E

GOVERNMENT OF INDIA

Bombay Explosion (Compensation) Ordinance, 1944

Application for compensation in respect of uninsured moveable property, i.e., *household and personal effects, motor vehicles, stock-in-trade and merchandise.*

I/We of (address) do hereby solemnly declare that on or about o'clock a. m./p. m. Indian Standard Time on the

day of April 1944, movable property consisting of household and personal effects, motor vehicle (s), stock-in-trade and merchandise, owned by me/us, which were/was not insured under any policy of insurance, were/was destroyed or damaged by fire/blast/fire and blast* and/or water.

I/We further solemnly declare that at the time of the said loss or damage, the actual value of the said property owned by me/us amounted to Rs.
as detailed below and that apart from myself/ourselves, no person other than
has any interest in the said property.

I/We therefore apply for compensation from the Governor-General in Council amounting to Rs.
as detailed below and I/we solemnly declare that this application contains a true and accurate statement of the loss or damage sustained by me/us, without inclusion of profit of any kind.

Situation of property at the time of loss or damage—

If the property at risk immediately before the loss or damage occurred comprised property subject to compulsory insurance under the War Risks (Goods) Insurance Ordinance, 1940, or the War Risks (Factories) Insurance Ordinance, 1942, give details of all insurances effected under the former Ordinance since 31st December 1943 and details of the Policy or Policies in force at the time of the loss or damage in the case of the latter Ordinance :—

Policy No.	Government agent	Term of policy	Sum insured	Description of property insured

In the case of household and personal effects—

(i) give the names of members of the household and their relationship with the applicant—

(ii) state if any other member of the household has made a separate application for compensation in respect of these effects and if the answer is in the affirmative give his name and address—

In the case of stock-in-trade and merchandise owned by a firm, give the names and addresses of partners in the firm and state whether any of the partners has made a separate application for compensation—

Details of damage or loss:—

——	Description of property **	Actual value at time of loss or damage	Value of salvage	Actual loss
Household and personal effects				
Stock-in-trade & merchandise.				
Motor vehicles †				

Is the property or any of it required to be declared or held under a licence by an order under the Defence of India Rules or any other law for the time being in force ?—

If so, has a declaration been made or a licence obtained?—

Give the name of the officer to whom the declaration has been made or from whom the licence has been obtained and the date when it was made or the licence obtained—

Give the name of Assessor who examined the damaged property of (address)—

I certify that the information furnished above is true to the best of my knowledge and belief.

Date 1944.

(Signature of claimant or thumb-mark, if illiterate)*

Full name of applicant (in block letters)—

Declared before me this day of 1944.

Signed.....

Magistrate or Justice of the Peace.

*Delete words which do not apply.

**If necessary, particulars of the property may be given on a sheet to be attached and signed or thumb-marked, as the case may be. In that case it would be sufficient to say in this column "As described on the sheet attached and marked——".

† Give type, make, year of manufacture, horsepower and seating capacity of vehicle.

THE THIRD SCHEDULE

(*See* section 9)

RECEIVED from the Governor General in Council the sum of Rs. in full satisfaction and discharge of all my/our claims and rights of whatever nature against the Governor-General in Council or against the Province of Bombay, the Trustees of the Port of Bombay, the Municipal Corporation of the City of Bombay, His Majesty's Government or any servant or agent of the Crown or against any other Government, person or persons whomsoever arising directly or indirectly from the occurrence in the Bombay Docks on the 14th of April 1944.

In consideration of my/our acceptance of the above amount from the Governor-General in Council I/we hereby admit and agree that my/our claims and rights of whatever nature arising directly or indirectly from the said occurrence and whether in contract or in tort or otherwise howsoever arising have been fully and finally satisfied and that I/we have no cause of action whatsoever against any Government, person or persons whomsoever arising directly or indirectly from the said occurrence and if and to the extent that my/our claims and rights as aforesaid are not extinguished I/we in consideration of the premises hereby assign such claims and rights to the Governor-General in Council.

Dated this day of 194 .

[THE] CANTEEN STORES (EXEMPTION FROM LOCAL TAXATION) ORDINANCE, 1945.

(ORDINANCE NO. V OF 1945)[a]

[*30th January 1945.*]

An Ordinance to provide for the exemption of certain goods from payment of taxes imposed by local authorities.

WHEREAS an emergency has arisen which makes it necessary to provide for the exemption of the goods hereinafter referred to from payment of taxes imposed by local authorities ;

NOW, THEREFORE, in exercise of the powers conferred by section 72 of the Government of India Act, as set out in the Ninth Schedule to the Government of India Act, 1935, the Governor-General is pleased to

make and promulgate the following Ordinance :—

[a] Published in the Gazette of India, Extraordinary dated 30th January 1945.

Short title, extent and commencement.

1. *(1)* This ordinance may be called the Canteen Stores (Exemption from Local Taxation) Ordinance, 1945.

(2) It extends to the whole of British India.

(3) It shall come into force at once.

Exemption of certain goods from local taxation.

2. Notwithstanding anything contained in any enactment for the time being in force no tax, duty, cess, toll, due or other impost, however, named imposed by a Municipal Committee, Cantonment Board, or any other local authority whatever shall be payable in respect of any goods, including alcoholic liquors for human consumption and tobacco, which—

(a) are the property of, or consigned or under transport for ultimate delivery to, the Canteen Stores Department, the Indian Red Cross Society or the St. John Ambulance Association, or

(b) have been issued from the Canteen Stores Department for sale to members of the Armed Forces, to contractors authorised to purchase stores from that Department for such sale.

[THE] CIVILIAN PERSONNEL (WAR DEPARTMENT) TRANSFER ORDINANCE, 1944.

(ORDINANCE No. XXXVII OF 1944.)[a]

[19th August, 1944.]

An Ordinance to provide for the transfer from one corps, department, establishment, formation or appointment to another of civilian personnel employed under the War Department of the Central Government.

WHEREAS an emergency has arisen which makes it necessary to provide for the transfer from one corps, department, establishment, formation or appointment to another of civil personnel employed under the War Department of the Central Government ;

NOW, THEREFORE, in exercise of the powers conferred by section 72 of the Government of India Act, as set out in the Ninth Schedule to the Government of India Act, 1935, the Governor-General is pleased to make and promulgate the following Ordinance :—

[a] Published in the Gazette of India, Extraordinary dated 19th August 1944.

Short title, extent and commencement.

1. *(1)* This ordinance may be called the Civilian Personnel (War Department) Transfer Ordinance, 1944.

(2) It extends to the whole of British India, and applies also to British subjects and servants of the Crown in any part of India wherever they may be.

(3) It shall come into force at once.

Definitions.

2. In this Ordinance,—

(a) "competent authority" means any person designated by the Commander-in-Chief of His Majesty's Forces in India in this behalf ;

(b) "contract of service" includes, in relation to any person, any other conditions of service applicable to him ;

(c) "the period of the present emergency" means the period beginning with the date of the promulgation of this Ordinance and ending with such date as the Central Government may, by notification in the official Gazette, declare to be the date on which the emergency which was the occasion of the making of this Ordinance came to an end.

Transfers of civilian personnel.

3. *(1)* During the period of the present emergency, any person, whether or not for the time being subject to naval, military or air force law, who is employed in a civilian capacity under the War Department of the Central Government, other than a person engaged outside India for such employment, may, notwithstanding anything to the contrary contained in his contract of service, be transferred without his consent from one corps, department, establishment, formation or appointment to another under the War Department by order of the competent authority :

Provided that no transfer shall be ordered in pursuance of this section—

(a) if it would operate to the financial disadvantage of the person concerned, or

(b) if it would involve service overseas or in an operational or field service area where liability for such service is not included in the contract of service of the person concerned :

Provided further that the restriction contained in clause *(a)* of the first proviso shall not apply to any reduction or reversion to a lower appointment which may for any reason be ordered under the contract of service of the person concerned.

(2) If any question arises as to whether a proposed transfer is one which cannot be ordered by reason of the provisions of the first proviso to sub-section (1), the decision of the Commander-in-Chief of His Majesty's Forces in India thereon shall be final.

Retransfer on request at end of emergency period.

4. At the end of the period of the present emergency any person transferred under the provisions of section 3 shall, if he continues to be employed as aforesaid and so desires, be retransferred by the competent authority as soon as may be convenient to the corps, department, establishment, formation, or appointment, as the case may be, in which he was employed at the time when he was first so transferred.

[THE] COLLECTIVE FINES ORDINANCE, 1942.

(ORDINANCE No. XX OF 1942).[a]

[13th May, 1942.]

An Ordinance to provide for the imposition of collective fines.

WHEREAS an emergency has arisen which makes it necessary to provide for the imposition of collective fines in connection with offences prejudicially affecting the defence of [b][India] [c][the public safety, the maintenance of public order, the efficient prosecution of war, or the maintenance of supplies or services necessary to the life of the community];

Now, THEREFORE, in exercise of the powers conferred by section 72 of the Government of India Act as set out in the Ninth Schedule to the Government of India Act, 1935, the Governor-General is pleased to make and promulgate the following Ordinance:—

[a] Published in the Gazette of India, Extraordinary dated 13th May 1942.

The Ordinance was applied to British Baluchistan, *see* Notification No. 47-W, dated 27-5-1942, Gazette of India, 1942, Part I, page 918; and to the excluded and partially excluded areas in the Madras Presidency, *see* Notification No. 37, dated 20-7-1942,

The Ordinance has been subsequently amended by

Ordinance No. 43 of 1942, Ordinance No. 49 of 1942, Ordinance No. 63 of 1942 and Ordinance No. 5 of 1943.

[b] *Substituted* for 'British India" by the Indian Independence (Adaptation of Central Acts and Ordinances) Order, 1948 [23-3 1948]. [c] These words were *substituted* for the words "or the efficient prosecution of war" by the Collective Fines (Amendment) Ordinance, 1942 (XLIII [43] of 1942), S. 2. [19-8 1942].

Short title, extent and commencement.

1. *(1)* This Ordinance may be called the Collective Fines Ordinance, 1942.

(2) It extends to the whole of British India.

(3) It shall come into force at once.

Interpretation.

2. In this Ordinance,—

(a) "District Magistrate" means in a Presidency-town, and within the limits of the tract defined by notification under section 1 of the Calcutta Suburban Police Act, 1866[a], as the limits to which the operation of that Act is confined, the Commissioner of Police;

(b) "Provincial Government" means in relation to a Chief Commissioner's Province the Chief Commissioner.

[a] Beng. Act II of 1866.

Imposition of collective fines on inhabitants of area.

3. *(1)* If it appears to the Provincial Government that the inhabitants of any area are concerned in or abetting the commission of offences prejudicially affecting the defence of [aa][India], [a][the public safety, the maintenance of public order, the efficient prosecution of war, or the maintenance of supplies or services necessary to the life of the community], or are harbouring persons concerned in the commission of such offences, or are failing to render all the assistance in their power to discover or apprehend the offender or offenders or are suppressing material evidence of the commission of such offences, the Provincial Government may, by notification in the official Gazette, impose a collective fine on the inhabitants of that area.

[b][*(1A)* An officer empowered in this behalf by the Provincial Government by general or special order may exercise the power conferred by sub-section *(1)* on the Provincial Government:

Provided that an imposition of a collective fine by any such officer may be made by publication of the order imposing the fine either in the official Gazette or in any such other manner as such officer considers best calculated to bring the order to the notice of the inhabitants of the area concerned.]

(2) The Provincial Government [b][or any officer empowered in this behalf by the Provincial Government by general or special order], may exempt any person or class or section of such inhabitants from liability to pay any portion of such fine.

(3) The District Magistrate, after such inquiry as he may deem necessary, shall apportion such fine among the inhabitants who are liable collectively to pay it, and such apportionment shall be made according to the District Magistrate's judgment of the respective means of such inhabitants.

[b][*(3A)* In any such apportionment the District Magistrate may assign a portion of such fine to a Hindu undivided family to be payable by it.]

[c][*(4)* The portion of such fine payable by any person (including a Hindu undivided family) may be recovered—

(a) in the manner provided by the Code of Criminal Procedure, 1898, for the recovery of fines imposed by a Court, as if such portion were a fine imposed by the District Magistrate acting as a Court: Provided that the Provincial Government may, in lieu of the rules referred to in sub-section *(2)* of section 386 of the Code of Criminal Procedure, 1898, make rules under this Ordinance regulating the manner in which warrants under clause *(a)* of sub-section *(1)* of the said section of the said Code are to be executed, and for the summary determination of any claims made by any person other than the person liable to pay the fine in respect of any property attached in execution of the warrant: or

(b) as arrears of land-revenue.]

Explanation.—For the purposes of this section the expression "inhabitants of an area" includes persons who themselves or by their agents or servants occupy or hold land or other immovable property within such area, and landlords who themselves or by their agents or servants collect rents from holders or occupiers of land in such area, notwithstanding that they do not actually reside therein.

[aa] *Substituted* for "British India" by the Indian Independence (Adaptation of Central Acts and Ordinances) Order, 1948 [23-3-1948].

[a] These words were *substituted* for the words "or the efficient prosecution of war," by the Collective Fines (Amendment) Ordinance, 1942 (XLIII [43] of 1942), S. 2. [19 8-1942]. [b] *Inserted* by the Collective Fines (Second Amendment) Ordinance, 1942 (XLIX [49] of 1942), S. 2. [12-9-1942]. [c] Sub-s. (4) was *substituted and shall be deemed always to have been substituted* for the original sub-s. (4) by the Collective Fines (Third Amendment) Ordinance, 1942 (LXIII [63] of 1942), S. 2. [5-12-1942].

Bar of legal proceedings.

[a][4]. No suit, prosecution or other proceeding whatsoever shall lie against any person for or in respect of anything which is in good faith done or intended to be done under this Ordinance.]

[a] This section was *added* by the Collective Fines (Amendment) Ordinance, 1943 (V [5] of 1943), S. 2. [20-1-1943.]

[THE] COTTON CLOTH AND YARN (CONTRACTS) ORDINANCE, 1944

(ORDINANCE NO. II OF 1944)[a]

[*13th January, 1944*].

An Ordinance to regulate the prices which may be charged in sales of cotton cloth and yarn under contracts.

WHEREAS an emergency has arisen which makes it necessary to regulate the prices which may be charged in sales of cotton cloth and yarn under contracts;

NOW, THEREFORE, in exercise of the powers conferred by section 72 of the Government of India Act, as set out in the Ninth Schedule to the Government of India Act, 1935, the Governor-General is pleased to make and promulgate the following Ordinance:—

[a] Published in the Gazette of India, Extraordinary dated 13th January 1944.

PREAMBLE—NOTE 1.

[1] The Ordinance has a retrospective effect and applies to all contracts made before or after the commencement of the Ordinance and to sales made on or after August 15, 1943, in pursuance of a contract made before or after the Ordinance. ('45) I L R (1945) Mad 848 (854) (DB).

Short title, extent and commencement.

1. *(1)* This Ordinance may be called the Cotton Cloth and Yarn (Contracts) Ordinance, 1944.

(2) It extends to the whole of British India.

(3) It shall come into force at once.

Sales in pursuance of contracts.

2. *(1)* Where after the making of any contract for the sale of cotton cloth or cotton yarn by one wholesale dealer to another or by a wholesale dealer to a retail dealer the maximum prices ex-factory and retail at which such cloth or yarn may be sold have been fixed by an order made under the Cotton Cloth and Yarn (Control) Order, 1943, then, notwithstanding anything to the contrary in such contract, when any delivery takes place in pursuance of that contract on or after the date of the said order, the maximum price which may be charged for such cloth or yarn shall not in any case exceed the maximum retail price fixed by the said order, nor shall it in the case of a first or any subsequent sale after delivery from the manufacturer exceed by more than a percentage to be fixed in this behalf by the Textile Commissioner the price paid on the occasion of the last preceding transfer, or, if the said order has fixed a maximum price in respect of such sale, that maximum price ; and where, in pursuance of any such contract, the buyer has paid a price exceeding that laid down in this section, whether voluntarily or in execution of a decree passed by a Court or otherwise, he shall be entitled to receive from the seller any sum so paid in excess.

(2) The provisions of this section apply to contracts made whether before or after the commencement of this Ordinance, and to sales made in pursuance of any such contract on or after the 15th day of August, 1943.

[THE] COTTON TEXTILES FUND ORDINANCE, 1944.
(ORDINANCE NO. XXXIV OF 1944).

CONTENTS.

SECTIONS.
1. Short title, extent and commencement.
2. Definitions.
3. The Cotton Textiles Fund.
4. Government's contribution to the fund.
5. The Cotton Textiles Fund Committee.
6. Application of Fund.
7. Accounts.
8. Dissolution of Committee.
9. Power to make rules.

[THE] COTTON TEXTILES FUND ORDINANCE, 1944.
(ORDINANCE NO. XXXIV OF 1944,)[a]

[8th July, 1944.]

An Ordinance to establish the Cotton Textiles Fund and to levy a duty of customs on exported cotton cloth and yarn.

WHEREAS an emergency has arisen which makes it necessary to establish a fund for supervising the exports of cotton cloth and yarn, and for the development of technical education, research and other matters in relation to the cotton textiles industry and for those purposes to levy a duty of customs on exports of cotton cloth and yarn ;

NOW, THEREFORE, in exercise of the powers conferred by section 72 of the Government of India Act, as set out in the Ninth Schedule to the Government of India Act, 1935, the Governor-General is pleased to make and promulgate the following Ordinance:—

[a] Published in the Gazette of India, Extraordinary dated 8th July 1944.

The Ordinance has been amended by Ordinance No. 43 of 1944 ; Ordinance No. 56 of 1944 ; and Act 42 of 1947.

Short title, extent and commencement.

1. *(1)* This Ordinance may be called the Cotton Textiles Fund Ordinance, 1944.

(2) It extends to the whole of British India.

(3) It shall come into force at once.

Definitions.

2. In this Ordinance, unless there is anything repugnant in the subject or context,—

(a) "Collector" means a Customs collector as defined in clause *(c)* of section 3 of the Sea Customs Act, 1878, or a Collector of Land Customs as defined in clause *(c)* of section 2 of the Land Customs Act, 1924, as the case may be ;

(b) 'the Committee" means the Cotton Textiles Fund Committee constituted under section 5 ;

(c) "cloth" and "yarn" mean respectively cloth and yarn of any description manufactured either wholly from cotton or partly from cotton and partly from any other substance and containing not less than ten *per centum* of cotton by weight ;

(d) "the fund" means the Cotton Textiles Fund established under section 3 ;

(e) "prescribed" means prescribed by rules made under this Ordinance.

The Cotton Textiles Fund.

3. The Central Government shall establish for the purposes of this Ordinance a fund to be called the Cotton Textiles Fund.

Government's contribution to the Fund.

[a][4. The Central Government may from time to time make such contributions to the Fund as it thinks fit.]

[a.] This section was *substituted* by the Indian Finance (Supplementary) Act, 1947 (42 [XLII of 1947), S. 3 [18-12-1947].

SECTION 2 — NOTE 1.

[1] In pursuance of a contract made on 15th April, 1943, for sale of some bales of cotton yarn deliveries were made on the 29th September, 1943. The buyer was forced to pay before delivery the price at the contract rate. Meantime, a maximum price was fixed for the yarn by a notification under the Cotton Cloth and Yarn Control Order, 1943. A suit was filed by the buyer against the seller for the recovery of the difference in price between the contract price paid by him and the selling price fixed by the notification. Subsequently the Cotton Cloth and Yarn (Contracts) Ordinance (1944) of 13th January, 1944, was published on 20th January, 1944. It was held that the Ordinance had retrospective effect and therefore, the buyer was entitled to recover the excess price paid by him. ('45) I L R 1945 Mad 848 (852, 854) (DB).

[2] 'Sales' in sub-sec. (2) mean concluded sales in which property has passed from seller to the buyer irrespective of whether delivery has taken place or not. The Ordinance, therefore, does not apply to a concluded sale made before 15th August, 1943 though delivery may be contemplated to take place after that date. (Vol 35) 1948 Mad 122 (128) (DB) ⁂ (Vol 34) 1947 Mad 455 (457) (D B). (Sale completed before date of fixing of maximum prices under Cotton Cloth and Yarn Control Order, 1943 — Ordinance of 1944 confers no benefit on buyer.)

The Cotton Textiles Fund Committee.

5. *(1)* The Central Government shall constitute a body to be called the Cotton Textiles Fund Committee to administer the Fund in accordance with the provisions of this Ordinance.

(2) The Committee shall consist of such number of members appointed by the Central Government as the Central Government may from time to time consider expedient.

(3) The chairman of the Committee shall be appointed by the Central Government from among the members thereof.

(4) The Committee may, subject to the general control of the Central Government, employ such staff as it thinks necessary for the efficient discharge of its functions under this Ordinance, and may, with the previous sanction of the Central Government, make bye-laws consistent with this Ordinance and the rules made thereunder to provide for all or any of the following matters, namely:—

(a) the procedure to be followed at meetings of the Committee ;

(b) the powers exercisable and the duties to be discharged by the chairman of the Committee and the members of the staff of the Committee ;

(c) the travelling and other allowances which may be drawn by members of the Committee ;

(d) the appointment, promotion and dismissal of members of the staff of the Committee and their terms of service.

Application of Fund.

6. *(1)* Moneys at the credit of the Fund shall be applied by the Committee towards meeting —

(a) firstly, the cost of discharging its functions under this Ordinance;

(b) secondly, the cost of such measures as may be necessary for supervising the export of cloth and yarn;

(c) thirdly, the cost of such measures, including measures involving capital costs, as the Committee may consider necessary or desirable to take for promoting and increasing the sale of Indian cloth and yarn abroad, and generally for the development of technical education and research relating to the cotton textiles industry.

(2) In exercising its functions under sub-section *(1)* the Committee shall follow such general or special directions as the Central Government may from time to time think fit to give and if any question arises whether or not any particular expenditure is debitable to the Fund, the decision of the Central Government thereon shall be final.

Accounts.

7. *(1)* The Committee shall maintain the accounts of the Fund in such manner as may be prescribed.

(2) Such accounts shall be examined and audited annually by auditors appointed by the Central Government in this behalf, and an abstract of such accounts with the report of the auditors thereon shall be published in such form, at such time and in such manner as may be prescribed.

Dissolution of Committee.

8. When the Committee is dissolved by reason of this Ordinance having ceased to be in force, the unexpended balance at the credit of the Fund shall be applied in such manner as the Central Government may direct, towards meeting the cost of measures such as are described in clause *(c)* of sub-section *(1)* of section 6.

Power to make rules.

9. *(1)* The Central Government may, by notification in the official Gazette, make rules to carry out the purposes of this Ordinance.

(2) Without prejudice to the generality of the foregoing power rules may be made providing for all or any of the following matters, namely : —

(a) the term of office of members of the Committee, the circumstances in which members may be removed and the filling of causal vacancies in the Committee;

(b) the conduct of business by the Committee and the number of members which shall form a quorum at a meeting;

(c) the maintenance by the Committee of records of business transacted by the Committee and the submission of copies thereof to the Central Government;

(d) the preparation by the Committee of estimates of annual receipts and expenditure;

(e) the conditions subject to which the Committee may incur expenditure from the Fund outside India for the promotion of the interests of the cotton textiles industry;

(f) any other matter which is to be or may be prescribed under this Ordinance.

[THE] CRIMINAL LAW AMENDMENT ORDINANCE, 1943.

(ORDINANCE NO. XXIX OF 1943)

CONTENTS

SECTIONS

1. Short title, extent and commencement.
2. Interpretation.
3. Constitution of Special Tribunals.
4. Composition of Special Tribunals.
5. Cases triable by Special Tribunals.
6. Procedure and powers of Special Tribunals.
7. Appeal and revision.
8. Bar of certain jurisdiction.
9. Special rules of evidence.
10. Special provisions regarding punishment.
11. Power to make rules.
THE SCHEDULE.

Ordinance how affected by subsequent Ordinance or Act.

The Ordinance has been amended by the following Ordinances :—

Ordinance No. 39 of 1943,
Ordinance No. 40 of 1943,
Ordinance No. 6 of 1944,
Ordinance No. 16 of 1944,
Ordinance No. 24 of 1944,
Ordinance No. 36 of 1944,
Ordinance No. 40 of 1944,
Ordinance No. 49 of 1944,
Ordinance No. 52 of 1944,
Ordinance No. 12 of 1945,
Ordinance No. 22 of 1945,
Ordinance No. 7 of 1946.

See also the Special Tribunals (Supplementary Provisions) Act, 1946 (26 [XXVI] of 1946), Section 3 which makes provision regarding sentences and orders of Special Tribunals) constituted under this Ordinance) which cease to function.

[THE] CRIMINAL LAW AMENDMENT ORDINANCE, 1943
(ORDINANCE NO. XXIX OF 1943)

[11th September, 1943.]

An ordinance to provide for the more speedy trial and more effective punishment of certain offences [b][* * *]

WHEREAS an emergency has arisen which makes it necessary to provide for the more speedy trial and more effective punishment of certain offences [c][* * *];

Now, THEREFORE, in exercise of the powers conferred by section 72 of the Government of India Act, as set out in the Ninth Schedule to the Government of India Act, 1935, the Governor General is pleased to make and promulgate the following Ordinance : —

[a] Published in the Gazette of India, Extraordinary dated 11th September 1943.

[b] The words "punishable under the Indian Penal Code" were *omitted* by the Criminal Law (1943 Amendment) Second Amending Ordinance, 1945 (22 [XXII] of 1945), S. 2. [4-7-1945].

[c] The words, brackets and figures "punishable under the Indian Penal Code, (XLV of 1860)" were *omitted, ibid.*

Short title, extent and commencement. 1. *(1)* This Ordinance may be called the Criminal Law Amendment Ordinance, 1943.

(2) It extends to the whole of British India and applies also to British subjects and servants of the Crown in any part of India and to British subjects who are domiciled in any part of India wherever they may be.

(3) It shall come into force at once.

Interpretation. 2. In this Ordinance "transport" includes the carriage whether of persons or, property of any description by rail, road air, sea or inland waters.

Constitution of Special Tribunals. 3. The Central Government may, by notification in the official Gazette, constitute for the purposes of this Ordinance [a][five Special Tribunals, two ([b][which may be] referred to respectively as the First and Second Tribunal) to sit at Lahore, and the three to sit at Calcutta, Lucknow and Amraoti, respectively,] [c][and may from time to time by like notification—

(a) constitute for the said purposes such further Special Tribunals as may appear to it to be necessary to sit at such places as shall be specified in the notification;

(b) direct that any Special Tribunal shall sit at a place other than the place specified for it by or under this section:

Provided that [d][any] [e][*] Special Tribunal may, if it is satisfied that it will tend to the general convenience of parties or witnesses in any particular case, sit for the trial of that case in a place other than [f][the place [g][**] specified for it.]

[a] *Substituted* by the Criminal Law Amendment (Seventh Amending) Ordinance, 1944 (52 [LII] of 1944), S. 2 [2-12-4944], for the original words. [b] *Substituted* by the Criminal Law (1943 Amendment) Amending Ordinance, 1945 (12 [XII] of 1945), S. 2. [12-5-1945], for the words "hereinafter". [c] *Inserted ibid.* [d] *Substituted* by the Criminal Law Amendment (Second Amending) Ordinance, 1944 (16 [XVI] of 1944), S. 2 [13-5-1944], for the word "either". [e] The word "such" was *omitted* by Ordinance No. 12 of 1945. [f] *Substituted* for the words "Calcutta or Lahore" by Ordinance No. 16 of 1944. [g] The word "hereinbefore" was *omitted* by Ordinance No. 12 of 1945.

Composition of Special Tribunals. [a][4]. *(1)* A Special Tribunal constituted under this Ordinance shall consist of three members, each of whom shall, except as provided in sub-section (2), be a person who—

(a) is qualified under sub-section (3) of section 220 of the Government of India Act, 1935 for appointment as a Judge of a High Court, or

(b) has for a period of not less than three years exercised, whether continuously or not, the powers under the Code of Criminal Procedure, 1898, of any one or more of the following, namely, Sessions Judge, Additional Sessions Judge, Chief Presidency Magistrate, Additional Chief Presidency Magistrate, Presidency Magistrate, District Magistrate, Additional District Magistrate,

and at least one shall have the qualification specified in clause *(a)*.

(2) One of the members may, instead of being a person qualified under sub-section (1), be an officer of His Majesty's force who is a barrister of England or Northern Ireland of at least five years' standing or a member of the faculty of Advocates in Scotland of at least five years' standing.

(3) The Central Government shall appoint one of the members qualified under sub-section (1) to be the President of the Special Tribunal].

[a] This section was *substituted* for the original S. 4, by the Criminal Law (1943 Amendment) Second Amending Ordinance, 1945 (22 [XXII] of 1945), S. 3. [4-7-1945].

Cases triable by Special Tribunal. 5. [a][*(1)* The Central Government may from time to time by notification in the official Gazette allot cases for trial to each Special Tribunal, and may also from time to time by like notification transfer any case from one Special Tribunal to another or withdraw any case from

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Preamble — Note 1

[1] The Ordinance is *intra vires* of the Ordinance-making authority of the Governor General. (Vol 31) 1944 All 257 (258) : I L R (1944) All 758 : 46 Cri L Jour 122 (FB). (Vol 31) 1944 Pat 378 (382, 386) : 23 Pat 457 : 46 Cri L Jour 438 (DB).

[2] The question whether emergency justifying making of Ordinance and setting up of Special Tribunals is one entirely within province of Governor-General and his decision is final. It is not open for examination by High Court. (Vol 31) 1944 Pat 378 (382) : 23 Pat 457 : 46 Cri L Jour 438 (DB).

[3] Effect of amendments by Ordinance LII of 1944, Ordinances XII and XXII of 1945, Repealing Ordinance I of 1946 and Bombay Special Tribunal (Continuation) Act, XXI of 1946—Tribunal constituted under this Ordinance—Tribunal held, did not cease to exist after repeal of Ordinance LII of 1944 by Ordinance I of 1946 and was competent to try cases after 30-9-46. (Vol 34) 1947 F C 38 (44)— (*See also* Government of India Act 1935, Sch. IX, S. 72.)

Section 3—Note 1

[1] The subject-matter of the Ordinance is within Governor-General's ordinance-making powers. (Vol 31) 1944 Pat 378 (385): 23 Pat 457: 46 Cr L Jour 438(DB).

Section 5—Note 1

[1] The words "as may be preferred" cannot be read as meaning that it was the decision of someone else than the Governor-General which gave effective jurisdiction to the Special Tribunal to try the cases mentioned in the First Schedule. The words mean that though the cases mentioned in the First Schedule have not yet

the jurisdiction of a Special Tribunal or make such modifications in the description of a case (whether in the names of the accused or in the charges preferred or in any other manner) as may be considered necessary].

[a]*(2)* The Special Tribunal shall have jurisdiction to try the cases [b][for the time being] respectively allotted to them [c][under sub-section (1)] in respect of such of the charges for offences specified in the [d][* *] Schedule as may be preferred against the several accused and any such case which is at the commencement of this Ordinance [e][or at the time of such allotment pending before any Court or another Special Tribunal shall be deemed to be transferred to the Special Tribunal to which it is so allotted.]

[a]*(3)* When trying any such case as aforesaid, a Special Tribunal may also try any offence [f][whether or not specified] in the [d][* *] Schedule which is an offence with which the accused may, under the Code of Criminal Procedure, 1898 be charged at the same trial.

[a] Original sub-sections (1) and (2) were *re-numbered* as sub-sections (2) and (3) respectively and before sub-section (2) as so re-numbered new sub-section (1) was *inserted* by the Criminal Law (1943 Amendment) Amending Ordinance, 1945 (12 [XII] of 1945), S. 3. [12-5-1945]. **[b]** *Inserted* by the Criminal Law Amendment (Second Amending) Ordinance, 1944 (16 [XVI] of 1944), S. 3. [13-5-1944]. **[c]** *Substituted* for the words "in the First Schedule" by Ordinance No. 12 of 1945. **[d]** The word "Second" was *omitted ibid.* **[e]** These words were *substituted* for the words "pending before any Court shall be deemed to be transferred from that Court to the Special Tribunal to which it is allotted" by Ordinance No. 16 of 1944, S. 3. **[f]** *Substituted* (and shall be deemed always to have been substituted) by the Criminal Law Amendment (Fifth Amending) Ordinance, 1944 (40 [XL] of 1944), S. 2. [26-8-1944].

Procedure and powers of Special Tribunals.

6. *(1)* A Special Tribunal may take cognizance of offences without the accused being committed to it for trial and in trying accused persons shall follow the procedure prescribed by the Code of Criminal Procedure, 1898 for the trial of warrant cases by magistrates :

Provided that a Special Tribunal may refuse to summon any witness if satisfied after examination of the accused that the evidence of such witness will not be material, and shall not be bound to adjourn any trial for any purpose, unless such adjournment is in its opinion necessary in the interests of justice :

Provided further that for the purposes of sub-section *(1)* of section 356 of the said Code [a][English shall be deemed to be the language of the Court and] the Tribunal may decide by which one, if any, of its members the evidence of any or all of the witnesses shall be taken down in writing and where under the provisions of that sub-section the evidence of witnesses is taken down under the direction and superintendence of the Tribunal but not by a member thereof, the provisions of sub-section *(3)* of section 356 shall not apply.

[b][*1A*) Notwithstanding anything contained in section 4, any two members of a Special Tribunal may proceed with the trial of a case during the temporary and unavoidable absence of the third member :

Provided that all three members shall be present when after the evidence has been concluded the prosecutor, or the accused or his pleader is addressing the Special Tribunal and when the judgment in the case is delivered.]

(2) Save as provided in sub-section *(1)* the provisions of the Code of Criminal Procedure, 1898 except the provisions of section 196A and of Chapter XXXIII, shall, so far as they are not inconsistent with this Ordinance, apply to proceedings of a Special Tribunal; and for the purposes of the said provisions the Special Tribunal shall be deemed to be a Court of Session, trying cases without a jury, and a person conducting a prosecution before a Special Tribunal shall be deemed to be a Public Prosecutor.

(3) A Special Tribunal shall not, merely by reason of a change in its members, be bound to recall and rehear any witness who has given evidence, and it may act on the evidence already recorded by or produced before it.

(4) In the event of any difference of opinion among the members of a Special Tribunal the opinion of the majority shall prevail.

(5) A Special Tribunal may pass any sentence authorised by law.

[a] *Inserted* by the Criminal Law Amendment (Amending) Ordinance, 1943 (39 [XXXIX] of 1943), S. 2. [25-10-1943].

[b] Sub section (1A) was *inserted* by the Criminal Law Amendment (Fifth Amending) Ordinance, 1944 (40 [XL] of 1944), S. 3. [26-8-1944].

Appeal and revision.

[a][7. The High Court within the local limits of whose jurisdiction the offence charged in a case before a Special Tribunal is alleged to have taken place may, in relation to that case and subject to the provisions of section 8 regarding the transfer of cases, exercise so far as they may be applicable all the powers conferred by Chapters XXXI and XXXII of the Code of Criminal Procedure, 1898 on a High Court, as if the Special Tribunal were a Court of Session trying cases without a jury within the local limits of that High Court's jurisdiction.]

[a] This section was *substituted* for the original S. 7 by the Criminal Law (1943 Amendment) Second Amending Ordinance, 1945 (22 [XXII] of 1945), S. 4, [4-7 1945].

Bar of certain jurisdiction.

[a][8. No Court shall have authority to transfer any case from a Special Tribunal or to make any order under section 491

Section 5—Note 1 *(contd.)*

come before any Court at the commencement of the Ordinance, yet the Special Tribunals shall have jurisdiction to try such cases. The First Schedule clearly indicates that the persons named in them are to be tried for the offences charged therein. (Vol 31) 1944 Pat. 378 (386): 23 Pat 457: 46 Cr. L. Jour 438 (DB). (*Per Imam J.*)

[2] Special Tribunal can try under S. 5 (3) not only offences mentioned in Schedule but also those for which charges can be framed at the same trial under Criminal P. C.—The words 'any offence' do not refer to offences which are only cognate to those mentioned in Schedule. (Vol 33) 1946 Nag 374 (375): I. L. R. (1946) Nag 671: 47 Cr. L. Jour 574.

[3] Offence of contravening Iron and Steel (Movement by Rail) Order (1942)—Offence committed outside British India—Allotment of trial to tribunal constituted under Ordinance is *ultra vires*. (Vol 34) 1947 Bom. 361 (362) (DB).

Section 6 — Note 1

[1] Section 6 (2) of the Ordinance read with S. 1 (2), Criminal P. C., indicates that S. 197, Criminal P. C., does not apply to cases triable under the Ordinance. (Vol 31) 1944 F C 66 (68) : 23 Pat 517 : (1944) F C R 262 : I L R (1944) Kar F C 189 : 45 Cr L Jour 755 (F C) & (Vol 31) 1944 Pat 378 (387) : 23 Pat 457 : 46 Cr L Jour 438 (DB). (Section 197 is inconsistent with Ordinance.)

Section 8 — Note 1

[1] The Ordinance is *intra vires* the ordinance-making authority of the Governor-General and S. 8 of

of the Code of Criminal Procedure, 1898 or save as provided in section 7, have any jurisdiction of any kind in respect of any proceedings of a Special Tribunal.]

[a] This section was *substituted* for the original S. 8 by the Criminal Law (1943 Amendment) Second Amending Ordinance, 1945 (22 [XXII] of 1945), S. 4. [4-7-1945].

Special rules of evidence.

9. *(1)* When any person is charged beford a Special Tribunal with an offence [a][specified in the Schedule] the fact that such person is in possession, for which he cannot satisfactorily account, of pecuniary resources or property disproportionate to his known sources of income, or that such person has, at or about the time of the offence with which he is charged, obtained an accretion to his pecuniary resources or property for which he cannot satisfactorily account, may be proved and may be taken into consideration by the Special Tribunal as a relevant fact in deciding whether he is or is not guilty of the particular offence with which he is charged.

(2) Where in any trial before a Special Tribunal of an offence punishable under section 161 or section 165 of the Indian Penal Code, it is proved that an accused person has accepted or obtained, or has agreed to accept or attempted to obtain for himself or for any other person, any gratification (other than legal remuneration) or any valuable thing from [b][any person] it shall be presumed unless the contrary is proved that he accepted or obtained, or agreed to accept or attempted to obtain, that gratification or that valuable thing as the case may be, as a motive or reward such as is mentioned in section 161, or, as the case may be, without consideration or for a consideration which he knows to be inadequate.

[a] *Substituted* for the words "punishable under section 161 or section 165 of the Indian Penal Code, (XLV of 1860)" by the Criminal Law (1943 Amendment) Amending Ordinance, 1945 (12 [XII] of 1945), S. 4. [12-5-1945].

[b] *Substituted* for the original words by the Criminal Law (1943 Amendment) Second Amending Ordinance, 1945 (22 [XXII] of 1945), S. 5. [4-7-1945].

Special provisions regarding punishment.

[a][10. *(1)* When any person charged before a Special Tribunal with an offence specified in the Schedule is found guilty of that offence, the Special Tribunal shall, notwithstanding anything contained in Indian Penal Code, whether or not it imposes a sentence of imprisonment, impose, in addition to such sentence of fine, if any, as it would otherwise have imposed, a further sentence of fine which shall be equivalent to the amount of money or value of other property found to have been procured by the offender by means of the offence.

(2) Except where the offence of which the person is found guilty is an offence specified in item 1 or item 5 of the Schedule, when it appears that the offence has caused loss to more than one Government referred to in the Schedule or local authority, the Special Tribunal shall in its order of conviction record a finding indicating the amount of loss sustained by each such Government or local authority.

(3) When a person is found guilty at the same trial of one or more offences specified in item 1 or item 5 of the Schedule and of one or more offences specified in any of the other items of the Schedule, the Special Tribunal shall in its order of conviction record a finding indicating separately the amounts procured by means of the two classes of offences.

(4) Where an additional fine is imposed under sub-section *(1)* for an offence, it shall, after deduction of the costs of recovery as determined by the District Magistrate or, in a Presidency-town, by the Chief Presidency Magistrate, be credited to the Government (being a Government referred to in the Schedule) or local authority to which the offence has caused loss, or where there is more than one such Government or local authority, be distributed among them in proportion to the loss sustained by each :

Provided that the provisions of this sub-section shall not apply in respect of any additional fine imposed for an offence specified in item 1 or item 5 of the Schedule, or in a case of the nature referred to in sub section *(3)*, in respect of such portion of the additional fee as is equivalent to the amount found under that sub-section to have been procured by means of offences specified in those items.

(5) Where in any appeal or revisional proceedings against an order of acquittal passed by a Special Tribunal the appellate Court convicts the accused, the appellate Court shall in passing sentence impose an additional fine as provided in sub-section *(1)*, and shall where necessary record a finding referred to in sub-section *(2)* or sub-section *(3)*.

(6) Nothing in this section shall apply to any case to which the provisions of section 12 of the Criminal Law Amendment Ordinance, 1944 apply.]

[a] This section was *substituted* for the original S. 10 by the Criminal Law (1943 Amendment) Amending Ordinance, 1946 (VII [7] of 1946), S. 2. [17-1-1946.]

Power to make rules.

11. The Central Government may make rules providing for —

(a) the times at which Special Tribunals may sit ;

(b) the procedure to be adopted in the event of any member of a Special Tribunal being prevented from attending throughout the trial of any accused person.

[a][*(c)* the inspection, and grant of copies, of records of Special Tribunals, and the fees for such inspection and grant.]

[a] Clause *(c)* was *added* by the Criminal Law Amenment (Second Amending) Ordinance, 1944 (XVI [16] of 1944), S. 4. [13-5-1944].

[THE FIRST SCHEDULE]

[Omitted by the Criminal Law (1943 Amendment) Amending Ordinance, 1945 (XII [12] of 1944), S. 6.]

NOTE.—This Schedule consisted of five Parts. These Parts gave the list of cases to be tried by the Special Tribunals with headquarters at Lahore, Calcutta, Lucknow and Amraoti The whole of this Schedule was subsequently omitted by the Criminal Law (1943 Amendment) Amending Ordinance, 1945 (XII [12] of 1945), section 6. However, the Proviso to the said section 6 is as follows : "Provided that every case therein shall be deemed to have been allotted by notification under sub-section *(1)* of section 5 of the said

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Section 8—Note 1 *(contd.)*

that Ordinance embodies a valid and binding provision of law. (Vol 31) 1944 All 257 (258) : I L R (1944) All 758 : 46 Cri L Jour 122 (FB).

[2] There is no right of appeal against the conviction by a Tribunal constituted under this Ordinance but such person can apply to High Court in its revisional jurisdiction. (Vol 31) 1944 Pat 378 (379) : 23 Pat 457 : 46 Cr L Jour 438 (DB). (Practice of Patna High Court in revision petitions stated.)

[3] Having regard to the provisions of the Ordinance a revisional application under this section cannot be treated as an appeal on facts. (Vol 31) 1944 Pat 378 (384) : 23 Pat 457 : 46 Cri L Jour 438 (DB).

Ordinance (i. e. Ordinance No. XXIX of 1943) to the Special Tribunal specified in the heading of that Part of the said Schedule in which it was, immediately prior to the commencement of this Ordinance (i.e. Ordinance No. 12 of 1945), contained."

THE [a]* * SCHEDULE.

[See section 5 (1)]

Offences triable by Special Tribunals.

[b][1. An offence punishable under section 161 or section 165 of the Indian Penal Code], [c][or any conspiracy to commit or any attempt to commit or any abetment of such offences]

[a] The word "second" was *omitted* from the heading by the Criminal Law (1943 Amendment) Amending Ordinance, 1945 (XII [12] of 1945), S. 7. [12-5-1945.]

[b] This item was *substituted* for the original items 1 and 2 by the Criminal Law (1943 Amendment) Second Amending Ordinance, 1945 (XXII [22] of 1945), S. 6. [4-7-1945.]

[c] Words *added* to item 1 by the Criminal Law (1943 Amendment) Amending Ordinance, 1946 (VII [7] of 1946) S. 3. [17-1-1946].

[a][2]. An offence punishable under section 406 [b][or section 408] or section 409 of the Indian Penal Code, where the property in respect of which the offence is committed is property entrusted by His Majesty's Government in the United Kingdom or in any part of His Majesty's dominions or the Central or a Provincial Government or a department of any such Government or a local authority or a person acting on behalf of any such Government or department or authority.

[a] Original item 3 was *renumbered* as item 2 by the Criminal Law (1943 Amendment) Second Amending Ordinance, 1945 (XXII [22] of 1945), S. 6. [4-7-1945].

[b] *Inserted* by the Criminal Law (1943 Amendment) Amending Ordinance, 1945 (XII [12] of 1945), S. 7. [12-5-1945].

[a][3. An offence punishable under section 411 or section 414 of the Indian Penal Code, where the stolen property in respect of which the offence is committed is property such as is described in the preceding item and in respect of which an offence punishable under section 406 [b][or section 408] or section 109 of the said Code has been committed.]

[a] This item was *inserted* as item 3A by the Criminal Law Amendment (Second Amending) Ordinance, 1944 (XVI [16] of 1944), S. 6. (13-5-1944) but was subsequently *renumbered* as item 3 by the Criminal Law (1943 Amendment) Second Amending Ordinance, 1945 (XXII [22] of 1945), S. 6. [4-7-1945].

[b] *Inserted* by the Criminal Law (1943 Amendment) Amending Ordinance, 1945 (XII [12] of 1945), S. 7. [12-5-1945].

4. An offence punishable under section 417 or section 420 of the Indian Penal Code, where the person deceived is His Majesty's Government in the United Kingdom or in any part of His Majesty's dominions or the Central or a Provincial Government or a department of any such Government or a local authority or a person acting on behalf of any such Government or department or authority.

[a][5. An offence punishable under the Hoarding and Profiteering Prevention Ordinance, 1943 or under any rule made or deemed to have been made under the Defence of India Act 1939], [b][or any conspiracy to commit or any attempt to commit or any abetment of such offences.]

[a] The item was *inserted* by the Criminal Law (1943 Amendment) Second Amending Ordinance, 1945 (XXII [22] of 1945), S. 6. [4-7-1945].

[b] These words were *added* to item 5 by the Criminal Law (1943 Amendment) Amending Ordinance 1946, (VII [7] of 1946), S. 3. [17-1-1946].

[a]6. Any conspiracy to commit or any attempt to commit or any abetment of any of the [b][offences specified in items 2, 3 and 4.]

[a] The original item 5 was *renumbered* as item 6 by the Criminal Law (1943 Amendment) Second Amending Ordinance, 1945 (XXII [22] of 1945), S. 6. [4-7-1945].

[b] *Substituted* for the words "aforesaid offences" by the Criminal Law (1943 Amendment) Amending Ordinance, 1946 (VII [7] of 1946), S. 3. [17-1-1946].

[THE] CRIMINAL LAW AMENDMENT ORDINANCE, 1944.
(ORDINANCE NO. XXXVIII OF 1944).

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THE SCHEDULE.

[THE] CRIMINAL LAW AMENDMENT ORDINANCE, 1944.
(ORDINANCE NO. XXXVIII OF 1944.)[a]

[23rd August, 1944.]

An Ordinance to prevent the disposal or concealment of property procured by means of certain offences.

WHEREAS an emergency has arisen which makes it necessary to provide for preventing the disposal or concealment of money or other property procured by means of certain offences punishable under the Indian Penal Code;

NOW, THEREFORE, in exercise of the powers conferred by section 72 of the Government of India Act, as set out in the Ninth Schedule to the Government of India Act, 1935, the Governor-General is pleased to make and promulgate the following Ordinance :—

[a] Published in the Gazette of India, Extraordinary dated 23rd August 1944.

The Ordinance has been amended by Ordinance No. 14 of 1945 and Act VI of 1945.

Short title, extent and commencement.

1. *(1)* This Ordinance may be called the Criminal Law Amendment Ordinance, 1944.

(2) It extends to the whole of British India, and applies also to British subjects and servants of the Crown in any part of India and to British subjects who are domiciled in any part of India wherever they may be.

[a][*(3)* It shall come into force at once.]

[a] Sub-section (3) was *inserted* by the Repealing and Amending Act, 1945 (6 [VI] of 1945), S. 3 and Sch. II. [16-4-1945.]

The sub-section *shall be deemed always to have been inserted.*

Interpretation.

2. *(1)* In this Ordinance, "scheduled offence" means an offence specified in the Schedule to this Ordinance.

(2) For the purposes of this Ordinance, the date of the termination of criminal proceedings shall be deemed to be —

(a) where such proceedings are taken to the High Court, whether in appeal or on revision, the date on which the High Court passes its final orders in such appeal or revision, or

(b) where such proceedings are not taken to the High Court, the day immediately following the expiry of sixty days from the date of the last judgment or order of a criminal Court in the proceedings.

(3) The functions of a District Judge under this Ordinance shall in a Presidency town be exercised by the Chief Judge of the Small Cause Court.

Application for attachment of property.

3. *(1)* Where the Provincial Government has reason to believe that any person has committed (whether after the commencement of this Ordinance or not) any scheduled offence, the Provincial Government may, whether or not any Court has taken cognisance of the offence, authorise the making of an application to the District Judge within the local limits of whose jurisdiction the said person ordinarily resides or carries on business, for the attachment under this Ordinance of the money or other property which the Provincial Government believes the said person to have procured by means of the offence, or if such money or property cannot for any reason be attached, of other property of the said person of value as nearly as may be equivalent to that of the aforesaid money or other property.

(2) The provisions of Order XXVII of the First Schedule to the Code of Civil Procedure, 1908, shall apply to proceedings for an order of attachment under this Ordinance as they apply to suits by the Crown.

(3) An application under sub-section (1) shall be accompanied by one or more affidavits, stating the grounds on which the belief that the said person has committed any scheduled offence is founded, and the amount of money or value of other property believed to have been procured by means of the offence the application shall also furnish —

(a) any information available as to the location for the time being of any such money or other property, and shall, if necessary, give particulars including the estimated value, of other property of the said person;

(b) the names and addresses of any other persons believed to have or to be likely to claim, any interest or title in the property of the said person.

Ad interim attachment.

4. *(1)* Upon receipt of an application under section 3 the District Judge shall, unless for reasons to be recorded in writing he is of the opinion that there exist no *prima facie* grounds for believing that the person in respect of whom the application is made has committed any scheduled offence or that he has procured thereby any money or other property, pass without delay an *ad interim* order attaching the money or other property alleged to have been so procured, or if it transpires that such money or other property is not available for attachment, such other property of the said person of equivalent value as the District Judge may think fit

Provided that the District Judge may if he thinks fit before passing such order, and shall before refusing to pass such order, examine the person or persons making the affidavits accompanying the application.

(2) At the same time as he passes an order under sub-section *(1)*, the District Judge shall issue to the person whose money or other property is being attached a notice, accompanied by copies of the order, the application and affidavits and of the evidence, if any, recorded, calling upon him to show cause on a date to be specified in the notice why the order of attachment should not be made absolute.

(3) The District Judge shall also issue notices, accompanied by copies of the documents accompanying the notice under sub-section *(2)*, to all persons represented to him as having or being likely to claim, any interest or title in the property of the person to whom notice is issued under the said sub-section, calling upon each such person to appear on the same date as that specified in the notice under the said sub-section and make objection if he so desires to the attachment of the property or any portion thereof on the ground that he has an interest in such property or portion thereof.

(4) Any person claiming an interest in the attached property or any portion thereof may, notwithstanding that no notice has been served upon him under this section, make an objection as aforesaid to the District Judge at any time before an order is passed under sub-section *(1)* or sub-section *(3)* as the case may be, of section 5.

Investigation of objections to attachment.

5. *(1)* If no cause is shown and no objections are made under section 4 on or before the specified date, the District Judge shall forthwith pass an order making the *ad interim* order of attachment absolute.

(2) If cause is shown or any objections are made as aforesaid, the District Judge shall proceed to investigate the same, and in so doing, as regards the examination of the parties and in all other respects he shall, subject to the provisions of this Ordinance, follow the procedure and exercise all the powers of a Court in hearing a suit under the Code of Civil Procedure, 1908

Section 3 — Note 1

[1] Expression 'District Judge' is synonymous with expression 'District Court' as used in Code of Civil Procedure—It includes Judge of Chief Court exercising ordinary original civil jurisdiction. (Vol 34) 1947 Sind 34 (35) : I L R (1946) Kar 129.

[2] Money procured by means of offence described in Schedule deposited in Bank — It can be attached even if such money is mixed up with other money of Bank. (Vol 33) 1946 Lah 406 (412): 48 Cri L Jour 136 (DB).

[3] Attachment by District Judge — High Court in revision cannot go into question whether he was right or wrong in issuing attachment even if the order is wrong on facts. (Vol 33) 1946 Lah 406 (413): 48 Cri L Jour 136 (DB).

Section 4 —Note 1

[1] The District Judge is not required by this section to give any grounds or reasons if he decides to issue *ad interim* attachment but is only bound to do so where there are no *prima facie* grounds to believe that the non-applicant has committed any scheduled offence or has, thereby, procured any money or other property. (Vol 33) 1946 Lah 406 (413): 48 Cri L Jour 136 (D B).

and any person making an objection under section 4 shall be required to adduce evidence to show that at the date of the attachment he had some interest in the property attached.

(3) After investigation under sub-section *(2)*, the District Judge shall pass an order either making the *ad interim* order of attachment absolute or varying it by releasing a portion of the property from attachment or withdrawing the order:

Provided that the District Judge shall not—

(a) release from attachment any interest which he is satisfied that the person believed to have committed a scheduled offence has in the property, unless he is also satisfied that there will remain under attachment an amount of the said person's property of value not less than that of the property believed to have been procured by the said person by means of the offence, or

(b) withdraw the order of attachment unless he is satisfied that the said person has not by means of the said offence procured any money or other property.

Attachment of property of mala fide transferees.

6. *(1)* Where the assets available for attachment of a person believed to have committed a scheduled offence are found to be less than the amount or value which he is believed to have procured by means of such offence, and where the District Judge is satisfied, by affidavit or otherwise, that there is reasonable cause for believing that the said person has, after the date on which the offence is alleged to have been committed, transferred (whether after the commencement of this Ordinance or not) any of his property otherwise than in good faith and for consideration, the District Judge may by notice require any transferee of such property (whether or not he received the property directly from the said person) to appear on a date to be specified in the notice and show cause why so much of the transferee's property as is equivalent to the proper value of the property transferred should not be attached.

(2) Where the said transferee does not appear and show cause on the specified date, or where after investigation in the manner provided in sub-section *(2)* of section 5, the District Judge is satisfied that the transfer of the property to the said transferee was not in good faith and for consideration, the District Judge shall order the attachment of so much of the said transferee's property as is in the opinion of the District Judge equivalent to the proper value of the property transferred.

Execution of orders of attachment.

7. An order of attachment of property under this Ordinance shall be carried into effect so far as may be practicable in the manner provided in the Code of Civil Procedure, 1908 for the attachment of property in execution of a decree.

Security in lieu of attachment.

8. Any person whose property has been or is about to be attached under this Ordinance may at any time apply to the District Judge to be permitted to give security in lieu of such attachment, and where the security offered and given is in the opinion of the District Judge satisfactory and sufficient, he may withdraw or, as the case may be, refrain from passing, the order of attachment.

Administration of attached property.

9. *(1)* The District Judge may, on the application of any person interested in any property attached under this Ordinance and after giving the agent of the Provincial Government an opportunity of being heard, make such orders as the District Judge considers just and reasonable for

(a) providing from such of the attached property as the applicant claims an interest in, such sums as may be reasonably necessary for the maintenance of the applicant and of his family, and for the expenses connected with the defence of the applicant where criminal proceedings have been instituted against him in any Court for a scheduled offence;

(b) safeguarding so far as may be practicable the interests of any business affected by the attachment, and in particular, the interests of any partners in such business.

(2) Where it appears to the District Judge to be just and convenient, he may by order appoint a receiver to manage any property attached under this Ordinance in accordance with such instructions as the District Judge may from time to time think fit to give ; and where a receiver is so appointed, the provisions of rules 2, 3, 4 and 5 of Order XL of the First Schedule to the Code of Civil Procedure, 1908 shall be applicable.

Duration of attachment.

10. An order of attachment of property under this Ordinance shall, unless it is withdrawn earlier in accordance with the provisions of this Ordinance, continue in force—

(a) where no Court has taken cognizance of the alleged scheduled offence at the time when the order is applied for, for three months from the date of the order under sub-section *(1)* of section 4 or sub section *(2)* of section 6, as the case may be, unless cognizance of such offence is in the meantime so taken, or unless the District Judge on application by the agent of the Provincial Government thinks it proper and just that the period should be extended and passes an order accordingly; or

(b) where a Court has taken cognizance of the alleged scheduled offence whether before or after the time when the order was applied for until orders are passed by the District Judge in accordance with the provisions of this Ordinance after the termination of the criminal proceedings.

Appeals.

11. *(1)* The Provincial Government or any person who has shown cause under section 4 or section 6 or has made an objection under section 4 or has made an application under section 8 or section 9 if aggrieved by any order of the District Judge under any of the foregoing provisions of this Ordinance, may appeal to the High Court within thirty days from the date on which the order complained against was passed.

(2) Upon any appeal under this section the High Court may, after giving such parties as it thinks proper an opportunity of being heard, pass such orders as it thinks fit.

(3) Until an appeal under this section is finally disposed of by the High Court, no Court shall, otherwise than in accordance with the provisions of section 8 or section 13, order the withdrawal or suspension of any order of attachment to which the appeal relates.

Criminal Courts to evaluate property procured by scheduled offences.

12. *(1)* Where before judgment is pronounced in any criminal trial for a scheduled offence it is represented to the Court that an order of attachment of property has been passed under this Ordinance in connection with such offence, the Court shall, if it is

Section 11—Note 1

[1] Every interlocutory order passed by District udge disposing of some objections cannot be regarded to be in the nature of 'order' contemplated by this section and would not give right of appeal. (Vol 33) 1946 Lah 406 (409): 48 Cri L Jour 136 (D B).

convicting the accused, record a finding as to the amount of money or value of other property procured by the accused by means of the offence.

(2) In any appeal or revisional proceedings against such conviction, the appellate or revisional Court shall unless it sets aside the conviction, either confirm such finding or modify it in such manner as it thinks proper.

(3) In any appeal or revisional proceedings against an order of acquittal passed in a trial such as is referred to in sub-section *(1)*, the appellate or revisional Court, if it convicts the accused, shall record a finding such as is referred to in that sub-section.

[a][*(4)* Where the accused is convicted of a scheduled offence other than one specified in item I of the schedule to this Ordinance and where it appears that the offence has caused loss to more than one Government referred to in the said schedule or local authority the finding referred to in this section shall indicate the amount of loss sustained by each such Government or local authority.

(5) Where the accused is convicted at the same trial of one or more offences specified in item I of the Schedule to this Ordinance and of one or more offences specified in any of the other items of the said Schedule, the finding referred to in this section shall indicate separately the amounts procured by means of the two classes of offences.]

[a] Sub-sections *(4)* and *(5)* were *added* by the Criminal Law (1944 Amendment) Amending Ordinance, 1945 (14 [XIV] of 1945), S. 2. [16-5-1945].

Disposal of attached property upon termination of criminal proceedings.

13. *(1)* Upon the termination of any criminal proceedings for any scheduled offence in respect of which any order of attachment of property has been made under this Ordinance or security given in lieu thereof, the agent of the Provincial Government shall without delay inform the District Judge, and shall where criminal proceedings have been taken in any Court, furnish the District Judge with a copy of the judgment or order of the trying Court and with copies of the judgments or orders, if any, of the appellate or revisional Courts thereon.

(2) Where it is reported to the District Judge under sub-section *(1)* that cognizance of the alleged scheduled offence has not been taken or where the final judgment or order of the criminal Courts is one of acquittal, the District Judge shall forthwith withdraw any orders of attachment of property made in connection with the offence, or where security has been given in lieu of such attachment, order such security to be returned.

(3) Where the final judgment or order of the criminal Courts is one of conviction, the District Judge shall order that from the property of the convicted person attached under this Ordinance or out of the security given in lieu of such attachment, there shall be forfeited to His Majesty such amount or value as is found in the final judgment or order of the criminal Courts in pursuance of section 12 to have been procured by the convicted person by means of the offence, together with the costs of attachment as determined by the District Judge and where the final judgment or order of the criminal Courts has imposed or upheld a sentence of fine on the said person (whether alone or in conjunction with any other punishment), the District Judge may order, without prejudice to any other mode of recovery, that the said fine shall be recovered from the residue of the said attached property or of the security given in lieu of attachment.

(4) Where the amounts ordered to be forfeited or recovered under sub-section *(3)* exceed the value of the property of the convicted person attached, and where the property of any transferee of the convicted person has been attached under section 6, the District Judge shall order that the balance of the amount ordered to be forfeited under sub-section *(3)* together with the costs of attachment of the transferee's property as determined by the District Judge shall be forfeited to His Majesty from the attached property of the transferee or out of the security given in lieu of such attachment ; and the District Judge may order, without prejudice to any other mode of recovery, that any fine referred to in sub-section *(3)* or any portion thereof not recovered under that sub-section shall be recovered from the attached property of the transferee or out of security given in lieu of such attachment.

(5) If any property remains under attachment in respect of any scheduled offence or any security given in lieu of such attachment remains with the District Judge after his orders under sub-sections *(3)* and *(4)* have been carried into effect, the order of attachment in respect of such property remaining shall be forthwith withdrawn or as the case may be, the remainder of the security returned, under the orders of the District Judge.

[a][*(6)* Every sum ordered to be forfeited under this section in connection with any scheduled offence other than one specified in item I of the Schedule to this Ordinance shall, after deduction of the costs of attachment as determined by the District Judge, be credited to the Government (being a Government referred to in the said Schedule) or local authority to which the offence has caused loss, or where there is more than one such Government or local authority, the sum shall, after such deduction as aforesaid, be distributed among them in proportion to the loss sustained by each.]

[a] Sub-section (6) was *added* by the Criminal Law (1944 Amendment) Amending Ordinance, 1945 (14 [XIV] of 1945), S. 3. [16-5-1945].

Bar to other proceedings.

14. Save as provided in section 11 and notwithstanding anything contained in any other law,—

(a) no suit or other legal proceeding shall be maintainable in any Court—

(i) in respect of any property ordered to be forfeited under section 13 or which has been taken in recovery of fine in pursuance of an order under that section, or

(ii) while any other property is attached under this Ordinance, in respect of such other property,—

by any person upon whom a notice has been served under section 4 or section 6 or who has made an objection under sub-section (4) of section 4 ; and

(b) no Court shall, in any legal proceedings or otherwise, pass any decree or order, other than a final decree in a suit by a person not being a person referred to in clause (a), which shall have the effect of nullifying or affecting in any way any subsisting order of attachment of property under this Ordinance, or the right of the District Judge to hold security in lieu of any such order of attachment.

Protection of action taken.

15. No suit, prosecution or other legal proceedings shall lie against any person for anything in good faith done or intended to be done in pursuance of this Ordinance.

THE SCHEDULE

(See Section 2)

Offences in connection with which property is liable to be attached.

1. An offence punishable under section 161 or section 165 of Indian Penal Code [a][or any conspiracy to commit or any attempt to commit or any abetment of such offence.]

2. An offence punishable under section 406 [b][or section 408] or section 409 of the Indian Penal Code,

where the property in respect of which the offence is committed is property entrusted by His Majesty's Government in the United Kingdom or in any part of His Majesty's dominions or the Central or a Provincial Government or a department of any such Government or a local authority or a person acting on behalf of any such Government or department or authority.

3. An offence punishable under section 411 or section 414 of the Indian Penal Code, where the stolen property in respect of which the offence is committed is property such as is described in the preceding item and in respect of which an offence punishable under section 406 [b][or section 408] or section 409 of the said Code has been committed.

4. An offence punishable under section 417 or section 420 of the Indian Penal Code, where the person deceived is His Majesty's Government in the United Kingdom or in any part of His Majesty's dominions or the Central or a Provincial Government or a department of any such Government or a local authority or a person acting on behalf of any such Government or department or authority.

5. Any conspiracy to commit or any attempt to commit or any abetment or any of the [c][offences specified in items 2, 3 and 4.]

[a] *Added* by the Criminal Law (1944 Amendment, Amending Ordinance, 1945 (14 [XIV] of 1945), S. 4. [16-5-1945]. [b] *Inserted, ibid.* [c] *Substituted, ibid.* for the words "aforesaid offences."

[THE] CRIMINAL LAW AMENDMENT ORDINANCE, 1946. (ORDINANCE NO. VI OF 1946)[a].

[17th January, 1946.]

An Ordinance to make special provision in regard to certain offences.

WHEREAS an emergency has arisen which renders it necessary to make special provision in regard to certain offences ;

NOW, THEREFORE, in exercise of the powers conferred by section 72 of the Government of India Act, as set out in the Ninth Schedule to the Government of India Act, 1935, the Governor General is pleased to make and promulgate the following Ordinance.

[a] Published in the Gazette of Indian, Extraordinary dated 17th January 1946.

Short title, extent and commencement.

1. *(1)* This Ordinance may be called the Criminal Law Amendment Ordinance, 1946.

(2) It extends to the whole of British India, and applies also to British subjects and servants of the Crown in any part of India and to British subjects who are domiciled in any part of India wherever they may be

(3) It shall come into force at once.

Special rules of evidence.

2. *(1)* In any trial of or inquiry by a Court into an offence specified in the Schedule, the fact that an accused person is in possession, for which he cannot satisfactorily account, of pecuniary resources or property disproportionate to his known sources of income, or that he has, at or about the time of the alleged offence, obtained an accretion to his pecuniary resources or property for which he cannot satisfactorily account, may be proved and may be taken into consideration by the Court as if it were a relevant fact within the meaning of the Indian Evidence Act, 1872.

(2) Where in any trial of or inquiry by a Court into an offence punishable under section 161 or section 165 of the Indian Penal Code it is proved that an accused person has accepted or obtained, or has agreed to accept or attempted to obtain, for himself or for any other person, any gratification (other than legal remuneration or any valuable thing from a person or the agent of a person seeking to obtain facilities for transport or holding or seeking to obtain a contract from His Majesty's Government in the United Kingdom or in any part of His Majesty's dominions, or the Central or a Provincial Government or a department of any such Government or a local authority, or from any person acting on behalf of any such Government or department or authority, it shall be presumed unless the contrary is proved that he accepted or obtained, or agreed to accept or attempted to obtain, that gratification or that valuable thing as the case may be, as a motive or reward such as is mentioned in the said section 161 or, as the case may be without consideration or for a consideration which he knows to be inadequate.

Explanation.—For the purposes of this sub-section "transport" includes the carriage whether of persons or property of any description by rail, road, air, sea or inland waters.

Special provisions regarding punishment.

3. *(1)* Notwithstanding anything to the contrary contained in the Indian Penal Code or the Code of Criminal Procedure 1898, relating to sentences and the powers of Courts to impose sentences, where any person is found guilty of an offence specified in the Schedule the Court convicting him, whether or not it imposes a sentence of imprisonment, shall impose, in addition to such sentence of fine, if any as it would otherwise have imposed, a further sentence of fine which shall be equivalent to the amount of money or value of other property found by the Court to have been procured by the convicted person by means of the offence.

(2) Except where the offence of which the person is found guilty is an offence specified in item 1 or item 5 of the Schedule, when it appears that the offence has caused loss to more than one Government referred to in the Schedule or local authority, the Court shall in its order of conviction record a finding indicating the amount of loss sustained by each such Government or local authority.

(3) When a person is found guilty at the same trial or in the same proceedings of one or more offences specified in item 1 or item 5 of the Schedule and of one or more offences specified in any of the other items of the Schedule, the Court shall in its order of conviction record a finding indicating separately the amounts procured by means of the two classes of offences.

(4) Where an additional fine is imposed under sub-section *(1)* for an offence, it shall, after deduction of the costs of recovery as determined by the Court, be credited to the Government (being a Government referred to in the Schedule) or local authority to which the offence has caused loss, or where there is more than one such Government or local authority, be distributed among them in proportion to the loss sustained by each :

Provided that the provisions of this sub-section shall not apply in respect of any additional fine imposed for an offence specified in item 1 or item 5 of the Schedule, or in a case of the nature referred to in sub-section *(3)*, in respect of such portion of the additional fine as is

Schedule I, Item 4 —Note 1

[1] Word 'Dominions' includes Government of Burma. (Vol 33) 1946 Lah 406 (408, 412) : 48 Cri L Jour 136 (DB).

equivalent to the amount found under that sub-section to have been procured by means of offences specified in those items.

(5) Nothing in this section shall apply to any case to which the provisions of section 12 of the Criminal Law Amendment Ordinance, 1944 apply.

The Schedule

[*See sections 2 (1) and 3*]

1. An offence punishable under section 161 or section 165 of the Indian Penal Code or any conspiracy to commit or any attempt to commit or any abetment of such offence.

2. An offence punishable under section 406 or section 408 or section 409 of the Indian Penal Code, where the property in respect of which the offence is committed is property entrusted by His Majesty's Government in the United Kingdom or in any part of His Majesty's dominions or the Central or a Provincial Government or a department of any such Government or a local authority or a person acting on behalf of any such Government or department or authority.

3. An offence punishable under section 411 or section 414 of the Indian Penal Code, where the stolen property in respect of which the offence is committed is property such as is described in the preceding item and in respect of which an offence punishable under any of the sections mentioned in that item has been committed.

4. An offence punishable under section 417 or section 420 of the Indian Penal Code, where the person deceived is His Majesty's Government in the United Kingdom or in any part of His Majesty's dominions or the Central or a Provincial Government or a department of any such Government or a local authority or a person acting on behalf of any such Government or department or authority.

5. An offence punishable under the Hoarding and Profiteering Prevention Ordinance, 1943 or under any rule made or deemed to have been made under the Defence of the India Act, 1939 or any conspiracy to commit or any attempt to commit or any abetment of such offence.

6. Any conspiracy to commit or any attempt to commit or any abetment of any of the offences specified in items 2, 3 and 4.

[THE] CURRENCY ORDINANCE, 1940. (ORDINANCE NO. IV OF 1940)[a]

[*24th July, 1940*]

An Ordinance to provide for the issue and putting into circulation of Government of India One Rupee Notes.

WHEREAS an emergency has arisen which renders it necessary to provide for the issue and putting into circulation of Government of India one rupee notes;

NOW, THEREFORE, in exercise of the powers conferred by section 72 of the Government of India Act as set out in the Ninth Schedule to the Government of India Act, 1935, the Governor General is pleased to make and promulgate the following Ordinance:—

[a] Published in the Gazette of India Extraordinary dated 24th July 1940.

The Ordinance has been amended by Act VI of 1943 and partly repealed, by Act VI of 1945.

See the Legal Tender (Inscribed Notes) Ordinance, 1942 (59 [LIX] of 1942) S. 2.

Short title, extent and commencement.

1. *(1)* This Ordinance may be called the Currency Ordinance, 1940.

(2) It extends to the whole of British India.

(3) It shall come into force at once.

Government of India one rupee notes

2. Notwithstanding anything contained in the Reserve Bank of India Act, 1934, the Central Government may issue Government of India notes of the denominational value of one rupee, and any such note shall be current in British India in the same manner and to the same extent and as fully as the silver coin called the Government rupee issued under the provisions of the Indian Coinage Act, 1906, shall be legal tender in British India for the payment of any amount and shall be deemed to be included in the expression "rupee coin" for all the purposes of the Reserve Bank of India Act, 1934 :

Provided that a Government of India one rupee note issued under this Ordinance shall be deemed not to be a currency note for any of the purposes of the Reserve Bank of India Act, 1934.

Amendment of sections 36, and 38, Act II of 1934.

3. [*Repealed by the Repealing and Amending Act, 1945 (6 of 1945) S. 2 and Sch. I.*) (*16 4-1945*)]

Application of Indian Penal Code.

4. The provisions of sections 489A, 489B, 489C and [489 D and489 E] of the Indian Penal Gode shall apply in respect of notes issued under this Ordinance as they apply in respect of currency notes and bank notes.

[a] *Substituted* for "and 489-D" by the Indian Penal Code (Amendment) Act, 1943 (6 [VI] of 1943), S. 3. [26-3-1943]

[THE] ESSENTIAL SERVICES (MAINTENANCE) ORDINANCE, 1941 (ORDINANCE NO. XI OF 1941).

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[THE] ESSENTIAL SERVICES (MAINTENANCE) ORDINANCE, 1941. (ORDINANCE NO. XI OF 1941)[a]

[20th December, 1941.]

An Ordinance to make provision for the maintenance of certain essential services.

WHEREAS an emergency has arisen which renders it necessary to make provision for the maintenance of certain essential services ;

NOW, THEREFORE, in exercise of the powers conferred by section 72 of the Government of India Act as set out in the Ninth Schedule to the Government of India Act, 1935, the Governor General is pleased to make and promulgate the following Ordinance:—

[a] Published in the Gazette of India, Extraordinary dated 20th December 1941.

The Ordinance was applied to British Baluchistan, *see* Notification No. I-W, dated 8-1-1942, Gazette of India, 1942, Part 1, page 80 ; and to certain Baluch Tribal Areas, *see* Notification No. 7-W, dated 22-1-1942, Gazette of India, 1942, Part I, page 173.

The Ordinance has been amended by Ordinance No. 26 of 1942, Ordinance No. 38 of 1942 and Ordinance No. 2 of 1943.

Short title, extent and commencement.

1. *(1)* This Ordinance may be called the Essential Services (Maintenance) Ordinance, 1941

(2) It extends to the whole of British India.

(3) It shall come into force at once.

Interpretation.

2. In this Ordinance, unless there is anything repugnant in the subject or context, "employment" includes employment of any nature and whether paid or unpaid.

Employment to which this Ordinance applies.

3. This Ordinance shall apply to all employment under the Crown and to any employment or class of employment which the Central Government or a Provincial Government, being of opinion that such employment or class of employment is essential for securing the defence of [a][India], the public safety, the maintenance of public order or the efficient prosecution of war, or for maintaining supplies or services necessary to the life of the community, may by notification in the official Gazette, declare to be an employment or class of employment to which this Ordinance applies.

[a] *Substituted* for "British India" by the India Independence (Adaptation of Central Acts and Ordinances) Order, 1948 [23-4-1948].

Power to order persons engaged in certain employments to remain in specified areas.

4. *(1)* [a][In respect of any employment under the Crown, the Government under which the person or persons concerned are employed or an officer authorized in this behalf by that Government, and] in respect of any employment or class of employment under section 3 to be an employment or class of employment to which this Ordinance applies, the Government making the declaration, or an officer authorised in this behalf by that Government, may, be general or special order, direct that any person or persons engaged in such employment shall not depart out of such area or areas as may be specified in such order.

(2) An order made under sub-section *(1)* shall be published in such manner as the Government or officer making the order considers best calculated to bring it to the notice of the persons affected by the order.

[a] *Inserted* by the Essential Services (Maintenance) Amendment Ordinance, 1942 (26 [XXVI] of 1942), S. 2. [28-5-1942].

Offences.

5. Any person engaged in any employment or class of employment to which this Ordinance applies who—

(a) disobeys any lawful order given to him in the course of such employment, or

(b) without reasonable excuse abandons such employment or absents himself from work, or

(c) departs from any area specified in an order under sub-section *(1)* of section 4 without the consent of the authority making that order,

and any employer of a person engaged in an employment or class of employment declared under section 3 to be an employment or class of employment to which this Ordinance applies, who without reasonable cause—

(i) discontinues the employment of such person, or

(ii) by closing an establishment in which such person is engaged, causes the discontinuance of his employment,

is guilty of an offence under this Ordinance.

[a][*Explanation 1.* — The fact that a person apprehends that by continuing in his employment he will be exposed to increased physical danger is not a reasonable excuse within the meaning of clause *(b)*.

Explanation 2.—A person abandons his employment within the meaning of clause *(b)* who, notwithstanding that it is an express or implied term of his contract of employment that he may terminate his employment on giving notice to his employer of his intention to do so, so terminates his employment without the previous consent of his employer.]

[a] *Explanations* 1 and 2 were *added* to S. 5 by the Essential Services (Maintenance) Amendment Ordinance, 1942 (26 [XXVI] of 1942), S. 3. [28-5-1942].

Section 3 — Note 1

[1] It is quite sufficient for the Government to declare that all services under the Municipality come within the Ordinance as essential. Particular services need not be declared. (Vol 30) 1943 Bom. 314 (316): 45 Cri L. Jour 361 (DB).

Section 5 — Note 1

[1] Section 5 (b) applies only to individual cessation of work but not to a strike. (Vol 31) 1944 Bom 248 (250) : ILR (1944) Bom 437 : 46 Cri L Jour 208 (DB). *(Obiter.)*

[2] Where a member of the A. R. P. service submitted his resignation to his immediate superior, who asked him to surrender his uniform and equipment and assigned no duties to him after that date on the ground that the letter of resignation was pending before the authorities, it could not be said that the member was guilty of the offence of abandoning his employment without reasonable cause or absenting himself from work. ('47) 48 Cr. L J 476 (477) (Cal).

[3] Accused, a first aider in A. R. P.—Fever resulting from anti-cholera injection followed by swelling in legs held not reasonable excuse for abandoning employment though might be justification for applying for leave. (Vol 31) 1944 Mad 20 (21) : 45 Cri L Jour 272.

[4] The accused, an Assistant Public Prosecutor, sent in his resignation partly as a protest against the repressive policy of the Government and partly with a view to take active part in the civil disobedience movement. He did not discharge any duties connected with his office after that date and he left the station before his resignation was accepted. It was held, that it was a clear case of abandonment by the accused of his employment and he was therefore guilty of an offence punishable under S. 5 (b) read with S. 7 (1). (Vol 31) 1944 Mad 132 (133) : 45 Cri L Jour 531.

6. *(1)* The Central Government or, [a][* * * * * *] a Provincial Government may make rules regulating or empowering a specified authority to regulate the wages and other conditions of service of persons or of any class of persons engaged in any employment or class of employment declared under section 3 to be an employment or class of employment to which this Ordinance applies.

Regulation of wages and conditions of service.

(2) When any such rules have been made or when any directions regulating wages or conditions of service have been given by an authority empowered by such rules to give them, any person failing to comply therewith is guilty of an offence under this Ordinance.

[a] The words "with the previous sanction of the Central Government" were *omitted* by the Essential Services (Maintenance) Amendment Ordinance, 1942 (26 [XXVI] of 1942), S. 4. [28-5-1942.]

7. *(1)* Any person found guilty of an offence under this Ordinance shall be punishable with imprisonment for a term which may extend to one year and shall also be liable to fine.

Penalties and procedure.

(2) Where the person accused of an offence under this Ordinance is a company or other body corporate, every director, manager, secretary or other officer thereof shall, unless he proves that the offence was committed without his knowledge or that he exercised due diligence to prevent the commission of the offence, be liable to the punishment provided for the offence.

(3) No Court shall take cognizance of any offence under this Ordinance except upon complaint in writing made by a [a][servant of the Crown] authorised in this behalf by the Central or a Provincial Government.

[b][*(4)* Notwithstanding anything contained in the Code of Criminal Procedure, 1898, an offence under this Ordinance shall be cognizable.]

[a] These words were *substituted* for the word "person" by the Essential Services (Maintenance) Amendment Ordinance, 1943 (2 [II] of 1943), S. 2. [9-1-1943.] [b] Sub-section (4) was *added* by the Essential Services (Maintenance) Amendment Ordinance, 1942 (26 [XXVI] of 1942), S. 5. [28-5-1942.]

8. No suit, prosecution or other legal proceeding shall lie against any person for anything which is in good faith done or intended to be done under this Ordinance or the rules made thereunder.

Bar of legal proceedings.

[a][9. Nothing contained in this Ordinance or in any declaration or order made thereunder shall have effect in derogation of any provision of law for the time being in force imposing upon a person engaged in an employment or class of employment to which this Ordinance applies any liability to be called up for national service or to undertake employment in the national service.]

Saving of effect of laws imposing liability to national service.

[a] This section was *substituted* for the original section 9, by the Essential Services (Maintenance) Second Amendment Ordinance, 1942 (XXXVIII [38] of 1942), S. 2 [28-7-1942].

THE EXCESS PROFITS TAX ORDINANCE, 1943. (ORDINANCE NO. XVI OF 1943.)[a]

[17th May 1943.]

An Ordinance to make certain provisions in connection with the tax on excess profits.

WHEREAS an emergency has arisen which renders it necessary to make certain provisions in connection with the tax on excess profits :

NOW THEREFORE, in exercise of the powers conferred by section 72 of the Government of India Act, as set out in the Ninth Schedule to the Government of India Act, 1935, the Governor-General is pleased to make and promulgate the following Ordinance :—

[a] Published in the Gazette of India, Extraordinary, dated 17th May 1943.

The Ordinance was applied to British Baluchistan, *see* Notification No. 32-W, dated 27-5-1943, Gazette of India, 1943, Part I, page 560; to the Darjeeling Districts and the partially excluded areas of the Mymensingh District with effect from 17-5-1943, *see* Bengal Government Notification No. 821 A. R. dated 15-6-1943; and to the partially excluded areas of the Orissa Province with modification, *see* Orissa Government Notification No. 16449 f (c) dated 4-8-1943.

The Ordinance has been amended by the Indian Finance Act, 1944 and Ordinance No. 20 of 1945; and it has been partially repealed by Ordinance No. 1 of 1946.

1. *(1)* This Ordinance may be called the Excess Profits Tax Ordinance, 1943.

Short title, extent and commencement.

(2) It extends to the whole of British India.

(3) It shall come into force at once.

2. *(1)* When excess profits tax charged under the provisions of the Excess Profits Tax Act, 1940, in respect of any chargeable accounting period ending after the 31st day of December 1942, becomes payable under that Act after

Deposits in connection with payments of excess profits tax.

Section 7 — Note 1

[1] On 12-9-1942, the Government of Bombay declared employment in connection with the Ahmedabad Municipality to be employment coming under the Ordinance and authorised its Administrator to make orders and complaints in respect of offences under the Ordinance by any employee of the Municipality. On 7-9-1942, *W* took charge as the Administrator of the Municipality from the Collector and on 15-9-1942 passed an order calling on all employees of the municipality to work properly and carefully and to dispose expeditiously of all tasks which had been or might be lawfully assigned to them in the course of their employment. The accused was not willing to perform any work and accordingly a complaint was filed against him by *W* on 16-9-1942. By a notification dated 5-10-1942, the Government of Bombay directed that the powers and duties which were assigned to the Collector were to be exercised and performed by *W* with effect from 7-9-1942 *i. e*, from the date on which he took charge from the Collector: *Held*, that *W* was not properly appointed and was not the Administrator when he issued the orders or filed the complaint which were therefore incompetent; and that the part of the notification of 5-10-1942, seeking to give retrospective effect to the appointment of *W* could have no effect to validate the complaint. (Vol 30) 1943 Bom 314 (316, 317) : 45 Cri L Jour 361 (DB).

[2] Where the Commissioner of Police is authorised under S. 7 (3) to file complaints, the Court has no jurisdiction to take cognizance of an offence under the Ordinance on a charge-sheet filed by a Sub-Inspector of Police. (Vol 31) 1944 Mad 20 (21, 22) : 45 Cri L Jour 272.

assessment made under section 14 of that Act, the person liable to pay such excess profits tax shall deposit with the Central Government, before such date as may be specified in a notice in this behalf in such form as may be prescribed by rules made under sub-section *(5)* issued to him by the Excess Profits Tax Officer, a further sum equal to one fifth of the amount of the said excess profits tax; and the provisions of section 10 of the Indian Finance Act, 1942, shall, save in so far as they are inconsistent with this section, apply in respect of such deposits as they apply in respect of the voluntary deposits for which provision is made in the said section 10.

[a][Provided that, in respect of any chargeable accounting period ending after the 31st day of December 1943, the provisions of this sub section shall have effect as if, in relation to any person who is a company, for the words 'one fifth' the words 'nineteen-sixtyfourths' were substituted and as if, in relation to any other person, for the words 'one-fifth' the words 'seventeen-sixtyfourths' were substituted :]

[b][Provided further that, in respect of any chargeable accounting period ending after the 31st day of December 1944, the provisions of this sub-section as modified by the first proviso shall have effect as if for the words'nineteen sixty fourths' the figures '37/128ths' were substituted :]

[a][Provided further that, if in respect of any chargeable accounting period ending after the 31st day of December 1943 a person who has deposited a further sum equal to seventeen-sixtyfourths of the excess profits tax payable shows that the amount of the income tax and super-tax payable in respect of the excess profits arising in such period exceeds fifteen-sixtyfourths of the amount of the excess profits tax payable, so much of the deposit shall be refunded as will secure that the total of the deposit made and the income-tax and super-tax payable in respect of the excess profits arising in such period does not exceed one-half of the excess profits tax payable;]

[c][*(1A)* In respect of any chargeable accounting period ending after the 31st day of December 1943, in respect of which a provisional assessment of excess profits tax is made under section 14A of the Excess Profits Tax Act, 1940, the person liable to pay such excess profits tax shall deposit in the manner laid down in sub-section *(1)* a further sum equal to nineteen-sixty fourths of the amount of the said excess profits tax if such person is a company and seventeen-sixtyfourths of the said amount if such person is not a company; and the provisions of sub-sections *(6)* and *(7)* of the said section 14A shall apply to any payment made under this sub-section as they apply to a payment of excess profits tax :]

[d][Provided that, in respect of any chargeable accounting period ending after the 31st day of December 1944, the provisions of this sub-section shall have effect as if for the words 'nineteen sixtyfourths' the figures '37/128ths' were substituted]

(2) The provisions of sub section *(1)* of section 10 of the Indian Finance Act, 1942, in so far as they enable the making of voluntary deposits, shall cease to have effect except in relation to excess profits tax charged in respect of a chargeable accounting period ending on the 31st day of December 1942, or earlier.

(3) Any further sum such as is referred to in sub-section *(1)* deposited in accordance with that sub-section shall be repaid by the Central Government within twelve months of the date of termination of the present hostilities or within twenty-four months of the date on which the deposit was made, whichever is later

(4) The provisions of law applicable to the payment and recovery of excess profits tax contained in sections 45 and 46 [except sub-sections *(1)* and *(1A)* thereof] of the Indian Income-tax Act, 1922, as applied by section 21 of the Excess Profits Tax Act, 1940, shall apply to the payment and recovery of the deposits required by [e][sub section *(1)* or *(1A)* of this section] as if the notice referred to in sub-section *(1)* of this section were a notice of demand under section 29 of the Indian Income tax Act, 1922, and as if a default in making payment of such deposit were a default in making payment of excess profits tax.

(5) The power to make rules for carrying out the purposes of section 10 of the Indian Finance Act, 1942, conferred by sub-section *(3)* of that section shall include a power to make rules for carrying out the purposes of this section.

[a] The first and third provisos were *added* by the Indian Finance Act, 1944, S. 8(3). [31-3-1944]. [b] The second proviso was *inserted* by the Excess Profits Tax (Amendment) Ordinance, 1945 (XX [20] of 1945), S. 2 [30-6 1945]. [c] Sub section (1A) was *inserted* by the Indian Finance Act, 1944, S. 8 (3). [d] This proviso was *added* to sub-section (1A) by Ordinance No. 20 of 1945. [e] These words were *substituted* for the words "sub-section (1) of this section" by the Indian Finance Act, 1944, S. 8 (3).

3. [Insertion of new section 14A in Act XV of 1940.] *Repealed by the Repealing Ordinance 1946 (1 [I] of 1946), S. 2 and Sch. [5-1-1946].*

4 [Amendment of rule 12, Schedule I, Act XV of 1940.] *Repealed by the Repealing Odinance, 1946 (1 [I] of 1946), S. 2 and Sch. [5-1 1946].*

5. [Amendment of rule 3, Schedule II, Act XV of 1940.] *Repealed by the Repealing Ordinance, 1946 (1 [I] of 1946), S. 2 and Sch. [5-1-1946].*

[THE] HIGH DENOMINATION BANK NOTES (DEMONETISATION) ORDINANCE, 1946 (ORDINANCE NO. III OF 1946).

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[THE] HIGH DENOMINATION BANK NOTES (DEMONETISATION) ORDINANCE, 1946. (ORDINANCE No. III OF 1946).[a]

[12th January, 1946]

An Ordinance to provide for the demonetisation of certain high denomination bank notes.

WHEREAS an emergency has arisen which makes it necessary to provide for the demonetisation of certain high denomination bank notes ;

NOW, THEREFORE, in exercise of the powers conferred by section 72 of the Government of India Act, as set out in the Ninth Schedule to the Government of India Act, 1935, the Governor General is pleased to make and promulgate the following Ordinance :—

[a] Published in the Gazette of India, Extraordinary dated 12th January 1946.

Short title, extent and commencement.

1. *(1)* This Ordinance may be called the High Denomination Bank Notes (Demonetisation) Ordinance, 1946.

(2) It extends to the whole of British India.

(3) It shall come into force at once.

Interpretation.

2 In this Ordinance,—

(a) "bank" means a banking company as defined in section 277F of the Indian Companies Act 1913 and includes any branch of a bank ;

(b) "bank note" includes all currency notes of the Government of India issued either by the Central Government or by the Reserve Bank ;

(c) "high denomination bank note" means a bank note of the denominational value of five hundred rupees, one thousand rupees or ten thousand rupees,

(d) "Reserve Bank" means the Reserve Bank of India ;

(e) "scheduled bank" means a bank included in the Second Schedule to the Reserve Bank of India Act, 1934.

High denomination bank notes to cease to be legal tender.

3. On the expiry of the 12th day of January 1946 all high denomination bank notes shall, notwithstanding anything contained in section 26 of the Reserve Bank of India Act, 1934 cease to be legal tender in payment or on account at any place in British India.

Prohibition of transfer and receipt of high denomination bank notes.

4. Save as provided by or under this Ordinance, no person shall after the 12th day of January 1946 transfer to the possession of another person or receive into his possession from another person any high denomination bank note.

Exchange of high denomination bank notes held by banks and Government treasuries.

5. *(1)* A bank, other than a scheduled bank, may obtain from the Reserve Bank or a scheduled bank an equivalent amount in bank notes of the denominational value of one hundred rupees in exchange for the high denomination bank notes declared by it in the returns under the Bank Notes (Declaration of Holdings) Ordinance, 1946, and tendered for such exchange, or if it so desires, a credit of that amount with the Reserve Bank or a scheduled bank.

(2) A scheduled bank or a Government treasury may obtain from the Reserve Bank an equivalent amount in bank notes of the denominational value of one hundred rupees in exchange for any high denomination bank notes tendered for such exchange which have been declared by it in the returns under the aforesaid Ordinance or which have been received by it in exchange under this Ordinance, or if a scheduled bank so desires, a credit of that amount with the Reserve Bank.

(3) Notwithstanding anything to the contrary in the foregoing provisions of this section, where the first return referred to in section 4 of the Bank Notes (Declaration of Holdings) Ordinance, 1946 is presented in the manner provided in the proviso to sub section *(2)* of that section, the exchange referred to in this section may be effected only with the Reserve Bank at Bombay.

(4) The copies of the returns given back under sub-section of *(4)* section 4 of the aforsaid Ordinance shall accompany the first application for the exchange of high denomination bank notes under this section.

Exchange of high denomination bank notes held by other persons.

6. *(1)* Notwithstanding anything to the contrary contained in the Reserve Bank of India Act, 1934 any high denomination bank note held by a person other than a bank or Government treasury shall after the 12th day of January 1946 be exchanged only on tender of the note for exchange by the owner thereof in the manner provided in this section.

(2) Every such owner of a high denomination bank note desiring to tender it for exchange shall prepare in the form set out in the Schedule or in a form as near thereto as may be, three copies of a declaration signed by him giving in full the particulars required by that form, and shall, within ten days after the commencement of this Ordinance, deliver such copies in person together with the high denomination bank notes he desires to exchange to a branch of the Reserve Bank or to a scheduled bank or to a Government treasury:

Provided that if such owner resides in a place not within convenient reach of any such branch, bank or treasury or if by reason of age, infirmity or illness he is unable to attend thereat, or if the provisions of sub-section are *(9)* applicable to him he may forward the high denomination bank notes he desires to exchange with the three copies of his declaration by insured post to the Reserve Bank at Bombay, Calcutta or Madras at any time within fourteen days after the commencement of this Ordinance.

(3) Every declaration under this section shall, for the purpose of identifying the person making it, be attested either by his banker or by a salaried magistrate or a Justice of the Peace or a police officer not below the rank of Inspector of Police.

(4) Where a person applies under this section for the exchange of high denomination bank notes in more than one instalment or at more than one branch of the Reserve Bank, scheduled bank or Government treasury or on more than one day, he shall give in the declaration which shall accompany every such application full particulars of other applications made by him.

(5) The person who signs any declaration under this section shall be deemed for all purposes to be the owner of the high denomination bank notes to which it relates, and if it is proved that he is not in fact the owner of such bank notes, he and the owner thereof, unless in the case of the latter he can prove that the declaration was made without his knowledge, shall be deemed to have contravened the provisions of section 4.

(6) Unless it appears that the declaration has not been completed in all material particulars, the Reserve Bank, scheduled bank or Government treasury, as the case may be, to which an application for exchange of high denomination bank notes is made under this section shall exchange the said notes for an equivalent value of Bank notes of the denominational value of one hundred rupees, or if the applicant so desires, for the

credit of an equivalent amount to his account with a bank.

(7) Where it appears that the declaration has not been completed in all material particulars, the Reserve Bank, scheduled bank or Government treasury, as the case may be, to which such application as aforesaid is made, shall, unless the applicant is able to supply the omission without delay, refuse to accept and exchange the bank notes to which the declaration relates, and if it does so refuse, shall return one copy of the declaration to the applicant after entering thereon the date on which it is presented, and shall refer the applicant to the Central Government to which it shall forward a copy of the declaration with a brief statement of the reasons for refusing to exchange the bank notes.

(8) The Central Government may require any applicant referred to it under sub-section *(7)* to amplify his declaration to such extent and in respect of such particulars as it thinks fit, and may unless the applicant is able fully to comply with such requirement, refuse to sanction the exchange of the high denomination bank notes to which the declaration relates.

(9) Notwithstanding anything to the contrary in the foregoing provisions of this section, no high denomination bank notes exceeding in value ten lakhs of rupees held by any person shall be exchangeable under this section except with the Reserve Bank at Bombay, Calcutta or Madras.

(10) The Central Government or any person or authority authorised by it in this behalf may for sufficient reason extend[a] in any particular case the period during which high denomination notes may be tendered for exchange under this section.

[a] By Finance Department notification No. F. 3 (1)-F I/46 dated 19-1-1946, the Central Government authorised the Reserve Bank, every Scheduled Bank and every Government Treasury to extend the period to 26th January 1946, *see* Gazette of India, Extraordinary 1946, page 77.

Penalties.

7. *(1)* Whoever knowingly makes in any declaration under section 6 any statement which is false or only partially true or which he does not believe to be true, or contravenes any provision of this Ordinance or the rules made thereunder, shall be punishable with imprisonment for a term which may extend to three years or with fine or with both.

(2) Where the person committing an offence punishable under sub-section *(1)* is a company or other body corporate, every director, manager, secretary or other officer or agent thereof shall, unless he proves that the offence was committed without his knowledge or that he exercised all due diligence to prevent such commission, be deemed to be guilty of the offence.

(3) No prosecution for an offence punishable under this section shall be instituted except with the previous sanction of the Central Government.

(4) Notwithstanding anything in section 32 of the Code of Criminal Procedure, 1898, a Presidency Magistrate or a Magistrate of the first class trying an offence punishable under this section may impose a fine exceeding one thousand rupees.

Closing of banks and Government treasuries.

8. All banks and Government treasuries shall be closed for the transaction of all business on the 14th day of January, 1946, and that day shall for the purposes of the Negotiable Instruments Act, 1881 be deemed to be a public holiday notified under that Act.

Bar of legal proceedings.

9. No suit, prosecution or other legal proceeding shall lie against any person for anything done or in good faith intended to be done under this Ordinance.

Condonation of certain offences under Ordinance II of 1946, not involving high denomination bank notes.

10. Notwithstanding anything contained in section 6 of the Bank Notes (Declaration of Holdings) Ordinance, 1946, where a bank which at the close of business on the 11th day of January, 1946, held no high denomination bank notes (as defined in this Ordinance) fails to present the first return referred to in section 4 of that Ordinance, it shall be deemed not to have committed an offence under that Ordinance.

Power to make rules.

11. The Central Government may make rules to provide for any matter for which it deems provision necessary or expedient in order to give effect to the purposes and provisions of this Ordinance, and without prejudice to the generality of the foregoing power, such rules may provide for the manner in which and the conditions subject to which high denomination bank notes brought or sent into British India after the commencement of this Ordinance or which are held outside British India may be exchanged.

THE SCHEDULE

(See section 6)

Form of Declaration

1. Name of declarant.

2. Status of declarant as owner of the bank notes to which this declaration relates, whether individual, Hindu undivided family, company, firm, local authority or other association of persons.

3. Address.

4. District or circle in which declarant is assessed to income-tax.

5. If declarant is engaged in business, profession or vocation, name in which carried on or in the case of a firm, the firm's name.

6. Principal place of business, profession or vocation of declarant, location and style of each branch.

7. Name and address of each partner, if declarant is a firm.

8. Name and address of each firm or firms, if declarant is a partner in a firm.

9. If declarant is a salaried person, amount of the salary per annum.

10. If declarant is a Government servant, Government Department and post held.

11. If declarant is a retired Government servant, last post held, the Government Department under which such post held and date of retirement.

12. If declarant is a retired servant of a non-Government employer, particulars of last post held.

13. If declarant is not a retired employee, particulars of former profession or vocation.

If declarant is a lady, name of husband or guardian and his address.

If declarant is a lady with a vocation, or employment, particulars.

14. Particulars of high denomination notes tendered:—

Denomination	Numbers*	Total value
Rs. 500		Rs.
1,000		
10,000		

*List to be attached separately.

15. Reasons for keeping above amount in high denomination notes rather than in current account; fixed deposit or securities.

16. When and from what source did declarant come into possession of bank notes now tendered?

17. If notes in question represent re-import of bank notes sent out of British India quote number and date of Reserve Bank of India's licence.

18. Does the value of bank notes now tendered represent business profits in whole or in part? If so, specify name of business and year or years in which such profits made and place of business.

19. If amount in 18 above is in excess of profits referred to therein, indicate the source of excess with evidence in support.

20. Has any other declaration been made by declarant or on his behalf elsewhere? If so, state full particulars.

I/We hereby declare that the particulars furnished above are full, true and correct to the best of my/our knowledge and belief. I/We further declare that the bank notes tendered herewith belong to me/us and are not benami holdings.

I/We undertake to advise the Reserve Bank of India, Bombay, if any other high denomination bank notes are tendered for exchange by me/us for exchange at any other station(s).

Date Signature

Permanent address

I/We (if Bank) hereby testify that I/We know the declarant and certify that the above declaration was signed in my/our presence.

Seal

Date Signature

Designation

I/We (if an Office of the Reserve Bank of India) hereby acknowledge the receipt of the high denomination bank notes tendered by.....with the above declaration at.....P.M. today.

Date Signature

Designation of receiving authority

Seal

[THE] INCOME-TAX AND EXCESS PROFITS-TAX (EMERGENCY) ORDINANCE, 1942 (ORDINANCE NO. LX OF 1942)[a]

[14th November, 1942.]

An Ordinance to remove certain difficulties caused by the destruction of documents and records pertaining to the collection of Income-tax and Excess Profits Tax.

WHEREAS an emergency has arisen which makes it necessary to remove certain difficulties caused by the destruction of documents and records pertaining to the collection of Income-tax and Excess Profits Tax;

Now, therefore, in exercise of the powers conferred by section 72 of the Government of India Act, as set out in the Ninth Schedule to the Government of India Act, 1935 the Governor-General is pleased to make and promulgate the following Ordinance :—

[a] Published in the Gazette of India, Extraordinary dated 14th November 1942.

This Ordinance was applied to all the partially excluded areas of the Orissa Province: *See* Orissa Government Notification No. 986-F *(c)* dated 20-1-1943.

So much of the Ordinance as pertains to the collection of income-tax shall apply to the Chhittagong Hill-tracts with effect from 14-1-1943, subject to certain exceptions, *see* Bengal Government Notification No. 3—P. R. I. dated 11-1-1943.

Short title and commencement.

1. *(1)* This Ordinance may be called the Income-tax and Excess Profits Tax (Emergency) Ordinance, 1942.

(2) It shall come into force at once.

Power to issue notices and to secure returns.

2. *(1)* Where documents or records pertaining to the assessment, collection or payment of income-tax or excess profits tax have been damaged, lost or destroyed as a result of riot or civil commotion the authority authorised under the Indian Income-tax Act, 1922 or the Excess Profits Tax Act, 1940 as the case may be, to issue any notice for any of the purposes of either Act may, notwithstanding anything contained in either of the said Acts, and notwithstanding that such notice has already been issued, or has already been issued and has been or is alleged to have been complied with, or where such notice has already been issued, that the time within which the notice is to be issued has already expired, reissue such notice, and any notice so reissued shall in all respects have the same effect as if it were the original notice, and any proceedings that could have been taken in pursuance of or subsequent to the original notice may be taken in like manner in pursuance of or subsequent to the notice so re-issued :

Provided that in respect of assessments or reassessments made in the course of any proceedings taken under the powers conferred by this sub-section the periods of eight and four years mentioned in sub-section *(2)* of section 34 of the Indian Income-tax Act 1922, shall be deemed to commence on and to run from the date on which the notice under sub-section *(2)* of section 22 or sub-section *(1)* of section 34 of that Act is reissued under the powers conferred by this sub-section :

Provided further that where a person proves to the satisfaction of the Income-tax Officer or the Excess Profits-Tax Officer, as the case may be, that he has already been assessed in respect of the income or the excess profits in respect of which notices under section 22 or section 34 of the Indian Income-tax Act, 1922, or under section 13 or section 15 of the Excess Profits Tax Act, 1940, have been reissued, and that he has paid the tax, he shall not be subject to fresh assessment.

(2) Any return or information required or which could be required under the provisions of either of the said Acts to be furnished by any person shall, if the Income-tax Officer or the Excess Profits Tax Officer so requires at any time be again furnished by such person notwithstanding that it may have been or is alleged to have been already furnished, and any failure to comply with any such requirement by an Income-tax Officer or Excess Profits Tax Officer shall involve the same consequences as if the return or information had been altogether withheld.

Settlement of doubts.

3. If any question arises whether a document or record has been damaged, lost or destroyed as a result of riot or civil commotion the matter shall be referred to the Commissioner of Income-tax or to the Commissioner of Excess Profits Tax, as the case may be, and his decision shall be final.

Preamble—Note 1

1. This Ordinance as amended by Ordinance No. 16 [XXI] of 1945 is intra vires. (Vol 34) 1947 Bom 380 (381) (DB).

Section 2—Note 1

1. 'Deeming' a past event or thing to be something other than what it was or is, may be an interference with the course of nature, since it creates an artificial data in place of existing fact, but it is not a retrospective changing of the statute law. (Vol 34) 1947 Bom 380 (381) (DB).

Power to make rules. 4. The Central Government may make rules providing for any matter necessary to carry into effect the purposes of this Ordinance.

[THE] INCOME-TAX PROCEEDINGS VALIDITY ORDINANCE, 1943. (ORDINANCE No. IV of 1943.)[a]

[16th January, 1945.]

An Ordinance to establish the validity of certain appointments as Income-tax Officer of, and certain proceedings under the Indian Income-tax Act, 1922, taken by persons designated as Assistant Income-tax Officers.

WHEREAS an emergency has arisen which makes it necessary to establish the validity of certain appointments as Income-tax Officer of, and certain proceedings under the Indian Income-tax Act, 1922, taken by, persons designated as Assistant Income-tax Officers;

NOW, THEREFORE, in exercise of the powers conferred by section 72 of the Government of India Act, as set out in the Ninth Schedule to the Government of India Act, 1935, the Governor General is pleased to make and promulgate the following Ordinance :-

[a] Published in the Gazette of India, Extraordinary, dated 16th January 1943.

The Ordinance was applied to the Darjeeling District and the partially excluded areas of Mymensingh District with certain modification with effect from 15-4-1943, *see* Bengal Government Notification No. 533-A. R. dated 8-4-1943.

Short title and commencement. 1. *(1)* This Ordinance may be called the Income-tax Proceedings Validity Ordinance, 1943.

(2) It shall come into force at once.

Validity of appointments as Income-tax Officer of Assistant Income-tax Officers and of proceedings taken by them. 2. Where, whether before or after the commencement of this Ordinance, any person designated as an Assistant Income-tax Officer has been appointed to be or to discharge the functions of an Income-tax Officer for any of the purposes of the Indian Income-tax Act, 1922, and where, whether before or after the commencement of this Ordinance, a person designated as an Assistant Incom-tax Officer, appointed to be or to discharge the functions of an Income-tax Officer, has given or served any notice or taken any action whatsoever under the said Act for the purpose of or in connection with the making of an assessment under the said Act, such person shall be deemed to be and always to have been validly appointed as an Income-tax officer for the purposes of the said Act, and no act purporting to have been done by such person as an Income-tax Officer, and no notice purporting to have been given or served by such person as an Income-tax Officer shall be called in question merely on the ground of any irregularity or defect in the manner of his appointment as an Income-tax Officer.

[THE] INCOME-TAX AND EXCESS PROFITS TAX (VALIDITY OF NOTICES) ORDINANCE, 1944 (ORDINANCE No. XLV of 1944).[a]

[3rd October, 1944.]

An Ordinance to remove doubts as to the validity of certain notices under the Indian Income-tax Act, 1922 and the Excess Profits Tax Act, 1940.

WHEREAS, an emergency has arisen which makes it necessary to remove doubts as to the validity of certain notices under the Indian Income-tax Act, 1922 and the Excess Profits Tax Act, 1940 ;

NOW, THEREFORE, in exercise of the powers conferred by section 72 of the Government of India Act, as set out in the Ninth Schedule to the Government of India Act, 1935, the Governor-General is pleased to make and promulgate the following Ordinance :—

[a] Published in the Gazette of India, Extraordinary, dated 3rd October 1944.

The Ordinance has been amended by Ordinance No. 16 of 1945.

Short title extent and commencement. 1. *(1)* This Ordinance may be called the Income-tax and Excess Profits Tax (Validity of Notices) Ordinance, 1944.

(2) It extends to the whole of British India, and applies also, within the Indian States and the tribie areas, in relation to the persons specified in sub-section *(2)* of section 1 of the Indian Income-tax Act, 1922.

(3) It shall come into force at once

Validity of certain notices. 2. For the removal of doubts it is hereby enacted that every notice published or issued, whether before or after the commencement of this Ordinance [a][but not later than the 19th day of May, 1945],—

(a) under sub-section *(1)* of section 22 of the Indian Income-tax Act, 1922, requiring a return to be furnished within sixty days from the date of the notice, or

(b) under sub-section *(2)* of the said section or under sub section *(1)* of section 34 of the said Act, requiring a return to be furnished within thirty days of the receipt of the notice, or

(c) under sub-section *(1)* of section 13 of the Excess Profits Tax Act, 1940 requiring a return to be furnished within sixty days from the date of the service of the notice, or

(d) under section 15 of the last-mentioned Act, requiring a return to be furnished within sixty days of the receipt of the notice—

shall, notwithstanding any judgment or order of any Court, Appellate Tribunal or Income-tax authority to the contrary, and whether or not any specified date on or before which the return is to be furnished is or has been given in the notice as an alternative, be deemed to give or have given a period of notice in full compliance with law, and no such notice shall be called in question or be deemed to be, or at any time to have been, invalid for any purpose whatsoever (including any proceedings, criminal or otherwise, instituted whether before or after the commencement of this Ordinance, under, or for a contravention of, any of the provisions of either of the above-mentioned Acts) on the ground merely that a period insufficient in law within which to carry out the requirements of the notice has been specified therein.

[a] *Inserted* by the Income-tax and Excess Profits Tax (Validity of Notices) Amendment Ordinance, 1945 (XVI [16] of 1945), S. 2. [19-5 1945].

[THE] INDIAN FORCES (TRANSFER) ORDINANCE, 1940. (ORDINANCE NO. X OF 1940).[a]

[30th August, 1940]

An Ordinance to provide for the transfer from one corps or department to another of persons enrolled under the Indian Army Act, 1911.

WHEREAS an emergency has arisen which makes it necessary to provide for the transfer from one corps or department to another of persons enrolled under the Indian Army Act, 1911 ;

NOW, THEREFORE, in exercise of the powers conferred by section 72 of the Government of India Act as set out in the Ninth Schedule to the Government of India Act, 1935, the Governor-General is pleased to make and promulgate the following Ordinance :—

[a] Published in the Gazette of India, Extraordinary, dated 30th August 1940.

Short title and commencement.

1. *(1)* This Ordinance may be called the Indian Forces (Transfer) Ordinance, 1940.

(2) It shall come into force at once.

Definitions.

2. In this Ordinance,—

(a) "Competent military authority" means the Commander-in-Chief of His Majesty's Forces in India, or any officer designated by him in this behalf ;

(b) "the period of the present emergency" means the period beginning with the date of the promulgation of this Ordinance and ending with such date as the Central Government may, by notification in the official Gazette, declare to be the date on which the emergency which was the occasion of the passing of this Ordinance came to an end.

Transfer from one corps or department to another.

3. During the period of the present emergency, any person enrolled under the Indian Army Act, 1911, may, notwithstanding anything to the contrary contained in the conditions of the service for which he is enrolled, be transferred without his consent to any corps or department by order of the competent military authority.

Re-transfer to original corps or department.

4. At the end of the period of the present emergency any person transferred under the provisions of section 3 shall, if he continues in military service and so desires, be retransferred by the competent military authority, as soon as may be convenient, to the corps or department in which he was serving at the time when he was first so transferred.

[THE] INTERNATIONAL MONETARY FUND AND BANK ORDINANCE, 1945. (ORDINANCE NO. XLVII OF 1945)

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THE SCHEDULE.

[THE] INTERNATIONAL MONETARY FUND AND BANK ORDINANCE, 1945. (ORDINANCE NO. XLVII of 1945.)[a]

[24th December, 1945.]

An Ordinance to implement the International Monetary Fund and Bank Agreements.

WHEREAS, at the United Nations Monetary and Financial Conference held at Bretton Woods, New Hampshire, in July 1944, Articles of the following agreements were drawn up, and set out in the Final Act of the said Conference, that is to say,—

(a) an agreement (hereinafter referred to as the Fund Agreement) for the establishment and operation of an international body to be called the International Monetary Fund (hereinafter referred to as the International Fund), and

(b) an agreement (hereinafter referred to as the Bank agreement) for the establishment and operation of an international body to be called the International Bank for Re-construction and Development (hereinafter referred to as the International Bank) ;

AND WHEREAS an emergency has arisen which renders it necessary to make certain provisions for the purpose of implementing the aforesaid Agreements ;

NOW, THEREFORE, in exercise of the powers conferred by section 72 of the Government of India Act, as set out in the Ninth Schedule to the Government of India Act, 1935, the Governor-General is pleased to make and promulgate the following Ordinance:—

[a] Published in the Gazette of India, Extraordinary, dated 24th December 1945.

Short title, extent and commencement.

1. *(1)* This Ordinance may be called the International Monetary Fund and Bank Ordinance, 1945.

(2) It extends to the whole of British India.

(3) It shall come into force at once.

Payments to International Fund and Bank.

2. *(1)* There shall be paid out of the revenues of the Central Government all such sums as may from time to time be required for the purpose of paying—

(a) the subscriptions payable by the Central Government, to the International Fund under paragraph *(a)* of section 3, and paragraph *(a)* of section 4, of Article III of the Fund Agreement, and to the International Bank under paragraph *(a)* of section 3 of Article II of the Bank Agreement;

(b) any sums payable by the Central Government to the International Fund under paragraph (b) of section 8 of Article IV of the Fund Agreement, and to the International Bank under section 9 of Article II of the Bank Agreement;

(c) any charges payable by the Central Government to the International Fund under section 8 of Article V of the Fund Agreement ;

(d) any sums required for implementing the guarantee of the Central Government referred to in section 3 of Article XIII of the Fund Agreement.

(e) any compensation required to be paid by the Central Government to the International Fund or to any member thereof under Sch. D or Sch. E to the Fund Agreement.

(2) The Central Government may, if it thinks fit so to do, create and issue to the International Fund or

International Bank, in such form as it thinks fit, any such non-interest bearing and non-negotiable notes or other obligations as are provided for by section 5 of Article III of the Fund Agreement and section 12 of Article V of the Bank Agreement.

Reserve Bank to be depository for International Fund and Bank.

3. The Reserve Bank of India (hereinafter referred to as the Reserve Bank) shall be the depository of the British Indian currency holdings of the International Fund and International Bank.

Power to call for information.

4. *(1)* Where under section 5 of Article VIII of the Fund Agreement, the International Fund requires the Central Government to furnish it with any information, the Central Government, or if generally or specially authorised by the Central Government in this behalf, the Reserve Bank, may by order in writing require any person to furnish to such officer or other person as may be specified in the order such detailed information as the Central Government or the Reserve Bank, as the case may be, may determine to be essential for the purpose of complying with the request of the International Fund; and any person so required shall be bound to furnish such information.

(2) Every officer or person to whom any information is required to be furnished under this section shall be deemed to be a public servant within the meaning of section 21 of the Indian Penal Code.

(3) No information obtained under this section shall be furnished to the International Fund in such detail as to disclose the affairs of any person, and the provisions of sub-sections *(1)*, *(2)* and *(3)* of section 54 of the Indian Income-Tax Act, 1922 shall apply in relation to information obtained under this section as they apply to the particulars referred to in that section.

(4) A determination of the Central Government or the Reserve Bank under sub-section *(1)* as to the extent of detail in which information is to be furnished shall be final, and in any prosecution under section 176 or section 177 of the Indian Penal Code in respect of any information required to be furnished under this section, it shall not be a defence to assert that the information was required to be furnished in greater detail than was essential for the purpose of complying with the request of the International Fund.

(5) No prosecution for an offence in respect of any information required to be furnished under this section shall be instituted except with the previous sanction of the Central Government.

Certain provisions of agreements to have force of law.

5. Notwithstanding anything to the contrary contained in any other law, the provisions of the Fund and Bank Agreements set out in the Schedule shall have the force of law in British India :

Provided that nothing in section 9 of Article IX of the Fund Agreement or in section 9 of Article VII of the Bank Agreement shall be construed as —

(a) entitling the International Fund or International Bank to import into British India goods free of any duty of customs without any restriction on their subsequent sale therein, or

(b) conferring on the International Fund or International Bank any exemption from duties or taxes which form part of the price of goods sold or which are in fact no more than charges for services rendered.

Amendment of section 17, Act II of 1934.

6. [*Omitted.*—NOTE: This section adds clause (15A) to section 17 of the Reserve Bank of India Act, 1934 (II of 1934).]

Power to make rules.

7. The Central Government may, by notification in the Official Gazette, make rules for giving effect to the provisions set out in the Schedule, and generally for carrying out the purposes of this Ordinance.

THE SCHEDULE.

(See section 5.)

PROVISIONS OF AGREEMENTS WHICH SHALL HAVE FORCE OF LAW.

PART I.

FUND AGREEMENT.

Paragraph (b) of section 2 of Article VIII.

Exchange contracts which involve the currency of any member and which are contrary to the exchange control regulations of that member maintained or imposed consistently with this Agreement shall be unenforceable in the territories of any member .....

ARTICLE IX.

STATUS, IMMUNITIES AND PRIVILEGES.

Purpose of Article.

1. To enable the fund to fulfil the functions with which it is entrusted, the status, immunities and privileges set forth in this Article shall be accorded to the Fund in the territories of each member.

Status of the Fund.

2. The Fund shall possess full juridical personality, and in particular, the capacity

(i) to contract;

(ii) to acquire and dispose of immovable and moveable property;

(iii) to institute legal proceedings.

Immunity from judicial process.

3. The Fund, its property and its assets, wherever located and by whomsoever held, shall enjoy immunity from every form of judicial process except to the extent that it expressly waives its immunity for the purpose of any proceedings or by the terms of any contract.

Immunity from other action.

4. Property and assets of the Fund, wherever located and by whomsoever held, shall be immune from search, requisition, confiscation, expropriation or any other form of seizure by executive or legislative action.

Immunity of archives.

5. The archives of the Fund shall be inviolable.

Freedom of assets from restrictions.

6. To the extent necessary to carry out the operations provided for in this Agreement, all property and assets of the Fund shall be free from restrictions, regulations, controls and moratoria of any nature.

Privilege for communications.

7. The official communications of the Fund shall be accorded by members the same treatment as the official communications of other members.

Immunities and privileges of officers and employees.

8. All Governors, executive directors, alternates, officers and employees of the Fund

(i) shall be immune from legal process with respect to acts performed by them in their official capacity except when the Fund waives this immunity;

(ii) not being local nationals, shall be granted the same immunities from immigration, restrictions, alien registration requirements and national service obligations and the same facilities as regards exchange restrictions as are accorded by members to the representatives, officials, and employees of comparable rank of other members;

(iii) shall be granted the same treatment in respect of travelling facilities as is accorded by members to representatives, officials and employees of comparable rank of other members.

Immunities from taxation.

9. *(a)* The Fund, its assets, property, income and its operations and transactions authorised by this Agreement, shall be immune from all taxation and from all customs duties. The Fund shall also be immune from liability for the collection or payment of any tax or duty.

(b) No tax shall be levied on or in respect of salaries and emoluments paid by the Fund to executive directors, alternates, officers or employees of the Fund who are not local citizens, local subjects, or other local nationals.

(c) No taxation of any kind shall be levied on any obligation or security issued by the Fund, including any dividend or interest thereon, by whomsoever held.

(i) which discriminates against such obligation or security solely because of its origin ; or

(ii) if the sole jurisdictional basis for such taxation is the place or currency in which it is issued, made payable or paid, or the location of any office or place of business maintained by the Fund.

PART II.

BANK AGREEMENT.

Article VII.

STATUS, IMMUNITIES AND PRIVILEGES.

Purpose of Article.

1. To enable the Bank to fulfil the functions with which it is entrusted, the status, immunities and privileges set forth in this Article shall be accorded to the Bank in the territories of each member.

Status of the Bank.

2. The Bank shall possess full juridical personality, and, in particular, the capacity

(i) to contract ;

(ii) to acquire and dispose of immovable and movable property ;

(iii) to institute legal proceedings.

Position of the Bank with regard to judicial process.

3. Actions may be brought against the Bank only in a Court of competent jurisdiction in the territories of a member in which the Bank has an office, has appointed an agent for the purpose of accepting service or notice of process, or has issued or guaranteed securities. No actions shall, however, be brought by members or persons acting for or deriving claims from members. The property and assets of the Bank shall, wheresoever located and by whomsoever held, be immune from all forms of seizure, attachment or execution before the delivery of final judgment against the Bank.

Immunity of assets from seizure.

4. Property and assets of the Bank, wherever located and by whomsoever held, shall be immune from search, confiscation, expropriation or any other form of seizure by executive or legislative action.

Immunity of archives.

5. The archives of the Bank shall be inviolable.

Freedom of assets from restrictions.

6. To the extent necessary to carry out the operations provided for in this agreement and subject to the provisions of this Agreement, all property and assets of the Bank shall be free from any restrictions, regulations, controls and moratoria of any nature.

Privilege for communications.

7. The official communications of the Bank shall be accorded by each member the same treatment that it accords to the official communications of other members.

Immunities and privileges of officers and employees.

8. All governors, executive directors, alternates, officers and employees of the Bank—

(i) shall be immune from legal process with respect to acts performed by them in their official capacity except when the Bank waives this immunity;

(ii) not being local nationals, shall be accorded the same immunities from immigration restrictions, alien registration requirements and national service obligations and the same facilities as regards exchange restrictions as are accorded by members to the representatives, officials, and employees of comparable rank of other members;

(iii) shall be granted the same treatment in respect of travelling facilities as is accorded by members to representatives, officials and employees of comparable rank of other members.

Immunities from taxation.

9. *(a)* The Bank, its assets, property, income and its operations and transactions authorized by this Agreement, shall be immune from all taxation and from all customs duties. The Bank shall also be immune from liability for the collection or payment of any tax or duty.

(b) No tax shall be levied on or in respect of salaries and emoluments paid by the Bank to executive directors, alternates, officials or employees of the Bank who are not local citizens, local subjects, or other local nationals.

(c) No taxation of any kind shall be levied on any obligation or security issued by the Bank (including any dividend or interest thereon) by whomsoever held.

(i) which discriminates against such obligation or security solely because it is issued by the Bank; or

(ii) if the sole jurisdictional basis for such taxation is the place or currency in which it is issued, made payable or paid, or the location of any office or place of business maintained by the Bank.

(d) No taxation of any kind shall be levied on any obligation or security guaranteed by the Bank (including any dividend or interest thereon) by whomsoever held.

(i) which discriminates against such obligation or security solely because it is guaranted by the Bank; or.

(ii) if the sole jurisdictional basis for such taxation is the location of any office or place of business maintained by the Bank.

[THE] LEGAL TENDER (INSCRIBED NOTES) ORDINANCE, 1942. (ORDINANCE NO. LIX OF 1942.)[a]

[*31st October, 1942.*]

An Ordinance to restrict the negotiability of currency and other notes inscribed with messages of a political character.

WHEREAS an emergency has arisen which makes it necessary to restrict the negotiability of currency and other notes inscribed with messages of a political character;

NOW, THEREFORE, in exercise of the powers conferred by section 72 of the Government of India Act, as set out in the Ninth Schedule to the Government of India Act, 1935, the Governor General is pleased to make and promulgate the following Ordinance:

[a]. Published in the Gazette of India, Extraordinary, dated 31st October 1942.

The Ordinance was applied to all the partially excluded areas of the Orissa Province, *see* Orissa Government Notification No. 7-f. (c), dated 2-1-1943.

Short title and commencement.

1. *(1)* This Ordinance may be called the Legal Tender (Inscribed Notes) Ordinance, 1942.

(2) It shall come into force at once.

Notes bearing messages of a political character not to be legal tender.

2. Notwithstanding anything contained in the Reserve Bank of India Act, 1934, or in the Currency Ordinance, 1940, or in any other enactment or rule of law, a currency note of the Government of India, a bank note issued by the Reserve Bank of India, or a Government of India one-rupee note issued under the Currency Ordinance, 1940, which bears written upon it any extrinsic words or visible representations intended to convey or capable of conveying a message of a political character, shall not be legal tender in British India : and the Reserve Bank of India shall not be under any legal obligation to receive any such note, or to issue rupee coin or other coin or currency notes or bank notes in exchange for any such note, or to refund the value of any such note:

Provided that the Reserve Bank of India may in its discretion refund as of grace the whole or part of the value of any such note.

[THE] LIMITATION (WAR CONDITIONS) ORDINANCE, 1945.

(ORDINANCE NO. XXXIII OF 1945.)[a]

[8th September, 1945.]

An Ordinance to exclude periods spent in enemy territory in computing limitation.

WHEREAS an emergency has arisen which makes it necessary to provide that the period of limitation prescribed by law for suits shall not run in the period during which persons instituting suits have been detained in enemy territory by circumstances attributable to war;

NOW, THEREFORE, in exercise of the powers conferred by section 72 of the Government of India Act, as set out in the Ninth Schedule to the Government of India Act, 1935, the Governor-General is pleased to make and promulgate the following Ordinance:

[a.] Published in the Gazette of India, Extraordinary, dated 8th September 1945.

Short title, extent and commencement.

1. *(1)* This Ordinance may be called the Limitation (War Conditions) Ordinance, 1945.

(2) It extends to the whole of British India.

(3) It shall come into force at once.

Interpretation.

2. In this Ordinance, unless there is anything repugnant in the subject or context,—

(a) "enemy subject" means any individual who possesses the nationality of a State which is, or at any time since the 3rd day of September 1939, has been, at war with His Majesty, or who, having possessed such nationality at any time has lost it without acquiring another nationality, or any body of persons constituted or incorporated in or under the laws of such State;

(b) "enemy territory" means any area under the sovereignty of, or administered by, or for the time being in the occupation of, a State which is, or at any time since the 3rd day of September 1939, has been, at war with His Majesty, not being an area in the occupation of His Majesty or of a State allied with His Majesty, and includes any area which the Central Government may, by notification in the official Gazette, declare either generally or in respect of any particular period to be enemy territory for the purposes of this Ordinance.

Suspension of limitation for suits in certain circumstances.

3. If at any time before the expiration of the period of limitation prescribed for any suit by the Indian Limitation Act, 1908, or by any other law for the time being in force, any person who could have instituted the suit has been detained in enemy territory by circumstances attributable to war, the said period of limitation, as regards the institution of the suit by such person, shall be deemed not to have run in the period during which it is shown to the satisfaction of the Court that such person was so detained, and shall, notwithstanding anything contained in the said Act or in any other law, in no case expire before the end of six months from the date, as determined by the Court, when such person ceased to be so detained or from the date of the commencement of this Ordinance, whichever is later :

Provided that where two or more periods have occurred in which a person was so detained those periods shall be treated for the purposes of this section as one continuous period beginning with the beginning of the first period and ending with the end of the last period :

Provided further that this section shall not apply to suits instituted to enforce rights of pre-emption, or to suits of any description, which may be instituted by enemy subjects.

[THE] MARTIAL LAW (INDEMNITY) ORDINANCE, 1943.

(ORDINANCE NO. XVIII OF 1943.)

CONTENTS.

SECTIONS.
1. Short title, extent and commencement.
2. Definitions.
3. Indemnity of servants of the Crown and other persons for certain acts.
4. Sanction necessary for institution of certain legal proceedings.
5. Confirmation of orders for seizure or destruction of property.

SECTIONS.
6. Validity of sentences passed by martial law Courts.
7. Confirmation and continuance of martial law sentences of confinement.
8. Application of sections 6 and 7 to certain trials under martial law.
9. Savings.

[THE] MARTIAL LAW (INDEMNITY) ORDINANCE, 1943. (ORDINANCE NO. XVIII OF 1943.)[a]

[31st May, 1943.]

An Ordinance to indemnify servants of the Crown and other persons in respect of acts done under martial law, and to provide for certain other matters in connection with the administration of martial law.

WHEREAS an emergency has arisen which makes it necessary to indemnify servants of the Crown and other persons in respect of acts done under martial law, and to provide for certain other matters in connection with the administration of martial law;

NOW, THEREFORE, in exercise of the powers conferred by section 72 of the Government of India Act, as set out in the Ninth Schedule to the Government of India Act, 1935, the Governor-General is pleased to make and promulgate the following Ordinance :—

[a] Published in the Gazette of India, Extraordinary, dated 31st May 1943.

Short title, extent and commencement.

1. *(1)* This Ordinance may be called the Martial Law (Indemnity) Ordinance, 1943.

(2) It extends to the whole of British India.

(3) It shall come into force at once.

Definitions.

2. In this Ordinance—

(1) "martial law area" means—

(a) with reference to the martial law period beginning on the 1st day of June 1942, and ending on the 31st day of May 1943, the area bounded—

(i) on the east by the eastern boundary of the Provinces of Sind and of the Khaipur State from the river Indus at Kashmor to the Jodhpur Bikaner Railway and including that Railway;

(ii) on the south by the Jodhpur-Bikaner Railway and the North-Western Railway, and including those Railways, from the eastern boundary of the Province of Sind to the river Indus at Kotri;

(iii) on the West by the river Indus from Kotri to Kashmor, including that river; and

(b) with reference to the martial law period beginning on the 29th day of July 1942, and ending on the 31st day of May 1943 the aforesaid area together with the area bounded—

(i) on the east by the river Indus from Rohri to Kotri;

(ii) on the south by a line running due west from the Indus at Kotri so as to include the municipal area of Kotri, to a point five miles therefrom;

(iii) on the west by a line running from the westernmost point of the aforesaid southern boundary parallel to and five miles distant from the North-Western Railway line passing from Kotri through Larkhana and Sukkur to Habibkhot;

(iv) on the north by a line running from Habibkhot to Rohri.

(2) "martial law period" means with reference to the area described in sub-clause *(a)* of the foregoing definition the period beginning on the 1st day of June 1942, and ending on the 31st day of May 1943, and with reference to the area described in sub clause *(b)* of the foregoing definition the period beginning on the 29th day of July 1942, and ending on the 31st day of May, 1943.

Indemnity of servants of the Crown and other persons for certain acts.

3. *(1)* No suit, prosecution or other legal proceeding shall lie in any Court against any servant of the Crown for or on account of or in respect of any act ordered or done by him or purporting to have been ordered or done by him in the martial law area during the martial law period for the purpose of maintaining or restoring order or of carrying into effect any regulation, order or direction issued by any authority responsible for the administration of martial law in the said area to which he was subordinate; and no suit, prosecution or other legal proceeding shall lie in any Court against any other person for or on account of or in respect of any act done or purporting to have been done by him under any order of a servant of the Crown given for any such purpose as aforesaid :

Provided that the act was done in good faith and in a reasonable belief that it was necessary for the purpose intended to be served thereby.

(2) For the purposes of this section it shall be conclusive proof that an act was done under an order of a servant of the Crown given for one of the aforesaid purposes if the Central Government, in the case of an officer employed in connection with the affairs of the Central Government, or the Provincial Government, in the case of an officer employed in connection with the affairs of a Provincial Government, so certifies; and an act shall be deemed to have been done in good faith and in a reasonable belief that it was necessary for the purpose intended to be served thereby unless the contrary is proved.

Sanction necessary for institution of certain legal proceedings.

4. Without prejudice to the operation of any other provision of law for the time being in force requiring any sanction for the institution of legal proceedings, no suit, prosecution or other legal proceeding such as is referred to in section 3 shall be instituted in any Court on an allegation that the act complained of was not done in good faith or was not done in a reasonable belief that it was necessary for the purpose intended to be served thereby except with the previous sanction—

(a) where the act complained of was ordered or done by a servant of the Crown employed in connection with the affairs of the Central Government, of the Central Government, and

(b) where the act complained of was ordered or done by a servant of the Crown employed in connection with the affairs of the Provincial Government, of the Provincial Government.

Confirmation of orders for seizure or destruction of property.

5. Where in the course of operations conducted in the martial law area during the martial law period property whether movable or immovable has been seized, confiscated, destroyed or damaged by or under the directions of a servant of the Crown acting under martial law, such seizure, confiscation, destruction or damage shall be deemed to have been lawfully ordered and authorised, and no claim shall be maintainable in any Court in respect of any such property for the restoration thereof or for compensation for any loss sustained in consequence of the seizure, confiscation, destruction or damage thereof.

Validity of sentences passed by martial law Courts.

6. All sentences passed during the martial law period by a Court or other authority constituted or appointed under martial law and acting in a judicial capacity shall be deemed to have been lawfully passed, and

all sentences executed according to the tenor thereof shall be deemed to have been lawfully executed.

Confirmation and continuance of martial law sentences of confinement.

7. *(1)* Every person confined under and by virtue of a sentence passed by a Court or other authority constituted or appointed under martial law and acting in a judicial capacity shall continue liable to confinement until the sentence, reduced by remissions, if any, earned under the rules applicable to the serving of such sentence, is served, or until he is released by order of the Central Government.

(2) The provisions of Chapter XXIX of the Code of Criminal Procedure, 1898, shall not apply to any sentence or confinement referred to in this section.

Application of sections 6 and 7 to certain trials under martial law.

8. The provisions of sections 6 and 7 apply to sentences passed during the martial law period by a Court or other authority constituted or appointed under martial law notwithstanding that such Court or authority held the whole or a part of its sittings outside the martial law area, or notwithstanding that the offence or a part of the offences for which the accused person was tried and convicted was committed before the beginning of the martial law period.

Saving.

9. Nothing in this Ordinance shall prevent the institution of proceedings by or on behalf of Government against any person in respect of any matter whatsoever.

[THE] MILITARY NURSING SERVICES (INDIA) ORDINANCE, 1943. (ORDINANCE NO. XXX OF 1943).

CONTENTS.

SECTIONS.
1. Short title, application and commencement.
2. Definitions.
3. Constitution of Military Nursing Services (India).
4. Liability of service of members of Military Nursing Services (India).
5. Members to be of commissioned rank.
6. Eligibility for appointment.
7. Dismissal from Military Nursing Services (India).
8. Liability to undergo training and perform duties.
9. Application of Army Act and Indian Army Act, 1911, to members of Military Nursing Services (India).
10. Power to make rules.
11. Power to make regulations.

[THE] MILITARY NURSING SERVICES (INDIA) ORDINANCE, 1943. (ORDINANCE NO. XXX OF 1943.)[a]

[15th September, 1943.]

An Ordinance to constitute in British India a force to be called the Military Nursing Services (India) as part of the armed forces of the Crown.

WHEREAS an emergency has arisen which makes it necessary to provide for the constitution in British India of a force to be called the Military Nursing Services (India) as a part of the armed forces of the Crown;

NOW, THEREFORE, in exercise of the powers conferred by section 72 of the Government of India Act, as set out in the Ninth Schedule to the Government of India Act, 1935, the Governor General is pleased to make and promulgate the following Ordinance : —

[a] Published in the Gazette of India, Extraordinary dated 15th September 1943.

Short title, application and commencement.

1. *(1)* This Ordinance may be called the Military Nursing Services (India) Ordinance, 1943.

(2) It applies to British subjects in any part of India and to members of the Military Nursing Services (India) wherever they may be.

(3) It shall come into force at once.

Definitions.

2. In this Ordinance, unless there is anything repugnant in the subject or context,—

(a) "prescribed" means prescribed by rules made under this Ordinance;

(b) "regulations" means regulations made under this Ordinance.

Constitution of Military Nursing Services (India).

3. *(1)* There shall be raised and maintained, in the manner hereinafter provided, as part of the armed forces of the Crown and for service with His Majesty's military forces an auxiliary force which shall be designated the Military Nursing Services (India).

(2) The Military Nursing Services (India) shall comprise two corps namely, the Indian Military Nursing Service and the Army in India Nursing Service Reserve.

Liability of service of members of Military Nursing Services (India).

4. *(1)* The members of the Indian Military Nursing Service shall be liable for service only with forces and persons subject to the Indian Army Act, 1911.

(2) The Army in India Nursing Service Reserve shall comprise two parts, one consisting of members who have engaged to serve and shall be liable to service only with forces and persons subject to the Army Act[a] the other consisting of members who have engaged to serve and shall be liable to service only with forces and persons subject to the Indian Army Act, 1911.

[a] (1881) 44 & 45 Vict., c. 58.

Members to be of commissioned rank.

5. All members of the Military Nursing Services (India) shall be of commissioned rank and shall be appointed as officers of the Military Nursing Services (India) by the Central Government by notification in the official Gazette.

Eligibility for appointment.

6. *(1)* Any British subject or any subject of an Indian State, if a woman and above the age of twenty-one, shall be eligible for appointment as an officer in the Military Nursing Services (India), and, if she satisfies the prescribed conditions, may be appointed thereto in the manner laid down in section 5.

(2) Every person so appointed shall be subject to this Ordinance and to the rules and regulations made thereunder.

Dismissal from Military Nursing Services (India).

7. The Central Government, or an authority empowered by the Central Government in this behalf, or the [a][Commander-in-Chief India] may dismiss any officer from the Military Nursing Services (India).

[a] *Substituted* for "Commander-in-Chief of His Majesty's Foaces in India" by the Indian Independence (Adaptation of Central Acts and Ordinances) Order, 1948. [23-3-1948.]

Liability to undergo training and perform duties.

8. Subject to the provisions of this Ordinance, a member of the Military Nursing Services (India) shall be bound to undergo such training and in such manner and to perform such duties in connection with His Majesty's military forces as may be laid down by regulations.

Application of Army Act and Indian Army Act, 1911, to members of Military Nursing Services (India).

9. *(1)* The provisions of the Indian Army Act, 1911 shall, to such extent and subject to such adaptations and modifications as may be prescribed, apply to members of the Indian Military Nursing Service and to those members of the Army in India Nursing Service Reserve who have engaged to serve with forces and persons subject to the Indian Army Act, 1911, as they apply to Indian commissioned officers, unless they are clearly inapplicable to women.

(2) The provisions of the Army Act[a] shall, to such extent and subject to such adaptations and modifications as may be prescribed, apply to those members of the Army in India Nursing Service Reserve who have engaged to serve with forces and persons subject to the Army Act as they apply to officers of the regular forces unless they are clearly inapplicable to women.

[a] (1881) 44 & 45 Vict., c. 58.

Power to make rules.

10. *(1)* The Central Government may, by notification in the official Gazette make rules to carry out the purposes of this Ordinance.

(2) In particular and without prejudice to the generality of the foregoing power, rules may be made under this section—

(a) providing for the medical examination of persons offering themselves for appointment in the Military Nursing Services (India);

(b) providing for any matter which under this Ordinance is to be or may be prescribed.

Power to make regulations.

11. The [a][Commander-in-Chief India] may make regulations consistent with this Ordinance and the rules made thereunder, providing for all matters to be laid down by regulations, and generally for all details connected with the organisation, pay, allowances, duties discipline, training, clothing equipment and leave of members of the Military Nursing Services (India).

[a] *See* Legislative-note [a] under S. 7.

[THE] NAVAL DISCIPLINE ORDINANCE, 1945. (ORDINANCE NO. VII OF 1945)[a]

[3rd February, 1945.]

An Ordinance to make certain provisions for the discipline of persons subject to the Indian Army Act, 1911, or the Indian Air Force Act, 1932, when embarked on a naval vessel.

WHEREAS an emergency has arisen which makes it necessary to make certain provisions for the discipline of persons subject to the Indian Army Act, 1911, or the Indian Air Force Act, 1932 (XIV of 1932), when embarked on a naval vessel ;

NOW, THEREFORE, in exercise of the powers conferred by section 72 of the Government of India Act, as set out in the Ninth Schedule to the Government of India Act, 1935, the Governor-General is pleased to make and promulgate the following Ordinance:—

[a] Published in the Gazette of India, Extraordinary, dated 3rd February 1945.

Short title and commencement.

1. *(1)* This Ordinance may be called the Naval Discipline Ordinance, 1945.

(2) It shall come into force at once.

Discipline of military and air force personnel on board naval vessels.

2. Any person subject to the Indian Army Act, 1911, or the Indian Air Force Act, 1932, when embarked on board any ship of His Majesty's Navy shall be subject to the provisions of the Naval Discipline Act,[a] and, when embarked on board any ship of the Indian Navy, to the provisions of the Naval Discipline Act as applied to the Indian Navy by the Indian Navy (Discipline) Act, 1934, to such extent and under such regulations as the Central Government shall at any time or times direct.

[a] (1866) 29 & 30 Vict., c. 109.

THE PENALTIES (ENHANCEMENT) ORDINANCE, 1942. (ORDINANCE NO. III OF 1942).

CONTENTS.

SECTIONS
1. Short title, extent and operation.
2. Power of Provincial Government to put the provisions of this Ordinance into effect.
3. Punishment for theft.
4. Punishment for offences under sections 326, 386, 387, 392, 393, 399, 435 and 436, Indian Penal Code.
5. Punishment for contraventions of rule 35, Defence of India Rules.
6. Punishment for offences under section 376, Indian Penal Code.
7. Punishment for offences under sections 147, 148 and 186, Indian Penal Code.
7a. Punishment for offences under sections 3, 4 and 5 of Act VI of 1908.
7b. Punishment for attempts to commit, and abetment of, offences.
8. Savings.

[THE] PENALTIES (ENHANCEMENT) ORDINANCE, 1942. (ORDINANCE NO. III OF 1942.)[a]

[2nd January, 1942].

An Ordinance to enhance in certain circumstances the penalties provided by law for the punishment of certain offences.

WHEREAS an emergency has arisen which makes it necessary to enhance in certain circumstances the penalties provided by law for the punishment of certain offences ;

ORDINANCE III OF 1942

Preamble — Note 1

[1] The Ordinance is *intra vires* of the powers of the Governor-General promulgating it. (Vol 30) 1943 Nag 211(214): ILR (1943) Nag 369: 44 Cri L Jour 731 (DB).

NOW THEREFORE, in exercise of the powers conferred by section 72 of the Government of India Act as set out in the Ninth Schedule to the Government of India Act, 1935, the Governor-General is pleased to make and promulgate the following Ordinance :—

[a.] Published in the Gazette of India, Extraordinary, dated 2nd January 1942.

Applied to British Baluchistan, *see* Notification No. 6-W, dated the 16th January 1942, Gaz. of India, 1942, Part I, page 119.

This Ordinance is amended by Ordinances No. 7 of 1942; No. 29 of 1942; No. 46 of 1942; No. 3 of 1943.

Short title, extent and operation.

1. *(1)* This Ordinance may be called the Penalties (Enhancement) Ordinance, 1942.

(2) It extends to the whole of British India.

(3) It shall come into force at once; but sections 3 to 7 inclusive shall have effect only in pursuance of and in accordance with a notification issued, under section 2 and only so long as such notification remains unrescinded.

Power of Provincial Government to put the provisions of this Ordinance into effect.

2. The Provincial Government may, from time to time by notification in the Official Gazette, declare[a] that sections [b][3 to 7A] inclusive, or any of them, or such provisions of section 4 or section 7 [c][or section 7A] as relate to a particular offence or particular offences therein specified shall have effect throughout the Province, or in any specified area in the Province.

[a.] Sections 3 to 7 declared to have effect throughout Ajmer-Merwara, *see* Gaz. of India, 1942, Extraordinary p. 1015; in Madras Presidency from 12-3-1943, *see* Mad. Govt. Notifn. No. 756, dated 6-3-1942; and section 7A, in the Chittagong Hill Tracts from 1-4-1943, *see* Beng. Govt. Notifn. No. 392-S, dated 26-3-1943.

[b.] *Substituted* for "3 to 7" by the Penalties (Enhancement) Amendment Ordinance, 1943 (III of 1943), S. 2. [16-1-1943.]

[c.] *Inserted, ibid.*

Punishment for theft.

3. Whoever commits theft in any premises which have been damaged by war operations, or vacated by reason of attack by the enemy or in consequence of any authorised directions given for the purpose of meeting or hindering any actual or apprehended attack by the enemy or of protecting persons and property from the dangers involved in any such attack, or commits theft of any article which has been left exposed or unprotected as a consequence of war operations shall be punished with death, or with rigorous imprisonment for a term which may extend to ten years, or with whipping [a][or with whipping in addition to such rigorous imprisonment.]

Explanation.—In this section "theft" means theft as defined in section 378 of the Indian Penal Code, and "authorised directions" means any order or direction made or given in the exercise of any power conferred by or under the Defence of India Act, 1939[b], or made or given by any officer of His Majesty's Forces acting in the course of his duties.

[a] *Added* by the Penalties (Enhancement) Second Amendment Ordinance, 1942 (No. 29 of 1942), S. 2 [10-6-1942.] [b] *Expired* on 30-9-1946.

Punishment for offences under sections 326, 386, 387, 392, 393, 399, 435 and 436, Indian Penal Code.

4. Whoever commits an offence punishable under section 326 [a][or section 385 or section 387 or section 392 or section 393 or section 399] or section 435 or section 436 of the Indian Penal Code, may in lieu of any punishment to which he is liable under the said Code, be punished with death, or with whipping [b][or with whipping in addition to any punishment to which he is liable under the said Code.]

[a] *Inserted* by the Penalties (Enhancement) Second Amendment Ordinance, 1942 (No. 29 of 1942), S. 3 [10-6-1942]. [b] *Added, ibid.*

Punishment for contraventions of rule 35, Defence of India Rules.

5. Whoever contravenes any of the provisions [a][for the time being in force of rule 35 of the Defence of India Rules [a][or is deemed under rule 121 of the said Rules to have contravened any such provision] may, in lieu of any punishment to which he is liable under [b][the said Rules] be punished with death, or with whipping [c][or with whipping in addition to any punishment to which he is liable under [b][the said Rules]].

[a] *Inserted* by the Penalties (Enhancement) Third Amendment Ordinance, 1942 (No. 46 of 1942), S. 2 [26-8-1942]. [b] *Substituted, ibid.* [c] *Added* by the Penalties (Enhancement) Second Amendment Ordinance, 1942 (No. 29 of 1942), S. 4 [10-6-1942].

Punishment for offences under section 376, Indian Penal Code.

6. Whoever commits an offence punishable under section [a][376] [b][or section 380 or section 382 or section 394 or section 395], of the Indian Penal Code, may, in lieu of any punishment to which he is liable under the said Code or under the Whipping Act, 1909, be punished with death [c][or in the case of an offence punishable under section 380 or section 382 with whipping in addition to any punishment to which he is liable under the said Code.]

[a] *Substituted* for the figure '375' by the Penalties (Enhancement) Ordinance, 1942 (No. 7 of 1942), S. 2 [29-1-1942]. [b] *Inserted* by the Penalties (Enhancement) Second Amendment Ordinance, 1942 (No. 29 of 1942), S. 5 [10-6-1942]. [c] *Added, ibid.*

Punishment for offences under sections 147, 148 and 186, Indian Penal Code.

7. Whoever commits any offence punishable under section [a][147] or section 148 or section 186 of the Indian Penal Code, may, in lieu of [b][or in addition to] any punishment to which he is liable under the said Code, be punished with whipping.

[a] *Substituted* for the figure '146' by the Penalties (Enhancement) Amendment Ordinance, 1942 (No. 7 of 1942), S. 2 [29-1-1942]. [b] *Inserted* by the Penalties (Enhancement) Second Amendment Ordinance, 1942 (No. 29 of 1942), S. 6 [10-6-1942].

Punishment for offences under sections 3, 4 and 5 of Act VI of 1908.

[a][7A. Whoever commits an offence punishable under section 3 or section 4 or section 5 of the Explosive Substances Act, 1908, may, in lieu of any punishment to which he is liable under the said Act, be punished with death, or with whipping, or

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Preamble—Note 1 *(contd.)*

[2] Offences committed before the Ordinance are outside its scope. (Vol 30) 1943 All 26 (44) : I L R (1943) All 238 : 44 Cri L Jour 216 (FB). (Per Bajpai J.)

Section 4 — Note 1

[1] Though under this section the Judge can pass a sentence of death for an offence under S. 326, Penal Code, it does not follow that he must necessarily do so. Where the accused is a youth and not a hardened criminal, a sentence of transportation for life can be passed upon him. (Vol 31) 1944 Sind 83 (88, 89) : 45 Cri L Jour 598 (FB).

with whipping in addition to any punishment to which he is liable under the said Act.]

[a] S. 7A was *inserted* by the Penalties (Enhancement) Amendment Ordinance, 1943 (No. 3 of 1943), S. 3 [16-1-1943].

Punishment for attempts to commit, and abetment of, offences.

[a][7B. Whoever attempts to commit, or abets, or attempts to abet, or does any act preparatory to the commission of, any offence referred to in section 3, 4, 6, 7 or 7A shall, notwithstanding anything contained in the Indian Penal Code, be punishable with the punishment provided for the commission of the offence.]

[a] S. 7B was *inserted* by the Penalties (Enhancement) Amendment Ordinance, 1943 (No. 3 of 1943), S. 3 [16-1-1943].

Savings.

8. Notwithstanding anything elsewhere contained in any Act, Regulation or Ordinance, an offence made punishable with death by this Ordinance shall not by reason of having been made so punishable, cease to be triable by any Court which might have tried the offence had it not been made so punishable.

[THE] PENSIONS APPEAL TRIBUNALS (POWERS) ORDINANCE, 1945. (ORDINANCE NO. XLVI OF 1945)[a]

[22nd December, 1945.]

An Ordinance to vest Pensions Appeal Tribunals with certain powers.

WHEREAS an emergency has arisen which makes it necessary to vest Pensions Appeal Tribunals with certain powers;

NOW, THEREFORE, in exercise of the powers conferred by section 72 of the Government of India Act, as set out in the Ninth Schedule to the Government of India Act, 1935, the Governor-General is pleased to make and promulgate the following Ordinance:—

[a] Published in the Gazette of India, Extraordinary, dated 22nd December 1945.

Short title, extent and commencement.

1. *(1)* This Ordinance may be called the Pensions Appeal Tribunals (Powers) Ordinance, 1945.

(2) It extends to the whole of British India.

(3) It shall come into force at once.

Powers of Pensions Appeal Tribunals.

2. Every Pensions Appeal Tribunal constituted under the Pensions Appeal Tribunals Rules, 1945, appended to the Resolution of the Government of India in the War Department, No. 1770, dated the 19th November, 1945,[a] shall have all the powers of a Civil Court for the purposes of receiving evidence, administering oaths, enforcing the attendance of witnesses, and compelling the discovery and production of documents, and shall be deemed to be a Civil Court within the meaning of sections 480 and 482 of the Code of Criminal Procedure, 1898.

[a] *See* Gazette of India, 1945, Extraordinary, page 943.

[THE] POST-OFFICE NATIONAL SAVINGS CERTIFICATES ORDINANCE, 1944. (ORDINANCE NO. XLII OF 1944)[a]

[9th September, 1944.]

An Ordinance to make certain provision in respect of Post-Office Twelve-Year National Savings Certificates and other classes of Savings Certificates.

WHEREAS an emergency has arisen which renders it necessary to make certain provision in respect of Post-Office Twelve-Year National Savings Certificates and other classes of Savings Certificates:

NOW, THEREFORE, in exercise of the powers conferred by section 72 of the Government of India Act, as set out in the Ninth Schedule to the Government of India Act, 1935, the Governor-General is pleased to make and promulgate the following Ordinance:—

[a] Published in the Gazette of India, Extraordinary, dated 9th September 1944.

Short title, application and commencement.

1. *(1)* This Ordinance may be called the Post-Office National Savings Certificates Ordinance, 1944.

(2) It applies to—

(a) Post-Office Twelve-Year National Savings Certificates issued in pursuance of the Notification of the Government of India in the Finance Department, No. F. 17 (100)-F/43, dated the 4th September, 1943[a], and

(b) any other classes of savings certificates to which the Central Government may from time to time by notification in the official Gazette direct that the provisions of this Ordinance shall apply.

(3) It shall come into force at once.

[a] *See* Gazette of India, 1943, Part I, page 975.

Interpretation.

2. In this Ordinance—

(a) "minor" means a person who is not deemed to have attained his majority under the Indian Majority Act, 1875;

(b) "savings certificate" includes a Post-Office Twelve-Year National Savings Certificate referred to in clause *(a)* of sub-section *(2)* of section 1 and a savings certificate of any other class to which the provisions of this Ordinance have been applied by a direction in pursuance of clause *(b)* of that sub-section;

(c) "transfer" means a transfer *inter vivos* and does not include a transfer by operation of law.

Restriction of transfer.

3. Notwithstanding any provision in any enactment or any rule of law for the time being in force to the contrary, no transfer, whether made before or after the commencement of this Ordinance or, as the case may be, before or after the making of a direction in pursuance of clause *(b)* of sub-section *(2)* of section 1, of a savings certificate shall be valid without the previous consent in writing of an officer of the Post Office authorised by general or special order of the Central Government in that behalf.

Payment on death of holder of savings certificate.

4. *(1)* If a person dies and is at the time of his death the holder of a savings certificate, payment of the sum for the time being

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Section 8 — Note 1

[1] The purpose and effect of S. 8 of this Ordinance is not to confer upon First Class Magistrates the power to pass sentences of death. The effect of the section read with S. 30, Cr. P. C., is to remove the bar of jurisdiction which would otherwise limit the power of a Court by reason of the fact that an offence is punishable with death. (Vol 30) 1943 Sind 87 (89) : I L R (1942) Kar 597 : 44 Cri. L Jour 461.

due thereon may be made in the manner provided in the Government Savings Banks Act, 1873, for the payment of deposits belonging to the estates of deceased persons, and the provisions of Ss. 4 to 9 of the said Act shall apply accordingly as if the holder of the savings certificate were a depositor in a Government Savings Bank and the sum for the time being due on the certificate were a deposit in such a Bank ;

Provided that in such application section 8 of the said Act shall be construed as if the reference therein to three thousand rupees were a reference to the amount of the maximum holding of savings certificates prescribed in the rules made or deemed to have been made under this Ordinance applicable to the particular savings certificate :

Provided further that —

(a) the powers conferred by the said provisions on the Secretary of a Government Savings Bank shall be exercisable by the Postmaster-General for the area within which the post office of issue of such savings certificate is situate [a][or if that area is in Pakistan, by the Postmaster-General for such area in India as the Central Government may by general or special order specify in this behalf ;]

(b) where in any one case payment is to be made of savings certificates issued from more post offices than one, the said powers shall be exercisable by the Postmaster-General for the area in which any of the said post offices is situate.

(2) Nothing in sub-section *(1)* shall be deemed to require any person to accept payment of the amount due on a savings certificate before it has reached maturity.

[a] *Added* by the Indian Independence (Adaptation of Central Acts and Ordinances) Order, 1948. [23-3-1948.]

Holdings by or on behalf of minors.

5. Notwithstanding any provision in any enactment or any rule of law for the time being in force to the contrary,—

(1) a minor may apply for and hold savings certificates and any person may apply for and hold savings certificates on behalf of a minor ;

(2) where any certificate is held by or on behalf of a minor, the minor shall, whether the certificate was applied for and issued before or after the commencement of this Ordinance or, as the case may be, before or after the making of a direction in respect of such certificate in pursuance of clause *(b)* of sub-section *(2)* of section 1, be bound by the provisions of this Ordinance and of any rules made or deemed to have been made thereunder applicable to such savings certificate and by the terms of any declaration made by the applicant for the certificate in pursuance of the said rules ;

(3) payment of the sum for the time being due on a savings certificate held by or on behalf of a minor may be made —

(a) to him personally, if he himself applied for the certificate, or

(b) for the use of the minor, if the application for the certificate was made by any person other than the minor,—

(i) to any such person, being a parent of the minor or guardian of his property, as may be nominated in that behalf in the form of application, or

(ii) if no such nomination has been made, to any guardian of the property of the minor appointed by a competent Court, or where no such guardian has been so appointed, to either parent of the minor, or where neither parent is alive, to any other guardian of the minor,—

and the receipt of the minor or, as the case may be, of his parent or guardian for any sum paid under this clause shall be a sufficient discharge therefor.

Rules.

6. *(1)* The Central Government may by notification in the official Gazette make rules relating to any class of savings certificate.

(2) In particular and without prejudice to the generality of the foregoing power, such rules may provide for the application for, the issue, maximum limits of holding and discharge of, and conditions as to interest or discount relating to, any class of savings certificate, and may also provide —

(a) that where any such maximum limits of holdings are exceeded, no interest shall be payable on the amount of such excess ;

(b) that if any interest has been paid on any amount of such excess, it shall be recoverable as an arrear of land revenue or in such other manner as the rules may prescribe.

(3) All rules relating to —

(a) the Post Office Twelve-Year National Savings Certificates in force at the commencement of this Ordinance,

(b) any other class of savings certificate in force at the time when a direction in pursuance of clause *(b)* of sub-section *(2)* of section 1 is made in respect thereof—

shall, so far as they are not inconsistent with the provisions of this Ordinance, continue in force until they are duly rescinded or amended, and shall be deemed to have been made under this Ordinance.

[THE] PRESENT WAR (DEFINITION) ORDINANCE, 1945. (ORDINANCE NO. XXIII OF 1945.)[a]

[14th July, 1945.]

An Ordinance to define "present war" and like expressions occurring in certain contexts.

WHEREAS an emergency has arisen which makes it necessary to define the meaning of the expression "present war" and like expressions when used in certain contexts prior to the outbreak of war between His Majesty and Japan ;

Now, THEREFORE, in exercise of the powers conferred by section 72 of the Government of India Act, as set out in the Ninth Schedule to the Government of India Act, 1935, the Governor-General is pleased to make and promulgate the following Ordinance :—

[a] Published in the Gazette of India, Extraordinary dated 14th July 1945.

Short title, extent and commencement.

1. *(1)* This Ordinance may be called the Present War (Definition) Ordinance, 1945.

(2) It extends to the whole of British India.

(3) It shall come into force at once.

Meaning of "present war" and like expressions in certain contexts.

2. For the removal of doubts it is hereby declared that any reference, express or implied and in whatever form of words, in any provisions made during the period commencing on the 3rd day of September, 1939 and ending on the 8th day of December, 1941 in any enactment or in any notification, rule or order under any enactment or in any contract, deed or other instrument, to the present war or the present hostilities shall, unless in the case of such a reference in any contract, deed or other instrument as aforesaid the subject or context otherwise requires, be deemed to include and always to have included a reference to the present war with Japan, notwithstanding that war had not, when the said provision was made, broken out between His Majesty and Japan :

Provided that nothing in this section shall prejudice the exercise of any power conferred in whatever form of words in any such provision as aforesaid on any Government, authority or person to declare for the purposes of such provision on what specified date the present war or the present hositilities shall be deemed to terminate.

[THE] PRISONERS OF WAR (FORFEITURE OF EMOLUMENTS) ORDINANCE, 1943. (ORDINANCE NO. XXXVI OF 1943.)[a]

[16th October, 1943.]

An Ordinance to provide for the forfeiture in certain cases not provided for by the Indian Army Act, 1911, of pay and allowances of certain persons subject to that Act.

WHEREAS an emergency has arisen which makes it necessary to provide for the forfeiture in certain cases not provided for by the Indian Army Act, 1911, of pay and allowances of certain persons subject to that Act ;

NOW, THEREFORE, in exercise of the powers conferred by section 72 of the Government of India Act, as set out in the Ninth Schedule to the Government of India Act, 1935, the Governor General is pleased to make and promulgate the following Ordinance :—

[a] Published in the Gazette of India, Extraordinary, dated 16th October 1943.

Applied to the Chittagong Hill-tracts with effect from 18-11-1943, *see* Beng. Govt. Notfn. No 210 S, dated 15-11-1943.

Short title and commencement.

1. *(1)* This Ordinance may be called the Prisoners of War (Forfeiture of Emoluments) Ordinance, 1943.

(2) It shall come into force at once.

Interpretation.

2. In this Ordinance, "Indian commissioned officer" means an Indian commissioned officer as defined in clause *(2)* of section 7 of the Indian Army Act, 1911.

Forfeiture of pay and allowances of prisoner of war.

3. *(1)* The whole or any part of the pay and allowances of an Indian commissioned officer may be forfeited by order of the Central Government if the officer is found by a military Court of Enquiry constituted under this Ordinance —

(a) to have deserted to the enemy, or

(b) while in enemy hands, to have served with, or under the orders of, the enemy, or in any manner to have aided the enemy, or

(c) to have allowed himself to be taken prisoner by the enemy through want of due precaution, or through disobedience of orders or wilful neglect of duty, or

(d) having been taken prisoner by the enemy, to have failed to rejoin His Majesty's service when it was possible to do so.

(2) The Central Government may at any time cancel in whole or in part any order made under sub-section *(1)*, and any such cancellation may be with retrospective effect.

Courts of Enquiry.

4. The Commander in Chief of His Majesty's Forces in India or any officer authorised by him in this behalf may constitute a military Court of such composition as the constituting authority thinks fit to enquire into and report to the Central Government on any case of the nature referred to in sub section *(1)* of section 3.

[THE] PUBLIC HEALTH (EMERGENCY PROVISIONS) ORDINANCE, 1944. (ORDINANCE NO. XXI OF 1944.)

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[THE] PUBLIC HEALTH (EMERGENCY PROVISIONS) ORDINANCE, 1944. (ORDINANCE No. XXI OF 1944.)[a]

[20th May, 1944.]

An Ordinance to make special provisions in regard to public health.

WHEREAS an emergency has arisen which renders it necessary to make special provision for preventing the spread of human disease, safeguarding the public health and providing and maintaining adequate medical services and other services essential to the health of the community :—

NOW, THEREFORE, in exercise of the powers conferred by section 72 of the Government of India Act, as set out in the Ninth Schedule to the Government of India Act, 1935, the Governor-General is pleased to make and promulgate the following Ordinance :—

[a] Published in the Gazette of India, Extraordinary, dated 20th May 1944.

Short title, extent and commencement.

1. *(1)* This Ordinance may be called the Public Health (Emergency Provisions) Ordinance, 1944.

(2) It extends to the whole of British India.

(3) It shall come into force at once.

Definitions.

2. In this Ordinance, unless there is anything repugnant in the subject or context—

(a) "appropriate Government" means in relation to cantonment authorities and to port authorities in major ports, the Central Government, and in relation to all other local authorities, the Provincial Government ;

(b) 'local area" means the area within which a local authority exercises its functions ;

(c) "local authority" in this section and in sections 7 to 10 and 14 includes any body, whether incorporated or not, engaged in providing a supply of water ;

(d) "medical establishment" means establishment employed in connection with the provision of medical services ;

(e) "public health services" and "public health establishment" include respectively sanitary, water supply, vaccination, sewage disposal, drainage and conservancy services and establishment maintained for the purposes of such services, and any other service or establisment of a local authority which the appropriate Government may by notification in the official Gazette declare to be a public health service or public health establishment for any purpose of this Ordinance ;

(f) "purpose of this Ordinance" includes the purposes of ensuring the provision of adequate medical services, of preventing the spread of human disease, of safe-guarding the public health and of providing or maintaining services essential to the health of the community.

Power to require local authorities to take health measures.

3. *(1)* The appropriate Government may by order in writing require any local authority to take within such period as may be specified in the order such measures as may be so specified, being measures which are in the opinion of that Government necessary for any purpose of this Ordinance ; and thereupon it shall be the duty of the local authority to comply with the order within the specified period.

(2) If in the opinion of the appropriate Government a local authority which has been ordered under sub-section *(1)*, to take any measures has failed to take, or is unlikely to complete, such measures within the period specified in the order, the appropriate Government may, without prejudice to any other action which may be taken under this Ordinance, authorise any person to take or complete, as the case may be, the said measures ; and the person so authorised may for the purpose exercise all or any of the powers of the local authority or of any committee or officer of the local authority conferred by or under any law for the time being in force, issue such directions as he thinks fit to the officers or servants of the local authority, and if he finds it necessary or expedient so to do, employ any outside agency.

(3) All charges and expenses incurred by a local authority in complying with an order under sub-section *(1)* or by a person authorised under sub-section *(2)* shall, except to such extent, if any, as the appropriate Government may direct to be paid out of its revenues, be paid out of the funds of the local authority.

Power to appoint additional health staff.

4. *(1)* The appropriate Government may, if it considers it necessary for any purpose of this Ordinance, appoint in any local area additional medical or public health establishment to perform such duties and exercise such functions as the appropriate Government may direct.

(2) Such additional establishment shall, unless and to such extent as the appropriate Government otherwise directs, be under the control of the appropriate Government, but its salaries and allowances or any specified portion thereof shall, if the appropriate Government so orders, be paid out of the funds of the local authority.

Powers of superintendence.

5. *(1)* The appropriate Government may, if it considers it necessary for any purpose of this Ordinance, by order in writing assume the superintendence of all or any of the medical and public health services of any local authority.

(2) Upon the assumption of superintendence under sub-section *(1)*,—

(a) the appropriate Government may by order in writing specify the scale of the medical or public health establishment concerned to be maintained by the local authority, the qualifications to be required for appointment to posts in such establishment, and the pay and other conditions of service of such establishment;

(b) the powers of appointment, dismissal and punishment of, and grant of leave to, members of such establisment shall vest in such authority as the appropriate Government may appoint in this behalf ;

(c) the appropriate Government may by order in writing specify the powers to be exercised by Health Officers employed under the local authority ;

(d) the appropriate Government shall have power to inspect, superintend and control the operations of the local authority in regard to any purpose of this Ordinance, and may by order in writing authorise persons to carry out such inspection, superintendence and control and define their powers and duties when so acting ;

(e) the costs of and incidental to the services and establishments concerned shall continue to be paid out of the funds of the local authority.

Power to take over administration of services.

6. The appropriate Government may, if it considers it necessary for any purpose of this Ordinance, authorise by order in writing any person to take over from any local authority the administration of all or any of its medical and public health services or of any medical institution maintained by the local authority; and the person so authorised may for the purposes of such administration exercise all the powers specified in sub-section *(2)* of section 3 of a person authorised under that sub-section; and all charges and expenses incurred by the person authorised under this section shall, except to such extent, if any, as the appropriate Government may direct to be paid out of its revenues, be paid out of the funds of the local authority.

Water-supply.

7. *(1)* A local authority may, with the previous sanction of the appropriate Government, supply water to any other local authority or to any other authority or person within or without its local area upon such terms as may be agreed, notwithstanding any provision prohibiting or restricting such supply contained in any other law.

(2) The appropriate Government may by order in writing direct any local authority to supply water to any area or to any authority or person within or without its local area at such places and in such quantities as may be specified in the order, subject to such payment being made therefor and to such other conditions as the appropriate Government may consider reasonable.

Power to give directions.

8. For the purpose of carrying into effect any of the foregoing provisions of this Ordinance or any order made thereunder, the appropriate Government may in writing give to any local authority such directions as it thinks fit, and it shall be the duty of the local authority to comply therewith.

Power to supersede local authorities.

9. *(1)* If the appropriate Government is of opinion that any local authority has failed to comply, or has delayed in complying, with any order or rule made or direction given under this Ordinance or has failed to act in accordance with or give effect to any notification issued under section 10, the appropriate Government may by order in writing supersede the local authority for such period as may be specified in the order.

(2) When an order of supersession has been made under sub section *(1)*—

(a) all the members of the local authority shall, as from the date of supersession, vacate their offices as such members;

(b) all the powers and duties which may by or under any law for the time being in force be exercised or

performed by or on behalf of the local authority shall, during the period of supersession, be exercised and performed by such person as the appropriate Government may authorise in this behalf;

(c) all property vested in the local authority shall during the period of supersession, vest in the appropriate Government.

(3) On the expiration of the period of supersession specified in the order under sub-section *(1)*, the appropriate Government may by order in writing—

(a) extend the period for such further term as it may consider necessary; or

(b) direct that the local authority shall be reconstituted in the manner provided for its constitution by or under the law relating thereto, and in such case any persons who vacated their offices under clause *(a)* of sub-section *(2)* shall not be deemed to be disqualified thereby for election, appointment or nomination; or

(c) direct that the local authority shall be reconstituted by the persons who vacated their offices under clause *(a)* of sub-section *(2)* and shall recommence functioning as if it had not been superseded :

Provided that the appropriate Government may at any time before the expiration of the period of supersession whether as originally specified under sub-section *(1)* or as extended under this sub section, make an order under clause *(b)* or clause *(c)* of this sub-section.

Power to modify rules, byelaws, etc.

10. In relation to any local area the appropriate Government may by notification in the official Gazette make any rules, byelaws, regulations or orders connected with any purpose of this Ordinance which the local authority would under any law for the time being in force be competent to make, and may in like manner amend or suspend the operation of any such rule, byelaw, regulation or order made by the local authority :

Provided that, notwithstanding anything to the contrary in any other law, it shall not be necessary when issuing any such notification to comply with the provisions of section 23 of the General Clauses Act, 1897, or the similar provisions of any local law or with any law providing for any procedure preliminary to the making of any such rule, byelaw, regulation or order :

Provided further that it shall be sufficient for the purpose of—

(a) cancelling any rule, byelaw, regulation or order made by the appropriate Government by notification under this section, or

(b) restoring to its form immediately prior to its amendment by notification under this section any rule, byelaw, regulation or order so amended—

to rescind the notification.

Power to make rules.

11. *(1)* The appropriate Government may make rules for carrying out the purposes of this Ordinance, and in particular and without prejudice to the generality of the foregoing power, such rules may—

(a) prescribe any disease against the spread of which special precautions are considered by the appropriate Government to be necessary;

(b) prohibit any act which in the opinion of the appropriate Government is likely to lead to or facilitate the spread of any disease prescribed under clause *(a)*.

(c) provide for the restraint, segregation and restriction of movement of persons suffering or suspected to be suffering from any such disease;

(d) provide for the temporary transfer of members of the medical and public health establishments of any local authority to service in another local area under the appropriate Government or another local authority.

(2) In making rules under this section, the appropriate Government may provide that a breach of any of the rules shall be punishable with imprisonment which may extend to three months or with fine or with both.

Certain persons deemed to be public servants.

12. All persons authorised under sub-section *(2)* of section 3, clause *(d)* of sub-section *(2)* of section 5, section 6 or clause *(b)* of sub-section *(2)* of section 9 shall be deemed to be public servants within the meaning of the Indian Penal Code.

Protection of action taken under this Ordinance.

13. No suit, prosecution or other legal proceeding shall lie against any person for anything in good faith done or intended to be done under this Ordinance.

Effect of other laws.

14. The provisions of this Ordinance and of any rules and orders made thereunder shall have effect notwithstanding anything contained in any law defining the powers, duties or obligations of a local authority.

[THE] REGISTRATION OF TRANSFERRED COMPANIES ORDINANCE, 1942.

(ORDINANCE No. LIV OF 1942.)[a]

[8th October, 1942]

An Ordinance to provide for enabling companies incorporated by or under the law in force in certain parts of His Majesty's dominions b*[outside India] to continue to operate effectively by removal* c*[to the Provinces of India].*

WHEREAS an emergency has arisen which makes it necessary to provide for enabling companies incorporated by or under the law in force in certain parts of His Majesty's[1] dominions b[outside India] to continue to operate effectively by removal c[to the Provinces of India.]

NOW, THEREFORE, in exercise of the powers conferred by section 72 of the Government of India Act, as set out in the Ninth Schedule to the Government of India Act, 1935 (26 Geo. 5, c. 2), the Governor General is pleased to make and promulgate the following Ordinance :—

[a] Published in the Gazette of India, Extraordinary, dated 8th October 1942.

Applied to British Baluchistan, *see* Notfn. No. 95-W, dated 28-10-1942, Gaz. of India, 1942, Prat I, p. 1656; the Darjeeling District and to the partially excluded areas of the Mymensingh District, *see* Beng. Govt. Notfn. No. 6022-Com., dated 28-11-1942; the partially excluded areas of Assam, *see* Assam Govt. Notfn. No. F. M. 22/43/S, dated 16-2-1943; the partially excluded area in Orissa, except the district of Angul and the Khondmals, *see* Orissa Govt. Notfn. No. 30491 J-1/43-Com. (c), dated 23-2-1942; the partially excluded areas in the C. P. and Berar, *see* C. P. & Berar Govt. Notfn. No. 392/C.R. 119/II, dated 26-2-1943; the partially excluded areas in Madras Presidency, *see* Mad. Govt. Notfn. No. 4119, dated 24-2-1943; the partially excluded areas in the

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Section 11 — Note 1

[1] Section 11, Rules under—Rr. 3 & 4—Contravention of—Test to determine is how the advertisement and signboard would be regarded by the man in street and not by the members of medical profession. (Vol 34) 1947 Cal 382 (383) : 4 Cri L Jour 231.

Bombay Province, *see* Bom. Govt. Notfn. No. 4885/83/1860, dated 8-2-1943; the districts of the Chota Nagpur Division and the Santhal Parganas, *see* Bihar Govt. Notfn. No. 5148-13-48/42-Com., dated 6-11-1942; the partially excluded areas of the Jaunsar-Bawar Pargana of the Dehra Dun District and the portion of the Mirzapur District south of the Kaimour Range, *see* U. P. Govt. Notfn. No. 76-R/XII-c-5/43, dated 12-2-1943.

This Ordinance is amended by Act XXX of 1946.

[b] *Substituted* for 'outside British India' by the Indian Independence (Adaptation of Central Acts and Ordinances) Order, 1948 [23-3-1948.] [c] *Substituted* for 'to British India' *ibid.*

Short title, extent and commencement.

1. *(1)* This Ordinance may be called the Registration of Transferred Companies Ordinance, 1942.

(2) It extends to the whole of British India.

(3) It shall come into force at once.

Registration in British India of companies incorporated elsewhere in His Majesty's dominions

2. *(1)* If the Central Government is satisfied as respects any company incorporated by or under the law in force in any Dominion within the meaning of the Statute of Westminster, 1931 (22 Geo. 5, c. 4), or [a][in Pakistan or in Ceylon], or in any Colony, or in any British Protectorate, or in any territory, in respect of which a mandate on behalf of the League of Nations has been accepted by His Majesty and is being exercised by His Majesty's Government in the United Kingdom, that it is expedient for any of the purposes specified in sub-section *(1)* of section 2 of the Defence of India Act, 1939, to exercise the powers conferred on the Central Government by this Ordinance, the Central Government may by order direct that the company shall be registered under and in accordance with this Ordinance by a Registrar of Companies in [b][a Province of India] and subject to the provisions of this Ordinance, where such a company is so registered, it shall, except so far as the order of the Central Government otherwise provides, be treated for all purposes as if it were a company incorporated under the India Companies Act, 1913, and registered under that Act in [b][a Province of India] and not elsewhere.

(2) Any such order may, in respect of the company to which it relates,—

(a) modify, adapt or exclude any of the provisions of the Indian Companies Act, 1913.

(b) modify, adapt or exclude any provisions of the memorandum and articles of association of the company as in force immediately before the making of the order, or of any other instrument as then in force regulating the constitution or functions of the company;

(c) contain such transitional provisions as appear to the Central Government to be necessary or expedient for enabling the company to carry on or recommence business outside the territory under the law of which it was incorporated immediately before the making of the order; and

(d) contain such incidental, supplemental and consequential provisions as appear to the Cenral Government to be necessary or expedient for the purposes of the order.

(3) The Central Government may make rules—

(a) regulating the manner in which companies are to be registered under this Ordinance and the matters which are to be registered under this Ordinance in relation to any company, and

(b) imposing upon Registrars of Companies under the Indian Companies Act, 1913, such duties in respect of the keeping of registers, books and other documents relating to the companies so registered as may be specified in the rules.

(4) The registration of a company under this Ordinance shall not affect any liability of the company or any other person to income-tax or excess profits tax and for the purposes of either such tax a company shall not be deemed to be resident in [c][a Province] by reason only of the fact that the control and management of the affairs of the company is temporarily situated wholly in [c][a Province] in consequence of the company having been registered in [c][a Province] under this Ordinance.

[a] *Substituted* for 'in British Burma' by the Indian Independence (Adaptation of Central Acts and Ordinances) Order, 1948. [23-3-1948]. [b] *Substituted* for 'British India', *ibid.* [c] *Substituted* for 'British India', *ibid.*

Cancellation of registration.

[a][2A. The Central Government may at any time by order cancel the registration of any company under this Ordinance on such terms and conditions as may be specified in the order.]

[a] *Inserted* by the Registration of Transferred Companies (Amendment) Act, 1946 (XXX of 1946), S. 2. [22-11-1946.]

Delegation of powers.

3. The powers conferred on the Central Government [a][by section 2, (except the power to make rules conferred by sub-section *(3)* thereof) and section 2A] may, if the Central Government so directs, be exercised in a Governor's Province by the Provincial Government and in a Chief Commissioner's Province by the Chief Commissioner.

[a] *Substituted* by the Registration of Transferred Companies (Amendment) Act, 1946 (XXX of 1946), S. 3. [22-11-1946.]

[THE] RESTRICTION AND DETENTION ORDINANCE, 1944 (ORDINANCE NO. III OF 1944)

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6. Validation of orders made under rule 26, Defence of India Rules.
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8. Order of delegation made in pursuance of delegation under section 5 to be reported to Government for confirmation.
9. Duration of orders of detention made under section 3.
10. Saving as to orders.
11. Disclosure of grounds of detention, etc., communicated or of contents of written representation made under section 7.
12. Protection of action taken under this Ordinance.
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[THE] RESTRICTION AND DETENTION ORDINANCE, 1944.
(ORDINANCE NO. III OF 1944).[a]

[15th January, 1944.]

An Ordinance to empower the Central Government and the Provincial Government and any officer or authority to whom the Central Government or the Provincial Government may delegate its powers in this behalf to restrict the movements and actions of and to place in detention and detain certain persons, to regulate the exercise of these powers and the duration of orders made in such exercise, and to confirm the validity of the past exercise of such powers under rule 26 of the Defence of India Rules.

WHEREAS, an emergency has arisen which makes it necessary to empower the Central Government and the Provincial Government and any officer or authority to whom the Central Government or the Provincial Government may delegate its powers in this behalf to restrict the movements and actions of and to place in detention and detain certain persons, to regulate the exercise of these powers and the duration of orders made in such exercise, and to confirm the validity of the past exercise of such powers under rule 26 of the Defence of India Rules.

NOW, THERFORE, in exercise of the powers conferred by section 72 of the Government of India Act, as set out in the Ninth Schedule to the Government of India Act, 1935, the Governor-General is pleased to make and promulgate the following Ordinance :—

[a] Published in the Gazette of India Extraordinary, dated 15th January 1944.

This Ordinance is amended by Ordinance No. 22 of 1944.

Short title, extent, application and commencement.

1. *(1)* This Ordinance may be called the Restriction and Detention Ordinance, 1944.

(2) It extends to the whole of British India, and it applies also—

(a) to British subjects and servants of the Crown in any part of India,

(b) to British subjects who are domiciled in any part of India wherever they may be,

(c) in respect of the regulation and discipline of any naval, military or air force raised in British India, to members of and persons attached to, employed with, or following, that force wherever they may be, and

(d) to, and to persons on, ships and aircraft registered in British India wherever they may be.

(3) It shall come into force at once.

Interpretation.

2. In this Ordinance, unless there is anything repugnant in the subject or context, "Provincial Government" means, in relation to a Chief Commissioner's Province, the Chief Commissioner.

Power to make orders restricting the movements or actions of or detaining certain persons.

3. *(1)* The Central Government or the Provincial Government, if satisfied with respect to any particular person that with a view to preventing him from acting in any manner prejudicial to the defence of British India, the public safety, the maintenance of public order, His Majesty's relations with foreign powers or Indian States, the maintenance of peaceful conditions in Tribal Areas or the efficient prosecution of the war it is necessary so to do, may make an order —

(a) directing such person to remove himself from British India in such manner, by such time and by

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Preamble — Note 1

[1] This Ordinance is not *ultra vires* of the powers of the Governor-General because it deals with exclusively a provincial subject (List II, entry I). As the Indian Legislature is by reason of a proclamation of emergency under S. 102 competent to legislate both upon central subjects and upon provincial subjects, there is no justification for limiting the ordinance-making power to Lists I and III subjects. (Vol 31) 1944 F C 86 (89) : I L R (1944) Kar F C 172 : 23 Pat 678 : (1944) 6 F C R 295 (FC).

[2] The reference to "the efficient prosecution of the war" in the Ordinance must be understood in the light of the circumstances in which the Ordinance came to be passed. And since efficient prosecution of war was necessary for Defence of India this Ordinance is not *ultra vires* the Governor-General. (Vol 32) 1945 F C 18 (19): I L R (1945) Kar F C 13 : 1945 F C R 81 : 24 Pat 187 : 46 Cri L Jour 559 (FC) ✠ (Vol 32) 1945 Pat 44 (53) : 23 Pat 968 (FB) ✠ (Vol 32) 1945 Pat 59 (61) : 23 Pat 475 : 46 Cri L Jour 460 (DB).

SECTION 3 — SYNOPSIS

1. Object of the section.
2. Authority to be satisfied.
3. 'If satisfied.'
4. 'From acting.'
5. Orders directing detention—General.
6. Burden of proof.
7. Clause (1) (c).

1. Object of the section. — [1] The powers conferred on the Executive under Ordinance 3 of 1944 are for the purpose of preventive detention and are not punitive in their nature. The Executive should not detain a subject in order to punish him for what he has already done but in order to prevent him from doing something which in the opinion of the Executive is likely to affect the safety of the State or the efficient prosecution of the war. (Vol 33) 1946 Bom 32(33)(DB).

2. Authority to be satisfied. — [1] The Governor who has to be satisfied before the exercise of powers under S. 3, is as a part of the Provincial Executive and not in any way in contrast with or in contradiction to the Provincial Executive. (Vol 33)1946 Bom 32(34)(DB).

3. 'If satisfied.' — [1] The detaining authority must consider the case with extreme care and caution; the liberty of a subject is not to be lightly taken away. The satisfaction, which the law requires on the part of the detaining authority is a reasonable satisfaction, not vitiated by any consideration which is foreign to the scope and object of Ordinance. (Vol 33) 1946 Bom 32 (35) (DB). (Where an order of detention is made with the object of considering whether the Criminal Tribes Act can be used against the detenue and pending consideration of the use of that Act, the order of detention under this Ordinance is illegal.)

[2] The Court is not entitled to examine the sufficiency of the Governor's reasons, but only the fact of his satisfaction. All that the Court is entitled to consider is whether the Governor was in fact satisfied that the detention was necessary when he made the order and whether his order was *bona fide*. A mere allegation of want of good faith cannot entitle the Courts to examine the materials on which the Governor was satisfied of the necessity for detaining. (Vol 32) 1945 Pat 44 (51) : 23 Pat 968 (FB).

[3] Evidence for conviction and evidence for detention is different—Evidence though insufficient to secure conviction may be sufficient to order detention of the accused. (Vol 32) 1945 Bom 533 (536) : 47 Cri L Jour 297 (DB).

4. 'From acting.' — [1] The words "from acting" in S. 3 (1) do not indicate persons considered to be

such route as may be specified in the order, and prohibiting his return to British India;

(b) directing that he be detained;

(c) directing that except in so far as he may be permitted by the provisions of the order, or by such authority or person as may be specified therein, he shall not be in any such area or place in British India as may be specified in the order;

(d) requiring him to reside or remain in such place or within such area in British India as may be specified in the order and if he is not already there to proceed to that place or area within such time as may be specified in the order;

(e) requiring him to notify his moyements or to report himself or both to notify his movements and report himself in such manner at such times and to such authority or person as may be specified in the order;

(f) imposing upon him such restrictions as may be specified in the order in respect of his employment or business in respect of his association or communication with other persons, and in respect of his activities in relation to the dissemination of news or propagation of opinions;

(g) prohibiting or restricting the possession or use by him of any such article or articles as may be specified in the order;

(h) otherwise regulating his conduct in any such particular as may be specified in the order :

Provided that no order shall be made under clause *(a)* of this sub-section in respect of any British Indian subject of His Majesty;

Provided further that no order shall be made by the Provincial Government under clause *(c)* of this sub-section directing that any person ordinarily resident in the Province shall not be in the Province.

(2) An order made under sub-section *(1)* may require the person in respect of whom it is made to enter into a bond; with or without sureties, for the due performance of, or as an alternative to the enforcement of, such restrictions or conditions made in the order as may be specified in the order.

(3) If any person is in any area or place in contravention of an order made under the provisions of this section or fails to leave any area or place in accordance with the requirements of such an order, then, without prejudice to the provisions of sub-section *(8)*, he may be removed from such area or place by any police officer or by any person acting on behalf of Government.

(4) So long as there is in force in respect of any person such an order as aforesaid directing that he be detained, he shall be liable to be removed to and detained in such place and under such conditions, including conditions as to maintenance, discipline and the punishment of offences and breaches of discipline, as the Central Government, or the Provincial

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Section 3 — Note 4 *(contd.)*

actually acting in a prejudicial manner at the time of the making of the order. Persons who may act in future in a prejudicial manner can also be detained. (Vol 32) 1945 Pat 44 (53) : 23 Pat 968 (FB).

5. Orders directing detention—General. — [1] Order directing detention of a person is the same thing as order for his detention. (Vol 32) 1945 Pat 44 (49) : 23 Pat 968 (FB).

[2] The Ordinance is applicable even to persons already in detention who can be placed in detention under S. 3 (1) (b) of the Ordinance. (Vol 32) 1945 Pat 44 (53) : 23 Pat 968 (FB).

[3] An order of detention is not invalid because it does not bear the seal of the Government of the Province. There is no rule requiring such an order to be so sealed. (Vol 32) 1945 Pat 44 (49) : 23 Pat 968 (FB).

[4] Previous order of detention under R. 26, Defence of India Rules — Governor can cancel order and pass fresh order under S. 3 (1) (b) — Fresh order need not be based on fresh materials — That fresh order was passed while detenu was in detention does not justify inference that there was no fresh material. (Vol 32) 1945 Pat 44 (52, 54) : 23 Pat 968 (FB).

[5] Where an original order of detention passed under S. 3 is bad and illegal, a subsequent order directing it to continue cannot validate it. Both orders must be held to be invalid. (Vol 33) 1946 Bom 32 (36) (DB).

[6] Detenu detained under order No. 963C made under R. 26, Defence of India Rules — Federal Court deciding that validity of order under R. 26, Defence of India Rules, could be investigated under S. 491, Criminal P. C.—Governor cancelling order No 963C and passing fresh order of detention under S. 3 (1) (b)—Subsequent order held was made *bona fide* and not to circumvent decision of Federal Court. (Vol 32) 1945 Pat 44 (49, 50) : 23 Pat 968 (FB).

6. Burden of proof. — [1] Detention order—Bad faith on part of authority making order cannot be presumed—Presumption is of good faith. (Vol 32) 1945 Pat 44 (51) : 23 Pat 968 (FB).

[2] *Bona fide* of detention order challenged—Crown is not bound in every case to file affidavit that Governor had applied his mind to case and was in fact satisfied of necessity of order before he made it—Production of detention order is sufficient (Vol 32) 1945 Pat 44 (56) : 23 Pat 968 (FB). (Per *Meredith J.*)

[2] Detention order challenged by detenu—Mode in which Crown should present its case indicated. (Vol 32) 1945 Pat 44 (57) : 23 Pat 968 (FB). (Per *Sinha J.*)

[4] Though it is open to the detenu detained under Ordinance to show that the order of detention was not in fact made by the authority empowered to make it or that it was a fraudulent exercise of the power, the burden of substantiating these pleas lies on the detenu. The mere fact that the detenu challenges the factum or the *bona fides* of the order or the fact that the officers of the Government must naturally be in possession of information on the subject cannot be said to be "proof to the contrary" so as to make it incumbent on the Government to adduce evidence in support of the order. (Vol 32) 1945 F C 18 (19, 20) : I L R (1945) Kar F C 13 : 24 Pat 187 : 1945 F C R 81 (FC).

[5] Detention order supported by affidavit—Onus on the person detained is practically impossible of discharge, the only method of escape being to show that the alleged order is no order at all—High Court cannot question motive of authority concerned unless fraud or mistake is proved. (Vol 32) 1945 Bom 533 (534, 536) : 47 Cri L Jour 297 (DB).

[6] Detenu detained under R. 26, Defence of India Rules, by order No. 963C—Application by detenu under S. 491, Criminal P. C., rejected on ground that High Court's jurisdiction was barred by S. 10 of Ordinance —Federal Court setting aside High Court's orders and remitting application for disposal to High Court—Thereafter Governor cancelling Order No. 963C and passing fresh order No. 3929C for detention under S. 3 (1) (b) of Ordinance — Detenu held not entitled to release merely by showing that order No. 963C was illegal—He must show that order No. 3929C was also illegal. (Vol 32) 1945 Pat 44 (48, 49) : 23 Pat 968 (FB).

7. Clause (1) (c).—[1] Section 3 (1) (c) falls within Sch. 7 List II, Item 1 and List III, Item 2, Government of India Act, and therefore is not *ultra vires* of powers of Governor-General. (Vol 32) 1945 Pat 444 (445, 446) : 24 Pat 418 : 47 Cri L Jour 463 (DB).

Government, as the case may be, may from time to time by general or special order specify.

(5) Where the power to specify the place of detention is exercisable by the Provincial Government the power of the Provincial Government shall include power to specify a place of detention outside the Province:

Provided that—

(a) no such place shall be specified save with previous consent of the Provincial Government of the Province in which the place is situated and where the place is situate in a Chief Commissioner's Province, of the Central Government.

(b) the power to specify the conditions of detention shall be exercised by the Provincial Government of the Province in which the place is situate, or where the place is situate in a Chief Commissioner's Province, by the Central Government.

(6) If the Central Government or the Provincial Government, as the case may be, has reason to believe that a person in respect of whom such an order as aforesaid has been made directing that he be detained has absconded or is concealing himself so that the order cannot be exercised that Government may—

(a) make a report in writing of the fact to a Presidency Magistrate or a Magistrate of the first class having jurisdiction in the place where the said person ordinarily resides; and thereupon the provisions of sections 87, 88 and 89 of the Code of Criminal Procedure, 1898 (V of 1898) shall apply in respect of the said person and his property as if the order directing that he be detained were a warrant issued by the Magistrate;

(b) by order notified in the official Gazette directing the said person to appear before such officer, at such place and within such period as may be specified in the order, and if the said person fails to comply with such direction he shall, unless he proves that it was not possible for him to comply therewith and that he had, within the period specified in the order, informed the officer of the reasons which rendered compliance therewith impossible and of his whereabouts, be punishable with imprisonment for a term which may extend to seven years, or with fine, or with both.

(7) The Central Government or the Provincial Government may, by general or special order made with the consent of the Crown Representative, provide for the removal of any person detained by it under sub-section *(1)* to, and for the detention of such person in, any area administered by the Crown Representative.

(8) If any person contravenes any order made under this section, other than an order of the nature referred to in clause *(b)* of sub-section *(6)*, he shall be punishable with imprisonment for a term which may extend to five years, or with fine, or with both, and if such person has entered into a bond in pursuance of the provisions of sub-section *(2)*, his bond shall be forfeited, and any person bound thereby shall pay the penalty thereof, or show cause to the satisfaction of the convicting Court why such penalty should not be paid.

(9) Any order made under the powers given by this section shall have effect notwithstanding anything inconsistent therewith contained in any Act, Ordinance or Regulation other than this Ordinance, or in any instrument having effect by virtue of any such Act, Ordinance or Regulation.

Powers of photographing, etc., persons.

4. *(1)* The Central Government or the Provincial Government may, by order, direct that any person, in respect of whom an order has been made under sub-section *(1)* of section 3, shall—

(a) allow himself to be photographed,

(b) allow his finger and thumb impressions to be taken,

(c) furnish specimens of his handwriting and signature, and

(d) attend at such time and place before such authority or person as may be specified in the order for all or any of the purposes mentioned in this sub-section.

(2) If any person contravenes any order made under this section, he shall be punishable with imprisonment for a term which may extend to six months or with fine, or with both.

Delegation of powers and duties of Central and Provincial Governments to other authorities and to officers.

5. *(1)* The Central Government may by order direct that any power or duty which under section 3 or section 4 is conferred or imposed upon the Central Government shall, in such circumstances and under such conditions, if any, as may be specified in the direction, be exercised or discharged—

(a) by any officer or authority subordinate to the Central Government, or

(b) by any Provincial Government or by any officer or authority subordinate to such Government.

(2) A Provincial Government may by order direct that any power or duty which by or under section 3 or by section 4 is conferred or imposed on the Provincial Government shall, in such circumstances and under such conditions, if any, as may be specified in that direction, be exercised or discharged by any officer or authority, not being (except in the case of a Chief Commissioner's Province) an officer or authority subordinate to the Central Government.

Validation of orders made under rule 26, Defence of India Rules.

6. *(1)* No order made before the commencement of this Ordinance under rule 26 of the Defence of India Rules shall after such commencement be deemed to be invalid or be called in question on the ground merely that the said rule purported to confer powers in excess of the powers that might at the time the said order was made be legally conferred by a rule made under section 2 of the Defence of India Ordinance, 1939, or under section 2 of the Defence of India Act, 1939.

(2) Every such order shall on the commencement of this Ordinance be deemed to have been, and shall have effect as if it had been made under this Ordinance,

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Section 6— Note 1

[1] By reason of Ss. 6 and 10 the High Court no longer has jurisdiction to hear applications under S. 491, Cr. P. Code by persons detained under R. 26, Defence of India Rules, pending before it. All such proceedings under S. 491 as were pending when the Ordinance came into force are discharged. (Vol 31) 1944 Lah 142 (145) : 45 Cri L Jour 711: I L R (1946) Lah 147 (FB).

[2] Section 6 (1) is not retrospective in such a way as to be invalid. (Vol 32) 1945 Pat 59 (61) : 23 Pat 475 : 46 Cri L Jour 460 (DB).

[3] The word "such" in the expression "every such order" in cl. (2) of S. 6 can only attract the qualification to be found in the opening words of cl. (1), namely, 'order made before the commencement of this Ordinance under Rule 26 of the Defence of India Rules". The further qualification to be extracted from the reference there contained to the ground of invalidity arising out of the *ultra vires* character of R. 26 could not be imported into cl. (2). (Vol 31) 1944 F C 86 (92, 93) : I L R (1944) Kar (F C) 172 : 23 Pat 678 : 1944 F C R 295 (F C).

[4] Clause 6 (2) together with the proviso makes it clear that the detention of persons originally detained

and as if this Ordinance had been in force at the time the order was made :

Provided that section 7 and section 9 of this Ordinance shall apply in relation to any order made under clause *(b)* of sub-rule *(1)* of rule 26 of the Defence of India Rules as if that order had been made on the date of the commencement of this Ordinance, and section 8 of this Ordinance shall not apply to any such order.

(3) Nothing in the foregoing provisions of this section shall apply to any such order which has already been cancelled by or in consequence of an order of a competent Court :

Provided that any such cancellation shall not prevent the making under this Ordinance of a fresh order to the same effect as the order cancelled.

Grounds of order to be disclosed to person affected by the order.

7. Where an order is made in respect of any person under clause (*b*) of sub-section (1) of section 3, as soon as may be after the order is made, and where before the commencement of this Ordinance an order has been made in respect of any person under clause *(b)* of sub-rule (1) of rule 26 of the Defence of India Rules, as soon as may be after the commencement of this Ordinance the authority making or which made the order shall communicate to the person affected thereby so far as such communication can be made without disclosing facts which the said authority considers it would be against the public interest to disclose, the grounds on which the order has been made against him and such other particulars as are in the opinion of such authority sufficient to enable him to make if he wishes a representation against the order, and such person may at any time thereafter make a representation in writing to such authority against the order, and it shall be the duty of such authority to inform such person of his right of making such representation and to afford him the earliest practical opportunity of doing so.

Order of detention made in pursuance of delegation under section 5 to be reported to Government for confirmation.

8. When any order is made in respect of any person under clause *(b)* of sub-section *(1)* of section 3 by an officer or authority empowered in pursuance of section 5, that officer or authority shall forthwith report the fact to the Government to which he or it is subordinate, and that Government shall, after considering all the circumstances of the case including any representation made by the person affected by the order, make an order confirming or cancelling the order.

Duration of orders of detention made under section 3.

9. No order made or deemed under the provisions of section 6 to have been made under clause *(b)* of sub-section *(1)* of section 3 shall be in force for more than six months from the date on which it is made :

Provided that the Government which made the order, or where the order was made by an officer or authority empowered in pursuance of section 5 of this Ordinance or sub-section *(4)* or sub-section *(5)* of section 2 of the Defence of India Ordinance 1939, or the Defence of India Act, 1939, the Government to which such officer or authority is subordinate, may after a further consideration of all the circumstances of the case [a][and at any time within thirty days before the expiry of the said six months, direct by an endorsement on the original order or otherwise that the order shall continue in force,] and the order as so extended shall continue in force for a further period of six months [b][from the date on which but for such direction it would have ceased to be in force] and thereafter if and so often as it is again extended by a further similar direction made in the same manner.

[a] *Substituted* for the words "direct that the order shall continue in force notwithstanding that the said period of six months has expired" by the Restriction and Detention (Amendment) Ordinance, 1944 (No. 22 of 1944), S. 2 [27-5-1944].

[b] *Inserted, ibid.*

Saving as to orders.

10. *(1)* No order made under this Ordinance, and no order having effect by virtue of section 6 as if it had been made under this Ordinance, shall be called in question in any Court, and no Court shall have power to make any order under section 491 of the Code of Criminal Procedure, 1898, in respect of any order made under or having effect under this Ordinance, or in respect of any person the subject of such an order.

Section 6 — Note 1 *(contd.)*

under Defence of India Rules, R. 26, is now to be treated as the detention of those persons under the Restriction and Detention Ordinance as if an order had been made under that Ordinance on 15th January 1944. It cannot be said that the proviso to Cl. 6 (2) is repugnant to the provisions of Cl. 6(2) itself. Clause 6 (2) relates to all orders under the Ordinance whereas the proviso relates to those made under R. 26 (1) (b), Defence of India Rules, namely, detention. (Vol 31) 1944 Cal 284 (285) : 45 Cri L Jour 745 (D B).

[5] Section 6 (2) does not validate a document which is not an order at all, even though it bears the signature of a duly authorised officer, if it can be shown that the officer never applied his mind when he affixed his signature to it ; and it is only orders made valid by S. 6 (1) to which S. 6 (2) applies and is limited. (Vol 32) 1945 Bom 212 (216) : I L R (1945) Bom 317 : 46 Cri L Jour 608 (FB). (Effect of S. 6 (1), explained.)

Section 7—Note 1

[1] Great vigilance is necessary in enforcing the privilege under the section. Inordinate delay in sending notice—In appropriate circumstances High Court may find that detention though not illegal in origin had become improper within meaning of S. 491, Criminal P. C. (Vol 33) 1946 Oudh 183 (187): 20 Luck 535 (DB).

Section 9 — Note 1

[1] Detention under an order made under S. 9 continuing in force an order previously made, which is ineffective and inoperative as the order was not served as required by R. 119 of the Defence of India Rules, is not legal. (Vol 32) 1945 Nag 159 (163) : I L R (1945) Nag 382 (DB)

Section 10 — Note 1

[1] The recital in preamble of the Ordinance as to the necessity "to confirm the validity of the past exercise of such powers under R. 26, Defence of India Rules" has relation to both S. 10 and S. 6. (Vol 31) 1944 F C 86 (90) : I L R (1944) Kar. F C 172 : 23 Pat. 678 : (1944) F C R 295 (FC).

[2] Provision in Ss. 10 and 6 that the order of detention shall not be called in question in any Court is valid. (Vol 31) 1944 F C 86 (90) : I L R (1944) Kar F C 172 : 23 Pat. 678 : (1944) F C R 295 (FC). ((Vol 30) 1943 F C 75 : I L R (1943) Kar F C 103 : (1944) F C R 1 (FC), *Rel. on.*)

[3] This section does not purport to repeal S. 491, Criminal P. C. All it does is to interdict the High Court from exercising the power or jurisdiction conferred by S. 491 in certain class of cases, which is permissible for the ordinance-making authority to do. (Vol 31) 1944 F C 86 (90, 94, 95) : I L R (1944) Kar F C 172 : 23 Pat 678 : (1944) F C R 295 (FC). (Nature and extent of curtailment of High Court's power indicated.)

[4] Jurisdiction of the Court to question the grounds or motives for making the orders or for calling them in

(2) If at the commencement of this Ordinance there is pending in any Court any proceeding by which the validity of an order having effect by virtue of section 6 as if it had been made under this Ordinance is called in question, that proceeding is hereby discharged.

(3) Where an order purports to have been made by any authority in exercise of any power conferred by or under this Ordinance, the Court shall, within the meaning of the Indian Evidence Act, 1872, presume that such order was so made by that authority.

Disclosure of grounds of detention, etc, communicated or of contents of written representation made under section 7.

11. *(1)* [a][No Court shall, except for the purposes of a prosecution for an offence punishable under sub-section (2), allow] any statement to be made or any evidence to be given before it of the substance of any communication made under section 7 of the grounds on which [b][any order referred to in that section] has been made against any person, or of any particulars disclosed in connection [c][therewith under that section,] or of any representation made under that section against any order, and, notwithstanding anything contained in the Indian Evidence Act, 1872, no Court shall be entitled to require any public officer to produce before it, or to disclose the substance of, any such communication of grounds, particulars disclosed, or representation made.

(2) It shall be an offence punishable with imprisonment for a term which may extend to two years, or with fine, or with both, for any person to disclose or publish without the previous authorization of the Central Government or the Provincial Government any contents d[or matter purporting to be contents] of any

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Section 10—Note 1 *(contd.)*

question is taken away by S. 10. The Court cannot call such an order in question unless it could be affirmatively proved that the order had been brought about by some fraud or that by some mistake the order did not apply to the person who was purported to be detained under it. (Vol 32) 1945 Bom 533 (534) : 47 Cri L Jour 297 (DB).

[5] The jurisdiction of the Court is taken away only when the order on which the Government is relying is an order "made under the Ordinance." It must be made by the detaining authority in the proper exercise of its powers and not merely in colourable exercise. Authority should also not exceed the powers given to it under the Ordinance. (Vol 33) 1946 Bom 32 (36) (DB). (Detention to consider whether Criminal Tribes Act should be applied—Detention is bad.)

[6] This section does not purport to repeal S. 491, Criminal P. C. The High Court is still at liberty to investigate whether an order purporting to have been made under R. 26, Defence of India Rules and deemed to be made under the Ordinance or a new order purporting to be made under the Ordinance was in fact validly made, and if it was not validly made, it has power to pass orders under S. 491, Criminal P. C. (Vol 32) 1945 Nag 159 (163): ILR (1945) Nag 382(DB).

[7] Section 10 does not preclude the High Court from considering applications for a writ of habeas corpus under S. 491, Criminal P. C., based on the allegation that the order of detention of the petitioner was passed *mala fide*. (Vol 32) 1945 Oudh 222 (225) : 20 Luck 504 (DB). ((Vol 31) 1944 F C 86 : I L R (1944) Kar F C 172 : 23 Pat 678 : (1944) F C R 295 (F C) and (Vol 32) 1945 F C 18 : I L R (1945) Kar F C 13 : 24 Pat 187 : 1945 F C R 81 (FC), *Foll.*)

[8] The first part of S. 10 (1) does not take away the jurisdiction of the Court to call in question orders under R. 26, Defence of India Rules on the ground that they are *ultra vires*. The second part of S. 10 (1) which suspends the operation of S. 491, Criminal P. C., applies to two classes of orders, that is to say, orders made under S. 3 of the Ordinance itself and orders "having effect under this Ordinance or in respect of any person the subject of such an order". (Vol 32) 1945 Bom 212 (216) : I L R (1945) Bom 317 : 46 Cri L Jour 608 (FB).

[9] The direction in S. 10 (2) that such a proceeding is discharged is clearly a judicial act and not a legislative enactment and hence, S. 10 (2) is void to the extent to which it goes further than S 10 (1). (Vol 31) 1944 F C 86 (90, 91) : I L R (1944) Kar F C L72 : 23 Pat 678 : (1944) F C R 295 (F C).

[See however (Vol 31) 1944 Lah 142 (148) : I L R (1946) Lah 147 : 45 Cri L Jour 711 (FB). (The words "that proceeding is hereby discharged" simply mean that the High Court has no longer any jurisdiction to continue hearing the matter or to adjudicate upon it. The Governor-General cannot be said to exercise judicial and not legislative power in enacting the sub-section. The sub-section accordingly is *intra vires*.)]

[But see (Vol 32) 1945 Pat 59 (61) : 23 Pat 475 : 46 Cri L Jour 460 (DB). (Provision in S. 10 (2) for discharging certain proceedings is not a usurpation of judicial functions in the guise of legislation and there is nothing invalid in such legislation—Case decided before the decision in (Vol 31) 1944 F C 86 : I L R (1944) Kar F C 172 : 23 Pat 678 : (1944) F C R 295 (FC).)]

[10] Section 10 (2) is a valid piece of legislation. Assuming that cutting down the powers of the High Court is cutting down the powers of the Crown in relation to the administration of justice it cannot be said that the sovereignty, or dominion or suzerainty of the Crown is affected within S. 110, Government of India Act. (Vol 31) 1944 Cal 284[s] (287): 45 Cr L J 745 (DB).

[11] Section 10 (3) raises a presumption that an order purporting to be made by any authority in exercise of any power conferred by or under the Ordinance was made by that authority. The onus therefore lies on the person alleging it to show that the order is not an order made by the Governor. (Vol 32) 1945 Pat 44 (49): 23 Pat 968 (FB).

Section 11 — Note 1

[1] Section 11 does not repeal any part of the Evidence Act and is not, on that ground, *ultra vires*. At most, what it does is that, for the period of its own currency, it suspends any provision of the Evidence Act which would enable the detenu to place before the Court the matters referred to in S. 11. (Vol 32) 1945 Pat 44 (51):23 Pat 968 (FB). (The detenue is, of course, entitled to show lack of good faith on the part of the authority making the order of detention under the Ordinance by referring to materials, other than those referred to in S. 11.)

[2] The amendment effected in S. 11 (1) and (2) by Ordinance XXII of 1944, is retrospective in operation being an alteration of the procedural and not of the substantive law. (Vol 33) 1946 Nag 99 (103, 104) : I L R (1945) Nag 809 (DB) (Prosecution under sub-s. (2) — Evidence of substance of communication made under S. 7 wrongly shut out in trial Court—Power of Appellate Court to direct further evidence to be taken under S. 428, Criminal P. C.)

[3] The true meaning of sub-s. (1) is that a public officer authorised to do so may produce before the Court, or disclose the substance of, such grounds or particulars, though the Court cannot require him to do so, and the first part of sub-s. (1) refers to statements made or evidence given by persons other than such public officer. (Vol 33) 1946 Nag 99 (104):I L R (1945) Nag 809 (DB).

such communication of grounds, particulars disclosed, or representation made :

Provided that nothing in this sub-section shall apply to a disclosure made by a person the subject of an order under this Ordinance to his legal adviser.

[a] *Substituted* for the words "No Court shall allow" by the Restriction and Detention (Amendment) Ordinance, 1944 (No. 22 of 1944), S. 3. [27-5-1944]

[b] *Substituted* for "an order under clause (*b*) of sub-section (*1*) of S. 3", *ibid.*

[c] *Substituted* for "therewith under S. 7", *ibid.*

[d] *Inserted, ibid.*

Protection of action taken under this Ordinance.

12. No suit, prosecution or other legal proceeding shall lie against any person for anything in good faith done or intended to be done in pursuance of this Ordinance.

Application of other laws not barred.

13. The provisions of this Ordinance shall be in addition to, and not in derogation of, the provisions of any other Act, Ordinance or Regulation for the time being in force.

[THE] SECUNDERABAD MARRIAGE VALIDATING ORDINANCE, 1945. (ORDINANCE NO. XXX OF 1945.)[a]

[1st September, 1945.]

An Ordinance to validate a certain marriage solemnised in Secunderabad.

WHEREAS the Reverend Harold William Sibree Page, a Minister of the Methodist Church having been granted by the Resident in Hyderabad a licence under section 9 of the Indian Christian Marriage Act, 1872, (XV of 1872) to grant certificates of marriage between Indian Christian subjects of His Majesty in the Hyderabad State, did on the 20th day of April 1944 at Secunderabad solemnise a marriage between Christian, but not Indian Christian, subjects of His Majesty in the belief that he was by the aforesaid licence authorised so to do;

AND WHEREAS the parties to the said marriage believed that the said Reverend Harold William Sibree Page was duly authorised to solemnise the marriage and that the marriage was valid in law;

AND WHEREAS the said parties being Christians, but not Indian Christian subjects of His Majesty, the said Reverend Harold William Sibree Page had not the requisite authority under the licence held by him to solemnise the said marriage;

AND WHEREAS, the said marriage having been solemnised in good faith, an emergency has arisen which renders it necessary to provide for the validation thereof;

NOW, THEREFORE, in exercise of the powers conferred by section 72 of the Government of India Act, as set out in the Ninth Schedule to the Government of India Act, 1935, the Governor-General is pleased to make and promulgate the following Ordinance: —

[a] Published in the Gazette of India, Extraordinary dated 1st September 1945.

Short title.

1. This Ordinance may be called the Secunderabad, Marriage Validating Ordinance, 1945.

Validation of a certain irregular marriage and the records thereof.

2. *(1)* The marriage solemnised in St. Andrew's Church at Secunderabad on the 20th day of April 1944 between persons being Christian, but not Indian Christian, subjects of His Majesty by the Reverend Harold William Sibree Page, a Minister of the Methodist Church, shall be, and shall be deemed to have been with effect on and from the said date, as good and valid in law as if it had been solemnised under a license granted under section 6 of the Indian Christian Marriage Act, 1872, authorising the solemnisation of marriages between persons being Christian, but not necessarily Indian Christian, subjects of His Majesty in the Hyderabad State.

(2) Certificates of the marriage declared by sub-section *(1)* to be good and valid in law, and register books and certified copies of true and duly authenticated extracts therefrom, deposited in compliance with the provisions of the Indian Christian Marriage Act, 1872, in so far as the register books and extracts relate to the said marriage, shall be received as evidence of the marriage as if it had been duly solemnised under Part I of the said Act.

[THE] SPECIAL CRIMINAL COURTS (REPEAL) ORDINANCE, 1943. (ORDINANCE NO. XIX OF 1943.)[a]

[5th June, 1943.]

An Ordinance to repeal the Special Criminal Courts Ordinance, 1942, and to provide for certain matters in connection with such repeal.

WHEREAS an emergency has arisen which makes it necessary to repeal the Special Criminal Courts Ordinance, 1942, and to provide for certain matters in connection with such repeal;

ORDINANCE IX OF 1943

Preamble — Note 1

[1] It cannot be assumed that Ordinance XIX of 1943 was enacted on the admitted footing that Ordinance II of 1942 was void, and that the new Ordinance attempts to do something which the ordinance-making authority had no power to do. (Vol 31) 1944 F C 1 (5) : 23 Pat 159 : I L R (1944) Nag 300 : 45 Cri L Jour 413 : I L R (1944) Kar F C 8 : 1944 F C R 61 (F C).

[2] The Ordinance is a valid Ordinance, as it is one which it was competent to the Governor-General to enact. (Vol 31) 1944 Bom 121 (123) : I L R (1944) Bom 142 : 45 Cri L Jour 567 (FB).

[3] Although a legislative authority cannot validate what it could not have antecedently authorised, it cannot be held that it cannot validate by subsequent legislation what it could have legally authorised beforehand. There is no objection, therefore, to the Governor-General doing subsequently what he could have properly done previously. (Vol 30) 1943 Pat 446 (451) : 22 Pat 614 : 45 Cri L Jour 557 (DB). (Agarwala J.)

[4] The substance of the Repeal Ordinance, that is to say, the execution of the sentences passed by the Special Courts subject to such modification as may be made on the merits on appeal or in review, has been expressed with sufficient clarity to take effect and is not *ultra vires*. (Vol 30) 1943 Pat 346 (352) : 22 Pat 565 : 44 Cri L Jour 809 (DB).

[5] Interpretation — Ordinance as a whole should be taken and construed in the light of surrounding circumstances. (Vol 30) 1943 Cal 489 (493) : 45 Cri L Jour 37 (SB).

[6] Ordinance XIX of 1943 can be invoked for the purpose having a reference for confirmation of a death sentence even though Ordinance II of 1942 did not contain any provision for that purpose. (Vol 30) 1943 Pat 413 (415) : 45 Cri L Jour 577 (DB).

NOW THEREFORE, in exercise of the powers conferred by section 72 of the Government of India Act, as set out in the Ninth Schedule to the Government of India Act, 1935, the Governor-General is pleased to make and promulgate the following Ordinance:—

[a] Published in the Gazette of India, Extraordinary, dated 5th June 1943.

Applied to the Chittagong Hill-tracts, with modifications, with effect from 1st July 1943, in so far as it is not inconsistent with the Chittagong Hill-tracts Regulation 1900, or any rules for the time being in force thereunder, *see* Beng. Govt. Notifn. No. 181-S, dated 26-6-1943; to the Darjeeling District and the partially excluded areas of the Mymensingh District, with modifications, with effect from 1st July 1943, *see* Beng. Govt. Notifn. No. 7916-Def. dated 30-6-1943.

Short title and commencement.

1. *(1)* This Ordinance may be called the Special Criminal Courts (Repeal) Ordinance, 1943.

(2) It shall come into force at once.

Repeal of Ordinance II of 1942.

2. The Special Criminal Courts Ordinance, 1942 (hereinafter referred to as the said Ordinance) is hereby repealed.

Confirmation and continuance, subject to appeal, of sentences.

3. *(1)* Any sentence passed by a Special Judge, a Special Magistrate or a summary Court in exercise of jurisdiction conferred or purporting to have been conferred by or under the said ordinance shall have effect, and subject to the succeeding provisions of this section, shall continue to have effect, as if the trial at which it was passed had been held in accordance with the Code of Criminal Procedure, 1898, by a Sessions Judge, an Assistant Sessions Judge or a Magistrate of the first class respectively, exercising competent jurisdiction under the said Code :

[a][Provided that in respect of any such sentence as aforesaid passed in a Presidency-town, the reference in this sub-section to Courts established under the said Code shall be construed as a reference to the Court in the Presidency-town competent in law to have passed the sentence.]

(2) Notwithstanding anything contained in any other law, any such sentence as is referred to in sub-section *(1)* shall, whether or not the proceedings in which the sentence was passed were submitted for review under section 8 and whether or not the sentence was subject of an appeal under section 13 or section 19, of the said Ordinance, be subject to such rights of appeal as would have accrued, and to such powers of revision as would have been exercisable under the said Code if the sentence had at a trial so held been passed on the date of the commencement of this Ordinance; [a][or in respect of a sentence passed in a Presidency-town, on the date of the commencement of the Special Criminal Courts (Repeal) Amendment Ordinance, 1943 :

Provided that in respect of any such sentence as aforesaid passed in a Presidency-town, which sentence would, if it had been passed in a sessions division outside the Presidency-town, have had effect as if passed by a Sessions Judge or an Assistant Sessions Judge, the convicted person shall have a right of appeal to the High Court in the same manner as if the Court competent in law to have passed the sentence had been the Court of Session in a sessions division outside the Presidency-town :]

[b][Provided further that notwithstanding anything contained in section 418 of the Code of Criminal Procedure, 1898, an appeal against any such sentence as aforesaid shall lie on a matter of fact as well as a matter of law.]

(3) Where any such sentence as aforesaid has been altered in the course of review or on appeal under the said Ordinance, the sentence as so altered shall for the purposes of this section be deemed to have been passed by the Court which passed the original sentence.

[a] *Added* by the Special Criminal Courts (Repeal) Amendment Ordinance, 1943 (No. 26 of 1943), S. 2 [17-7-1943]. [b] *Added* by the Special Criminal Courts (Repeal) Second Amendment Ordinance, 1943 (No. 32 of 1943), S. 2 [29-9-1943].

SECTION 3—SYNOPSIS.

1. Object and scope.
2. Validity of the section.
3. Retrospective effect.
4. 'Sentence.'
5. Powers of High Court.
6. Clause (3).

1. Object and scope.— [1] One plain and obvious purpose of the Ordinance is to remedy the hardship and the anomaly which would ensue if punishments which have already been dealt out are to be continued but are to be exempt from judicial examination. This is how sub-s. (2) of S. 3 came to be enacted, and it is not inconsistent with the view that the Legislature had bowed to the authority of the Federal Court in the matter of jurisdiction of the Special Courts. (Vol 30) 1943 Cal 489 (500):45 Cri L Jour 37 (SB). (Per *Khundkar J.*)

[2] There is no attempt to exercise judicial power. (Vol 31) 1944 F C 1 (9) : 23 Pat 159 : I L R (1944) Nag 300:45 Cri L Jour 413 : I L R (1944) Kar F C 8 : (1944) F C R 61 (F C).

[3] Section 3 (1) refers not only to the exercise of a jurisdiction conferred by or under Ordinance 2 of 1942, but also to a jurisdiction purported to be conferred on the Special Judge It covers a case where the jurisdiction exercised by the Provincial Government is doubtful because the application of the Ordinance in a particular case is doubtful. (Vol 31) 1944 Sind 1 (12) : I L R (1943) Kar 449 : 45 Cri L Jour 471 (F B).

[4] Ordinance does not validate conviction — It merely gives indemnity for acts done — Sentences are merely kept in effect till dealt with in appeal or revision. (Vol 30) 1943 Cal 489 (495) : 45 Cri L Jour 37 (S B). (Per *Derbyshire C. J.*)

[5] Section 3 covers all trials held under Ordinance 2 of 1942 whether they have resulted in convictions or acquittals. (Vol 32) 1945 Sind 33 (37, 38): I L R (1944) Kar 430 : 46 Cri L Jour 422 (D B). (Person acquitted by Special Magistrate holding trial under Ordinance 2 of 1942 —No fresh trial can be held for same offence.)

[6] The convictions could not be set aside merely because the Special Judge had tried what was ordinarily a summons case as a warrant case. (Vol 31) 1944 Sind 1 (13) : I L R (1943) Kar 449: 45 Cri L Jour 471 (FB).

[7] Section 3 validates also a trial held under the provisions of R. 130, Defence of India Rules. (Vol 31) 1944 Pat 232(233): 23 Pat 108: 45 Cri L Jour 725(DB).

[8] Sections 3 and 4—Special Judge issuing notice to accused to show cause why they should not be prosecuted under S. 193, Penal Code, for making false statements in his Court — Before accused could appear to show cause, Court of Special Judge abolished by Ordinance 19 of 1943—Ordinance 19 of 1943 held provided no successor to Court of Special Judge — Sessions Judge held had no jurisdiction to direct prosecution of accused for perjury. (Vol 32) 1945 Pat 64 (66) : 46 Cri L Jour 605 : 23 Pat 701 (D B).

2 Validity of the section.—[1] Section 3 (1) confers validity and full effectiveness on sentences passed by

Disposal of pending cases.

4. Where the trial of any case pending before a Court constituted under the said Ordinance has not concluded before the date of the commencement of this Ordinance the proceedings of such Court in the case shall be void; and the case shall be deemed to be transferred,

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Section 3 — Note 2 *(contd.)*

Special Courts under Ordinance 2 of 1942 and this provision is not *ultra vires* the Governor General. (Vol 31) 1944 F C 1 (12):I L R (1944) Nag 300:23 Pat 159:I L R (1944) Kar (F C) S : 45 Cri L Jour 413 : (1944) F C R 61 (F C) ✠ (Vol 31) 1944 Bom 121 (122, 123) : I L R (1944) Bom 142 : 45 Cri L Jour 567 (F B). (S. 3 (1) does not run counter to the decision of the Federal Court in (Vol 30) 1943 F. C. 36)✠(Vol 30) 1943 All 379 (386, 387) : I L R (1944) All 42 : 45 Cri L Jour 491 (F B).

[2] The legislation which affects sentences in S. 3 (1) of Ordinance 19 of 1943 falls within Item 2 of List III of Sch. 7, Government of India Act (1935), and is, therefore, the proper subject-matter of legislation by the Governor-General acting under S. 72. (Vol 31) 1944 Sind 1 (9): ILR (1943) Kar 449:45 Cri L Jour 471 (F B).

[3] The Courts set up under Ordinance II of 1942 were not validly constituted Courts hence the Governor-General had power to pass an Act validating sentences imposed by those Courts. S. 3 (1) is not therefore invalid and it means what it says. (Vol 30) 1943 Mad 602 (607, 608) : I L R (1943) Mad 737 : 45 Cri L Jour 59 (F B).

3. Retrospective effect.—[1] Section 3 (1) has no retrospective effect. It speaks from the moment it was made and promulgated (namely from 5th June 1943). (Vol 30) 1943 All 379 (386) : I L R (1944) All 42 : 45 Cri L Jour 491 (F B). (Per *Iqbal Ahmad C. J.*).

4. 'Sentence.'—[1] Sections 3 (1) and 2—Word 'sentence' is used in narrower sense as meaning 'punishment imposed'. (Vol 33) 1946 P C 169 (172, 173) : 47 Cri L Jour 933 : 73 Ind App 199 : I L R (1946) Kar P C 153 (P C). (I L R (1943) Kar 449 : (Vol 31) 1944 Sind 1 : 45 Cri L Jour 471 (F B), *Overruled.*)

[*See also* (Vol 30) 1943 Cal 489 (499) : 45 Cri L Jour 37 (SB). (Per *Khundkar J.*—The word "sentences" in S. 3 is ill-judged and out of place. What the Legislature apparently intended to give life to and to continue was really the penalty or punishment, be it fine or imprisonment, which is now in process of being endured by persons who have been visited with such penalty or punishment under Ordinance 2 of 1942.)]

[2] As S. 3 (1) requires the sentence to be treated as one passed by a competent Court at a proper trial, no separate provision referring to 'conviction' was necessary. (Vol 31) 1944 F C 1 (7) : I L R (1944) Nag 300 : 23 Pat 159 : I L R (1944) Kar F C S : 45 Cri L Jour 413 : (1944) F C R 61 (F C).

[3] For the purpose of confirmation and continuance of a conviction and sentence under sub-s. (1) of S. 3 the material date is the date when the sentence is passed, and the conviction recorded, the date the judgment bears and not the date of the commencement of the Ordinance. This is the date from which the sentence would run if the appellate Court confirmed the conviction and sentence. (Vol 31) 1944 Sind 1 (13) : I L R (1943) Kar 449 : 45 Cri L Jour 471 (F B).

5. Powers of High Court. — [1] Right of appeal under S. 3 (2) is not illusory. (Vol 31) 1944 Bom 121 (122) : I L R (1944) Bom 142:45 Cri L Jour 567 (F B). (Per *Beaumont C. J.*)

[2] As regards the provision for appeal and revision so much of S. 3 (2) as is meaningless and unworkable may be disregarded. Regard may be paid to the section only so far as it provides for the exercise of revisional powers under S. 435 of the Code. (Vol 30) 1943 Cal 489 (502) : 45 Cri L Jour 37 (S B). (Per *Khundkar J.*)

[3] The appellate Court acting under S. 3 (2) is entitled to examine the totality of those proceedings and to pronounce such judgment as to the sentences imposed by the Special Judge as after the examination of those proceedings it thinks just. It is, therefore, the duty of the appellate Court to consider not only points of law but the sufficiency of the evidence to justify the sentence imposed. (Vol 30) 1943 Pat 446 (452) : 22 Pat 614 : 45 Cri L Jour 557 (D B).

[4] Sub-section(1) of S. 3 must be interpreted in such a way as not only to permit the High Court but to make it incumbent upon it to consider the confirmation of any death sentence passed by a Special Judge in the same way as it should consider the confirmation of a death sentence passed by a Sessions Judge under the Criminal Procedure Code. The High Court can in such a case consider all questions of law and fact that may arise. (Vol 31)1944 Sind 83(85): 45 Cri L J 598 (FB).

[5] The expression "at a trial so held" in S. 3 (2) means obviously a trial held in accordance with the Criminal Procedure Code and by a Court having competent jurisdiction under the Code. As sub-s (2) gives the right of appeal and the power of revision only on this hypothetical footing, the appellate or revisional authority cannot ignore this basic postulate and give relief on the very ground that the trial had not been held under the Code or before a Court exercising competent jurisdiction under the Code. (Vol 31) 1944 F C 1 (6) : I L R (1944) Nag 300 : 23 Pat 159 : I L R (1944) Kar F C S : 45 Cri L Jour 413 : (1944) F C R 61 (F C).

[6] 'Sentence' in S. 3 (2) means punishment imposed and hence High Court has, under this sub-section, power to revise the sentence passed by the Special Magistrate i. e., to enhance or reduce it but it has no power to set the conviction aside or to direct a retrial. (Vol 33) 1946 P C 169 (173):47 Cri L Jour 933 : 73 Ind App 199 : I L R (1946) Kar P C 153 (P C). ((Vol 30) 1943 Cal 594 (S B), *Reversed*; (Vol 31) 1944 Bom 121 : ILR (1944) Bom 142 : 45 Cri L Jour 567 (FB), *Approved*; ((Vol 31) 1944 Sind 1: I L R (1943) Kar 449: 45 Cri L Jour 471 (F B), *Overruled.*)]

6. Clause (3).— [1] A sentence as altered by the Review Judge is to be regarded as the sentence passed by the Original Court only if he had not exceeded his powers and made the order in the proper exercise of his powers. (Vol 30) 1943 Pat 413 (417) : 45 Cri L Jour 577 (D B).

Section 4 — Note 1

[1] Section 4 can be invoked only in cases where the trial *before the Special Courts* had not concluded. The High Court acting as such under the Cr. P. Code, cannot be spoken of as a "Special Court" within the meaning of this section. (Vol 31) 1944 F. C. 1 (13): I. L. R. (1944) Nag 300 : 23 Pat 159 : 45 Cri L Jour 413 : I L R (1944) Kar (F C) 8 : (1944) F C R 61 (FC).

[2] Though the word 'trial' sometimes denotes only the recording of evidence, in the context in which it occurs in this Ordinance it comprises all stages of the proceedings including imposition of sentence. (Vol 31) 1944 F C 1 (12) : I L R (1944) Nag 300: 23 Pat. 159 : I L R (1944) Kar F C S : 45 Cr L J 413 : (1944) F C R 61 (FC).

[3] "Trial" in S. 4 does not refer to the entire course of proceedings including appeal, if, any; it refers only to the proceedings of the Court of first nstance. The intention in S. 4 is to refer only to the

in a Presidency-town to the Chief Presidency Magistrate, or elsewhere to the Sub-Divisional Magistrate, [a][if there is one or if there is not, to the District Magistrate], who may either—

(i) inquire into or try the case himself, or

(ii) transfer the case for inquiry or trial to any Magistrate subordinate to him,—

in accordance with the Code of Criminal Procedure, 1898.

[a] *Added* by the Special Criminal Courts (Repeal) Amendment Ordinance, 1943 (No. 26 of 1943). S. 3 [17-7-1943].

Indemnity. 5. No suit, prosecution or other legal proceedings shall lie in any Court against any servant of the Crown for or on account of or in respect of any sentence passed or any act ordered or done by him whether in exercise of any jurisdiction or power conferred or purporting to have been conferred on him by or under the said Ordinance, or in carrying out any sentence passed by any Court in exercise of any such jurisdiction as aforesaid.

[THE] STATE PRISONERS (DETENTION OF LUNATICS) ORDINANCE, 1941. (ORDINANCE NO. V OF 1941.)[a]

[26th June 1941.]

An Ordinance to authorise the reception and detention in an asylum of individuals committed by warrants issued under the Bengal State Prisoners Regulations, 1818, to detention in that asylum.

WHEREAS an emergency has arisen which makes it necessary to authorise the reception and detention in an asylum of individuals committed by warrants issued under the Bengal State Prisoners Regulation, 1818,[b] to detention in that asylum;

NOW, THEREFORE in exercise of the powers conferred by section 72 of the Government of India Act as set out in the Ninth Schedule to the Government of India Act, 1935, the Governor-General is pleased to make and promulgate the following Ordinance:—

[a] Published in the Gazette of India, Extraordinary, dated 26th June 1941. Applied to British Baluchistan, *see* Notfn. No. 111 F, dated 22-7-1941, Gaz., of India, 1941, Part I, page 1040; to the Chittagong Hill-tracts, with effect from 31-7-1941, *see* Beng-Govt. Notfn. No. 427 T-S, dated 25-7-1941. and to the Darjeeling Dist. and the partially excluded areas of the Mymensingh Dist., *see* Beng Govt., Notfn. 6094-P., dated 13-8-1941.

[b] Bengal Regulation III of 1818.

Short title, extent and commencement. 1. *(1)* This Ordinance may be called the State Prisoners (Detention of Lunatics) Ordinance, 1941.

(2) It extends to the whole of British India.

(3) It shall come into force at once.

Power to receive and detain in asylum person restrained under Regulation III of 1818. 2. Nothwithstanding anything contained in the Indian Lunacy Act, 1912, a warrant of commitment issued under section 2 of the Bengal State Prisoners Regulation, 1818,[a] directing the detention in an asylum of an individual placed under personal restraint in pursuance of that section, who is, in the opinion of the authority issuing that warrant, insane, shall be and shall be deemed to have been from the time such warrant was issued sufficient authority for the reception and detention of that individual in that asylum or in any other asylum to which he may be lawfully transferred.

[a] Bengal Regulation III of 1818.

[THE] TERMINATION OF WAR (DEFINITION) ORDINANCE, 1946. (ORDINANCE NO. X OF 1946).[a]

[5th February 1946.]

An Ordinance to provide for the determination of the date of the termination of the present war for certain purposes.

WHEREAS an emergency has arisen which makes it necessary to provide for the determination of the date of the termination of the present war for certain purposes;

NOW, THEREFORE, in exercise of the powers conferred by section 72 of the Government of India Act, as set out in the Ninth Schedule to the Government of India Act, 1935, the Governor-General is pleased to make and promulgate the following Ordinance:—

[a] Published in the Gazette of India, Extraordinary, dated 5th February 1946.

Section 4—Note 1 *(contd.)*

pendency of original proceedings and not to the pendency of appellate proceedings. (Vol 31) 1944 Pat 373 (376): 23 Pat 278: 46 Cri L Jour 546 (DB).

[4] In all cases falling under S. 8 *(a)* of Ordinance II of 1942 and in all cases where references had been made by the Special Judge under S. 8 *(b)* of that Ordinance, the accused will have to be tried under S. 4 of Ordinance XIX of 1943, unless the reviewing judge, acting under the Ordinance II of 1942, had given his decision before the new Ordinance of 1943 came into operation. (Vol 31) 1944 F C 1 (12, 13): I L R (1944) Nag 300: 23 Pat 159: I L R (1944) Kar F C 8: 45 Cri L Jour 413: (1944) F C R 61 (FC) ✠ ('45) 46 Cri L Jour 167 (167): I L R (1944) Kar (FC) 81 (FC). (Non-completion of review under S. 8 (a) of Ordinance II of 1942 prior to Ordinance XIX of 1943 coming into force.) ✠(Vol 31) 1944 F C 39 (40): I L R (1944) Kar F C 78: 46 Cri L Jour 301: 1944-6 F C R 161 (FC). (Do.)

[5] The case of a person who at a trial held by a Special Court under Ordinance II of 1942 has been acquitted, cannot be deemed to be a pending case within the meaning of S. 4, though there is a review pending before the Judge under S. 8 of Ordinance II of 1942. (Vol 32) 1945 Sind 33 (33): 46 Cri L Jour 422: I L R (1944) Kar 430 (DB).

[6] Special Judge is not a *persona designata* but a 'Court' and therefore he is not entitled to act as a Court in any other place except the headquarters of the revenue District. (Vol 33) 1946 Nag 38 (39): I L R (1945) Nag 788. (Complaints by Special Judge for Warora under Ss. 197 and 476, Cr. P. C. while sitting at Nagpur cannot be entertained by any Criminal Court).

ORDINANCE V OF 1941

Preamble—Note 1

[1] Ordinance V of 1941, though wholly repugnant to S. 4, Lunacy Act is not *ultra vires* the Governor-General in Council as S. 72 of Sch. IX, Govt. of India Act empowers Governor General to pass such legislation. (Vol 32) 1945 Lah 274 (280): I L R (1946) Lah 71: 48 Cri L Jour 5 (FB).

Short title, extent and commencement.

1. *(1)* This Ordinance may be called the Termination of War (Definition) Ordinance, 1946.

(2) It extends to the whole of British India.

(3) It shall come into force at once.

Declaration of date of termination of present war.

2. For the purposes of any provision made after the 2nd day of September 1939, in any enactment or in any notification, rule or order under any enactment or in any contract, deed or other instrument, making any reference, express or implied and in whatever form of words, to the present war or the present hostilities, the present war and present hostilities shall, unless in the case of such a reference in any contract, deed or other instrument as aforesaid the subject or context otherwise requires, be deemed to continue to, and to end on, the day on which the Proclamation of Emergency made on the 3rd day of September 1939, under section 102 of the Government of India Act, 1935, is revoked[a].

Provided that nothing in this section shall apply to or prejudice the exercise of any power conferred in whatever form of words in any such provision as aforesaid on any Government, authority or person to declare for the purposes of such provision on what specified date the present war or the present hostilities or the present emergency shall be deemed to end.

[a] It was revoked on 1st April 1946, *vide* Notfn. No. F. 54/46-GG (A) dated 1-4-1946, Gaz of India, 1946. Extraordinary, page 255.

[THE] UNITED PROVINCES SPECIAL ARMED CONSTABULARY ACT (EXTENSION) ORDINANCE, 1942.

(ORDINANCE NO. XVII OF 1942)[a]

[21st April 1942.]

An Ordinance to apply the provisions of the United Provinces Special Armed Constabulary Act, 1942, to members of the United Provinces Special Armed Constabulary constituted under that Act when serving outside the United Provinces.

WHEREAS an emergency has arisen which makes it necessary to apply the provisions of the United Provinces Special Armed Constabulary Act, 1942,[b] to members of the United Provinces Special Armed Constabulary constituted under that Act when serving outside the United Provinces;

NOW, THEREFORE, in exercise of the powers conferred by section 72 of the Government of India Act as set out in the Ninth Schedule to the Government of India Act, 1935, the Governor-General is pleased to make and promulgate the following Ordinance:—

[a] Published in the Gazette of India, Extraordinary, dated 21st April 1942.

[b] U. P. Act V of 1942.

Short title, extent and commencement.

1. *(1)* This Ordinance may be called the United Provinces Special Armed Constabulary Act (Extension) Ordinance, 1942.

(2) It extends to the whole of British India.

(3) It shall come into force at once.

Application of U. P. Act V of 1942 to members of the United Provinces Special Armed Constabulary serving outside the United Provinces.

2. The provisions of the United Provinces Special Armed Constabulary Act, 1942, shall apply to and in relation to members of the United Provinces Special Armed Constabulary constituted under that Act when serving in any Province other than the United Provinces as they apply to and in relation to members of the said Constabulary within the United Provinces.

[THE] WAR GRATUITIES (INCOME-TAX EXEMPTION) ORDINANCE, 1945.

(ORDINANCE NO. XXIV OF 1945)[a]

[14th July 1945.]

An Ordinance to exempt certain war gratuities from liability to income-tax.

WHEREAS an emergency has arisen which makes it necessary to provide for exempting certain war gratuities from liability to income-tax;

NOW, THEREFORE, in exercise of the powers, conferred by section 72 of the Government of India Act, as set out in the Ninth Schedule to the Government of India Act, 1935, the Governor-General is pleased to make and promulgate the following Ordinance:—

[a] Published in the Gazette of India, Extraordinary, dated 14th July 1945.

Short title and commencement.

1. *(1)* This Ordinance may be called the War Gratuities (Income-tax Exemption) Ordinance, 1945.

(2) It shall come into force at once.

Interpretation.

2. In this Ordinance "war gratuity" means any gratuity paid in respect of any person's service in His Majesty's Forces in connection with any hostilities in which His Majesty has been or may be engaged during the period commencing on the 3rd day of September 1939 and ending on such date as the Central Government may by notification in the official Gazette specify in this behalf, but does not include a gratuity (by whatever name called) payable under a contract of service.

Exemption of war gratuities from liability to income-tax.

3. Notwithstanding anything contained in the Indian Income-tax Act, 1922, any war gratuity paid whether after the commencement of this Ordinance or not to any person shall not for the purposes of that Act be included in the total income or total world income of that person.

[THE] WAR INJURIES ORDINANCE, 1941.

(ORDINANCE NO. VII OF 1941)[a]

[25th July 1941.]

An Ordinance to make provision for the grant of relief in respect of certain personal injuries sustained during the continuance of the present hostilities.

WHEREAS, an emergency has arisen which renders it necessary to make provision for the grant of relief in respect of certain personal injuries sustained during the continuance of the present hostilities;

NOW, THEREFORE, in exercise of the powers conferred by section 72 of the Government of India Act, as set out in the Ninth Schedule to the Government of India Act, 1935, the Governor-General is pleased to make and promulgate the following Ordinance:—

[a] Published in the Gazette of India, Extraordinary, dated 25th July 1941.

Applied to British Baluchistan, *see* Notfn. No. 23-W, dated 1-10-1941; to the Darjeeling District and the partially excluded areas of the Mymensingh District, with effect from 11-9-1941, *see* Beng Govt. Notfn. No. 3824-Com, dated 9-9-1941; and to the Chittagong hill-tracts with modification, with effect from 8 10-1942, *see* Beng. Govt. Notfn. No. 182-S, dated 30-9-1942.

This Ordinance is amended by Ordinances No. 1 of 1942; No. 39 of 1942 and No. 10 of 1945.

Short title, extent and commencement.

1. *(1)* This Ordinance may be called the War Injuries Ordinance, 1941.

(2) It extends to the whole of British India [a][and applies also to British subjects and servants of the Crown in any part of India.]

(3) It shall come into force at once.

[a] *Added* by the War Injuries (Second Amendment) Ordinance, 1942 (No. 39 of 1942), S. 2 [8-8 1942].

Interpretation.

2. In this Ordinance, unless there is anything repugnant in the subject or context,—

(1) "civil defence organisation" means any organisation established for civil defence purposes which is declared by a scheme to be a civil defence organisation for the purposes of this Ordinance and the scheme;

(2) "civil defence volunteer" in relation to an injury, means a person certified, by an officer of a civil defence organisation authorised by the Central Government to grant such certificates, to have been a member of that organisation at the time the injury was sustained;

(3) "continuance of the present hostilities" means the period beginning with the commencement of this Ordinance and ending with such date as the Central Government may, by notification in the official Gazette, declare to be the date on which the present hostilities terminated.

(4) "gainfully occupied person" means a person who is engaged in any trade, business, profession, office, employment or vocation and is wholly or substantially dependent thereon for a livelihood, or a person who, though temporarily unemployed is normally so engaged and dependent;

(5) "scheme" means a scheme made under this Ordinance;

(6) "war injury" means a physical injury—

(a) caused by—

(i) the discharge of any missile (including liquids and gas), or

(ii) the use of any weapon, explosive or other noxious thing, or

(iii) the doing of any other injurious act,

either by the enemy or in combating the enemy or in repelling an imagined attack by the enemy; or

(b) caused by the impact on any person or property of any enemy aircraft, or any aircraft belonging to or held by any person on behalf of or for the benefit of His Majesty or any allied power, or any part of, or anything dropped from, any such aircraft; [a][or

(c) caused by any explosion or fire which involves any explosives or munitions or other dangerous things required for war purposes and which happens or is caused by, through or in connection with the manufacture, storage or transportation of any such explosives, munitions or other dangerous things;]

(7) "war service injury," in relation to a civil defence volunteer, means any physical injury shown to the satisfaction of the Central Government or other authority authorised to make payments under a scheme to have arisen out of and in the course of the performance by the volunteer of his duties as a member of the civil defence organisation to which he belonged at the time the injury was sustained, and (except in the case of a war injury) not to have arisen out of and in the course of his employment in any other capacity:

Provided that before being so satisfied the Central Government or other authority authorised to make payments under a scheme shall have received from the civil defence organisation of which the volunteer concerned was a member at the time the injury was sustained, a report, by an officer of the organisation authorised by the Central Government to make such reports, about the injury in question.

[a] The word 'or' and clause *(c)* were *added* by the War Injuries (Amendment) Ordinance, 1945 (No. 10 of 1945), S. 2. [28-4-1945.]

Power to make schemes for relief in respect of war injuries and war service injuries.

3. *(1)* The Central Government may make a scheme or schemes in accordance with the provisions of this Ordinance providing for the grant of relief in respect of the following injuries sustained during the continuance of the present hostilities, namely:—

(a) war injuries sustained by gainfully occupied persons (with such exceptions, if any, as may be specified in the scheme) and by persons of such other classes as may be so specified; and

(b) war service injuries sustained by civil defence volunteers.

(2) A scheme may authorise the Central Government, or any authority authorised by the Central Government to make payments under the scheme, in such circumstances and subject to such conditions as may be specified in the scheme, to make to or in respect of persons injured—

(a) payments by way of temporary allowance, which shall be payable only so long as the person injured is incapacitated for work by the injury and has not received any such payment as is mentioned in clause *(b)*;

(b) payments otherwise than by way of temporary allowance, which shall be payable only where the injury causes serious and prolonged disablement or death; and

(c) payments for the purchase of or the grant at the cost of Government of artificial limbs or surgical or other appliances [a][and payments for medical and surgical treatment.]

(3) A scheme may empower the Central Government to make regulations for giving effect to the purposes of the scheme.

(4) A scheme may provide that it shall come into operation or shall be deemed to have come into operation on such date as may be specified therein.

(5) A scheme may be amended or rescinded at any time by the Central Government.

(6) Any decision of the Central Government or other authority empowered to make payments under a scheme as to the making, refusal or amount, or as to the continuance or discontinuance, of a payment under a scheme may be varied from time to time by a subsequent decision of the Central Government or such authority as the case may be, but save in so far as it is so varied shall be final and conclusive.

[a] *Added* by the War Injuries (Amendment) Ordinance, 1942 (No. 1 of 1942), S. 2. [1-1-1942.]

Relief from liability to pay compensation or damages.

4. *(1)* In respect of a war injury sustained during the continuance of the present hostilities by any person, and in respect of a war service injury sustained during that period by

a civil defence volunteer, no such compensation or damages shall be payable, whether to the person injured or to any other person, as apart from the provisions of this sub-section—

(a) would be payable under the Workmen's Compensation Act, 1923; or

(b) would, whether by virtue of any enactment or by virtue of any contract or at common law, be payable—

(i) in the case of a war injury, by any person, or

(ii) in the case of a war service injury sustained by a civil defence volunteer, by the employer of the volunteer, or by any person who has responsibility in connection with the volunteer's duties as such or by any other civil defence volunteer,

on the ground that the injury in question was attributable to some negligence, nuisance or breach of duty for which the person by whom the compensation or damages would be payable is responsible.

(2) The failure to give a notice or make a claim or commence proceedings within the time required by any enactment shall not be a bar to the maintenance of proceedings in respect of any personal injury, if—

(a) an application for a payment under a scheme has been duly made to the Central Government or other authority empowered to make payments under the scheme in respect of the injury; and

(b) the Court or other authority before which the proceedings are brought is satisfied that the said application was made in the reasonable belief that the injury was such that a payment could be made under the scheme; and

(c) the Central Government or other authority empowered to make payments under the scheme certifies that the application was rejected, or that payments made in pursuance of the application were discontinued, on the ground that the injury was not such an injury; and

(d) the proceedings are commenced within one month from the date of the said certificate.

Information as to earnings.

5. *(1)* Where it is necessary in order to determine the amount of any payment to be awarded under a scheme in respect of any injury, to ascertain the earnings of the person injured in respect of any period before he sustained the injury, the Central Government or other authority authorised to make payments under the scheme may by notice in writing require—

(a) any person who was an employer of the injured person during that period, or

(b) any other person having any knowledge with respect to the financial circumstances of the injured person during that period,

to furnish in accordance with the notice any information in his possession relating to those earnings or circumstances, and to produce to any person specified in the notice any wage books, records or other documents in his possession containing entries with respect to those earnings.

(2) If any person—

(a) fails to comply with the requirements of any such notice, or

(b) in purported compliance with any such notice, knowingly or recklessly makes any untrue statement or untrue representation, or produces any document which is false in a material particular or calculated to deceive,

he shall be punishable with fine which may extend to three hundred rupees.

Medical attention in dispensaries and hospitals.

[a][5A. *(1)* The person managing any dispensary or hospital shall, if so required by the Central or a Provincial Government by general or special order,—

(a) provide at the dispensary or hospital medical and surgical treatment for persons who have sustained injuries of the nature specified in sub-section *(1)* of section 3, and

(b) keep such records and make such returns relating to the persons treated for such injuries as may be required by or under a scheme.

(2) If any person fails to comply when so required with the provisions of this section he shall be punishable with fine which may extend to one thousand rupees.]

[a] *Inserted* by the War Injuries (Amendment) Ordinance, 1942 (1 of 1942), S. 3 [1-1-1942].

Penalty for false statement.

6. Any person who, for the purpose of obtaining a payment or grant under a scheme either for himself or for any other person, knowingly makes any untrue statement or untrue representation, shall be punishable with imprisonment for a term which may extend to three months.

Assignment or charges to be void.

7. Any assignment of, or charge on, and any agreement to assign or charge any payment awarded or to be awarded under a scheme shall be void, and, on the insolvency of any person to whom such a payment has been awarded, the payment shall not pass to any trustee or other person acting on behalf of the creditors.

[THE] WAR RISKS (FACTORIES) INSURANCE ORDINANCE, 1942.

(ORDINANCE NO. XII OF 1942).

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THE SCHEDULE.

[THE] WAR RISKS (FACTORIES) INSURANCE ORDINANCE, 1942
(ORDINANCE NO. XII OF 1942)[a]

[8th April, 1942]

An Ordinance to provide for the insurance of certain property [b][* *] *against war risks.*

WHEREAS an emergency has arisen which makes it necessary to provide for the insurance of certain property [b][* *] against war risks ;

NOW, THEREFORE, in exercise of the powers conferred by section 72 of the Government of India Act, as set out in the Ninth Schedule to the Government of India Act, 1935, the Governor-General is pleased to make and promulgate the following Ordinance:—

[a] Published in the Gazette of India, Extraordinary, dated 8th April 1942. This Ordinance is amended by Ordinance No. 32 of 1942 ; No. 40 of 1942 ; No. 9 of 1943 ; No. 25 of 1943 ; No. 9 of 1944; No. 13 of 1945; No. 29 of 1945. [b] The words "in British India" were *omitted* by the War Risks (Factories) Insurance (Amendment) Ordinance, 1942 (No. 32 of 1942), S. 2 [1-7-1942.]

Short title, extent and commencement.

1. *(1)* This Ordinance may be called the War Risks (Factories) Insurance Ordinance, 1942.

(2) It extends to the whole of British India.

(3) It shall come into force at once.

Definitions.

2. In this Ordinance, unless there is anything repugnant in the subject or context,—

(a) "buildings" includes foundations, plinths, floors, staircases, tanks, engine and boiler beds, chimneys and flues [a][and boundary walls] ;

(b) "factory" means a factory as defined in clause *(j)* of section 2 of the Factories Act, 1934, and includes any premises including the precincts thereof which, having at any time after the 31st day of December, 1938, been a factory as defined in clause *(j)* of section 2 of the said Act, have not been exempted under section 14 from the provisions of section 5 of this Ordinance ;

(c) "factory buildings" includes all buildings comprised in the factory, and such other buildings (including residential buildings for staff and workmen, hospitals and welfare centres) within a radius of two miles from the main factory building as are in the same ownership or occupation as the factory and are used for the purposes of the factory;

(d) "the Fund" means the War Risks (Factories) Insurance Fund constituted under section 7 ;

(e) "insurable value" of property means the value of the property as ascertained for the purposes of insurance under this Ordinance ;

(f) "occupier" of a factory has the meaning assigned to the word in clause *(l)* of section 2 of the Factories Act, 1934 ;

(g) "owner" of a factory includes, when parts of the property insurable under this Ordinance in relation to the factory are owned by different persons, each such person in respect of the part owned by him ;

(h) "prescribed" means prescribed by rules made under this Ordinance ;

[b][*(i)* "property insurable under this Ordinance" means, in relation to any factory, the factory buildings and, except where they are for the time being goods insurable under the War Risks (Goods) Insurance Ordinance, 1940, all plant and machinery in the factory, all materials in the factory for use in the production or transmission of motive power, or in the maintenance of plant and machinery or in the construction or reconstruction or maintenance of factory, buildings, and such other plant, machinery or materials as may be prescribed;]

[c][*(ii)* "quarter" means a period of three months commencing on the first day of March, June, September or December;]

(j) "the Scheme" means the War Risks (Factories) Insurance Scheme referred to in sub-section *(1)* of section 3 ;

(k) "war risks" means such risks arising from —

(i) action taken by an enemy or action taken in combating an enemy or in repelling an imagined attack by an enemy,

[d][*(ii)* any explosion or fire which involves any explosives or munitions or other dangerous things required for war purposes and which happens or is caused by, through or in connection with the manufacture, storage or transportation of any such explosives, munitions or other dangerous things,]

[e][*(iii)*] measures taken under proper authority to avoid the spreading of, or otherwise to mitigate, the consequences of damage occurring (whether accidentally or not) as the direct result of any such action as, [f][is described in sub clause *(i)* or of any such explosion or fire as is described in sub-clause *(ii)*],

[e][*(iv)*] precautionary or preparatory measures taken under proper authority with a view to preventing or hindering the carrying out of any attack by an enemy, being measures involving risk to property,

[e][*(v)*] precautionary or preparatory measures involving the doing of work on land and taken under proper authority in any way in anticipation of enemy action being measures involving risk to property,

[e][*(vi)*] precautionary or preparatoay measures taken under proper authority with a view to denying facilities to an enemy, being measures involving damage to or diminution of the value of property as may be prescribed.

[a] *Added* by the War Risks (Factories) Insurance (Amendment) Ordinance, 1943 (No. 9 of 1943), S. 2 [27-1-1943]. [b] Clause (i) was *substituted*, *ibid.* [c] Clause (ii) was *inserted* by Ordinance No. 32 of 1942, S. 3 [1-7 1942]. [d] Sub-clause (ii) of clause (k) was *inserted* by the War Risks (Factories) Insurance (Amendment) Ordinance, 1945 (No. 13 of 1945), S. 2 [16-5-1945] [e] *Renumbered*, *ibid.* [f] *Substituted* for the word 'aforesaid', *ibid.*

3. [War Risks (Factories) Insurance Scheme.] *[Repealed by the War Risks (Factories) Insurance (Termination) Ordinance, 1945 (No. 29 of 1945), S. 2. (31-8-1945)]*

Note :— Section 3 of the War Risks (Factories) Insurance (Termination) Ordinance, 1945 (No. 29 or 1945) (which Ordinance is published in the Gazette of India, Extraordinary, dated 31st August 1945) runs as follows :— "*Termination of policies of insurance.* — All policies of insurance issued under the War Risks (Factories) Insurance Ordinance, 1942, and the War Risks (Factories) Insurance Scheme or under those provisions construed with the provisions of the War Risks (Inland Vessels) Insurance Ordinance, 1943, shall, notwithstanding anything contained in any other law or in the said policies of insurance, be determined on the commencement of this Ordinance and cease thereafter to have effect."

Employment of agents by the Central Government.

4. The Central Government may employ or authorize the employment of any person or firm to act as its agents for any of the purposes of this Ordinance, and may pay to persons or firms so employed such remuneration as the Central Government thinks fit :

Provided that no person or firm shall be so employed unless that person or firm is either—

(a) a member of an association prescribed in this behalf, or

(b) a person who in British India has a standing contract with underwriters who are members of the Society of Lloyd's whereby such person is authorized within the terms of such contract to issue protection notes, cover notes or other documents granting insurance against war risks.

5. [Compulsory insurance.] *[Repealed by the War Risks (Factories) Insurance (Termination) Ordinance, 1945 (No. 29 of 1945), S. 2. (31-8-1945).]*

6. [Restriction on carrying on certain insurance business.] *[Repealed by the War Risks (Factories) Insurance (Termination) Ordinance, 1945 (No. 29 of 1945), S. 2. (31-8-1945).]*

War Risks (Factories) Insurance Fund.

7. *(1)* The Central Government shall establish a fund for the purposes of this Ordinance to be called the War Risks (Factories) Insurance Fund into which shall be paid all sums received by the Central Government by way of insurance premiums under the Scheme or by way of payments made on composition of offences under section 12, [a][or under any provision of law corresponding thereto in force in an Indian State, or in the French Establishments in India, or in the territories (hereinafter referred to as Administered Areas) set out in the Schedule] [b][or by way of expenses or compensation awarded by a Court, under section 545 of the Code of Criminal Procedure, 1898, out of any fine imposed under this Ordinance] and out of which shall be paid all sums required for the discharge by the Central Government of any of its liabilities under the Scheme, or for payments by the Central Government under section 9, or for the payment by the Central Government of the remuneration and expenses of agents employed for the purposes of the Scheme.

(2) If at any time when a payment is to be made out of the Fund the sum standing to the credit of the Fund is less than the sum required for the making of that payment, an amount equal to the deficiency shall be paid into the Fund as an advance out of general revenues.

(3) If at any time the amount standing to the credit of the Fund exceeds the sum which, in the opinion of the Central Government, is likely to be required for the making of payments out of the Fund, the excess shall be paid into general revenues.

(4) The Central Government shall prepare in such form and manner as may be prescribed and shall publish either annually, or at such shorter intervals as may be prescribed, an account of all sums received into and paid out of the Fund.

[a] *Inserted* by Ordinance No. 32 of 1942, S. 6. [1-7-1942]. [b] *Inserted* by Ordinance 9 of 1943, S. 5. [27-1-1943]

Power of Central Government to obtain information.

8. [a][*(1)* Any person authorised in this behalf by the Central Government may, for the purpose of ascertaining whether or not the owner or occupier of any property required to be insured under this Ordinance has taken out a policy of insurance as required by this Ordinance in respect of such property, or for the purpose of investigating the insurable value of any property insured, or required to be insured, or proposed for insurance under this Ordinance, or for the purpose of estimating the damage suffered by any property insured under this Ordinance,—

(a) require the owner or occupier of the property, or any person carrying on in British India the business of fire insurance in respect of the property, to submit to him such accounts, books or other documents, or to furnish to him such information as he may reasonably think necessary, or

(b) at any reasonable time enter any premises comprising or containing the property, inspect such premises or property, and require any person found on such premises whom he believes to be in possession of information relevant to his investigation, to furnish to him such information as he may reasonably think necessary.]

(2) Whoever wilfully obstructs any person in the exercise of his powers under this section or fails without reasonable excuse to comply with any request made thereunder shall, in respect of each occasion on which any such obstruction or failure takes place, be punishable with fine which may extend to one thousand rupees.

(3) Whoever, in purporting to comply with his obligations under this section, knowingly or recklessly makes a statement false in a material particular, shall be punishable with fine which may extend to one thousand rupees.

[a] *Substituted* for original sub-section *(1)* by Ordinance No. 9 of 1943, S. 6 [27-1 1943].

Payments towards cost of removal and reconstruction of factory.

9. Where the Central Government requires the owner of a factory to remove the factory and to reconstruct it in another locality, the Central Government shall make to such owner out of the Fund such payments, in addition to any sum payable under the policy of insurance as it considers sufficient to defray the cost of the removal and, if necessary, the replacement of any part of the property in respect of which no compensation is payable.

Recovery of premiums unpaid.

[a][10. *(1)* Without prejudice to the provisions of sub-section *(4)* of section 5, where any person has failed to insure as, or to the full amount required by this Ordinance, and has thereby evaded the payment by way of premium of any money which he would have had to pay but for such failure, an officer authorised in this behalf by the Central Government may determine the amount payment of which has been so evaded and the amount so determined shall be payable by such person and shall be recoverable from him as provided in sub-section *(2)*.

(2) Any instalment of premium due on a policy of insurance issued under the Scheme, and any amount determined as payable under sub-section *(1)* shall be recoverable as an arrear of land-revenue and shall be a first charge on the propetty in respect of which the default was made.

(3) A person against whom a determination is made under sub-section *(1)* may, within the prescribed period, appeal against such determination to the Central Government whose decision shall be final.]

[a] *Substituted* for original Section 10 by Ordinance No. 9 of 1943, S. 7. [27-1-1943].

Limitation of prosecutions.

11. No prosecution for any offence punishable under this Ordinance shall be instituted against any person except by or with the consent of the Central Government or an authority authorized in this behalf by the Central Government.

Composition of offences.

12. Any offence punishable under sub-section *(4)* of section 5 may, either before or after the institution of the prosecution, be compounded by the Central Government, or by any authority authorized in this behalf by the Central Government, on payment for credit to the Fund of such sum as the Central Government or such authority, as the case may be, thinks fit.

Bar of legal proceedings.

13. [a][*1*] No suit, prosecution or other legal proceedings shall lie against any person for anything which is in good faith done or intended to be done under this Ordinance.

[a][*(2)* On and after the 29th day of May 1942, no suit shall be maintainable in any civil Court against the Central Government, or a person acting as its agent under section 4, for the refund of any money paid or purporting to have been paid as premium on a policy of insurance taken out or purporting to have been taken out under this Ordinance.]

[a] The original section was *numbered* as sub section *(1)* of that section and sub-section *(2)* was *added* by Ordinance No. 9 of 1943, S. 8. [27-1-1943.]

14. [a][*(1)*] The Central Government may, by notification in the Official Gazette, exempt any factory or any description of factories or any premises including the precincts thereof which have at any time after the 31st day of December 1938, been a factory as defined in clause *(j)* of section 2 of the Factories Act, 1934, [b][from the provisions of this Ordinance requiring such factories or premises to be insured or to continue to be insured under this Ordinance; but such exemption shall not prejudice the infliction of any penalty or the accrual of any liability incurred before the date on which the exemption takes effect.]

Power to exempt factories.

[c][*(2)* In granting any exemption under this section the Central Government may direct that the exemption shall take effect or be deemed to have taken effect on a specified date after or before the date of the notification.]

[a] The original section was *numbered* as sub-section *(1)* of the section by Ordinance No. 9 of 1943, S. 9. [27-1-1943]. [b] *Substituted*, *ibid.* [c] *Added*, *ibid.*

15. *(1)* The Central Government may, by notification in the Official Gazette, make rules to carry into effect the provisions of this Ordinance.

Power to make rules.

(2) Without prejudice to the generality of the foregoing power, such rules may —

(a) prescribe the method of ascertaining the value of property for the purposes of insurance under this Ordinance;

(b) prescribe the plant [a][machinery and materials] other than plant [a][machinery and materials] in the factory which shall be [b][property] insurable under this [c][Ordinance] ;

(c) prescribe the risks which shall be deemed to be war risks for the purposes of clause *(k)* of section 2;

(d) prescribe the forms of the policies of insurance referred to in clause *(c)* of sub-section (4) of section 3 and the period in respect of which such policies shall be issued ;

(e) prescribe the associations referred to in clause *(a)* of the proviso to section 4 ;

(f) prescribe the form of and the manner of preparing the account referred to in sub-section *(4)* of section 7.

[d][*(g)* prescribe the procedure in making determinations and in presenting appeals from determinations made under section 10.]

[a] *Substituted* for the words "and machinery" by the War Risks (Inland Vessels) Insurance Ordinance, 1943 (No. 25 of 1943), S. 4. [17 7-1943.]

[b] *Substituted* by Ordinance No. 9 of 1943, S. 10. [27-1-1943.] [c] *Substituted* for the word 'Act' by Ordinance No 32 of 1942, S. 7. [1-7-1942.] [d] *Added* by Ordinance No. 9 of 1943, S. 10. [27-1-1943.]

16. [Power of Central Government to extend Ordinance and Scheme to certain insurance projects.] *[Repealed by the War Risks (Factories) Insurance (Termination) Ordinance, 1945 (No. 29 of 1945), S. 2. (31 8-1945)]*

17. [Application of the scheme to property in certain territories outside British India.] *[Repealed by the War Risks (Factories) Insurance (Termination) Ordinance, 1945 (No. 29 of 1945), S. 2. (31 8-1945).]*

[a][18. The Central Government may, in any case in which it thinks fit, allow a refund to be made of any sum paid by way of premium on a policy of insurance issued or purporting to have been issued under this Ordinance]

Refund of insurance premiums.

[a] *Added* by Ordinance 9 of 1943, S. 12. [27-1-1943.]

[a][THE SCHEDULE.

(*See* section 7.)

1. The Cantonment of Baroda.

2. The administered areas in the Western India States Agency specified in the Western India States Administered Areas (Application of Laws) Order, 1937.

3. The administered areas in the Central India Agency specified in the Central India Administered Areas (Application of Laws) Order, 1937.

4. The Gwalior Residency Area.

5. The District of Abu.

6. The administered areas in the Hyderabad State specified in the Hyderabad Administered Areas (Application of Laws) Order, 1937.

7. The Civil and Military Station of Bangalore.

8. The Kolhapur Residency Area and the Wadi Jaghir.

9. The railway lands in the Western India States Agency specified in the notifications of the Political Department, Nos. 189-I.B. and 190-I.B., dated the 8th September 1937.

10. The Rajputana and Central India railway lands specified in the Rajputana and Central India Railway Lands (Application of Laws) Order, 1937.

11. The Punjab States railway lands specified in the Punjab States Railway Lands (Application of Laws) Order, 1939.

12. The Thana Circles in the Rewa Kantha Agency in the Gujrat States Agency and the Dangs.

13. The British Reserve in Manipur.

[b][14 The Shillong Administered Areas.]

[a] *Added* by Ordinance No. 32 of 1942, S. 10. [1-7-1942.] [b] *Added* by Ordinance No. 25 of 1943, S. 6. [17-7-1943.]

[THE] WAR RISKS (GOODS) INSURANCE ORDINANCE, 1940.
(ORDINANCE NO. IX OF 1940.)

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[THE] WAR RISKS (GOODS) INSURANCE ORDINANCE, 1940.
(ORDINANCE No. IX OF 1940.)[a]

[26th August, 1940.]

An Ordinance to make certain provisions for the insurance of goods in British India against damage by enemy action.

WHEREAS an emergency has arisen which renders it necessary to make certain provisions for the insurance of goods in British India against damage by enemy action ;

NOW, THEREFORE, in exercise of the powers conferred by section 72 of the Government of India Act as set out in the Ninth Schedule to the Government of India Act, 1935, the Governor General is pleased to make and promulgate the following Ordinance :—

[a] Published in the Gazette of India, Extraordinary, dated 26th August 1940.

This Ordinance is amended by Ordinances No. 12 of 1941 ; No 14 of 1942 ; No. 19 of 1942 ; No. 36 of 1942 ; No. 8 of 1943 ; No. 25 of 1943 ; No. 29 of 1944 ; it is partly repealed by Ordinance No. 34 of 1945.

Short title, extent and commencement.

1. *(1)* This Ordinance may be called the War Risks (Goods) Insurance Ordinance, 1940.

(2) It extends to the whole of British India.

(3) It shall come into force on such date as the Central Government may, by notification in the Official Gazette, appoint.[a]

[a] The Ordinance came into force on 1st October 1940, *see* Department of Commerce Notfn. No. 5-W-R-1/40 dated 14-9-1940.

Definitions.

2. In this Ordinance, unless there is anything repugnant in the subject or context,—

(a) "agricultural products" means products of agriculture, horticulture or sylviculture and includes growing crops, plants and trees ;

(b) "goods" means any materials, commodities or articles and includes materials or articles used in or for the construction of ships up to the time at which a ship after construction is launched ;

[a][*(c)* "War risks" means such risks arising from —

(i) action taken by an enemy or action taken in combating an enemy or in repelling an imagined attack by an enemy,

[b][*(ii)* any explosion or fire which involves any explosives or munitions or other dangerous things required for war purposes and which happens or is caused by, through, or in connection with the manufacture, storage or transportation of any such explosives, munitions or other dangerous things] ;

[c][*(iii)*] measures taken under proper authority to avoid the spreading of, or otherwise to mitigate, the consequences of damage occurring (whether accidentally or not) as the direct result of any such action as d[is described in sub-clause (i) or of any such explosion or fire as is described in sub-clause (ii)],

[c][*(iv)*] precautionary or preparatory measures taken under proper authority with a view to preventing or hindering the carrying out of any attack by an enemy, being measures involving a substantial degree of risk to property ;

[c][*(v)*] precautionary or preparatory measures involving the doing of work on land and taken under proper authority in any way in anticipation of enemy action, being measures involving a substantial degree of risk to property, as may be prescribed ;]

e[[c][*(vi)*] precautionary or preparatory measures taken under proper authority with a view to denying facilities to an enemy, being measures involving a substantial degree of damage to or diminution of the value of property.]

(d) "live-stock" includes animals of any description;

(e) "prescribed" means prescribed by rules made under this Ordinance ;

(f) "seller of goods" includes a seller of goods acting as an agent, and, in relation to any person carrying on the business of selling goods as an agent, any reference in this Ordinance to goods produced by him or to goods not produced by him shall be construed as including a reference to goods produced, or as the case may be, not produced by his principal ;

(g) †[* * * *].

[a] *Substituted* by the War Risks (Goods) Insurance (Amendment) Ordinance, 1941 (No. 12 of 1941), S. 2. [20-12-1941.] [b] *Inserted* by *ibid*, 1944 (No. 29 of 1944), S. 2. [1-7-1944.] [c] *Renumbered*, *ibid*, 1944. [d] *Substituted* for 'aforesaid,' *ibid*, 1944. [e] *Added*, *ibid*, 1942 (No. 14 of 1942), S. 2. [11-4-1942]. [f] *Omitted ibid*, 1941.

Goods insurable under this Ordinance.

3. *(1)* Subject to the provisions of this section —

(a) the following goods shall, in relation to any person carrying on business in British India as a seller of goods of any description produced by him, be deemed to be goods insurable under this Ordinance, that is to say, all goods situated in British India [a][* * *] b[or, when consigned from one place in British India to another place in British India and in transit, situated in India] being either —

(i) goods of that description, or

(ii) goods used as material from which goods of that description are produced or as ingredients or component parts of goods of that description ; and

(b) the following goods shall, in relation to any person carrying on business in British India as a seller of goods of any description not produced by him, be deemed to be goods insurable under this Ordinance, that is to say, all goods of that description being goods situated in British India [a][* * *] b[or, when consigned from one place in British India to another place in British India and in transit, situated in India].

(2) In relation to a person carrying on in British India the business of selling agricultural products produced by him, all agricultural products and live-stock for the time being situated in British India [a][* * *] shall, subject to the following provisions of this section, be deemed to be goods insurable under this Ordinance :

Provided that the Central Government may by general or special order direct that the provisions of section 7 shall not operate so as to require a person to be insured in respect of any goods which, in relation to that person would not, apart from the provisions of this sub-section, be goods insurable under this Ordinance.

(3) Things which, in relation to a person carrying on any business as a seller of goods, are at any time goods insurable under this Ordinance shall not cease to be goods so insurable by reason only that they are subsequently placed in or affixed to land under a contract of sale entered into by that person in the course of that business.

(4) The Central Government may, by notification in the official Gazette, direct that goods of any description specified in the notification shall, notwithstanding anything contained in this section, be deemed not to be goods insurable under this Ordinance.

[a] Certain words inserted by Ordinance No. 14 of 1942, S. 5, were *omitted* by the War Risks (Goods) Insurance (Amendment) Ordinance, 1943 (No. 8 of 1943), S. 2. [27-1-1943]. [b] *Inserted* by the War Risks (Goods) Insurance (Third Amendment) Ordinance, 1942 (No. 36 of 1942), S. 2. [28-7-1942].

Ownership.

[a][4. *(1)* Save in so far as is otherwise expressly provided in this Ordinance, any goods shall, subject to the provisions of this section, be deemed for the purposes of this Ordinance to be owned—

(a) if the property in the goods is for the time being vested in a person in relation to whom they are insurable under this Ordinance, by that person;

(b) if the property in the goods is not so vested, by any person in relation to whom the goods are insurable under this Ordinance and who is for the time being entitled, either unconditionally or conditionally, to have the property in the goods vested in him :

Provided that where—

(i) any goods would, under the foregoing provisions of this sub-section, be deemed to be owned by a person in whom the property therein is vested otherwise than in the course of a business carried on by him in British India, or who is entitled to have the property therein vested in him otherwise than in the course of such a business, and

(ii) any person carrying on business in British India is for the time being entitled to sell the goods as agent, the goods shall be deemed to be owned by the last mentioned person.

(2) Where in the course of any business a ship is being, or has been constructed under contract, and the ship or any part thereof or any goods appropriated for the construction thereof—

(a) would, apart from the provisions of this sub-section, have been deemed for the purposes of this Ordinance to be owned at any time by the person from time to time carrying on the business; or

(b) have at any time been accepted, in pursuance of a contract made with him, by the person from time to time carrying on the business, then, notwithstanding that they would not, apart from the said provisions, be deemed for the said purposes to be owned by the person from time to time carrying on the business, the ship and any part thereof and any goods so appropriated as aforesaid shall, subject to the provisions of sub-section *(3)*, be deemed, in a case to which clause *(a)* applies, to continue to be owned by the person from time to time carrying on the business until the acceptance of the ship, in pursuance of the contract in question, by the person for whom it is being, or has been, constructed, and in a case to which clause *(b)* applies, to be owned by the person from time to time carrying on the business at all times between the acceptance referred to in the said clause *(b)* and the acceptance of the ship as aforesaid by the person for whom it is being, or has been, constructed.

(3) The provisions of sub-section *(2)* shall apply in relation to the construction under contract in the course of a business of part of a ship, not being part of a ship which is being, or has been, constructed by the person from time to time carrying on the business, as they apply in relation to the construction of a ship—

(a) with the substitution for references to a ship of references to part of a ship;

(b) where the contract for the part of the ship is with the person for whom the ship is being constructed, with the substitution for references to the acceptance of the ship under the contract in question of references to the acceptance of the ship under the contract for the construction thereof;

(c) where the contract for the part of the ship is with any other person, with the substitution for references to the acceptance of the ship under the contract in question of references to the acceptance of the part of the ship under the contract for the construction of the part by the person for whom it is being, or has been, constructed.

(4) Where the person from time to time carrying on a business receives any money, under a policy issued in pursuance of the War Risks (Goods) Insurance Scheme, in respect of the loss of or damage to a ship, part of a ship or goods which are deemed to be owned by him by virtue of sub-section *(2)* or sub-section *(3)*, the money shall be held by him on trust for the person who apart from the provisions of those sub-sections would be deemed for the purposes of this Ordinance to be the owner of the ship, part or goods subject, however, to any lien or charge which would otherwise be enforceable against the ship, part or goods, and subject also to the right to retain out of the money the amount of any expenses reasonably incurred by the first mentioned person in making good any part of the loss or damage which he is liable to make good.]

[a] *Substituted* for the original by the War Risks (Goods) Insurance (Amendment) Ordinance, 1941 (No. 12 of 1941), S. 3. [20-12-1941.]

5. [War Risks Insurance Scheme.] *Repealed by the War Risks (Goods) Insurance (Termination) Ordinance, 1945 (No. 34 of 1945), S. 2.*

[a]5A. [Effect of change of rate of premium.] *Repealed by the War Risks (Goods) Insurance (Termination) Ordinance, 1945 (No. 34 of 1945), S. 2.*

[a] This section was inserted by the War Risks (Goods) Insurance (Amendment) Ordinance, 1942 (No. 14 of 1942), S. 5.

Employment of agents by Central Government.

6. The Central Government may employ or authorise the employment of any person or firm to act as its agent for any of the purposes of this Ordinance and may pay to persons or firms so employed such remuneration as the Central Government thinks fit :

Provided that no person or firm shall be so employed unless that person or firm is either—

(a) a member of an association prescribed in this behalf, or

(b) a person who in British India has a standing contract with under-writers who are members of the Society of Lloyd's whereby such person is authorised within the terms of such contract to issue protection notes, cover notes or other documents granting insurance against war risks.

7 [Compulsory insurance.] *Repealed by the War Risks (Goods) Insurance (Termination) Ordinance, 1945 (No. 34 of 1945), S. 2.*

Recovery of premiums unpaid.

[a][7A. *(1)* Without prejudice to the provisions of sub-section *(2)* of section 7, where any person has failed to insure as, or to the full extent, required by this Ordinance, and has thereby evaded the payment by way of premium of any money which he would have had to pay but for such failure, an officer authorised in this behalf by the Central Government may determine the amount payment of which has been so evaded. The amount so determined shall be payable by such person and shall be recoverable from him as an arrear of land-revenue and shall be a first charge on the property in respect of which the default was made.

(2) A person against whom a determination is made under sub-section *(1)* may, within the prescribed period, appeal against such determination to the Central Government whose decision shall be final.]

[a] *Inserted* by the War Risks (Goods) Insurance (Amendment) Ordinance, 1943 (No. 8 of 1943), S. 4 [27-1-1943].

8. [Restriction on carrying on certain insurance business.] *[Repealed by the War Risks (Goods) Insurance (Termination) Ordinance, 1945 (No. 34 of 1945), S. 2.]*

War Risks Insurance Fund.

9. *(1)* The Central Government shall establish a fund for the purposes of this Ordinance, to be called the War Risks (Goods) Insurance Fund, into which shall be paid all sums received by the Central Government by way of insurance premiums under the War Risks Insurance Scheme [a][or by way of payments made on composition of offences under section 12A] [b][or under any provision of law corresponding thereto in force in an Indian State, or in the French Establishments in India, or in the territories (hereinafter referred to as Administered Areas) set out in the Schedule] [c][or ordered to be paid under section 545 of the Code of Criminal Procedure, 1898, in any prosecution under this Ordinance,] and out of which shall be paid all sums required for the discharge by the Central Government of any liabilities under the War Risks Insurance Scheme, or for the payment by the Central Government of the remuneration and expenses of agents employed for the purposes of that scheme.

(2) If, at any time when a payment is to be made out of the said fund, the sum standing to the credit of the fund is less than the sum required for the making of that payment an amount equal to the deficiency shall be paid into the fund as an advance out of the general revenues.

(3) If at any time, the amount standing to the credit of the fund exceeds the sum which, in the opinion of the Central Government, is likely to be required for the making of payments out of the fund, the excess shall be paid into general revenues.

(4) The Central Government shall prepare in such form and manner as may be prescribed, and shall publish either annually or at such shorter intervals as may be prescribed, an account of all sums received into and paid out of the War Risks (Goods) Insurance Fund.

[a] *Inserted* by the War Risks (Goods) Insurance (Amendment) Ordinance, 1941 (No. 12 of 1941), S. 6. [20-12-1941.]

[b] *Inserted* by the War Risks (Goods) Insurance (Third Amendment) Ordinance, 1942 (No. 36 of 1942), S. 3. [28-7-1942.]

[c] *Inserted* by the War Risks (Goods) Insurance (Amendment) Ordinance, 1943 (No. 8 of 1943), S. 5. [27-1-1943.]

Power of Central Government to obtain information.

10. [a][*(1)* Any person authorised in this behalf by the Central Government may for the purposes of ascertaining whether or not [b][the requirements of this Ordinance have been complied with]—

(a) require any person carrying on in British India the business of fire insurance or of a seller of goods to submit to him such accounts, books or other documents or to furnish to him such information as he may reasonably think necessary, or

(b) at any reasonable time enter any premises occupied by any person carrying on in British India any such business, and inspect the premises and require any person found therein who is for the time being in charge thereof to produce to him and allow him to examine such accounts, books or other documents as may relate to the business carried on in the premises, or to furnish to him such information as he may reasonably think necessary.]

(2) Whoever wilfully obstruct any person in the exercise of his powers under this section or fails without reasonable excuse to comply with a request made thereunder shall, in respect of each occasion on which any such obstruction or failure takes place, be punishable with fine which may extend to five hundred rupees.

(3) Whoever, in purporting to comply with his obligations under this section, knowingly or recklessly makes a statement false in a material particular, shall be punishable with fine which may extend to one thousand rupees.

[a] Sub-section *(1)* was *substituted* for the original sub-section by the War Risks (Goods) Insurance (Amendment) Ordinance, 1941 (No. 12 of 1941), S. 7. [20-12-1941]. [b] *Substituted* for the words "any person has insured any goods against war risks, and, if so, for what value", *ibid*, 1943 (No. 8 of 1943), S. 6 [27-1-1943.]

Refund of premiums in certain cases.

11. [a][*(1)* Where goods of any description have been insured by a seller of goods for any period, and before that period has elapsed goods of that description have ceased, by virtue of a notification under sub-section *(4)* of section 3, to be goods insurable under this Ordinance, the person who has insured such goods shall be entitled to a proportionate refund of premium.

[a][*(2)* In any other case the Central Government may, at its discretion, order a refund to be made of any sum paid or purporting to have been paid as premium in respect of any policy issued or purporting to have been issued under this Ordinance.

(3) On and after the 1st day of October, 1940, no suit shall be maintainable in any civil Court against the Central Government or a person acting as agent of the Central Government under section 6 for the refund of money paid or purporting to have been paid as premium in respect of any policy issued or purporting to have been issued under this Ordinance.]

[a] The original section was *renumbered* as sub-section (1) of that section and sub-sections (2) and (3) were *inserted* by the War Risks (Goods) Insurance (Amendment) Ordinance, 1943 (No. 8 of 1943), S. 7. [27-1-1943].

Limitation on prosecutions.

12. No prosecution for any offence punishable under this Ordinance shall be instituted against any person except by or with the consent of the Central Government or an authority authorised in this behalf by the Central Government.

Composition of offences.

[a][12A. Any offence punishable under sub-section *(2)* of section 7 may either before or after the institution of the prosecution, be compounded by the Central Government or by any authority authorised in this behalf by the Central Government, on payment for credit to the War Risks (Goods) Insurance Fund of such sum as the Central Government or such authority, as the case may be, thinks fit.]

[a] *Inserted* by the War Risks (Goods) Insurance (Amendment) Ordinance, 1941 (No. 12 of 1941), S. 8. [20-12-1941.]

Bar of legal proceedings.

13. No suit, prosecution or other legal proceeding shall lie against any person for anything which is in good faith done, or intended to be done under this Ordinance.

Power to make rules.

14. *(1)* The Central Government may, by notification in the official Gazette, make rules[a] to carry into effect the provisions of this Ordinance.

(2) Without prejudice to the generality of the foregoing power, such rules may prescribe—

(a) the risks which shall be deemed to be war risks for the purposes of clause (c) of section 2;

(b) the forms of the policies of insurance referred to in sub-section *(2)* of section 5, the maximum period in respect of which such policies shall be issued, the rests at which premiums on such policies shall be payable, and the [b][minimum amount] which shall be payable as any one premium on such policies,

(c) the associations to be prescribed for the purposes of clause *(a)* of the proviso to section 6;

(d) the maximum amount to be prescribed for the purposes of the proviso to sub-section *(1)* of section 7;

[c][*(dd)* the procedure in making determinations and in presenting appeals from determinations made under section 7A;]

(e) the form of and the manner of preparing the account referred to in sub-section *(4)* of section 9 and the intervals at which such account shall be published.

[a] For the War Risks (Goods) Insurance Rules, 1940, *see* Commerce Department Notfn. No. 9-W.R.I/40, dated 14-9-1940.

[b] *Substituted* for "maximum amount" by Ordinance No. 14 of 1942, S. 6. [11-4-1942.]

[c] *Inserted* by Ordinance No. 8 of 1943, S. 8. [27-1-1943].

[a]15. [Application of scheme to goods in certain territories outside British India.] *Repealed by the War Risks (Goods) Insurance (Termination) Ordinance, 1945 (No 34 of 1945), S. 2.*

[a] Section 15 was added by Ordinance No. 36 of 1942, S. 4.

[a]THE SCHEDULE.

[*See* section 9 (1).]

1. The Cantonment of Baroda.
2. The Administered Areas in the Western India States Agency specified in the Western India States Administered Areas (Application of Laws) Order, 1937.
3. The Administered Areas in the Central India Agency specified in the Central India Administered Areas (Application of Laws) Order, 1937.
4. The Gwalior Residency Area.
5. The District of Abu.
6. The Administered Areas in the Hyderabad State specified in the Hyderabad Administered Areas (Application of Laws) Order, 1937.
7. The Civil and Military Station of Bangalore.
8. The Kolhapur Residency Area and the Wadi Jaghir.
9. The railway lands in the Western India States Agency specified in the notifications of the Political Department Nos. 189-I. B. and 190-I.B. dated the 8th September 1937.
10. The Rajputana and Central India railway lands specified in the Rajputana and Central India Railway Lands (Application of Laws) Order, 1937.
11. The Punjab States railway lands specified in the Punjab States Railway Lands (Application of Laws) Order, 1939.
12. The Thana Circles in the Rewa Kantha Agency in the Gujarat States Agency and the Dangs.
13. The British Reserve in Manipur.

[b][14. The Shillong Administered Areas]

[a] The Schedule was *added* by the War Risks (Goods) Insurance (Third Amendment) Ordinance, 1942 (No. 36 of 1942), S. 5. [28-7 1942.]

[b] *Added* by the War Risks (Inland Vessels) Insurance Ordinance, 1943 (No. 25 of 1943), S. 7 [17-7-1943.]

IV.—ORDERS.

(Made by the Governor-General in 1947-1948.)

[THE] ASSAM HIGH COURT ORDER, 1948.

(S. O. 4 dated 1-3-1948.)

WHEREAS the Assam Legislative Assembly have on the ninth day of September, 1947, adopted a resolution that a High Court be established for the Province of Assam, and the said resolution has been submitted to the Governor-General;

NOW, THEREFORE, in the exercise of the powers conferred by sub-section *(1)* of section 229 of the Government of India Act, 1935, as adapted by the India Provisional Constitution (Amendment) Order, 1948, the Governor-General is pleased to make the following Order :—

1. *(1)* This Order may be cited as the Assam High Court Order, 1948.

(2) It shall come into force on the date of its publication in the Gazette of India.

2. *(1)* The Interpretation Act, 1889,[a] applies for the interpretation of this Order, as it applies for the interpretation of an Act of Parliament.

(2) In this Order, "the Act" means the Government of India Act, 1935, as for the time being in force in the Dominion of India.

[a] (1889) 52 & 53 Vict., c. 63.

3. *(1)* As from the fifth day of April, 1948 (hereinafter referred to as "the prescribed day"), there shall be a High Court for the Province of Assam which shall be a Court of record, and shall consist of a chief justice and such other judges as the Governor-General may from time to time, whether before or after the prescribed day, appoint in accordance with the provisions of section 220 of the Act :

Provided that any appointments so made before the prescribed day shall not take effect till the prescribed day.

(2) The said High Court is hereinafter referred to as the High Court of Assam.

4. The High Court of Assam shall have, in respect of the territories for the time being included in the Province of Assam, all such original, appellate and other jurisdiction as, under the law in force immediately before the prescribed day, is exercisable in respect of the said territories or any part thereof by the High Court in Calcutta, or by the Governor of Assam exercising the functions of a High Court.

5. *(1)* The High Court of Assam shall have the like power to approve, admit, enrol, remove and suspend advocates and attorneys, and to make rules with respect to advocates and attorneys, as are, under the law in force immediately before the prescribed day, exercisable by the High Court in Calcutta.

(2) The right of audience in the High Court of Assam shall be regulated in accordance with the like principles as immediately before the prescribed day, are in force with respect to the right of audience in the High Court in Calcutta :

Provided that, subject to any rule made or direction given by the High Court of Assam in the exercise of the powers conferred by this Article, any person who immediately before the prescribed day, is an advocate entitled to practise or an attorney entitled to act in the High Court in Calcutta, shall be recognised as an advocate or an attorney entitled to practise or to act, as the case may be, in the High Court of Assam.

6. Subject to the provisions of this Order the law in force immediately before the prescribed day with respect to practice and procedure in the High Court in Calcutta shall, with the necessary modifications, apply in relation to the High Court of Assam, and accordingly that High Court shall have all such powers to make rules and orders with respect to practice and procedure as are immediately before the prescribed day exercisable by the High Court in Calcutta :

Provided that any rules or orders which are in force immediately before the prescribed day with respect to practice and procedure in the High Court in Calcutta shall, until varied or revoked by rules or orders made by the High Court of Assam, apply with the necessary modifications in relation to practice and procedure in the High Court of Assam as if made by that Court

7. *(1)* The High Court of Assam shall have a Seal of such form and design as the Chief Justice may direct.

(2) The law in force immediately before the prescribed day with respect to the custody of the Seal of the High Court in Calcutta shall, with the necessary modifications, apply with respect to the custody of the Seal of the High Court of Assam.

8. The law in force immediately before the prescribed day with respect to the form of writs and other processes used, issued or awarded by the High Court in Calcutta shall, with the necessary modifications, apply with respect to the form of writs and other processes used, issued or awarded by the High Court of Assam.

9. The law in force immediately before the prescribed day relating to the powers of the Chief Justice, single Judges and division Courts of the High Court in Calcutta, and with respect to all matters ancillary to the exercise of those powers, shall, with the necessary modifications apply in relation to the High Court of Assam.

10. The High Court of Assam, and the judges and division Courts thereof, shall sit at such places in the Province of Assam as the Chief Justice may, with the approval of the Governor of Assam, appoint.

11. The law in force immediately before the prescribed day relating to appeals to His Majesty in Council or to the Federal Court from the High Court in Calcutta and the judges and division Courts thereof shall, with the necessary modifications, apply in relation to the High Court of Assam.

12. *(1)* Except as hereinafter provided, the High Court in Calcutta shall, on and after the prescribed day, have no jurisdiction in respect of the Province of Assam.

(2) Notwithstanding anything contained in paragraph (1) of this Article or in Article 4, —

(a) any proceedings which, immediately before the prescribed day, are pending in the High Court in Calcutta on its original side, including any proceedings then pending in that High Court as a Court of reference shall be heard and determined by that High Court;

(b) the High Court in Calcutta shall have the like jurisdiction to hear and determine any appeal from, or to review, an order of a judge of that High Court, whether on its original or appellate side, as if this Order had not been made, and the High Court of Assam shall have no jurisdiction to hear or determine any such appeal, or to review any such order; and

(c) the High Court in Calcutta shall have the like jurisdiction to hear and dispose of any application for leave to appeal to His Majesty in Council or the Federal Court from an order of that High Court as it would have had if this Order had not been made, and the High Court of Assam shall have no jurisdiction to hear or dispose of any such application.

(3) All proceedings pending in the High Court in Calcutta immediately before the prescribed day, other than proceedings with respect to which that High Court retains jurisdiction by virtue of paragraph (2) of this Article, shall, where the Court of origin is situated in the Province of Assam, stand transferred by virtue of this Order to the High Court of Assam.

(4) Any order made by the High Court in Calcutta

(a) in any proceedings with respect to which that High Court retains jurisdiction by virtue of paragraph (2) of this Article, or

(b) before the appointed day, in any proceedings transferred to the High Court of Assam by virtue of paragraph (3) of this Article

shall for all purposes have effect, not only as an order of the High Court in Calcutta, but also as an order made by the High Court of Assam.

(5) For the purposes of this Article, proceedings shall be deemed to be pending in a Court until that Court has disposed of all issues between the parties, including any issues with respect to the taxation of the costs of the proceedings.

(6) References in this Article to a High Court shall be construed as including references to a judge or division Court thereof, and references to an order made by a Court or a judge shall be construed as including references to a sentence, judgment or decree passed or made by that Court or judge.

13. As from the prescribed day, the Governor of Assam shall cease to have the jurisdiction of a High Court in respect of any part of the Province of Assam, and all proceedings which immediately before that day are pending before the Governor exercising the functions of a High Court shall stand transferred by virtue of this Order to the High Court of Assam and shall be disposed of by that High Court according to law.

14. Nothing in this Order shall prejudice the application to the High Court of Assam of any relevant provisions of the Act, and this Order shall have effect subject to any provision that may be made on or after the prescribed day with respect to that High Court by any legislature or other authority having power to make such provision.

[THE] FEDERAL COURT ORDER, 1947.

(G. G. O. 3 dated 11-8-1947.)

In exercise of the powers conferred by section 9 of the Indian Independence Act, 1947, and of all other powers enabling him in that behalf, the Governor-General is pleased to make the following Order : —

1. This Order may be cited as the Federal Court Order, 1947.

2. The Interpretation Act, 1889,[a] applies for the interpretation of this Order as it applies for the interpretation of an Act of Parliament.

[a] (1889) 52 & 53 Vict., c. 63.

3. In this Order,—

"the appointed day" means the fifteenth day of August 1947;

"the Federal Court", where used without qualification, means the Federal Court constituted under the Government of India Act, 1935, as in force immediately before the appointed day;

"India" means the Dominion of India;

"Pakistan" means the Dominion of Pakistan.

4. *(1)* The Federal Court shall, as from the appointed day, be the Federal Court of India, and shall accordingly be deemed to have been duly constituted as such in accordance with the provisions contained in that behalf in the Government of India Act, 1935, as it applies in relation to India on and after that day.

(2) Without prejudice to the general effect of the preceding paragraph, any person who is a judge of the Federal Court immediately before the appointed day shall, as from that day, be deemed to have been duly appointed a judge of the Federal Court of India under section two hundred, or, as the case may be, section two hundred and two, of the Government of India Act, 1935, as it applies in relation to India, and shall, on and after that day, be capable of acting in his office as a judge of the Federal Court of India without making a fresh oath or observing any other formality.

(3) Any rules of the Federal Court in force immediately before the appointed day shall remain in force as from that day as if duly made by the Federal Court of India, and may be varied or revoked accordingly.

5. *(1)* Any proceedings pending in the Federal Court immediately before the appointed day may be continued in the Federal Court of India on and after that day :

Provided that the Federal Court of India may, if it appears to them that any such proceedings as aforesaid ought to be transferred to the Federal Court of Pakistan, direct that the proceedings shall be so transferred; and where any such direction is given the Federal Court of Pakistan shall have jurisdiction with respect to those proceedings to the exclusion of the Federal Court of India.

(2) Where any proceedings pending in the Federal Court immediately before the appointed day are continued in the Federal Court of India on or after that day, any order made in those proceedings by the Federal Court of India, or by His Majesty in Council on appeal therefrom, shall, in addition to being enforceable in India, be enforceable in Pakistan as if it were an order made by the Federal Court of Pakistan, or as the case may be, an order made by His Majesty in Council on appeal from that Court.

(3) For the purposes of this Order proceedings shall be deemed to be pendidg in the Federal Court until all issues between the parties (including any issues with respect to the taxation of the costs of the proceedings) have been finally disposed of.

6. *(1)* Subject to the provisions hereinafter contained with respect to appeals, any order made by the Federal Court before the appointed day shall be enforceable in India as if it were an order made by the Federal Court of India, and be enforceable in Pakistan as if it were an order made by the Federal Court of Pakistan.

(2) Where any such order as is mentioned in the preceding paragraph has, whether before or after the appointed day, been confirmed, varied or reversed on appeal, the decision of His Majesty in Council on the appeal shall be enforceable in India as if the decision appealed from were a decision of the Federal Court of India, and shall be enforceable in Pakistan as if the decision appealed from were a decision of the Federal Court of Pakistan.

[THE] HIGH COURT (CALCUTTA) ORDER, 1947.

(G. G. O. 6 dated 11-8-1947.)

In exercise of the powers conferred by section 9 of the Indian Independence Act, 1947, and of all other powers enabling him in that behalf, the Governor-General is pleased to make the following Order :—

1. This Order may be cited as the High Court (Calcutta) Order, 1947.

2. *(1)* The Interpretation Act, 1889[a], applies for the interpretation of this Order as it applies for the interpretation of an Act of Parliament.

(2) In this Order :—

"the appointed day" means the 15th day of August 1947 ;

"the High Court in Calcutta" means the High Court of Judicature at Fort William in Bengal, constituted in accordance with Letters Patent, dated the 28th December, 1865.

[a] (1889) 52 and 53 Vict., c. 63.

3. The High Court in Calcutta shall continue to exist on and after the appointed day, and shall, save as expressly provided by the High Courts (Bengal) Order, 1947, have all such original appellate and other jurisdiction as it had immediately before that day.

4. Without prejudice to the general effect of the preceding Article, any person holding office as a Judge of the High Court in Calcutta immediately before the appointed day (including the person holding office as Chief Justice of the said Court and any person holding office as a temporary or additional judge thereof) shall, subject to the provisions of the High Courts (Bengal) Order, 1947, continue, as from that day, to hold the like office on the same terms and conditions as were applicable in his case immediately before that day.

5. Subject to any general or special orders or arrangements affecting his case, any person who immediately before the appointed day is serving as a clerk or other officer of the High Court in Calcutta shall, as from that day, remain in the service of the said Court on the like terms and conditions as were applicable to him immediately before that day :

Provided that the Chief Justice of the said Court may, on or after the appointed day, determine the appointment of any such person as aforesaid if he thinks it expedient so to do having regard to any changes effected by or under the Indian Independence Act, 1947.

6. Any rules or orders with respect to practice or procedure in force in the High Court in Calcutta immediately before the appointed day shall remain in force as from that day until altered or modified by a competent authority.

7. Nothing in this Order shall prejudice the application to the High Court in Calcutta of any relevant provisions of Part IX of the Government of India Act, 1935, as it applies in relation to the Dominion of India ; and the provisions of this Order shall have effect subject to any provision made on or after the appointed day with respect to the High Court in Calcutta by any legislature or other authority having power to make such provision.

(G. G. O. 7, dated 11-8-1947).

In exercise of the powers conferred by section 9 of the Indian Independence Act, 1947, and of all other powers enabling him in that behalf, the Governor-General is pleased to make the following Order :—

1. This Order may be cited as the High Court (Lahore) Order, 1947.

2. *(1)* The Interpretation Act, 1889[a], applies for the interpretation of this Order as it applies for the interpretation of an Act of Parliament.

(2) In this Order :—

"the appointed day" means the 15th day of August, 1947 ;

"the High Court at Lahore" means the High Court of Judicature at Lahore, established by Letters Patent, dated the 21st March, 1919.

[a] (1889) 52 and 53 Vict., c. 63.

3. The High Court at Lahore shall continue to exist on and after the appointed day, and shall, save as expressly provided by the High Courts (Punjab) Order, 1947, have all such original appellate and other jurisdiction as it had immediately before that day.

4. Without prejudice to the general effect of the preceding Article any person holding office as a judge of the High Court at Lahore immediately before the appointed day (including the person holding office as Chief Justice of the said Court and any person holding office as a temporary or additional judge thereof) shall, subject to the provisions of the High Courts (Punjab) Order, 1947, continue, as from that day, to hold the like office on the same terms and conditions as were applicable in his case immediately before that day.

5. Subject to any general or special orders or arrangements affecting his case, any person who immediately before the appointed day is serving as a clerk or other officer of the High Court at Lahore shall, as from that day, remain in the service of the said Court on the like terms and conditions as were applicable to him immediately before that day :

Provided that the Chief Justice of the said Court may, on or after the appointed day, determine the appointment of any such person as aforesaid if he thinks it expedient so to do having regard to any changes effected by or under the Indian Independence Act, 1947.

6. Any rules or orders with respect to practice or procedure in force in the said High Court at Lahore immediately before the appointed day shall remain in force as from that day until altered or modified by a competent authority.

7. Nothing in this Order shall prejudice the application to the High Court at Lahore of any relevant provisions of Part IX of the Government of India Act, 1935, as it applies in relation to the Dominion of India ; and the provisions of this Order shall have effect subject to any provision made on or after the appointed day with respect to the High Court at Lahore by any legislature or other authority having power to make such provision.

[THE] HIGH COURTS (BENGAL) ORDER, 1947.

(G. G. O. 4, dated 11-8-1947)

In exercise of the powers conferred by section 9 of the Indian Independence Act, 1947, and of all other powers enabling him in that behalf, the Governor-General is pleased to make the following Order:—

1. This Order may be cited as the High Courts (Bengal) Order, 1947.

2. *(1)* The Interpretation Act, 1889,[a] applies for the interpretation of this Order as it applies for the interpretation of an Act of Parliament.

(2) References herein to an order made by any court or judge shall be construed as including references to any sentence, judgment or decree passed or made by that court or judge.

[a] (1889) 52 & 53 Vict., c. 63.

3. As from the 15th day of August, 1947 (hereinafter referred to as "the appointed day"), there shall be a High Court of Judicature for the Province of East Bengal; and the said court is hereinafter referred to as the High Court of East Bengal.

4. *(1)* Between the coming into force of this Order and the appointed day, His Majesty may appoint a Chief Justice of the said court and may appoint such other judges of the said court as he thinks fit, and any appointments so made shall take effect as from the appointed day:

Provided that no person shall be qualified to be appointed a judge under this paragraph unless, under the law in force at the time of the making of this Order, he would have been qualified to be appointed a judge of the High Court in Calcutta, and no person shall be qualified to be appointed Chief Justice under this paragraph unless, under the said law, he would have been qualified to be appointed Chief Justice of the High Court in Calcutta.

(2) If any judge of the High Court in Calcutta, having elected to be a judge of the High Court of East Bengal, is appointed to be a judge of that court in accordance with the preceding provisions of this Order, then, as from the appointed day, the judge so appointed shall cease to be a judge of the High Court in Calcutta.

5. The High Court of East Bengal shall be a court of record, and shall have, in respect of the territories for the time being included in the Province of East Bengal, all such original appellate and other jurisdiction as, under the law in force immediately before the appointed day, is exercisable in respect of the said territories by the High Court in Calcutta.

6. *(1)* The High Court of East Bengal shall have the like powers to approve, admit, enrol, remove and suspend advocates, vakils and attorneys, and to make rules with respect to advocates, vakils and attorneys, as are, under the law in force immediately before the appointed day, exercisable by the High Court in Calcutta.

(2) The right of audience in the High Court of East Bengal shall be regulated in accordance with the like principles as, immediately before the appointed day, are in force with respect to the right of audience in the High Court in Calcutta:

Provided that, subject to any rule made or direction given by the High Court of East Bengal in the exercise of the powers conferred by this Article, any person who, immediately before the appointed day, is an advocate, vakil or attorney entitled to practice in the High Court in Calcutta, shall be recognised as an advocate, vakil or attorney entitled to practice in the High Court of East Bengal.

7. Subject to the provisions of this Order, the law in force immediately before the appointed day with respect to practice and procedure in the High Court in Calcutta shall, with the necessary modifications, apply

in relation to the High Court of East Bengal, and accordingly that High Court shall have all such powers to make rules and orders with respect to practice and procedure as are immediately before the appointed day exercisable by the High Court in Calcutta.

Provided that any rules or orders which are in force immediately before the appointed day with respect to practice and procedure in the High Court in Calcutta shall, until varied or revoked by rules or orders made by the High Court of East Bengal, apply with any necessary modifications in relation to practice and procedure in the High Court of East Bengal as if made by that Court.

8. *(1)* The High Court of East Bengal shall have a Seal consisting of the Royal Arms, with an exergue or label surrounding the same with the inscription "The Seal of the High Court of Judicature in East Bengal".

(2) The law in force immediately before the appointed day with respect to the custody of the Seal of the High Court in Calcutta shall, with the necessary modifications, apply with respect to the custody of the Seal of the High Court of East Bengal.

9. The law in force immediately before the appointed day with respect to the form of writs and other processes used, issued or awarded by the High Court in Calcutta shall, with any necessary modifications, apply with respect to the form of writs and other processes used, issued or awarded by the High Court of East Bengal.

10. The law in force immediately before the appointed day relating to the powers of the Chief Justice and of single judges and divisional courts of the High Court in Calcutta, and with respect to all matters ancillary to the exercise of those powers, shall, with the necessary modifications, apply in relation to the High Court of East Bengal.

11. The High Court of East Bengal and the judges and divisional courts thereof shall sit at such places in the Province of East Bengal as the Chief Justice of the said court may, with the approval of the Governor of East Bengal, appoint.

12. Subject to any relevant provisions contained in Part IX of the Government of India Act, 1935, as it applies in Pakistan after the appointed day, the law in force immediately before the appointed day relating to appeals to His Majesty in Council from the High Court in Calcutta and the judges and divisions thereof shall, with any necessary modifications, apply in relation to appeals to His Majesty in Council from the High Court of East Bengal and the judges and divisions thereof.

13. *(1)* Subject as hereinafter provided, the High Court in Calcutta shall have no jurisdiction in respect of the territories for the time being included in the Province of East Bengal.

(2) Notwithstanding anything contained in this Order:—

(a) any proceedings which, immediately before the appointed day, are pending in the High Court in Calcutta on its original side, including any proceedings then pending in the said High Court as a court of reference, shall be heard and determined by that court;

(b) the High Court in Calcutta shall have the like jurisdiction to hear and determine any appeal from an order of a judge of the said court on its original side as if this Order had not been made, and the High Court of East Bengal shall have jurisdiction to hear or determine any such appeal; and

(c) the High Court in Calcutta shall have the like jurisdiction to review any order made by any judge of the said High Court as it would have had if this Order had not been made, and the High Court of East Bengal shall have no jurisdiction to review any such order.

(3) Subject to the preceding provisions of this Article, all proceedings pending on the appellate side of the High Court in Calcutta immediately before the appointed day, shall, where the court of origin is, as from that day, situated in the Province of East Bengal, stand transferred by virtue of this Order to the High Court of East Bengal.

(4) Subject to the following provisions of this Article with respect to appeals, any order made by the High Court in Calcutta either

(a) before the appointed day, or

(b) in any proceedings with respect to which the said High Court retains jurisdiction by virtue of paragraphs (2) and (3) of this Article:

shall for all purposes have effect not only as an order of the High Court in Calcutta but also as an order made by the High Court of East Bengal.

(5) Subject to the following provisions of this Article with respect to appeals, any order made by the High Court of East Bengal in proceedings transferred to that High Court by virtue of this Article, shall for all purposes have effect not only as an order of that court but also as an order made by the High Court in Calcutta.

(6) Where any such order as is mentioned in paragraphs (4) and (5) of this Article has, whether before or after the appointed day, been confirmed, varied or reversed on appeal, effect shall be given to the decision of the appellate court as if the order appealed from were an order not only of the High Court by which it was made, but also of the High Court in Calcutta or the High Court of East Bengal, as the case may be.

(7) Any reference in this Article to a High Court shall be construed as including a reference to a judge or division thereof; and for the purposes of this Article proceedings shall be deemed to be pending in a particular court until that court has disposed of all issues between the parties including any issues with respect to the taxation of the costs of the proceedings.

14. Nothing in this Order shall prejudice the application to the High Court of East Bengal of any relevant provisions of Part IX of the Government of India Act, 1935, as it applies in relation to Pakistan, and the provisions of this Order shall have effect subject to any provision made on or after the appointed day with respect to the High Court in Calcutta or the High Court of East Bengal by any legislature or other authority having power to make such provision.

[THE] HIGH COURTS (PUNJAB) ORDER, 1947

[G. G. O. 5, dated 11-8-1947.]

In exercise of the powers conferred by section 9 of the Indian Independence Act, 1947, and of all other powers enabling him in that behalf, the Governor-General is pleased to make the following Order:—

1. This Order may be cited as the High Courts (Punjab) Order, 1947.

2. *(1)* The Interpretation Act, 1889,[a] applies for the interpretation of this Order as it applies for the interpretation of an Act of Parliament.

(2) References herein to an order made by any court or judge shall be construed as including references

to any sentence, judgment or decree passed or made by that court or judge.

[a] (1889) 52 & 53 Vict., c. 63.

3. As from the 15th day of August, 1947, (hereinafter referred to as "the appointed day"), there shall be a High Court of Judicature for the Province of East Punjab; and the said court is hereinafter referred to as the High Court of East Punjab.

4. *(1)* Between the coming into force of this Order and the appointed day, His Majesty may appoint a Chief Justice of the said court and may appoint such other judges of the said court as he thinks fit, and any appointments so made shall take effect as from the appointed day:

Provided that no person shall be qualified to be appointed a judge under this paragraph unless, under the law in force at the time of the making of this Order, he would have been qualified to be appointed a judge of the High Court at Lahore, and no person shall be qualified to be appointed Chief Justice under this paragraph unless, under the said law, he would have been qualified to be appointed Chief Justice of the High Court at Lahore

(2) If any judge of the High Court at Lahore, having elected to be a judge of the High Court of East Punjab, is appointed to be a judge of that court in accordance with the preceding provisions of this Order, then, as from the appointed day, the judge so appointed shall cease to be a judge of the High Court at Lahore.

5. The High Court of East Punjab shall be a Court of record, and shall have, in respect of the territories for the time being included in the Province of East Punjab and in the Province of Delhi, all such original appellate and other jurisdiction as, under the law in force immediately before the appointed day, is exercisable in respect of the said territories by the High Court at Lahore.

6. *(1)* The High Court of East Punjab shall have the like powers to approve, admit, enrol, remove and suspend advocates. vakils and attorneys, and to make rules with respect to advocates, vakils and attorneys, as are, under the law in force immediately before the appointed day, exercisable by the High Court at Lahore.

(2) The right of audience in the High Court of East Punjab shall be regulated in accordance with the like principles as, immediately before the appointed day, are in force with respect to the right of audience in the High Court at Lohore :

Provided that, subject to any rule made or direction given by the High Court of East Punjab in the exercise of the powers conferred by this Article, any person who, immediately before the appointed day, is an advocate, vakil or attorney entitled to practise in the High Court at Lahore, shall be recognised as an advocate, vakil or attorney entitled to practise in the High Court of East Punjab.

7. Subject to the provisions of this Order, the law in force immediately before the appointed day with respect to practice and procedure in the High Court at Lahore shall, with the necessary modifications, apply in relation to the High Court of East Punjab, and accordingly that High Court shall have all such powers to make rules and orders with respect to practice and procedure as are immediately before the appointed day exercisable by the High Court at Lahore:

Provided that any rules or orders which are in force immediately before the appointed day with respect to practice and procedure in the High Court at Lahore shall, until varied or revoked by rules or orders made by the High Court of East Punjab, apply with any necessary modifications in relation to practice and procedure in the High Court of East Punjab as if made by that Court.

8. *(1)* The High Court of East Punjab shall have a Seal consisting of the Royal Arms with an exergue or label surrounding the same with the inscription "the Seal of the High Court of Judicature in East Punjab."

(2) The law in force immediately before the appointed day with respect to the custody of the Seal of the High Court at Lahore shall, with the necessary modifications, apply with respect to the custody of the Seal of the High Court of East Punjab.

9. The law in force immediately before the appointed day with respect to the form of writs and other processes used, issued or awarded by the High Court at Lahore shall, with any necessary modifications, apply with respect to the form of writs and other processes used, issued or awarded by the High Court of East Punjab.

10. The law in force immediately before the appointed day relating to the powers of the Chief Justice and of single judges and divisional courts of the High Court at Lahore, and with respect to all matters ancillary to the exercise of those powers, shall, with the necessary modifications, apply in relation to the High Court of East Punjab.

11. The High Court of East Punjab and the judges and divisional courts thereof shall sit at such places in the Provinces of East Punjab and Delhi as the Chief Justice of the said court may, with the approval of the Governor of East Punjab, appoint.

12. Subject to any relevant provisions contained in Part IX of the Government of India Act, 1935, as it applies in India after the appointed day, the law in force immediately before the appointed day relating to appeals to His Majesty in Council from the High Court at Lahore and the judges and divisions thereof shall, with any necessary modifications, apply in relation to appeals to His Majesty in Council from the High Court of East Punjab and the judges and divisions thereof.

13. *(1)* Subject as hereinafter provided, the High Court at Lahore shall have no jurisdiction in respect of the territories for the time being included in the Province of East Punjab or in the Province of Delhi.

(2) Notwithstanding anything contained in this Order :—

(a) any proceedings which, immediately before the appointed day, are pending in the High Court at Lahore on its original side, including any proceedings then pending in the said High Court as a court of reference, shall be heard and determined by that court;

(b) the High Court at Lahore shall have the like jurisdiction to hear and determine any appeal from an order of a judge of the said court on its original side as if this Order had not been made, and the High Court of East Punjab shall have jurisdiction to hear or determine any such appeal; and

(c) the High Court at Lahore shall have the like jurisdiction to review any order made by any judge of the said High Court as it would have had if this Order had not been made, and the High Court of East Punjab shall have no jurisdiction to review any such order.

(3) Subject to the preceding provisions of this Article, all proceedings pending on the appellate side of the High Court at Lahore immediately before the appointed day, shall, where the Court of origin is, as from that day, situated in the Province of East Punjab or in the Province of Delhi, stand transferred by virtue of this Order to the High Court of East Punjab.

(4) Subject to the following provisions of this Article with respect to appeals, any order made by the High Court at Lahore either—

(a) before the appointed day ; or

(b) in any proceedings with respect to which the

said High Court retains jurisdiction by virtue of paragraphs (2) and (3) of this Article;

shall for all purposes have effect not only as an order of the High Court at Lahore but also as an order made by the High Court of East Punjab.

(5) Subject to the following provisions of this Article with respect to appeals, any order made by the High Court of East Punjab in proceedings transferred to that High Court by virtue of this Article shall for all purposes have effect not only as an order of that court but also as an order made by the High Court at Lahore.

(6) Where any such order as is mentioned in paragraphs (4) and (5) of this Article has, whether before or after the appointed day, been confirmed, varied or reversed on appeal, effect shall be given to the decision of the appellate court as if the order appealed from were an order not only of the High Court by which it was made, but also of the High Court at Lahore or the High Court of East Punjab, as the case may be.

(7) Any reference in this Article to a High Court shall be construed as including a reference to a judge or division thereof; and for the purposes of this Article proceedings shall be deemed to be pending in a particular court until that Court has disposed of all issues between the parties, including any issues with respect to the taxation of the costs of the proceedings.

14. Nothing in this Order shall prejudice the application to the High Court of East Punjab of any relevant provisions of Part IX of the Government of India Act, 1935, as it applies in relation to India, and the provisions of this Order shall have effect subject to any provision made on or after the appointed day with respect to the High Court at Lahore or the High Court of East Punjab by any legislature or other authority having power to make such provision.

[THE] INDIA (ADAPTATION OF EXISTING INDIAN LAWS) ORDER, 1947.

(G. G. O. 16, dated 14-8-1947.)

WHEREAS sub-section *(3)* of section 18 of the Indian Independence Act, 1947 (hereafter in the recitals to this Order referred to as "the said Act") provides that save as otherwise expressly provided in the said Act, the law of British India and of the several parts thereof existing immediately before the appointed day shall, so far as applicable and with the necessary adaptations, continue as the law of each of the new Dominions and the several parts thereof, until other provision is made by laws of the Legislature of the Dominion in question or by any other Legislature or other authority having power in that behalf;

AND WHEREAS sub-section *(1)* of section 9 of the said Act provides that the Governor-General shall by order make such provision as appears to him to be necessary or expedient for bringing the provisions of the said Act into effective operation and for removing difficulties arising in connection with the transition to the provisions of the said Act;

NOW, THEREFORE, in exercise of the powers conferred by the said Act, the Governor-General is pleased to make the following Order :—

1. *(1)* This Order may be cited as the India (Adaptation of Existing Indian Laws) Order, 1947.

(2) It shall come into force on the fifteenth day of August, 1947.

2. *(1)* In this Order—

"appointed day" means the fifteenth day of August, 1947.

"existing Indian law" means any Act, Ordinance Regulation, rule, order or bye-law which immediately before the appointed day has the force of law in the whole or any part of the territories which as from that day form the territories of the Dominion of India, but does not include any Act of Parliament, or any Order in Council, rule or other instrument made under an Act of Parliament, or the General Clauses Act, 1897.

(2) The General Clauses Act, 1897, applies for the interpretation of this Order as it applies for the interpretation of a Central Act.

3. As from the appointed day, all existing Indian laws shall, until repealed or altered or amended by a competent Legislature or other competent authority, in their application to the Dominion of India and any part or parts thereof, be subject to the adaptations directed in this Order.

4. *(1)* Where an existing Indian law contains a provision defining the territories to which the law extends, or a provision referring to the territories which are within the scope of that provision, that provision shall be so adapted as to exclude any territories which on the appointed day are not to form part of the territories of the Dominion of India.

(2) Without prejudice to the general effect of the preceding paragraph, references in any existing Indian law to "the whole of British India" (or "British India"), to "Bengal" and to "the Punjab" shall, except where the reference occurs in a title or preamble or any citation or description of an Act, Ordinance or Regulation and except where the context otherwise requires, be replaced by references to "all the Provinces of India", to "West Bengal" and to "East Punjab", respectively.

5. Any reference in an existing Indian law to a High Court which as from the appointed day ceases to be a High Court for any part of the Dominion of India shall —

(a) if the reference be to the High Court of Judicature at Lahore, be replaced by a reference to the High Court of East Punjab, and

(b) in any other case, be omitted.

6. Any words in an existing Indian law signifying that the Governor-General or Governor is to act in his discretion or to exercise his individual judgment shall be omitted.

7. Any reference in an existing Indian law to the exercise of the functions of the Crown in its relation with Indian States (including any provision the operation of which depends on the exercise of such functions) shall be omitted, and references in any such law to the Crown Representative shall be omitted or construed as references to the Central Government as the context may require.

8. Any reference in an existing Indian law to the Indian Legislature or to a Chamber or the Chambers thereof shall be construed as a reference to the Central Legislature.

9. *(1)* Any tribunal, authority, officer or official body constituted or appointed before the commencement of this Order under an existing Indian law for, or with jurisdiction over, the whole of India or the whole of British India shall, as from the appointed day, be deemed to have been constituted or appointed for or with jurisdiction over, the whole of the Dominion of India, and any reference in an existing Indian law to any such tribunal, authority, office or official body as aforesaid shall be construed accordingly.

(2) Any reference in an existing Indian law to a tribunal, authority, officer or official body whose jurisdiction or authority immediately before the appointed day extends—

(a) to the whole of the Province of Bengal or over parts of that Province which on the said day fall partly within the Province of East Bengal and partly within the Province of West Bengal, or

(b) to the whole of the Province of the Punjab or over parts of that Province which on the said day fall partly within the Province of East Punjab and partly within the Province of West Punjab, or

(c) to the whole of the Province of Assam or over parts of that Province which on the said day fall partly within the Province of Assam and partly within the Province of East Bengal,

shall be construed as references to such tribunal, authority, officer or official body as the appropriate Government may by notification in the official Gazette constitute or appoint in that behalf, and any such direction may be given so as to have effect from the appointed day :

Provided that nothing in this paragraph shall apply to any tribunal, authority, officer or official body to which or to whom the provisions of paragraph (1) of this Article apply.

(3) For the purpose of sub-paragraph (2) the expression "appropriate Government" means, as respects a law relating to a matter enumerated in List I of the Seventh Schedule to the Government of India Act, 1935, the Central Government, and as respects any other law, the Provincial Government of West Bengal, East Punjab or Assam, as the case may be.

10. Any court, tribunal or authority required or empowered to enforce an existing Indian law shall, notwithstanding that this Order makes no provision or insufficient provision for the adaptation of the law for the purpose of rendering it consistent with the provisions of the Indian Independence Act, 1947, and of the Government of India Act, 1935, as applicable to the Dominion of India, construe the law with all such adaptations as are necessary for the said purpose :

Provided that if any question arises regarding the adaptations with which such law should be construed for the said purpose, the question shall be referred to the Central Government if the law relates to a matter enumerated in List I or List III in the Seventh Schedule to the Government of India Act, 1935, and to the Provincial Government in any other case, and the decision of that Government on any such reference shall be final.

11. The General Clauses Act, 1897, shall in its application to the Dominion of India, until repealed or altered or amended by the Central Legislature, be subject to the adaptations specified in the Schedule to this Order.

12. The provisions of this Order shall not render invalid anything duly done before the appointed day under an existing Indian law, and anything so done for British India or for parts thereof including territories thereafter included in the Dominion of India shall, as from the appointed day and until altered, varied or undone, have effect as if it had been done after the appointed day for the whole of the Dominion of India or as the case may be, for such territories thereof as aforesaid, by a competent authority and under and in accordance with the provisions then applicable to the case.

13. If by order under section 9 of the Indian Independence Act, 1947, provision is made for authorising the continued carrying on for the time being on behalf of the new Dominions or on behalf of any two or more of the Provinces therein referred to as the said new Provinces of services or activities previously carried on under the authority of an existing Indian law on behalf of British India as a whole or on behalf of the former Provinces which those new Provinces represent, then, notwithstanding anything herein contained, such law shall, as from the appointed day, or where the order under the said section 9 is made after the appointed day, as from the date of the making of the order, have effect in its application to the Dominion of India according to the tenor of that order.

THE SCHEDULE.

(See Article 11.*)*

Adaptations of the General Clauses Act, 1897, in its application to the Dominion of India.

[*Note* :— Adaptations of the General Clauses Act, 1897, have been incoporated in that Act as printed in Vol. IV of this Manual. Hence the text of this schedule is not reproduced here.]

[THE] INDIA (ADAPTATION OF INCOME-TAX, PROFITS TAX AND REVENUE RECOVERY ACTS) ORDER, 1947.

(G. G. O. 31, dated 10-12-1947)

In exercise of the powers conferred by section 9 of the Indian Independence Act, 1947, and of all other powers enabling him in that behalf, the Governor-General is pleased to make the following Order :—

1. *(1)* This Order may be cited as the Indian (Adaptation of Income-tax, Profits-tax and Revenue Recovery Acts) Order, 1947.

(2) It shall be deemed to have effect from the fifteenth day of August 1947.

2. In their application to the Dominion of India and any part or parts thereof, the Central Acts specified in the Schedule to this Order shall, as from the fifteenth day of August 1947, and until repealed or altered or amended by a competent Legislature, be subject to the adaptations specified in the said Schedule.

3. The provisions of this Order shall have effect notwithstanding anything to the contrary contained in the India (Adaptation of Existing Indian Laws) Order, 1947.

THE SCHEDULE

(See Article 2.*)*

I. THE INDIAN INCOME-TAX ACT, 1922 (XI OF 1922).

Section 1. — In sub-section (2), *omit* "British Baluchistan and" and "the Crown Representative or".

Section 2. — After clause (3), *insert* :—

"(3A) "British India" means, as respects any period before the 15th day of August 1947, the territories then referred to as British India but including Berar, and as respects any period after the 14th day of August 1947, the territories for the time being comprised in the Provinces of India ;".

Section 7. — In sub-section (2), *omit* "the Crown Representative or".

Section 23. — In sub-section (5), at the end of the second proviso to clause *(a)*, *for* "and" *substitute* :—

"Provided also that if at the time of assessment of any partner of a registered firm, the Income-tax Officer

is of opinion that the partner is residing in Pakistan, the partner's share of the income, profits and gains of the firm shall be assessed on the firm in the manner laid down in the preceding proviso and the sum so determined as payable shall be paid by the firm ; and".

To section 46, *add* :—

"*(8)* For the purposes of this section, the expression "Collector" shall include a Collector in Pakistan and the Income-tax Officer may forward a certificate under sub-section (2) to a Collector in Pakistan through the Central Board of Revenue of Pakistan, if the assessee has property in the district of that Collector.

(9) Where a Collector in British India receives through the Central Board of Revenue of India a certificate under the signature of an Income-tax Officer in Pakistan, the Collector shall proceed to recover the amount specified therein in the manner in which he would proceed to recover the amount specified in a certificate received from an Income-tax Officer in British India, and shall remit any sum so recovered by him to the Income-tax Officer in Pakistan, after deducting his expenses in connection with the recovery proceedings.

(10) The provisions of sub-sections (8) and (9) shall remain in force only so long as there are in force similar provisions in this Act as in force as part of the law of Pakistan or under any other similar Act forming part of the law of Pakistan, for the recovery of tax by a Collector in Pakistan on receipt of a certificate from an Income-tax Officer in British India".

Section 49A. — In sub-section (1) *after* "Dominion income-tax" *insert* "in one or more countries", and in sub-section (2) *for* "other than the United Kingdom" *substitute* "including the United Kingdom".

After section 49A, *insert* : —

"49AA. *Agreement for avoidance of double taxation in India and Pakistan.* — The Central Government may enter into an agreement with Pakistan for the avoidance of double taxation of income, profits and gains under this Act and under the corresponding law in force in Pakistan, and may, by notification in the official Gazette, make such provision as may be necessary for implementing the agreement".

Section 54. — In sub-section (3), in clause (i), after "49" *insert* "or section 49AA".

Section 66. — In sub-section (8), *omit* clause *(a)*.

Section 66A — In sub-section (1), *omit* the proviso.

II.—THE EXCESS PROFITS TAX ACT, 1940 (XV OF 1940).

Section 2. — After clause (4), *insert* :—

"(4A) 'British India means, as respects any period before the 15th day of August 1947, the territories then referred to as British India, and as respects any period after the 14th day of August 1947, the territories for the time being comprised in the Provinces of India;".

After section 11, *insert* :—

"11A. *Agreement for avoidance of double taxation in India and Pakistan.* — The Central Government may enter into an agreement with Pakistan for the avoidance of double taxation of profits under this Act and under the corresponding law in force in Pakistan, and may, by notification in the official Gazette, make such provision as may be necessary for implementing the agreement".

Section 12. — In sub-section (1), after "section 11" *insert* "or section 11A".

After section 21, *insert* :—

"21A. *Application of Income-tax Act before 15th day of August 1947, with certain modification.* — Any references in this Act to the Indian Income-tax Act, 1922, shall, in relation to the profits of any chargeable accounting period and to the state of affairs and all the circumstances necessary to determine the charge to excess profits tax, mean the said Act as in force in the relevant period :

Provided that whatever be the relevant period, references to section 46 of the said Act shall be deemed to include references to sub-sections (8), (9) and (10) of that section".

III.—THE BUSINESS PROFITS TAX ACT, 1947 (XXI OF 1947).

Section 2. — After clause (2), *insert*:—

"(2A) 'British India' means, as respects any period before the 15th day of August 1947, the territories then referred to as British India, and as respects any period after the 14th day of August 1947, the territories for the time being comprised in the Provinces of India; ".

After section 18, *insert* : —

18A. *Agreement for avoidance of double taxation in India and Pakistan.* — The Central Government may enter into an agreement with Pakistan for the avoidance of double taxation of profits under this Act and under the corresponding law in force in Pakistan, and may, by notification in the official Gazette, make such provision as may be necessary for implementing the agreement".

Section 19.—For "section 21" *substitute* "sections 21 and 21A".

IV.—THE REVENUE RECOVERY ACT, 1890 (I OF 1890).

Section 1.—For sub-section (2), *substitute* : —

"(2) It extends to all the Provinces of India".

Section 4.—In sub-section (4)—

before "Burma" where it occurs for the first and second times, *insert* "Pakistan or" ;

for "Burma" where it occurs for the third time, *substitute* "Pakistan or Burma, as the case may be," :

for "British India" *substitute* "a Province of India".

Section 8. — *Omit* "or the Crown Representative".

For "British India" at both the places, *substitute* "the Provinces of India".

Section 9. — In sub-section (1), *omit* "British" wherever it occurs.

Add the following sub-section :

"(3) Sub-sections (1) and (2) shall apply in relation to Pakistan as they apply in relation to Burma".

Section 10. — After "Collector in" *insert* "Pakistan or".

[THE] INDIA (PROVISIONAL CONSTITUTION) ORDER, 1947

(G. G. O. 14, dated 14-8-1947.)

[As amended by the India Provisional Constitution (Amendment) Order, 1947 (G. G. O 24), the India Provisional Constitution and Provincial Legislatures (Amendment) Order, 1947 (G. G. O. 26) and the India Provisional Constitution (Second Amendment) Order, 1947 (G. G. O. 27).]

Note. — For text of this Order, *see* the same printed in A. I. R. Manual, Vol. V *after* the Government of India Act, 1935.

(G. G. O. 31, dated 5-2-1948.)

WHEREAS in the exercise of the powers conferred by section 9 of the Indian Independence Act, 1947, the Governor General was pleased to make the India (Provisional Constitution) Order, 1947, providing for adaptations and modifications of the Government of India Act, 1935 ;

AND WHEREAS it appears to the Governor-General to be expedient to make certain further additions to and modifications of the said Government of India Act, 1935;

AND WHEREAS sub-section *(5)* of section 19 of the Indian Independence Act, 1947, provides that any power conferred by that Act to make any order includes power to vary any order previously made in the exercise of that power ;

NOW, THEREFORE, in the exercise of the powers conferred on him as aforesaid and of all other powers enabling him in that behalf, the Governor-General is pleased to make the following Order :—

1. *(1)* This Order may be cited as the India Provisional Constitution (Amendment) Order, 1948.

(2) It shall come into force at once.

2. The following further additions and modifications shall be made in the Government of India Act, 1935, as adapted by the India (Provisional Constitution) Order, 1947, namely :—

(a) in the proviso to sub-section *(1)* of section 219, for the words "His Majesty by Letters Patent" the words "Order of the Governor-General" shall be substituted ;

(b) in paragraph *(b)* of the proviso to sub-section *(2)* of section 220, for the words "if the Judicial Committee of the Privy Council on reference being made to them, report" the words "if the Federal Court on reference being made to it, reports" shall be substituted ;

(c) in section 229, for the words "His Majesty" and the words "letters patent," wherever they occur, the words "the Governor-General" and the word "order" shall respectively be substituted ;

(d) in sub-section *(2)* of section 240, for the words "authority subordinate to the Governor-General or the Governor according as that person is serving in connexion with the affairs of the Dominion or of a Province," the words "authority other than the Governor-General" shall be substituted ;

(e) in sub-clause *(a)* of clause *(b)* of section 247, for the word "pay" the word "remuneration" shall be substituted ; and

(f) to section 247, the following shall be added :—

"Provided that no rule made under this section shall have effect so as to give to any of the persons aforesaid less favourable terms as respects remuneration, leave or pension, or less rights as respects disciplinary matters, than were given to him by the rules in force immediately before the establishment of the Dominion.

Explanation.—In this section, 'remuneration' includes leave pay allowances and the cost of any privileges or facilities provided in kind."

[THE] INDIA PROVISIONAL CONSTITUTION (SECOND AMENDMENT) ORDER, 1948.

(G. G. O. 35, dated 10-2-1948.)

WHEREAS in the exercise of the powers conferred by section 9 of the Indian Independence Act, 1947, the Governor-General was pleased to make the India (Provisional Constitution) Order, 1947, providing for adaptations and modifications of the Government of India Act, 1935 ;

AND WHEREAS it appears to the Governor-General to be expedient to make certain further modifications of the said Government of India Act, 1935 ;

AND WHEREAS sub-section *(5)* of section 19 of the Indian Independence Act, 1947, provides that any power conferred by that Act to make any order includes power to vary any order previously made in the exercise of that power ;

NOW, THEREFORE, in the exercise of the powers conferred on him as aforsaid and of all other powers enabling him in that behalf, the Governor-General is pleased to make the following Order :—

1. *(1)* This Order may be cited as the India Provisional Constitution (Second Amendment) Order, 1948.

(2) It shall come into force at once.

2. In sub-section *(3)* of section 23 of the Government of India Act, 1935, as adapted by the India (Provisional Constitution) Order, 1947, for the word "one-sixth" at both places where it occurs the word "one-tenth" shall be substituted.

[THE] INDIAN INDEPENDENCE (ADAPTATION OF CENTRAL ACTS AND ORDINANCES) ORDER, 1948.

[G. G. O. 37, dated 23rd March, 1948.]

WHEREAS sub-section *(3)* of section 18 of the Indian Independence Act, 1947, provides that save as otherwise expressly provided in the said Act, the law of British India and of the several parts thereof existing immediately before the appointed day shall, so far as applicable and with the necessary adaptations, continue as the law of each of the new Dominions and the several parts thereof, until other provision is made by laws of the Legislature of the Dominion in question or by any other Legislature or other authority having power in that behalf.

AND WHEREAS sub-section *(1)* of section 9 of the said Act provides that the Governor-General shall by Order make such provision as appears to him to be necessary or expedient for bringing the provisions of the said Act into effective operation and for removing difficulties arising in connexion with the transition to the provisions of the said Act;

NOW, THEREFORE, in the exercise of the powers conferred by the said Act, the Governor-General is pleased to make the following Order :—

1. *(1)* This Order may be cited as the Indian Independence (Adaptation of Central Acts and Ordinances) Order, 1948.

(2) It shall come into force at once.

2. In this Order, the expression "Central Act", has the meaning assigned to it by clause (8aa) of the General Clauses Act, 1897, and the expression "Ordinance" means any Ordinance made by the Governor-General under section 72 of the Government of India Act as set out in the Ninth Schedule to the Government of India Act, 1935.

3. *(1)* The Central Acts and Ordinances specified in the Schedule to this Order shall, until repealed or altered or amended by a competent Legislature or other competent authority, have effect subject to the adaptations directed by that Schedule and by paragraph *(2)* of this Article.

(2) Wherever the expression "the whole of British India" or the expression "British India" (otherwise than in the expression "the whole of British India") occurs in a Central Act or Ordinance, whether in an Act or Ordinance specified in the Schedule to this Order or not, then, unless that expression is by that Schedule expressly directed to be otherwise modified, or to be omitted, there shall be substituted for the expression first-named the expression "all the Provinces of India", and for the expression second named the expression "the Provinces" :

Provided that nothing in this paragraph shall apply to —

(i) the Revenue Recovery Act, 1890 (I of 1890),

(ii) the Indian Railways Act, 1890 (IX of 1890),

(iii) the Indian Income-tax Act, 1922 (XI of 1922),

(iv) the Excess Profits Tax Act, 1940 (XV of 1940), or

(v) the Business Profits Tax Act, 1947 (XXI of 1947).

(3) References in paragraph *(2)* of this Article and in the Schedule to this Order to any Central Act or Ordinance shall be construed as references to that Act or Ordinance as amended or modified by any subsequent Act or Ordinance and as in force in the Dominion of India immediately before the coming into force of this Order.

4. The Provisions of this Order shall have effect notwithstanding anything to the contrary contained in the India (Adaptation of Existing Indian Laws) Order, 1947.

THE SCHEDULE.

Central Acts.

The Indian Registration of Ships Act, 1841.
(X of 1841).

Section 1.—In the fourth paragraph, *omit* "within the territories of the East India Company".

Section 15.—*For* "British India" wherever the words occur *substitute* "a Province".

The Indian Registration of Ships Act (1841) Amendment Act, 1850.
(XI of 1850.)

Section 3.—After "Burma" *insert* "or Pakistan".

The Public Servants (Inquiries) Act, 1850.
(XXXVII of 1850.)

Preamble.—*Omit* "the territories under the Government of".

The Conveyance of Land Act, 1854.
(XXXI of 1854.)

Section 13.—*For* "British India" *substitute* "a Province of India".

The Mortgaged Estates Administration Act, 1855.
(XXIII of 1855.)

Section 1.—*For* "within British India" *substitute* "in a Province of India."

The Penal Servitude Act, 1855.
(XXIV of 1855.)

Section 1.—*For* "within British India" *substitute* "in a Province of India."

Section 2.—*For* "part of British India" *substitute* "Province."

Section 4.—*For* "within British India", *substitute* "in a Province."

The Indian Penal Code, 1860.
(XLV of 1860.)

Preamble.—*For* "British India" *substitute* "the Provinces of India."

Section 1.—*For* "take effect throughout British India" *substitute* "extend to all the Provinces of India."

Section 4.—*For* "native Indian subject of Her Majesty" *substitute* "British subject of Indian domicile"; *for* "native Prince or Chief in India" *substitute* "Acceding State or the tribal areas"; *for* "a coolie, who is a native Indian subject" *substitute* "who is a British subject of Indian domicile"; and *for* "Punjab" *substitute* "East Punjab."

Section 14.—*For* "any Government in British India or of the Crown Representative" *substitute* "the Central Government or of any Provincial Government."

Section 17.—*For* "in any part of British India" *substitute* "in the Provinces or in any Province or in any part thereof."

Section 21.—In clause *Second*, *for* "of the Queen, while serving under any Government in British India or the Crown Representative" *substitute* "of the Dominion of India."

Section 42.—*For* "British India" *substitute* "the territories comprised in the Provinces."

Section 121A.—*Omit* "of British Burma" and "or the Government of Burma."

Section 124.—*Omit* "or a Member of the Council of the Governor-General of India"; and *for* "Governor-General, Governor or Member of Council" at both places *substitute* "Governor-General or Governor."

Section 124A.—*Omit* "or the Crown Representative" and "or British Burma".

Sections 194 and 195.—*For* "law of British India or of England" *substitute* "law for the time being in force in the Provinces."

Section 271.—*Omit* "or the Crown Representative."

The Government Seal Act, 1862.
(III of 1862.)

Omit "or 'Government of the Federation of India.' "

The Religious Endowments Act, 1863.
(II of 1863)

Section 22.—*For* "any Government in India" *substitute* "the Central Government or any Provincial Government "

Omit section 24.

The Comptoir D'Escompte de Paris Act, 1864.
(VIII of 1864.)

In section 1, *omit* the definition of "British India."

The Native Converts' Marriage Dissolution Act, 1866.
(XXI of 1866.)

For section 35 *substitute* :—

"*35. Extent of Act.*—This Act extends to all the Provinces of India."

Act No. XI of 1867.

Long title and preamble. — *For* "British India" *substitute* "the Provinces of India."

Section 2.—*Omit* "as defined in this Act."

The Acting Judges Act, 1867.
(XVI of 1867.)

Section 1.—*Omit* ' in British India."

The Sarais Act, 1867.
(XXII of 1867)

Section 17 —*For* "British India" *substitute* "the territories under its government."

The Press and Registration of Books Act, 1867.
(XXV of 1867.)

Section 11.—*For* the words from "transmitted" to "as the case may be" *substitute* "transmitted to th Central Government."

Section 19.—Omit "to the said Secretary of State and" and "respectively."

The Indian Divorce Act.
(IV of 1869.)

Section 2.—For the first paragraph *substitute* :—
"This Act extends to all the Provinces of India and applies also —
(a) to all British subjects in the Acceding States, and
(b) to all British subjects of Indian domicile in Indian States other than the Acceding States."

Section 3.—In clause (1), —
in sub-clause *(a)* for "Bengal" *substitute* "West Bengal";
for sub-clause *(f) substitute* :—
"*(f)* in East Punjab and Delhi, the High Court of East Punjab';
for sub-clauses *(i)* and *(j) substitute* :—
"(i) in any Acceding State or other Indian State, that one of the Courts mentioned above which the Central Government shall from time to time appoint in this behalf by notification in the Official Gazette, and until such appointment, which immediately before the fifteenth day of August 1947, was exercising criminal jurisdiction in respect of European British subjects in that State".

The Court-fees Act, 1870.
(VII of 1870.)

Section 3.—For the words from 'High Courts" to "or section 229" *substitute* "Courts which are High Courts for the purposes."

Section 19J.—Omit "in any part of British India."

Schedule I. — In item No. 13, *for* "High Court of Judicature at Lahore" *substitute* "High Court of East Punjab" and *for* "Financial Commissioner of the Punjab" *substitute* "Financial Commissioner of East Punjab".

The Female Infanticide Prevention Act, 1870.
(VIII of 1870.)

Section 7.—For "North Western Provinces, to the Punjab and to Oudh" *substitute* "United Provinces, East Punjab and Delhi", and *for* "part of British India" *substitute* "Province".

The Indian Evidence Act, 1872.
(I of 1872.)

Section 36.—For "any Government in British India" *substitute* "the Central Government or any Provincial Government."

Section 57. — In clause (6), *for* "Courts of British India" *substitute* "Courts in the Provinces of India"; and in clause (7) *for* "part of British India" *substitute* "Province".

Section 74.—For "whether of British India, or of any other part", *substitute* "of any part"; and *for* "in British India" *substitute* "in any Province".

Section 78. — In clause (5), *for* "British India" *substitute* "a Province".

Section 79. — After "shall presume" *insert* "to be genuine"; and *for* the words from "in British India" to "genuine" *substitute* of the Central Government or of a Provincial Government, or by any officer in an Acceding State or other Indian State who is duly authorized thereto by the Central Government".

The Indian Contract Act, 1872.
(IX of 1872.)

Section 21.—For the words "British India" wherever they occur *substitute* "any Province of India"; *for* "Federation" *substitute* "Dominion"; and *for* "a Federated State" *substitute* "an Acceding State".

The Indian Christian Marriage Act, 1872.
(XV of 1872.)

Section 81. — *For* "Secretary of State for India" *substitute* "Central Government".

Section 86.—Omit sub-section (1).

The Government Savings Banks Act, 1873.
(V of 1873.)

Section 3. — At the end of the definition relating to "Secretary", *insert* "or if that area is in Pakistan, by the Postmaster General for such area in India as the Central Government may by general or special order specify in this behalf".

The Indian Oaths Act, 1873.
(X of 1873.)

Section 3. Omit "or by any law which no legislature or authority in British India has power to repeal."

The Married Women's Property Act, 1874.
(III of 1874.)

Section 6. — In sub-section (2) *for* 'part of British India" *substitute* "Province".

The Foreign Recruiting Act, 1874.
(IV of 1874.)

Preamble.—For "Governor General in Council" *substitute* "Central Government."

The European Vagrancy Act, 1874.
(IX of 1874.)

Section 31. — *For* "British Indian port" *substitute* "port in the Provinces"; and *for* "other Government in British India" *substitute* "Provincial Government".

Section 32. — *For* "other Government in British India" *substitute* "Provincial Government".

Section 35.—Omit the proviso.

Second Schedule.—For the words "Governor-General in Council (or, after the establishment of the Federation, the Governor General of India)" wherever they occur, *substitute* "Governor-General of India".

The Native Coinage Act, 1876.
(IX of 1876.)

Preamble. — *For* 'Governor-General in Council" *substitute* "Central Government"

The Dramatic Performances Act, 1876.
(XIX of 1876.)

Section 3. — In clause *(b) for* "British India or British Burma" *substitute* "India".

The Specific Relief Act, 1877.
(I of 1877.)

Section 9.—In the third paragraph, *omit* "the Secretary of State" and "the Crown Representative".

Section 45. — In clause *(f), omit* "The Secretary of State" and "the Crown Representative"; and in clause *(g) omit* "other".

Section 56.— In clause *(d), omit* "the Crown Representative."

The Sea Customs Act, 1878.
(VIII of 1878.)

Section 3. — In clause *(e), for* "British India" *substitute* "the Provinces of India."

Section 18.—For the words "British India" wherever they occur, *substitute* "the Provinces of India."

For sub-clause (iv) of clause *(f) substitute* "(iv) have been manufactured in an Acceding State in premises which, if situate in a Province, would be a factory as defined in the Factories Act, 1934."

For sub-clause (iv) of clause *(i) substitute* "(iv) has been manufactured in an Acceding State in premises which, if situate in a Province, would be a factory as defined in the Factories Act, 1934."

For sub-clause (iv) of clause *(j) substitute* "(iv) has been manufactured in an Acceding State in premises which, if situate in a Province, would be premises not

exempted from the operation of sub-section (2) of section 12 of the Indian Merchandise Marks Act, 1889".

Section 144. — *For* "British India" *substitute* "a Province".

Section 150. — *For* "British India" *substitute* "a Province".

Section 151. — *For* "British India" *substitute* "a Province".

Schedule. — In the Form of Bond for Import Duty, *for* the words from "jointly and severally bound" to "for which payment" *substitute* "jointly and severally bound to the Governor-General of India in the sum of rupees to be paid to the said Governor-General, for which payment."

The Indian Arms Act, 1878.
(XI of 1878.)

Section 1. — In clause *(b) for* "any Government in British India" *substitute* "the Central Government or of any Provincial Government".

Section 11. — After "foreign territory" *insert* "or between the Provinces and Acceding States."

Section 18. — *For* "the whole or any portion of British India" *substitute* "the Provinces of India or any part thereof".

The Hackney Carriage Act, 1879.
(XIV of 1879.)

Section 3. — *For* "the Punjab" *substitute* "East Punjab".

The Legal Practitioners Act, 1879.
(XVIII of 1879.)

Preamble. — *For* the words from "the Lower Provinces" to "administered by it" *substitute* "certain Provinces, and to empower the Provincial Government of every other Province to extend thereto."

Section 1. — In the third paragraph *for* the words from "the territories respectively administered" to "Assam" *substitute* "West Bengal, the United Provinces, East Punjab, Bihar, the Central Provinces and Berar, Assam, Orissa and Delhi"; *for* "any other Provincial Government" *substitute* "the Provincial Government of any other Province"; and *for* "the territories under its administration" *substitute* "that Province".

The Municipal Taxation Act, 1881.
(XI of 1881.)

Preamble. — *For* "the Governor-General in Council" *substitute* "Government", and *for* "Secretary of State for India in Council" *substitute* "Provincial Government."

The Negotiable Instruments Act, 1881.
(XXVI of 1881.)

Section 11. — *For* "British India" *substitute* "a Province".

Section 136. — *For* "out of British India" *substitute* "outside the Provinces of India", *for* "law of British India" *substitute* "law of the Provinces of India," and *for* "in British India" *substitute* "within the Provinces of India."

Section 137. — After "foreign country" *insert* "or Acceding State", and *for* "British India" *substitute* "the Provinces of India".

The Indian Trusts Act, 1882.
(II of 1882.)

Section 1. — *For* the first sentence of the second paragraph *substitute* :—

"It extends to all the Provinces of India, except the Andaman and Nicobar Islands and Panth Piploda ; but the Central Government may, from time to time, by notification in the Official Gazette, extend it to either or both of the said Provinces or to any part thereof."

Section 20. — In clause *(b)*, after "Imperial Parliament" *insert* ' before the fifteenth day of August, 1947," and *for* "Federation" *substitute* "Governor-General in Council"; in clause *(d)* for "Any Act" *substitute* "any Central Act or Act", and *for* "British India" *substitute* "a Province"; after clause *(d) insert* the following proviso, namely :—

"Provided that after the 31st day of March, 1948, no money shall be invested in any securities issued by or on behalf of a municipal body, port trust or city improvement trust in Rangoon town, or by or on behalf of the trustees of the port of Karachi";

and in clause *(e)*, *for* "British India" *substitute* "a Province of India."

The Transfer of Property Act, 1882.
(IV of 1882.)

Section 1. — In the third paragraph, *for* the words from "the territories" to "Punjab" *substitute* "Bombay, East Punjab and Delhi"; and in the fourth paragraph, *for* " said territories " *substitute* "said Provinces."

Section 3. — In the definition of "registered", *for* "British India" *substitute* "a Province."

Section 52.—*Omit* "or the Crown Representative."

Section 58.—In sub-section *(f)*, *for* "Bombay and Karachi" *substitute* "and Bombay".

Section 69. — In clause (*c*) of sub-section (1), *omit* "Karachi."

The Presidency Small Cause Courts Act, 1882.
(XV of 1882.)

Section 15.—In third paragraph *for* "any British Indian Legislature" *substitute* "the Central Legislature or of any Legislature established in a Province of India".

Section 93.—*Omit* "and Members of his Council"; *for* "Fort St. George" *substitute* "Madras"; and *for* " Fort William in Bengal" *substitute* "West Bengal."

The Indian Explosives Act, 1884
(IV of 1884.)

Section 14 —In clause (*b*), *for* "any Government in British India" *substitute* "the Central Government or under a Provincial Government."

The Agriculturists' Loans Act, 1884.
(XII of 1884.)

Preamble.—*For* 'any part of British India" *substitute* "other Provinces of India".

Section 2. — In sub-section (2) *for* the words from "the territories" to "Ajmer" *substitute* "Bombay, the United Provinces, East Punjab, the Central Provinces, Assam, Delhi and Ajmer-Merwara."

The Indian Telegraph Act, 1885.
(XIII of 1885.)

Section 1.—In sub-section (2), *for* clauses (*a*), (*b*) and (*c*) *substitute* :—

"(*a*) all British subjects domiciled in India wherever they may be,

(*b*) all other British subjects within the Acceding States, and

(*c*) all servants of Government, whether British subjects or not, within the territories of any Acceding State or other Indian State."

The Land Acquisition (Mines) Act, 1885.
(XVIII of 1885.)

Section 1.—In sub-section (3) *for* "territories administered by the Governor of Madras in Council and the Lieutenant-Governor of Bengal" *substitute* "Provinces of Madras, West Bengal, Bihar, Assam and Orissa."

The Births, Deaths and Marriages Registration Act, 1886.
(VI of 1886.)

Section 32.—*For* "British India" *substitute* "a Province" ; and in the proviso *for* "which is within th

political charge of a Provincial Government" *substitute* "in which a Provincial Government exercises any extra-provincial jurisdiction."

The Indian Tramways Act, 1886.
(XI of 1886)

Section 3. — In clause (16), *for* "Federal Railway Authority" *substitute* "Central Government."

Section 12. — *For* clause (*a*) *substitute* :—
"(*a*) if the tramway is a railway, by the Central Government,"

The Police Act, 1888.
(III of 1888.)

Section 2. — In sub-section (1) *for* "any part of British India" *substitute* "a Province".

Section 3.—*For* "British India beyond the limits of the Province" *substitute* "any other Province."

Act No. XIV of 1888.

Section 2.—*For* "British India" *substitute* "India."

The Charitable Endowments Act, 1890.
(VI of 1890)

Section 1. — In sub-section (2) *omit* "inclusive of British Baluchistan."

The Guardians and Wards Act, 1890.
(VIII of 1890.)

Section 1. — In sub-section (2) *omit* "inclusive of British Baluchistan."

The Colonial Courts of Admiralty (India) Act, 1891.
(XVI of 1891)

Preamble.—*For* "British India" *substitute* "India".

Section 2.—After "Madras" *insert* "and"; and *omit* "and (6) the District Court of Karachi".

Omit section 4.

The Government Management of Private Estates Act, 1892.
(X of 1892.)

Section 1. — In sub-section 2, *omit* "inclusive of British Baluchistan".

The Land Acquisition Act, 1894.
(I of 1894)

Section 43 — *For* "or any Government in British India" *substitute* "the Central Government or any Provincial Government."

The Prisons Act, 1894.
(IX of 1894.)

Section 1. — In sub-section (2) *omit* "British Baluchistan"; and in sub-section (4), *for* "Presidency" *substitute* "Province."

The Inland Bonded Warehouses Act, 1896.
(VIII of 1896.)

Section 2.—*For* "British India" *substitute* "the Provinces of India."

Form of Bond.—*For* the words "Governor-General in Council" where they first occur, *substitute* "Governor-General of India"; *for* the same words where they next occur, *substitute* "said Governor-General"; and omit the Note at the end.

The Epidemic Diseases Act, 1897.
(III of 1897.)

Section 1.—In sub-section (2), *omit* "British Baluchistan."

The Reformatory Schools Act, 1897.
(VIII of 1897.)

Section 1.—*For* sub-section (3) *substitute* :—
"(3) It extends to all the Provinces of India."

The General Clauses Act, 1897.
(X of 1897.)

Section 3.—After clause (39) *insert* :—
"(40) 'Political Agent' shall mean the principal officer, by whatever name called, representating the Central Government in any Acceding State or group of Acceding States or any territory or place outside India ;",

and in clause (43), after "Chief Commissioner's Province" *insert* "and 'the Provinces' shall mean, as respects any period before the establishment of the Dominion of India, all territories for the time being comprised within British India, and as respects any period thereafter, all territories for the time being comprised within the Governors' Provinces and the Chief Commissioners' Provinces."

The Lepers Act, 1898.
(III of 1898.)

Section 1 .— In sub-section (2) *omit* "British Baluchistan".

Section 19.—*For* "Indian State" *substitute* "Acceding State."

The Code of Criminal Procedure, 1898.
(V of 1898.)

Section 4.—In clause (*j*) of sub-section (1), *for* the words from "the High Courts of Judicature" to "Sind" *substitute* "the Courts which are High Courts for the purposes of the Government of India Act, 1935."

Section 30. — *For* the territories respectively administered by the Lieutenant-Governors of the Punjab and the Chief Commissioners of" *substitute* "East Punjab, Delhi "; and *omit* "in Sind".

Sections 93A, 93B and 93C.— *Omit* the words "or the Crown Representative," wherever they occur.

Section 188. — *For* "Native Indian subject of Her Majesty" *substitute* " British subject domiciled in India",and *for* the words "the territories of any Native Prince or Chief in India" at both places where they occur, *substitute* "an Acceding State or tribal area."

Section 197. — In sub-section (1), *for* "some higher authority" *substitute* "the Central Government" and *for* "Federation" *substitute* "Dominion"; and *omit* sub-section (3).

Section 320.—*For* clause (*aa*) *substitute* "(*aa*) members of the Central Legislature or of any Provincial Legislature."

Section 364.—In sub-section (1) *for* "established by Royal Charter or the Chief Court of Oudh" *substitute* "within the meaning of the Government of India Act, 1935."

Section 365. — *For* "established by Royal Charter and the Chief Court of Oudh" *substitute* "within the meaning of the Government of India Act, 1935."

Section 503. — In sub-section (2A), *omit* the word "British," at both places, and in sub-section (4), *for* "Crown Representative" *substitute* "Central Government".

Section 508A. — *Omit* the word "British" at both places.

Section 554.—In sub-section (1), *for* "established by Royal Charter" *substitute* "within the meaning of the Government of Indian Act, 1935, other than the Chief Court of Oudh"; and in sub-section (2), *for* "not established by Royal Charter" *substitute* "not being a High Court to which sub-section (1) applies."

Schedule V. — *Omit* the words "Empress of India" and the words "Emperor of India", wherever they occur.

The Indian Post Office Act, 1898.
(VI of 1898.)

Section 1. — In sub-section (2), *omit* "British Baluchistan"; *for* clause (*a*) *substitute* "(*a*) British subjects domiciled in India wherever they may be ;" and *for* the words "the territories of any Native Prince or Chief in India" at both places where they occur, *substitute* "any Acceding State or tribal area."

Section 2. — In clause (*b*), *omit* the words "or the Crown Representative" at both places.

Section 31.—*Omit* "or the Secretary of State."

Section 34.—*For* "neither the Central Government nor the Secretary of State shall" *substitute* "the Central Government shall not."

Section 35.—In sub-section (4), *omit* "the Secretary of State."

Section 57. — *For* "in India beyond the limits of British India" *substitute* "in a tribal area, Acceding State or other Indian State"; and *omit* "or the Crown Representative."

The Indian Stamp Act, 1899.
(II of 1899.)

Section 1. — In sub-section (2), *omit* "British Baluchistan."

Section 57.—In sub-section (1), *for* clauses (*a*) to (*i*) *substitute* :—

"(*a*) if it arises in the Andaman and Nicobar Islands, to the High Court at Calcutta;

(*b*) if it arises in Ajmer-Merwara, to the High Court at Allahabad ; and

(*c*) if it arises in any other Province or part of a Province, to the High Court of that Province or part of the Province."

Sections 58, 59 and 60. — *Omit* the words "Chief Court or Judicial Commissioner's Court" wherever they occur.

The Government Buildings Act, 1899.
(IV of 1899.)

Section 3.—In the proviso, *omit* "Imperial".

Section 4.—In sub-section (1), *omit* "Imperial".

The Prisoners Act, 1900.
(III of 1900.)

Section 1.—In sub-section (2), *omit* "British Baluchistan".

Section 15.—In clause (*b*) (ii) of sub-section (1), *for* "British India" *substitute* "India".

Section 18.—In sub-section (1), *for* "British Court" *substitute* "Court established by the authority of the Central Government", and for *for* "Crown" *substitute* "Central Government" ; and in sub-section (3), *for* "shall be deemed to be a British Court for purposes of this section" *substitute* "shall, for purposes of this section, be deemed to be a Court established by the authority of the Central Government", and *omit* "or the Crown Representative".

Section 29. — In sub-section (1), *for* "Crown Representative" *substitute* "Central Government" and *for* "by him or under his authority" *substitute* "by it or under its authority".

The Indian Tolls (Army and Airforce) Act, 1901.
(II of 1901.)

Section 1.—In sub-section (2), *omit* "British Baluchistan".

Section 2. — In clause (*f*), *omit* "or of the Crown Representative" and in clause (i), *omit* "or the Federal Railway Authority".

The Indian Works of Defence Act, 1903.
(VII of 1903.)

Section 1. — In sub-section (2), *omit* "British Baluchistan".

The Indian Tea Cess Act, 1903.
(IX of 1903.)

Section 4. — In clause (*d*) of sub-section (2) *for* "Bengal" *substitute* "West Bengal", and in sub-section (3), *for* "British India" *substitute* "India".

The Indian Foreign Marriage Act, 1903.
(XIV of 1903.)

Section 1.—In sub-section (2), *omit* "British Baluchistan".

The Indian Extradition Act, 1903.
(XV of 1903.)

Preamble. — *For* "British India" *substitute* "the Provinces of India".

Section 1. — In sub-section (2), *omit* "British Baluchistan".

Section 16. — *For* "of British India" *substitute* "in the Provinces".

The Ancient Monuments Preservation Act, 1904.
(VII of 1904.)

Section 1. — In sub-section (2), *omit* "British Baluchistan"

The Indian Railway Board Act, 1905.
(IV of 1905.)

Omit section 4.

The Indian Coinage Act, 1906.
(III of 1906.)

Section 1.—In sub-section (2), *omit* "British Baluchistan".

Code of Civil Procedure, 1908.
(V of 1908.)

Section 2. — In clause (5), *omit* "or the Crown Representative."

Section 10.—*Omit* "or the Crown Representative".

Section 29. — *Omit* "or continued," and "or of the Crown Representative".

Section 43.—*For* "part of British India" *substitute* "area within the Provinces of India", and *for* "the territories of any foreign Prince or State" *substitute* "any Indian State".

Section 44. — *For* "British India" *substitute* "that Province".

Section 45. — *Omit* "or continued", and *for* "or of the Crown Representative in the territories of any foreign Prince or State" *substitute* "in any Indian State".

Section 60. — In sub-section (1), *omit* clause (ii) of Explanation 3.

Section 78. — In clause (*a*), *omit* "or of the Crown Representative"; and *for* clause (*b*) and (*c*) *substitute*:—

"(*b*) Courts of any Acceding State, or

(*c*) Courts of any State or country outside India".

In the heading above section 79, *for* "Crown" *substitute* "Government".

For section 79 *substitute*:—

"79. *Suits by or against Government.*—In a suit by or against the Government, the authority to be named as plaintiff or defendant, as the case may be, shall be—

(*a*) in the case of a suit by or against the Central Government, the Dominion of India, and

(*b*) in the case of a suit by or against a Provincial Government, the Province".

Section 80. — *For* "instituted against the Crown" *substitute* "instituted against the Government" ; *omit* clause (*b*), the word "and" in clause (*c*), and clause (*d*); and *re-letter* clause (*aa*) as clause (*b*).

Section 82. — In sub-section (1), *for* "Crown" *substitute* "Dominion of India or a Province."

Section 83. — *For* the words "in British India" at both places *substitute* "in India" ; *for* "of British India" *substitute* "in the Provinces"; *for* the United Kingdom of Great Britain and Ireland" *substitute* "India"; and *omit* "or one of His Majesty's Secretaries of State or."

Section 84. — *For* "of British India" *substitute* "in the Provinces".

Section 85. — In sub-section (1), *for* the words "of the Government" at both places where they occur *substitute* "of the Central Government", and *omit* the Explanation.

Section 86.—In sub-section (1), *Omit* the words from "in the case of" to "any other case"; in sub-section (3), *for* "such consent as is mentioned in sub-section (1)" *substitute* 'the consent of the Central Government"; and in sub-section (4), *omit* "or the Crown Representative as the case may be"

Section 87. — *Omit* "the Crown Representative".

Section 172. — *For* 'High Courts constituted by his Majesty by Letters Patent and the Chief Court of Oudh" *substitute* "Courts which are High Courts for the purposes of the Government of India Act, 1935,".

Section 223 — In sub-section (1), *omit* "and of the Chief Court."

Order V, Rule 26. In clause *(a)*, *for* "foreign jurisdiction vested in His Majesty or in the Central Government or the Crown Representative" *substitute* 'foreign or extra-provincial jurisdiction vested in the Central Government".

Order XXI, Rule 48. — *Omit* clause (ii) of the Explanation.

Order XXVII. — Throughout the Order, *for* the word "Crown" wherever it occurs otherwise than in the expression 'Crown pleader' *substitute* "Government"; in rule 3, *omit* "or if the suit is against the Secretary of State the words 'the Secretary of State' "; in rule 5, *omit* "or the Government' and in rule 8 (3) *omit* from clause *(a)*, the words "the Secretary of State or" and *omit* clause *(b)*

Order XXVII-A. — In rules 1 and 2, *for* "a substantial question of law as to the interpretation of the Government of India Act, 1935, or any Order in Council made thereunder" *substitute* "any such question as is referred to in sub-section (1) of section 205 of the Government of India Act, 1935".

Order XXVII, Rule 16 — *Omit* " or the Crown Representative".

Order XXVII, Rule 1. — *Omit* "(c) the Court of the Judicial Commissioner, Sind".

The Explosive Substances Act, 1908.
(VI of 1908.)

Section 1. In sub-section (2), *for* "native Indian subjects of His Majesty" *substitute* "British subjects of Indian domicile" and for "the territories of any native Prince or Chief in India" *substitute* "any Acceding State or tribal area".

The Indian Limitation Act, 1908.
(IX of 1908.)

Section 2. — In clause (6), *for* "British India" *substitute* "India, but includes also any Acceding State".

Section 13. — *Omit* "or the Crown Representative".

First Schedule.—In Article 149, *omit* "the Secretary of State for India in Council, the Secretary of State, the Crown Representative"; in Article 151, *for* "Bombay and Lahore" *substitute* "and Bombay, or of the High Court of East Punjab" ; and in Article 162, *omit* "Lahore", and *for* "Chief Court of Sind" *substitute* "High Court of East Punjab".

The Indian Criminal Law Amendment Act, 1908.
(XIV of 1908.)

Section 1. — In sub-section (2), *for* "Bengal and of Eastern Bengal, *substitute* "West Bengal".

The Indian Ports Act, 1908.
(XV of 1908.)

Section 33.—In sub-section (2), *for* "British India" *substitute* "any Province".

Section 39.—In sub-section (3), *omit* " or to ballam boats plying to and from the port of Chittagong".

Section 41. — In clauses (1) and (2), *for* "British India" *substitute* "the Provinces of India".

The First Schedule.—In the heading of Part I, *for* "Bengal" *substitute* "West Bengal and Orissa" ; in Part III *omit* the entries relating to Karachi ; and *omit* Part V.

The Indian Registration Act, 1908.
(XVI of 1908.)

Section 30 — In sub-section (2), *omit* "and the Registrar of the Lahore District '.

The Presidency-towns Insolvency Act, 1909.
(III of 1909.)

Preamble. — *Omit* "and the town of Karachi".

Section 2. *Omit* clauses *(bb)* and *(bbb)*.

Section 3. — *For* clauses *(a)* and *(b)*, *substitute* "the High Courts at Calcutta, Madras and Bombay".

Section 4. — *Omit* 'or Judicial Commissioner".

Section 6. — *Omit* "or Judicial Commissioner".

Section 77. — In clause *(b)* of sub-section (1) for "Bengal" *substitute* "West Bengal" and in clause *(c)*, *omit* "and for the Court of the Judicial Commissioner of Sind, the Provincial Government of Sind".

Section 90 *Omit* sub-section (8).

Section 117. — In clause *(a)*, *for* "British India" *substitute* "the Provinces of India".

The Whipping Act, 1909.
(IV of 1909.)

Section 1. In sub-section (2), *omit* "British Baluchi-tan and."

The Indian Electricity Act, 1910.
(IX of 1910.)

Section 1. - In sub-section (2), *omit* "British Baluchistan and".

Section 36A.—In sub-section (2) *for* "fifteen members" *substitute* "thirteen members", *for* "Bengal" *substitute* "West Bengal", *for* "the Punjab" *substitute* "East Punjab" and *omit* "the North-West Frontier Province, Sind".

Section 37. In sub-section (1), *for* "the whole or any part of British India" *substitute* "all the Provinces or any part thereof."

Section 49.—*For* "any Government in British India" *substitute* "the Central Government or any Provincial Government".

Section 53.—*Omit* clause *(aa)* of sub-section (1).

The Indian Patents and Designs Act, 1911.
(II of 1911.)

Section 1.—In sub-section (2), *omit* "British Baluchistan and".

Section 78A.—In sub-section (1), *for* the words from "If His Majesty" to "then any person" *substitute* "Whereas His Majesty has by Order made on the 28th day of July 1938, declared British India to be a convention country within the meaning of section 91A of the Patents and Designs Acts, 1907 to 1938, any person" ; and in sub-section (4), *for* "any State in India" *substitute* "any Acceding State or other Indian State."

The Indian Army Act, 1911.
(VIII of 1911.)

Throughout the Act *for* the words "Commander-in-Chief in India" wherever they occur *substitute* "Commander-in-Chief".

Section 7.—In clause (17), *for* "British India" *substitute* "a Province", and *omit* "or the Crown Representative" ; and in clause (18), *for* "British India" *substitute* "a Province".

Section 41. — In the Proviso to sub-section (1), *omit* "or the Crown Representative" and *for* "jurisdiction by virtue of the Government of India Act, 1935, or of any Order in Council made under the Foriegn Jurisdiction Act, 1890", *substitute* "extra-provincial jurisdiction".

Section 85.—In sub-section (3), *omit* "or the Crown Representative".

The Indian Lunacy Act, 1912.

(IV of 1912.)

Section 1. — In sub-section (2), *omit* "British Baluchistan".

Section 2. — After "Letters Patent" *insert* "or by order of the Governor-General".

Section 3.—In clause (1), *for* "any Government in British India" *substitute* "the Central Government or or any Provincial Government".

Section 91. — In clause *(a)* of sub-section (1) after "Letters Patent" *insert* "or by order of the Governor-General".

Section 95.—In sub-section (1), *for* "by the Secretary of State or any Government in British India" *substitute* "by the Central Government or any Provincial Government" ; and in sub-section (2), *omit* "Secretary of State or, as the case may be, the".

Schedule I.—In Forms 7 and 8, *omit* the words "Emperor of India" wherever they occur.

The Wild Birds and Animals Protection Act, 1912.

(VIII of 1912.)

Section 1.—In sub-section (2), *omit* "British Baluchistan".

The Official Trustees Act, 1913.

(II of 1913.)

Section 1.—In sub-section (2), *omit* "British Baluchistan and".

Section 2. — In clause (2), *for* sub-clauses *(a)* to *(c)*, *substitute* :—

"*(a)* in relation to the Andaman and Nicobar Islands, the High Court at Calcutta ;

(b) in relation to the United Provinces and Ajmer-Merwara, the High Court at Allahabad ;

(c) in relation to any other Province, the High Court of that Province ;"

and *re letter* sub-clause *(j)* as sub-clause *(d)*.

Section 4. — In clause *(d)* of sub-section (2), *for* 'Bengal" *substitute* "West Bengal".

The Administrator-General's Act, 1913.

(III of 1913.)

Section 1.—In sub-section (2), *omit* "and British Baluchistan".

Section 2.— In clause (12), *for* sub-clauses *(a)* to *(c)* *substitute* :—

"*(a)* in relation to the Andaman and Nicobar Islands, the High Court at Calcutta ;

(b) in relation to the United Provinces and Ajmer-Merwara, the High Court at Allahabad ;

(c) in relation to any other Province, the High Court of that Province ;"

and *re-letter* sub-clause *(j)* as sub-clause *(d)*.

Section 3.—In clause *(d)* of sub-section (2), *for* "Bengal" *substitute* "West Bengal".

Section 53.—*Omit* the proviso to sub-section (2).

The Indian Companies Act, 1913.

(VII of 1913.)

Section 1.—In sub-section (3), *omit* "British Baluchistan and".

Section 2A — *For* the words from "which was immediately before" to "in Burma or Aden", *substitute* "the registered office whereof is in Burma, Aden or Pakistan and which was immediately before the separation of that country from India a company as defined by the said section" ; and in clause (ii) of the proviso for Burma "and Aden" *substitute* "that country".

Section 245.— In sub-section (1), *for* "sworn in British India" *substitute* "sworn in India", and *omit* "or in any part of India other than British India before any Court authorised or continued by the Central Government or the Crown Representative".

The Destructive Insects and Pests Act, 1914.

(II of 1914)

Long title.—After "introduction into" *insert* "the Provinces of India" and *omit* "in British India".

Preamble.—After "introduction into" *insert* "the Provinces of India" and *omit* "in British India".

Section 2.—*Omit* clause *(d)* and the words "and" at the end of clause *(c)*.

Section 4A.—*Omit* "in British India".

Section 4B.—*For* "in British India outside the Province" *substitute* "in a Province other than the Province".

Section 4D.—In the proviso, *omit* "both chambers of."

Section 5A.—*Omit* 'in British India".

The Indian Copyright Act, 1914.

(III of 1914.)

Preamble. — *For* "British India" *substitute* "the Provinces of India".

Section 1. — In sub-section (2), *omit* "British Baluchistan."

The Local Authorities Loans Act, 1914.

(IX of 1914.)

Schedule I.—*Omit* "The Commissioners for the Port of Chittagong". "The Municipality of Karachi", and "The Trustees of the Port of Karachi".

The Inland Steam-Vessels Act, 1917.

(I of 1917.)

Section 69.—*For* "any Government in British India" *substitute* "the Central Government or any Provincial Government".

Section 72.—*Omit* sub-section (2).

The Post Office Cash Certificates Act, 1917.

(XVIII of 1917.)

Section 3. — At the end of the first proviso to sub-section (1) *insert* "or if that area is in Pakistan, by the Postmaster-General for such area in India as the Central Government may by general or special order specify in this behalf ;"

The Cinematograph Act, 1918.

(II of 1918.)

Section 1.—In sub-section (2), *omit* "including British Baluchistan".

The Usurious Loans Act, 1918.

(X of 1918.)

Section 1.— In sub-section (2), *omit* "including British Baluchistan".

The Poisons Act, 1919.

(XII of 1919.)

Long title and preamble.—*Omit* "throughout British India".

Section 1.—In sub-section (2), *omit* "British Baluchistan and".

The Provincial Insolvency Act, 1920.

(V of 1920.)

Long title and preamble.—*For* "British India" *substitute* "the Provinces of India," and *omit* "and the town of Karachi".

Section 2.—In clause *(b)*, *omit* the words and figures from "and the limits" to "1909".

The Indian Securities Act, 1920.

(X of 1920.)

Section 1.—In sub-section (2), *omit* "including British Baluchistan".

Section 7.—*For* "State in India" *substitute* "Acceding State or other Indian State".

Section 13.—In the Explanation below sub-section (2), *for* "a State in India" *substitute* "an Acceding State or other Indian State."

Section 26.—For "British India" *substitute* "the Provinces of India".

The Indian Red Cross Society Act, 1920.

(XV of 1920)

Section 1.—In sub-section (2), *omit* "British Baluchistan".

Section 8. — In sub section (1), after "India" *insert* "and Pakistan"; in sub-section (2), *for* "Governor-General in Council" *substitute* "Central Government", after the words "part of India" at both places *insert* "or Pakistan"; and in sub-section (4), after "India" *insert* "and Pakistan".

Second Schedule.—For the entries relating to Bengal and Punjab, *substitute*:

"West Bengal East Bengal	10	12·54
East Punjab West Punjab	11	13·47".

The Identification of Prisoners Act, 1920.

(XXXIII of 1920)

Section 1. — In sub-section (2), *omit* "British Baluchistan".

The Indian Passport Act, 1920.

(XXXIV of 1920)

Long title and preamble. — *For* "British India" *substitute* "the Provinces of India".

Section 1. — In sub-section (2), *omit* "British Baluchistan".

The Imperial Bank of India Act, 1920.

(XLVII of 1920.)

Section 5. — In sub-section (7), *for* "out of British India" *substitute* "outside the Provinces of India".

Section 10. — After "any Government" *insert* "in India or Pakistan".

Sections 13A, 23, 25 and 29.—For "British India or British Burma" *substitute* "the Provinces of India or Pakistan or in Burma".

Schedule I, Part I. — In item *(a)*, in sub-item (i), after "Indian" *insert* "Pakistan", in sub-item (iii), *for* "any Act of a Legislature established in British India or British Burma" *substitute* "any Central Act or any Act of a Legislature established in a Province or India or Pakistan or in Burma", and *for* "a Prince or Chief of any State in India" *substitute* "the Government of any State which has acceded to India or Pakistan or of any other Indian State", and in the proviso, *for* "any Government in British India, the Federal Railway Authority" *substitute* "the Central Government or any Provincial Government in India, the Central Government or any Provincial Government in Pakistan".

Schedule I, Part II.—In paragraph 4, *for* "Burma" *substitute* "Pakistan or Burma".

Schedule II.—In sub-regulation (2) of regulation 39, *for* the words "British India or British Burma" at both places, *substitute* 'any Province of India or Pakistan or in Burma"; and in sub-regulation (1) of regulation 61, *for* the words "British India or British Burma" at both places *substitute* "any Province of India or Pakistan or in Burma"; and in regulation 62, *for* "India or Burma" *substitute* "India, Pakistan or Burma".

The Indian Territorial Force Act, 1920.

(XLVIII of 1920.)

Section 1. — In sub-section (2), *omit* "British Baluchistan and".

Section 14.—In sub-section (1), *for* "Commander-in-Chief of His Majesty's Forces in India", *substitute* "Commander-in-Chief, India".

The Maintenance Orders Enforcement Act, 1921.

(XVIII of 1921.)

Long title and preamble. — *For* "British India" *substitute* "the Provinces of India", and after "Protectorates" *insert* "Acceding States and other Indian States".

Section 1. — In sub-section (2), *omit* "and British Baluchistan".

Section 2. —*For* "British India" *substitute* "India".

Section 3 — In sub-section (2), *for* "State in India" *substitute* "Acceding State or other Indian State".

The Indian Emigration Act, 1922.

(VII of 1922)

Section 9.—In sub-section (1), *omit* "Karachi".

Section 10.—In sub-section (2), *omit* "both Chambers of", *for* "each Chamber" *substitute* "that Legislature", and *for* "both Chambers agree" *substitute* "that Legislature agrees".

Sections 13, 21 and 30A.—In sub-section (2) of each of these sections, *omit* "both Chambers of".

Section 31 — *For* "a State in India" *substitute* "an Acceding State".

The Police (Incitement to Disaffection) Act, 1922.

(XXII of 1922.)

Section 1. — In sub-section (2), *omit* "British Baluchistan and".

Section 3. — *For* "British India or British Burma" *substitute* "India".

The Schedule. — *Omit* the entries relating to the Burma Military Police Act, 1887, and the Rangoon Police Act, 1899.

The Indian States (Protection against Disaffection) Act, 1922.

Long title and preamble.—*For* "Princes or Chiefs of States in India" *substitute* "Rulers of Acceding States and other Indian States".

Section 1. — In sub-section (2) *omit* "British Baluchistan and".

Section 3. — In sub-section (1), *for* "any Prince or Chief of a State in India" *substitute* "the Ruler of any Acceding State or other Indian State"; and in sub-section (2), *for* the words "Prince, Chief" at both places, *substitute* "Ruler".

The Indian Mines Act, 1923.

(IV of 1923).

Section 1. — In sub-section (2), *omit* "British Baluchistan and".

Section 3. — In clause (i), *for* "any Legislature in British India" *substitute* "the Central Legislature or of any Legislature in a Province of India".

The Indian Boilers Act, 1923.

(V of 1923.)

Section 1. — In sub section (2), *omit* "British Baluchistan and".

Section 3. — In sub-section (2), *for* "Safety Controlling Authority" *substitute* "Central Government", *for* "Federal Railway Authority" *substitute* "Central Government" and *omit* the second paragraph.

Section 27A. — In sub-section (2), *for* "fourteen" *substitute* "twelve", and *for* clause *(b) substitute*:—

"*(b)* one member to be nominated by the Provincial Government of each Governor's Province".

The Cantonments (House-Accommodation) Act, 1923.

(VI of 1923)

Section 1.—In sub-section (2), *omit* "(inclusive of British Baluchistan").

The Workmen's Compensation Act, 1923.

(VIII of 1923)

Section 1. — In sub section (2), *omit* "British Baluchistan and".

Section 2.—In clause (i), of sub-section (1), *for* "any Legislature in British India" *substitute* "the Central Legislature or of any Legislature in a Province of India".

Section 35. — In sub-section (1), after "make rules for the transfer" *insert* "to any Acceding State or", after "about to reside in such" *insert* "State" and after "relating to workmen's compensation" *insert* "in any Acceding State or".

The Indian Cotton Cess Act, 1923.

(XIV of 1923.)

Section 1.—*For* sub-section (2), *substitute*:—

"(2) It extends to all the Provinces of India, including Berar and the Sonthal Parganas".

Section 2.—*Omit* clause *(g)*.

Section 4.—In item (ii) *for* "six persons" *substitute* "five persons", *omit* "Sind", and *for* "the Punjab" *substitute* "East Punjab"; in item (iv), *for* "nine persons" *substitute* "eight persons" and *omit* "the Karachi Chamber of Commerce"; in item (v), *for* "the Punjab" *substitute* "East Punjab"; in item (vi), *for* "Bengal" *substitute* "West Bengal"; and *for* item (viii), *substitute*:—

"(viii) two persons nominated by the Central Government to represent the cotton growing industry in each of the following Provinces, namely, Madras, Bombay, the United Provinces, East Punjab and the Central Provinces and Berar".

The Indian Official Secrets Act, 1923.

(XIX of 1923.)

Section 2. — *Omit* clause (1-A).

The Indian Merchant Shipping Act, 1923.

(XXI of 1923.)

Section 2. — In sub-section (2), *for* "British India" *substitute* "India" and after "so registered" *insert* "and as from the fifteenth day of August 1947, a British ship registered before that date within the territories which on that date constituted the Dominion of Pakistan, or registered on or after that date in Pakistan, shall not be deemed for purposes of the aforesaid to be a British ship registered in India".

Section 4. — After "any foreign Prince or State" *insert* "or any Acceding State or the Ruler thereof", and after "that foreign Prince or State" *insert* or "that Acceding State, as the case may be".

Section 5.—*For* the words "British India" wherever they occur, *substitute* "the Provinces of India".

Section 51.—*For* "British Indian currency" *substitute* "the currency of the Provinces of India", and *for* "the Imperial and the Indian Governments" *substitute* "the Government of India and the Government of the United Kingdom".

Section 218.—After the word "India" at both places, *insert* "Pakistan".

Section 232.—In sub-section (4), *for* "British Indian register" *substitute* "Indian register".

Section 283. — In sub-section (1), *for* "any place in British India" *substitute* "any place in a Province of India", and *for* the words from "in His Majesty's Dominions" to "is instituted" *substitute* "in any other Province or in any part of His Majesty's Dominions".

The Legal Practitioners (Women) Act, 1923.

(XXIII of 1923.)

Section 1. — In sub-section (2), *omit* "British Baluchistan and".

The Mussalman Wakf Act, 1923.

(XLII of 1923.)

Section 1. — In sub-section (2), *omit* "British Baluchistan and".

The Cantonments Act, 1924.

(II of 1924)

Section 1.—In sub-section (2), *omit* "including British Baluchistan".

Section 13.—*Omit* the proviso to sub-section (1).

Section 18. — In sub-section (1), *for* "Crown", *substitute* "Constitution of India", and *for* "His Majesty's the King, Emperor of India, his heirs and successors" *substitute* "the Constitution of India as by law established".

Section 27. — In clause (i) of sub-section (2), *for* "Indian" *substitute* "Acceding".

The Indian (Specified Instruments) Stamp Act, 1924.

(XIII of 1924.)

Section 1. — In sub-section (2), *omit* "British Baluchistan and".

The Land Customs Act, 1924.

(XIX of 1924.)

Long title and preamble. — *For* "British India" *substitute* "the Provinces of India".

The Indian Soldiers (Litigation) Act, 1925.

(IV of 1925.)

Section 1. — In sub-section (2), *omit* "British Baluchistan and".

Section 3. — In clause *(c)*, *for* "British India" *substitute* "India".

Section 14A. — *For* "Indian State" and "Indian States" *substitute* "Acceding State" and "Acceding States", respectively.

The Legislative Assembly (President's Salary) Act, 1925.

(VI of 1925.)

Section 3.—*For* "Federation" *substitute* "Dominion".

The Cotton Ginning and Pressing Factories Act, 1925.

(XII of 1925.)

Section 1.—In sub-section (2), *omit* "British Baluchistan and".

The Provident Funds Act, 1925.

(XIX of 1925.)

Section 1.—In sub-section (2), *omit* "including British Baluchistan".

Section 2.—In clause *(f)* *for* "Federal Railway Authority" at both places *substitute* "Central Government".

Schedule.—*Omit* items 15, 21 and 34.

The Coal Grading Board Act, 1925.

(XXXI of 1925.)

Section 2.—In clause *(b)*, *for* "British India" *substitute* "a Province of India".

Section 3.—In clause *(a)* of sub-section (1), and in sub-section (3), *omit* "or, after the establishment of the Federal Railway Authority, to that authority".

Indian Succession Act, 1925.

(XXXIX of 1925.)

Long title and preamble. — *For* "British India" *substitute* "the Provinces of India".

Section 273.—*For* "the whole of British India" *substitute* "the other Provinces of India", and *add* the following paragraph:—

"The proviso shall also apply in the Provinces of India after the separation of Pakistan from India to probates and letters of administration granted before the date of the separation, or after that date in proceedings pending at that date, in any of the territories which on that date constituted Pakistan."

Section 318.—*For* "the whole of British India" *substitute* "the Provinces of India".

Section 380.—For "the whole of British India" *substitute* "the Provinces of India"; and *add* the following paragraph :—

'It shall also apply in the Provinces of India after the separation of Pakistan from India to certificates granted before the date of the separation, or after that date in proceedings pending at that date in any of the territories which on that date constituted Pakistan."

Section 382.—After "has been granted' *insert* "to a resident within an Acceding State by a District Judge of that State, or" *for* "British representative" *substitute* "representative of India", and *for* "such representative" *substitute* "such Judge or representative".

Schedule IV.—For "whole of British India" *substitute* "Provinces of India".

The Government Trading Taxation Act, 1926.

(III of (1926.)

Long title.—For "British India" *substitute* "the Provinces of India."

Preamble.—For "in British India" *substitute* "in the Provinces of India"; and *for* " of British India" *substitute* " of India or the Government of any Acceding State or other Indian State."

Section 2. — In sub-section (1) *for* " of British India" *substitute* "of India", and after sub section (1) *insert* :—

"(1-A) The provisions of sub-section (1) shall apply in relation to the Government of any Acceding State or other Indian State as they apply in relation to the Government of any part of His Magisty's Dominions exclusive of India".

The Indian Naturalisation Act, 1926.

(VII of 1926.)

Long title and preamble—For "British India" *substitute* "the Provinces of India."

Section 1.—In sub-section (2), *omit* "British Baluchistan and."

Section 6.—Omit "Emperor of India."

After section 14-A, *insert* :—

"14-B.—*Application to certificates granted before separation of Pakistan.*—The provisions of this Act shall, after the separation of Pakistan from India, continue to apply, as respects the Provinces of India, to certificates granted under this Act or the Indian Naturalisation Act, 1852, before the said separation by the Local Government or Provincial Government of any Province which or any part of which, was on the said separation included in Pakistan and any such certificates may after the said separation be revoked as respects the Provinces of India accordingly."

The Promissory Notes (Stamp) Act, 1926.

(XI of 1926.)

Section 1.—In sub-section (2), *omit* " British Baluchistan and."

The Contempt of Courts Act, 1926.

(XII of 1926.)

Section 2.—In sub-section (1), after "Letters Patent" *insert* "or by order of the Governor-General under the Indian Independence Act, 1947, or the Government of India Act, 1935."

The Indian Trade Unions Act, 1926

(XVI of 1926.)

Long title and preamble. —For "British India" *substitue* "the Provinces of India."

Section 1.—In sub-section (2), *omit* "British Baluchistan and."

The Cotton Industry (Statistics) Act, 1926.

(XX of 1926.)

Long title and preamble.—For "British India" *substitute* "the Provinces of Inda."

The Indian Bar Councils Act, 1926.

(XXXVIII of 1926.)

Long title and preamble.—For "British India *substitute* "the Provinces of India."

Section 4. — In sub-section (4), *for* "of Bengal" *substitute* "of West Bengal."

The Indian Forest Act, 1927.

(XVI of 1927.)

Section 1.—For sub-section (2), *substitute* :

"(2) It extends to Bombay, West Bengal, the United Provinces, Bihar, East Punjab, the Central Provinces and Orisa."

The Indian Lighthouse Act, 1927.

(XVII of 1927.)

Long title and preamble. —For "British India" *substitute* "the Provinces of India."

The Hindu Inheritance (Removal of Disabilities) Act, 1928.

(XII of 1928.)

Section 1.—In sub- section (2), *omit* "British Baluchistan and."

The Hindu Law of Inheritance (Amendment) Act, 1929.

(II of 1929.)

Section 1.—In sub-section (2), *omit* "British Baluchistan and."

The Indian Soft Coke Cess Act, 1929.

(VIII of 1929.)

Throughout the Act, including the preamble and long title, *for* "Bengal" *substitute* "West Bengal."

Section 4.—In sub-sections (1) and (2) *omit* "or after the establishment of the Federal Railway Authority, to that Authority."

The Child Marriage Restraint Act, 1929.

(XIX of 1929.)

Section 1.—In sub-section (2), *omit* "British Baluchistan and."

The Dangerous Drugs Act, 1930.

(II of 1930.)

Long title and preamble. — For "Governor-General in Council" *substitute* "Central Government", and *for* "British India" *substitute* "the Provinces of India."

Section 1.—In sub-section (2), *omit* "British Baluchistan and."

Schedule.—Omit "Emperor of India," at both places.

The Indian Sale of Goods Act, 1930.

(III of 1930.)

Section 1.—In sub section (2), *omit* "British Baluchistan and."

The Indian Lac Cess Act, 1930.

(XXIV of 1930.)

Section 4.—In clause (v) of sub-section (4), *for* 'Bengal" *substitute* "West Bengal."

The Provisional Collection of Taxes Act, 1931.

(XVI of 1931.)

Section 4.—In clause *(b)* of sub-section (2), *omit* "either Chamber of."

The Indian Press (Emergency Powers) Act, 1931.

(XXIII of 1931.)

Section 1.—In sub-section (2), *omit* "British Baluchistan and."

The Indian Partnership Act, 1932.

(IX of 1932)

Section 1.—In sub-section (2), *omit* "British Baluchistan and."

Section 58.—In sub-section (3), *omit* "or the Crown Representative."

The Foreign Relations Act, 1932.

(XII of 1932.)

Long title and preamble. — *For* "His Majesty's Government" *substitute* "the Government of India."

Section 1.—In sub-section (2) *omit* "British Baluchistan and."

Section 3.—*For* "His Majesty's Government" *substitute* "the Government of India."

The Sugar Industry (Protection) Act, 1932.

(XIII of 1932..)

Long title and preamble.—*For* "British India" *substitute* "the Provinces of India."

Section 3.—*For* "Indian Legislature" *substitute* "Central Legislature."

The Indian Air Force Act, 1932.

(XIV of 1932.)

Section 6.—In clause (15), *omit* "or the Crown Representative."

Section 9.—*For* 'a subject of His Majesty or of a Prince or Chief in India" *substitute* "a British subject or the subject of an Acceding State."

Section 90.—In sub-section (3) *omit* "or the Crown Representative"; in sub-section (6), *for* "British consular officer, British Magistrate or other British" *substitute* "Indian consular officer or other Indian."

The Port Haj Committees Act, 1932.

(XX of 1932.)

Section 1.—In sub-section (2), *for* "Presidencies of of Bombay and Bengal" *substitute* "Provinces of Bombay and West Bengal."

For section 3 substitute:—

"*3. Continuance of Port Haj Committees of Calcutta and Bombay.*—There shall continue to be a committee called the Port Haj Committee of Calcutta and a committee called the Port Haj Committee of Bombay."

Section 4.—In clause *(c)* of sub-section (1), *for* "Chambers of the Bengal Legislature *substitute* "West Bengal Legislative Assembly", *for* 'Chambers of the Central Legislature" *substitute* "Central Legislature" *for* "part of Bengal" *substitute* "part of West Bengal", and *for* "Bengal Medical Council" *substitute* "West Bengal Medical Council"; in sub-clause (ii) of clause *(c)* of sub-section (2), *omit* "the Chambers of"; and *omit* sub-section (3).

Section 6.—In sub-section (1) *for* "Bombay or Karachi" *substitute* "or Bombay."

The Tea Districts Emigrant Labour Act, 1932.

(XXII of 1932.)

Section 2.—In clause *(a)*, *for* "Cachar and Sylhet" *substitute* "and Cachar", and in clause *(f)*, *for* "British India" *substitute* "any Province of India."

The Criminal Law Amendment Act, 1932.

(XXIII of 1933.)

Section 1.—In sub-section (2), *omit* "British Baluchistan and."

The Children (Pledging of Labour) Act, 1933.

(II of 1933.)

Section 1.—In sub-section (2), *omit* "British Baluchistan and."

The Indian Wireless Telegraphy Act, 1933.

(XVII of 1933.)

Section 1.—In sub section (2), *omit* "British Baluchistan and."

The Murshidabad Estate Administration Act, 1933.

(XXIII of 1933.)

Throughout the Act, except in the second recital of the Preamble, *for* "Bengal" *substitute* "West Bengal."

Preamble.—After the second recital, *insert*:—

"And Whereas by virtue of paragraph (2) of Article 8 of the Indian Independence (Rights, Property and Liabilities) Order, 1947, the said indenture is, as from the date of establishment of the Dominion of India, to have effect as if it had been made on behalf of the Province of West Bengal, and all rights and liabilities which have accrued and may accrue under the said indenture, to the extent to which they would have been rights or liabilities of the Province of Bengal, are the rights and liabilities of the Province of West Bengal; "

Section 1.—In sub-section (2), *omit* "British Baluchistan and".

Section 4.—In clause *secondly, omit* "or the Secretary of State" and in clause *fourthly, for* "Secretary of State" *substitute* "Provincial Government."

Section 5.—In clause (1), *omit* 'the Secretary of State or" and *for* "his representative" *substitute* "its representative" and in clause (3), *for* "Secretary of State" *substitute* "Province of West Bengal".

The Indian Medical Council Act, 1933.

(XXVII of 1933.)

Section 2.—In clause *(a)*, *for* "British Indian University" *substitute* "Indian University", and *omit* "In British India".

Section 3.—In sub-section (1), in clause *(b) omit* "British" and in clause *(c) for* "a British Indian University" *substitute* "an Indian University."

Section 5.—In sub-section (1), *for* "a British Indian University" *substitute* "an Indian University".

Section 11.—In sub-section (1), *for* "British India" *substitute* "the Provinces of India" and in sub-section (2), *for* "British India" *substitute* "a Province of India".

Section 20.—In sub-section (1), *omit* "established by Letters Patent of the Crown".

The First Schedule.—In the heading *for* 'British India" *substitute* "the Provinces of India" and *omit* all entries relating to Punjab University.

The Second Schedule.—In the headings *for* "British India" *substitute* "the Provinces of India" and after the entry relating to New Zealand, *insert* the following entry :—

"PAKISTAN—			
Punjab University	L.M.S. M.B., M.B.B.S. M.D., M.S."	Medicine and Surgery	U West Punjab.

The Reserve Bank of India Act, 1934.

(II of 1934.)

Preamble.—For "British India" *substitute* "India".

Section 1.—In sub-section (2), *omit* "British Baluchistan and".

Section 2.—In clause *(c)*, *for* "British India" *substitute* "the Province".

Section 4.—In clause *(c)* of sub-section (3), *for* the words "British India" at both places where they occur *substitute* "a Province of India"; and in sub-section (5), *for* the words from "two elected members" to "respective Houses" *substitute* "three persons elected from among themselves by the members of the Central Legislature".

Section 11.—In sub-section (5), *for* "Federal" *substitute* "Central" and *omit* the Indian Legislature".

Section 17.—In clause (1) *omit* "the Secretary of State" and "the Federal Railway Authority" ; in clause (5) *omit* "the Federal Railway Authority" ; and in clause *(11) omit* "the Secretary of State".

Section 28.—Omit "of both Houses."

Section 45.—In sub-section (3), *omit* "and the Federal Railway Authority".

The First Schedule.—In paragraph I, *for* "the Bombay Presidency, including Sind" *substitute* "the Province of Bombay", *omit* "Khairpur" and after "Deccan States" *insert* "and until the 30th day of June, 1948, the Province of Sind and the State of Khairpur in Pakistan" in paragraph II, *for* "the Bengal Presidency, Bihar and Orissa" *substitute* West Bengal, Bihar, Orissa" and after "Khasi States" *insert* "and until the 30th day of June, 1948, the Province of East Bengal in Pakistan" : and in paragraph III, for "the Punjab", *substitute* "East Punjab"; *omit* "the North-West Frontier Province" and "Baluchistan", *for* "the Punjab States, excluding Khairpur" *substitute* 'East Punjab States" and *for* "Khaniadhana" *substitute* and Khaniadhana, and until the 30th day of June, 1948, the North-West Frontier Province and Baluchistan and the States of Bahawalpur,".

The Khaddar (Name Protection) Act, 1934.

(VIII of 1934.)

Section 1.—In sub-section (2), *omit* 'British Baluchistan and".

The Indian States (Protection) Act, 1934.

(VIII of 1934.)

Long title and preamble.—For "States in India which are under the suzerainty of His Majesty" *substitute* "States which have acceded to the Dominion of India".

Section 1.—In sub-section (2), *omit* "British Baluchistan and".

Sections 2 and 3.—For "State in India" *substitute* "Acceding State".

Section 4 and 5.—For "a State in India" *substitute* an "Acceding State"

The Sugarcane Act, 1934.

(XV of 1934.)

Section 1.—In sub-section (2), *omit* "British Baluchistan and",

The Indian Dock Labourers Act, 1934.

(XIX of 1934.)

Long title and preamble.—For "British India" *substitute* "the Provinces of India".

The Indian Carriage by Air Act, 1934.

(XX of 1934.)

Long title and preamble.—For "British India" *substitute* "the Provinces of India".

Section 1.—In sub-section (2), *omit* "British Baluchistan and",

The Indian Aircraft Act, 1934.

(XXII of 1934.)

Section 1.—In sub-section (2), *omit* "British Baluchistan and" and *for* "in British India" *substitute* "in any Province of India".

Section 5.—In sub-section (3), *omit* "each of the chambers of", and *for* the words from "or where the period" to "or both chambers agree", *substitute* "that Legislature makes any modifications in the rule or directs".

The Factories Act, 1934.

(XXV of 1934.)

Section 1.—In sub-section (2), *omit* "British Baluchistan and".

Section 3.—Omit the brackets and letter "*(a)*", the words "in British India" at both places where they occur, and the word "and", immediately before the proviso".

Section 12.—In the *Explanation, for* "any Legislature in British India" *substitute* "the Central Legislature or of any Legislature in a province".

The Petroleum Act, 1934.

(XXX of 1934.)

Section 1.—In sub-section (2), *omit* "British Baluchistan and".

The Indian Navy (Discipline) Act, 1934.

(XXXIV of 1934.)

Section 3.—In sub-section (2), *for* the words from "as so set forth" to "constituting the Indian Navy" *substitute* "as so set forth," "the Indian Navy" has the same meaning as in this Act".

The First Schedule.—Throughout the Schedule except in sections 90-B and 90-C and except as hereinafter expressly provided, *for* "His Majesty's navy" *substitute* "the Indian Navy" *for* "ship of His Majesty" *substitute* "ship of the Indian Navy" *for* "ships of His Majesty' *substitute* "ships of the Indian Navy" and *for* "any of His Majesty's ships" *substitute* "any ship of the Indian Navy".

In section 39, *for* "any of His Majesty's ships and vessels of war" *substitute* "any of the ships and vessels of war of the Indian Navy" :

In sections 45 and 46, *for* the words "British India" wherever they occur, *substitute* "India",

In section 50, *for* "fleet or squadron of His Majesty's ships or of one of His Majesty's ships" *substitute* "fleet, squadron or ship of the Indian Navy", and *for* "some other of His Majesty's ships" *substitute* "some other ship of the Indian Navy".

In section 58, in regulation (3), *for* "two of Majesty's ships" *substitute* "two ships of the Indian Navy"; in regulation (10), *for* "His Majesty's ships or vessels" *substitute* "the ships or vessels to the Indian Navy" ; in regulation (12) *for* "His Majesty's ships" at both places, *substitute* "the Indian Navy", and after regulation (16), *insert*—

"(17) References in the foregoing regulations to officers of the Indian Navy include officers of the Royal Navy who are attached to or serving with, the Indian Navy."

In section 59, *for* "one of His Majesty's ships or vessels of war" *substitute* "a ship or vessel of war of the Indian Navy."

In section 67, *for* "British India" *substitute* "any Province of India".

In section 70, *for* "British India" at both places *substitute* "a Province of India".

In section 80, *for* "British India" *substitute* "the Provinces of India"

In section 86, *for* "one of His Majesty's ships" *substitute* "a ship of the Indian Navy".

In section 87, *for* "any one of His Majesty's ships" *substitute* "any ship of the Indian Navy",

In section 88, *for* "as His Majesty, His heirs and successors, by any Order or Orders in Council shall at any time or times direct" *substitute* "as the Central Government may from time to time direct".

In sub-section (1) of section 90, *for* "one of His Majesty's ships" *substitute* "a ship of the Indian Navy".

In section 90-B *omit* " or of India" at all three places.

In section 90-C, in sub-section (1) *omit* the words, "or Burma" wherever they occur, and in sub-section (2) *for* "and Newfoundland" *substitute* "Newfoundland, Pakistan and Ceylon".

In section 91, *for* "any one of His Majesty's ships" *substitute* "any ship of the Indian Navy", and *for* "some other of His Majesty's ships of war" *substitute* some other ship of war of the Indian Navy".

In section 96, *for* "of His Majesty's ships" *substitute* "ships of the Indian Navy".

The Payment of Wages Act.

(IV of 1936.)

Section 1.—In sub-section (2), *omit* "British Baluchistan and".

The Decrees and Orders Validating Act, 1936.

(V of 1936.)

Section 1.—In sub-section (2), *omit* "British Baluchistan and".

The Geneva Convention Implementing Act, 1936.

(XIV of 1936)

Section 1.—In sub-section (2), *omit* "British Baluchistan and".

The Agricultural Produce (Grading and Marketing) Act, 1937.

(I of 1937.)

Section 1.—*For* sub-section (2), *substitute*:—

"(2) It extends to all the Provinces of India".

The Arbitration (Protocol and Convention) Act, 1937.

(VI of 1937.)

Long title and preamble.—*For* "British India" *substitute* "the Provinces of India".

Section 1.—In sub-section (2), *omit* "British Baluchistan and".

The Muslim Personal Law (Shariat) Application Act, 1937.

(XXVI of 1937.)

Long title and preamble.—*For* "British India" *substitute* "the Provinces of India".

Section 1.—In sub-section (2), *omit* "excluding the North-West Frontier Province".

Section 3.—In clause (*c*) of sub-section (1), *for* "British India" *substitute* "a Province of India".

The Insurance Act, 1938.

(IV of 1938.)

Section 2.—In clause (3), *for* "any Act" *substitute* any Central Act or Act", *for* "British India" *substitute* "a Province", and *for* "Indian State"; *substitute* "Acceding State or other Indian State" and in sub-clause (*a*) of clause (9), *for* "other than British India" *substitute* "or State outside the Provinces of India."

Section 2-A.—*For* "British India" *substitute* "the Provinces of India."

Section 9.—In sub-section (2), *for* "any Indian State" *substitute* "any Acceding State or other Indian State," and *for* "the Indian State" *substitute* "that State."

Section 15.—In sub-sections (1) and (3), *for* "British India" *substitute* "the Provinces of India."

Section 31.—In sub-section (2), *for* "Indian State" *substitute* "Acceding State or other Indian State."

Section 36.—*For* "British India or in an Indian State" *substitute* "India or in a non-acceding Indian State."

Section 40.—In sub-section (1-A), *for* "Indian State" *substitute* "Acceding State or other Indian State."

Section 114.—In sub-section (3), *omit* "each of the chambers of" and *for* the words from "or where the period" to "or both Chambers agree" *substitute* "the Legislature makes any modification in the rule or directs."

Section 116.—In sub-section (1), *for* "Indian State" *substitute* "Acceding State or other Indian State."

The Second Schedule.—In regulation 2 of Part I, *for* "British Indian income-tax" *substitute* "Indian (Central) income-tax"; and in the first column of Form B, *for* "British Indian Taxes" *substitute* "Indian (Central) Taxes."

The Third Schedule.—In regulation 10 of Part I, *for* the words "British Indian" where they first occur, *substitute* "Indian (Central), Indian (State)," and *for* British Indian income tax" *substitute* "Indian Central) income tax"; in the first column of, and Note (*d*) below, Form D and in the first column of Form F for "British Indian" *substitute* "Indian."

The Fourth Schedule.—In the first column of, and Note (*d*) below, Form G, *for* "British Indian" *substitute* "Indian."

The Indian Tea Control Act, 1938.

(VIII of 1938.)

Long title and preamble.—*For* "British India" *substitute* "the Provinces of India."

Section 3.—In clause (*b*) of sub-section (1), *for* "the Surma Valley, the Indian State of Tripura," *substitute* the Cachar District and the State of Tripura," and *omit* "the Chittagong Hill Tracts and the District of Chittagong"; and in clause (*c*) of sub-section (1), *for* "Indian States" *substitute* "the Acceding States."

Section 12.—In sub-section (2), *for* "British India" *substitute* "any Province"

Section 25.—*For* "Indian State" *substitute* "Acceding State."

The Motor Vehicles Act, 1939.

(IV of 1939.)

Preamble.—*For* "British India" *substitute* "the Provinces of India."

Section 9.—In sub-sections (2) and (4), *for* "Indian State" *substitute* "Acceding State or other Indian State."

Section 28.—In sub-section (1), *for* "elsewhere in British India', *substitute* "in any other Province"; and in sub-sections (2) and (5), *for* "Indian State" *substitute* "Acceding State or other Indian State."

Section 42.—In clause (*h*) of sub-section (3), *for* "Indian State" *substitute* "Acceding State or other Indian State."

Section 44.—In the first proviso to sub-section (1) *omit* "in the North West Frontier Province and "

Section 92.—In clause (*a*) of sub-section (1), *for* "from British India" *substitute* "from India."

Section 93.—In clause (*a*) *for* "Indian State" *substitute* "Acceding State or other Indian State"; and in clause (*c*), *for* "such Indian State or such area administered by the Crown Representative" *substitute* "such Acceding State or other Indian State."

Section 94.—In sub-section (2) *omit* "(ii) the Crown Representative ", in item (iv), *for* "any Indian State" *substitute* "any Acceding State or other Indian State," in item (vi) *for* "British India" *substitute* "a Province of India," in item (vii), *for* "Crown Representative" *substitute* "Central Government in the exercise of its extra-provincial jurisdiction," and in item (viii), *for* ,'Indian State" *substitute* "Acceding State or other Indian State."

The Sixth Schedule.—*Omit* the entries relating to Bengal, North West Frontier Province, Sind and Punjab; after the entry relating to Central Provinces and Berar, *insert*:—

"East Punjab ... ... E.P.";

and after the entry relating to United Provinces, *insert*:—

"West Bengal ... ... W.B."

The Registration of Foreigners Act, 1939.

(XVI of 1939.)

Long title and preamble.—For "British India" *substitute* "the Provinces of India."

Section 2.—For sub-clauses (ii) and (iii) of clause *(a) substitute*:—

"(ii) a British subject domiciled in India; or

(iii) the Ruler or subject of an Acceding State or other Indian State; or."

Section 6.—In the proviso, *omit* "both Houses of."

The Coal Mines Safety (Stowing) Act, 1939.

(XIX of 1939.)

Section 1.—In sub-section (2) *for* "the Punjab" *substitute* "East Punjab."

The Medical Diplomas Act, 1939.

(XXVIII of 1939.)

Section 3.—After the words and figures "Government of India Act, 1935," where they first occur *insert* "as originally enacted"; and *omit* clause *(c)*.

Section 4.—For "clauses *(a)*, *(b)* and *(c)*" *substitute* "clauses *(a)* and *(b)*."

The Commercial Documents Evidence Act, 1939.

(XXX of 1939.)

The Schedule.—In item 18 of Part I, *for* "a British Consular officer or British or Indian" *substitute* "an Indian or British Consular officer, or by an Indian or British."

The Trade Marks Act, 1940.

(V of 1940.)

Sub-section (1) of section 10, sub-section (2) of section 21, section 23, sub-section (2) of section 57, sub-section (4) of section 68 and section 82A—*For* the words "Indian State" wherever they occur, *substitute* "Acceding State or other Indian State."

Section 68.—In clause *(c)* of sub section (3), *for* "a country outside British India" *substitute* "an Acceding State or of a country outside India."

Section 84.—In clause (ll) of sub-section (2), *for* "Indian States" *substitute* "Acceding States or other Indian States."

The Agricultural Produce Cess Act, 1940.

(XXVII of 1940.)

Section 9.—In sub-section (3), *omit* "both chambers of."

The Reciprocity Act, 1943.

(IX of 1943.)

Long title and preamble.—For "British India" *substitute* "the Provinces of India".

Section 2.—In clause *(a) for* "British India" *substitute* "India".

The Central Excises and Salt Act, 1944.

(I of 1944.)

Preamble.—For "British India" *substitute* "the Provinces of India."

Section 5.—For "Indian State" *substitute* "Acceding State or other Indian State."

Section 38.—In the proviso *omit* "each of the Chambers of", and *for* the words from "or where the period" to "or both Chambers agree" *substitute* "that Legislature makes any modification in the rule or directs."

The Indian Cocoanut Committee Act, 1944.

(X of 1944.)

Section 4. — In clause *(b)*, *for* "Bengal" *substitute* "West Bengal"; and in clause *(g)*, *for* "two, *substitute* "three", *for* "elected members of the Legislative Assembly" *substitute* "members", and *omit* "one shall be a person elected from among themselves by the elected members of the Council of State."

Section 17.—Omit "both Chambers of."

The Indian Oilseeds Committee Act, 1946.

(IX of 1946.)

Section 4. — In clause *(d)*, *for* "Department" at all three places *substitute* "Ministry," and *for* "Industries and Supplies" *substitute* "Industry and Supply"; in clause *(e)*, *for* "Bengal" *substitute* "West Bengal" and *for* "the Punjab" *substitute* "East Punjab"; in clause *(f)*, *for* "Indian States" *substitute* "Acceding States"; in clause *(g)*, *for* "Bengal" *substitute* "West Bengal," *for* "the Punjab" *substitute* "East Punjab," and *for* "rest of British India and the Indian States" *substitute* "other Provinces and the Acceding States"; and *for* clause *(s) substitute* —

"*(s)* six persons representing the consumers of oilseed products, to be elected from among themselves by the members of the Central Legislature;".

Section 16.—Omit "both Chambers of."

The Explosives (Temporary Provisions) Act, 1947.

(X of 1947)

Section 1.—In sub-section (2), *for* "ports of Karachi and" *substitute* "port of."

The Industrial Disputes Act, 1947.

(XIV of 1947)

Section 2. — In clause *(a)*, *omit* "by the Federal Railway Authority"; and in clause *(g)*, *for* "a Government in British India" *substitute* "the Central Government or a Provincial Government."

Section 15. — In sub-section (2), *for* "Central Legislative Assembly" *substitute* "Central Legislature" and *for* "Legislative Assembly may" *substitute* "Legislative Assembly or, as the case may be, the Central Legislature."

Section 20. — In sub-section (3), after "Legislative Assembly" at both places, *insert* "or Central Legislature."

Ordinances.

The Essential Services (Maintenance) Ordinance, 1941.

(XI of 1941)

Section 3. — *For* "British India" *substitute* "India."

The Collective Fines Ordinance, 1942.

(XX of 1942)

Preamble and sub-section (1) of section 3. — *For* "British India" *substitute* "India."

The Registration of Transferred Companies Ordinance, 1942.

(LIV of 1942)

Long title and preamble. — *For* "outside British India" *substitute* "outside India," and *for* "to British India" *substitute* "to the Provinces of India."

Section 2.—In sub-section (1), *for* "in British Burma" *substitute* "in Pakistan, or in Ceylon", and *for* "British India" at both places; *substitute* "a Province of India"; and in sub-section (4), *for* the words "British India" wherever they occur, *substitute* "a Province."

The Military Nursing Services (India) Ordinance, 1943.

(XXX of 1943)

Throughout the Ordinance *for* "Commander-in Chief of His Majesty's Forces in India" *substitute* "Commander-in-Chief, India."

The Post-Office National Saving Certificates Ordinance, 1944.

(XLII of 1944)

Section 4. — At the end of clause *(a)* of the second proviso to sub-section (1), *insert*, "or if that area is in Pakistan, by the Postmaster-General for such area in India as the Central Government may, by general or special order, specify in this behalf."

(THIRD AMENDMENT) ORDER, 1948.

(G. G. O. 38, dated 31-3-1948)

WHEREAS in the exercise of the powers conferred by section 9 of the Indian Independence Act, 1947, the Governor-General was pleased to make the India (Provisional Constitution) Order, and other orders providing for adaptations and modifications of the Government of India Act, 1935;

AND WHEREAS it appears to the Governor-General to be expedient to make certain further modifications of the said Government of India Act, 1935;

AND WHEREAS sub-section *(5)* of section 19 of the Indian Independence Act, 1947, provides that any power conferred by that Act to make any order includes power to vary any order previously made in the exercise of that power;

NOW, THEREFORE, in the exercise of the powers conferred on him as aforesaid and of all other powers enabling him in that behalf, the Governor-General is pleased to make the following Order:—

1. *(1)* This Order may be cited as the India Provisional Constitution (Third Amendment) Order, 1948.

(2) It shall come into force at once.

2. In this Order, "the Act" means the Government of India Act, 1935, as adapted by the India (Provisional Constitution) Order, 1947, and subsequent orders.

3. In section 28 of the Act, for the words "members of the Indian Legislature," the words members of the House of Commons of the Parliament of the United Kingdom" shall be substituted.

4. In section 29 of the Act, for the words beginning with the words "allowances at such rates" and ending with the words "Indian Legislature" the following shall be substituted, namely:—

"the rules relating to allowances and other matters which immediately before the establishment of the Dominion were applicable to members of the Legislative Assembly of the Indian Legislature shall apply to members of the Dominion Legislature subject to such modifications as may from time to time be made therein by the Governor-General."

5. To section 91 of the Act, the following proviso shall be added, namely:—

"Provided that the Governor General may at any time by Order—

(a) direct that the whole or any specified part of an excluded area shall become, or become part of, a partially excluded area;

(b) direct that the whole or any specified part of a partially excluded area shall cease to be a partially excluded area or a part of such an area;

(c) alter, but only by way of rectification of boundaries, any excluded or partially excluded area;

(d) on any alteration of the boundaries of a Province, or the creation of a new Province, declare any territory not previously included in any Province to be, or to form part of, an excluded area or a partially excluded area, and any such Order may contain such incidental and consequential provisions as appear to the Governor-General to be necessary and proper."

[THE] INDIAN RAILWAYS ACT (ADAPTATION) ORDER, 1948.

(G. G. O. 36, dated 11 2-1948.)

In the exercise of the powers conferred by section 9 of the Indian Independence Act, 1947, and of all other powers enabling him in that behalf, the Governor-General is pleased to make the following Order:—

1. *(1)* This order may be cited as the Indian Railways Act (Adaptation) Order 1948.

(2) It shall come into force at once.

2. The Indian Railways Act, 1890, shall, until repealed or altered or amended by a competent legislature, in its application to the Dominion of India or any part or parts thereof be subject to the adaptations directed in the Schedule to this Order.

3. The provisions of this Order shall have effect notwithstanding anything to the contrary contained in the India (Adaptation of Existing Indian Laws) Order, 1947.

THE SCHEDULE.

Adaptations of the Indian Railways Act, 1890.

Throughout the Act, *for* "safety controlling authority", *substitute* "Central Government" and *for* "Federal Railway Authority", *substitute* "Central Government."

Section 1.—For sub-section (2), *substitute*:—

"(2) It extends to all the Provinces of India, and applies also to all British subjects within the Acceding States, and to all British subjects domiciled in India wherever they may be."

Section 3. — In clause (3) *omit* "in British India"; in clause (6), *omit*, "Native" at both places; *omit* clauses (20) and (21); and *for* clause (22), *substitute*:—

"(22) 'the general controlling authority' means, in relation to a minor railway wholly situate in a Province, the Provincial Government, and in relation to any other railway, the Central Government."

Section 42. — In clause *(f)* of the proviso to sub-section (4), *for* "make their order", *substitute* "makes its order."

Section 42B.—In sub-section (2), *for* "that Authority" *substitute* "the Central Government."

Section 46.—In sub-sections (1) and (2), *for* "appropriate authority," *substitute* "general controlling authority," and *omit* sub-section (3).

Omit section 46B.

Section 47. — In sub-section (3), *after* "general controlling authority and", *insert* "where that authority is not the Central Government, also of", and in clause *(a)* of the proviso, *omit* "the same as"; and for sub-section (4), *substitute*:—

"(4) Without prejudice to the provisions of section 21 of the General Clauses Act, 1897, any rule made under this section may be cancelled—

(a) where the general controlling authority concerned is the Central Government, by that Government; and

(b) where that authority is not the Central Government, by that authority with the sanction of the Central Government:

Provided that the Central Government shall not refuse its sanction to the cancellation of any rule unless it appears to it to be necessary so to do for the purpose of securing safety."

In sections 49, 50, 51 and 51-A, *omit* "not being a company for which the Statute 43 and 42 Vict , Chap. 41 provides."

Section 90. — *For* "where the safety controlling authority is different from the general controlling authority", *substitute* "where the general controlling authority is not the Central Government."

Section 140.—Omit "Native".

Section 145.—Omit "Native".

(S. O. 3, dated 28-2 1948)

WHEREAS it has been agreed between the Government of India and the Government of Madras that the jurisdiction of the High Court of Judicature at Madras may be extended to the Chief Commissioner's Province of Coorg;

NOW, THEREFORE, in the exercise of the powers conferred by sub-section (1) of section 230 of the Government of India Act, 1935, as adapted by the India (Provisional Constitution) Order, 1947, the Governor-General is pleased to make the following Order:—

1. This Order may be cited as the Madras High Court (Extension of Jurisdiction to Coorg) Order, 1948.

2. As from the first day of April, 1948 (hereinafter referred to as "the appointed day"),—

(a) the jurisdiction of the High Court of Judicature at Madras shall extend to the whole of the Chief Commissioner's Province of Coorg;

(b) the Court of the Judicial Commissioner of Coorg established by the Coorg Courts Regulation, 1901 (Reg. No. 1 of 1901), shall cease to function and all its powers, authority and jurisdiction shall be exercisable by the said High Court;

(c) all proceedings pending in the Court of the Judicial Commissioner of Coorg immediately before the appointed day shall stand transferred by virtue of this Order to the said High Court;

(d) any order made before the appointed day by the Court of the Judicial Commissioner of Coorg shall for all purposes have effect, not only as an order of that Court, but also as if it were an order made by the said High Court.

[THE] ORISSA HIGH COURT ORDER, 1948.

(S. O. 10, dated 30-4-1948.)

WHEREAS the Orissa Legislative Assembly have on the third day of March, 1948, presented an address to the Governor of Orissa for submission to the Governor-General that a High Court be constituted for the Province of Orissa and the said address has been submitted to the Governor-General;

NOW, THEREFORE, in the exercise of the powers conferred by sub-section (1) of section 229 of the Government of India Act, 1935, as adapted by the India Provisional Constitution (Amendment) Order, 1948, the Governor-General is pleased to make the following Order :—

1. *(1)* This Order may be cited as the Orissa High Court Order, 1948.

(2) It shall come into force on the date of its publication in the Gazette of India.

2. *(1)* The Interpretation Act, 1889[a], applies for the interpretation of this Order as it applies for the interpretation of an Act of Parliament.

(2) In this Order "the Act" means the Government of India Act, 1935, as for the time being in force in the Dominion of India.

a. (1889) 52 & 53 Vict , c. 63.

3. *(1)* As from the [a][twenty-sixth day of July, 1948] (hereinafter referred to as "the prescribed day" there shall be a High Court for the Province of Orissa which shall be a court of record and shall consist of a Chief Justice and such other judges as the Governor-General may from time to time whether before or after the prescribed day, appoint in accordance with the provisions of section 220 of the Act :

Provided that any appointment so made before the prescribed day shall not take effect till the prescribed day.

(2) The said High Court is hereinafter referred to as "the High Court of Orissa".

[a] *Substituted* for the words "fifth day of July" by the Orissa High Court (Amendment) Order, 1948.

4. The High Court of Orissa shall have, in respect of the territories for the time being included in the Province of Orissa, all such original, appellate and other jurisdiction as under the law in force immediately before the prescribed day is exercisable in respect of the said territories or any part thereof by the High Court in Patna.

5. *(1)* The High Court of Orissa shall have the like power to approve, admit, enroll, remove and suspend advocates and attorneys and to make rules with respect to advocates and attorneys as are under the law in force immediately before the prescribed day, exercisable by the High Court in Patna.

(2) The right of audience in the High Court of Orissa shall be regulated in accordance with the like principles as immediately before the prescribed day are in force with respect to the right of audience in the High Court in Patna :

Provided that subject to any rule made or direction given by the High Court of Orissa in the exercise of the powers conferred by this Article any person who immediately before the prescribed day, is an advocate entitled to practice or an attorney entitled to act in the High Court in Patna shall be recognised as an advocate or an attorney entitled to practice or to act, as the case may be, in the High Court of Orissa.

6. Subject to the provisions of this Order, the law in force immediately before the prescribed day with respect to practice and procedure in the High Court in Patna shall, with the necessary modifications, apply in relation to the High Court of Orissa and accordingly that High Court shall have all such powers to make rules and orders with respect to practice and procedure as are immediately before the prescribed day exercisable by the High Court in Patna:

Provided that any rules or orders which are in force immediately before the prescribed day with respect to practice and procedure in the High Court in Patna shall, until varied or revoked by rules or orders made by the High Court of Orissa apply with the necessary modifications in relation to practice and procedure in the High Court of Orissa as if made by that Court.

7. *(1)* The High Court of Orissa shall have a seal of such form and design as the Chief Justice may direct.

(2) The law in force immediately before the prescribed day with respect to the custody of the seal of the High Court in Patna shall, with the necessary modifications, apply with respect to the custody of the seal of the High Court of Orissa.

8. The law in force immediately before the prescribed day with respect to the form of writs and other processes used, issued or awarded by the High Court in Patna shall, with the necessary modifications, apply with respect to the form of writs and other processes used, issued or awarded by the High Court of Orissa.

9. The law in force immediately before the prescribed day relating to the powers of the Chief Justice, single judge and division courts of the High Court in Patna

and with respect to all matters ancillary to the exercise of those powers, shall, with the necessary modifications, apply in relation to the High Court of Orissa.

10. The High Court of Orissa and the judges and division courts thereof shall sit at such places in the Province of Orissa as the Chief Justice may with the approval of the Governor of Orissa appoint.

11. The law in force immediately before the prescribed day relating to appeals to His Majesty in Council or to the Federal Court from the High Court in Patna and the judges and division courts thereof shall with the necessary modifications apply in relation to the High Court of Orissa.

12. *(1)* Except as hereinafter provided the High Court in Patna shall, on and after the prescribed day, have no jurisdiction in respect of the Province of Orissa.

(2) Notwithstanding anything contained in paragraph (1) of this Article or in Article 4,—

(a) the High Court in Patna shall have the like jurisdiction to hear and determine any appeal from, or to review, any order of a Judge of that High Court, whether on its original or appellate side, as if this order had not been made, and the High Court of Orissa shall have no jurisdiction to hear or determine any such appeal or to review any such order ; and

(b) the High Court in Patna shall have the like jurisdiction to hear and dispose of any application for leave to appeal to His Majesty in Council or the Federal Court from an order of that High Court as it would have if this order had not been made, and the High Court of Orissa shall have no jurisdiction to hear or dispose of any such application.

(3) All proceedings pending in the High Court in Patna immediately before the prescribed day, other than proceedings with respect to which that High Court retains jurisdiction by virtue of paragraph (2) of this Article, shall, where the court of origin is situated in the Province of Orissa, stand transferred by virtue of this order to the High Court of Orissa.

(4) Any order made by the High Court in Patna—

(a) in any proceedings with respect to which that High Court retains jurisdiction by virtue of paragraph (2) of this Article, or

(b) before the prescribed day in any proceedings transferred to the High Court of Orissa by virtue of paragraph (3) of this Article,

shall for all purposes have effect, not only as an order of the High Court in Patna, but also as an order made by the High Court of Orissa.

(5) For the purposes of this Article, proceedings shall be deemed to be pending in a court until that court has disposed of all issues between the parties, including any issues with respect to the taxation of the costs of the proceedings.

(6) References in this Article to a High Court shall be construed as including references to a judge or division court thereof and references to an order made by the court or a judge shall be construed as including references to a sentence, judgment or decree passed or made by that court or judge.

13. Nothing in this Order shall prejudice the application to the High Court of Orissa of any relevant provisions of the Act, and this Order shall have effect subject to any provision that may be made on or after the prescribed day with respect to that High Court by any legislature or authority having power to make such provision.

[THE] UNITED PROVINCES HIGH COURTS (AMALGAMATION) ORDER, 1948.

(S. O. 17, dated 19-7-1948).

WHEREAS both Chambers of the Legislature of the United Provinces have presented addresses to the Governor of that Province to amalgamate the High Court in Allahabad and the Chief Court in Oudh, and the said addresses have been submitted to the Governor-General;

NOW, THEREFORE, in the exercise of the powers conferred by section 229 of the Government of India Act, 1935, and of all other powers enabling him in that behalf, the Governor-General is pleased to make the following Order:—

1. *(1)* This order may be cited as the United Provinces High Courts (Amalgamation) Order, 1948.

(2) It shall come into force on the date of its publication in the Gazette of India.

2. *(1)* In this Order,—

"the Act" means the Government of India Act, 1935, as for the time being in force in the Dominion of India;

"appointed day" means the twenty-sixth day of July, 1948; and

"existing High Courts" means the High Courts referred to in section 219 of the Act as the High Court in Allahabad and the Chief Court in Oudh.

(2) The Interpretation Act, 1889, applies for the interpretation of this Order as it applies for the interpretation of an act of Parliament.

3. As from the appointed day, the High Court in Allahabad and the Chief Court in Oudh shall be amalgamated and shall constitute one High Court by the name of the High Court of Judicature at Allahabad (hereinafter referred to as "the new High Court").

4. *(1)* Every person who, immediately before the appointed day, is a permanent judge of either of the existing High Courts shall as from that day be a permanent judge of the new High Court.

(2) Every person who, having been appointed an additional judge of either of the existing High Courts for a term extending beyond the appointed day, is immediately before that day an additional judge of that High Court, shall as from that day be an additional judge of the new High Court, and shall be deemed to have been so appointed until the expiration of the said term.

(3) Every person who, immediately before the appointed day, is an acting judge of either of the existing High Courts shall as from that day be an acting judge of the new High Court, and shall be deemed to have been so appointed under sub-section *(2)* of section 222 of the Act.

5. *(1)* The person who, immediately before the appointed day, is the Chief Justice of the High Court in Allahabad shall be the Chief Justice of the new High Court.

(2) The other persons who by virtue of paragraph (1) of Article 4 of this Order become permanent judges of the new High Court shall rank in that Court in the following order, namely:—

Firstly, the former Chief Judge of the Chief Court in Oudh and the former puisne judges of the High Court in Allahabad, according to the priority of their respective appointments as such Chief Judge or puisne Judge, and

secondly, the former puisne judges of the Chief Court in Oudh, according to the priority of their respective appointments in that Court.

(3) The persons who by virtue of paragraphs (2) and (3) of Article 4 of this Order become additional judges and acting judges of the new High Court shall rank in that Court according to the priority of their respective appointments as additional judges or acting judges in either of the existing High Courts.

6. Every person who, immediately before the appointed day, is an officer or servant of either of the existing High Courts shall as from that day be an officer or servant, as the case may be, of the new High Court, and shall be deemed to have been appointed to a corresponding office or post in the new High Court on the same terms and conditions of service (or on terms and conditions as similar thereto as the changes effected by this Order may permit) as were applicable to him immediately before the appointed day:

Provided that nothing in this Article shall be deemed to prevent the Chief Justice of the new High Court from altering the designation or the duties of any office or post.

7. *(1)* The new High Court shall have, in respect of the whole of the United Provinces, all such original, appellate and other jurisdiction as, under the law in force immediately before the appointed day, is exercisable in respect of any part of that Province by either of the existing High Courts.

(2) The new High Court shall also have inrespect of any area outside the United Provinces all such original, appellate and other jurisdiction as under the law in force immediately before the appointed day is exercisable in respect of that area by the High Court in Allahabad.

8. *(1)* The new High Court shall have the like powers to approve, admit, enrol, remove and suspend advocates and attorneys, and to make rules with respect to advocates and attorneys, in the whole of the United Provinces as are, under the law in force immediately before the appointed day, exercisable by either of the existing High Courts.

(2) The right of audience in the new High Court shall be regulated in accordance with the like principles as, immediately before the appointed day, are in force with respect to the right of audience in the High Court in Allahabad.

Provided that, subject to any rule made or direction given by the new High Court in the exercise of the powers conferred by this Article, any person who, immediately before the appointed day, is an advocate entitled to practise or an attorney entitled to act in either of the existing High Courts, shall be recognised as an advocate or an attorney entitled to practise or to act, as the case may be, in the new High Court.

[a][Provided further that notwithstanding the amalgamation of the existing High Courts all undertakings given by persons who have held office as Judges of either of the existing High Courts or of the new High Court not to practice as advocates within the jurisdiction of either of the existing High Courts shall be deemed to continue in force, and the Chief Justice shall issue directions prohibiting from practice as advocates such persons to such extent as may be appropriate having regard to the terms of their undertakings, and for this purpose the said undertakings shall be construed as applicable to the new High Court.]

[a.] *Added* by para. 2 of the United Provinces High Courts (Amalgamation) (Amendment) Order, 1948. [4-11-1948].

9. Subject to the provisions of this Order, the law in force immediately before the appointed day with respect to practice and procedure in the High Court in Allahabad shall, with the necessary modifications apply in relation to the new High Court, and accordingly that High Court shall have all such powers to make rules and orders with respect to practice and procedure as are immediately before the appointed day exercisable by the High Court in Allahabad:

Provided that any rules or orders which are in force immediately before the appointed day with respect to practice and procedure in the High Court in Allahabad shall, until varied or revoked by rules or orders made for the new High Court, apply with the necessary modifications in relation to practice and procedure in the new High Court as if made by that Court:

Provided further that the Chief Justice may, in his discretion, order that any rules or orders which were in force immediately before the appointed day with respect to practice and procedure in the Chief Court in Oudh shall, until varied or revoked by new rules or orders made for the new High Court, apply with the necessary modifications in relation to practice and procedure in the new High Court sitting at Lucknow.

10. Any rules or orders which, having been made by either of the existing High Courts for regulating the practice and procedure of, or otherwise exercising control over, courts subject to its superintendence, shall until varied or revoked by rules or orders made by the new High Court continue to apply with the necessary modifications in relation to the said subordinate courts.

11. *(1)* The new High Court shall have a seal of such form and design as the Chief Justice may direct.

(2) The law in force immediately before the appointed day with respect to the custody of the seal of the High Court in Allahabad shall, with the necessary modifications, apply with respect to the custody of the seal of the new High Court.

12. The law in force immediately before the appointed day with respect to the form of writs and other processes used, issued or awarded by the High Court in Allahabad shall, with the necessary modifications, apply with respect to the form of writs and other processes used, issued or awarded by the new High Court.

13. The law in force immediately before the appointed day relating to the powers of the Chief Justice, single judges and division courts of the High Court in Allahabad and with respect to all matters ancillary to the exercise of those powers shall, with the necessary modifications, apply in relation to the new High Court.

14. The new High Court, and the judges and division courts thereof, shall sit at Allahabad or at such other places in the United Provinces as the Chief Justice may, with the approval of the Governor of the United Provinces, appoint:

Provided that unless the Governor of the United Provinces with the concurrence of the Chief Justice otherwise directs, such judges of the new High Court, not less than two in number, as the Chief Justice may, from time to time nominate, shall sit at Lucknow in order to exercise in respect of cases arising in such areas in Oudh as the Chief Justice may direct, the jurisdiction and power for the time being vested in the new High Court:

Provided further that the Chief Justice may in his discretion order that any case or class of cases arising in the said areas shall be heard at Allahabad.

15. The law in force immediately before the appointed day relating to appeals to His Majesty in Council or to the Federal Court from the High Court in Allahabad and the judges and division courts thereof shall, with the necessary modifications, apply in relation to the new High Court.

16. *(1)* All proceedings which, immediately before the appointed day, are pending in either of the existing High Courts shall, by virtue of this Order, stand transferred to the new High Court and shall be continued as if they had been proceedings instituted in that High Court.

(2) Any order made by either of the existing High Courts in any such proceedings as aforesaid shall for all purposes have effect, not only as an order of that Court, but also as an order made by the new High Court.

17. As from the appointed day,—

(a) the Letters Patent of His Majesty dated the 17th March, 1866, establishing the High Court of Judicature for the North-Western Provinces and Chapter II of the Oudh Courts Act, 1925 (U. P. Act IV of 1925), shall cease to have effect except for the purpose of construing, or giving effect to, the provisions of this Order;

(b) the Government of India (High Court Judges) Order, 1937, shall be further amended as follows:—

(i) in the First Schedule, in the entry relating to the High Court at Allahabad, for the figures "12" the figures "21" shall be substituted, and the entry relating to the Chief Court of Oudh shall be omitted; and

(ii) in the Second Schedule, the entry relating to the Chief Court of Oudh shall be omitted, and in the *Note*, the words "a Chief Judge and an acting Chief Judge" shall be omitted ; and

(c) references in any Indian law to either of the existing High Courts by whatever name shall, unless the context otherwise requires, be construed as references to the new High Court.

18. Nothing in this Order shall prejudice the application to the new High Court of any relevant provisions of the Act, and this Order shall have effect subject to any provisions that may be made on or after the appointed day with respect to the new High Court by any Legislature or authority having power to make such provision.

V.—CIVIL PROCEDURE CODE, 1908.

PROVINCIAL AMENDMENTS.

ALLAHABAD

ORDER XXI.

(1) In Rule 131 *insert* the following words between the words "judgment-debtor" and the words "issue a notice," namely :—

"which has been attached under Rule 46 of this Order."

(2) In Rule 133, *delete* the words "upon the notice"

(3) In Rule 134 *delete* the words "or sought to be attached".

—Notfn. No. 2891/VIID-85 dated 6-5-1948.

ORDER XXVII.

Add the following as new Rule 10 :—

"10. Where the Crown undertakes the defence of a suit against a public officer, the Crown shall, for the purposes of execution and satisfaction of the decree be deemed to be the decree-holder or the judgment-debtor, as the case may be, with respect to the amount of cost only decreed in favour of or against the public officer."

—Notfn. No. 2820A dated 4-5-1948.

ORDER XLII.

(1) For the proviso to Rule 1 *substitute* the following :—

"Every memorandum of appeal from an appellate decree shall be accompanied by a copy of the decree appealed from and unless the Court sees fit to dispense with either or all of them :

(1) a copy of the judgment on which the said decree is founded ;

(2) a copy of the judgment of the Court of first instance ; and

(3) a copy of the finding of the civil or the revenue Court as the case may be where an issue is remitted to such Court for decision."

—Notfn. No. 3922/VIID-107 dated 18/21-6-1948.

ORDER XLV.

Add the following as a new rule :—

"17. The provisions of sub-rules *(1)* and *(2)* of Rule 15 and the provisions of Rule 16 shall apply *mutatis mutandis* to the execution of decrees or orders for costs passed by the Federal Court in appeals from the High Court."

—Notfn. No. 3922/VIID-107 dated 18/21-6-1948.

BOMBAY

ORDER XLV.

In Rule 3 sub-rule *(2) delete* the words "unless it thinks fit to refuse the certificate."

—Bom. Govt. Gazette, 1945, Part IV-C Page 938 [29-11-1945.]

ORDER XLV-A.

Insert the following new order after Order XLV:—

"ORDER XLV-A.

Enforcement of orders of the Federal Court.

Procedure to enforce orders of Federal Court.

1. The provisions of sub-rules *(1)* and *(2)* of Rule 15 and the provisions of Rule 16 of Order XLV shall apply, *mutatis mutandis*, to the execution of decrees or orders for costs passed by the Federal Court in appeals from the High Court."

—Bom. Govt. Gazette, 1947, Part IV-C, Page 469 [17-9-1947]

SCH. I, APP. G.

Add the following as a note to Form No. 2 and Form No. 3 :—

"Note. — Unless appropriately altered, the printed form binds the surety only to an immediate appeal from the decree mentioned in the bond and does not cover any obligation in respect of any further appeal."

In the beginning of Form No. 3, *for* the words "this security bond on stay of execution of decree executed by" the following words shall be *substituted*, namely, "This security bond on order being made for execution of decree executed by".

—Bom. Govt. Gazette, 1945, Part IV-C, Page 938 [29-11-1945.]

Number X.1614/48. — The following rules have been made by the High Court of Judicature at Bombay, in exercise of the powers conferred by section 122 of the Code of Civil Procedure, Act V of 1908, and have received the previous approval of the Government of Bombay. The rules are published for general information under section 127 of the Civil Procedure Code, and they shall come into force from the date on which the City Civil Court Act comes into force [The Bom-

bay City Civil Court Act came into force on 16-8-1948.] —

RULE I (Amendment of Order V, Rule 5).

In the proviso to Rule 5 of Order V, Civil Procedure Code of 1908, the words "the Bombay City Civil Court or by" shall be inserted between the words "every suit heard by" and " a Court of Small Causes."

RULE II (Amendment of Order VI, Rule 15(1).)

In sub-rule *(1)* of Rule 15, Order VI of the Civil Procedure Code, 1908, in so far as it applies to the Bombay City Civil Court, there shall be substituted a comma for the full stop, and the following shall be added at the end of the sub-rule.

"Within the local jurisdiction, before one of the Officers of the Court empowered to administer oath, and elsewhere in India, before the Officer indicated by section 139 of the Code."

RULE III (Addition of Rules 13 to 22 in Order VIII).

The following Rules 13 to 22 shall be added after Rule 10 (12?) in Order VIII of the Civil Procedure Code, 1908, under the heading "counterclaim" ; and they shall apply only to proceedings taken in the Bombay City Civil Court :—

"COUNTERCLAIM.

13. A defendant in a suit in addition to his right of pleading a set off under Order VIII, Rule 6 of the Code of Civil Procedure, may set up by way of counterclaim against the claims of the plaintiff any right or claim in respect of a cause of action accruing to the defendant either before or after the filing of the suit but before the defendant has delivered his defence and before the time limited for delivering his defence has expired, whether such counterclaim sounds in damages or not, and such counterclaim shall have the same effect as a cross suit so as to enable the Court to pronounce a final judgment in the same suit, both on the original and on the counterclaim, and the plaintiff (if so advised) shall be at liberty to file a written statement in answer to the counterclaim of the defendant within four weeks after service upon him or his pleader of a copy of the defendant's counterclaim ; and the Court or Judge may on the application of the plaintiff before trial, if in the opinion of the Court or Judge such counterclaim cannot be disposed of in the pending suit or ought not to be allowed, refuse permission to the defendant to avail himsels thereof, and require him to file a separate suit in respect thereof.

14. Where any defendant seeks to rely upon any grounds as supporting a right of counterclaim, he shall in his written statement state specifically that he does so by way of counterclaim.

15. Where a defendant by a written statement sets up any counterclaim which raises questions between himself and the plaintiff along with any other persons, he shall add to the title of his written statement a further title similar to the title in a plaint setting forth the names of all the persons who, if such counterclaim were to be enforced by cross-suit, would be defendants to such cross-suit and shall deliver copies of his written statement to such of them as are parties to the suit within the period within which he is required to deliver it to the plaintiff.

16. Where any such person as in the last preceding rule mentioned is not a party to the suit, he shall be summoned to appear by being served with a copy of the written statement and such service shall be regulated by the same rules as are herein or under the Civil Procedure Code contained with respect to the service of a writ of summons.

17. Any person not a defendant to the suit, who is served with a written statement and counterclaim as aforesaid, must appear thereto as if he had been served with a writ of summons to appear in a suit.

18. Any person named in a written statement as a party to a counterclaim thereby made, may deliver a reply within the time, within which he might deliver a written statement if it were a plaint.

19. Where a defendant sets up a counterclaim, if the plaintiff or any other person named in manner aforesaid as party to such counterclaim, contends that the claim thereby raised ought not to be disposed of by way of counterclaim but in an independent suit, he may, at any time before reply apply to the Court or a Judge for an order that such counterclaim may be excluded and the Court or a Judge may, on the hearing of such application make such order as shall be just.

20. If in any case in which the defendant sets up a counterclaim, the suit of the plaintiff is stayed, discontinued or dismissed, the counterclaim may nevertheless be proceeded with.

21. If the defendant to the counterclaim makes default in putting in a reply to the counterclaim, the defendant in the suit who is the plaintiff to the counterclaim may, in such cases, get the suit set down on motion for judgment on the counterclaim, and such judgment shall be given as the Court shall consider him to be entitled.

22. Where in any suit a set off or counterclaim is established as a defence against the plaintiff's claim the Court or a Judge may, if the balance is in favour of the defendant, give judgment for the defendant for such balance, or may otherwise adjudge to the defendant such relief as he may be entitled to upon the merits of the case."

RULE IV. (Addition of Rules 23 to 30 in Order VIII).

The following Rules 23 to 30 shall be added after Rule 20 (22?) in Order VIII of the Civil Procedure Code, 1908 under the heading "Third Party Procedure"; and they shall apply only to proceedings taken in the Bombay City Civil Court:—

"THIRD PARTY PROCEDURE.

23. (1) Where in a suit a defendant claims as against any person not already a party to the suit (hereinafter called the third party)—

(a) that he is entitled to contribution or indemnity, or

(b) that he is entitled to any relief or remedy relating to or connected with the original subject-matter of the suit and substantially the same as some relief of remedy claimed by the plaintiff, or

(c) that any question or issue relating to or connected with the said subject-matter is substantially the same as some question or issue arising between the plaintiff and the defendant and should properly be determined not only as between the plaintiff and the defendant but as between the plaintiff and the defendant and the third party or between any or either of them,

he may by leave of the Court or a Judge, issue a notice (hereinafter called the third party notice) to that effect, sealed with the seal of the Court. Such notice shall be filed with the Registrar and a copy thereof served on such person according to the rules relating to the service of writs of summonses.

(2) The notice shall state the nature and grounds of the claim or the nature and extent of any relief or remedy claimed or the nature of the question or issue sought to be determined, and shall, unless otherwise ordered by the Court or a Judge, be served on the third party within the time limited for filing the written

statement of defence and therewith shall be served a copy of the plaint.

(3) The third party shall, as from the time of the service upon him of the notice, be a party to the suit with the same rights in respect of his defence against any claim made against him and otherwise as if he had been duly sued in the ordinary way by the defendant.

24 If a person not a party to the suit who is served as mentioned in Rule 23 (hereinafter called the third party) desires to dispute the plaintiff's claim in the suit as against the defendant on whose behalf the notice has been given, or his own liability to the defendant, the third party must enter an appearance or file a 'Vakalatnama' in the suit, within eight days from the service of the notice. In default of his so doing, he shall be deemed to admit the validity of the decree obtained against such defendant, whether obtained by consent or otherwise, and his own liability to contribute or indemnify, as the case may be, to the extent claimed in third party notice:

Provided always that a person so served and failing to appear within the said period of eight days may apply to the Court or a Judge for leave to appear, and such leave may be given upon such terms, if any, as the Court or Judge shall think fit.

25. Where a third party makes default in entering an appearance or filing a 'Vakalatnama' in the suit in case the suit is tried and results in favour of the plaintiff, the Judge who tries the suit may, at or after the trial, pass such decree as the nature of the case may require, for the defendant giving the notice against the third party:

Provided that execution thereof be not issued without leave of the Judge until after satisfaction by such defendant of the decree against him. And if the suit is finally decided in the plaintiff's favour, otherwise than by trial, the Court or a Judge may, on application by motion as the case may be, pass such decree as the nature of the case may require, for the defendant giving the notice against the third party at any time after satisfaction by the defendant of the amount recovered by the plaintiff against him.

26. If a third party enters an appearance or files a 'Vakalatnama', the defendant giving notice may, after serving notice of the intended application upon the plaintiff, the third party and any other defendant, apply to the Court or a Judge for directions, and the Court or Judge may *(a)* where the liability of the third party to the defendant giving the notice is established on the hearing of the application, pass such decree as the nature of the case may require in favour of the defendant giving the notice against the third party, or *(b)* if satisfied that there is a question of issue proper to be tried as between the plaintiff and the defendant and the third party or between any or either of them as to the liability of the defendant to the plaintiff or as to the liability of the third party to make the contribution or indemnity claimed, in whole or in part, or as to any other relief or remedy claimed in the notice by the defendant or that a question or issue stated in the notice should be determined not only as between the plaintiff and the defendant but as between the plaintiff, the defendant and the third party or any or either of them, order such question or issue to be tried in such manner, before, at or after the trial of the suit, as the Court or Judge may direct, or *(c)* dismiss the application.

27. The Court or Judge upon the hearing of the application mentioned in Rule 26 may, if it shall appear desirable to do so give the third party liberty to defend the suit, either alone or jointly with the original defendant upon such terms as may be just, or to appear at the trial and take such part therein as may be just, and generally may order such proceedings to be taken, pleadings or documents to be delivered, or amendments to be made, and give such directions as to the Court or Judge shall appear proper for having the question and the rights and liabilities of the parties most conveniently determined and enforced, and as to the mode and extent in or to which the third party shall be bound or made liable by the decree in the suit.

28. The Court or a Judge may decide all questions of costs as between a third party and the other parties to the suit, and may order any one or more to pay the costs of any other, or others, or give such direction as to costs as the justice of the case may require.

29. (1) Where a person served with a third party notice by defendant makes as against any person not already a party to the suit such claim as is defined in Rule 23, he may by leave of the Court or a Judge issue a third party notice to that effect, and the preceding rules as to third party procedure shall apply *mutatis mutandis* to every notice so issued and the expression 'third party notice" and "third party" in these rules shall apply to and include other notices so issued and every person served with such notice respectively.

(2) Where a person served with a notice under this rule by a third party in turn makes such a claim as is defined in Rule 23 against another person not a party to the suit, the procedure prescribed by the preceding rules shall be followed as regards such further person and any other further person or persons so served and so on successively.

30 Where a defendant claims against another defendant *(a)* that he is entitled to contribution or indemnity or *(b)* that he is entitled to any relief or remedy relating to or connected with the original subject matter of the suit and substantially the same as some relief or remedy claimed by the plaintiff or *(c)* that any question or issue relating to or connected with the subject-matter is substantially the same as some question or issue arising between the plaintiff and the defendant making the claim and should properly be determined not only as between the plaintiff and the defendant making the claim but as between the plaintiff and the defendant and another defendant or between any or either of them, the defendant making the claim may without leave of the Court or a Judge issue and serve on such other defendant a notice making such claim or specifying such question or issue, and the same procedure shall be adopted for the determination of such questions between the defendants as would be issued and taken against such other defendant, if such last mentioned defendant were a third party; but nothing herein contained shall prejudice the rights of the plaintiff against any defendant in suit."

RULE V. (Amendment of Order XIII, rule 4)

In sub rule (1) of Rule 4 of Order XIII, Civil Procedure Code of 1908, in so far as it relates to proceedings taken in the Bombay City Civil Court, at the end of the sub-rule the words "officer in Court" shall be substituted for the word "Judge".

RULE VI (Amendment of Order XVIII, rule 5)

In relation to proceedings taken in the Bombay City Civil Court, for the existing rule 5 of Order XVIII of the Civil Procedure Code the following Rule shall be substituted :

"5. Upon the hearing of any suit the evidence of the witnesses shall be taken down in writing by or in the presence and under the personal direction and superintendence of the Judge, not ordinarily in the form of question and answer, but in that of a narrative, and the notes so taken shall be sufficient for all purposes and shall form part of the record "

RULE VII (Amendment of Order XX, rule 3)

In relation to proceedings taken in the Bombay City

Civil Court for the existing rule 3 of Order XX of the Civil Procedure Code, 1908, the following rule shall be substituted :

"3. The judgment shall be dated and initialled by the Judge. When the judgment is once initialled by the Judge, it shall not afterwards be altered or added to, save as provided by section 152 or on review."

RULE VIII (Amendment of Order XX, rule 7)

In relation to proceedings taken in the Bombay City Civil Court, for the existing Rule 7 of Order XX of the Civil Procedure Code, 1908, the following rule shall be substituted :

"7. The decree shall bear date the day on which the judgment was pronounced and it shall be engrossed in the office of the Registrar and be signed by him and sealed with the seal of the Court."

RULE IX. (Addition of Rule 17 in Order XXXIII)

In order XXXIII of the Civil Procedure Code of 1908, in so far as it relates to proceedings taken in the Bombay City Civil Court after Rule 16 the following rule shall be added as Rule 17 :

"17. Any person may be allowed to defend as a pauper either before or after he has entered appearance and the rules in this Order shall apply to him *mutatis mutandis* as if he was a plaintiff and his written statement was a plaint."

RULE X. (Addition of Rule 18 in Order XXXIII)

In Order XXXIII of the Civil Procedure Code of 1908 in so far as it relates to proceedings taken in the Bombay City Civil Court after Rule 17 the following rule shall be added as Rule 18 :

"18. No cause suit or matter commenced or carried on by a pauper plaintiff or defendant shall be compromised on any account whatever without leave first had and obtained from the Judge in Chambers or the Court".

RULE XI (Amendment of Order XXXVII, rule 1)

In Rule 1 of Order XXXVII of the Civil Procedure Code, 1908 after clause (a) the following clause shall be inserted as clause (aa) :

"*(aa)* the Bombay City Civil Court" ;

—Bom. Govt. Gaz., 1948, Part IV-c, page 425.

CALCUTTA.

ORDER XVI.

(1) *Add* the following to Rule 3 :—

"Provided—

(i) that where the person summoned is a servant of any Provincial Government, whose pay exceeds Rs. 10 per mensem or whose head-quarters are situated more than 5 miles from the Court, and he has been summoned to appear as a witness in his official capacity in a civil case to which Government is a party, the sum so fixed shall be credited to the Treasury ;

(ii) that where the person summoned is a Finger Print Expert of the Criminal Investigation Department and he is summoned to give evidence in private cases the sum so fixed, other than his travelling allowance, shall be credited to the Treasury ;

(iii) that where the person summoned is the Government Examiner of Questioned Documents or his Assistant and he is summoned to give evidence or his opinion is sought in private cases the sum so fixed shall be credited to the Treasury ;

(iv) that where the person summoned is a servant of the Central Government or a State Railway or any other Commercial Department of Government and he is summoned to give evidence in his public capacity in a civil case, whether Government is or is not a party, the sum so fixed shall be credited in the Treasury to the Government or the State Railway, as the case may be, to which the employee belongs ; and

(v) that where the person summoned is a State Railway employee and he is summoned to give evidence in his private capacity in a civil Court in Assam, the sum so fixed shall be credited to the Railway to which he belongs."

(2) *Add* the following to Rule 8 (2) :—

"*Exception.* — When applying for a summons for any of its own officers in his official capacity, Government will be exempt from the operation of this rule"

—No. 15016 dated 8-3-1948, Cal. Gaz., 1948, Part I, page 342.

ORDER XLI.

(1) At the end of sub-rule (1) of Rule 5, *for* the words "but the Appellate Court may for sufficient cause order stay of execution of such decree" *substitute* the following :—

"but the Appellate Court may, subject to sub-rule (3) of Rule 6 of this Order, for sufficient cause order stay of the execution of such decree."

(2) In Rule 6 sub-rule (2), *add* the following as sub rule (3) :—

"(3) Where no such application has been presented to the Court which made the order, an application for stay of the sale shall not be entertained by the Appellate Court"

—No. 6374G dated 5-10-1948, Cal. Gaz, 1948, Part I, page 1403.

ORDER XLV-A

Insert the following as Order XLV-A —

"ORDER XLV-A.

Appeals to the Federal Court.

1. The High Court shall on receipt of a declaratory order of the Federal Court, cause notice to be issued and served on the parties intimating that it will proceed to deal with the matter on a specified date and shall, after hearing the parties appearing, if any, pass a decree or order in terms of the declaratory order of the Federal Court in substitution of the decree or order which formed the subject-matter of the appeal to the Federal Court.

The substituted decree or order so passed shall thereupon be transmitted, with such directions as may be required, to the Court which passed the first decree appealed from ; and the Court to which the said decree or order is transmitted shall execute it in the manner and according to the provisions applicable to the execution of its original decrees.

If the Court which passed the first decree or order be the High Court, such substituted decree or order as aforesaid shall be executed in the manner and according to the provisions applicable to the execution of its original decrees.

2. Whoever desires to obtain execution of an order of the Federal Court awarding costs under section 209 (2) of the Government of India Act, 1935, shall apply to the High Court by petition accompanied by a certified copy of the order passed by the Federal Court and sought to be executed, and the High Court shall direct such order to be filed and thereupon transmit the certified copy of the said order for execution in the manner prescribed in Rule 1 of this Order.

If such order of the Federal Court relates to an appeal arising out of a decree or order made by the High Court, in its Original Jurisdiction, it shall be executed in the manner and according to the provisions applicable to the execution of its original orders."

—No. 4575G dated 30-7-1948, Cal. Gaz., 1948, Part I, page 1027

Order XLIX.

In Rule 3 *delete* the word "rule" before the figure "35" and *insert* the words "rules 12, 14, 15 and" before "35".

—No. 6874G dated 5-10-1948, Cal. Gaz, 1948, Part I, page 1403.

CENTRAL PROVINCES AND BERAR.

Order XX.

Add the following proviso below Rule 14, sub-rule 1 (b) :—

"Provided that if there are crops standing on the property, possession of the property shall not be delivered to the plaintiff until such crops have been reaped. The plaintiff shall be entitled to simple interest not exceeding 6 per cent. per annum at the discretion of the Court on the amount deposited by him in Court in respect of the period between the date of payment into Court by him of the purchase-money and the costs (if any) and the date on which delivery of possession to him by the defendant takes place".

——C P. & Berar Gazette, 1947, Part III, page 526. [12-9-1947.]

Order XLV.

Insert the following as Rule 17 :

"17. The provisions of sub-rules (1) and (2) of Rule 15 and the provisions of Rule 16 shall apply *mutatis mutandis*, to the execution of decrees or orders for costs passed in accordance with the declaration or order made by the Federal Court in appeals from the High Court".

——C. P. & Berar Gazette, 1946, Part III, page 462. [29-11-1946]

MADRAS.

Order III.

Add the following in the end of Rule 4 (6) :

"but such pleader shall file a memorandum of appearance signed by himself and stating the particulars mentioned in sub-rule (5)".

Order V.

(1) *Add* the following after Rule 9 (2) :—

"(3) Where the defendant resides in India whether within the jurisdiction of the Court in which the suit is instituted or not, the Court may direct the proper officer to cause summons under this chapter to be addressed to the defendant at the place where he ordinarily resides or carries on business or works for gain and sent to him by the registered post prepaid for acknowledgment. An acknowledgment purporting to be signed by the defendant shall be deemed to be sufficient proof of service of such summons".

——Fort St. Geo Gaz D/- 24-8-48, Pt. II Rules Suppl, page 89.

(2) *Add* the following after Rule 30 :

"31. *(1)* The Court may, on the application of the plaintiff and on such terms as to security or otherwise as the Court thinks fit, dispense with the service of summons on a defendant who is resident in territory belonging to or occupied by a State at war with His Majesty :

Provided that an order dispensing with service of summons shall not be made unless the Court is satisfied that the defendant is resident in such territory and that service of summons on him in the mode prescribed by the Code is not possible.

(2) The Court may before making the said order direct such publication of the application as it considers necessary in the circumstances.

(3) Where in any suit an order dispensing with service of summons on a defendant is made under this rule and a decree or order is passed against him, the Court may on his application and on such terms as may be just set aside such decree or order and appoint a day for proceeding with the suit.

(4) The provisions of the first proviso to rule 13 of Order IX and the provisions of rule 14 of the said order shall apply to an order setting aside a decree or order under sub-rule (3).

(5) The application under sub-rule (3) shall be filed within one year from the date of cessation of hostilities with the said State.

(6) The provisions of section 5 of the Indian Limitation Act shall apply to applications under sub-rule (3).

(7) The provisions of this Rule shall apply *mutatis mutandis* to a respondent in an appeal or a Civil Revision Petition who is resident in such territory as is referred to in sub-rule (1)".

— [R. D. C. No. 2108/44 dated 29-3-1944.]

Order VI.

Insert the following after Rule 4:—

"4-A. *(1)* In a suit for infringement of patent the plaintiff shall state in his plaint or annex thereto the particulars of the breaches relied upon.

(2) In any such suit the defendant if he disputes the validity of the patent shall state in his written statement or annex thereto the particulars of the objections on which he relies in support of such invalidity.

(3) At the hearing of any such suit no evidence shall except by leave of the Court (to be given upon such terms as to the Court may seem just), be admitted in proof of any alleged infringement or objection not raised in the particulars of breaches or objections respectively".

[Madras R. O. C. 2770/44.]

Order VII.

Substitute the following for sub-clause (d) of Rule 1 :—

"(d) Where the plaintiff or the defendant is a minor or a person of unsound mind, a statement to that effect, and in the case of a minor, a statement regarding his age to the best of the knowledge and belief of the person verifying the plaintiff :

Provided that where, owing to the large number of defendants or any other sufficient reason, it is not practicable to ascertain with reasonable accuracy the age of the minor defendant, it may be stated that the age of the minor defendant is not known".

[R. O. C. No. 1433/43 — B. I.]

Order IX.

Delete Rule 15. [P. Dis. No. 397 of 1945 dated 4-9-1945.]

Order XVI.

(1) Add after Rule 2 (3) :—

"(4) Where the summons is served on the witness by the party directly, the expenses mentioned in clause (1) shall be paid to the witness by the party or his agent".

—Fort St. Geo. Gaz., dated 24-8-1948, Part II, R. S., page 89.

(2) The following shall be *substituted* for Rule 8:—

"8. A summons under this Order may be delivered by the Court to the party applying for such summons for making service on the witness, provided that where the service is not effected by the party, or the party is unwilling to do so, the summons shall be delivered through the proper officer of the Court The rules in Order V as to proof of service shall apply in the cases

of all summonses served under this rule".

—Fort St. Geo. Gaz. dated 24-8-18, Pt. II Rules Suppl., page 89.

Order XXI.

(1) *Add* the following after R. 17 (4) :—

"17-A. Where an application is made to a Court for the execution of a decree or order passed against a defendant in respect of whom service of summons has been dispensed with under rule 31 of Order V, the Court shall ordinarily direct stay of execution of the decree or order against such defendant till the expiry of a period of one year after cessation of hostilities with the State in whose territory such defendant was resident :

Provided that the Court may, if it considers that the interests of justice so require, order execution on such terms as to security otherwise as it thinks fit".

[Madras R. O. C. No. 2108 of 1944 B. I. of 29-3-1945.]

(2) *Substitute* the following for first paragraph in rule 85.

"The full amount of the purchase money payable and the general stamp for certificate under rule 94 or the amount required for such stamp, shall be deposited into Court by the purchaser before the Court closes on the fifteenth day from the sale of the property.

Provided that in calculating the amount of purchase money to be so deposited, the purchaser shall have the advantage of any set off to which he may be entitled under rule 72".

[P. Dis. No. 677 of 1914.]

(3) *Add* the following after Rule 103 : —

"*104.* (1) The Court before which an application under any of the foregoing rules of this order is pending may fix a day for the hearing of the application.

(2) Where on the day fixed or on any other day to which the hearing may be adjourned the applicant does not appear, when the case is called on for hearing, the Court may make an order that the application be dismissed.

(3) Where the applicant appears and the respondent to whom the notice has been issued by the Court does not appear, the Court may hear the application *ex parte* and pass such order as it thinks fit.

Explanation : — An application referred to in sub-rule 1 includes a claim or objection made under Rule 58 of this order.

105. (1) The applicant against whom an order is made under sub-rule (2) of the preceding rule or the respondent against whom an order is passed *ex parte* under sub-rule (3) of the preceding rule or under sub-rule (1) of Rule 23 of this Order, may apply to the Court to set aside the order and if he satisfies the Court that there was sufficient cause for his non appearance, when the application was called on for hearing, the Court shall set aside the order on such terms as to costs or otherwise as it thinks fit, and shall appoint a day for the further hearing of the application.

(2) No order shall be made on an application under sub rule (1) unless notice of the application has been served on the opposite party.

(3) An application under sub-rule (1) shall be made within thirty days of the date of the order or where in the case of an *ex parte* order the notice was not duly served, the date when the applicant had knowledge of the order.

(4) The provisions of section 5 of the Indian Limitation Act, 1908, shall apply to applications under sub-rule (1)."

[P. Dis. No. 397 of 1945 dated 4-9-1945.]

Order XL.

Substitute the following for sub-clauses (a) and (b) of Rule 3 : —

"Every receiver so appointed shall

(a) Unless the Court otherwise orders furnish security in the moveable property for such amount as the Court thinks fit duly to account for what he shall receive in respect of the property of which he is appointed a receiver;

(b) submit his accounts at such period and in such forms as may be prescribed."

[P. Dis. No. 577 of 1944.]

Order XLI.

Rule 21 shall be *re-numbered* as sub rule (1) of that rule and the following shall be *added* as sub-rule 2) :

"(2) The provisions of section 5 of the Indian Limitation Act, 1908, shall apply to applications under sub-rule (1)."

Order XLII.

Delete the proviso to rule 1.

[P. Dis. No. 2057 of 1917; P. Dis. No. 101 of 1918.]

Order XLIII.

(1) In clause (d) *omit* the following : —

(a) ' or Rule 15" occurring between the expressions "Rule 13" and "of Order IX"; and

(b) "or order" occurring between the words ' decree" and "passed".

(2) *Add* the following after Rule 1 (j) : -

"(jj) an order rejecting an application made under sub-rule (1) of Rule 105 of Order XXI, provided an order on the main application referred to in sub-rule (1) of Rule 104 of that order is appealable."

[P. Dis. No. 397 of 1945.]

(3) *Add* the following after Rule 1 (n) :

"(nn) An order under Rule 5 or Rule 7 of Order XXXIII rejecting an application for permission to sue as a pauper on the ground specified in clause (c) or clause (d) of Rule 5 aforesaid."

[P. Dis. No. 105 of 1947.]

Order XLV.

Add the following after Rule 16 : —

"*16-A.* The provisions of sub rules (1) and (2) of rule 16 shall apply, *mutatis mutandis*, to the execution of decree or orders for costs passed by the Federal Court in appeals from the High Court."

[R. O. C. No. 280 of 1945 B. I. dated 28-1-1946.]

Appendix F.

Add the following as Form No. 11.

"Bond to be given by Receiver (Order XL, Rule 3) where immoveable property is offered as security :

Know all men by these presents, that we and are jointly and severally bound to the Court of in Rs. to be paid to the said Court, for which payment to be made we bind ourselves, and each of us, in the whole, our and each of our heirs executors and administrators, jointly and severally by these presents and we do, as security for the said payment, mortgage to the Judge of the said Court, his successors in office and assigns the undermentioned immovable properties which belong to us and of which we are possessed and which are free from mortgage charge or any other encumbrance and the title deeds of which have been lodged in the District Court.

Dated this day of 19 .

(Rest of the clauses will be continued as in Form No. 10)."

[P. Dis. 577/44.]

OUDH

Order XVIII.

(1) *Cancel* the proviso added to Rule 8.

(2) *Cancel* the amendment made in Rule 14.

[Correction Slip No. 15.]

Order XLV.

After Rule 16 *add* the following as rule 17 : —

"*Rule 17.*—The provisions of sub-rules (1) and (2) of Rule 15 and the provisions of Rule 16 shall apply *mutatis mutandis*, to the execution of decrees or orders for costs passed by the Federal Court in appeals from the Chief Court."

[No. 16 dated 13-5-1946.]

Appendix E

Insert the words "on or before"———————— *after* the word "attach" in the first paragraph of form No. 8.

[No. 13 dated 4-4-1944.]

Appendix H.

Substitute the following *for* form No. 11.

"FORM NO. 11.

Notice to minor Defendant and Guardian :

In the Court at District

Suit No. of 19 .

Resident of ... ... *Plaintiff.*

versus

Resident of ... *Defendant.*

To—

(1) ... *Minor defendant.*

and

(2) ... *Natural ————guardian,
Certificated

the person in whose care the minor is alleged to be.

Whereas the application has been presented on the part of the plaintiff in the above suit for the appointment of a guardian for the suit to the minor defendant, you

(1) said minor, and (2) the *natural ————guardian certificated.

or the person in whose care the minor is alleged to be are hereby required to take notice that unless within ————————days from the service upon you of this notice, an application is made to this Court to show cause why the person named below should not be appointed or for the appointment of any other person willing to act as guardian for the suit, the Court will proceed to appoint the person named below or some other person to act as guardian of the minor for the purposes of the said suit.

Proposed guardian son of resident of

Given under my hand and the seal of the Court, this day of 19 .

Judge."

*Cut out the word 'natural" if the certificated guardian is named; cut out the word "certificated" if the natural guardian be intended and cut out both "natural" and "certificated" and the word "or" if the guardian be of neither class, but one with whom the minor lives.

[No. 14 dated 4-4-1944.]

PATNA

Order IX.

In rule 6 (1) (c) *delete* the words "and shall direct notice of such day to be given to the defendant" and *substitute* a full stop for the comma after the words 'fixed by the Court".

Order XXI.

(1) In Rule 22 *add* the following as sub-rule (3) :

"(3) Proceedings held in execution of a decree shall not be invalid solely by reason of any omission to issue or failure to serve a notice under sub-rule (1) or to record reasons where such notice is dispensed with under sub-rule (2) unless the judgment-debtor has sustained injury thereby."

(2) After Rule 22 *add* the following new Rule :

"*22A.* Where any property is sold in execution of a decree the sale shall not be set aside by reason only of the death of the judgment-debtor between the date of issue of the sale proclamation and date of sale notwithstanding the failure to substitute his legal representative in his place but in case of such failure the Court may set aside the sale if satisfied that the legal representative of the judgment-debtor has been prejudiced thereby."

VI.—Three Important Old Regulations.

The Bengal State Prisoners Regulation, 1818[a]

(Bengal Regulation III of 1818)

[*7th April, 1818.*]

A Regulation for the confinement of State Prisoners.

Preamble.

1. WHEREAS [b][reasons of State connected with defence, external affairs or relations with Acceding States or with the maintenance of public order] occasionally render it necessary to place under personal restraint individuals against whom there may not be sufficient ground to institute any judicial proceeding, or when such proceeding may not be adapted to the nature of the case, or may for other reasons be unadvisable or improper;

and whereas it is fit that, in every case of the nature herein referred to the determination to be taken should proceed immediately from the authority of the [c][Government];

and whereas the ends of justice require that, when it may be determined that any person shall be placed under personal restraint, otherwise than in pursuance of some judicial proceeding, the grounds of such determination should from time to time come under revision, and the person affected thereby should at all times be allowed freely to bring to the notice of the [c][Government] all circumstances relating either to the supposed grounds of such determination, or to the manner in which it may be executed;

and whereas the ends of justice also require that due attention be paid to the health of every State prisoner confined under this Regulation, and that suitable provision be made for his support according to his rank in life, and to his own wants and those of his family;

and whereas the reasons above declared sometimes render it necessary that the estates and lands of *zamindars*, *talukdars*, and others [d][* * *] should be attached and placed under the temporary

management of the Revenue Authorities without having recourse to any judicial proceeding;

and whereas it is desirable to make such legal provisions as may secure from injury the just rights and interests of individuals whose estates may be so attached under the direct authority of Government;

[e][It is hereby enacted as follows:]—

[a] Short title was given by the Amending Act 1897 (V of 1897). The Regulation is amended by Act 12 of 1891, supplemented by Acts 34 of 1850 and 3 of 1858, repealed in part by Acts 16 of 1874 and 1 of 1903. For Acts 34 of 1850 and 3 of 1858 *See* A. I. R. Manual Vol, VII.

The Regulation is declared in force:—(a) throughout former Province of Bengal and Agra, except as regards the Scheduled Districts, by Act 15 of 1874, Ss. 6 and 7; (b) in the Central Provinces and Sambalpur District by S. 3 of Act 20 of 1875; (c) in Sonthal Parganas by S. 3 of Regulation 3 of 1872 as amended by S. 3 of Regulation 3 of 1899; (d) in the district of Khondamals by S. 3 and Sch. of Reg. 4 of 1936; (e) in the Angul District by S. 3 and Sch. of Regn: 5 of 1936; (f) in the Chittagong Hill-tracts by S. 4 of Regn. 1 of 1900; (g) in the Punjab by S. 3 of Act 4 of 1872; (h) in the N-W. Frontier Province by S. 4 of Regn. 7 of 1901; (i) in Oudh (with modifications, and with the exception of S. 10) by S 3 of Act 18 of 1876; (j) in Ajmer by S. 3 of Regn. 3 of 1877; (k) in British Baluchistan by S. 3 of Regn. 2 of 1913, (l) in Panth Piploda by S. 2 of Regn. 1 of 1929.

Extended to the areas transferred to Orissa from the Madras Presidency by Regn. 1 of 1936.

[b] *Substituted* by the Bengal State Prisoners Regulation (Amendment) Order, 1947, Para. 2. [15-8-1947]

[c] *Substituted* for the words "Governor-General in Council" by A. O.

[d] The words 'situated within the territories dependent on the Presidency of Fort William' were *deleted* by A. O,

[e] *Substituted* by A. O.

Proceeding for Placing persons under restraint as State prisoners.

2. *First.*—When the reasons stated in the Preamble of this Regulation [a][may seem to the Government] to require that an individual should be placed under personal restraint, without any immediate view to ulterior proceedings of a judicial nature, [b][a warrant of commitment shall be issued by the Government] to the officer in whose custody such person is to be placed.

Form of warrant.

[c][*Second.* — The warrant of commitment shall, be in that one of the forms set out in the Appendix to this Regulation which is appropriate to the case.

Authority of warrant.

Third.— The warrant of commitment shall, in relation to a person to be confined for reasons connected with defence, external affairs or [d][relations with Acceding States, be sufficient authority for his detention in any fortress, jail or other place in any Governor's Province or Chief Commissioner's Province, and in relation to any person to be confined for reasons connected with the maintenance of public order in a Province shall be sufficient authority for his detention in any fortress jail or other place in that Province.]

[a] *Substituted* for the words 'may seem to the Governor-General in Council' by A. O. [b] *Substituted* by A. O. [c.] *Substituted* by A. O. [d] *Substituted* for the words "the discharge of the functions of the Crown in its relations with Indian States" by the Bengal State Prisoners Regulation [Amendment] Order, 1947, [15-8-1947.]

Officers having custody of State prisoners to submit periodical reports.

3. Every officer in whose custody any State prisoner may be placed shall, on the 1st of January and 1st of July of each year, submit a report to the [a][Government] [b][* * *] on the conduct, the health and the comfort of such State prisoners, in order that the [a][Government] may determine whether the orders for his detention shall continue in force or shall be modified.

[a] *Substituted* for the words "Governor-General in Council" by A. O. [b] The words "through the secretary to Government in the Political Department" were *omitted* by A. O.

State prisoners in custody of Zila Magistrate, by whom to be visited.

4. *First.*— When any State prisoner is in the custody of a *Zila* [a][*] Magistrate, the Judges [b][**] are to visit such State prisoner on the occasion of the periodical sessions and they are to issue any orders concerning the treatment of the State prisoner which may appear to them advisable, provided they be not inconsistent with the orders of the [c][Government] issued on that head.

State prisoners in custody of public officer, not being Zila Magistrate, by whom to be visited.

Second. — When any State prisoner is placed in the custody of any public officer not being a *Zila* [a][*] Magistrate, the [c][Government] will instruct either the *Zila* [a][*] Magistrate, or the Judge [b][**] or any other public officer, not being the person in whose custody the prisoner may be placed, to visit such prisoner at stated periods and to submit a report to Government regarding the health and treatment of such prisoner.

[a] The words 'or City' were *repealed* by the Amending Act, 1903 (1[I] of 1903). [b] The words 'of Circuit' were *repealed* by the Repealing Act, 1874 (16 [XVI] of 1874). [c] *Substituted* for the words 'Governor-General in Council' by A. O.

Representations by State prisoners to be submitted to Government.

5. The officer in whose custody any State prisoner may be placed is to forward, with such observations as may appear necessary, every representation which such State prisoner may from time to time be desirous of submitting to the [a][Government].

[a] *Substituted* for the words 'Governor-General in Council' by A. O.

Report to Government regarding confinement, etc., of prisoners.

6. Every officer in whose custody any State prisoner may be placed shall, as soon after taking such prisoner into his custody as may be practicable, report to the [a][Government] whether the degree of confinement to which he may be subjected appears liable to injure his health, and whether the allowance fixed for his support be adequate to the supply of his own wants and those of his family, according to their rank in life.

[a] *Substituted* for the words 'Governor-General in Council' by A. O.

Appropriation of allowance for support.

7. Every officer in whose custody any State prisoner may be placed shall take care that the allowance fixed for the support of such State prisoner is duly appropriated to that object.

Division of functions between Central Government and Provincial Government.

[a][7A. *(1)* Where a person is, or is to be, confined in a Governor's Province under this Regulation for reasons connected with defence, external affairs or [b][relations with

Acceding States,] the warrant of commitment, and any orders as to his release or the place of his detention shall be issued by the Central Government, and the amount of the allowance to be fixed for his support shall be fixed by the Central Government and shall be paid by the Central Government to, and applied by, the Provincial Government; and all reports and representations to be made under the foregoing provisions of this Regulation shall be submitted and forwarded both to the Central Government and the Provincial Government.

(2) Subject as aforesaid, all things to be done by or to the Government in relation to any persons confined or to be confined under this Regulation shall be done by or to the Provincial Government.

(3) References in the preceding sections of this Regulation to the Government shall be construed in accordance with the foregoing provisions of this section.

(4) [c][* * * * * *].]

[a] Section 7A was *inserted* by A. O. [b] *Substituted* for the words 'the discharge of the functions of the Crown in its relations with Indian States' by the Bengal State Prisoners Regulation (Amendment) Order 1947, Para. [15-8-1947.] [c] *Omitted, ibid.*

Applicability of Ss. 3 to 7 to persons now confined as State prisoners.

8. Repealed by the Repealing Act, 1874 (XVI of 1874).

Attachment of estates by order of Government without decision of Court

9. Whenever [a][the Provincial Government], for the reasons declared in the Preamble to this Regulation, shall judge it necessary to attach the estates or lands of any *zamindar jagirdar, talukdar* or other person, without any previous decision of a Court of Justice or other judicial proceeding, the grounds on which the Resolution of Government may have been adopted, and such other information connected with the case as may appear essential, shall be communicated [b][* * * *] to the Judge and Magistrate of the district in which the lands or estates may be situated, [c][and] [d][* * * * *] to the *Sadar Diwani Adalat*, and *Nizamat Adalat.*

[a] *Substituted* for the words 'Governor-General in Council' by A. O. [b] The words 'under the hand of one of the Secretaries to Government' were *omitted* by A. O. [c] *Inserted* by the Amending Act, 1891 (XII [12] of 1891). [d] The words 'to the Provincial Court of Appeal and Circuit, and' were *repealed* by the Repealing Act, 1874 (XVI [16] of 1874).

Management of attached estates.

10. *First.* — The lands or estates which may be so temporarily attached shall be held under the management of the officers of Government in the Revenue Department; and the collections shall be made and adjudged on the same principles as those of other estates held under *khas* management.

Attached lands not liable to sale in execution.

Second.— Such lands or estates shall not be liable to be sold in execution of decrees of the Civil Courts, or for the realization or fines or otherwise, during the period in which they may be so held under attachment.

Government to arrange for satisfaction of decrees.

Third.—In the cases mentioned in the preceding clause the Government will make such arrangement as may be fair and equitable for the satisfaction of the decrees of the Civil Courts.

Rules as to cases where Government orders release of estate from attachment.

11. Whenever the [a][Provincial Government] shall be of opinion that the circumstances which rendered the attachment of such estate necessary have ceased to operate, and that the management of the estate can be committed to the hands of the proprietor without public hazard or inconvenience, the Revenue-authorities will be directed to release the estate from attachment, to adjust the accounts of the collections during the period in which they may have been superintended by the officers of Government, and to pay over to the proprietor the profits from the estate which may have accumulated during the attachment.

[a] *Substituted* for the words 'Governor-General in Council' by A. O.

Extent.

[a][12. This Regulation, so far as it relates to the confinement of persons for reasons connected with defence, external affairs [b][or relations with Acceding States,] extends to the whole of all the Governor's Provinces and Chief Commissioners' Provinces ; and so far as relates to other matters, extends to all those Provinces except Madras [c][and Bombay].]

[a] Section 12 was *inserted* by A. O. [b] *Substituted* for the words 'and the discharge of the functions of the Crown in its relation with Indian States' by the Bengal State Prisoners Regulation (Amendment) Order, 1947, Para 2. [15-8-1947.] [c] *Substituted* for the words 'Bombay and Sind', *ibid.*

[a]APPENDIX

FORMS OF COMMITMENT.

Form of commitment for reasons connected with defence, external affairs, or [b][relations with Acceding States]

To the *(here insert the officer's designation.).*

WHEREAS the [c][* * *] Governor-General [d][* * *] for good and sufficient reasons, being reasons connected with defence, external affairs and [b][relations with Acceding States] *(omit any inappropriate words),* has seen fit to determine that *(here insert the State prisoner's name)* shall be placed under personal restraint at *(here insert the name of the place)* you are hereby required and commanded in pursuance of that determination to receive the person abovenamed into your custody and to deal with him in accordance with the orders of the Government and the provisions of the Bengal State Prisoners Regulation, 1818.

Form of Commitment in other Cases.

To the *(here insert officer s designation.)*

WHEREAS the [Governor] [c][* * *] [Governor-General] *(omit the inappopriate words)* for good and sufficient reasons, being reasons connected with the maintenance of public order, has seen fit to determine that *(here insert the State prisoner's name)* shall be placed under personal restraint at *(here insert the name of the place)* you are hereby required and commanded, in pursuance of that determination, to receive the person abovenamed into your custody, and to deal with him in conformity with the orders of the Government and the provisions of the Bengal State Prisoners Regulation, 1818.

[a] This Appendix was *inserted* by A. O. [b] *Substituted* for the words 'the discharge of the functions of the Crown in its relations with the Indian States' by the Bengal State Prisoners Regulation (Amendment) Order, 1947, Para 2. [15-8-1947.] [c] The words 'Governor General in Council' were *omitted, ibid.* [d] The words and bracket '(omit the inappropriate words)' were *omitted, ibid.*

[1st January, 1827.]

A Regulation for the confinement of State Prisoners and for the attachment of the lands of Chieftains and others for reasons of State.

Preamble.

WHEREAS reasons connected with the maintenance of public order in a Province, occasionally render it necessary to place under personal restraint individuals against whom there may not be sufficient ground to institute any judicial proceedings, or when such proceedings may not be adapted to the nature of the case, or may for other reasons be unadvisable or improper;

and whereas it is fit that, in every case of the nature herein referred to, the measures adopted should emanate immediately from the Governor in Council;

and whereas reasons of State sometimes render it necessary that the estates and lands of zemindars, taluqdars and others should be attached and placed under the temporary management of the Revenue-authorities, without having recourse to any judicial proceeding;

the following rules have therefore been enacted:—

CHAPTER I.

Rules for the apprehension and confinement of individuals as State Prisoners.

Proceeding for placing persons under restraint as State prisoners.

1. *First.*—When reasons connected with the maintenance of public order in the Province may seem to the Provincial Government to require that an individual should be placed under restraint, without any immediate view to ulterior proceedings of a judicial nature, it shall be lawful for the Provincial Government provided always that, with reference to the individual, the measure shall not be in breach of British law, to cause such individual to be apprehended in such manner as the Provincial Government may deem fit, and, when apprehended, to be delivered over to any officer in whose custody it may be deemed expedient that he shall be placed, with a warrant of commitment to such officer's address.

Form and authority of warrant.

Second.—The warrant of commitment shall be in the form specified in Appendix A, and shall be sufficient authority for the detention of any State prisoner in any fortress, jail or other place within the Province.

Allowance for support of State prisoner.

2. The Provincial Government shall fix such allowance for the support of the State prisoner as may seem to it expedient in reference to the prisoner's habits and rank in society, and shall specify at the same time through whose means it is to be paid and how it is to be applied.

Report to Government as to conduct, etc., of prisoner.

3. Every officer in whose custody any State prisoner may be placed shall, on the first of January and first of July of each year, submit a report to the Provincial Government on the conduct, the health and the comfort of such State prisoner in order that the Provincial Government may determine whether the orders for his detention shall continue in force or shall be modified.

4. [*First.—Powers of Judge of Circuit.*] Repealed by the Repealing Act, 1873 (XII [12] of 1873).

Prisoner in custody of officer other than District Magistrate by whom to be visited.

Second.—When any State prisoner is placed in the custody of any public officer not being a District Magistrate the Provincial Government shall instruct either the District Magistrate, or any other public officer, not being the person in whose custody the prisoner may be placed, to visit such prisoner at stated periods, and to submit a report to Government regarding the health and treatment of such prisoner.

Report to Government as to confinement, etc., of prisoner.

5. *First.*—Every officer in whose custody any State prisoner may be placed shall as soon after taking such prisoner into his custody as may be practicable, report to the Provincial Government whether the degree of confinement to which he may be subjected appears liable to injure his health, and whether the allowance fixed for his support be adequate to the supply of his own wants and those of his family, according to their rank in life.

Representation of prisoner to be submitted.

Second.—The officer in whose custody any State prisoner may be placed is to forward, with such observations as may appear necessary, every representation which such State prisoner may from time to time be desirous of submitting to the Provincial Government.

6. [*Persons already confined as State prisoners.*] Repealed by the Repealing Act, 1876 (XII [12] of 1876).

CHAPTER II.

Rules for the Attachment of Lands for Reasons of State, and for Removing such Attachment.

Attachment of estates by order of Government without decision of Court.

7. Whenever the Provincial Government for reasons of State shall judge it necessary to attach the estates or land of any zamindar, jagirdar, taluqdar or other person without any previous decision of a Court of Justise, or other judicial proceeding, the grounds on which the resolution of Government may have been adopted, and such other information connected with the case as may appear essential shall be communicated, to the Judge and the District Magistrate or other civil authorities of the district in which the lands or estates may be situated.

Management of attached lands.

8. *First.*—The lands or estates which may be temporarily attached shall be held under the management of the officers of Government in the Revenue Department, and the collections shall be made and adjusted on the same principles, if consistent with rights of others, as had been followed by the proprietor;

Provided, however, that any change may be introduced which the proprietor may desire, and which may not infringe on private rights, nor appear objectionable to the Collector; and annual accounts of the management of the lands attached shall be furnished to the proprietor.

Attached lands how saleable in execution. Income applicable to satisfaction of decrees.

Second.—Such lands or estates, while so under attachment shall not be liable to be sold by process of law, or otherwise, without the mutual consent of Government and the proprietor; but the annual income or any portion of it may, if Government shall so direct, be applicable to the satisfaction of decrees of the Civil Court.

Rules as to cases where Government orders release from attachment.

9. Whenever the Provincial Government shall be of opinion that the circumstances which rendered the attachment of such estate necessary have ceased to operate, and that the management of the estate can be committed to the hands of the proprietor without public hazard or inconvenience, the Revenue authorities will be directed to release the estate from attachment, to adjust the accounts of the collections during the period in which they may have been superintended by the officers of Government, and to pay over to the proprietor the profits from the estates which may have accumulated during the attachment.

CHAPTER III.

Extent of this Regulation.

Extent.

10. This Regulation extends to the whole of the Provinces of Bombay and Sind as constituted under the Government of India Act, 1935.

APPENDIX A.

To the *(here insert the officer's designation)*

Whereas the Governor for good and sufficient reasons, has resolved that *(here insert the State prisoner's name)* shall be placed under personal restraint at *(here insert the name of the place)*, you are hereby ordered, in pursuance of that resolution, to receive the person abovenamed into your custody, and to deal with him in conformity to the orders of the Governor and the provisions of Regulation XXV, A. D. 1827.

THE MADRAS STATE PRISONERS REGULATION, 1819[a]

(Madras Regulation II of 1819.)

[4th March, 1819.]

A Regulation for the confinement of State Prisoners.

Preamble.

Whereas [b][reasons connected with the maintenance of public order in the Province] occasionally render it necessary to place under personal restraint individuals against whom there may not be sufficient ground to institute any judicial proceeding, or when such proceeding may not be adapted to the nature of the case, or may for other reasons be unadvisable or improper ;

and whereas it is fit that, in every case of the nature herein referred to the determination to be taken should proceed immediately from the authority of the Governor in Council ;

and whereas the ends of justice require that, when it may be determined that any person shall be placed under personal restraint otherwise than in pursuance of some judicial proceeding, the ground of such determination should from time to time come under revision and the person affected thereby should at all times be allowed freely to bring to the notice of the Governor in Council all circumstances relating either to the supposed grounds of such determination, or to the manner in which it may be executed ;

and whereas the ends of justice also require that due attention be paid to the health of every State prisoner confined under this Regulation, and that suitable provision be made for his support, according to his rank in life and to his own wants and those of his family ;

and whereas [c][reasons of State] sometimes render it necessary that the estates and lands of *zamindars*, *talugdars* and others, d[* * * *] should be attached and placed under the temporary management of the Revenue authorities, without having recourse to any judicial proceeding ;

and whereas it is desiarble to make such legal provisions as may secure from injury the just rights and interests of individuals whose estates may be so attached under the direct authority of Government ;

e[it is hereby enacted as follows :—]

[a] Short title was given by the Repealing and Amending Act, 1901 (11 [XI] of 1901). On and from 1st April 1937 the Regulation is in force throughout the Province of Madras by virtue of section 12.

[b] *Substituted* for the words 'reasons of State policy' by A. O. [c] *Substituted* for the words 'the reasons above declared,' by A. O. [d] The words 'situated within the 'territories dependent on the Presidency of Fort St. George' were *omitted* by A. O. [e] *Substituted* by A. O.

Procedure in placing persons under restraint as State prisoners.

2. *First.* — When [a][reasons connected with the maintenance of public order in the Province] may seem to the [b][Provincial Government] to require that an indvidual should be placed under personal restraint, without any immediate view to ulterior proceedings of a judicial nature, a warrant of commitment c[shall be issued by the Provincial Government] to the officer in whose custody such person is to be placed.

Second. — The warrant of commitment shall be according to the form prescribed in the Appendix to this Regulation.

Form of warrant.

Third.—The warrant of commitment shall be sufficient authority for the detention of any State prisoner in any fortress, jail or other place within the d[Province].

Warrant to be authority for detention of State prisoner.

[a] *Substituted* for the words 'the reasons stated in the Preamble of this Regulation' by A. O. [b] *Substituted* for the words 'Governor in Council', *ibid.* [c] *Substituted* for the words 'under the authority of the Governor in Council and under the hand of the Chief Secretary, or of one of the Secretaries to Government, shall be issued' by A.O. [d] *Substituted* for the words 'territories subject to the Presidency of Fort St. George' *ibid.*

Officers having custody of State prisoners to report to Government.

3. Every officer in whose custody any State prisoner may be placed shall, on the first of January and first of July of each year, submit a report to the [a][Provincial Government] [b][* * *], on the conduct, the health and the comfort of such State prisoner, in order that the [a][Provincial Government] may determine whether the orders for his detention shall continue in force or shall be modified.

[a] *Substituted* for the words 'Governor in Council' by A. O. [b] The words 'through the Chief Secretary to Government' were *omitted*, *ibid.*

4. [*State prisoners to be periodically visited.*] Repealed by the Repealing Act, 1874 (16 [XVI] of 1874).

Representations by State prisoners to be submitted to Government.

5. The officer in whose custody any State prisoner may be placed is to forward, with such observations as may appear necessary, every representation which such State

prisoner may from time to time be desirous of submitting to the [a][Provincial Government].

[a] *Substituted* for the words 'Governor in Council' by A. O.

Report as to their confinements, health and allowances.

6. Every officer in whose custody any State prisoner may be placed shall, as soon after taking such prisoner into his custody as may be practicable, report to the [a][Provincial Government] whether the degree of confinement to which he may be subjected appears liable to injure his health, and whether the allowance fixed for his support be adequate to the supply of his own wants and those of his family according to their rank in life.

[a] *Substituted* for the words 'Governor in Council' by A. O.

Allowance to be appropriated for support of State prisoner.

7. Every officer in whose custody any State prisoner may be placed shall take care that the allowance fixed for the support of such State prisoner is duly appropriated to that object.

8. [*Foregoing provisions made applicable to persons already confined as State prisoners.*] Repealed by the Repealing Act, 1876 (12 [XII] of 1876).

Attachment of estates by orders of Government when to be communicated to Court.

9. Whenever the [a][Provincial Government] for [b][reasons of State], shall judge it necessary to attach the estates or lands of any *zamindar, jagirdar, taluqdar* or other person, without any previous decision of a Court of Justice or other judicial proceeding, the grounds on which the resolution of Government may have been adopted, and such other information connected with the case as may appear essential, shall be communicated, [c][* * * *] to the Judge of the district in which the lands or the estates may be situated d[* * *] and to the Sadr and Faujdari Adalat.

[a] *Substituted* for the words 'Governor in Council' by A. O. [b] *Substituted* for the words 'the reasons declared in the preamble to this Regulation' by A. O. [c] The words 'under the hand of one of the Secretaries to Government' were *omitted*, by A. O. [d] Certain words were repealed by the Repealing Act, 1876 (12 [XII] of 1876).

Management of attached estates.

10. *First.*—The lands or estates which may be so temporarily attached shall be held under the management of the officers of Government in the Revenue Department, and the collections shall be made and adjusted on the same principles as those of other estates held under *khas* management.

Second.—Such lands or estates shall not be liable to be sold in execution of decrees of the Civil Courts or for the realisation of fines or otherwise during the period in which they may be so held under attachment.

Not liable to be sold while under attachment.

Third.—In the cases mentioned in the preceding clause the Government will make such arrangement as may be fair and equitable for the satisfaction of the decrees of the Civil Courts.

Satisfaction of decrees of Courts.

Procedure when Government releases estate from attachment.

11. Whenever the [a][Provincial Government] shall be of opinion that the circumstances which rendered the attachment of such estate necessary have ceased to operate, and that the management of the estate can be committed to the hands of the proprietor without public hazard or inconvenience, the Revenue authorities will be directed to release the estate from attachment, to adjust the accounts of the collections during the period in which they may have been superintended by the officers of Government, and to pay over to the proprietor the profits from the estate which may have accumulated during the attachment.

[a] *Substituted* for the words 'Governor in Council' by A. O.

Extent.

[a][12. This Regulation extends to the whole of the Province of Madras.]

[a] This section was *inserted* by A. O.

APPENDIX.

Form of Warrant of Commitment.

To the *(here insert the officer's designation).*

Whereas the Governor [a][* *], for good and sufficient reasons, has seen fit to determine that *(here insert the State prisoner's name)* shall be placed under personal restraint at *(here insert the name of the place)* you are hereby required and commanded, in pursuance of that determination, to receive the person abovenamed into your custody, and to deal with him in conformity to the orders of the Governor [a][* *] and the provisions of Regulation II of 1819.

b[* * * * *].

[a] The words 'in Council' were *omitted* by A.O. [b] The words 'Fort St. George, the

By order of the Governor in Council,

A.B.,

Chief Secretary to Government.'

were omitted by A. O.

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(2) These indexes are given in the alphabetical order of the respective Acts.

(3) For this purpose each Act is treated as a main heading in the Index.

(4) Where a topic dealt with in a certain section of an Act is not indicated by the title of the Act the topic is mentioned as an independent main heading.

(5) Under the heading "Words and Phrases" are given all expressions statutorily defined.

(6) References are to Acts and sections and not to pages.

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—Of prohibition—*See* : Specific Relief Act, 1877, S. 45

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(2) Trusts Act, 1882, S. 63

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1921	1922	1923	1924	1925	1926	1927
15	16	17	18	19	20	21
1928	1929	1930	1931	1932	1933	1934
22	23	24	25	26	27	28
1935	1936	1937	1938	1939	1940	1941
29	30	31	32	33	34	35
1942	1943	1944	1945	1946	1947	1948

(I. L. R.) Allahabad

1	2	3	4	5	6
1875–1877	1878–1880	1881	1882	1883	1884
7	8	9	10	11	12	13
1885	1886	1887	1888	1889	1890	1891
14	15	16	17	18	19	20
1892	1893	1894	1895	1896	1897	1898
21	22	23	24	25	26	27
1899	1900	1901	1902	1903	1904	1905
28	29	30	31	32	33	34
1906	1907	1908	1909	1910	1911	1912
35	36	37	38	39	40	41
1913	1914	1915	1916	1917	1918	1919
42	43	44	45	46	47	48
1920	1921	1922	1923	1924	1925	1926
49	50	51	52	53	54	55
1927	1928	1929	1930	1931	1932	1933
56	57	58				
1934	1935	1936				

From 1937 citation by year.

Agra High Court Reports

1	2	3
1866	1867	1868

Allahabad Law Journal

1	2	3	4	5	6	7
1904	1905	1906	1907	1908	1909	1910
8	9–10	11	12	13	14	15
1911	1912	1913	1914	1915	1916	1917
16	17	18	19	20	21	22	23
1918	1919	1920	1921	1922	1923	1924	1925
24	25	26					
1926	1927	1928					

From 1929 citation by year.

Allahabad Weekly Notes

1	2	3	4	5	6	7
1881	1882	1883	1884	1885	1886	1887
8	9	10	11	12	13	14
1888	1889	1890	1891	1892	1893	1894
15	16	17	18	19	20	21
1895	1896	1897	1898	1899	1900	1901
22	23	24	25	26	27	28
1902	1903	1904	1905	1906	1907	1908

Allahabad Weekly Reporter

1935 AWR / 1935 Citation by year.

Bengal Law Reports

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1868	1869	1870	1871	1872	1873	1874
14–15						
1875						

Bihar Reports

1	2	3	4	5	6	7
1935	1936	1937	1938	1939	1940	1941
8	9	10	11	12	13	
1942	1943	1944	1945	1946	1947	

(I. L. R) Bombay

1	2	3	4
1875–1877	1877–1878	1878–1879	1879–1880
5	6	7	8	9	10
1880–1881	1881–1882	1883	1884	1885	1886
11	12	13	14	15	16	17
1887	1888	1889	1890	1891	1892	1893
18	19	20	21	22	23	24
1894	1895	1896	1897	1898	1899	1900
25	26	27	28	29	30	31
1901	1902	1903	1904	1905	1906	1907
32	33	34	35	36	37	38
1908	1909	1910	1911	1912	1913	1914
39	40	41	42	43	44	45
1915	1916	1917	1918	1919	1920	1921
46	47	48	49	50	51	52
1922	1923	1924	1925	1926	1927	1928
53	54	55	56	57	58	59	60
1929	1930	1931	1932	1933	1934	1935	1936

From 1937 citation by year.

Bombay High Court Reports

1	2	3	4
1862–1863	1864–1866	1866–1867	1867–1868
5	6	7	8	9	10
1868–1869	1869	1870	1871	1872	1873
11	12				
1874	1875				

Bombay Law Reporter

1	2	3	4	5	6	7
1899	1900	1901	1902	1903	1904	1905
8	9	10	11	12	13	14
1906	1907	1908	1909	1910	1911	1912
15	16	17	18	19	20	21
1913	1914	1915	1916	1917	1918	1919
22	23	24	25	26	27	28
1920	1921	1922	1923	1924	1925	1926

Bombay Law Reporter *(contd.)*

29	30	31	32	33	34	35	36
1927	1928	1929	1930	1931	1932	1933	1934
37	38	39	40	41	42		43
1935	1936	1937	1938	1939	1940		1941
44	45	46	47	48	49		50
1942	1943	1944	1945	1946	1947		1948

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5	6	7	8
1884–1887	1888–1890	1891–1893	1894–1896
9	10		
1897–1898	1899–1900		

Burma Law Journal

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1948 Bur. L R. Citation by year
1948

Burma Law Times

1	2	3	4	5	6	7
1908	1909	1910	1911	1912	1913	1914
8	9	10	11	12	13	
1915	1916	1917	1918	1919	1920	

(I. L. R.) Calcutta

1	2	3	4	5
1875–1876	1876–1877	1877–1878	1879	1880
6-7	8	9	10	11	12-13	14
1881	1882	1883	1884	1885	1886	1887
15	16	17	18	19	20	21
1888	1889	1890	1891	1892	1893	1894
22	23	24	25	26	27	28
1895	1896	1897	1898	1899	1900	1901
29	30	31	32	33	34	35
1902	1903	1904	1905	1906	1907	1908
36	37	38	39	40	41	42
1909	1910	1911	1912	1913	1914	1915
43	44	45	46	47	48	49
1916	1917	1918	1919	1920	1921	1922
50	51	52	53	54	55	56
1923	1924	1925	1926	1927	1928	1929
57	58	59	60	61	62	63
1930	1931	1932	1933	1934	1935	1936

From 1937 citation by year.

Calcutta Law Journal

1–2	3–4	5–6	7–8	9–10	11–12	13–14
1905	1906	1907	1908	1909	1910	1911
15–16	17–18	19–20	21–22	23–24	25–26	
1912	1913	1914	1915	1916	1917	
27–28	29–30	31–32	33–34	35–36	37–38	
1918	1919	1920	1921	1922	1923	
39–40	41–42	43–44	45–46	47–48	49–50	
1924	1925	1926	1927	1928	1929	
51–52	53–54	55–56	57–58	59–60	61–62	
1930	1931	1932	1933	1934	1935	

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63–64	65–66	67–68	69–70	71–72	73–74
1936	1937	1938	1939	1940	1941
75–76	77	78	79–80	81	82
1942	1943	1944	1945	1946	1947
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Calcutta Law Reports

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Calcutta Weekly Notes

1	2	3	4	5	6	7
1897	1898	1899	1900	1901	1902	1903
8	9	10	11	12	13	14
1904	1905	1906	1907	1908	1909	1910
15	16	17	18	19	20	21
1911	1912	1913	1914	1915	1916	1917
22	23	24	25	26	27	28
1918	1919	1920	1921	1922	1923	1924
29	30	31	32	33	34	35
1925	1926	1927	1928	1929	1930	1931
36	37	38	39	40	41	42
1932	1933	1934	1935	1936	1937	1938
43	44	45	46	47	48	49	50
1939	1940	1941	1942	1943	1944	1945	1946
51	52						
1947	1948						

Central Provinces Law Reports

1	2	3	4	5	6	7
1888	1889	1890	1891	1892	1893	1894
8	9	10	11	12	13	14
1895	1896	1897	1898	1899	1900	1901
15	16	17				
1902	1903	1904				

Criminal Law Journal

1	2	3–4	5–6	7–8	9–10	11
1904	1905	1906	1907	1908	1909	1910
12	13	14	15	16	17	18
1911	1912	1913	1914	1915	1916	1917
19	20	21	22	23	24	25
1918	1919	1920	1921	1922	1923	1924
26	27	28	29	30	31	32
1925	1926	1927	1928	1929	1930	1931
33	34	35	36	37	38	39
1932	1933	1934	1935	1936	1937	1938
40	41	42	43	44	45	46	47
1939	1940	1941	1942	1943	1944	1945	1946
48	49						
1947	1948						

Hyde's Reports

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1897

(L. R.) Indian Appeals

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1873–1874	1874–1875	1875–1876	1876–1877

(L. R.) Indian Appeals *(contd.)*

5	6	7	8
1877–1878	1878–1879	1879–1880	1880–1881
9	10	11	12
1881–1882	1882–1883	1883–1884	1884–1885
13	14	15	16
1885–1886	1886–1887	1887–1888	1888–1889

17	18	19	20	21	22	23
1890	1891	1892	1893	1894	1895	1896
24	25	26	27	28	29	30
1897	1898	1899	1900	1901	1902	1903
31	32	33	34	35	36	37
1904	1905	1906	1907	1908	1909	1910
38	39	40	41	42	43	44
1911	1912	1913	1914	1915	1916	1917
45	46	47	48	49	50	51
1918	1919	1920	1921	1922	1923	1924
52	53	54	55	56	57	58
1925	1926	1927	1928	1929	1930	1931
59	60	61	62	63	64	65
1932	1933	1934	1935	1936	1937	1938

66	67	68	69	70	71	72	73
1939	1940	1941	1942	1943	1944	1945	1946

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1915	1916	1917	1918	1919	1920
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1921	1922	1923	1924	1925	1926
99–106	107–112	113–120	121–128	129–134	
1927	1928	1929	1930	1931	
135–140	141–146	147–152	153–158	159–165	
1932	1933	1934	1935	1936	
166–172	173–178	179–184	185–190	191–196	
1937	1938	1939	1940	1941	
197–203	204–209	210–215	216–221	222–227	
1942	1943	1944	1945	1946	

228–230
1947

Indian Jurist

1	2	3	4	5	6	7
1877	1878	1879	1880	1881	1882	1883
8	9	10	11	12	13	14
1884	1885	1886	1887	1888	1889	1890
15	16	17				
1891	1892	1893				

Indian Rulings

IR 1929	IR 1930	IR 1931	IR 1932	6
1929	1930	1931	1932	1933–1934
7	8	9	10	
1934–1935	1935–1936	1936–1937	1937–1938	
11	12	13	14	
1938–1939	1939–1940	1940–1941	1941–1942	

Indian Ruling *(contd.)*

15	16	17	18
1942–1943	1943–1944	1944–1945	1945–1946
19			
1946–1947			

(I. L. R.) Karachi

ILR 1939 Kar / 1939 — Citation by year.

Knapp's Reports, Privy Council

1	2	3
1829–31	1831–34	1834–36

(I. L. R.) Lahore

1	2	3	4	5	6	7
1920	1921	1922	1923	1924	1925	1926
8	9	10	11	12	13	14
1927	1928	1929	1930	1931	1932	1933
15	16	17				
1934	1935	1936				

From 1937 citation by year

(Pak. L. R.) Lahore

Pak. L. R. 1948 Lahore / 1948 — Citation by year.

Lahore Law Journal

1	2	3	4	5	6	7
1919	1920	1921	1922	1923	1924	1925
8						
1926						

Law Reporter, Allahabad

1	2	3	4	5	6	7
1920	1921	1922	1923	1924	1925	1926
8	9	10	11	12	13	14
1927	1928	1929	1930	1931	1932	1933
15	16	17				
1934	1935	1936				

Lower Burma Rulings

1	2	3	4
1900–1902	1903–1904	1905–1906	1907–1908
5	6	7	8
1909–1910	1911–1912	1913–1914	1915–1916
9	10	11	
1917–1918	1919–1920	1921–1922	

(I. L. R.) Lucknow

1	2	3	4	5	6	7
1926	1927	1928	1929	1930	1931	1932
8	9	10	11	12	13	14
1933	1934	1935	1936	1937	1938	1939
15	16	17	18	19	20	21
1940	1941	1942	1943	1944	1945	1946
22	23					
1947	1948					

(I. L. R.) Madras

1	2	3	4–5	6
1876–1878	1878–1880	1881	1882	1883
7	8	9	10	11	12
1884	1885	1886	1887	1888	1889

(I. L. R.) Madras *(contd.)*

13	14	15	16	17	18	19
1890	1891	1892	1893	1894	1895	1896
20	21	22	23	24	25	26
1897	1898	1899	1900	1901	1902	1903
27	28	29	30	31	32	33
1904	1905	1906	1907	1908	1909	1910
34	35	36	37	38	39	40
1911	1912	1913	1914	1915	1916	1917
41	42	43	44	45	46	47
1918	1919	1920	1921	1922	1923	1924
48	49	50	51	52	53	54
1925	1926	1927	1928	1929	1930	1931
55	56	57	58	59		
1932	1933	1934	1935	1936		

From 1937 citation by year.

Madras High Court Reports

1	2	3	4
1862–1863	1864–1865	1866–1868	1868–1869
5	6	7	8
1869–1870	1870–1871	1871–1874	1874–1875

Madras Law Journal

1	2	3	4	5	6	7
1891	1892	1893	1894	1895	1896	1897
8	9	10	11	12	13	14
1898	1899	1900	1901	1902	1903	1904
15	16	17	18	19	20	21
1905	1906	1907	1908	1909	1910	1911
22–23		24–25	26–27	28–29	30–31	32–33
1912		1913	1914	1915	1916	1917
34–35		36–37	38–39	40–41	42–43	44–45
1918		1919	1920	1921	1922	1923
46–47		48–49	50–51	52–53	54–55	56–57
1924		1925	1926	1927	1928	1929
58–59		60–61	62–63	64–65	66–67	68–69
1930		1931	1932	1933	1934	1935
70–71						
1936						

From 1937 citation by year.

Madras Law Times

1	2	3–4	5–6	7–8	9–10	11–12
1906	1907	1908	1909	1910	1911	1912
13–14	15–16	17–18	19–20	21–22	23–24	
1913	1914	1915	1916	1917	1918	
25–26	27–28	29	30–31	32–33	34–35	
1919	1920	1921	1922	1923	1924	

Madras Law Weekly

1	2	3–4	5–6	7–8	9–10	11–12
1914	1915	1916	1917	1918	1919	1920
13–14	15–16	17–18	19–20	21–22	23–24	
1921	1922	1923	1924	1925	1926	
25–26	27–28	29–30	31–32	33–34	35–36	
1927	1928	1929	1930	1931	1932	
37–38	39–40	41–42	43–44	45–46	47–48	
1933	1934	1935	1936	1937	1938	
49–50	51–52	53–54	55	56	57	
1939	1940	1941	1942	1943	1944	
58	59	60	61			
1945	1946	1947	1948			

Madras Weekly Notes

1910 MWN
1910

Citation by year.

Moore's Indian Appeals

1	2	3	4
1836–1837	1837–1841	1841–1846	1846–1851
5	6	7	8
1851–1854	1854–1857	1857–1859	1859–1861
9	10	11	12
1861–1863	1863–1866	1866–1867	1867–1869
13	14		
1869–1870	1870–1872		

(I. L. R.) Nagpur

ILR 1936 Nag
1936

Citation by year.

Nagpur Law Journal

1	2	3	4	5	6	7
1918	1919	1920	1921	1922	1923	1924
8	9	10	11	12	13	14
1925	1926	1927	1928	1929	1930	1931
15	16	17	18	19	20	
1932	1933	1934	1935	1936	1937	

From 1938 citation by year.

Nagpur Law Reports

1	2	3	4	5	6	7
1905	1906	1907	1908	1909	1910	1911
8	9	10	11	12	13	14
1912	1913	1914	1915	1916	1917	1918
15	16	17	18	19	20	21
1919	1920	1921	1922	1923	1924	1925
22	23	24	25	26	27	28
1926	1927	1928	1929	1930	1931	1932
29	30	31				
1933	1934	1935				

North-West Provinces High Court Reports

1	2	3	4	5	6	7
1869	1870	1871	1872	1873	1874	1875

Oudh Cases

1	2	3	4	5	6	7
1898	1899	1900	1901	1902	1903	1904
8	9	10	11	12	13	14
1905	1906	1907	1908	1909	1910	1911
15	16	17	18	19	20	21
1912	1913	1914	1915	1916	1917	1918
22	23	24	25	26	27	28
1919	1920	1921	1922	1923	1924	1925
29						
1926						

Oudh Law Journal

1	2	3	4	5	6	7
1914	1915	1916	1917	1918	1919	1920
8	9	10	11	12	13	
1921	1922	1923	1924	1925	1926	

Oudh Law Reports

1934 OLR / 1934 — Citation by year.

Oudh Weekly Notes

1	2	3	4	5	6	7
1924	1925	1926	1927	1928	1929	1930

8	9	10	11
1931	1932	1933	1934

From 1935 citation by year.

(I. L. R.) Patna

1	2	3	4	5	6	7
1922	1923	1924	1925	1926	1927	1928

8	9	10	11	12	13	14
1929	1930	1931	1932	1933	1934	1935

15	16	17	18	19	20	21
1936	1937	1938	1939	1940	1941	1942

22	23	24	25	26	27
1943	1944	1945	1946	1947	1948

Patna High Court Cases

1917 PHCC / 1917 — Citation by year.

Patna Law Journal

1	2	3	4	5	6
1916	1917	1918	1919	1920	1921

Patna Law Reports

1	2	3
1923	1924	1925

Patna Law Times

1	2	3	4	5	6	7
1920	1921	1922	1923	1924	1925	1926

8	9	10	11	12	13	14
1927	1928	1929	1930	1931	1932	1933

15	16	17	18	19	20	21
1934	1935	1936	1937	1938	1939	1940

22	23	24	25	26	27	28
1941	1942	1943	1944	1945	1946	1947

29
1948

Patna Law Weekly

1	2–3	4–5
1916	1917	1918

Patna Weekly Notes

1936 PWN / 1936 — Citation by year.

Punjab Law Reporter

1900 PLR / 1900 — Citation by year upto 1923 and then

Punjab Law Reporter *(contd.)*

27	28	29	30	31	32	33
1926	1927	1928	1929	1930	1931	1932

34	35–36	37	38	39	40	41
1933	1934	1935	1936	1937	1938	1939

42	43	44	45	46	47	48
1940	1941	1942	1943	1944	1945	1946

49	50
1947	1948

Punjab Records

1872 PR / 1872 — Citation by year.

Punjab Weekly Reporter

1905 Pun W R / 1905 — Citation by year

(I. L. R.) Rangoon

1	2	3	4	5	6	7
1923	1924	1925	1926	1927	1928	1929

8	9	10	11	12	13	14
1930	1931	1932	1933	1934	1935	1936

Rangoon Law Reports

1937 RLR / 1937 — Citation by year up to 1947

Sind Law Reporter

1	2	3	4	5	6	7
1907	1908	1909	1910	1911	1912	1913

8	9	10	11	12	13	14
1914	1915	1916	1917	1918	1919	1920

15	16	17	18	19	20	21
1921	1922	1923	1924	1925	1926	1927

22	23	24	25	26	27	28
1928	1929	1930	1931	1932	1933	1934

29	30	31	32
1935	1936	1937	1938

Sutherland's Weekly Reporter

1	2–4	5–6	7–8	9–10	11–12	13–14
1864	1865	1866	1867	1868	1869	1870

15–16	17–18	19–20	21–22	23–24	25	26
1871	1872	1873	1874	1875	1876	1877

United Provinces Law Reports

1	2	3
1919	1920	1921

Upper Burma Rulings

1 Cri / 1892–1903 — 2 Civ / 1892–1903 — From 1904 Citation by year upto 1913 and then 2 / 1914–1916

3 / 1917–1920 — 4 / 1921–1922

PRINTED AND PUBLISHED BY D. V. CHITALEY, B.A., LL.B., ADVOCATE, AT THE ALL INDIA REPORTER PRESS, FOR THE ALL INDIA REPORTER, LIMITED, NAGPUR.

FOR PERSONAL NOTES

FOR PERSONAL NOTES

Overlooking of Precedents leads to Erroneous Decisions

"Ignorance of the Judge is the misfortune of the innocent." *Latin Maxim.*

(1943) 30 A. I. R. 1943 Privy Council 189 (191).— In an appeal from Allahabad the question for decision involved was as to the inherent power of the Court to grant restitution to the successful defendant. Their Lordships observed: "The decision of the Board in 46 I. A. 228 was not cited in either of the Courts in India . . . . . The application now before the Board . . . . . invoked the powers of the learned Subordinate Judge to assess the sum due by way of restitution . . . . by the method laid down in 46 I. A. 228 . . . . For this purpose the case must go back to the Court of the Subordinate Judge. . . ."

(1922) 9 A. I. R. 1922 Privy Council 11 (12) = 43 All. 469 (475) (PC). — Section 89, T.P. Act, 1882, ended after providing for the decree "and thereafter the defendants' right to redeem and the security shall both be extinguished." These words do not occur in either the foreclosure section of the Act of 1882 or the corresponding rule of O. 34, Civil P. C.

"The difficulty which had arisen as to these words in several cases, e.g., *Vannikalinga* v. *Chidambara*, (1908) I. L. R. 29 Mad. 37 — which case, it may be mentioned, does not seem to have been brought to the notice of the Board in *Hot Ram's case*, (1918) 45 I. A. 180—therefore no longer arises."

(1948) 35 A. I. R. 1948 Nagpur 382 (384) (DB). — "The decree [of the District Judge] was set aside and the decree of the trial Court was restored by Gruer J. in Second Appeal No. 109 of 1938 on 7-11-1940. It is against this decree that the present appeal has been filed . . . . If the above decision [namely, 1939 Nag. L. R. 358] had been placed before Gruer J. he would not have reached the conclusion he did."

(1947) 34 A. I. R. [illegible] 436 (431).—*Per Kania J.* — "My attention has been drawn to two [illegible] connection. One is my own judgment in (1943) 45 Bom. L. R. 400 . . . . At [illegible] attention was not drawn to the judgment of the Appeal Court in (1939) 40 Bo[illegible] — 673."

(1947) 34 A. I. R. [illegible] adras 405 (407) (DB). — "We now come to the first case referred to in the order [illegible]erence, namely, 1943-2 M. L. J. 180. There Horwill J. held that the right of a legal re[illegible]entative was merely to file a fresh application to sue *in forma pauperis* or institute a separate suit. No reference was made in the judgment to the decision in (1935) 58 Mad. 169 . . . . . This decision is not only in conflict with the judgments in (1928) 51 Mad. 667 and (1935) 58 Mad. 169, but it ignores the fact. . . ."

(1947) 34 A. I. R. 1947 Oudh 180 (190) (FB).—*Thomas C. J.* — "The learned counsel for the plaintiffs respondents has strongly relied . . . . upon my decision in A.I.R. 1936 Oudh 240 relying on 55 I. A. 139 wherein I held . . . . . But now having regard to the argument advanced, and the fact my attention was not drawn to the decision of their Lordships of the Privy Council in (1876) 4 I. A. 228, I entertain serious doubt as to the correctness of that decision. Nor was 4 I. A. 228 brought to the notice of Ashworth J. in (1926) 3 O. W. N. 321."

(1947) 34 A. I. R. 1947 Oudh 232 (233) (DB).—"No doubt in 1940 O. W. N. 561 a Bench of this Court entertained an application in revision against the order of a District Judge and set aside that order but the attention of the learned Judges does not seem to have been drawn to the Full Bench decision to which we have referred [namely, a decision of five Judges reported in (1929) 4 Luck. 589], nor was the point as to the maintainability of an application in revision considered."

(1945) 32 A. I. R. 1945 Lahore 260 (261) (FB). — *Per Achhru Ram J.* (in the Order of Reference) — " He (i. e., Patanjali Sastri, J. in A. I. R. 1942 Mad. 13) does not, however, appear to have noticed one of the Division Bench judgments of his own Court reported in A. I. R. 1920 Mad. 177 which also dealt with the same subject and took just the opposite view from that taken by him."

(1945) 32 A. I. R. 1945 Madras 139 (141) (FB). — "The decisions in which the contrary view has been expressed are: 45 Mad. 466, A. I. R. 1919 Mad. 220, A. I. R. 1928 Mad. 440 and 1941-2 M. L. J. 754." In the first of these cases "the Court did not, however, consider the case in 5 Mad. 141 . . . . In none of the other cases was any reason given for the view expressed and in no case was 5 Mad. 141 mentioned or considered . . . . We consider that 5 Mad. 141 should be followed."

A. I. R. Commentaries Judicially Noticed.

(1948) 35 A I. R 1948 Allahabad 19 (24, 25) (FB) *Per Rajhubar Dayal J.* — "Circumstances requiring remand of a case can be many and need not be exhaustively imagined at a time A good number of such cases are noted under Note 20, O 41, R 23, Civil P C, in Chitaley's Civil P C 4th (1944) Edn . I find that two other High Courts, the Madras High Court and the Lahore High Court, have given very wide powers to the appellate Court to remand the suits These amendments are given in Chitaley's Code of Civil Procedure, 4th Edn.'

(1947) 34 A. I. R 1947 Bombay 345 (350) (SB) — *Per Sen J* —"Chitaley in his Code of Criminal Procedure 1941 edition, has pointed out at page 1234 that there is not specific provision enabling the Court to try the case where the accused pleads guilty and the Court does not accept the same and the law in India where the Court does not think it expedient to act upon the accused's plea of guilt the usual procedure is to advise him to withdraw his plea of guilty and to plead not guilty Chitaley has further pointed out that in this country the general trend of opinion is that the accused may be treated in such cases as if he had pleaded not guilty and then the trial may be proceeded with in the ordinary way, and he has referred to several authorities in support of this view" [View approved]

(1945) 32 A. I R. 1945 Calcutta 298 (299). — The court we are taking of sub s (2), R 1 of O 40 finds support from the decision of the [redacted] High Courts and even from some earlier decisions of the Allahabad High Court itself Those decisions are noted at the foot note to para. 19 of Chitaley and Rao's Commentaries on the Code of Civil Procedure, Vol 3, page 2024." (Now see 4th Edn, page 2068)

(1947) 34 A. I R. 1947 Lahore 403 (40[redacted] J.— "In Chitaley's Commentary on S. 141, Civil P C [4th Edn., 1944) I [redacted] 741 the learned author observes that proceedings under the Indians a [redacted] 1890, have been held to be original matters the nature contemplated by th [redacted] [This view is approved]

(1948) 35 ... I. R. 1948 Nagpur 210 (2[redacted] — *Per Hidayatullah J* — "In my opinion, the matter is to be determined on [redacted] construction of S 91 ( ) T P Act As pointed out in Chitaley's Transfer of Property Act, 2nd (1945, Edn.], p 1372, the two phrases in S 91 (a) refer to different stages .. The passage in Chitaley can be quoted with advantage here. 'The property mortgaged is not the same thing . . after deducting the mortgagee interest''

(1948) 35 A. I. R. 1948 Oudh 116 (125) (DB). — *Per Raul J* — "As pointed out by Chitaley in his Commentary on S 151, Civil P C, (Note 2) it has been held by the High Courts of Allahabad, Calcutta Lahore, Madras, Patna, Rangoon and the Judicial Commissioner's Court of Oudh and Sind that there is no inherent power to set aside an *ex parte* decree, or restore a suit dismissed for default, except under the circumstances and conditions mentioned in O 9, R 13 and R 9 respectively The same remarks would apply to restoration of appeals under O 41, R 19, Civil P C I agree with the view thus stated."

(1948) 35 A I R. 1948 Patna 460 (462) (DB) — *Per Meredith J* — "I will make two quotations from Chitaley an Annaji Rao's annotated edition of the Civil Procedure Code, 4th Edn, Vol III, because those learned commentators have, in my opinion, correctly summed up the position in language which cannot be bettered At page 3009, with reference to O 41, R 4 they say. 'There is a conflict ... that the former view is correct'. Then with regard to O 41, R 33, at page 3165 they say 'The appellate Court can exercise .. .. the words respondents or parties' That is just the point which appeals to me"

(1947) 34 A. I. R. 1947 Peshawar 15 (18) (DB) "All the authorities bearing on the point were examined and the result of the examination was thus stated in the Indian Limitation Act by Chitaley etc, 2nd (1942) Edn. page 1337 'It would seem to appear from an examination of cases ..... a fresh cause of action and time would run from that date.' It is obvious that according to this view a fresh invasion of title would constitute a new cause of action for a suit from which limitation should commence to run."

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